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Preface

Cracking open the champagne for 100 years of Hague Rules

Peter LAURIJSSEN (*)

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 Dijkgracht*, 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 Dijkgracht*, 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 Dijkgracht* [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 Dijkgracht* [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 Dijksgrecht* 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 Dijksgrecht* 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 Dijksgrecht* [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 Dijksgrecht* [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.

First Centenary of the Good Old Hague Rules and Their (In)capable Descendants

Marko PAVLIHA(*)

This article is dedicated to Professor William Tetley, a superb lawyer, legendary teacher, writer, mentor, and dear friend.

1. Introduction: How to Understand a Marine Cargo Claim?

It was a colourful September 1989 when I came to Montreal, Canada to study comparative law at McGill University, Faculty of Law. My focus was on international maritime law and I had to complete one more graduate master's program in order to write a doctoral thesis⁽¹⁾ under the supervision of world renown Professor William Tetley (1927-2014).⁽²⁾

At that time, I did not know much about Professor Tetley's impressive achievements and international reputation. He was educated in Montreal public schools, and then the Royal Canadian Naval College and served in the Royal Canadian Navy Reserve as a midshipman, Sub-Lieutenant and Lieutenant. He obtained his B.A. from McGill University and LL.B. from Laval University and then practiced maritime law for 18 years for Martineau, Walker, Allison, Beaulieu & Tetley, which became Fasken Martineau DuMoulin. Subsequently, he was a member of the Québec National Assembly for eight years, including almost seven years as a Cabinet member under Premier Robert Bourassa. In 1976, he joined McGill Law Faculty, where he taught international maritime law, private international law, and consumer law. He was Visiting Professor of Maritime and Commercial Law at Tulane University, New Orleans from 1984 to 1998 and one year later the Tulane University named an annual lecture series in his honour, referred to as the annual Tetley Maritime Law Lecture. He was appointed a visiting professor at Dalian University in 1996, and lectured at many other universities and conferences around the world, for instance at Cambridge, Aix-en-Provence and Southampton.

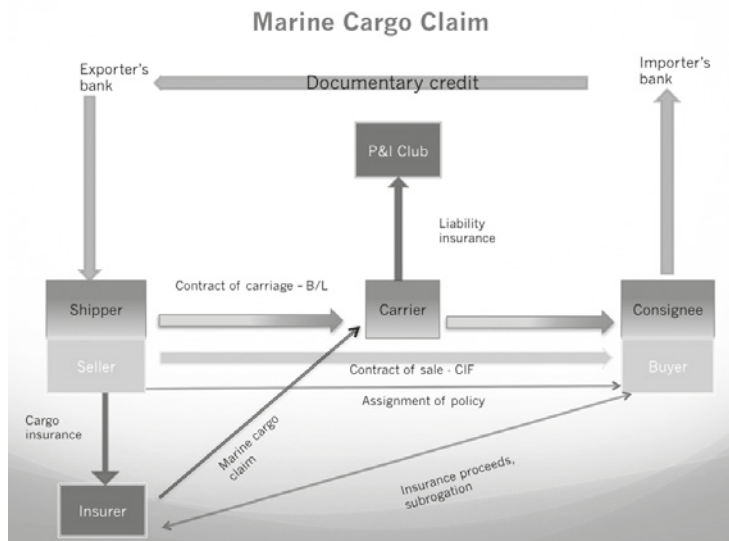
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⁽¹⁾ Dissertation was later published with Tetley's kind introduction: M. PAVLIHA, *Implied Terms of Voyage Charters*, Sava Re, Ljubljana, 1993.

⁽²⁾ Professor Tetley departed this life on 1 July 2014 at the age of 87 and saddened I wrote a rather emotional obituary – M. PAVLIHA, *In memoriam: Professor William Aubrey Tetley, C.M., Q.C. (1927-2014)*, *European Transport Law*, vol. XLIX, no. 5 – 2014, pp. 483-485.

In addition, my beloved mentor earned many honours throughout his long career. In 1981, he won the Lilar Prize of Brussels, awarded every three years by the Comité Maritime International (CMI) for a leading work on maritime law published in any language in the world. In 1994, he was named a Honorary Life Vice-President of the CMI and in 1995 a Member of the Order of Canada. He received the F.R. Scott Award for Distinguished Service from McGill Faculty of Law in 2007 to recognize his significant contribution to law and the life of the Faculty, and his exceptional service and leadership to society. In 2004, a fellowship was named after him for doctoral and master's studies at McGill University (the William Tetley Fellowship). Last but not least, he was an award-winning author of books on international maritime law covering areas of Conflict of laws, Maritime Liens and Mortgages, and Marine Cargo Claims. His books have been translated into many languages, including Russian, Japanese and Chinese.

So, it was the beginning of Autumn some 35 years ago when I bought my first professional book in English to start preparing for the forthcoming lectures. It was Tetley's third edition of his legendary *Marine Cargo Claims* which, at the beginning, motivated me much more by its dark blue colour and promising content than by its threatening size of 1305 pages.⁽³⁾ However, I realised soon that the tome was (and still is) a unique master piece which helps students, practitioners or any other lawyers tremendously to understand a complicated network of overlapping – different and yet related – legal branches as shown in the following picture:⁽⁴⁾



⁽³⁾ W. TETLEY, *Marine Cargo Claims*, 3rd edition, Les Éditions Yvon Blais Inc., Montreal, 1988. The fourth edition was published in 2008 by Thomson-Carswell and is even more comprehensive, comprising Volumes 1 and 2 on 3231 pages. The third volume on the Rotterdam Rules was expected in April 2009, however, at least to my knowledge, it never came to realisation.

⁽⁴⁾ The first (Slovenian) version of this scheme was published in M. PAVLIHA, P. VLAČIČ, K. OBLAK, *Prevozno pravo (Transport Law)*, tretja, spremenjena in dopolnjena izdaja (3rd edition), IUS Software, GV Založba, Ljubljana, 2017, p. 168.

Let us imagine the following scenario: the Slovenian seller vends two containers of bottled olive oil to the Canadian buyer (who is also the consignee for the sake of the exercise) on the basis of contract of sale including the international commercial term CIF (Cost, Insurance Freight). This clause requires the seller/the shipper to arrange cargo insurance and transportation by ship from Koper, Slovenia, to Montreal, Canada. The shipowner/the carrier issues a clean bill of lading, the cargo is loaded on the ship, the marine policy is assigned by the seller/the insured to the buyer, and the goods are to be paid by the documentary credit. Unfortunately, they arrive to the purchaser in a damaged condition, therefore he demands the insurance proceeds from the insurer which fulfils its contractual obligation and obtains the right to sue the carrier on the basis of subrogation. In other words, the insurer files a *marine cargo claim* against the sea carrier (whose liability is insured by one of the P & I Clubs) and Professor Tetley's magnificent book explains various possible legal bases for such an action (e.g. the Hague Rules, the Hague-Visby Rules, the Hamburg Rules), and the burden and order of proof, i.e. what the cargo claimant must prove, what the carrier must prove, the counter proof by the claimant and related arguments available to both parties.

For the past hundred years or so, the prevailing legal ground for marine cargo claims arising from international carriage of goods has remained to be the Hague Rules (1924), the Hague-Visby Rules (1968), the SDR Protocol (1979), or a particular national legislation which incorporates the gist of these rules. It is fair to say that the Hague Rules in one or another version are presently in force in most of the world's shipping nations and have been continuously applied to, reviewed, interpreted and corroborated by courts and arbitrations in both, common and civil law countries.⁽⁵⁾ There have been two major attempts to replace this legal regime, namely by the Hamburg Rules (1978) and the Rotterdam Rules (2008), however, until now more or less unsuccessfully.

The primary purpose of this contribution is to honour the 100th anniversary of the Hague Rules by remembering their essence, as well as further development of international law regarding the carriage of goods by sea. In conclusion, a few possible options for future action will be noted.

2. The Hague Rules (1924)

2.1. Historical Background

General maritime law relating to carriage of goods is of ancient origin, going back to the Hammurabi Code (17th century B.C.) and hundreds of years later to the birth of general average (*lex Rhodia de iactu*) and the edicts of Roman praetors prescribing nearly absolute liability of the seamen, innkeepers and stable keepers for their custody of received things (*receptum nautarum, cauponum, stabulariorum*). The law was further developed by the medieval statutes like *Llibre del Consolat de Mar* (13th/14th century A.D.), the Laws of Oleron (12th century) and the Laws of

⁽⁵⁾ The relevant caselaw is available in numerous law reports and journals, e.g. Lloyd's Shipping & Trade Law, Lloyd's Maritime and Commercial Law Quarterly, European Transport Law, Lloyd's Law Reports, American Law Reports, and many others.

Wisbuy (13th century), followed by the Laws of the Hanse Towns (16th century), the Marine Ordinances of Louis XIV (1681),⁽⁶⁾ and modern civil and commercial codes (19th century), such as the famous Napoleonic Code.

As explained succinctly by Rendell,⁽⁷⁾ the merchant (who accompanied his goods on board) and the shipowner each shared the maritime risks, the voyage being considered a common adventure. The shipowner was bound to furnish a sea-worthy vessel with competent crew, however, if the ship was lost due to the perils of the sea, the shipowner and the merchant “suffered together”. In 18th century, the bill of lading had been introduced into commerce with a triple purpose: it is as a receipt for the goods, a document of title, and it is said to be “an excellent evidence” of the contract of carriage. In this latter capacity, shipowners began to put exemptions from liability into their bills of lading. The courts generally held two types to be against public policy, one a reduction of the warranty of seaworthiness, the other an exemption from the carrier’s own negligence.⁽⁸⁾

In 1893, the United States Congress enacted the revolutionary Harter Act, forbidding the two types of exemptions already held to be against public policy, and adding a compromise of excusing the carrier from errors in navigation or in management of the ship provided he exercised due diligence before the voyage to make the vessel in all respects seaworthy.⁽⁹⁾ After thirty years of instability, during which the law relating to shipments to or from the United States differed from that in most other parts of the world,⁽¹⁰⁾ the helm of uniformity, certainty and justice of maritime law was taken over by the industrious hands and brilliant minds of two non-governmental organizations, Comité Maritime International (CMI) and International Law Association (ILA), firstly to produce a model bill of lading and finally a new international convention.⁽¹¹⁾

2.2. *New International Convention*

On a historical day of 25th August 1924, the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading was signed in Brussels by 14 countries, some of which even do not exist anymore, for instance the Kingdom of Serbs, Croats and Slovenes. The convention, which is predominantly known as the Hague Rules, was ratified or acceded to by almost 90 countries,⁽¹²⁾ it

⁽⁶⁾ The Laws of Oleron, the Laws of Wisbuy, the Laws of the Hanse Towns, and the Marine Ordinances of Louis XIV are available in English in 30 Fed. Cas. 1171.

⁽⁷⁾ R.S. RENDELL, *Report on the Hague Rules Relating to Bills of Lading*, 22 INT’L L. 246 (1988) <https://scholar.smu.edu/til/vol22/iss1/20>.

⁽⁸⁾ *Ibid.*

⁽⁹⁾ *Ibid.*

⁽¹⁰⁾ *Ibid.*

⁽¹¹⁾ See 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>.

⁽¹²⁾ The information regarding the status of international agreements mentioned in this article was obtained from the CMI website (<https://comitemaritime.org/publications-documents/status-of-conventions/>) where the readers are referred to the relevant official repository for each convention.

came into effect on the 2nd June 1931, and is still in force also in some European Union (EU) member states.⁽¹³⁾

As it was recently concisely observed by Lord Justice Males in the U.K. Court of Appeal case *Mv Giant Ace*,⁽¹⁴⁾ the Hague Rules represent “a negotiated compromise between the interests of ship and cargo interests”, providing “an internationally accepted regime for the carriage of goods by sea which expressly limits the parties ‘freedom of contract’, in particular by preventing shipowners from imposing unreasonable and unjust exemptions from liability.”

The essential characteristics of the Hague Rules can be summarised as follows:⁽¹⁵⁾

- They apply automatically, by their own force (*ex proprio vigore*) only to transport contracts evidenced by a bill of lading or any similar document of title issued in a country where these rules are effective.
- Many national laws require that the bill of lading must expressly provide for the application of these rules with a special Paramount Clause, although this is not necessary.
- The rules do not apply to charter parties.
- The rules do not apply to the carriage of live animals and to the agreed transport of cargo on deck.
- They cover the period from the time when the goods are loaded on to the time they are discharged from the ship (“tackle to tackle”).
- The carrier must exercise due diligence to make the ship seaworthy before and at the beginning of the voyage, and shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods.
- The carrier’s liability for damage, shortage or loss of cargo is based on presumed fault. He is liable for the delay only on the condition that he was informed of special circumstances or that such liability was specified in the bill of lading.
- Several exculpatory reasons or circumstances are prescribed, due to which the carrier can be relieved from liability (for example, error in navigation, fire, act of god/force majeure, act of war, saving or attempting to save life or property at sea, insufficiency of packing, latent defects, etc.), but only on the condition that his due diligence to provide a seaworthy ship was exercised.

⁽¹³⁾ Republic of Cyprus, Germany, Ireland, Malta, Portugal, and Slovenia. To my knowledge, only two EU member states are not parties to any of the carriage of goods by sea conventions. i.e. Bulgaria and Estonia.

⁽¹⁴⁾ [2023] EWCA CIV 569, also available in *European Transport Law*, vol. LVIII, no. 5 – 2023, pp. 667-690.

⁽¹⁵⁾ PAVLIHA et al. (2017), pp. 114-117. There have been probably hundreds of books and articles written about the Hague, the Hague-Visby, the Hamburg and the Rotterdam Rules, so I decided to prepare just a selected list which is available at the end of this contribution.

- The carrier’s liability is limited to 100 pounds sterling per package or unit of cargo.
- The one-year time bar is prescribed, meaning that the lawsuit must be filed no later than within 12 months after the delivery of the goods.
- Any contractual provision that reduces the carrier’s liability is null and void.

3. The Visby Rules (1968)

Invention of containers, better communication systems and modern navigation technology demanded an adapted international legal regulation which led to the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the Visby Rules) which was signed in Brussels on 23rd February 1968 and entered into force on 23rd June 1977. The protocol was ratified or acceded to by 25 states, including 12 EU members.⁽¹⁶⁾ Amongst experts, the Hague Rules as amended by the Visby Rules are popularly known as the Hague-Visby Rules.

The main amendments brought by the Hague-Visby Rules are the following:⁽¹⁷⁾

- The parties to the carriage of goods contract may extend the one-year limitation period by agreement.
- The carrier’s liability limit is increased to 10,000 Poincaré francs per package or 30 francs per kilogram of damaged cargo, whichever is higher.
- A container clause has been introduced to the effect that where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport is deemed the number of packages or units for the purpose of limiting the carrier’s liability, otherwise a container means one package or unit.
- The carrier loses the right to limit liability if it is proven that he caused the damage intentionally or recklessly, knowing that the damage was likely to occur, which has become a standard for the entire transportation law.
- The carrier can refer to the limits and other provisions in the convention both in the case of a lawsuit based on the contract of carriage as well as in the case of a non-contractual claim for damages (in tort).
- Liability can also be limited by the shipowner’s servants or agents.
- The scope of application of the Hague-Visby Rules is extended, as they apply to transport between ports of two countries, if (1) the bill of lading is issued in a country where these rules apply, or (2) if the carriage of goods takes place from a port of departure in a country where these rules apply, or (3) if the contract of carriage contained or recorded in the bill of lading specifies the application of these rules.

⁽¹⁶⁾ Sweden, Denmark, France, Belgium, Poland, Netherlands, Finland, Italy, Croatia, Latvia, Lithuania, and United Kingdom.

⁽¹⁷⁾ PAVLIHA et al. (2017), p. 117-118.

4. The SDR Protocol (1979)

Finally, on 21st December 1979, the international maritime community adopted the Protocol Amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25th August 1924, as amended by the Protocol of 23rd February 1968. The so called SDR Protocol was ratified or acceded to by 24 states, including 14 EU members⁽¹⁸⁾ which are presently parties to the Hague-Visby Rules as amended by the SDR Protocol.⁽¹⁹⁾ Because Spain has ratified the Rotterdam Rules, it will become bound by this convention when it comes in force.

The protocol has introduced a new accounting unit called Special Drawing Right (SDR) and increased the carrier's liability to 666.67 SDR per package or 2 SDR per kilogram of gross weight of the goods lost or damaged, whichever is the higher. The SDR was created by the International Monetary Fund (IMF) as a supplementary reserve asset in 1969 when currencies were tied to the price of gold and the US dollar was the leading international reserve asset. The value of SDR is based on a basket of five currencies – the US dollar, the euro, the Chinese renminbi, the Japanese yen, and the British pound sterling⁽²⁰⁾ – and this is why it is more stable than the value of gold which was used in the past.

In other words, the purpose of having the financial limits of liability expressed in SDRs is to mitigate the consequences of inflation (an increase in consumer prices due to economic growth and supply disruption) and devaluation (a decline in the value of the currency relative to its foreign counterpart).

5. The Hamburg Rules (1978)

Although the Hamburg Rules and the Rotterdam Rules are not part of “the good old Hague Rules family,” they regulate the same area of maritime law and are meant to replace and upgrade the rusty system of rules dealing with the carriage of goods by sea. (Un)fortunately, the first convention has been more or less ignored by the leading maritime countries, and the second has not come into effect yet.

In light of achieving a more just balance between the cargo interests and the sea carriers, this mission was entrusted to the United Nations Commission on Trade Law (UNCITRAL) in Vienna. On 31st March 1978, the United Nations Convention on the Carriage of Goods by Sea (the Hamburg Rules) was adopted and did not come into effect before 1st November 1992, on the All Saints Day without a similar symbolic future. The Hamburg Rules were ratified or acceded to by 35 countries,

⁽¹⁸⁾ Sweden, Denmark, France, Belgium, Poland, Netherlands, Finland, Italy, Croatia, Latvia, and Lithuania.

⁽¹⁹⁾ Belgium, Croatia, Denmark, Finland, France, Greece, Italy, Latvia, Lithuania, Luxemburg, Netherlands, Poland, Spain, and Sweden.

⁽²⁰⁾ <https://www.imf.org/en/About/Factsheets/Sheets/2023/special-drawing-rights-sdr>.

including 5 EU countries,⁽²¹⁾ whereas some other EU members have signed this convention but never ratified it.⁽²²⁾

Among the essential features of the Hamburg Rules, we should mention only those that distinguish them from the Hague Rules:⁽²³⁾

- The rules are applicable to the carriage of goods to and from the contracting state, to all transport contracts, including the carriage of goods on the basis of a bill of lading or a waybill, to deck cargo and the carriage of live animals, as well as to contractual and non-contractual (tort) liability of the carrier from “port to port”.
- The responsibility of the contractual carrier is defined, which according to the Hamburg Rules is also responsible for the conduct of the actual carrier.
- The concept of the carrier’s presumed fault is preserved.
- The carrier may be relieved of liability if he proves that he and his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.
- The carrier’s traditional exoneration – the error in navigation – has been omitted.
- The carrier must use all reasonable measures to maintain the ship in good condition (seaworthiness) during the entire voyage.
- The rules abandoned seventeen of the carrier’s historical liability exclusions of the Hague and Hague-Visby Rules which are now covered by general definition of liability based on presumed fault.
- The plaintiff can file a lawsuit either (i) at the court where the defendant has its seat or permanent residence, (ii) at the court where the contract of carriage was concluded, (iii) where the port of loading or port of discharge is, (iv) where the ship was arrested (if the Hamburg Rules apply in such a country) or (v) also elsewhere, if so provided by the contract.
- The carrier may assert claims from the letter of guarantee against the shipper, unless he intended to defraud a third party by not entering observations in the bill of lading.
- The carrier can limit liability up to 835 SDR per package or piece of damaged or lost cargo, or up to 2.5 SDR per kilogram, whichever is the higher.
- Damage due to delay is limited to two and a half times the amount of the freight for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea.

⁽²¹⁾ Austria, Czech Republic, Hungary, Romania, and Slovakia.

⁽²²⁾ Denmark, Germany, Finland, France, and Portugal.

⁽²³⁾ PAVLIHA et al. (2017), p. 118-120.

- The carrier and his servants cannot limit their liability if the other party proves that they caused the damage intentionally (*dolus*) or recklessly, knowing that damage is likely to occur as a result of their conduct.
- The statute of limitations is two years from the occurrence of the damage.

6. The Rotterdam Rules (2008)

Given the relatively archaic international maritime law of carriage of goods by sea and the failure of the 1980 United Nations Convention on International Multimodal Transport of Goods (the Multimodal Convention) to ever enter into effect, the UNCITRAL and CMI decided to prepare a new contemporary convention and embarked on a long 10-year journey of drafting new rules and coordinating different views and expectations.

The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was adopted on 11th December 2008 in New York and signed on 23rd September 2009 in Rotterdam, and this is why they are called the Rotterdam Rules. Up to the present, they have been ratified by 5 countries, including Spain as the only member of EU.

The Rotterdam Rules are extremely complex,⁽²⁴⁾ containing 96 articles in 18 chapters, which is much more than the Hague-Visby Rules (10 articles), the Hamburg Rules (34 articles) or the Multimodal Convention (40 articles). In addition, they are very complicated, due to the interweaving of the civil law style of writing (conciseness, elegance) with the common law style (precision, exhaustive enumeration). There are quite a few new terms which depart from well established case law throughout a centennial, some articles are too long and contain too many references and exceptions.

The new rules prescribe their application more broadly, i.e. not only for unimodal (maritime) transport, but also for multimodal transport where part of the voyage is performed by sea. Under certain conditions, the rules also apply to the carriage of goods on deck and the carriage of live animals. As usual, they do not apply to tramp shipping and charter parties. In multimodal transport, the convention refers to a door-to-door transport.

Like the Hamburg Rules, the Rotterdam Rules distinguish between the actual and the contractual carrier. The rules regulate some areas that until now have not been the subject of conventions, for example, handling of cargo during transport and delivery of goods.

The liability of the carrier remains to be based on the presumed fault. The carrier is liable for damage, loss, damage and delay, if the party with a legal interest proves that the damage, loss, damage or delay occurred during the time when the carrier is responsible for the goods. He can be relieved of liability wholly or partly if he proves that the cause or one of the causes cannot be attributed to his fault or

⁽²⁴⁾ PAVLIHA et al. (2017), p. 120-122.

the fault of the persons for whom he is responsible. The scope of liability for others is also extended, as the carrier is also responsible for independent contractors. He is liable from the time of receipt of the goods until the delivery (“door to door”), which is wider than “tackle to tackle” under the Hague Rules or “port to port” under the Hamburg Rules.

The Rotterdam Rules maintain the institute of exempted dangers or exculpatory grounds following the example of the Hague-Visby Rules and extend them also to liability for delay, which is not covered by the Hague-Visby Rules. Fifteen exclusions from liability are exhaustively listed and there is no error in navigation among them. However, fire on the ship has the same legal consequences as other exceptions and is not specifically regulated like in the Hague-Visby and the Hamburg Rules.

The duty to provide a seaworthy ship which affects the liability of the shipowner and the general limitation of liability, also extends this obligation to the entire duration of the voyage.

One of the novelties of the Rotterdam Rules is the possibility of agreement between the contracting parties, i.e. carriers and transport users, about the scope of the contract or some kind of quantitative, “volume” or “tonnage” contracts. This gives them almost unlimited contractual freedom under the Rotterdam Rules regarding the implementation of the general liability regime. With such a contract, the parties can agree on a higher limit of liability, unlimited liability or even the carrier’s liability for losses that may arise as a result of damage, loss or delay (indirect damage). Within the scope of the contract, there is also the possibility of an agreement between the parties that, in exchange for a lower freight, the carrier may have the benefit of lower liability limits or that it is otherwise additionally protected. Such broad contractual freedom may increase the chances of formal agreement between parties who have persistently rejected contractual commitments. In exchange for a lower freight rate, for example, they can also agree that the carrier is only liable for losses in the maritime part of the transport, or perhaps for fixed (flat-rate) compensation in the event of delay.

The Rotterdam Rules provide for a system of modified network liability of the carrier and not single liability, such as, for example, the Multimodal Convention, which can be a problem (if the damage occurs, for example, during road transport, the CMR convention⁽²⁵⁾ applies, during rail transport CIM,⁽²⁶⁾ etc., which introduces confusion and uncertainty into the regulation).

Transport of live animals is now regulated, but the rules allow the contractual freedom in this regard. This means that the carrier’s liability can be contractually excluded or limited, but not if the damage, injury or delay was caused intentionally or due to gross negligence. Furthermore, the rules consider a technological progress and comprehensively regulate electronic business or transport documents in

⁽²⁵⁾ Convention on the Contract for the International Carriage of Goods by Road.

⁽²⁶⁾ Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) – Appendix B to COTIF Convention.

electronic form. The provisions on jurisdiction and arbitration apply only to those countries which declare that they are bound by these provisions. The right to file a lawsuit expires in two years, but the deadline can be extended by agreement.

7. Conclusion: Is Old Really Gold?

Some time ago I have come across a wonderful quote mentioned by my colleague and friend the Honorable Sean Harrington,⁽²⁷⁾ referring to Professor Georges Ripert, a notable French scholar:

La vie et le droit commencent et terminent avec la mer – Life and the law begin and end with the sea.

Indeed, the international maritime law “has it all”, since it is the most complete, interesting and complex area of the law, covering the safety and security of shipping, general average, the law of obligations, such as contracts, torts and bailment, bills of lading, charter parties, marine insurance, the conflict of laws, the protection of marine environment and human rights, the law of the sea, and other legal aspects related to the oceans and ships. Carriage of goods by sea is one of the most important subjects, given the planetary dimensions of transportation by ships.

As it can be seen from a comprehensive and by no means exhaustive list of books and articles dealing with the Hague, the Hague-Visby, the Hamburg and the Rotterdam Rules provided at the end of this article,⁽²⁸⁾ none of these international agreements is perfect, however, many pundits argue that “old is gold” and we should not fix something which “works.”

But does it really work?

Well, yes, to certain extent, since the courts and stakeholders are familiar with the old law and it is quite predictable how it will be construed in various situations. However, the competing coexistence of these conventions causes uncertainty and insecurity in the everyday business of international carriage by sea that serves 90% of international trade involving the movement of goods and commodities around our planet. Moreover, the experience from everyday practice shows “that fortunes have changed and the tables have turned”⁽²⁹⁾ to the detriment of shipowners, which should be reflected by the law.

Hence, there are probably at least four relatively reasonable options for the future.

⁽²⁷⁾ S.J. HARRINGTON, *Canada's Contribution to Maritime Law*, CMI Montreal Colloquium, 15th June 2023, Francesco Berlingieri Memorial Lecture, published in *European Transport Law*, vol. LVIII, no. 5 – 2023, pp. 639-650.

⁽²⁸⁾ At the time of publication of this contribution as part of the special issue of ETL, also papers from the recent CMI Colloquium, which ran from 22nd until 24th May in Göteborg, Sweden, are probably available. The event was dedicated to the 100th anniversary of the unification of the law on the carriage of goods by sea and the list of prominent speakers on this topic included Michael Sturley, Stuart Hetherington, Alexander von Ziegler, Miriam Goldby, David Farrell, Andrew Robinson, Tomotaka Fujita, Manuel Alba, and Erik Rosaeg.

⁽²⁹⁾ See P. KRAGIC, D. JEROLIMOV, *A Modern Lex Mercatoria for Carriage of Goods by Sea*, Croatian Maritime Law Association, Rijeka, 2022, pp. 9, 70-71

Firstly, despite of their aged patina, the Hague-Visby Rules as amended by the SDR Protocol should be ratified or acceded to by the vast majority of all countries in order to contribute to the uniformity, certainty and justice of international law, which was one of Professor Tetley's favourite mission statements.

Secondly, giving the increasing demand for logistics and door-to-door transportation of containerized cargo, the 1980 Multimodal Convention should be revived and refreshed to attract more support from international community.

Thirdly, the shipping world should accept the Rotterdam Rules which is indeed very unlikely if they remain in the present form.

Fourthly, we need to amend the Rotterdam Rules to make them acceptable to the maritime industry. It would be therefore appropriate to consider thoroughly within national maritime law associations and the CMI Standing Committee on Ratification of the Rotterdam Rules numerous opinions in this regard, including the proposals argued by our esteemed Croatian colleagues Petar Kragic and Diana Jerolimov.⁽³⁰⁾ In addition to their propositions in relation to jurisdiction and arbitration, they suggest several amendments to the Rotterdam Rules to make them more appealing to the maritime stakeholders and governments, contending that cargo liabilities should be channelled solely to contractual carriers and that the rights of claimants should be protected by mandatory marine insurance and direct right of action.

It is believed that a good scientist ought to be brave enough to ask provocative questions, and then to search for the answers. Leaving aside the dilemma whether the law is also a science, one of my longstanding (almost heretical) questions remains whether it is still justifiable and ethical⁽³¹⁾ in the 21st century to enable carriers to rely on the unique privilege to limit their financial liability for damages to cargo and even to passengers and their luggage (except in aviation). Other service providers and wrongdoers must usually pay in full for the loss they cause, so why exempt transporters who can also easily insure their liability? What impacts can we expect of artificial intelligence, digitalisation⁽³²⁾ and unmanned ships,⁽³³⁾ who is going to be the ultimate and potentially liable carrier?

Maybe the time is ripe for a paradigm shift in transport law, including the international maritime law.

⁽³⁰⁾ KRAGIC, JEROLIMOV (2022), pp. 72-73.

⁽³¹⁾ More about ethical questions in M. PAVLIHA, *Essay on Ethics in International Maritime Law*, European Transport Law, vol. XLVII, no. 5 – 2012, pp. 461-472.

⁽³²⁾ E.g. P. VLACIC, B. CEKRLIC, *The Time is Now: Widespread Adoption of the Electronic Bill of Lading*, *Diritto marittimo*. 2020, anno 122, fasc. 3, pp. 701-715.

⁽³³⁾ See, e.g., the CMI International Working Group Position Paper on Unmanned Ships and the International Regulatory Framework, 2018, <https://comitemaritime.org/wp-content/uploads/2018/05/CMI-Position-Paper-on-Unmanned-Ships.pdf>.

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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-

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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

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 now discuss the events of the 1920s. The immediate impetus for the Hague Rules came from the British Empire. While ship-owners 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 ship-owning 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.

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (the Rotterdam Rules): The long overdue ratification, Europe's chance to take the lead.

Stuart HETHERINGTON (*)

On Monday the 25th August 1924 a large number of nations completed their negotiations in Brussels for the Hague Rules Convention. Despite the many years in its production, principally initially by the Comité Maritime International (CMI), it took many years for it to be widely accepted.

On 11 December 2008 the United Nations Assembly agreed the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which is known as The Rotterdam Rules, UNCITRAL having been provided by CMI with a draft Instrument it then undertook the task of producing an international Convention in its Working Group III.

This article traces the history of the work of CMI in relation to this project, explains the reasons why it was undertaken and the explanation for its strongly held view that the maritime community needs to work together to have this Convention ratified and brought into force without delay, and suggests that Europe is ideally situated to take the lead.

The raison d'être of the CMI

By Article 1 of its Constitution the CMI has as its object: to contribute by all appropriate means and activities to the unification of maritime law". Former CMI President Albert Lilar said:

"The history of maritime law bears the stamp of a constant search for stability and security in the relations between the men who commit themselves and their belongings to the capricious and indomitable sea. Since time immemorial, the postulate which has inspired all the approaches to the problem has implied the establishment of a uniform law."

The significance of Uniformity in international shipping.

Justice Haight of New York made the following comments in a paper given in honour of Professor Bill Tetley at Tulane University, New Orleans:

"Those who strive to achieve a uniform maritime law, nationally and internationally, seek to have the people of the maritime community -shipowners,

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

cargo owners, insurers, lenders, furnishers of supplies, salvors – “be of one language and of one speech”, so that rights and obligations may be certain and predictable”.

The problems which the CMI identified in the late 1980s (to which reference will be made below) can be categorised as the awareness that there had become an absence of both certainty and predictability in relation to the international cargo liability regime.

As early as 1983 another experienced Admiralty Judge, Justice Yeldham of the New South Wales Supreme Court, in an address to the Maritime Law Association of Australia and New Zealand in that year, said as follows:

“Unless and until all the major maritime nations adopt either the 1968 Brussels Protocol or the Hamburg Rules or some other Rules, ship owners and shippers will have the prospect of operating and trading under perhaps three concurrent and alternative international Conventions governing their rights and liabilities inter se. ... Another consequence of the non-adoption of the Visby Amendments or the Hamburg Rules so far as Australia is concerned, is that problems with the sea carriage of goods, and especially those concerning containers ... will in many cases continue to be problems and fertile sources of litigation to be considered by the courts.”

How prophetic were those words.

In his commentary on the Rotterdam Rules: “The preparation, philosophy and potential impact of the Rotterdam Rules”⁽¹⁾ Professor Michael Sturley drew attention to the Opinion of the US Supreme Court in *Norfolk Southern Railway Company v James N Kirby P/L*.⁽²⁾ The following statements made in that Opinion and its consideration of the question as to whether the bills of lading in that case were “maritime contracts” attracting federal law resonate on the topics of modernity and uniformity:

“Maritime commerce has evolved along with the nature of transportation and is often inseparable from some land based obligations. The international transportation industry “clearly has moved into a new era – the age of multi modalism, door-to-door transport based upon efficient use of all available modes of transportation by air, water and land” ... The cause is technological change: Because goods can now be packaged in standardized containers, cargo can move easily from one mode of transport to another... Contracts reflect the new technology, hence the popularity of “through” bills of lading in which cargo owners can contract for transportation across oceans and to inland destinations in a single transaction ... The popularity of that efficient choice, to assimilate land legs into international ocean bills of lading, should not render bills for ocean carriage non-maritime contracts ... Conceptually, so long as a bill of lading requires substantial carriage of goods by sea its purpose is to effectuate maritime commerce, and thus it is a maritime contract ...

⁽¹⁾ (2008) JIML 461

⁽²⁾ 543 US 14, 29, 2004 AMC 2705 2715 2004

Here, our touchstone is a concern for the uniform meaning of maritime contracts ... It certainly could not have been the intention to place rules and limits of maritime law under the disposal and regulations of the several States as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects affecting the intercourse of the States with each other or with foreign states ...

In protecting uniformity of federal maritime law, we also reinforce the liability regime Congress established in COGSA.”

Whilst primarily concerned with achieving uniformity within the States of the USA the Court was clearly conscious in its Opinion of the need for uniformity internationally as well.

Commentaries made on the Rotterdam Rules by stakeholders, and others.

International Chamber of Shipping

In a brochure published by the International Chamber of Shipping and the International Shipping Federation on the topic Promoting Treaty Ratification: the ICS and ISF Campaign the following is stated in the first two paragraphs:

“ICS and ISF member national shipowners associations continually emphasise to their governments that shipping is an inherently international industry which depends on a global regulatory system to operate efficiently.

It is crucial that the same regulations governing such matters of safety, environmental protection, liability, and seafarers’ working conditions apply to all ships in international trade and that the same rules apply to all parts of the voyage. The alternative would be a web of conflicting rules and regulations that would compromise the efficiency of global trade, around 90% of which is carried by sea.”

In its publication “Promoting maritime treaty ratification” which was produced jointly by the International Chamber of Shipping and the CMI it described ICS thus: “a global trade association for shipowners, comprising national shipowners’ associations representing all sectors and trades, in over 80% of the world merchant fleet”.

It makes the following comments:

“A global industry requires global rules ...”

“It is critical that the same regulations governing matters such as safety, environmental protection and shipowners’ liability, as well as seafarer’s claiming and employment standards apply equally to all ships engaged in international trade, and that the same rules apply during all parts of the voyage.

The alternative would be a plethora of conflicting national or regional rules that would seriously compromise the efficiency of world trade, creating market distortion and administrative confusion ...”

“Any delay of the entry into force of new conventions can encourage the promotion of unwelcome unilateral regulation by national or regional

authorities which may not be fully aware of the highly developed framework that applies to international shipping ...”

“United Nations Convention on Contracts of international carriage of goods wholly or partly by sea (Rotterdam Rules (2009)).

The Rotterdam Rules adopted by the UN Commission on International Trade Law (UNCITRAL), are intended to provide a modern cargo liability regime to replace the long-standing Hamburg and Hague-Visby Rules. It is vital that the new regime enters into force to prevent a proliferation of regional cargo liability regulations, and to ensure a global regime that reflects modern “door to door” services involving other transport modes in addition to the sea-leg and “just in time” delivery practices. If the Rotterdam Rules do not take hold then the United States and the EU will almost certainly pursue their own regional regimes and the opportunity for global uniformity will be lost for another generation.”

The United Kingdom P&I Club

In its pamphlet described as “Legal briefing” of September 2009 on the Rotterdam Rules the UK P and I Club said:

“If brought widely into force, the Convention will significantly increase the liability of shipowners and maritime carriers in respect of the carriage of cargo. The long established exception of negligent error in the navigation, management or pilotage of a vessel will be lost. The obligation to exercise due diligence in relation to seaworthiness of a vessel will be extended to the duration of the voyage rather than merely before and at the commencement of the voyage as under the Hague-Visby Rules. Limits of liability per package or unit of weight will be increased beyond Hague-Visby or Hamburg Rules limits. Shipowners and other maritime carriers will become liable for the so-called “maritime performing parties” such as sub-contracted sea carriers, stevedores and terminals. The use of unfamiliar concepts and terminology will inevitably lead to legal uncertainty – which will no doubt keep lawyers busy.

There is a positive side. Although the new Convention will increase shipowners’ liabilities, in so doing it offers the best prospects for updating carriage of goods by sea law in a uniform approach across the world. The alternatives regional updating will certainly involve the same (or worse) problems of increased liabilities and legal uncertainties (but multiplied by the difficulties of conflicting, overlapping regimes). In common with follow clubs in the international group, the UK Club therefore supports the introduction of the Rotterdam Rules notwithstanding the additional liability burden”.

BIMCO

BIMCO supported the Rotterdam Rules on the basis that they would contribute to the harmonisation of international trade practices and thus the benefit of the ship-

ping industry. It did this by having a “BIMCO Position” to this effect published on its website. In 2023 BIMCO launched a campaign “to accelerate uptake of electronic bills of lading” whose acceptability and reliability would be enhanced by the widespread ratification of this Convention.

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⁽³⁾. 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 discussed 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.”

A paper was given at the Conference by: **Hannu Honka** in which he discussed “The scope of application, the Freedom of contract’ and 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

⁽³⁾ CMI Yearbooks 2007-2008 Athens I and 2009 Athens II

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 described 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 today’s 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 explained 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 Article 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”⁽⁴⁾, 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 Article 26 and 82, see further comments below.) He also discussed the topics of: performing parties (in particular terminal operators), electronic transport records, and delivery of goods (referring to articles 43, 47).

At the CMI Beijing Conference (October 2012) the papers⁽⁵⁾ 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.

⁽⁴⁾ CMI Yearbook 2010 pages 516-520

⁽⁵⁾ CMI Yearbooks 2011 Beijing 1 and 2013 Beijing 11

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 spirit 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 historical background to the Rotterdam Rules Convention

The significance of the Rotterdam Rules Convention cannot be appreciated without a knowledge of the historical background as to governmental involvement in the regulation of the liability of carriers in the international carriage of goods by sea. The author is indebted to the great work of Professor Michael Sturley in his study of the *Travaux Préparatoires* of the Hague Rules⁽⁶⁾.

In the late 19th century concerns were raised concerning the unfairness in the contractual arrangements which were being forced on exporters of cargo by carriers. Tensions grew between the legal systems of those countries that favoured freedom of contract and those who preferred some restrictions on that freedom. The International Law Association, which had been founded to prepare a Code of International Law, convened meetings, which took place in Liverpool in 1882 where a draft model Bill of Lading was prepared and in Hamburg in 1885 where a Draft set of rules, known as the Hamburg Rules of Affreightment, for incorporation into Bills of lading, was prepared. Neither of these endeavours achieved the desired result of seeking to provide a fairer and more unified international regime.

The first intervention by a National Government in the regulation of the liabilities and responsibilities for the carriage of goods by sea was made by the United States in its *Harter Act 1893*. That was followed in New Zealand by the *Shipping and Seamen Act 1903*, in Australia by the *Sea-Carriage of Goods Act 1904* and Canada by its *Water Carriage of Goods Act 1910*.

In 1907 the Comité Maritime International (**CMI**) which had been founded in 1897 commenced work on seeking to produce international rules relating to the carriage of goods by sea and concluded that work in 1921. The Rules thereby formulated then became the basis of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924, which entered into force on 2 June 1931 (**the Hague Rules**) and over time became internationally accepted by the major trading nations of the world.

In 1968 the Brussels Protocol amended the Hague Rules Convention by, *inter alia*, increasing the limits of liability that a carrier is entitled to rely on, the package limitation, from £100 sterling to Fr10,000 per package or unit or Fr30 per kilo of the gross weight of goods lost or damaged (**the Hague-Visby Rules**). It entered into force on 23 June 1977

In 1979, by a further Protocol to amend the Hague Rules, the limitation sums were identified in accordance with the Special Drawing Rights of the International Monetary Fund as 666.67 units of account per package or two units of account per kilogram of gross weight of the goods lost or damaged (**the SDR Protocol**). It entered into force on 14 February 1984

⁽⁶⁾ The Legislative History of the Carriage of Goods by Sea Act and the *Travaux Préparatoires* of the Hague Rules Michael F Sturley ed, Caroline Boyle trans, 1990. (Fred B Rothman and Co Colorado 80127, 1990.)

In 1978 a further International Treaty was produced: the United Nations Convention on the Carriage of Goods by Sea 1978 which entered into force on 1 November 1992, known as the **Hamburg Rules** Convention, prepared by UNCITRAL at the request of UNCTAD.

With the encouragement of UNCITRAL, which was being made aware of the deficiencies in the Hague Rules regime and in particular through its work on electronic commerce, CMI began work, from 1988 on identifying the areas in which a new international Convention might be devised which met all the concerns that were emerging concerning the Hague Rules.

During the 1990s States became concerned that the Hamburg Rules were unlikely to be adopted by the world's leading trading nations and some States, including Australia and China, introduced hybrid versions of the Hague Rules by incorporating elements of the Hague-Visby Rules and the SDR Protocol and parts of the Hamburg Rules into their regimes.

Also during the 1990s, the Maritime Law Association of the United States (MLAUS) started work on drafting a Bill to be presented to Congress to amend the US Carriage of Goods by Sea Act 1936 (COGSA). The International Group of P and I Clubs approached the CMI to ask it to prevail upon the MLAUS to desist from such a unilateral course. This request was considered by the CMI Executive Council in November 1997 and it was decided not to do so. The Minutes of that meeting read in part: "... while they had sympathy for the fact that concerns are raised regarding proliferation of national enactments it was realised that CMI had no power to intervene in the national developments within a country. In any event the developments within the US proved to the contrary that there is urgent need for CMI and the international community to find a new basis for uniformity in this area".⁽⁷⁾

The MLAUS did not proceed with its unilateral attempt to amend its COGSA and participated actively with the CMI and then through the UNCITRAL process in producing a new International Convention.

Because of the disuniformity which was occurring as a result of the multiplicity of regimes that by then had emerged the CMI began to consider how best it could assist in recreating the uniformity, predictability and certainty which the Hague Rules had achieved since 1924 until amendments had been made to them.

Status of Rotterdam Rules

The Rotterdam Rules have been ratified by the following five States: Spain (2011); Togo (2012); Congo (2014); Cameroon (2017); and Benin (2019).

The Rotterdam Rules have been signed by 25 States: Armenia, Cameroon, Congo, Democratic Republic of Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, Guinea-Bissau, Luxembourg, Madagascar, Mali, Netherlands, Niger, Nigeria, Norway, Poland, Senegal, Spain, Sweden, Switzerland, Togo and the United States.

⁽⁷⁾ CMI News Letter No 54 1997 page 3

As can be seen Spain has shown the way to its European partners and many other European countries have signed but not as yet ratified. (Those 25 States together represented over 25 percent of the then current world trade volumes according to the UN 2018 International Merchandise Trade Statistics Yearbook.) A number of States have not ratified the Rotterdam Rules but are amongst the signatories that have passed legislation which will enable them to ratify the Rules when they determine that their major trading partners have ratified them. Those States include Norway, Sweden, Denmark and the Netherlands.

The Maritime Law Association of the United States (MLAUS) has been working tirelessly since 2009 to have the Rotterdam Rules ratified in their country.

How the Rotterdam Rules came into being

At the CMI Conference in Paris in 1990 the following Declaration on Uniformity of the Law of Carriage of Goods by Sea was made:

- “1. During the 34th international Conference of the CMI held in Paris on 24 to 29 June 1990 a draft document entitled “Uniformity of the Law of the Carriage of Goods by Sea in the 1990s” was discussed by a Committee of the Conference, largely on the basis of the Hague-Visby Rules and in which discussion all 41 national associations represented at the Conference participated.
2. Following this discussion the draft was amended to clarify certain points which were raised and to reflect views expressed by delegates which were not always unanimous. The document, as amended, is attached. It was presented to a Plenary Session at the Conference on Friday 29 June and was approved as a basis for the work.
3. In approving the document as a basis for further work the hope was expressed that the international organisations concerned would continue to offer to the CMI the co-operation it has received in the past for the work that lies ahead.”

The topics discussed were:

Identity of the carrier; contracts and documents; debt cargo; period of application; exemptions from liability; limits of liability; deviation; and damages including damages from delay.

The Introduction to those considerations contains the following:

1. It is now almost 100 years since the Bill HR9176, which ultimately led to the passage of the Harter Act 1893 was introduced in the US Congress. The Harter Act was the beginning of the movement which led to the uniformity brought about by the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, popularly known as the Hague Rules. The Convention is itself based on a set of Rules adopted by the Maritime Committee of the International Law Association at a meeting in the Hague in September 1921. It was intended that those Rules should

be voluntarily incorporated by reference in bills of lading, but owing to opposition from cargo interests the Rules were recast in legislative form at a meeting of the Diplomatic Conference on Maritime Law in Brussels in August 1924.

This was the first time that freedom of contract in relation to contracts of carriage of goods by sea was restricted by an international Convention. The Rules as adopted by the 1924 Diplomatic Conference were subsequently amended by a Protocol adopted at the Diplomatic Conference in Brussels in February 1968 (the Rules as amended will be referred to as the Hague-Visby Rules). A further amendment was made by a Protocol adopted at a Diplomatic Conference held in Brussels in December 1979.

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

Among the reasons for this decision were the following:

First, a considerable time has elapsed since the Hague Rules were last the object of study by a Conference of the CMI. Such a study was last conducted in 1963 at the Stockholm Conference, where the draft of the Visby Protocol was approved. Secondly, many important events have occurred since then, including substantial changes in transportation technique and the documentation of contracts of carriage as well as the adoption of a new international convention, the 1978 United Nations Convention on the Carriage of Goods by Sea (the Hamburg Rules). Thirdly, whether or not the Hamburg Rules achieve widespread adoption it is likely that the Hague-Visby Rules will remain in force for many years. A study by the CMI of potentially controversial provisions may be of assistance in generating greater uniformity.

3. For this purpose it was decided to select a number of problems. The problems which were chosen are the following:
 1. Identity of the carrier;
 2. Contracts and documents;
 3. Deck cargo;
 4. Period of application;
 5. Exemptions from liability;
 6. Limits of liability;
 7. Deviation; and
 8. Damages including damages resulting from delay.

June 1996 at the 29th Session of UNCITRAL, in the context of its work on electronic data interchange the following was observed:

“... existing national laws and international conventions left significant gaps regarding issues such as the functioning of the bill of lading and sea waybill, the relation of those transport documents to the rights and obligations between seller and the buyer of the goods and to the legal position of the entities that provide financing to a party to the contract of carriage.”

11 May 1998: At the first meeting of the “round table” on Issues of Transport Law attended by representatives of BIMCO, ICS, FIATA, IGP&I, IAPH as well as CMI representatives including the President Patrick Griggs, Alexander Von Ziegler (Secretary-General), Frank Wiswall, (Vice President), Stuart Beare, and others including the Secretary-General of UNCITRAL, Mr Sekolec the report of the meeting noted that:

“Mr Sekolec outlined the background to the project and referred to the report of the Steering Committee. He said that delegates to UNCITRAL were quite aggravated by the situation prevailing in Maritime Law. UNCITRAL therefore had gone to the CMI in order to obtain a good picture of existing legal issues, and those which would arise in the future, and how they should be codified. This might be done by legislative action, such as a treaty, a model law or legislative guide, or by a non-legislative text such as model contracts or model clauses. He was looking forward to the outcome of the study which would highlight the issues and indicate possible solutions.

There was no need to hurry; UNCITRAL wanted the CMI to do a job which at the end of the day would command consensus. UNCITRAL wanted everyone on board, and he encouraged all international organizations to put forward their views so that there would be no surprises. He believed that this project would involve into a very important project and he appealed for cooperation.”⁽⁸⁾

Report on the Work of the International Sub-Committee: Uniformity of the Law of the Carriage of Goods by Sea by Francesco Berlingieri, Chairman of the International Sub Committee (1999).⁽⁹⁾

“The process of unification of the law relating to liability arising out of the carriage of goods by sea, which was begun by the CMI as long ago as 1907, continued satisfactorily until the Visby Protocol of amendments to the Hague Rules was adopted in 1968. At that time there were 73 States parties to the 1924 Convention, including most of the major maritime nations of the world. Some other States had introduced the provisions of the Hague Rules into their domestic legislation without ratifying the Convention. With the entry into force of the Visby Protocol in 1977, the degree of uniformity decreased, as only a limited

⁽⁸⁾ CMI News Letter No 2 1998 page 4

⁽⁹⁾ CMI Yearbook 1999 Pages 105-113; and CMI News Letter No 2 1999 pages 1-5

number of States parties to the Convention became parties to the Protocol. Presently there are 60 States Parties to the unamended 1924 Convention, 17 States Parties to the Convention as amended by the Visby Protocol and 18 States Parties to the Convention as amended by the Visby Protocol and by the SDR Protocol. Moreover, although about 8 States simultaneously ratified the Protocol and denounced the unnamed Convention, about 12 other States have ratified the 1968 Visby Protocol without denouncing the original 1924 Convention.

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

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

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

Statement by the Comité Maritime International (1999)⁽¹⁰⁾

“The Trend towards Disuniformity of the Law of the Carriage of Goods by Sea.

- 1.1. The object of the Comité Maritime International (“CMI”) is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects. In pursuance of this object the CMI began the process of unification of the law relating to liability arising out of the carriage of goods by sea in 1907. It drafted the Hague Rules, which were formally adopted at the 1924 Brussels Conference, and the Visby Protocol, which was adopted at the Brussels Conference in 1968.
- 1.2. The degree of international uniformity established by the widespread adoption of the Hague Rules decreased when the Hague Visby Rules entered into force in 1977, since the majority of States Parties to the Hague Rules have not ratified the Visby Protocol. This trend significantly increased with the entry into force of the Hamburg Rules in 1992 and the enactment of domestic legislation in a number of states adopting non-uniform versions of the Hague Visby Rules.

10 CMI Yearbook 1999 pages 326-332

- 1.3. The CMI views this trend with great concern. In response to a questionnaire sent to its Member National Associations in 1994, the majority of those national associations which replied considered that the proliferation of legal regimes relating to liability for carriage of goods by sea was an unacceptable situation and that some effort should be made by the CMI to remedy it.
- 1.4. The CMI then set up an International Sub-Committee (“ISC”) which identified and debated the most relevant issues that the uniform law of the carriage of goods by sea should regulate. The ISC has met five times. The work of the ISC will be concluded in the form of a CMI Study which will be published in 1999. It summarised the areas where there is consensus and the areas where there are conflicting positions regarding principals of liability. No attempt to draft new rules will be made at this stage.
- 1.5. It is the view of the majority of the national associations that the existence of a third liability convention would introduce even greater disuniformity. To achieve unification it would be necessary for a new convention to supersede the Hague Rules, the Hague Visby Rules and the Hamburg Rules”.

The International Sub-Committee that had been set up had decided on 4 April 1989 that the CMI should consider the most relevant legal issues relating to carriage of goods by sea and that the study to be carried out should be based upon the Hague-Visby Rules. The results of that study can be found in the CMI Yearbook 1990 Paris 1. Stuart Beare in his paper in 2010, after the Rotterdam Rules had been agreed, entitled: “The need for change and the preparatory work of the CMI” referred to the adoption by the United Nation’s General Assembly on 11 December 2008 of the Rotterdam Rules and its Preamble to the Resolution which recited concerns that the current legal regime governing the international carriage of goods by sea lacks uniformity and failed adequately to take into account modern transport practices, including containerisation, door to door transport contracts and the use of electronic transport documents. He then went on to say that the present disharmony and the problems in this area:

“have long been the concern of the CMI. The most recent work began in 1988 where a sub-committee was set up under the chairmanship of Professor Francesco Berlingieri and a study of the current problems, albeit based on the Hague-Visby Rules, was a major topic of the CMI’s Conference in Paris in 1990. Five years later a new subcommittee was formed, commonly known as the “Uniformity Sub-Committee”, also under Professor Berlingieri’s chairmanship. Professor Berlingieri’s 1999 report was the starting point for work on the obligations and liabilities of the carrier to be included in the draft instrument which the CMI was then preparing for the UNCITRAL Secretariat. This draft instrument had its origins in the 29th Session of the UNCITRAL Commission in 1996, when it considered a proposal to include in its work programme a revision of current practices and laws in the area of carriage of goods by sea with a view to achieving greater uniformity of law. This proposal arose out of UNCITRAL’s work on its Model Law on Electronic Commerce, which had exposed the fact that there were significant gaps regarding issues such as the functions of bills of

lading and sea waybills. The CMI took the lead in this project, which initially was primarily concerned with topics, such as electronic transport documents, that were not governed by existing conventions, but it became apparent that this work involved some provisions of the Hague-Visby and the Hamburg Rules, and this in turn led to a review of the obligations of liabilities of the carrier and the shipper, based initially on Professor Berlingieri's reports."

The CMI delivered its draft instrument to the UNCITRAL Secretariat in December 2001. This preliminary draft instrument was the starting point for the subsequent inter-governmental negotiations in UNCITRAL Working Group III. During the six-year period of these negotiations the preliminary draft instrument was changed out of all recognition into the new Convention in terms of detailed drafting, but the basic structure of the draft prepared by the CMI remained."

Stuart Beare then went on to discuss the enormous changes that had happened in shipping since 1924, contrasting the speed at which vessels moved, their dead weight capacities and the enormous changes in speed and size of vessels with the introduction of containerisation in the late 1960s, then the arrival of door to door transportation by carriers, and the introduction of many other parties who perform carriage operations. His comments provide a useful historical perspective of the changes since 1924. One of the most significant changes since the 1990s has, of course been the growing use of electronic documentation.

Rotterdam Rules and E Commerce

In the last several years more and more has been written about the use of electronic commerce and more recently in connection with supply chain efficiency. Developments in electronic commerce, such as "Blockchain"; have been said to be likely to revolutionize shipping.

Not much appears on the surface to have changed since Kyunghee Park⁽¹¹⁾, stated:

"Globalisation has brought the most advanced trading networks the world has seen, with the biggest, fastest vessels, robot-operated ports and vast computer databases tracking cargoes. But it all still relies on millions and millions of paper documents."

The article goes on to show how that is changing, and describes the revolution taking place "on a scale not seen since the move to standard containers".

British futurist, Kate Adamson, has referred to "this digital industrial revolution ... opening the gates to massive gains in productivity and efficiency".⁽¹²⁾

It is difficult to see how all this change can take place when the cargo liability regime that still prevails in international carriage documentation was agreed in 1924. The only realistic answer is that States will need to ratify the Rotterdam Rules.

What has been forgotten in the lethargy of States (except the five who have ratified them) and carriers since the Rotterdam Rules were adopted is that they, unlike

⁽¹¹⁾ Bloomberg, April 2018

⁽¹²⁾ "Shipping and the 800-lb Gorilla"

any of their predecessor regimes (Hague, Hague Visby, and Hamburg), actually deal with electronic commerce in a holistic way.

As long ago as 2018, when the original text on this subject matter “Rotterdam Rules and E Commerce” was written by the writer and Tomotaka Fujita⁽¹³⁾ there was an article entitled “Thinking outside the box: Global logistics”⁽¹⁴⁾ which was referred to which had identified the significance of the problem:

“Removal of administrative blockages and outdated practices would, by some accounts, do more to boost international trade than eliminating tariffs. The UN reckons that putting all the Asia-Pacific regions trade-related paperwork online could slash the time it takes to export goods by up to 44%, cut the cost of doing so by up to 31% and boost exports by as much as \$257 billion a year”.

How much more important can it be for such savings to be made than the present when carriers are being forced to undertake much longer and more expensive sea voyages to avoid traversing the Suez Canal due to dangerous terrorist activities in that region.

The article identified an institutional obstacle to reform as the failure to ratify the Rotterdam Rules which would “put electronic documents in international shipping on a firm legal footing”.

When the CMI drafted its Instrument on Transport Law, which was provided to UNCITRAL in 2001 it declared that “there should be a clear statement in a preamble or in the Instrument that one of the intentions of the Instrument is to remove paper based obstacles to electronic transactions by adopting the relevant principles of the UNCITRAL Model Law on Electronic Commerce, 1996”.

The CMI Yearbook 2001, in its introduction to what was the final version of the “Outline Instrument” made the following far-sighted comments:

“Electronic commerce

The Instrument should apply to all contracts of carriage, including those concluded electronically. To reach this goal, the Instrument must be medium neutral as well as technology neutral. This means that it must be adapted to all types of systems, not only those based on a registry such as Bolero. It must be suited to systems operating in a closed environment (such as an intranet), as well as those operating in an open environment (such as the internet). One must also be careful not to be limited by what is currently in use, keeping in mind that technology evolves rapidly and that what appears impossible today is probably already on the current agenda of software developers.”

The preamble to the Rotterdam Rules Convention, after referring to the Hague, Hague Visby and Hamburg Rules, noted that the Convention had been drafted:

⁽¹³⁾ CMI website Carriage of Goods

⁽¹⁴⁾ The Economist April 25, 2018

“Mindful of the technological and commercial developments that have taken place since the adoption of those Conventions and of the need to consolidate and modernise them.”

The definitions section in the Rotterdam Rules gives a clue to the transformative nature of the Rotterdam Rules compared with its predecessors. There are definitions of the following words “electronic communication”; “electronic transport record”; “negotiable electronic transport record”; “non-negotiable electronic transport record”; “the “issuance” of a negotiable electronic transport record; and “the “transfer” of a negotiable electronic transport record.

Chapter 3 of the Rotterdam Rules is entitled “Electronic transport records” and contains Article 8 to 10 enabling the use of electronic transport records which are functional equivalents to transport documents such as bills of lading.

In addition Chapter 8 is headed “Transport documents and electronic transport documents” and comprises Article 35 to 42 and Chapter 9 deals with “delivery of the goods” and comprises Article 43 to 49 both of which include parallel provisions applicable to paper documents and their electronic equivalents; Chapter 10 “rights of the controlling party” (Article 50 to 56) and Chapter 11 “Transfer of rights” (Article 57 to 58) also address issues not covered by the previous regimes. All these provisions were carefully designed to be applicable to both paper and electronic records.

In addition to the use of electronic transport records the Rotterdam Rules create the possibility for using electronic communications to transfer the right of control.

It will be seen from this brief description of the contents of the Rotterdam Rules that they were drafted with electronic commerce in mind, unlike their predecessors.

Those involved in the transport chain, including carriers, port authorities, cargo interests, insurers and others involved in international trade should recognize the significance of the Rotterdam Rules in the context of electronic commerce, and they need to encourage their national governments to ratify the Convention as soon as possible.

Rotterdam Rules and Safety at Sea

A few years ago the CMI reminded delegates at the IMO⁽¹⁵⁾ that the Rotterdam Rules have a number of provisions that benefit safety at sea.

The CMI made a submission on the role of the Rotterdam Rules and vessel safety. The “Summary”, at the beginning of the submission stated that it highlighted “the role that the Rules would play in reducing the risk of container fires by (i) requiring greater sharing of information between shippers and carriers; (ii) focusing more generally on safety standards; (iii) facilitating electronic commerce which will better enable operational personnel to have timely access to the information they need to ensure vessel safety.”

⁽¹⁵⁾ IMO document to Subcommittee on Carriage of Cargoes and Containers 7th session Agenda item 6 Amendments to the IMDG Code and Supplements CCC7/6/1 14 February 2020

Reference was made in particular to the following Articles in the Rotterdam Rules: 27, 28, 29(i)(a) and (b), 29(ii); and Article 32.

When reference is also made to Article 14, which extends the carrier's obligations to exercise due diligence to provide a seaworthy ship beyond the commencement of the voyage to the entire voyage, and also the deletion of the previous exclusion of liability available to carriers where there was negligence in the navigation or management of the vessel it will be appreciated how much more thought has been given to vessel safety, (and thus personnel, the environment and cargo) in the Rotterdam Rules compared to earlier Conventions and Protocols dealing with the same subject matter, in order to encourage greater ship safety.

Rotterdam Rules: Jurisdiction and Arbitration

Under Article 78 signatories need to declare under Article 91 that they will be bound by those provisions, that is they need to opt in if they wish to obtain the benefits of the jurisdiction and arbitration provisions in the Rotterdam Rules.

The articles dealing with jurisdiction commence at Article 66 which provides that the institution of judicial proceedings may take place against the carrier in 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
- (iv) The port where the goods were initially loaded on a ship and the port where the goods are finally discharged.

The provisions dealing with arbitration commence at Article 75 which provides that the parties may agree to arbitrate and they may take place:

- (a) At any place designated for that purpose in the agreement
- (b) Any other place where any of the following are 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
 - (iv) The port where the goods are initially loaded or the port where they are finally discharged.

The Rotterdam Rules and Protection of Employees and Contractors

Article 4 applies any defence or limit of liability available to a carrier under the Convention to, not only, the carrier, but also a maritime performing party, the master, crew or any other person that performs service onboard the ship or employees of the carrier or maritime performing party; ie providing the protection to such persons as Himalaya Clauses in bills of lading seek to do.

Rotterdam Rules and Interrelationship with Other Conventions

Concern has been expressed by some quarters that there is a conflict or overlap between the Rotterdam Rules and other international Conventions dealing with the carriage of goods, otherwise than by sea. The Rotterdam Rules has attempted, in the writer's view successfully, to ensure that such conflict does not occur. The important provisions in the Rotterdam Rules are contained in articles 26 and 82 which provide respectively:

“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 the 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 the 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 the contract either at all or to the detriment of the shipper under that instrument.”

“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 of this Convention enters into force, including any future amendment of 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 the road cart of the vehicle carried onboard a ship;
- (c) any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea or 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.”

It is difficult to see how any perceived conflict or overlap could be said to occur given the contents of those two Articles .

Disuniformity, Disharmony and legal uncertainty

The “web of conflicting rules” referred to by ICS and ISF (see earlier in this article) or “plethora of conflicting national or regional rules” referred to by CMI/ICS, (see earlier in this article) can be seen at work in a telling example of the confusion that exists in the decision of the Court of Appeal in England in the “*Superior Pescadores*”.⁽¹⁶⁾ It was a case which went to the Court of Appeal in England. It was a relatively straightforward cargo claim. The cargo comprised machinery and equipment for use in the construction of a liquid natural gas facility in Yemen, which were shipped from Antwerp. The cargo shifted in the hold while crossing the Bay of Biscay. The losses were about USD 3.6 million. A P&I Club letter of undertaking was obtained. It contained an agreement that English law and jurisdiction would apply. That law applies the Carriage of Goods by Sea Act 1971 which renders the Hague Visby Rules applicable when carriage is from a port in a contracting State. The carrier admitted liability to the extent of the Hague Visby package limitation. The cargo claimants sought USD 200,000 more in reliance on the Hague Rules’ limitation. Paramount clause:

“The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.”

The issue which the Court of Appeal in England had to grapple with was whether the Paramount clause should be interpreted as giving effect to the Hague Rules or as contained also in its later amendments, the Hague Visby Rules. The Judge, at first instance, had felt constrained to hold that it was the Hague Rules that applied. The Court of Appeal found that it was the Hague Visby Rules that applied despite the fact that no mention was made in that Paramount clause of the Protocol to the Hague Rules.

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 case of *Poralu Marine Australia P/L v MV Dijksgracht*⁽¹⁷⁾ in the Federal Court of Australia is it.

⁽¹⁶⁾ (2016) 1 Lloyds Rep. 561

⁽¹⁷⁾ (2022) FCA 1038

It exemplifies the unnecessary expense that the parties to cargo litigation are being put because of the lack of uniformity in the area of cargo litigation. It involved, as did “*The Superior Pescadores*” (2016) 1 *Lloyds Rep.* 561, the interpretation of a Clause Paramount, which lacked clarity as to the cargo liability regime which the parties intended to apply to their contract of carriage. In the first instance decision Stewart J also had to unscramble a Clause Paramount and determine which of 4 different liability regimes applied (and actually identified 6 regimes in the course of his decision) in order to determine what package limitation applied. In the event he held the carrier entitled to limit its liability to 100 pounds.

On appeal to the Full Court of the Federal Court of Australia (Rares, Sarah Derrington, and Feutill JJ) 8 September 2023⁽¹⁸⁾ partially allowed the Appeal. The leading judgment on Appeal is a joint judgment given by Steven Rares and Sarah Derrington JJ. Their honours early in their judgment 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.”

At first instance Stewart J. described the case as giving rise to, inter alia, the following issues:

- (i) Was a Booking Note the contract of carriage in circumstances in which no formal charter party was entered into; if so was it a charter party for the purposes of determining whether an international Treaty applied to it;
- (ii) What was the meaning and effect of the Clause Paramount;
- (iii) What was the status of a sea waybill that was issued;
- (iv) What was the law that applied to the contract;
- (v) Were the Hague Visby Rules compulsorily applicable under Dutch law;
- (vi) Was Ireland a contracting State to the Hague Visby Rules;
- (vii) Did the Himalaya clause protect the owner;
- (viii) Did Article 9 of the Hague Rules (the Gold clause) apply;
- (ix) When a bill of lading or sea waybill is issued electronically where is it in fact issued.

In his first instance judgment at paragraphs 16 to 22, his Honour identified the four different liability regimes which were relevant to the case, and for completeness also referred to three others, as follows:

⁽¹⁸⁾ (2023) FCAFC 147

1. The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, open for signature 25 August 1924, entered into force 2 June 1931, under which regime a carrier's entitlement to limit its liability was "100 pounds sterling per package or unit" and Article 9 which provided that those monetary units are taken to be gold value, (known as the **Hague Rules**).
2. The Protocol to amend the International Convention for Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels on 25 August 1924 (open for signature 23 February 1968), entered into force 23 June 1977 (known as the Visby Protocol which affected amendments to the Hague Rules), pursuant to which the limitation of a carrier's liability was amended to be defined as the equivalent of 10,000 francs per package or unit or 30 francs per kilo of the gross weight of the goods lost or damaged (whichever is the higher) and known as the **Hague-Visby Rules**.
3. The Protocol amending the International Convention for Unification of Certain Rules of Law Relating to Bills of Lading, 25 August 1924 as amended by the Protocol of 23 February 1968, opened for signature 21 December 1979, entered into force 14 February 1984, pursuant to which the limitation of liability of the carrier was amended to "666.67 units of account per package or unit or two units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher and the "units of account" being the Special Drawing Rights of the International Monetary Fund, known as the **SDR Protocol**.
4. The Amended Hague Rules as enacted by the Australian government which gives effect to a version of the Hague-Visby Rules, peculiar to Australia, and which is set out in Schedule 1A to the COGSA legislation. It adopts the same limitations as in the SDR Protocol and is known as the **Amended Hague Rules**.
5. The United Nations Convention on the Carriage of Goods by Sea, 1978, opened for signature 31 March 1978, entered into force 1 November 1978, known as the **Hamburg Rules**.
6. The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, open for signature 11 December 2008 (not yet in force), known as the **Rotterdam Rules**.
7. Last but not least are other hybrids such as the Chinese Code, known as the **Hybrids**.

(Emphasis has been added.)

The facts in this case

Between 6 and 11 December 2019, 23 pontoons (described as "breakwater units") and 11 pallets were loaded on board the vessel "Dijksgracht" at the Port of Cork, Ireland as breakbulk cargo consigned to Poralu Marine Australia Pty Ltd the

plaintiff in these proceedings for installation at the Royal Geelong Yacht Club. The cargo was discharged on or about 13 February 2020 and three of the pontoons were found to be damaged.

The result of the case at first instance:

The questions posed for the court's determination included whether or not the carrier was entitled to limit its liability to **£100 per package** and his Honour found it was so entitled. He did not believe that that amount was limited to the present value of 100 pounds of gold in 1924, nor did he find that it was limited to 666.67 units of account per package or 2 units of account per kilogram of gross weight of the goods and he also found that the limitation applied equally to the plaintiff's claims in bailment and negligence against the vessel's owner, the second respondent, by reason of the Himalaya clause.

The result of the case on Appeal:

The appeal was allowed in part: the carrier was not permitted to limit liability to 100 pounds per package.

The Full Court agreed with Stewart J that the carrier was not permitted to limit liability to the present value of 100 pounds of gold in 1924 per package.

The Full Court also found that the carrier was entitled to limit its liability to 666.67 units of account per package or 2 units of account per kilogram of the gross weight of the goods, whichever is the higher, unless article 4(5)(e) of the Hague Visby Rules as set out in the third schedule of the Merchant Shipping (Liability of shipowners and others) Act 1996 (Ireland) is found to apply (that being the breaking limit provision in those Rules.)

The Judgments in the Full Court of the Federal Court in the Appeal.

The Full Court differed principally from Stewart J in the manner in which they found the contract of carriage had been entered into. Their honours found that the Hague Visby Rules as enacted in Ireland in the Merchant Shipping Act 1996 applied in reliance on the reasoning in *Kyokuyo Co Ltd v AP Moller-Maersk* ("*The Maersk Tangier*")⁽¹⁹⁾.

Their honours also applied the decision of the "*Superior Pescadores*" which they considered stated the law as it applied currently in the UK as to the meaning to be given to the incorporation of "the Hague Rules" in a Clause Paramount, which the Court of Appeal had decided should be treated as

COMMENT

The multiplicity of alternative carriage of goods liability regimes which are in force around the world is causing a huge hindrance to the efficient operation

⁽¹⁹⁾ (2018) 2 Lloyds Rep 59

of cargo claims handling which greater uniformity would otherwise supply. The complexity in having a multiplicity of different carriage regimes which are legislated for around the world and the variety of Paramount Clauses incorporated into Charter Parties or Bills of Lading cause claimants, their insurers and lawyers and shipowners/carriers, their insurers and lawyers litigating recovery claims to face the prospect of incurring ever greater legal expenses in cargo claims litigation in identifying the relevant liability regime which applies to a particular cargo claim.

The effect of the first instance decision in Australia, referred to above, highlights only one aspect (of many) as to why the nearly one hundred years old Hague Regime is anachronistic in modern shipping. The fact that any bill of lading could have contemplated that a limitation sum of 100 pounds is still appropriate (when the States that approved the Rotterdam Rules at UNCITRAL in 2008 agreed limitation sums of 875 SDRs per package or shipping unit or 3 SDRs per kilogram of the gross weight of the goods (Article 59)) shows that intervention by States in the form of ratification of a fit for purpose modern regime such as the Rotterdam Rules or domestic legislation giving effect to those Rules is urgently needed to improve the efficiency of supply chains, to properly enable E Commerce, and to improve safety of sea.

There are two rhetorical questions that occur to the writer in relation to the recent history of the Hague Rules and Rotterdam Rules arising from these recent cases: Firstly: how is it that after all the effort put into making a comprehensive, fit for purpose and up to date Convention for the 21st century there are only 5 ratifications at the present time after the CMI spent 13 years developing a draft instrument which it hoped would enable uniformity to be re-established, a further six years of debate took place at UNCITRAL, and there has been inactivity (except from the five States who have ratified the Rotterdam Rules) for some 14 years since then. At the time when the Rotterdam Rules were concluded at UNCITRAL there was unanimity of views in favour of early ratification of the Rotterdam Rules by all sectors of industry, from shipowners (and carriers) and their representative organisations, to insurers and their representative organisations and, most importantly, cargo owners whether as shippers or consignees who saw the necessity to replace the Hague Rules and make it more fit for purpose in the 21st Century.

Secondly: how is it that in the modern era parties to carriage contracts are still using a Paramount clause which makes reference to the Hague Rules 1924? Furthermore is it not strange that such a clause has a fall-back that, if there is no such enactment giving effect to the 1924 Brussels Convention in the country of shipment, the corresponding legislation in the country of destination is to apply and, where there is no such legislation in that country, then it is simply the Convention itself which applies. That is, a Convention which was agreed nearly one hundred years ago and at a time when no-one could have conceived the revolution that took place in the 1960s when containers and container ships came onto the scene, let alone E commerce. Such a result rules out any effect being given to amendments of that regime, unless as occurred when the Court of Appeal in England held that the clause was intended to give effect to the Hague Visby regime which was in place in Belgium. As Longmore LJ said:

“... I consider that in any case, in which a bill of lading is issued in 2008 incorporating the Hague Rules as enacted in the country of shipment and in which the country of shipment has (as here) enacted the Hague-Visby Rules, should be regarded as a case which is subject to the Hague Visby Rules rather than the (old) Hague Rules”.

What if China or Australia had been the country of shipment—both having hybrid regimes comprising parts of the Hague, Hague Visby and Hamburg Rules? The “web of conflicting rules” referred to by ICS was presumably what provoked the IG P& I to approach CMI to intervene in the US in 1997 to prevent the MLAUS proceeding with its work on drafting a Bill for Congress to amend the US COGSA, in order to avoid this unilateral evolution of maritime law in the US. Having taken that course it is surprising that the International Group is not more active today in seeking ratification around the world.

Further evidence of the disuniformity can be seen in the confusion highlighted as to the applicability of the time bar under the Hague and Hague Visby Rules where there has been misdelivery of the cargo in the cases of *FIM Bank PLC v KCH Shipping Co Ltd (The Giant Ace)*⁽²⁰⁾, and *FIM Bank PLC v KCH Shipping Co Ltd (The Giant Ace No 2)*⁽²¹⁾ (which is discussed by Stephen Girvin in the *Journal of International Maritime Law*).⁽²²⁾

It is extraordinary that such confusion is allowed to persist and that the amounts pursuant to which a carrier is entitled to limit its liability in respect of packages or the weight of cargo which have not altered since 1924 in some jurisdictions or 1968 (or later when that Protocol came into force) in others, and that a regime based upon the contract of carriage which is evidenced by a paper document, a bill of lading or other carriage document, is still relied upon when international carriage is largely supported in the modern era by electronic documents. As long ago as 1999, in another Australian case of *Chapman Marine P/L v Wilhelmsen Lines A/S*⁽²³⁾ the limitation sum appeared to be exceedingly low. The carrier and its negligent stevedore (by way of the Himalaya clause) were held entitled to rely on the US COGSA limitation of US\$500 when a cruiser which had been shipped from the US and valued at US\$88,000 was a constructive total loss having been knocked over the side of the vessel onto the wharf when discharging containers.

The changes which have taken place in world shipping since 1924 and the increase in value of the cargoes being shipped are greater than at any time previously. How come the States who ventured into this world 100 years ago think it is appropriate that the regime, which was agreed internationally at that time, is still fit for purpose almost 100 years later? In this age of consumer protection it is surprising that States permit a carrier of goods to avoid having a liability for damage which occurs if its servant or agent has been negligent in the management or the

⁽²⁰⁾ (2023) 2 Lloyds Rep 457

⁽²¹⁾ (2023) 1 Lloyds Rep 38

⁽²²⁾ (2023) 29 JIML 144-151

⁽²³⁾ (1999) FCA 178

navigation of the vessel. This, at a time, when conservation and the protection of the natural environment have never been more rigorously patrolled and sought to be protected.

The history of the work done by the CMI and what motivated the CMI in the late 1980s and 1990s, can be seen in the contemporaneous documentation. The same motivations apply today, 35 years since the work began.

There were detractors of the Rotterdam Rules and the CMI responded to them. The complaints made by maritime lawyers based in South America in the so-called Montevideo Declaration have little substance. What strikes the reader 13 years after those materials were produced are:

1. They do not reflect on the necessity for compromises to be reached to satisfy both carriers and shippers of cargo.
2. They do not take account of the years that had gone into the drafting of the Rotterdam Rules.
3. They do not recognise the considerable benefits which accrue to shippers and consignees of cargo from the Rotterdam Rules.
4. They offer no solution to the disuniformity which started from the late 1960s and has grown greater since then.

Reasons for Ratification

Some of the principal benefits of the Rotterdam Rules have already been discussed but, simply, can be identified as offering:

1. Uniformity.
2. Fair allocation of risk.
3. Reasonable monetary limitations.
4. Recognition of E-Commerce.
5. Flexibility for States in the resolution of disputes on Jurisdiction and Arbitration.
6. Safety at sea, particularly in the area of dangerous goods. It is noteworthy that BIMCO has recently launched a campaign to accelerate the uptake of electronic bills of lading.

It needs to be recalled that acceptance of the Hague Rules also took many years to achieve. It took 12 years after the Hague Rules Convention before the United States COGSA was passed in 1936.

Interestingly part of the tortuous history in the legislative processes in the United States occurred in 1924, and is set out in *Travaux Préparatoires* of the Hague Rules of Professor Michael Sturley where on page 18 of the Historical Introduction, reference is made to Senator Charles McNary of Oregon, who introduced a Bill

in 1924 which inter alia (quoting from this work but inserting similar Rotterdam Rules provisions in brackets):

- (i) Extended the period of application of the Rules from the time when the goods are received by the carrier until proper delivery thereof at the point of destination. (Compare Rotterdam Rules Article 12).
- (ii) The carrier's obligation to exercise due diligence 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 Rotterdam Rules Article 14).
- (iii) The time for giving notice of claim was extended to 10 days (Compare Rotterdam Rules Article 23 (7 days)).
- (iv) Time for suit provision permitted filing an action up to one year after the carrier declined to pay a claim (Compare Rotterdam Rules Article 62 – 2 years from delivery of goods).
- (v) 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 Rotterdam Rules Article 17 and 18).

The fact that such provisions were thought appropriate by some to have been introduced into COGSA in 1924 and are virtually replicated in the Rotterdam Rules strongly supports ratification over 100 years later. These are clearly further examples as to why the Hague Rules are out of date and the Rotterdam Rules need to be ratified.

In recent times CMI has sought to remind its membership, and international bodies, of some of the particular benefits to be derived from the Rotterdam Rules such as E-Commerce and Safety at sea.

Maritime Law Associations are united in wanting States to ratify the Rotterdam Rules, together with denouncing any prior international Convention or Protocol which it has previously ratified or acceded to for the following reasons.

It is considered that the Hague Rules and all other subsequent amendments to it or substitutes of it are not fit for purpose in the modern international shipping scene and there is a strong desire to achieve certainty and uniformity once again.

As has been seen, the Rotterdam Rules were supported by ship owners, carriers and the international bodies that represent such organisations, as well as their liability insurers, together with such bodies as represent shippers and consignees of goods that utilise international shipping as well as individual shippers and consignees of goods, together with the marine insurance industry worldwide that provides insurance for cargo that is shipped internationally. Such support can be seen in the documentation referred to herein.

Kate Lannan former secretary of UNCITRAL Working Group III on Transport Law, in an excellent PowerPoint presentation⁽²⁴⁾ succinctly identified the “Benefits of the Rotterdam Rules” as follows:

- 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 contracts for carriage, so not limited just to bills of lading and sea carriage documents or all transport documents in liner trade, but simply contracts;
- 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, reduces transaction costs and harms efficiency, commercial and legal predictability and transparency.

Kate Lannan also referred to the principal reforms made to the Hague Rules regime by the Rotterdam Rules:

- a. the elimination of the nautical fault and management of the vessel defence available to shipowners under the Hague/Hague-Visby Rules regime;
- b. the obligation of the carrier to exercise due diligence to make the ship seaworthy being extended to cover the entire voyage;
- c. the liability of the carrier for delay;
- d. greater transparency in relation to the identity of the carrier;
- e. it raises the limits of liability of carriers to reasonable amounts in modern currency;

⁽²⁴⁾ CMI website Carriage of Goods

- f. the inclusion of obligations in relation to deck cargo so that the carrier is not automatically exonerated from responsibility for such cargo;
- g. the extension of the notice period for loss or damage to cargo;
- h. the extension of the limitation period for time of suit extended to two years;
- i. clarification of the liability of maritime performing parties and confirmation of Himalaya clause protections;
- j. 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;
- k. improved regime for deviation;
- l. clear rules in respect of undelivered cargo;
- m. solution to problems of concealed damage in multimodal carriage;
- n. the requirement that cargo owners have responsibility properly to identify their cargo;
- o. providing clarity in relation to roles, obligations and powers in relation to the complex issues occasioned by E commerce;
- p. makes specific reference to volume contracts;
- q. requirements for jurisdiction and arbitration provisions but gives flexibility to States as to whether to accept such provisions when giving effect to the Convention.

Conclusion

There is much to recommend the international acceptance of the UNCITRAL drafted Rotterdam Rules Convention of 2008 at the earliest opportunity, provided States that ratify those Rules also repeal any national legislation dealing with cargo liabilities and renounce any previous Convention or Protocol which they have ratified once the Rotterdam Rules enter into force with 20 Ratifications.

The Ratification of the Rotterdam Rules is supported on the basis that it is a comprehensive regime which covers all aspects of international carriage of goods where sea carriage is a major element and represents a modernisation and levelling of the playing field between carrier and cargo owner from its predecessors, in particular because of:

- a) the elimination of the nautical fault and management of the vessel defence available to shipowners under the Hague/Hague-Visby Rules regime;
- b) it places greater responsibility on cargo owners properly to identify their cargoes and therefore enhances safety at sea;
- c) it raises the limits of liability of carriers to reasonable amounts in modern currency;
- d) it deals with the complex issues caused by electronic commerce;

- e) it creates minimum requirements for jurisdiction and arbitration provisions and gives flexibility to States as to whether to permit alternative arrangements when giving effect to the convention;
- f) it retains much of the language and practices of the original Hague Rules regime meaning that the jurisprudence built up over 100 years remains significant and relevant;
- g) There is no alternative regime available or likely to be available for at least another 20 years and there is no suggestion being made at the present time that any such regime should be produced;
- h) There is a considerable wastage of funds spent annually within the shipping and insurance industries over arguments as to which of the multitude of different regimes apply in any given shipment of goods which could be avoided if States came together and ratified the Rotterdam Rules, denouncing all prior Conventions and Protocols that they may have ratified or acceded to and repealing all hybrid legislation.

The Ratification of the Rotterdam Rules is long overdue and necessary to restore greater uniformity, predictability and certainty to the liability regime which governs the international carriage of goods by sea, enable use of electronic documents pursuant to a regime which governs their use, promote greater efficiency in the supply chain (and thus lower costs) and will improve safety. Europe, specifically the EU, is ideally situated to lead the major trading nations to ratification of this important Convention. Spain has already ratified, the Netherlands has passed legislation indicating its future intentions to ratify and Scandinavian countries have done likewise.

100 YEARS OF LIMITATION OF LIABILITY IN THE CARRIAGE OF GOODS BY SEA

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1. INTRODUCTION

It is now 100 years since 25 August 1924, the historic day that witnessed the birth of international regulation in the field of limitation of liability for damages in connection with the carriage of goods by sea. On that day, an international conference held in Brussels adopted two landmark conventions on the subject, namely the International Convention for the Unification of certain Rules relating to the Limitation of the Liability of Owners of Seagoing Vessels (“1924 Limitation of Liability Convention”)⁽¹⁾ and the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the “Hague Rules”).⁽²⁾ The first convention is commonly referred to as a “global limitation convention”, whereas the second is what this author refers to as a “particular liability regime”. Though these two conventions interrelate, their essence and purpose are different as will be outlined further in this contribution.

Before delving into the distinction and interrelationship between these two regimes, it is necessary to briefly explain the concept of limitation of liability. Limitation of liability is the concept that allows the person invoking such a right to limit the compensation due for maritime claims to a maximum amount regardless of the actual amount and nature of the claims brought against such person. This concept, which is firmly entrenched in the maritime industry, takes two fundamental forms: (a) limitation of liability in relation to a specific type of claims (“particular liability regimes”); and (b) limitation of liability in relation to all claims arising out of any distinct occasion (“global limitation of liability”).⁽³⁾

Particular liability regimes are codified in many international conventions, ranging from the conventions relating to the carriage of goods by sea (which is the main focus of this contribution), conventions relating to the carriage of passengers and their luggage by sea, conventions on liability and compensation for pollution

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⁽¹⁾ International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels, done at Brussels on 25 August 1924, entered into force: 2 June 1931, 120 LNTS 123; RMC I.2.300, II.2.300; ARROYO MARTÍNEZ, Ignacio, *International Maritime Conventions*, p. 303 (1924 Limitation Convention).

⁽²⁾ International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, done at Brussels on 25 August 1924, entered into force: 2 June 1931, 120 LNTS 155; CMR I.5.10, II.5.10; ARROYO MARTÍNEZ, Ignacio, *International Maritime Conventions*, p. 329.

⁽³⁾ For a study on the relationship between global limitation of liability conventions and particular liability regimes, see Norman A. MARTÍNEZ GUTIERREZ, *Limitation of Liability in International Maritime Conventions: The Relationship between Global Limitation Conventions and Particular Liability Regimes*, Routledge, London/New York, 2011.

damage, to the convention on liability for the removal of wrecks. On the other hand, global limitation of liability is regulated at the international level by various conventions dating from 1924 (adopted on the same day as the Hague Rules), 1957,⁽⁴⁾ 1976⁽⁵⁾ and a Protocol of 1996.⁽⁶⁾ From these conventions, the current international regulatory framework on this subject is largely set out in the LLMC Convention,⁽⁷⁾ as amended by the 1996 LLMC Protocol.⁽⁸⁾ Notably, the 1996 LLMC Protocol was amended by Resolution LEG.5(99), adopted on 19 April 2012, which entered into force on June 8, 2015.⁽⁹⁾ These 2012 amendments significantly increased the limits of liability for maritime claims, reflecting the need for higher compensation.⁽¹⁰⁾

Turning to the specific case of limitation of liability in the carriage of goods by sea, it may be noted that when concluding a contract of carriage, the carrier and shipper contemplate the risks that both parties face in the marine adventure. Such contemplation should recognize that the costs of risks faced by the carrier must be covered by freight.⁽¹¹⁾ However, because of the high price of some of the goods carried, where the carrier has breached his obligations under the contract of carriage and consequently incurs liability, it is to be expected that the carrier will seek to limit his liability in relation to the damage caused. Thus, limitation of liability has the effect of reversing the risk of loss or damage to the goods transported to the shipper. On the one hand, this creates a need for the shipper to take steps to cover these risks (e.g., through cargo insurance), and on the other hand, since the right of limitation of liability does not require the carrier to raise the freight to cover the risks mentioned above, the shipper of low-cost goods does not have to subsidize the shipper of high-value goods which creates greater risks for the carrier.⁽¹²⁾

(4) International Convention Relating the Limitation of Liability of Owners of Sea-Going Ships, done at Brussels on 10 October 1957, entry into force: 31 May 1968, 1412 UNTS 81; CMR I.2.310, II.2.310; ARROYO MARTÍNEZ, Ignacio, *International Maritime Conventions*, p. 309 (1957 Limitation Convention).

(5) Convention on Limitation of Liability for Maritime Claims, done at London on 19 November 1976, entered into force: 1 December 1986, 1456 UNTS 221; 16 ILM 606; RMC I.2.330, II.2.330; ARROYO MARTÍNEZ, Ignacio, *International Maritime Conventions*, p. 319 (LLMC Convention).

(6) Protocol of 1996 to amend the Convention on the Limitation of Liability for Maritime Claims, 1976, done at London on 2 May 1996, entered into force: 13 May 2004, LEG/CONF.10/8 of 9 May 1996; 35 ILM 1433; RMC I.2.340, II.2.340 (1996 LLMC Protocol).

(7) As of 11 June 2024, 56 States are Parties to the Convention.

(8) As of 11 June 2024, 64 States (constituting 64.73% of the world's tonnage) are Parties to the Protocol.

(9) Resolution LEG.5(99) on the adoption of amendments to the amounts of limitation contained in the 1996 Protocol Amending the Convention on the Limitation of Liability for Maritime Claims, 1976, adopted on 19 April 2012 (Annex 2 to document LEG 99/14 of 24 April 2012).

(10) For a discussion on the new limits of liability see Norman A. MARTÍNEZ GUTIÉRREZ, "New Global Limits of Liability for Maritime Claims", *International Community Law Review*, Vol. 15, No. 3, 2013, pp. 341-357.

(11) Michael STURLEY et al., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, Sweet & Maxwell, London, 2010, p. 160.

(12) *Ibid* p. 160.

The concept of limitation of liability in the carriage of goods by sea is embodied in a number of conventions on the subject, ranging from the Hague Rules, the Hague-Visby Rules,⁽¹³⁾ the Hamburg Rules,⁽¹⁴⁾ to the Rotterdam Rules.⁽¹⁵⁾

The Hague Rules introduced for the first time an international regulation of the existing legal framework with the aim of protecting shippers from the perceived dominance of carriers, who were viewed as having a superior bargaining power. Previously, carriage contracts were subject to freedom of contract, which led to many carriers including increasingly one-sided contractual terms which excluded all liability for negligence of the crew of the owner in providing a seaworthy ship.⁽¹⁶⁾

The Hague Rules were intended to provide a balance between the parties thereby preventing carriers from evading liability for cargo loss or damage through adhesion contracts, while promoting greater diligence in transport and delivery practices.⁽¹⁷⁾ Owing to their equitable approach and practical applicability, the Hague Rules were extensively adopted by numerous nations across the globe, establishing themselves as a fundamental pillar of international maritime law and thus giving birth to the modern era of bills of lading.⁽¹⁸⁾

The purpose of this article is to briefly examine the Hague Rules, with a comparative analysis of the Hague-Visby Rules, focusing particularly on the provisions relating to limitation of liability in the carriage of goods by sea and its relationship to the global limitation of liability as established in various international conventions.

2. THE PROVISIONS OF HAGUE RULES

It is pertinent to highlight that the Hague Rules were thoroughly deliberated during their preparatory stages. Among the key points of these discussions was the issue of limitation of liability. During these deliberations, it was made clear that

⁽¹³⁾ Protocol amending the International Convention for the Unification of Certain Rules relating to the Bill of Lading, done at Brussels on 23 February 1968, entered into force: 23 June 1977, 1412 UNTS 121; CMR I.5.20, II.5.20; ARROYO MARTÍNEZ, Ignacio, *International Maritime Conventions*, p. 337.

⁽¹⁴⁾ United Nations Convention on the Carriage of Goods by Sea, done at Hamburg on 31 March 1978, entered into force: 1 November 1992, UN Doc: A/CONF.89/13; 1695 UNTS 3; 17 ILM 608; RMC I.5.220, II.5.220; ARROYO MARTÍNEZ, Ignacio, *International Maritime Conventions*, p. 345.

⁽¹⁵⁾ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, done at New York on 11 December 2008, not yet in force, United Nations General Assembly Resolution A/Res/63/122 of 11 December 2008. For a discussion on limitation of liability under the Rotterdam Rules see Norman A. MARTÍNEZ GUTIÉRREZ, “La Limitación de la Responsabilidad de Acuerdo a las Reglas de Rotterdam y su Relación con la Limitación Global de la Responsabilidad”, in da Costa Gomes, M. Janeiro (Ed.), *III Jornadas de Lisboa de Direito Marítimo: Das Regras da Haia às Regras de Roterdão*, Almedina, 2014, p. 579-601.

⁽¹⁶⁾ Nicholas GASKELL, *Bills of Lading: Law and Contracts*, LLP Professional Publishing, London, 2000, pp. 3-4; Richard AIKENS et al., *Bills of Lading*, second edition, Informal Law from Routledge, 2016, p. 13.

⁽¹⁷⁾ P. EGGER, “The Unworkable Per-Package Limitation of the Carrier’s Liability under the Hague (or Hamburg) Rules”, *McGill Law Journal*, 1978, p. 459.

⁽¹⁸⁾ AIKENS (n 16) p. 14.

there was a need to establish a clear limitation, contending that the Rules would lack efficacy without such a provision. The sum of £100 per package was proposed, referencing its common inclusion in English bills of lading and its incorporation in Canadian and Australian legislation.⁽¹⁹⁾

However, shipowners, in particular, opposed this proposal, emphasizing the impracticality of fixing a specific sum due to fluctuating exchange rates. They highlighted the challenges associated with converting pound sterling into other currencies like francs, marks, or dollars, especially given the disorganized nature of exchanges at the time.⁽²⁰⁾ Following extensive discussions and debates regarding the fairness of specifying a particular amount and determining the appropriate limit and currency to be used, consensus was eventually reached on the provision concerning limitation of liability setting it at £100 per package or unit.⁽²¹⁾ In this regard, Article 4(5) and Article 9 of the Hague Rules are dedicated to the limitation of liability, stipulating as follows:

Article 4(5)

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 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.

This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connexion with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

Article 9

The monetary units mentioned in this Convention are to be taken to be gold value.

Those contracting States in which the pound sterling is not a monetary unit reserve to themselves the right of translating the sums indicated in this Con-

⁽¹⁹⁾ FRANCESCO BERLINGIERI, *The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules*, Comité Maritime International, Antwerp, 1997, p. 447.

⁽²⁰⁾ *Ibid.*, pp. 448-449. Gaskell highlighted the problem that Article 9(1) did not make clear what “gold value” meant, which led to conversion problems where the sterling was not a monetary unit. In this respect, see GASKELL (n 16) p. 511 and AIKENS (n 16), p. 15.

⁽²¹⁾ *Ibid.*, p. 467.

vention in terms of pound sterling into terms of their own monetary system in round figures.

The national laws may reserve to the debtor the right of discharging his debt in national currency according to the rate of exchange prevailing on the day of the arrival of the ship at the port of discharge of the goods concerned.

It is thus clear that the Hague Rules established for the first time a fundamental international framework for limitation of liability relating to the carriage of goods by sea. In fact, one article is explicitly devoted to defining the limits of liability concerning the loss of or damage to the goods carried. The concept of limitation of liability, as recognized by the Hague Rules, is established on a “per-package” or “per-unit” basis. Additionally, the Rules further elucidate the designated monetary units for such purposes.

In 1968, the Visby Protocol introduced amendments to the Hague Rules, a necessary step to modernize and ensure their alignment with advancements in maritime trade. These amendments aimed to ensure fairer liability limits, as the original amounts had proven inadequate over time due to inflation and the escalating value of cargo. Additionally, the Protocol addressed the challenges posed by the container revolution, dealing with complexities, and strengthening the carrier’s responsibilities. It introduced provisions pertaining to an additional criterion based on weight of the cargo and the loss of the right to limit liability in cases of the carrier’s act or omission, thereby fostering greater diligence in cargo handling. Article 4(5) of the Hague-Visby Rules further enhanced the provisions related to the limitation of liability, as follows:

Article 4(5)

- (a) *Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.*
- (b) *The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.*

The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

- (c) *Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these pack-*

ages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.

- (d) *The unit of account mentioned in this Article is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in sub-paragraph (a) of this paragraph shall be converted into national currency on the basis of the value of that currency on the date to be determined by the law of the Court seized of the case. The value of the national currency, in terms of the Special Drawing Right, of a State which is a member of the International Monetary Fund, shall 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 the national currency, in terms of the Special Drawing Right, of a State which is not a member of the International Monetary Fund, shall be calculated in a manner determined by that State.*

Nevertheless, a State which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of the preceding sentences may, at the time of ratification of the Protocol of 1979 or accession thereto or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in its territory shall be fixed as follows:

- (i) *in respect of the amount of 666.67 units of account mentioned in sub-paragraph (a) of paragraph 5 of this Article, 10,000 monetary units;*
- (ii) *in respect of the amount of 2 units of account mentioned in sub-paragraph (a) of paragraph 5 of this Article, 30 monetary units.*

The monetary unit referred to in the preceding sentence corresponds to 65.5 milligrammes of gold of millesimal fineness 900. The conversion of the amounts specified in that sentence into the national currency shall be made according to the law of the State concerned. The calculation and the conversion mentioned in the preceding sentences shall be made in such a manner as to express in the national currency of that State as far as possible the same real value for the amounts in sub-paragraph (a) of paragraph 5 of this Article as is expressed there in units of account.

States shall communicate to the depositary the manner of calculation or the result of the conversion as the case may be, when depositing an instrument of ratification of the Protocol of 1979 or of accession thereto and whenever there is a change in either.

- (e) *Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.*

- (f) *The declaration mentioned in sub-paragraph (a) of this paragraph, if embodied in the bill of lading, shall be prima facie evidence, but shall not be binding or conclusive on the carrier.*
- (g) *By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph.*
- (h) *Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.*

Article 4bis

Application of Defences and Limits of Liability

1. The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.
2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.
3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in these Rules.
4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this Article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

In light of the foregoing provisions, hereunder follows a brief explanation of the implications of these articles on the carriage of goods by sea.⁽²²⁾

2.1. Limitation of Liability for Loss of or Damage to Goods Carried by Sea

Article 4(5) of the Hague Rules is devoted to the limitation of liability for loss of or damage to the goods carried. This article contemplates two possibilities: the limitation of liability based on the number of packages or other unit load, and finally,

⁽²²⁾ It is important to mention that, in accordance with Article 4 of the Rotterdam Rules, the limits of liability prescribed in that Convention shall apply in any judicial or arbitral proceedings, whether based on rules on contract, tort or other liability. On this point see Yvonne BAATZ et al., *The Rotterdam Rules: A Practical Annotation*, Informa, London, 2009, p. 182.

the possibility of an agreement between the shipper and carrier to agree on a higher limit than the two mentioned above.⁽²³⁾ The Hague-Visby Rules later retained these criteria but also introduced an alternative criterion based on the weight of the cargo.

2.1.1. Limitation of Liability Based on Number of Packages or Other Unit Load

The concept of limitation of liability recognized by the Hague Rules is calculated on the basis of the number of packages or unit load. This form of limitation has been recognized for many years⁽²⁴⁾ and is prescribed in the Hague Rules,⁽²⁵⁾ the Hague-Visby Rules⁽²⁶⁾ and the Hamburg Rules.⁽²⁷⁾

Article 4(5) of the Hague Rules indicates that:

[...] “Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit, ...”

The Hague Rules, however, do not provide explicit definitions for the terms “package” and “unit”. Therefore, a comprehensive understanding of the distinctions and definitions pertaining to “package” and “unit” is crucial for determining the carrier’s limitation of liability.

Legal challenges surrounding the interpretation of the “package” and “unit” criteria encompass several aspects, including the determination of whether a container meets the qualifications of a package, whether unpackaged goods can be deemed to be one unit, and the definition of a unit in the context of bulk cargoes.⁽²⁸⁾ Additionally, an important aspect to consider is whether the packages or units referred to establish liability limits should be those explicitly listed in the bill of lading or those that have been lost or damaged.

Temperley suggests that the term “package” properly implies an item that has been packed up or prepared for carriage.⁽²⁹⁾ Tetley further defines a package as a wrapper, case, bag, envelope, or platform where cargo is contained or positioned

⁽²³⁾ Yuzhuo Si y Ping GUO, “Limits of Liability”, in Alexander von ZIEGLER et al., *The Rotterdam Rules 2008*, Kluwer Law International, Alphen aan den Rijn, 2010, p. 245 at 247.

⁽²⁴⁾ Stephen GIRVIN, “The Right of the Carrier to Exclude and Limit Liability”, in D. Rhidian THOMAS (ed.), *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, Lawtext Publishing Limited, Witney, 2009, p. 111 at 127-128.

⁽²⁵⁾ Hague Rules, Article 4(5).

⁽²⁶⁾ Hague-Visby Rules, Article 4(5).

⁽²⁷⁾ Hamburg Rules, Article 6(1)(a).

⁽²⁸⁾ Marc A. HUYBRECHTS, “Package Limitation as an Essential Feature of the Modern Maritime Transport Treaties: A Critical Analysis”, in D. Rhidian THOMAS (ed.), *The Carriage of Goods by Sea under the Rotterdam Rules*, Lloyd’s List, London, 2010, p. 119 at 130. Gaskell even argues that “[i]t is doubtful if there was ever a limit under the Hague Rules for Bulk Cargo (e.g. ore or grain) as it was not normally shipped in a package or (shipping) unit. In this respect see GASKELL (n 16) p. 512.

⁽²⁹⁾ Robert TEMPERLEY, “Carriage of Goods by Sea Act, 1924: (including the rules relating to bills of lading)”, *The Cambridge Law Journal*, Volume 5, Issue 1, March 1933, p. 79.

for carriage.⁽³⁰⁾ Hence, to meet the criteria as a package under the Hague Rules, an object must be appropriately packed. Conversely, items that stand independently, lacking any form of packaging or accessories to shield against damage or aid in transport, do not fulfil the package requirements.⁽³¹⁾ It is thus reasonable to argue that the right to limitation of liability cannot be claimed for goods that are not packaged. The underlying rationale is that unpackaged goods afford the carrier the opportunity to evaluate their value and nature, thereby imposing upon the carrier the obligation to exercise due diligence.

The implementation of the Hague Rules' package criterion to emerging transportation modalities, such as containers and pallets utilized for cargo consolidation, has presented a significant challenge. This challenge is likely attributed to the failure of drafters to anticipate the existence of containerized transport during the initial drafting of the Rules. Courts have been confronted with the task of determining whether containers, pallets or similar transport mechanisms should be considered packages when they contain other packages or individual pieces of goods.

The "unit" criterion serves as a secondary alternative to the package basis for all types of unpackaged goods under the Rules. If the cargo cannot be classified as packaged, the carrier's liability for compensation will be limited based on the unit.⁽³²⁾

Nevertheless, Article 4(5) of the Hague Rules does not explicitly define the concept of "per unit". The term "unit" can refer to either the "shipping unit", representing the physical unit of cargo, or the "freight unit" used for calculating freight charges.⁽³³⁾ Over time, there has been a lack of consensus among statutes, courts, and authors regarding the precise definition of the term "unit". This lack of clarity presents significant obstacles to achieving the primary objective of the Rules, which is to standardize the carrier's liability and unify provisions related to the contract of carriage.

Subsequently, it has been suggested that under the Hague and Hague-Visby Rules, the term "unit" may refer to an individual article or piece of goods that was not packaged, such as an unpackaged car, yacht, or log of wood.⁽³⁴⁾ In other words, the term "unit load" seems to refer to goods that are transported in a single "package" (such as in a container) and that, since it is not possible to pack them in separate packages, are transported individually. For example, in the case of a contract for the carriage of "a container loaded with 5,000 plants", even if these plants are not consolidated in separate packages within the container, to calculate the

⁽³⁰⁾ William TETLEY, *Marine Cargo Claims*, (3rd ed.), International Shipping Publications, 1988, p. 880.

⁽³¹⁾ *Hartford Fire Inc Co. V. Pacific Far East Line Ltd.* (1974) A.M.C., 1478 at p. 1481.

⁽³²⁾ Franco BONELLI, "Limitation of Liability of the Carrier, Present Regulation and Prospects of Reform", in *Studies on the Revision of the Brussels Convention on Bills of Lading*, Genoa 1974, p. 156 at 169.

⁽³³⁾ John F. WILSON, "Basic Carrier Liability and the Right of Limitation", published in the *Hamburg Rules on the Carriage of Goods by Sea*, edited by Samir MANKABADY, 1978, p. 146; UNCTAD Secretariat, "Report on Bills of Lading", TD/B/C.4/ISL/6/Rev.1, New York, 1971, p. 45.

⁽³⁴⁾ Thomas Gilbert CARVER, *Carriage by Sea*, (13th ed.), 1982, p. 399.

limitation of the carrier's liability one must take into account 5,000 plants expressly mentioned in the contract of carriage, each not as a "package", but as a "unit".⁽³⁵⁾

Certain unresolved issues regarding the interpretation of the terms "package" and "unit" from the original version of the Hague Rules have been specifically addressed through the Visby Protocol, notably in Article 4(5)(c) of the Hague-Visby Rules.⁽³⁶⁾ This provision establishes a clear guideline for determining when a container shall be regarded as a "package" or a consolidating "unit" under the Rules. Article 4(5)(c) states that:

Where a container, pallet, or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid, such article of transport shall be considered the package or unit.

In essence, if the bill of lading specifies the packages within the container, those numbers are deemed the number of packages.⁽³⁷⁾ If not, the container itself is considered the package under the Rules for purposes of the limitation of liability.⁽³⁸⁾ Additionally, unpacked units that are tied or lashed together may constitute a package if they are described as such in the bills of lading.⁽³⁹⁾

Once the "package" or "shipping unit" has been determined, the carrier may limit its liability for loss or damage to the goods.

2.1.2. *Limitation of Liability Based on Weight*

The Hague-Visby Rules have preserved the concept of "package" or "unit" from the Hague Rules to calculate limitation of liability for individual cargo items. Additionally, the Rules have introduced an additional criterion based on weight.

Limitation of liability based on the number of packages or other shipping units has simplified the calculation of the carrier's limit of liability in most cases, for example when the goods are packed in pallets, containers, etc. However, this limit is sometimes inadequate, for example when transporting goods that are not packed in packages or that are extremely heavy. To solve this problem, Article 4(5)(a) of the Hague-Visby Rules introduced a system of limitation based on the weight of the goods.

Sturley, Fujita and van der Ziel explain that the system of limitation of liability based on the weight of goods has significant advantages over limiting liability based on the number of packages or other shipping unit, particularly in terms of uniformity, certainty and predictability.⁽⁴⁰⁾ Thus, while many courts have spent years

⁽³⁵⁾ STURLEY (n 10) p. 162.

⁽³⁶⁾ Ilian DJADJEV, "The Obligations of the Carrier Regarding the Cargo the Hague-Visby Rules", (1st ed.) Springer International Publishing, 2017, p. 284.

⁽³⁷⁾ Yuzhuo Si and Ping Guo (n 23) p. 247.

⁽³⁸⁾ BAATZ (n 22) p. 182; GASKELL (n 16) p. 515.

⁽³⁹⁾ DJADJEV (n 36) p. 286.

⁽⁴⁰⁾ STURLEY (n 10) p. 162-163.

defining ambiguous terms such as “package”,⁽⁴¹⁾ the meaning of “kilogram” is universal and indisputable, greatly reducing the scope of potential litigation.

With regard to the limit of liability based on weight, it should be mentioned that the carrier may limit his liability to an amount of two units of account per kilogram of gross weight of the goods lost or damaged.

In view of the above, it can be seen that Article 4(5)(a) of the Hague-Visby Rules provides the carrier with the possibility of limiting his liability on the basis of two criteria: (a) on the basis of the number of packages or shipping units, and (b) on the basis of the weight of the goods. However, given the existence of this dual possibility of limitation, one can ask who favours the eventual choice (the carrier or the shipper)? It is to be expected that by invoking the right of limitation, the carrier will seek to limit his liability to the lesser amount calculated on the basis of the different options offered by the Rules. However, the Rules are very clear in stating that the limit of liability to be used is the higher of the weight or package/shipping unit. In this regard, Article 4(5)(a) provides that:

[...] neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

The weight criterion applies universally to all types of goods, prioritizing the protection of cargo interests. Consequently, if the cargo falls under two different measures, separate calculations must be conducted to determine the limitation amounts. The higher amount must be applied, regardless of any indication in the bill of lading, as the limitation provisions mandate the application of “whichever is the higher” without allowing for discretion.⁽⁴²⁾

2.1.3. Statement of Value and Agreement Between the Parties

In addition to the liability limits prescribed by Article 4(5) of the Hague Rules, this article allows the parties to avoid limited liability by means of a declaration of the value of the goods, provided that such a declaration has been included in the contract particulars.⁽⁴³⁾ Furthermore, the parties may avoid limited liability by agreeing to a limit higher than the limit of liability set out in that article.⁽⁴⁴⁾ To

⁽⁴¹⁾ On this point, see the decisions of *Studebaker Distributors Ltd v. Charlton Steam Shipping Co Ltd* [1938] 1 KB 459 and the decision of the full Court of Australia in the case of *El Greco (Australia) Pty Ltd v. Mediterranean Shipping Co SA* [2004] FCAFC 202; [2004] 2 Lloyd's Rep 537 cited in Stephen GIRVIN, p. 131 as well as the decision in the case of the *MV Elbe* de la Cour d'Appel de Rouen (2ème Ch. civ.) 28 February 2002, *Navire Elbe*, WSA Lines c/ Ste Mitsui OSK Lines, Ste Van Omeren Transports, Ste Godown, Ste Interesting, Ste Hugo Shipping et Ste ECU Line, Limitation de Responsabilité du Transporteur – Calcul Limitation. Calcul. Notion de colis ou unité. *Droit Maritime Français*, 2004, 648, 447 cited in Marc A. HUYBRECHTS, p. 134.

⁽⁴²⁾ Antony William DIAMOND, “The Hague-Visby Rules”, *LMCLQ* 225, 1978, p. 244.

⁽⁴³⁾ GIRVIN (n 24) p. 131.

⁽⁴⁴⁾ BAATZ (n 22) p. 182.

this end, Article 4(5) of the Hague Rules prescribes that the limits set forth therein shall apply:

[...] By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

The shipper's declaration of a higher value for their goods serves to establish a maximum limit of liability for the carrier that exceeds the standard limit set by the Hague Rules. For instance, consider a scenario where a shipper is transporting a shipment of electronic equipment valued at \$50,000. Recognizing the high value of the goods and the potential risk involved in transit, the shipper declares the value of the goods as \$100,000 in the bill of lading. Upon the carrier's acceptance of this declaration, the carrier's liability limit is effectively increased to \$100,000. However, if the carrier fails to accept the declaration or the shipper omits to make such a declaration, the carrier's liability is relegated to the standard limit mandated by the Hague Rules.

This mechanism allows shippers to obtain greater protection for their valuable goods during transit by ensuring that the carrier assumes a higher level of liability. It is crucial for both parties to clearly understand and agree upon these terms to avoid disputes and ensure compliance with the contractual obligations established under the Hague Rules. Therefore, a clear comprehension and explicit agreement regarding these terms are indispensable for averting disputes and ensuring adherence to the regulatory stipulations outlined in the Hague Rules. Additionally, Article 4(5)(g) of the Hague-Visby Rules, consistent with the provisions of the Hague Rules, stipulates that:

By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph.

At this point, it may be mentioned that, although it is common for the carrier to agree to compensate the shipper for the full amount of the damage suffered in volume contracts, the option of evading the limit of liability by declaring the value of the goods is not widely used. The reason for this is that by declaring a higher value of the goods, the carrier will charge a higher freight to cover its risk, whereas the shipper can obtain similar compensation under a cargo insurance contract and will usually find the insurance premium less expensive.⁽⁴⁵⁾

2.2. Limitation of Liability for Losses Caused by Delay

Neither the Hague Rules nor the Hague-Visby Rules specifically address losses caused by delays affecting cargo interests. The absence of specific provisions

⁽⁴⁵⁾ STURLEY (n 10) p. 164.

regarding delay leads to a different treatment of such damages across jurisdictions, except in cases where the delay directly results in cargo deterioration.⁽⁴⁶⁾

It is important to clarify that losses due to delay can be categorized into two types: (a) “concrete damage”, which occurs when the delay in the arrival of goods results in material damage to the goods themselves, and (b) “abstract damage”, which occurs when the delay leads to purely economic losses without any material harm to the goods.

In such instances, consensus exists that where the delay in the arrival of goods causes physical damage, irrespective of whether the delay directly caused it, the carrier’s limit of liability must be calculated in the same manner as for any other resulting loss or damage. However, for other types of damages arising from delays, such as loss of profit due to fluctuations in commodity prices, significant disparities emerge in the application of the Hague Rules. These discrepancies are apparent not only in the judicial practices of various States but also in the interpretation of the Hague Rules as reflected in their enactment into national legislation.⁽⁴⁷⁾ This lack of uniformity underscores the importance of carefully examining the applicable laws and regulations in each jurisdiction to determine the extent of liability for delay-related losses.

Over the years, the prevailing view has been that the Hague and Hague-Visby Rules do not distinguish between concrete/physical and abstract/non-physical loss or damage to the goods. As a result, the limitation provisions are deemed applicable to all forms of loss or damage.⁽⁴⁸⁾

Nevertheless, disparities in views, notably evident in judicial rulings, have endured on this matter. It can be asserted that the judgment rendered in the *Thorco Lineage* case,⁽⁴⁹⁾ being of considerable significance, effectively resolves the debates surrounding it.

In the *Thorco Lineage* case, on 13 January 2023, the court rejected the rationale of the *Limnos* case that economic losses, in the absence of physical damage, are unlimited. The court determined that all losses, whether physical or economic, must be limited based on the weight of the goods related to the loss. This interpretation of the Hague-Visby Rules’ Article 4(5)(a) suggests that the term “goods lost or damaged” encompasses both physical and economic damages. Consequently, claims for pure economic losses, such as reductions in market value or losses from liens for salvage or general average, are subject to limitation under Article 4(5) (a), irrespective of the presence of physical damage. However, the limitation is determined by the total weight of the cargo involved. As per the ruling, the limitation is to be computed based on the total weight of the cargo associated with the losses under the Hague-Visby Rules.

⁽⁴⁶⁾ Kacic, HRVOJE. “Analysis of the Provisions regarding Liability under the Hague and Hague-Visby Rules.” *Uporedno Pomorsko Pravo i Pomorska Kupoprodaja*, 119, 1988, p. 177 at 186.

⁽⁴⁷⁾ *Ibid*, p. 187.

⁽⁴⁸⁾ UNCTAD Secretariat, *Bills of Lading Report*, p. 46.

⁽⁴⁹⁾ *Trafigura Pte Ltd v TTK Shipping Pte Ltd (“The Thorco Lineage”)* [2023] EWHC 26 (Comm), *ETL* 2024, 25-55.

While the Hague Rules primarily set forth liability limits on a per package or per unit basis, there is an argument to be made that liability for losses resulting from delay could also be limited by considering the total package or unit of the cargo involved under the Hague Rules.

The *Thorco Lineage* ruling benefits carriers by limiting economic loss claims even in the absence of physical damage and the absence of any provision regarding limitation of liability for losses caused by delay. By preventing unlimited liability for losses caused by delay, this case now sets a legal precedent, superseding the reasoning of earlier court decisions.

2.3. *Loss of Right to Limitation of Liability*

Under the Hague Rules, there is no explicit provision that prevents the carrier from invoking the limitation of liability if the damage is caused by the carrier's act or omission done with the intent to cause damage or recklessly and with knowledge that damage would probably result. This is unlike the Hague-Visby Rules, Hamburg Rules, or Rotterdam Rules, which contain such provisions. However, certain circumstances might still impact a carrier's ability to invoke his right to limit liability. For example, as stated in Article 4(5) of the Hague Rules the carrier may be liable above the prescribed limit if:

[...] the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

For a declaration to effectively exempt the carrier from limitation of liability, specific formal requirements must be satisfied. This entails a clear and explicit identification of the particular goods intended for carriage. Furthermore, the shipper is obliged to disclose both the nature and value of the goods before shipment, with these particulars accurately documented in the bill of lading.

The declaration, when included in the document, serves as prima facie evidence but is not binding or conclusive on the carrier, as stipulated in Article 4(5) of the Hague Rules. Accordingly, the carrier retains the right to present evidence revealing the actual nature and value of the cargo, especially if it is lower than the declared value. In addition, according to Article 4(5) of the Hague Rules:

[...] Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

A stringent penalty is imposed for misrepresentation of the nature or value of goods by the shipper, as the carrier is relieved of liability under any circumstances for loss or damage to, or in connection with, goods if the shipper knowingly misstates their nature or value in the bill of lading. In addition to the declaration of the nature and value of such goods by the shipper before the shipment, the

introduction of a new provision in Article 4(5)(e) of the Hague-Visby Rules is noteworthy. This article states that:

Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

Article 4(5)(e) of the Hague-Visby Rules specifically addresses situations where the carrier's liability cannot be limited. Such circumstances arise when substantiated evidence establishes that the damage resulted from a deliberate act or omission by the carrier, executed with the intention of causing harm or exhibiting reckless disregard, with the knowledge that damage would likely result.

Regarding this matter, Article 4bis (4) of the Hague-Visby Rules also states that:

Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this Article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

It is evident that both the carrier and the servants or agents of the carrier will relinquish all benefits conferred by the Rules in the event of deliberate acts or omissions on their part.⁽⁵⁰⁾ The wording of these articles aims to restrict the possibility of losing the right of limit liability to actions that may constitute *mens rea* on the part of the carrier and any of the persons referred to in the Rules, since the different elements of the above conduct require a subjective element on the part of the person invoking the right of limitation.⁽⁵¹⁾

It is therefore possible to assert that the wording of Article 4(5)(e) is intended to establish a right of limitation that was once considered virtually unbreakable. Although a claimant has sometimes been successful in preventing the respondent from invoking the right of limitation, this is only the case in exceptional situations and carriers can operate with peace of mind knowing that their right of limitation is well protected; so much so that the burden of proof in this regard is on the claimant, who must prove the conduct set out in Article 4(5)(e) in order to avoid the limits of liability prescribed by the Rules, an extremely difficult task.⁽⁵²⁾ Notwithstanding this, as will be discussed later in this contribution, IMO has tried to ensure a uniform interpretation of this type of provisions and has adopted a number of resolutions to this effect.⁽⁵³⁾

⁽⁵⁰⁾ For an analysis of loss of right to limit under the Hague-Visby Rules, see GASKELL (n 16) p. 519-522.

⁽⁵¹⁾ For an analysis of the conduct prescribed by the Convention on Limitation of Liability for Maritime Claims, 1976 (as amended), see Norman A. MARTÍNEZ GUTIÉRREZ (n 3) p. 62-75.

⁽⁵²⁾ Ibid, p. 73-75.

⁽⁵³⁾ See section 3.3 below.

2.4. Recognition of the Right of Global Limitation of Liability

The Hague Rules establish the particular liability regime (including limitation of liability) for the carriage of goods by sea. However, the Convention acknowledges the possibility that a carrier may exercise the right to global limitation of liability. Accordingly, the Convention preserves this right through the provisions outlined in Article 8, which state that:

The provisions of this Convention shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

Moreover, following the approach taken by the Hague Rules, Article 8 of the Hague-Visby Rules specifies that:

The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of vessels.

Consequently, Article 8 of both the Hague Rules and Hague-Visby Rules highlights the potential interaction between the particular liability regimes for the carriage of goods by sea, as stipulated in the Rules, and the global limitation of liability outlined in international conventions or domestic legal frameworks. To clarify this relationship, hereunder follows a brief overview of the current international legal framework governing global limitation of liability.

3. GLOBAL LIMITATION OF LIABILITY IN THE CARRIAGE OF GOODS BY SEA

As mentioned earlier, global limitation of liability has been regulated by several international conventions, with the latest regime being codified in the LLMC Convention and the 1996 LLMC Protocol (itself amended by Resolution LEG.5(99) of 19 April 2012), which together, for ease of reference, will be hereinafter referred to as the “1996 LLMC Convention”.

3.1. Persons Entitled to Limitation of Liability

The 1996 LLMC Convention prescribes in its Article 1 that the persons entitled to limit liability include the shipowner (including in this term the owner, charterer, manager and operator of a seagoing ship), salvors, any person for whose act, neglect or default the shipowner or salvor are responsible, as well as any insurer of liability for claims that are subject to limitation under the Convention.

Regarding the application of global limitation of liability to the carriage of goods by sea, it may be argued that the carrier may benefit from the 1996 LLMC Convention if he is acting as owner, charterer, manager or operator of the ship on which the goods are carried. Additionally, the right to limit liability also extends to any person for whose act, neglect or default the carrier is liable.

3.2. Claims Subject to Limitation

Article 2 of the 1996 LLMC Convention lists all the claims subject to limitation under the Convention. However, in relation to the carriage of goods by sea, the relevant claims are those included in paragraphs a) and b) of said article, i.e.:

[...]

- (a) *Claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;*
- (b) *Claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;*

[...]

The most important of these claims are those relating to loss of or damage to property (and damage resulting therefrom)⁽⁵⁴⁾ and claims relating to damage arising from delay in the carriage of goods by sea.⁽⁵⁵⁾

3.3. Conduct Barring Limitation

The 1996 LLMC Convention prescribes a very strict test to break the right to limit liability. Article 4 of the Convention provides that:

A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

When adopted, this formula was aimed to provide a virtually unbreakable right to limit liability. However, the passage of time showed that courts in different States were interpreting this test in different manners and finding ways to break the right to limit liability. This raised high concerns in the maritime community and IMO commenced work towards a Unified Interpretation on the Test for Breaking the Owner's Right to Limit Liability under the different IMO Conventions. In this respect, on 15 December 2021, the 32nd session of the IMO Assembly adopted three Resolutions on the Unified interpretation to break the right to limit liability, namely, Resolution A.1163(32) for States Parties to the LLMC Convention, Resolution A.1164(32) for States Parties to the 1996 LLMC Protocol, and Resolution A.1165(32) for States Parties to the Civil Liability Convention for Oil Pollution Damage, 1992.

These resolutions recognize that the effective operation of the limitation of liability regime is dependent upon a uniform implementation and application that is consistent with the aims and objectives agreed at the time of the adoption of the

⁽⁵⁴⁾ Article 2.1 (a) of the amended LLMC Convention.

⁽⁵⁵⁾ Article 2.1 (b) of the amended LLMC Convention.

conventions, and that will ensure that they will be applied equally and equitably to all parties and claimants. They also recognize the need to provide legal certainty in the interpretation and application of the conventions and to assist present and future States Parties to the Conventions to apply them in a uniform manner. With this in mind, the resolutions:

I AFFIRM that the test for breaking the right to limit liability as contained in article 4 of the 1976 LLMC Convention is to be interpreted:

- (a) as virtually unbreakable in nature, i.e. breakable only in very limited circumstances and based on the principle of unbreakability;*
- (b) to mean a level of culpability analogous to wilful misconduct, namely:*
 - (i) a level higher than the concept of gross negligence, since that concept was rejected by the 1976 International Conference on Limitation of Liability for Maritime Claims;*
 - (ii) a level that would deprive the shipowner of the right to be indemnified under their marine insurance policy; and*
 - (iii) a level that provides that the loss of entitlement to limit liability should begin where the level of culpability is such that insurability ends;*
- (c) that the term “recklessly” is to be accompanied by “knowledge” that such pollution damage, damage or loss would probably result, and that the two terms establish a level of culpability that must be met in their combined totality and should not be considered in isolation of each other; and*
- (d) that the conduct of parties other than the shipowner, for example the master, crew or servants of the shipowner, is irrelevant and should not be taken into account when seeking to establish whether the test has been met;*

It is expected that the IMO Resolutions on a unified interpretation of the test to break the right to limit liability will promote legal certainty. By recognizing that the right to limit liability is meant to be virtually unbreakable, courts should not feel free to easily break the right to limit liability. On the other hand, there would have to be extraordinary circumstances for the right to limit to be lost. This in turn provides legal and commercial certainty to the whole industry as all they can rest assured that if found liable, liability will be limited in accordance with the relevant convention.

3.4. The Limits of Liability

Since it aims at providing a global limitation of liability, the 1996 LLMC Convention prescribes three limitation amounts: one for claims relating to death or personal injury,⁽⁵⁶⁾ one for any other claims,⁽⁵⁷⁾ and one for claims relating to pas-

⁽⁵⁶⁾ Article 6(1)(a) of the 1996 LLMC Convention.

⁽⁵⁷⁾ Article 6(1)(b) of the 1996 LLMC Convention.

sengers.⁽⁵⁸⁾ With regard to the carriage of goods by sea, the only limit to be considered is that prescribed in Article 6(1)(b) of the amended Convention, which is dedicated to “any other claims”. It is, however, important to mention that the 1996 LLMC Protocol also had introduced a more efficient system for updating the limits of liability. This was done through the tacit acceptance procedure established by Article 8 of the Protocol. By virtue of this Article, the IMO Legal Committee adopted Resolution LEG.5(99) of 19 April 2012,⁽⁵⁹⁾ which increases the limits of liability provided for in Article 6(1) of the 1996 LLMC Convention. Accordingly, Article 6(1) of the 1996 LLMC Convention now prescribes that:

The limits of liability for claims other than those mentioned in Article 7, arising on any distinct occasion, shall be calculated as follows:

[...]

(b) in respect of any other claims,

(i) 1.51 million Units of Account for a ship with a tonnage not exceeding 2,000 tons;

(ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i)

for each ton from 2,001 to 30,000 tons, 604 Units of Account;

for each ton from 30,001 to 70,000 tons, 543 Units of Account; and

for each ton in excess of 70,000 tons, 302 Units of Account.

These new limits of liability entered into force on 8 June 2015.

4. CONCLUSIONS

The concept of limitation of liability is not a concept foreign to the carriage of goods by sea. It was recognized since the Hague Rules in 1924 and has since been broadly accepted in other conventions in this field such as the Hague-Visby Rules, the Hamburg Rules, and finally the Rotterdam Rules. Side by side with this, the concept of global limitation of liability has been regulated by various international conventions and there is a close relationship between these two types of limitation of liability.

From the above discussion, it may be deduced that, in addition to the carrier’s right to limit his liability under the Hague Rules / Hague-Visby Rules, in many jurisdictions, the carrier has the right to invoke a global limitation of its liability (generally under the 1996 LLMC Convention).

Consequently, claims for loss or damage to the carried goods may be subject to a double limitation regime. They can first be subject to limitation of liability under

⁽⁵⁸⁾ Article 7 of the 1996 LLMC Convention.

⁽⁵⁹⁾ Resolution LEG.5(99) on the adoption of amendments to the amounts of limitation contained in the 1996 Protocol Amending the Convention on the Limitation of Liability for Maritime Claims, 1976, adopted on 19 April 2012 (Annex 2 to document LEG 99/14 of 24 April 2012).

the Hague Rules / Hague-Visby Rules (based on the number of packages or other carriage units or based on the weight of the goods) and then may be subject to global limitation of liability based on the tonnage of the ship under the 1996 LLMC Convention (or other applicable limitation of liability convention), or any similar national legislation.

The latter type of limitation is particularly important where there are other types of claims arising in the same particular case, for example, claims relating to damage resulting from pollution caused by bunker oil from ships, loss of or damage to property away from the ship (including claims in respect of damage to harbour works, basins and waterways and aids to navigation), loss of or damage caused to passengers' luggage, wreck removal claims, etc. The reason for their importance at this point is that all such claims will be compensated from the amount calculated under the relevant global limitation convention or any analogous national legislation.

Therefore, if the carrier invokes the right of global limitation of liability, claims for loss of or damage to the goods carried, after being limited on the basis of the Hague Rules / Hague-Visby Rules, must compete with the other claims mentioned above with the amount to be calculated based on the limit of liability prescribed by the applicable global limitation convention or any similar national law. Thus, if the amount of all claims exceeds the limit calculated in accordance with the global limitation convention or similar applicable national law, the satisfaction of each claim must be reduced pro rata to bring it in line with the limit established by the convention or national legislation in question. Consequently, the amount calculated on the basis of the Hague Rules / Hague-Visby Rules for the recovery of claims for loss of or damage to carried goods, due to this possible double limitation, may not be fully compensated. Notwithstanding the above, unless there are major catastrophes that may give rise to global limitation of liability, the Hague Rules, one hundred years later, still play a central role in the limitation of liability for claims arising from the carriage of goods by sea.

Les 100 ans de la Convention de Bruxelles: le point de vue français.

Philippe DELEBECQUE (*)

1. Faut-il fêter le centième anniversaire de la Convention de Bruxelles du 24 janvier 1924? La longévité est, on en conviendra, un signe de qualité, partagée au demeurant avec d'autres conventions, à l'exemple de celle sur l'abordage de 1910, même si le CMI s'est récemment interrogé sur son actualisation. La Convention sur l'assistance également de 1910 a été rénovée et d'une manière très opportune (en 1989), mais certains pays s'y tiennent encore. La Convention de 1924, connue encore sous le nom de Règles de La Haye, avant son protocole modificatif de 1968 et de s'appeler les Règles de La Haye Visby, lie toujours de nombreux Etats dans sa version originaire et ses principales dispositions constituent encore et toujours le socle de la responsabilité des transporteurs maritimes. Ce qui ne veut pas dire pour autant qu'elle soit pleinement satisfaisante et réponde à toutes attentes des opérateurs.

2. L'influence de la Convention de 1924 reste forte: elle est toujours un modèle lorsqu'il s'agit d'apprécier la responsabilité du transporteur. En outre, même si les ratifications sont nombreuses, de grands pays n'ont toujours pas franchi le pas, la plupart des connaissements contiennent une clause *paramount* renvoyant à la convention originaire ou encore à la convention amendée. De plus, la convention est sinon intégrée dans de nombreux ordres juridiques internes, du moins reprises dans son économie générale. Enfin, lorsque dans les enseignements universitaires, on présente le droit des transports maritimes, c'est tout naturellement que l'on commence par développer ce que dit la Convention de Bruxelles, quels sont les principes sur lesquels elle repose et quelles sont les questions qu'elle règle plus précisément.

3. La Convention de 1924 contient donc encore et toujours le socle du droit des transports maritimes. Sans doute son contenu est-il complété par les commentaires de doctrine qui cherchent à en donner une interprétation uniforme et non nationale, comme l'avait souhaité Francesco Berlingieri. Sans doute a-t-elle été enrichie par le protocole de 1968 et par une abondante jurisprudence, notamment sur les problèmes de compétence des tribunaux, encore que l'UE s'en soit largement emparée. Mais on ne peut s'empêcher de poser la question de sa modernisation. N'a-t-elle pas été conçue à une époque où le conteneur n'existait pas? A une époque également où les documents papier étaient les plus importants et où les litiges portaient essentiellement sur la responsabilité en cas de pertes et d'avaries? A une époque enfin où les relations commerciales étaient moins tendues et où les questions contentieuses n'avaient pas l'importance qu'elles ont prises depuis quelque temps? En d'autres

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termes, peut-on se contenter aujourd'hui d'une convention qui ne s'efforce que d'unifier les règles sur le connaissance?

Peut-être pas. C'est pourquoi, la communauté maritime doit se demander si la grande convention qui l'entoure ne doit pas évoluer et s'il ne faut aussi la compléter.

I. Evoluer

4. Peut-on s'en tenir, comme le fait la Convention, à une approche documentaire du transport? La jurisprudence française est de plus en plus favorable à une approche contractuelle en considérant que la Convention s'applique alors même qu'aucun connaissance n'a été émis et que les parties se sont contentées d'un simple *sea way bill*. Plus récemment, la Cour de cassation a pu admettre qu'un accord de réservation (*Booking confirmation*) était suffisant (Cass. com. 6 janv. 2021, DMF 2021, 227, obs. Bloch). On notera aussi que le nouveau code maritime grec n'exige pas l'émission d'un quelconque document pour que les règles du transport de ligne s'appliquent et reconnaît que dans le transport autre que de ligne, un simple document, quel qu'il soit, suffit.

5. De même peut-on s'interroger sur le régime particulier de la pontée (cf. HVR, art. 1 c.) lorsque les marchandises sont transportées sur des navires porte-conteneurs. Est-il raisonnable de considérer que même dans le cas d'un transport d'un conteneur à bord d'un «navire muni d'installations appropriées», le consentement du chargeur est requis et de décider qu'une déclaration unilatérale du transporteur ne peut y suppléer, avec cette conséquence que la pontée est irrégulière, que le transporteur est ainsi en faute et qu'il ne peut, de ce fait, se prévaloir du cas excepté de périls de la mer et doit supporter l'entière responsabilité des dommages (v. *Ville de Tanya*, Com. 18 mars 2008, n° 07-11.777)? Exiger du chargeur qu'il consente à la pontée est assez irréaliste dans les transports en conteneur. Les dispositions prévues sur la pontée sont d'un autre âge. Dans le même esprit, il est permis de se demander si l'exclusion du transport d'animaux vivants de la Convention a encore une raison d'être suffisante.

6. D'autres difficultés d'interprétation ou même de compréhension de la Convention de 1924 tiennent au calcul de la limitation de responsabilité. On s'est ainsi préoccupé de savoir quelle «unité» il fallait considérer à propos du transport en vrac de 56 000 épis de maïs dans un conteneur: le poids? le conteneur ou encore les épis eux-mêmes (Cass. com. 23 mars 2022, DMF 2022, 432, rapp. S. Kass-Dano, obs. O. Cachard)? Il nous semble que dans ce genre de situation, l'élément déterminant doit être de caractère objectif et trouver son expression dans le conteneur lui-même, sauf à admettre que, faute de critère précis, la limitation de responsabilité ne s'applique pas dans les opérations de vrac (v. en droit anglais, aff. *Aqasia*, DMF HS 22, n° 99).

7. Il reste que de nombreuses autres questions se sont posées et ont fini par trouver des solutions satisfaisantes. La livraison est ainsi conçue d'une manière matérielle et n'est caractérisée, selon la jurisprudence française, que si le réceptionnaire a été mis en mesure de prendre possession de la marchandise. Ainsi la livraison à une

entreprise monopolistique ne vaut-elle pas livraison, sauf convention contraire des parties (Cass. com. 24 mai 2023, DMF 2023, 808). De même admet-on que la responsabilité du transporteur s'étend jusqu'à la livraison et couvre nécessairement les opérations de déchargement (comp. en droit anglais, l'affaire *Cocoa*, DMF HS 28, n° 82). On ajoutera que les clauses FIOS (*free in and out stowed*) ne sauraient avoir pour effet de transférer la responsabilité des opérations de chargement et de déchargement au chargeur: elles n'ont d'effet que sur la charge des frais de telles opérations. On notera aussi que l'expression «pertes ou dommages des marchandises ou les concernant» au sens de l'article 4.5 des HVR est comprise largement et vise autant les dommages physiques que les dommages économiques («goods economically damaged») (v. DMF HS 28, n° 91). Le retard est également visé.

8. La théorie des cas exceptés a également nourri, faut-il le rappeler, une jurisprudence importante qui a su régler certaines difficultés. Ainsi l'incendie constitue-t-il un cas excepté, sauf aux intérêts cargaison à établir la faute du navire dans la survenance de l'incendie et non dans la survenance du dommage (Cass. com. 16 janv. 2019, DMF 2019, 220). Quant à la faute nautique, elle suscite encore de nombreux contentieux, bien qu'elle soit comprise assez strictement et sans doute encore plus strictement en droit anglais qu'en droit français (cf. aff. *Libra*, 7 nov. 2021, Allianz 2021, UKSC 51). Tout au plus peut-on se demander si cette faute ne devrait pas être retenue lorsqu'elle présente un caractère inexcusable (cf. Rouen 16 juin 2022, DMF 2022, 828). Il est, en tout cas, d'autres controverses: l'accès aux cas exceptés est-il subordonné à la preuve par le transporteur qu'il a satisfait aux diligences que l'opération de transport lui impose (cf. aff. *Volcafe*)? Quelle conséquence faut-il attacher à la neutralisation d'un cas excepté par la preuve de la faute du transporteur: une responsabilité totale ou simplement partielle?

9. Les questions de procédure ou de quasi procédure ont été progressivement réglées dans les meilleures conditions. Ainsi en est-il de la prescription annale qui, en droit français, est bien considéré comme une prescription au sens civiliste de la notion: on pense au régime applicable quant au délai de recours de 3 mois, aux problèmes liés à l'interruption ou encore à la suspension du délai et, bien entendu, au champ d'application du délai d'un an. Ainsi a-t-il été admis que la prescription couvrirait bien les actions pour pertes et avaries comme pour *misdelivery*. La solution a été retenue beaucoup plus récemment en droit anglais (*High Court* 28 sept. 2022, DMF HS 27, n° 102).

La jurisprudence, comme on le voit, a su faire évoluer la Convention sur le transport maritime ou plus précisément lui donner l'interprétation équilibrée qu'elle méritait. Pour autant, toutes les questions sont loin d'avoir reçu une réponse, si bien que l'on se demande aujourd'hui si la Convention ne devrait pas aussi être complétée par de nouvelles dispositions.

II. Compléter

10. La communauté maritime se préoccupe à juste titre du régime à appliquer aux documents électroniques. Il est bien évident que les rédacteurs de la Conven-

tion n'avaient pu prendre en considération toutes les questions liées à la dématérialisation des documents de transport. Les choses ont changé et il serait temps d'apporter des réponses précises à ces questions en assurant la sécurité juridique requise. Au demeurant, le principe de l'équivalence de l'écrit papier et de l'écrit électronique devrait être adopté. Les dispositions contenues dans les Règles de Rotterdam pourraient servir de modèle et c'est du reste ce modèle qui a inspiré le législateur grec dans sa récente réforme du code maritime (cf. Lia Athanassiou, communication lors de la Journée Ripert à Paris du 27 juin dernier). Ce qui pourrait être adopté dans le cadre du projet de Convention CNUDCI sur le document de transport multimodal doit également être suivi avec la plus grande attention (v. O. Cachard, communication lors de la Journée Ripert à Paris du 27 juin dernier).

11. Une autre attention devrait être portée à la détermination des parties au contrat de transport, à commencer par les obligations du transporteur. La Convention est trop centrée sur les problèmes de responsabilité, même si elle n'est pas totalement muette sur la situation du transporteur (cf. obligations d'assurer la bonne navigabilité, obligations de chargement et de déchargement, ...). Mais ne faudrait-il pas rappeler que le transporteur, comme tout cocontractant est tenu d'une obligation de bonne foi, même si les juristes de *common law* restent, dans leur ensemble, opposés à la reconnaissance d'un tel concept. Dans notre opinion, les fameuses *liberties clauses* ne doivent jouer que si elles sont invoquées avec la loyauté qu'exige toute situation contractuelle. La question des surestaries de conteneur appellerait aussi quelques précisions: s'agit-il de simples accessoires du fret ou s'agit-il de pénalités contractuelles? Le droit positif n'est pas très clair sur ce point (v. S. Lootgieter, DMF 2020, 903). La nature de la «merchant clause» appellerait également bien des approfondissements (v. déjà R. de Wit, DMF 2020, 922).

12. Cela dit, la Convention devrait surtout être complétée par des dispositions sur les obligations du chargeur. Là encore, les Règles de Rotterdam pourraient servir de modèle, car la Convention de 1924 est totalement muette ou presque sur la question. Or, le chargeur doit d'abord remettre la marchandise au transporteur et une marchandise appropriée au transport, étant précisé qu'il peut engager sa responsabilité si sa marchandise endommage le navire ou encore les autres marchandises transportées. Il ne serait pas inutile, non plus, de définir ce que sont les contrats de volume ou les contrats de service dont l'importance se vérifie tous les jours, tout en laissant, comme le font les Règles de Rotterdam, une grande liberté aux parties à de tels contrats pour définir leurs droits et obligations

13. Enfin, et peut-être surtout, la Convention sur le transport maritime mériterait d'être complétée par des dispositions sur la compétence des tribunaux, en distinguant les transports de ligne des opérations de *tramping*. Dans les premiers, la clause, valable dans les relations chargeur / transporteur ne devrait jouer à l'égard du réceptionnaire (*consignee*) qu'en cas d'acceptation spéciale de sa part. Dans les autres opérations, une plus grande souplesse devrait être admise quant à l'opposabilité de la clause de compétence au porteur du connaissement ou du document de transport.

Conclusion

14. La conclusion de ces brèves observations est simple et trouve son expression, une fois de plus, dans la préconisation en vue d'une ratification rapide des Règles de Rotterdam. Le dernier congrès du CMI qui s'est tenu à Gothenburg a émis la même recommandation. Mais, malgré cette nouvelle relance, il n'est pas certain qu'il y ait des réactions positives de la part des États. Les États-Unis ne sont sans doute toujours pas décidés à avancer et l'Europe reste hésitante. Avouons que nous avons du mal à en comprendre les raisons.

Il reste que ces incertitudes et atermoiements ne sont pas propres au droit des transports maritimes. Ne les retrouve-t-on pas, par exemple, à propos du thème de l'abus de saisie (*wrongful arrest*) sur le fondement de la Convention de 1952, thème que le droit anglais se refuse toujours à consacrer? D'autres conventions sont venues heureusement moderniser le droit maritime, à l'exemple de la récente convention *HNS* ou *SNPD*, encore qu'il soit permis de se demander pourquoi, au-delà de l'idée utile de canalisation de responsabilité sur la tête du propriétaire du navire, la liste des immunités n'ait pas été repensée en y intégrant les sociétés de classification et en y maintenant les affréteurs à charge pour eux de prouver leur non faute. En tout cas, quoiqu'on fasse la pratique sera toujours en avance sur la législation. L'important est que l'écart ne se creuse pas définitivement.

Jurisdiction issues under the HVR and the Jurisdiction Chapter of the Rotterdam Rules

Frank STEVENS (*)

1. Introduction

In an almost inherently international business like shipping, jurisdiction is often an issue of concern, both for the carriers and for the cargo claimants. The Hague and Hague Visby Rules do not contain jurisdiction provisions, but bills of lading in practice almost invariably contain exclusive jurisdiction clauses. Jurisdiction clauses are of course well known and often used, but have since long been challenged and continue to be challenged in the ocean carriage context. Jurisdiction clauses in bills of lading and other ocean carriage documents are not only invoked between the initial contracting parties, but also, or even primarily, against third parties such as the consignee, third party holders of the bill of lading, etc. Some jurisdictions consider third parties bound by the jurisdiction clause, others don't. This leads to repeated and protracted litigation on jurisdiction issues.

2. The ocean carriage conventions

As already pointed out, the original 1924 Hague Rules do not address the jurisdiction issue at all. In those days, it wasn't usual yet for bills of lading to contain jurisdiction clauses⁽¹⁾. Furthermore, the national legislation⁽²⁾ that inspired the later Hague Rules and the Rules themselves were primarily concerned with the liability of the carrier, and much less with procedural aspects. In those circumstances, it is hardly surprising that the Hague Rules didn't pay attention to the jurisdiction issue.

In the run up to the 1968 Visby Amendments, the option of introducing jurisdiction provisions was considered⁽³⁾, and some national Maritime Law Associations were in favour of doing so⁽⁴⁾, but ultimately it was decided not to pursue this

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(1) Neither the Model Bill of Lading, produced by the Affreightment and International Bill of Lading Committee at the Liverpool Conference of 1882, nor the US Uniform Bill of Lading of 1909 contain jurisdiction provisions.

See also PEEL, S. (2002) *Development of the bill of lading: its future in the maritime industry*. Thesis. University of Plymouth, available at: <https://doi.org/10.24382/4271> None of the 17th, 18th or 19th century bills of lading included in Appendix 3 contain a jurisdiction clause.

(2) The US Harter Act 1893, the New Zealand Shipping and Seamen Act 1903, the Australian Sea Carriage of Goods Act 1904, the Canadian Water Carriage of Goods Act 1910, etc.

(3) See the 1959 Report of the International Sub-committee on Bill of Lading Clauses (available on the CMI website), p. 65-67.

(4) For example the French Maritime Law Association in its comments on the Report of the International Sub-committee on Bill of Lading Clauses, published in May 1963 (available on the CMI website).

course. Thus, the Hague-Visby Rules, currently the most widely used ocean carriage convention, do not contain jurisdiction provisions either.

The 1978 Hamburg Rules⁽⁵⁾ however changed tack and explicitly deal with jurisdiction in Article 21:

1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

- (a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or*
- (b) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or*
- (c) the port of loading or the port of discharge; or*
- (d) any additional place designated for that purpose in the contract of carriage by sea.*

The second paragraph of Article 21 allows cargo claims to be instituted with the court of the place where the carrying vessel has been arrested, be it that in such case the defendant can request the case to be removed to one of the courts referred to in the first paragraph. Finally, the third paragraph of Article 21 provides that cargo claims can only be instituted with courts referred to in paragraphs 1 or 2, thus invalidating jurisdiction clauses in favour of other courts.

The 2009 Rotterdam Rules, currently not in force, followed suit and contain explicit jurisdiction provisions, be it in the form of a chapter that is not mandatory but needs to be opted-in to.

3. Outline

Bills of lading and seaway bills very often contain jurisdiction clauses. If that is (exceptionally) not the case, or if such jurisdiction clause is considered invalid, the court seized with the case will have to apply its jurisdiction rules to determine whether it has jurisdiction. Therefore, the next section (4) will first look into the ‘general’ jurisdiction rules, followed by an analysis of exclusive and non-exclusive jurisdiction clauses (section 5) and conclusions.

4. General jurisdiction rules

Within the EU, jurisdiction rules have been unified in the Brussels I (recast) Regulation⁽⁶⁾. The preambles to this Regulation point out that the rules of juris-

⁽⁵⁾ United Nations Convention on the Carriage of Goods by Sea, done at Hamburg on 31 March 1978.

⁽⁶⁾ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

diction should be highly predictable⁽⁷⁾. Grounds of jurisdiction other than the defendant's domicile should be based on a close connection between the court and the action in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen⁽⁸⁾. It is submitted that these are, in fact, basic principles which would also be endorsed in non-EU States.

It should be pointed out that the purpose of jurisdiction rules in general or the Brussels I (recast) Regulation in particular is not necessarily to arrive at one single competent court. There are many situations in which more than one court is competent and where it is for the claimant to decide which of these courts he will actually seize. Multiple competent courts, and thus inevitably also the possibility of forum shopping, is innate in many rules of jurisdiction.

All carriage conventions, with the sole exception of the CMNI Convention⁽⁹⁾ (inland shipping) which lacks jurisdiction rules, provide for multiple competent courts.

Art. 21.(1) Hamburg Rules⁽¹⁰⁾:

In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

- (a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or*
- (b) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or*
- (c) the port of loading or the port of discharge; or*
- (d) any additional place designated for that purpose in the contract of carriage by sea.*

Art. 31.(1) CMR⁽¹¹⁾ (road carriage):

In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory:

⁽⁷⁾ Preamble 15.

⁽⁸⁾ Preamble 16.

⁽⁹⁾ Convention on the Contract for the Carriage of Goods by Inland Waterway, done at Budapest on 22 June 2001.

⁽¹⁰⁾ United Nations Convention on the Carriage of Goods by Sea, done at Hamburg on 31 March 1978.

⁽¹¹⁾ Convention on the Contract for the International Carriage of Goods by Road, done at Geneva on 19 May 1956.

- (a) *The defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or*
- (b) *The place where the goods were taken over by the carrier or the place designated for delivery is situated.*

Art. 46 § 1 CIM⁽¹²⁾ (rail carriage):

Actions based on these Uniform Rules may be brought before the courts or tribunals of Member States designated by agreement between the parties or before the courts or tribunals of a State on whose territory

- (a) *the defendant has his domicile or habitual residence, his principal place of business or the branch or agency which concluded the contract of carriage, or*
- (b) *the place where the goods were taken over by the carrier or the place designated for delivery is situated.*

Other courts or tribunals may not be seized.

Art. 33.(1) Montreal Convention⁽¹³⁾ (air carriage):

An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.

All of these conventions leave the choice to the claimant. This is very explicitly conformed in the Hamburg Rules and the Montreal Convention, but also follows from the wording of the CMR and CIM conventions.

For the purposes of the Brussels I (recast) Regulation, a contract of carriage is considered a contract for the provision of services, which makes the courts of the place where the services were provided or should have been provided competent (Art. 7.(1).(b) second indent). For carriage, that of course raises the question where the carriage services are performed. Although the wording of the second indent of Art. 7.(1).(b) seems to point to one single place of performance, the European Court of Justice has confirmed, first with regard to the carriage of passengers, that a contract of carriage is performed both in the place of departure and the place of arrival. Each of those two places has a sufficiently close link of proximity to the material elements of the dispute and, accordingly, the close connection required by the special jurisdiction rules of the Brussels I (recast) Regulation (*Rehder / Air Baltic*⁽¹⁴⁾), para. 43-44). The Court of Justice also confirmed that it is for the claim-

⁽¹²⁾ Uniform Rules Concerning the Contract of International Carriage of Goods by Rail, Appendix B to the Convention concerning International Carriage by Rail (COTIF), done at Berne on 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999.

⁽¹³⁾ Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999.

⁽¹⁴⁾ ECJ 9 July 2009, C-204/08, *Rehder / Air Baltic Corporation*.

ant to choose between these two places. This possibility to choose satisfies the requirement of predictability, as it allows both the claimant and the defendant easily to identify the courts before which proceedings may be brought. Furthermore, it is consistent with the objective of legal certainty, since the claimant's choice is limited to two possible judicial fora (*Rehder / Air Baltic*, para. 45). Later, in *Zurich Insurance / Abnormal Load Services*⁽¹⁵⁾, the European Court of Justice confirmed that these principles equally apply to the carriage of goods. A contract of carriage is performed both at the place of dispatch and at the place of delivery of the goods. This solution enables both the claimant and the defendant to identify the courts of the places, specified in the contract for carriage, of dispatch and delivery of the goods as the courts before which proceedings may be brought, and thus complies with the requirement of predictability (*Zurich Insurance / Abnormal Load Services*, para. 23-24).

It should also be pointed out that the European Court of Justice in *Nickel & Goeldner Spedition / Kintra*⁽¹⁶⁾ held that the choice of courts that Article 31 CMR offers to the claimant is, in essence, the same choice that the claimant has under the Brussels I (recast) Regulation (para. 40). As the choice of courts offered to the claimant by Article 66 of the Rotterdam Rules is very similar to the choice offered by Article 31 CMR, it follows that the jurisdiction rules of the Rotterdam Rules and the jurisdiction rules of the Brussels I (recast) Regulation with regard to contracts of carriage are at least comparable, if not essentially the same.

5. Jurisdiction clauses

Bills of lading and other ocean carriage documents very often contain jurisdiction clauses. Such clauses come in two flavours: they can be exclusive or non-exclusive.

5.1. Non-exclusive jurisdiction clauses

The Hamburg Rules and the CMR (road) and CIM (rail) conventions allow the parties to agree on a competent court. Such agreement cannot be exclusive, though. The parties can *add* an additional competent court to the set of courts that are competent under the convention, thus expanding the choice of courts available to the claimant, but they cannot exclude courts that are competent under the convention or restrict the claimant's option.

Here also, the Rotterdam Rules follow suit, and provide that the claimant has the right to institute proceedings against the carrier in the court or courts designated by an agreement between the shipper and the carrier (Art. 66.(b)), in addition to the courts listed in Article 66.(a).

Non-exclusive jurisdiction clauses are non-problematic and would not cause issues under the Hague-Visby Rules either, not only because the Hague-Visby

⁽¹⁵⁾ ECJ 11 July 2018, C-88/17, *Zürich Insurance – Metso Minerals / Abnormal Load Services*.

⁽¹⁶⁾ ECJ 4 September 2014, C-157/13, *Nickel & Goeldner Spedition / Kintra*.

Rules do not address jurisdiction, but also because non-exclusive jurisdiction clauses only add a further possibility and do not take away rights from the claimant.

Furthermore, both the Hamburg Rules (Art. 21.(5)) and the Rotterdam Rules (Art. 72.(1)) confirm that, once a dispute has arisen, the parties may agree to resolve it in any competent court. This, it would seem, is only a confirmation of a principle that is accepted in many legal regimes and thus would also apply today under the Hague-Visby Rules.

5.2. Exclusive jurisdiction clauses

Non-exclusive jurisdiction clauses are explicitly permitted by the Rotterdam Rules and are largely noncontroversial. In ocean carriage, however, the jurisdiction clauses used are generally *exclusive*. Their purpose is to restrict possible judicial proceedings to one single competent court.

Exclusive jurisdiction clauses are well known in many areas of the law, and their validity is, in general, accepted. A jurisdiction clause however must be a real agreement between two parties who consciously decide to submit their possible disputes to a court of their choice. In the EU, the Court of Justice has repeatedly stressed this requirement of a real consensus⁽¹⁷⁾. This is where jurisdiction clauses become problematic and contested in the ocean carriage context.

As long as jurisdiction clauses are invoked between the initial contract partners – shipper and carrier, owner and voyage charterer, etc. – they only give rise to the traditional issues that also arise in other areas (was there valid consent? is the clause formally valid? etc.). Bills of lading however are documents of title, which can be, or are even meant to be negotiated to third parties. When jurisdiction clauses are invoked against *third parties*, who did not initially negotiate or agree this choice of court, the required agreement becomes an acute question. This has been a highly contested issue since long, it still is a contested issue in case law today and will likely remain contested unless the issue is laid to rest by legislative intervention.

(17) ECJ 14 December 1976, C-24/76, *Estasis Salotti / RUWA*, at para. 7: “By making such validity subject to the existence of an ‘agreement’ between the parties, Article 17 imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated.”

ECJ 21 May 2015, C-322/14, *Majdoub*, at para. 30: “It follows that, like the aim pursued by the first paragraph of Article 17 of the Brussels Convention, ensuring the real consent of the parties is one of the aims of Article 23(1) of the Brussels I Regulation.”

See also ECJ 14 December 1976, C-25/76, *Segoura / Bonakdarian*; ECJ 6 May 1980, C-784/79, *Porta-Leasing / Prestige International*; ECJ 11 November 1986, C-313/85, *Iveco Fiat / Van Hool*; ECJ 10 March 1992, C-214/89, *Powell Duffryn*; ECJ 20 February 1997, C-106/95, *MSG / Gravieres Rhénanes*; ECJ 7 February 2013, C-543/10, *Refcomp / AXA*; ECJ 20 April 2016, C-366/13, *Profit Investment*; ECJ 7 July 2016, C-222/15, *Höszig / Alstom*; ECJ 28 June 2017, C-436/16, *Leventis – Vafeias / Malcon Navigation – Brave Bulk Transport*; ECJ 8 March 2018, C-64/17, *Saey Home & Garden*; ECJ 24 November 2022, C-358/21, *Tilman / Unilever*.

Under the Brussels I (recast) Regulation, the required agreement can only be proven in certain specific ways.

Within the EU, the way to *approach* the matter is today clear from the case law of the European Court of Justice – which is not to say that the ultimate outcome is always clear.

To start, a misunderstanding should be laid to rest. It is sometimes stated that the European legislator and the Brussels I Regulation are *in favour* of exclusive jurisdiction clauses, and that one of the reasons for the recast of the Brussels I Regulation was precisely to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics⁽¹⁸⁾. While this is correct, that is then taken as a stepping stone to (implicitly) argue that, when there is a jurisdiction clause, it must *always* be given effect, against any person or party that interacts with the agreement containing the jurisdiction clause or is aware of the existence of the jurisdiction clause. That, however, is most emphatically *not* the position of the European Court of Justice. The Court has repeatedly held that a jurisdiction clause only binds the parties to the agreement and that it cannot, as a general rule, be extended to third parties⁽¹⁹⁾. In *Refcomp*⁽²⁰⁾, a French property developer had bought, through the intermediary of another company, compressors for air-conditioning units from the Italian company Refcomp. The sales contract between Refcomp and the intermediary contained a jurisdiction clause in favour of the Italian courts. As the air-conditioners turned out to be defective, the property developer sued Refcomp and the intermediary before the French courts. Refcomp challenged the jurisdiction of the French courts, invoking the jurisdiction clause in its sales agreement. The Court of Justice held that Refcomp could not invoke its jurisdiction clause against the French sub-buyer, unless it could prove that this sub-buyer actually consented to the jurisdiction clause. In *Assens Havn*⁽²¹⁾, a carrier had taken out liability insurance with a UK insurer. The policy contained a jurisdiction clause in favour of the courts of England and Wales. The carrier was alleged to have caused damage to the port of Assens in Denmark. Since the carrier had gone into liquidation, however, Assens Havn sued the liability insurer directly before the Danish courts. The insurer challenged the jurisdiction of the Danish courts, invoking the jurisdiction clause in the policy. The Court of Justice held that the insurer could not invoke this clause against a victim of insured damage. In *Balta*⁽²²⁾, the Latvian company Grifs AG entered into a liability insurance policy with Balta. The policy contained an exclusive jurisdiction clause in favour of the Latvian courts. Afterwards, a wholly-owned subsidiary Lithuanian subsidiary of Grifs was held liable for negligence by the Lithuanian courts. The subsidiary then sued Balta before the Lithuanian courts. Balta contested the competence of the Lithuanian court, invoking the exclusive jurisdiction clause in the policy. The Court of Justice held that Balta could not invoke the jurisdiction clause against the subsidiary, which was not

⁽¹⁸⁾ See Preamble 22 to the Brussels I (recast) Regulation.

⁽¹⁹⁾ See ECJ 27 February 2020, C-803/18, *AAS Balta / UAB Grifs AG*, para. 31 and 41. See also ECJ 7 February 2013, C-543/10, *Refcomp / Axa*, para. 29; ECJ 21 May 2015, C-352/13, *CDC Hydrogen Peroxide*, para. 64.

⁽²⁰⁾ ECJ 7 February 2013, C-543/10, *Refcomp / Axa*.

⁽²¹⁾ ECJ 13 July 2017, C-368/16, *Assens Havn / Navigators Management (UK) Ltd.*

⁽²²⁾ ECJ 27 February 2020, C-803/18, *AAS Balta / UAB Grifs AG*.

an insurance professional and which had not consented to the jurisdiction clause. It is also noteworthy that the Court pointed out that in ‘large risk’ insurance (as was the case) the policyholder and/or insured are not necessarily economically weaker parties (which should therefore be protected), but that it would create a risk of legal uncertainty, contrary to the objective of the Brussels I (recast) Regulation, if it were assessed on a case-by-case basis whether a party is or is not economically weaker⁽²³⁾.

It should also be noted that a judgment given in violation of an exclusive jurisdiction clause must nevertheless be recognized in the other EU member states; recognition cannot be refused on the basis that the court that heard the case was not the chosen court. In *Gjensidige*⁽²⁴⁾, the Lithuanian company ACC had entered into a contract of carriage with Rhenus Logistics for the carriage of computer equipment from the Netherlands to Lithuania. This contract of carriage contained a jurisdiction clause in favour of the Lithuanian courts. When a shipment was stolen, however, Rhenus started proceedings before the Dutch courts, seeking a declaration that its liability was limited pursuant to the CMR convention. Some months after the start of the Dutch proceedings, ACC started proceedings before the Lithuanian courts, seeking (full) compensation for the loss. The Lithuanian court stayed its proceedings until the Dutch courts would have delivered a final judgment. The Dutch courts did eventually hand down a declaration that Rhenus’ liability was limited, and the question then arose whether the Lithuanian courts had to recognize this Dutch judgment, or could refuse recognition because Rhenus started proceedings in the Netherlands in violation of the jurisdiction clause it had agreed to. The Court of Justice held that the Lithuanian courts could *not* refuse to recognize the Dutch judgment. Section 7 (Prorogation of jurisdiction) of Chapter II is explicitly *not* included in the list of Article 45.(1).(e), and Article 45.(3) provides that ‘public policy’ (a ground to refuse recognition under Article 45.(1).(a)) does not include rules relating to jurisdiction. In the proceedings before the Court of Justice, ACC explicitly invoked the fact that the Brussels I (recast) Regulation is intended to enhance the effectiveness of choice-of-court agreements, and that its interests could be (or actually were) harmed by the disregard of the jurisdiction clause, since the case was now decided under Dutch law rather than under Lithuanian law⁽²⁵⁾. The Court of Justice did not accept either argument. The EU legislator, even if he did indeed intend to protect jurisdiction agreements, clearly chose not to include the disregard of a jurisdiction clause in the list of grounds to refuse recognition, and the fact that a case is heard under a different law cannot be regarded as a sufficiently serious breach of the right to a fair trial to justify refusal of recognition⁽²⁶⁾.

It is clear, therefore, that the case law of the European Court of Justice is certainly not to the effect that a jurisdiction clause is sacrosanct and must always be enforced, most certainly not as against third parties.

⁽²³⁾ ECJ 27 February 2020, C-803/18, *AAS Balta / UAB Grifs AG*, para. 42.

⁽²⁴⁾ ECJ 21 March 2024, C-90/22, *Gjensidige / Rhenus Logistics*.

⁽²⁵⁾ ECJ 21 March 2024, C-90/22, *Gjensidige / Rhenus Logistics*, para. 69-70.

⁽²⁶⁾ ECJ 21 March 2024, C-90/22, *Gjensidige / Rhenus Logistics*, para. 73 and para. 74-75.

With regard to third parties, the position of the European Court is clear. A distinction must be made depending on whether the third party succeeds to the rights and obligations of the shipper or not. If the third party succeeds to all rights and obligations of the shipper, then the third party is bound by the jurisdiction clause, provided that this clause was validly agreed between the shipper and the carrier (*Tilly Russ*⁽²⁷⁾). If on the other hand the third party does *not* succeed to all rights and obligations of the shipper, a jurisdiction clause that was agreed between the shipper and the carrier does not automatically ‘transfer’ to the third party, but only binds the latter if he himself has accepted the jurisdiction clause (*Coreck Maritime*⁽²⁸⁾). Similarly, in *Ryanair / DelayFix*⁽²⁹⁾, the European Court of Justice held that a jurisdiction clause in the contract of carriage between an air carrier and a passenger cannot be enforced against a collection agency to which the passenger has assigned the claim, unless this agency has succeeded to an original contracting party’s rights and obligations (para. 46-47). Earlier, in *CDC Hydrogen Peroxide*⁽³⁰⁾ (a non-carriage case) the Court had already held that a third party can only be bound by a jurisdiction clause if it has succeeded to an original party’s rights and obligations. The Court of Justice recently reconfirmed this approach in *Maersk / Allianz*⁽³¹⁾, and added that it is for the court seized with the case to decide whether or not the third party succeeds to the rights and obligations of the shipper (para. 55). Some EU Member States see the third party holder as succeeding to the shipper’s rights and obligations, others don’t.

The current reality therefore is that in some jurisdictions carriers are able to invoke jurisdiction clauses against third party holders, whereas in other jurisdictions they are unable to do so.

In this regard, the Rotterdam Rules truly innovate. In contrast with the other carriage conventions, the Rotterdam Rules explicitly deal with the issue of exclusive jurisdiction clauses in Article 67, distinguishing between the position of the parties to the contract (Art. 67.(1)) and the position of non-parties, i.e. third parties (Art. 67.(2)).

Opting in to the jurisdiction chapter would resolve the thorny issue of exclusive jurisdiction clauses invoked against third parties, thus leaving courts free to spend their time and resources on the merits of the case.

6. Conclusions

The original Hague Rules and the amended Hague-Visby Rules do not contain rules on jurisdiction. Judged against the circumstances and opinions at the time of drafting, this omission is understandable, but it does mean that the Hague (Visby)

⁽²⁷⁾ ECJ 19 June 1984, C-71/83, *Partenreederei ms Tilly Russ / Haven- en Vervoerbedrijf Nova*.

⁽²⁸⁾ ECJ 9 November 2000, C-387/98, *Coreck Maritime / Handelsveem*.

⁽²⁹⁾ ECJ 18 November 2020, C-519/19, *Ryanair / DelayFix*.

⁽³⁰⁾ ECJ 21 May 2015, C-352/13, *CDC Hydrogen Peroxide*, para. 65.

⁽³¹⁾ ECJ 25 April 2024, Joined Cases C-345/22 to C-347/22, *Maersk / Allianz Seguros y Reaseguros e.a.*

Rules fail to unify the law in this respect. In practice, this leads to a situation where jurisdiction is often contested. This results in (protracted) litigation on what is essentially a side issue, taking up time and resources of the courts which could be used more profitably on the merits of the case. Exclusive jurisdiction clauses can only be a solution if they were universally accepted as binding all parties involved, including third parties. This is currently not the case, and it is submitted that it is unrealistic to think or to expect that this will ever be the case.

By now, the mindset has changed and jurisdiction provisions in international conventions are no longer considered a rarity, an insurmountable hurdle to the ratification of conventions or a violation of the sovereignty of the States. Unification of the jurisdiction rules for ocean carriage along the lines of the other carriage conventions would be a real benefit to practice.

The (opt-in) jurisdiction chapter of the Rotterdam Rules offers ratifying States a realistic prospect to improve international uniformity, by introducing highly predictable jurisdiction rules, entirely in line with the jurisdiction rules that apply in other modes of transport and – for EU Member States – very similar to the jurisdiction rules that apply under the Brussels I (recast) Regulation. Opting in to the jurisdiction chapter will bring certainty and forestall wasteful litigation on jurisdiction issues, allowing courts to concentrate their efforts and resources on the merits of their cases.

EU Member States must request the Commission's permission to opt in to the jurisdiction chapter, as the EU already has its own rules on jurisdiction in the form of the Brussels I (recast) Regulation. In light of the case law of the European Court of Justice, as it developed since the signing of the Rotterdam Rules in 2009, it is now clear that the jurisdiction chapter is entirely compatible with the Brussels I (recast) Regulation and that the Commission could – and indeed *should* – allow EU Member States to opt in, as such an opt-in does not compromise the application of the Brussels I (recast) Regulation or its principles.