Preface

Cracking open the champagne for 100 years of Hague Rules

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It is said that there is always a reason to celebrate and that any reason to celebrate is a good one. As to the centenary of the Hague Rules, celebrations could have started as early as 2021 since their text owes much to the rules that were adopted on 2 September 1921 at the 30th Conference of the International Law Association held in The Hague (1). Celebrations can obviously be held in 2024 since the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, as the Hague Rules are officially named, was signed in Brussels on 25 August 1924. However, whilst there are plenty of opportunities to crack open the champagne, one may ask oneself whether there is good reason to be cheerful.

Certainly, the Hague Rules, whether in their original version or as amended by the Visby Protocol (2) in 1968 or the SDR Protocol (3) in 1979 or as incorporated into domestic legislation, continue to play a role of capital importance in today's maritime trade. Ratified or acceded to by short of 100 countries (4), the Hague Rules in one version or another remain the standard for the determination of liabilities pursuant to the carriage of goods by sea under bill of lading or, if incorporated through a clause paramount, under charter party. Indeed, in a large majority of charter parties, to which the Hague Rules do not apply per se, owners and charterers voluntarily incorporate the Rules, thereby giving them even wider application than just carriage under bill of lading (5). As such, this is a remarkable achievement in

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(1) C.N. Gregory, "The Thirtieth Conference of the International Law Association" in *American Journal of International Law*, 1922, 451-456. CMI, *The Travaux Préparatoires of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924 (the Hague Rules) and of the Protocols of 23 February 1968 and 21 December 1979 (the Hague-Visby Rules)*, https://comitemaritime.org/wp-content/uploads/2018/05/Travaux-Preparatoires-of-the-Hague-Rules-and-of-the-Hague-Visby-Rules.pdf. M. Sturley, The 2024 Berlingieri Lecture: The Hague Rules at 100, *ETL* 2024, 419-420.

(2) Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 24 August 1924, known as the Visby Rules, signed at Brussels on 23 February 1968.

(3) Protocol amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 24 August 1924, as amended by the Protocol of 23 February 1968, known as the Hague-Visby Rules, signed at Brussels on 21 December 1979.

(4) See https://comitemaritime.org/publications-documents/status-of-conventions/.

(5) E.g. BIMCO's Gencon 2022, clause 2.

terms of international harmonisation of maritime law and legal certainty for all parties involved in maritime trade.

In *The Dijksgracht*, a recent milestone judgment by the Federal Court of Australia (6), Steven Rares and Sarah Derrington JJ noted

> *"… the somewhat surprising feature of the appeal that in 2023 there remains uncertainty as to whether the almost 100 year old Hague Rules apply to a contract of carriage negotiated in late 2019 by a French ship and chartering broker with a Dutch carrier. The contract involved a shipment from Ireland, a country that has not ratified the Hague Visby Rules (but has enacted them by domestic statute), to Australia which has enacted a version of the Hague Visby Rules modified by domestic statute (despite having denounced the Hague Rules) and to which the consignee asserts English law applies."*

It is clear, therefore, that despite their age the Rules remain a guiding beacon in the international carriage of goods by sea. However, it appears from cases in various jurisdictions around the globe, that there is significant variation in the national laws that apply the Rules. This is also the conclusion of Feutrill J in his Reasons for Judgment in the abovementioned Australian Federal Court's decision:

> *"Although an evident aim of the 1924 Convention and 1968 and 1979 Protocols was and is to bring about uniformity of the rules that apply to the international carriage of goods by sea and, to an extent, that aim has been achieved, there is significant variation in the national laws that apply rules to such carriage. There are States that are contracting States for the purposes of the 1924 Convention, but are not so for that Convention as amended by the 1968 Protocol or 1979 Protocol. There are States that are signatories to or that have acceded to the 1924 Convention that have not ratified it or have denounced it. There are States that have acceded to one or more of the Protocols, but have not ratified them. There are States that have done none of sign, accede or ratify the 1924 Convention or the amending Protocols, but have enacted legislation that gives effect to the 1924 Convention or that Convention, as amended by one or both of the Protocols. There are States which have enacted idiosyncratic legislation that gives effect to the 1924 Convention, as amended, but with modifications. COGSA 1991 is an example of such legislation."* (7)

In *The Dijksgracht*, which involved damage to the cargo pursuant to the carriage by sea from Ireland to Australia, the parties were in dispute about whether liability of the ship, the contractual carrier and the ship owner is limited, at all, and, otherwise, on what terms the carrier's liability is contractually limited. The competing possibilities turned on whether the contract limited liability to £100 per package or unit based on Art. 4(5) of the Hague Rules (without the monetary unit, GBP, taken to be gold value in accordance with Art. 9 of those rules), or to £100 per package or unit based on Art. 4(5) of the Hague-Rules (with the monetary unit, GBP, taken to

(6) Poralu Marine Australia Pty Ltd v MV Dijksgracht [2022] FCA 1038 or https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2023/2023fcafc0147, nr. 4.

(7) Poralu Marine Australia Pty Ltd v MV Dijksgracht [2022], nr. 206.

be gold value in accordance with Art. 9 of those rules) or to 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods (whichever is higher) based on Art. 4(5) of the Hague-Visby Rules. Since the general clause paramount of the carrier's bill of lading provided for the application of the Hague Rules *as enacted in the country of shipment*, the court eventually applied the liability regime of the Hague-Visby Rules rather than that of the Hague Rules, holding that the Hague Rules, as enacted in Ireland from where the cargo was shipped, are the Hague-Visby Rules as amended by the 1979 SDR Protocol ([8]):

> *"The evident commercial reason for the use of the expression "as enacted in the country of shipment" is to recognise that different countries have enacted their international cargo regimes by choosing between the Hague Rules and later amendments, such as the Visby and SDR Protocols, and often make the enacted version apply by force of law to goods shipped on board at their ports. However, where, as here, a clause paramount uses the contractual expression "as enacted in the country of shipment" to incorporate such a cargo regime contractually to apply to a shipment because the local legislation does not impose it directly, commercial common sense requires the Court to construe that expression so as to align the rights and obligations of the parties with the version of the Hague Rules which the law of the country of shipment compulsorily applies: see* The Federal Bulker *[1989] 1 Lloyd's Rep at 105 per Bingham LJ."* ([9])

The same line of reasoning had been followed earlier by the English Court of Appeal in *The Superior Pescadores* ([10]).

Discussing the Federal Court of Australia's decision, Stuart Hetherington writes that, if ever a case could be held up as showing the disuniformity and the international chaos in the regulation of international shipping in the carriage of goods by sea, the Federal Court of Australia's decision in *The Dijksgracht* is it, as it exemplifies the unnecessary expense that the parties are being put through because of the lack of uniformity in the area of cargo litigation ([11]).

The *The Dijksgracht* decision puts the centenary of the Hague Rules in the right perspective. The Hague Rules have proven their worth for decades and decades, but isn't it time for a new regime, a new international convention taking into account the developments of international commerce and trade since 1924 and 1968 such as combined transport and network liability, electronic bills of lading, volume contracts, etc.?

([8]) The Third Schedule to the Irish Merchant Shipping (Liability of Shipowners and Others) Act, 1996 is titled: "Articles I to X of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading as Amended by the 1968 and 1979 Protocols" (https://www.irishstatutebook.ie/eli/1996/act/35/schedule/3/enacted/en/html).

([9]) Poralu Marine Australia Pty Ltd v MV Dijksgracht [2022], nr. 138.

([10]) Yemgas FZCO & Ors v Superior Pescadores SA ("The Superior Pescadores") [2016] EWCA Civ 101; [2016] 1 Lloyd's Rep. 561.

([11]) S. Hetherington, The case of Poralu Marine Australia Pty Ltd v MV Dijksgracht [2022] FCA 1038: Regimes governing the International Carriage of Goods by Sea (https://www.cbp.com.au/insights/insights/2023/september/the-case-of-poralu-marine-australia-pty-ltd-v-mv-d).

This special edition of ETL dedicated to the 100th anniversary of the Hague Rules, brings together the views of six eminent academics and practitioners, Marko Pavliha, Michael Sturley, Stuart Hetherington, Norman Martínez Gutiérrez, Philippe Delebecque and Frank Stevens on the longevity of the Hague Rules and the need for the modernisation of its liability regime for the carriage of goods by sea. In their contributions, the genesis and illustrious history of the Hague Rules pass the revue (Pavliha and Sturley) against the background of the question whether it isn't time for a new and modernized regime, in particular the Rotterdam Rules ([12]) (Pavliha, Hetherington and Delebecque). The concept of limitation of liability as introduced by the Hague Rules in 1924 and since then introduced in other conventions such as the Hague-Visby Rules, the Hamburg Rules, the Rotterdam Rules and the 1996 LLMC Convention (Martínez Gutiérrez), and the jurisdiction provisions of the Hague, Hague-Visby and Rotterdam Rules (Stevens), are put in the footlight.

Longevity being a sign of quality, let's toast on the jubilee of the Hague Rules but while taking a sip let's contemplate how the Rotterdam Rules, whose ratification is long overdue, can pick up the torch and become the beacon for the determination of liability in the international carriage of goods wholly or partly by sea, able to stand the test of time.

([12]) United Nations Convention on Contract for the International Carriage of Good Wholly or Partly by Sea, 2008, known as the Rotterdam Rules, signed at Rotterdam on 23 September 2009.