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DOOR-TO-DOOR CARRIAGE OF GOODS: THE ROTTERDAM RULES

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I. INTRODUCTION

In July 2008, following its 41st session, the United Nations Commission on International Trade Law (UNCITRAL) approved the draft text of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.[1] The text was subsequently adopted by the UN General Assembly on 11 December 2008.[2] The General Assembly resolution that adopted the Convention also authorized that it be opened for signature at a ceremony to take place in Rotterdam, the Netherlands, on 23 September 2009. In light of its place of opening for signature, and in keeping with the tradition of maritime transport conventions, the General Assembly recommended that the Convention should be known as the "Rotterdam Rules."[3] Moreover, with a view to establishing the global nature intended for the new Convention, the General Assembly called upon all Governments to consider becoming party to the Convention.[4]

This paper is intended to bring readers up to date on the Signing Ceremony and later events, as well as to summarize some of the more important innovations that the Rotterdam Rules will bring when they enter into force.[5]

II. THE SIGNING CEREMONY

On 23 September 2009, the Rotterdam Rules were opened for signature in Rotterdam, the Netherlands. The warm welcome of the Dutch hosts[6] was met with an enthusiastic response on the part of countries signing the Convention. Sixteen countries signed the Rotterdam Rules on the day that they were opened for signature, making it UNCITRAL's greatest success ever in terms of signatures obtained on the opening for signature of a convention that had been negotiated under the auspices of UNCITRAL.

The sixteen original signatories present a mix of developing and developed countries, including strong seafaring and trading nations, as well as traditional carrier and shipper nations. The original sixteen States are as follows: Republic of Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, the Netherlands, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo and the United States of America. Together, the 16 countries represent over 25% of world trade

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[1] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17), 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.

[6] The Signing Ceremony and related events were hosted by the Government of the Netherlands, the City of Rotterdam and Port of Rotterdam Authority.

volume.[7] While that figure is sufficiently impressive on its own, it is even more noteworthy when compared with the volume of global trade covered by the 34 Contracting States of the Hamburg Rules, a mere 5%.[8]

Since the Signing Ceremony on 23 September 2009, five more countries have added their signatures to the growing list, bringing the total number of signatures to date to 21. The additional five States are: Madagascar, Armenia, Cameroon, Niger and Mali.

Of interest from the perspective of OSCE, perhaps, is the number of OSCE Participating States that have signed the Convention. To date,[9] they are: Armenia, Denmark, France, Greece, the Netherlands, Norway, Poland, Spain, Switzerland, and the United States of America. Moreover, a number of States that were not yet in a position to sign the Rotterdam Rules due to ongoing internal consultations made very positive official statements at the conclusion of the Signing Ceremony about the aim of the Convention to achieve a global uniform regime for maritime transport. Amongst them are OSCE Participating States Belgium and the United Kingdom.

Coming back to the Signing Ceremony in Rotterdam, the days preceding it were equally important for the launch of the Convention. In particular, on 21 September 2009, a Colloquium on the Rotterdam Rules was held by the Dutch hosts under the auspices of UNCITRAL and the Comité Maritime International (CMI). The event brought together 11 authoritative speakers from around the globe to provide in-depth analysis of the Convention to an international audience of several hundred. Importantly for those unable to attend, all of the papers presented at the Colloquium may now be found on-line at the website established by the hosts of the event.[10]

III. CURRENT CONTEXT

It is well known that the current legal regime governing the international carriage of goods by sea is characterized by complexity, a lack of uniformity and a failure to take into account modern developments in, and requirements of, the industry due to the age of the existing conventions. Currently, three separate international treaties govern international maritime transport: the Hague Rules,[11] which date from 1924, the Hague-Visby Rules[12], which date from 1968, and the Hamburg Rules,[13] which date from 1978.

While each of these conventions has achieved a certain level of international acceptance, none has managed to establish a uniform global regime for maritime transport. The Hague Rules,[14] which are now over 80 years old, have achieved the greatest level of international acceptance, but have not been uniformly implemented or applied, and do not adequately take into account modern transport practices. Attempts have been made to modernize the regime through the negotiation of the 1968 Visby Protocol[15] and, later, the Hamburg Rules.[16] While the Hamburg

[7] According to the United Nations 2008 International Merchandise Trade Statistics Yearbook, based on 2007 figures, as 2008 figures for all countries were incomplete.
[8] Seven OSCE Participating States are party to the Hamburg Rules, Albania, Austria, the Czech Republic, Georgia, Hungary, Kazakhstan and Romania.
[9] As of the date of writing, 25 January 2010.
[10] See http://www.rotterdamrules2009.com/cms/index.php?page=text-speakers-rotterdam-rules-2009 (last checked 25 January 2010). For more information on the Rotterdam Rules, see also: http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html (last checked 25 January 2010)
[11] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 1924) ("the Hague Rules")
[12] 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).
[13] United Nations Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978) ("the Hamburg Rules")
[14] As of the date of writing, there are some 70 States Party to the Hague Rules.
[15] As of the date of writing, there are in the neighbourhood of 30 States Party to the Hague-Visby Rules.

Rules were appropriate to 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.[17]

Adding to the lack of uniformity in terms of international law, other States have resorted to their national law to either fill the legal gaps of the existing regimes, or as a substitute for them altogether. Other States or groups of States have pursued, or are currently pursuing, regional solutions.

This highly fragmented set of rules characterized by competing, and sometimes overlapping, international, regional and domestic regimes, has denied commercial actors the predictability and transparency that they require to do business internationally. The result has been legal and commercial uncertainty, increased commercial transaction costs and an overall loss of efficiency.

In addition, two extremely important aspects of the modern transport industry are not currently taken adequately into account by the existing outdated regimes. First, the rapid increase in the volume of container transport, which first made its appearance just 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 often requires the combination of several different modes of transport to allow for door-to-door movement under a single contract of carriage. However, 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 coverage in the case of the Hamburg Rules, and to tackle-to-tackle carriage in the case of the Hague and Hague-Visby Rules.

Secondly, modern commerce is increasingly turning to paperless transactions. Needless to say, given the age of the existing international maritime transport conventions and the relatively recent growth of electronic transactions, none of the existing conventions 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 as a means of filling the legal gaps. This resort to national law has also had a negative effect on overall harmonization in the field.

These and other concerns convinced industry, and then Governments, that the time had come to take a fresh look at the international regime governing the maritime carriage of goods. Importantly, however, that reassessment has not consisted of rewriting the law applicable to international maritime transport. Conscious of the various applicable legal regimes around the world, and of the need to harmonize them, the Rotterdam Rules build upon the legal pillars established by the existing conventions. Moreover, 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 thus represent a comprehensive instrument governing

[16] Other efforts at unification have not met a happier fate, as witnessed by the 1980 United Nations Convention on International Multimodal Transport of Goods. As of the date of writing, the Multimodal Convention has only 11 of the 30 treaty actions required for it to come into force pursuant to article 36.

[17] As of the date of writing, there are 34 States Party to the Hamburg Rules.

international contracts of carriage that does more than merely expand the existing liability regime to include contracts for door-to-door carriage and electronic transport documents.

IV. HISTORY OF THE CONVENTION

The seeds for the Rotterdam Rules were actually sown in UNCITRAL's Working Group on electronic commerce, then called the Working Group on Electronic Data Interchange (EDI). In 1994[18] and again in 1995,[19] the EDI Working Group had suggested to the Commission[20] 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." Of course, that issue had presented a particularly difficult problem for some time, and solutions to it 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 that was then underway in other international organizations, including the CMI,[21] and that the cooperation of other such relevant organizations and industry groups should therefore be sought.

Although the CMI had already been working for some time on various issues related to the harmonization of international maritime transport law, this decision to begin exploring the issues in the UNCITRAL forum marked the beginning of cooperation between the two bodies that ultimately led to the preparation of the Rotterdam Rules. While a more complete history of that cooperative effort may be examined elsewhere,[22] suffice it to say that the preparation of the Convention began only after thorough consultation with industry on its needs and desires, including with key stakeholders involved in maritime transport. The CMI's role in this early preparatory period was crucial to canvassing the needs of industry and paving the way for a commercially acceptable draft regime. By way of the CMI effort, a number of important industry groups became involved in the process at an early stage, including Bimco, the British Chamber of Shipping, the International Chamber of Commerce (ICC), the Institute of Chartered Shipbrokers, the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Group of P&I Clubs, the International Chamber of Shipping (ICS), the National Industrial Transportation League, the World Shipping Council and the International Association of Ports and Harbours (IAPH).

From 1996 to 2001, consultation and information gathering work was carried on by CMI and UNCITRAL. Importantly, CMI reported in this period that in the course of identifying 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.

At its 34th session in 2001, UNCITRAL considered a report that summarized the considerations and suggestions that had resulted to date from the discussions in the CMI International Subcommittee, which, of course, had been the beneficiary of strong industry representation. It

[18] Supra, note 1, *Forty-ninth Session, Supplement No. 17* (A/49/17), para. 201.
[19] Ibid, *Fiftieth Session, Supplement No. 17* (A/50/17), paras. 307-309.
[20] "The Commission" refers throughout this article to the United Nations Commission on International Trade Law.
[21] Supra, note 17, para. 309.
[22] See, for example, the website of the CMI outlining its role in the travaux préparatoires of the Rotterdam Rules, at http://www.comitemaritime.org/draft/travaux.html (last checked on 9 November 2009), as well as articles such as Michael F. Sturley, Transport law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules, Journal of international maritime law (Witney, U.K.) 14:6, p. 461-483, 2008; Stuart Beare, Liability Regimes: Where We Are, How We Got There and Where We Are Going, Lloyd's Marit. Comm. L.Q., 2002, 306-315; or Kate Lannan, The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: a general overview. Uniform law review (Roma) 14:1/2:290-323, 2009.

was recommended in the report that the following list of issues 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,
- 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.[23]

The UNCITRAL secretariat also reported to the Commission in 2001 that consultations that it had undertaken 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.[24] The Commission established a Working Group to consider the preliminary text of a possible future legislative instrument which was then being prepared by the CMI International Sub Committee. Importantly, the UNCITRAL Working Group was to have a broad mandate, including liability issues, as well as the feasibility of governing door-to-door transport operations.[25]

In July 2001, after the CMI International Sub Committee had circulated the text of the draft instrument for comment to all National Maritime Law Associations and to a number of international organizations, a meeting was held by the Sub Committee to further refine the draft instrument. In November 2001, a meeting of the Sub Committee was held to make final revisions to the draft instrument. Thus, after a long and thorough series of consultations with industry and other experts, on 11 December 2001, the CMI submitted the draft instrument to the UNCITRAL secretariat, thus closing the chapter on the preparatory work in the CMI, and opening the chapter of intergovernmental negotiations in the United Nations.

Importantly, this passing of the torch from the CMI to UNCITRAL represents a key step in the overall preparation of the Rotterdam Rules. The CMI period of work represented the all-important first step of strong industry involvement and consultation in deciding whether efforts should be made towards a harmonizing global text, and in setting out the key issues for inclusion in the new regime, as identified by commercial actors. The next step for the project was to introduce those industry-identified issues for negotiation in a broader context by government representatives. UNCITRAL, then, allowed for a broadening of the discussion of the issues involved, providing the all-important intergovernmental negotiating forum for the new regime.

Deliberations on the Rotterdam Rules 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, including from many OSCE States. Importantly, UNCITRAL's Working Group III continued to encourage the strong involvement of industry actors in its deliberations

[23] Supra, note 1, *Fifty-sixth Session, Supplement No. 17* (A/56/17), para. 338.
[24] Ibid., para. 339.
[25] Ibid., paras. 339 and 345.

through the participation of various IGOs and NGOs. Active participants in the intergovernmental 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, Bimco, the International Group of P&I Clubs, IAPH, the National Industrial Transportation League, the World Shipping Council, the European Commission, the Association of American Railroads, the Intergovernmental Organisation for International Carriage by Rail (OTIF), the European Shippers' Council, el Instituto Iberoamericano de Derecho Marítimo, the International Road Transport Union (IRU), the International Multimodal Transport Association (IMMTA) and the World Maritime University.

It is also important to remember that the States participating in the UNCITRAL intergovernmental negotiating process were also in consultation with their domestic industry stakeholders in preparing for the Working Group sessions. Thus, while Governments made all of the final policy decisions on the Rotterdam Rules in the course of the UNCITRAL discussions, they did so only after having carefully listened to industry voices not only in the Working Group, but also in consultation with their own domestic stakeholders. The importance of this level of industry involvement to the future success of such a convention cannot be overstated.

V. PARTICIPATION BY OSCE STATES

An examination of the list of participants of the intergovernmental negotiating sessions reveals that many OSCE Participating States were actively involved in the creation of the Rotterdam Rules. That involvement took the form of regular attendance at negotiating sessions, as well as frequent oral and written interventions.[26]

VI. MAIN INNOVATIONS OF THE ROTTERDAM RULES

The following section will highlight in general terms a number of improvements that the Convention will bring to the body of law governing the international carriage of goods by sea. More detailed information on each of these topics may be found in a number of locations, including the website of the Dutch organizers of the Signing Ceremony.[27]

Scope of Application: Contractual Approach and Door-to-Door Transport

One of the most significant changes made by the Rotterdam Rules to existing law is the expansion of its scope of application to include door-to-door transport.[28] As noted above, the Hague and Hague-Visby Rules apply only tackle-to-tackle, while the Hamburg Rules, of course, cover port-to-port shipments. Modern container transport, however, typically requires 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, often at an inland location in one State, until the delivery of the goods to the consignee at an inland location in 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 only to

[26] The following 36 OSCE States participated in some or all of the 14 negotiating sessions that took place under the auspices of UNCITRAL: Austria, Belarus, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, the Holy See, Italy, Latvia, Lithuania, the former Yugoslav Republic of Macedonia, Malta, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, Serbia, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom and the United States of America.
[27] Supra, Note 8, and www.rotterdamrules2009.com generally.
[28] Rotterdam Rules, art. 5.

a port-to-port shipment, but this is a decision that will be made by the contracting parties according to their commercial needs.

In order to achieve certainty, predictability and uniformity, it was logical to ensure that a single legal regime should cover the entire performance of the contract of carriage, rather than the current system in which each segment of the transport could be subject to a different contract of carriage and a different legal regime governing that particular mode of transport, whether it be by road, rail or other inland transport. While current industry practice does provide 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.

Of course, the Rotterdam Rules do not establish a full multimodal system. There must be an international sea leg, as well as an overall international carriage, 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 recognizes that in taking a "maritime plus" approach, the possibility of conflict with the existing unimodal inland conventions could be raised. In order to avoid that possibility, the Rotterdam Rules adopt the same practice as the contractual approach, i.e. a "limited network principle" such that where the damage to or delay of the goods can be localized as having occurred during an inland leg of the transport, the Rotterdam Rules provisions that govern the carrier's liability, limitation of liability and time for suit will give way to those provisions of an international unimodal convention that would have applied if a separate contract of carriage had been concluded for that leg of the transport.[29]

In order to ensure 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.[30]

Finally, like the Hamburg Rules, the Rotterdam Rules will cover both inbound and outbound international shipments to or from a Contracting State, unlike the Hague and Hague-Visby systems which covered only shipments outbound from a Contracting State.[31]

Electronic Commerce

Given the age of the Hague, Hague-Visby and Hamburg Rules, they fail to contain provisions regulating electronic commerce. 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 innovation.

The Rotterdam Rules contain an entire chapter[32] intended to facilitate the use of electronic transport records in lieu of paper transport documents, and to provide 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

[29] Rotterdam Rules, art. 26.
[30] Rotterdam Rules, art. 82.
[31] Rotterdam Rules, art. 5.
[32] Rotterdam Rules, Chapter 3.

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.

Containerization

The Hague-Visby and Hamburg Rules deal with containerization only in passing, by including the "container clause" in the limitation on carrier liability. However, the concept of containerization is integral to the Rotterdam Rules, and recognition of it is woven throughout the text in to a number of important provisions. A few examples suffice to make this point:

- the door to door scope of application;
- the due diligence obligation of the carrier now extends to containers that are provided by the carrier;[33]
- the provision allowing for the qualification of information on goods in the contract particulars now takes into account that the carrier often does not have the opportunity to inspect the goods in the container;[34] and
- a shipper that packs its own container must stow, lash and secure the contents properly and carefully so as to avoid causing harm.[35]

More Balanced Carriers' Liability

The Rotterdam Rules have made a number of changes in terms of the liability of the carrier compared with that of 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,[36] the carrier has, under the Rotterdam Rules regime, lost its defense 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"[37] as it appeared in the Hague and Hague-Visby Rules, has been narrowed to refer to "fire on the ship"[38] in the Rotterdam Rules.

[33] Rotterdam Rules, art. 14(c).
[34] Rotterdam Rules, art. 40.
[35] Rotterdam Rules, art. 27(3).
[36] Hague and Hague-Visby Rules, art. 4(2)(a).
[37] Hague and Hague-Visby Rules, art. 4(2)(b).
[38] Rotterdam Rules, art. 17(3)(f).

Both changes to the carrier's possible defenses 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 defense 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 here 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,[39] as well as specific provisions establishing a logical regime in respect of cargo carried on deck.[40] 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.[41]

Direct Liability of Maritime Performing Parties

Negligent third parties performing under the contract of carriage often seek to rely on a carrier's defenses and limitation of liability. The Hague Rules did not expressly deal with the subject, and the Hague-Visby Rules[42] were vague in terms of third parties who were independent contractors. The Hamburg Rules covered the servants and agents of the carrier,[43] but again, these provisions do 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 defenses 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.[44] In practice, this provision simply codifies the result that has been reached by the industry through contractual terms, and importantly, means that the maritime performing party is jointly and severally liable along with the carrier.[45]

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 electronic transport records. Further, the establishment of rules in these areas will enhance certainty in respect of the validity of the security interest that financial institutions may have in the goods.

For example, the right to provide instructions to the carrier in respect of the goods during the carriage allows an owner to dispose of the goods during the transport, or allows a financing institution to maintain control over the goods in which it has a security interest.

[39] Rotterdam Rules, art. 11.
[40] Rotterdam Rules, art. 25.
[41] Hamburg Rules, art. 9.
[42] Hague-Visby Rules, art. 4 *bis*.
[43] Hamburg Rules, art. 5 and art. 10.
[44] Rotterdam Rules, arts. 18 and 19.
[45] Rotterdam Rules, art. 20.

Since the existing law in respect of these matters is largely domestic, changes brought about by the Rotterdam Rules[46] 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.

Limitation amounts on carrier liability

Previous maritime transport conventions concentrated mainly on liability issues, thus there has always been a great deal of focus on 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),[47] while the Hague-Visby Rules have both a per package limitation (666.67 SDRs) and a per kilogram limitation (2 SDRs),[48] applying whichever yields the higher amount. The Hamburg Rules increased those limitation amounts by 25% to 835 SDRs per package and 2.5 SDRs per kilogram.[49]

Most of today's world trade is subject to the Hague-Visby limitations, while a fairly large proportion 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 a slight increase of the limitation levels on carrier liability in the amount of 875 SDRs per package, and 3 SDRs per kilogram.[50]

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 loss or damage in most cases, but that the new limitation levels will allow for higher recoveries in more extreme cases, and will certainly allow for higher recoveries in the case of non-containerized cargo, such as heavy machinery.

Delivery of Goods to the Consignee

Despite the obvious fact that delivery is one of the main obligations of the carrier – or perhaps, because it is so obvious – the current conventions do not specifically include the obligation. In order to avoid the current practical problems that can result from a lack of such rules, the Rotterdam Rules contain quite extensive rules on delivery.[51] While the rules are not exhaustive, they should provide a substantial improvement in terms of the legal certainty surrounding delivery.

Identity of the Carrier Clause

Despite efforts to clarify this murky issue, many transport documents remain fairly impenetrable in terms of identifying the contractual counterpart of the shipper. The new Convention presents a simple and clear solution to this difficult problem.[52]

Shippers' Obligations

[46] Rotterdam Rules, Chapter 10 and 11.
[47] Hague Rules, art. 4(5).
[48] Hague-Visby Rules, art. 4(5).
[49] Hamburg Rules, art. 6(1).
[50] Rotterdam Rules, art. 49.
[51] Rotterdam Rules, Chapter 9.
[52] Rotterdam Rules, art. 37.

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,[53] and they impose strict liability on the shipper for damage or expenses arising from the shipment of dangerous goods.[54] The Hamburg Rules reflect a similar approach to the obligations of the shipper.[55]

Although not representing a sea change in terms of the obligations of the shipper, the Rotterdam Rules contain clear and readily-identifiable provisions on the obligations of the shipper.[56] 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.[57] 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.[58]

As in the case of the Hamburg Rules,[59] 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.[60]

The new Convention thus provides a clear and logical codification of the obligations of the shipper to the carrier, further enhancing legal and commercial certainty.

Time for Suit

Under the Hague and Hague-Visby Rules,[61] a cargo claimant has one year in which to file its action against the carrier before such an action would be time-barred. The Hamburg Rules extended this period to two years,[62] and the Rotterdam Rules have followed the example of the Hamburg Rules.[63] The fact that claimants formerly subject to the Hague and Hague-Visby Rules will have twice the time under the Rotterdam 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 on jurisdiction[64] and arbitration[65] are based upon the corresponding provisions in the Hamburg Rules.[66]

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[53] Hague and Hague-Visby Rules, art. 4(3).
[54] Hague and Hague-Visby Rules, art. 4(6).
[55] Hamburg Rules, arts. 12 and 13.
[56] Rotterdam Rules, Chapter 7.
[57] Rotterdam Rules, art. 30 and 32.
[58] 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.
[59] Hamburg Rules., art. 17.
[60] Rotterdam Rules, art. 30 and 31.
[61] Hague and Hague-Visby Rules, art. 3(6).
[62] Hamburg Rules, art. 20.
[63] Rotterdam Rules, art. 62.
[64] Rotterdam Rules, Chapter 14.
[65] Rotterdam Rules, Chapter 15.
[66] Hamburg Rules, arts. 21 and 22.

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 cannot be circumvented by resort to the arbitration rules.[67]

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, since the EC has exclusive competence to negotiate on behalf of its Member States in respect of jurisdiction, and since the nature of the jurisdiction provisions would necessarily have an impact on the text of the arbitration chapter.

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.[68]

Freedom of Contract

One aspect of the Rotterdam Rules that has been considered controversial is the provision on volume contracts.[69] The volume contract provision recognizes that while the provisions of the Convention are mandatory, 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 at the hands of carriers. A number of strict requirements were inserted into the text in order to strongly protect the shipper. 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 to the contract of carriage without derogation.[70] Moreover, every shipper has the right to insist on a separate contract of carriage for each shipment, thus avoiding the possibility of falling within the definition of a 'volume contract'[71] at all. Thus, the mandatory provisions of the Rotterdam Rules are always the default rule.

Other protection inserted for the benefit of the shipper include the requirements that: the volume contract must contain a prominent statement that it derogates from the Convention; the volume contract must be individually negotiated or specify the sections of the contract that contain the

[67] Report of Working Group III (Transport Law) on the work of its eighteenth session, A/CN.9/616, paras. 267-279.
[68] Rotterdam Rules, arts. 74, 78 and 91.
[69] 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, A/CN.9/645, paras. 235-253.
[70] Rotterdam Rules, art. 80(2)(c).
[71] Rotterdam Rules, art. 1(2).

derogations; and the derogation cannot be incorporated by reference from another document, nor included in a contract of adhesion.[72]

Finally, there are a number of provisions from which a volume contract can *never* derogate:[73] the carrier's ongoing obligation to make and keep the ship seaworthy, and to properly crew, equip, and supply the ship;[74] the shipper's obligation to provide information, instructions and documents;[75] the dangerous goods rules;[76] and the loss of the benefit of the limitation on liability of the carrier.[77]

Third parties to the contract of carriage are also protected under the volume contract provision. The text requires that in order to be binding on third parties, the volume contract must not only meet the requirements outlined above, but third parties must receive information that prominently states that the volume contract derogates from the Convention. Further, the third party must give its express consent to be bound by those derogations.[78]

In addition, any party claiming the benefit of the derogation from the Convention bears the burden of proving that these rather onerous conditions for derogation from its provisions have been met.[79]

Conclusion

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 many of which are codifications of 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 an industry-driven approach that saw many competing interests reach a consensus on 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 commercial and legal predictability and transparency, thus improving conditions for international trade, enhancing efficiency for commercial transactions, and reducing the overall cost of doing business internationally.

[72] Rotterdam Rules, art. 80(2).
[73] Rotterdam Rules, art. 80(4).
[74] Rotterdam Rules, art. 14(a) and (b).
[75] Rotterdam Rules, art. 29.
[76] Rotterdam Rules, art. 32.
[77] Rotterdam Rules, art. 60.
[78] Rotterdam Rules, Art. 80(5).
[79] Rotterdam Rules, Art. 80(6).