



## THE ROTTERDAM RULES: BETWEEN HOPE AND DISAPPOINTMENT

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**ABSTRACT.** *In September 2009, the UN Convention on Contracts for International Carriage of Goods Wholly or Partly by Sea —known as the Rotterdam Rules— was opened for signature. When it formally enters into force, the United Nations Commission on International Trade Law (UNCITRAL) will have a single, uniform text which governs all international sea cargo transport as well as multimodal transport contracts that include a sea leg. The present study analyses the challenges and problems which might arise in the application of the Rotterdam Rules, especially with regard to carrier liability.*

**KEY WORDS:** *Maritime transport law, Rotterdam Rules, liability systems.*

**RESUMEN.** *En septiembre de 2009 se abrió a la firma la Convención de Naciones Unidas sobre el Contrato de Transporte Internacional de Mercancías Total o Parcialmente Marítimo, bajo el nombre de Reglas de Rotterdam. Con su entrada en vigor se pretende contar con un texto único y uniforme. En el presente artículo se reflexiona sobre algunos problemas que las Reglas de Rotterdam pueden presentar, especialmente en el tema de la responsabilidad.*

**PALABRAS CLAVE:** *Transporte marítimo internacional, Reglas de Rotterdam, sistemas de responsabilidad.*

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## I. INTRODUCTION

After more than ten years of intense work on the issue, the UN Convention on Contracts for International Carriage of Goods Wholly or Partly by Sea—the so-called Rotterdam Rules—was adopted on December 11, 2008, at the sixty-third session of the General Assembly by resolution A/RES/63/122. In accordance with its Article 88 (1), the Convention was opened for signature by all States at Rotterdam, The Netherlands, on September 23, 2009, and thereafter at the UN Headquarters in New York.<sup>1</sup> Shipping thus seems to have a new uniform text and expectations have been high, but many voices have predicted its failure even before its opening for signature. There is no shortage of reasons for either viewpoint. On one hand, there is a conviction that adopting uniform standards for the modernization and harmonization of rules applicable to international carriage of goods that include a sea leg will promote legal certainty, improve the predictability and efficiency of international commercial transport operations and reduce legal barriers to international trade between all States. On the other hand, there is a fear that the slow progress towards increased limitations on the carrier's liability might lead to a fiasco similar to that of the Hamburg Rules. Implementing a new regime that has no real chance of contributing to uniformity will most probably generate even more confusion in international commerce, especially in the scope of liability as will be seen later in this note.

## II. BACKGROUND

Before the Rotterdam Rules, maritime transport was regulated by several, co-existing legal texts that gave way to a situation some authors have

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<sup>1</sup> Actual status of Convention as of October 26th, 2009 was 21 signatories: Armenia (Sept. 29, 2009), Cameroon (Sept. 29, 2009), Congo (Sept. 23, 2009), Denmark (Sept. 23, 2009), France (Sept. 23, 2009), Gabon (Sept. 23, 2009), Ghana (Sept. 23, 2009), Greece (Sept. 23, 2009), Guinea (Sept. 23, 2009), Madagascar (Sept. 25, 2009), Mali (Oct. 26, 2009), Netherlands (Sept. 23, 2009), Niger (Oct. 22, 2009), Nigeria (Sept. 23, 2009), Norway (Sept. 23, 2009), Poland (Sept. 23, 2009), Senegal (Sept. 23, 2009), Spain (Sept. 23, 2009), Switzerland (Sept. 23, 2009), Togo (Sept. 23, 2009), and the United States of America (Sept. 23, 2009). According to *Article 94. Entry into force*: “1. This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.”

described as a legal Tower of Babel.<sup>2</sup> To understand this assertion, it should be borne in mind that the first important legal manifestation on this matter were the so-called Hague Rules, put into force by the 1924 Brussels Convention for the Unification of Certain Rules of Law relating to Bills of Lading. While the scope of application of the Hague Rules is vast due to their ratification by a large number of states, the text in force in the different signatory states is not necessarily the same. The reason for this is the fact that, despite their initial widespread acceptance, they would soon be modified by two protocols: firstly, by the Visby Rules on February 23, 1968, and, secondly, the Protocol of December 21, 1979. These protocols were opened to signature not only by the parties who had ratified the Brussels Convention, but also by other states in order to achieve a wider acceptance of the text. The signature and ratification of these protocols would produce the accession to the Rules as a whole. As a consequence, there are states in which the Hague Rules are in force in their original version, while others apply the so-called Hague-Visby Rules (those that have ratified the Protocol of 1968) and yet others, like Spain, use the Hague-Visby Rules as amended by the 1979 Protocol.

In addition to the versions of the Hague Rules, we can find the 1978 UN Convention on the Carriage of Goods by Sea, commonly known as the Hamburg Rules. Although participation of UNCITRAL<sup>3</sup> has guaranteed success in other areas where high degrees of uniformity have been reached through the promotion of the UN, its intervention in the field of maritime transport was not as positive. The underlying idea of this initiative was that of replacing the Hague-Visby Rules so that the ratification of these new rules would be subject to a former denunciation of the Brussels Convention and the subsequent Protocols. The content of the *Hamburg Rules* was considered adequate<sup>4</sup> since it envisaged a fair distribution of risks between the contracting parties—at least when compared to the *Hague Rules* that awarded the carrier a privileged position. However, this fair distribution of risks has led to the fact that the Hamburg Rules, despite their technical superiority, have been ratified by only a small number of States that have little importance in international shipping. Although the Hamburg Rules finally entered into force in 1992, as of today—almost twenty years later—only 34 states have ratified the Rules (one third of which are landlocked countries),<sup>5</sup> and neither the big trading powers nor the countries with the

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<sup>2</sup> See CLIVE M. SCHMITTHOFF, EXPORT TRADE. THE LAW AND PRACTICE OF INTERNATIONAL TRADE (1990).

<sup>3</sup> United Nations Commission on International Trade Law (UNCITRAL).

<sup>4</sup> It is considered adequate mainly for UNCITRAL and the Commission members who drew up the text.

<sup>5</sup> The current status of ratifications of the Hamburg Rules can be found at the following address: [http://www.uncitral.org/uncitral/es/uncitral\\_texts/transport\\_goods/Hamburg\\_status.html](http://www.uncitral.org/uncitral/es/uncitral_texts/transport_goods/Hamburg_status.html).

largest commercial fleets seem to be interested in joining the instrument. Created to establish uniform rules on international shipping of goods, the Hamburg Rules have thus contributed to expanding the legal Tower of Babel.<sup>6</sup>

Only four years after the entry into force of the Hamburg Rules, UNCITRAL recognized that the intended international uniformity had not been achieved and that certain fundamental problems had yet to be solved. At its twenty-ninth session, in 1996,<sup>7</sup> the Commission was informed that existing national laws and international conventions had left significant gaps regarding issues like the functioning of bills of lading and sea waybills, the relation of those transport documents to the rights and obligations of both the seller and the buyer of the goods and to the legal position of the entities that financed a party to the contract of carriage.<sup>8</sup> Some States had provisions on

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<sup>6</sup> The precepts contained in the Hamburg Rules have received a positive evaluation. In general on the contents of the Hamburg Rules, among others, see José Antonio Gómez Segade, *El transporte marítimo de mercaderías: de las Reglas de la Haya a las Reglas de Hamburgo*, 156 RDM 229-230 (1980); WILLIAM ERNEST ASTLE, *THE HAMBURG RULES* (1981); Rafael Matilla Alegre, *Reglas de Hamburgo: principios fundamentales*, LXXXII RGLJ 458 (1981); FERNANDO SÁNCHEZ CALERO, *LAS REGLAS DE HAMBURGO SOBRE EL CONTRATO DE TRANSPORTE MARÍTIMO DE MERCANCIAS. UNA VALORACIÓN CRÍTICA* (1981); FERNANDO SÁNCHEZ CALERO, *EL CONTRATO DE TRANSPORTE MARÍTIMO DE MERCANCIAS. REGLAS DE LA HAYA-VISBY 57-60* (2000); José María Alcántara, *Las Reglas de Hamburgo ante su inminente entrada en vigor. Una valoración actualizada*, 91 DN 398-411 (1990); JOSÉ MARÍA RUIZ SOROA ET AL., *MANUAL DEL TRANSPORTE MARÍTIMO 368-371* (2nd ed., 1997); Rafael Illescas Ortiz, *Las Reglas de Hamburgo (Convenio de las Naciones Unidas sobre el Transporte Marítimo de Mercancías, 1978)*, in *DERECHO UNIFORME DEL TRANSPORTE INTERNACIONAL 67-77* (Agustín Madrid Parra ed., 1998). States that hold important merchant fleets cling to the Hague-Visby Rules, thus contributing to increasing the lack of uniformity as regards the international regulation of maritime transport of goods (in this sense, Juana Pulgar Ezquerro, *Especialidades del transporte de mercancías en contenedores*, 247 RDM 37-73 (2003), who, among others, points to the privileged carrier liability system under the Hague-Visby Rules as one of the main obstacles when establishing a uniform regulation).

<sup>7</sup> *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*.

<sup>8</sup> In particular, debates about whether to undertake the development of a new maritime convention and its scope of application took place during the UNCITRAL's 29th to 35th session periods. Initially, the proposal raised some misgivings, in the fear that a new international convention on maritime transport of goods would become a third tool in contention (see the UNCITRAL report on the work of its 29th session period, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17, A/51/17*, at 210 to 214). These misgivings were assuaged by the fact that certain aspects of maritime transport of goods are not covered by the Hague or the Hamburg Rules. It was argued that the new instrument could center on the regulation of these issues, without having to face the controversial issue of carriers' liability (*id.* at 214). UNCITRAL's response consisted in instructing the Secretariat to coordinate the work of gathering information, ideas and opinions regarding the practical problems and possible solutions from all interested organizations (*id.*, pr. 215), among which the WCC played an active role from the start. Following its 29th Session in 1996, UNCITRAL requested that the CMI (as well as other organiza-

those issues, but the fact that these provisions were disparate and that many States lacked them constituted an obstacle to the free flow of goods and increased the cost of transactions. The growing use of electronic means of communication in the carriage of goods further aggravated the consequences of those fragmentary and disparate laws and created the need for uniform provisions addressing issues regarding the use of new technologies.

Faced with these facts, the project to develop a new instrument was launched in 1996, based on a draft convention worked out by the *Comité Maritime International* (CMI). The plan was to incorporate new topics related to technical and commercial developments rather than adapting the existing Hague-Visby or Hamburg Rules. During its 34th session in 2001, the Commission established the Working Group III (Transport Law) for the task of preparing, in close collaboration with other international organizations, a new legislative instrument on certain issues regarding the international carriage of goods, such as the scope of application of the new instrument, the period of the carrier's liability, the carrier's obligations, the carrier's liability, the shipper's obligations and transport documents. The Working Group began its deliberations on a draft instrument on the carriage of goods [wholly or partly by sea] during its 9th session in 2002. After years of difficult negotiations, the final version of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was approved on July 3, 2008, at the 41st session.

### III. TYPES OF CONVENTIONAL LIABILITY SYSTEMS

There is no international convention for the carriage of goods in general. Each mode of transport has one or several international conventions that specifically regulate the provision of international transport by sea, rail, road or air. The degree of heterogeneity depends on the liability regime (in a broad sense) the carrier is subject to.

In this scenario, the international regulation of maritime transport stands out because different regimes are in force simultaneously. Compared with other modes of transport, the sea carrier's liability is less severe especially in terms of the basis of liability, the catalogue of exoneration clauses or the

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tions) gather information about current practices and laws in the area of international carriage of goods by sea, to establish the need for uniform rules in the areas in which no such rules existed. The UNCITRAL noted that "existing national laws and international conventions left significant gaps regarding issues such as the functioning of the bill of lading and sea waybills, the relation of those transport documents to the rights and obligations between the seller and the buyer of goods, and to the legal position of the entities that provided financing to a party to the contract of carriage." See more in <http://comitemaritime.org/draft/travaux.html>.

monetary limits on compensation for loss, damage or delay in delivery of the goods.

One of the core issues to be considered in any attempt to produce a new text that aims at regulating international multimodal transport is that of determining the system of liability to be adopted. The main existing models are:<sup>9</sup>

- 1) “Uniform” Liability System: The multimodal transport operator is subject to a single liability format, regardless of the leg in which the event that gives rise to liability has occurred. Irrespective of where the damage, loss or delay may have originated, the carrier is held responsible under the same regime.<sup>10</sup>
- 2) “Network” Liability System: This system is based on the idea that the shipper should be considered as having concluded several “unimodal” contracts of carriage with each of the carriers that actually perform the transport operations. Thus, the liability of the multimodal transport operator is governed by the rules applicable to the transport leg in which the event that gives rise to liability has taken place. Obviously, a uniform system needs to be applied in cases in which locating the damage is impossible. In practice, implementing a network regime entails the nonexistence of a uniform liability system, resulting in a very high degree of legal uncertainty regarding these issues.<sup>11</sup>
- 3) “Modified” Liability System: Neither the “Uniform” nor the “Network” liability systems can be found in their purest form. It has become common to choose intermediate solutions like the modified liability system, according to which there is no block reference for unimodal conventions, but certain precepts are applied (usually those referring

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<sup>9</sup> In this sense see Aníbal Sánchez Andrés, *El transporte combinado de mercancías*, RDM 82 (1975); CARLOS GÓRRIZ LÓPEZ, LA RESPONSABILIDAD EN EL CONTRATO DE TRANSPORTE DE MERCANCÍAS (CARRETERA, FERROCARRIL, MARÍTIMO, AÉREO Y MULTIMODAL) 606 (2001); Carlos Górriz López, *El contrato de transporte multimodal de mercancías*, in EL CONTRATO DE TRANSPORTE 377 (José Luis Concepción Rodríguez ed., Consejo General del Poder Judicial, 2003); Francisco Carlos López Rueda, *La consecución de un régimen uniforme para el transporte multimodal internacional: problemas y soluciones*, in ACTAS DEL I CONGRESO INTERNACIONAL DEL TRANSPORTE: LOS RETOS DEL TRANSPORTE EN EL SIGLO XXI 759 (Fernando Martínez Sanz ed., 2005); Alikí Kiantou-Pampouki, *The Liability of Multimodal Transport Operator*, in MULTIMODAL TRANSPORT 28 (Emile Bruylant, 2000).

<sup>10</sup> Although this model seems to be the most coherent system, it has not met with success since it has not been adopted by any international organization or in any standard document.

<sup>11</sup> The network liability system has not been very well received by the carriers as it is primarily defended by traders because of the possibility of deriving greater benefits from “unimodal” liability systems. See KIANTOU-PAMPOUKI, *supra* note 9, at 29.

to the basis of the carrier's liability and its limitations). The UNCTAD/ICC rules reflect a modified network system.<sup>12</sup>

#### IV. THE ROTTERDAM RULES

While not every door-to-door operation requires the development of a uniform text to regulate legal issues related to multimodal transport, whenever a future convention is expected to apply to any international carriage that includes a sea leg, multimodality is an issue to be taken into account. The typical problems associated therefore need to be solved: which liability regime will be applied since the transport operation will be carried out with recourse to different transport modes that are, in principle, subject to different legal regulations. The original plan of the UNCITRAL Working Group III on Transport Law was to produce a new agreement capable of putting an end to the disparity and lack of harmony that characterized the legal environment of international carriage of goods by sea.<sup>13</sup> However, if the challenge were that of modernizing existing legal regulations, the new text should, rather than coordinate the peculiarities of maritime transport with regulations for the different modes involved, try to soften these very partic-

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<sup>12</sup> In order to fill gaps existing in the various standard contract terms applying in this field, the UNCTAD/ICC rules (1992) were promulgated. These rules follow the liability system of the Haya-Visby Rules as amended in 1979, and apply as such when a multimodal contract involves carriage of the goods by sea or inland waterway. When that contract does not have a sea leg but a road leg in addition to another mode of carriage, the rules of the CMR (Convention on the Contract for the International Carriage of the Goods by Road (1956), as amended by the Geneva Protocol in 1978) apply. This approach is internationally known as a *modified system*. However, the modified system does not solve all conflicting interests and the network system seems to still be attractive in the shipping industry, DAVID GLASS (2006). "Meddling in the multimodal muddle? - a network of conflict in the UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly] [by sea]." LLOYDS MARITIME AND COMMERCIAL LAW QUARTERLY (2006) 307-334.

<sup>13</sup> See Resolution 63/122, adopted by the General Assembly: United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. The text affirms that: "*The General Assembly [...] Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade [...] *Concerned* that the current legal regime governing the international carriage of goods by sea lacks uniformity and fails to adequately take into account modern transport practices [...] *Convinced* that the adoption of uniform rules to modernize and harmonize the rules that govern the international carriage of goods involving a sea leg would enhance legal certainty, improve efficiency and commercial predictability in the international carriage of goods and reduce legal obstacles to the flow of international trade among all States [...] 2°. *Adopts* the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, contained in the annex to the present resolution."

ular features by taking advantage of the opportunity to regulate door-to-door operations. It has been said<sup>14</sup> that the new text was to be an authentic maritime—and not merely multimodal—convention that, when delimiting its scope of application, should emphasize the importance of the sea leg throughout the entire transport operation. Thus, operations carried out with recourse to other modes of transport would be governed entirely by the new convention. The main issue is that the converging interests in maritime transport are more difficult to reconcile with those of any other non-maritime operator. By creating a single document for all transport operations involved, the aim is to award homogeneous protection to the owner of the goods during the whole operation, without excessively increasing rigidity in terms of the sea carrier's liability to prevent the risk of repeating the experience of the Hamburg Rules.

### 1. *Reasons for change*

Most of today's global trade operations are carried out according to the Hague-Visby Rules, but these rules are only a part of the law in force. Well over a quarter of the trade operations are still subject to the older Hague Rules and over thirty countries<sup>15</sup> have ratified the Hamburg Rules. To further complicate matters, not all countries adhere to only one of these three regimes.<sup>16</sup> Each of the elements that makes up this irregular patchwork is part of the "existing law" and should be taken into account in an in-depth comparative study. Certain aspects of the Convention will give way to more significant changes in some countries than in others. To a great extent, the Convention is mainly based on the Hague-Visby and Hamburg Rules, incorporating significant elements from both sets of rules. From a global point of view, changes to the existing law proposed by the Convention are not earth shattering: they are deliberately evolutionary, not revolutionary.

The focus has generally centered on updating and modernizing the existing legal regimes that govern the carriage of goods, filling some of the gaps that have been identified in practice over the years and harmonizing the

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<sup>14</sup> Nieves López Santana, *El papel de los auxiliares del porteador en las operaciones de transporte marítimo de mercancías concertadas de puerta a puerta y su tratamiento en el proyecto de Convenio sobre el Transporte de Mercancías Total o Parcialmente por Mar*, in ASPECTOS JURÍDICOS Y ECONÓMICOS DEL TRANSPORTE 1601-1632 (Fernando Martínez *et al.* eds., Universidad Jaume I, 2007).

<sup>15</sup> All be it, these countries represent a small sector of world trade.

<sup>16</sup> China—one of the world's largest trading nations—has a national maritime code that incorporates elements of both the Hague-Visby and the Hamburg Rules (along with domestic elements that are unique to Chinese law). Even the Nordic countries, which have long been major partners in the international effort to achieve uniformity in this field, have incorporated significant elements of the Hamburg Rules into their domestic versions of the Hague-Visby Rules.



law in force when possible. Several proposals for dealing with more important aspects (or those in which harmonization would have been difficult) were discarded in order to allow the Working Group to complete the project and address the core issues.<sup>17</sup>

Updating and modernizing is particularly necessary when a set of rules drafted over 80 years ago still regulates an industry that has drastically changed over that period. The Visby Amendments are over 40 years old and only made a few changes to the original Hague Rules. Even the Hamburg Rules are over 30 years old. The draftsmen of the early 1920s could not anticipate the container revolution, and not even the authors of the Visby and Hamburg Rules anticipated the impact the container revolution would eventually have on modern commercial practices—including the incredible growth of multimodal shipments, the increasing prominence of transport intermediaries and the potential for new technologies (such as electronic commerce).

Even if the existing law adequately addressed the requirements of modern industry, different regimes address those requirements in different ways, thus creating a need for greater harmonization. The benefits of international uniformity in this field are well-known and widely accepted, but some of the world's largest trading nations have nevertheless permitted their laws to diverge from international norms. The Rotterdam Rules offer the world community an opportunity to reclaim the uniformity it enjoyed immediately before the Second World War.

Perhaps the most visible of these changes has been the elimination of the severely criticized “nautical fault” exception,<sup>18</sup> but even this high-profile decision does not pose a “change to the existing law” for those countries that have adopted the Hamburg Rules. However, a number of other provisions in the Convention, some of which are critical, will also change the law to make it better suited to meet the needs of the industry as it enters the 21st century.

## 2. *Content of change*

Perhaps the most significant innovation of the Convention is its applicability to door-to-door operations. The Hague and Hague-Visby Rules apply only on a tackle-to-tackle basis,<sup>19</sup> while the Hamburg Rules extend cov-

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<sup>17</sup> For instance, originally, see Doc. A/CN.9/WG.III/WP.21 (2002), Chapter 9 was dedicated to Freight however, in A/CN.9/WG.III/WP.56 (2005), the “Freight” chapter is eliminated.

<sup>18</sup> Article 4(2) (a) of the *Hague and Hague-Visby Rules* excuses the carrier from liability for any “[a]ct, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.”

<sup>19</sup> “Tackle to tackle” referred to a period commencing when the tackle was hooked on to cargo for loading until the time the tackle was unhooked for delivery.

erage slightly, based on port-to-port criteria. Such limited coverage may have made sense in the days when each segment of a journey was generally governed by its own contract of carriage.<sup>20</sup>

In today's world, however, when contracts of carriage are typically carried out on a door-to-door basis, it makes much more sense for the governing law to follow the commercial practice. Thus, the Convention makes the carrier responsible for the entire contractual period of carriage. This fundamental change in the law was initially controversial, but it has been the only way to accomplish the most basic goals of a uniform international legal regime in this field: to obtain certainty, predictability and uniformity, a single legal regime must govern the entire performance of the contract. In today's practice, parties often agree to extend the maritime regime inland, but such a contractual extension only takes place with the force of a contract. The Convention will put into action a uniform legal regime with the force of law.

However, it is important to understand that the Convention is not a full multimodal instrument. To be applied, there must not only be a sea leg, but it must be an international one. The Convention can thus best be characterized as a "maritime plus."<sup>21</sup>

The Convention also recognizes that in some parts of the world (particularly in Europe), there are regional conventions that govern inland transport. As the countries involved tend to champion the preservation of these regional regimes, the Convention adopts a limited network principle so that the extent of the contracting carrier's liability for inland damage (when it can be localized) will be governed by the regional convention that would apply if a separate contract had been made for the inland leg. Although this approach undermines international uniformity and predictability, the Working Group concluded that it constituted a practical necessity.

As a general rule, the Hague and Hague-Visby Rules apply to outbound shipments *from* a contracting State. In contrast, the Hamburg Rules apply to both inbound and outbound shipments to or from a contracting State. The Convention follows the Hamburg Rules, thus changing the existing laws in many countries.

Another important reform is the Convention's revised treatment of the parties' freedom of contract.<sup>22</sup> Although this change has also been among the more controversial ones, it is still *evolutionary* rather than *revolutionary*.

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<sup>20</sup> See Section III of this paper.

<sup>21</sup> When the bill of lading involves different modes of transport, one of which being maritime transport, all parts of the contract shall be subject to the Rotterdam Rules, including its liability regime, even if the damage has occurred in the non-maritime leg. This is why we call this a "maritime plus" regime.

<sup>22</sup> According to Michael F. Sturley, "The UNCITRAL Carriage of Goods Convention: Changes to Existing Law" in *UNCITRAL Draft Convention on Contracts for the Int. Carriage of Goods Wholly or Partly by Sea*, 54-263 CMI YEARBOOK 2007-2008.

The Hague, Hague-Visby, and Hamburg Rules already permit freedom of contract between the immediate parties to a transaction in certain situations (particularly for contracts of carriage under charterparties). The Rotterdam Rules extend this freedom of contract to volume contracts,<sup>23</sup> but achieves greater uniformity by bringing these contracts under the new regime, at least on a default basis. In other words, shipments under volume contracts will be subject to the Convention unless the parties take the affirmative step of explicitly contracting not to apply the Convention. Under existing law, shipments under charterparties are routinely subject to the Hague or Hague-Visby Rules, but only because the parties take the affirmative step of contracting the rules into coverage.

Other developments of the rules are the chapters on jurisdiction and arbitration. These chapters are based directly on the corresponding chapters of the Hamburg Rules, and provide some additional protection for carriers (particularly in the context of volume contracts). As a result, these chapters will include some changes to existing law even in countries that have adopted the Hamburg Rules. The Hague and Hague-Visby Rules do not address jurisdiction or arbitration at all. Therefore, the existing law in most countries must be found in domestic legislation or national jurisprudence. As some members of Working Group III felt strongly about the need to address jurisdiction and arbitration while other members felt strongly about preserving inconsistent domestic law, these subjects were among the most controversial ones during the negotiations.<sup>24</sup>

The model seeks to provide the claimant with similar protection to that given in Article 22 of the Hamburg Rules.<sup>25</sup> Thus, any arbitration clause in

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<sup>23</sup> *Article 1.2* defines “Volume contract” as “a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.”

<sup>24</sup> Matters were further complicated by the need to involve the European Commission, which has the exclusive powers to negotiate this issue for European Union member countries. In the end, it was possible to reach a compromise by making the jurisdiction and arbitration chapters optional. A nation may ratify the Convention without accepting these two chapters, which will bind only those countries that explicitly declare their intention to be bound by them.

<sup>25</sup> *Article 22. Arbitration*. 1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.

2. Where a charter-party contains a provision that disputes arising there under shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.

3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

a transport document drawn up unilaterally by the carrier does not become an exemption clause in its favor.

Recourse to ordinary arbitration courts shall be open under the conditions laid down in Article 68.<sup>26</sup> There is, however, a problem because —according to Definition 29 of Article 1—<sup>27</sup> the competent court must be situated in a Contracting State. Therefore, any one of the four options the claimant can choose from must be situated in a Contracting State. Thus, the court that declares the arrest of a vessel only has jurisdiction over the substance of the matter if it is situated in a Contracting State of the Convention. It would have been desirable to establish that all the rules in the Convention regarding the choice of court were to be understood as exclusive jurisdiction, without admitting any doubt created by contractors.<sup>28</sup>

What are the limits of liability? The answer to this question is critical, and for many countries that protect users' interests it is the principal factor taken into account when deciding whether or not to adopt the Convention. All transport conventions contain limitations of the compensation to be paid by the carrier. The Hague Rules established the limitation at 100 pounds sterling, gold value, per package or unit. In the 1968 Visby Protocol, limits were set at 10,000 Poincaré gold francs per package or unit, or

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(a) a place in a State within whose territory is situated: (i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or (ii) 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 (iii) the port of loading or the port of discharge; or

(b) any place designated for that purpose in the arbitration clause or agreement.

4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

5. The provisions of paragraphs 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.

6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.

<sup>26</sup> *Article 68. Actions against the maritime performing party:* The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:

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

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

<sup>27</sup> *Article 1.29:* "Domicile" means (a) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation or central registered office, whichever is applicable, (ii) central administration or (iii) principal place of business, and (b) the habitual residence of a natural person.

<sup>28</sup> This is the same opinion found in José María Alcántara, *La Convención de Naciones Unidas sobre Transporte de Mercancías Total o Parcialmente por Mar: un instrumento neocon sobre responsabilidad del porteador*, in XIII CONGRESO DE DERECHO MARÍTIMO, INSTITUTO IBERO-AMERICANO DE DERECHO MARÍTIMO (November 10-12, 2008).

30 gold francs per kilogram of goods lost or damaged, whichever is higher. With the introduction of SDR<sup>29</sup> in the 1979 Protocol, the Visby limits were fixed at 666.67 SDR per package or 2 SDR per kg. Meanwhile, the Hamburg Rules raised the limits to 835 SDR per package or 2.5 SDR per kg, whichever is higher. Finally, the 1980 Multimodal Convention<sup>30</sup> —which has yet to enter into force— raised the limits to 920 SDR per package or 2.75 per kg. In its Article 59,<sup>31</sup> the Rotterdam Rules adopt higher limits than those provided for in the Hamburg Rules, that is, 875 SDR per package or unit or 3 SDR per kg, whichever is higher. As in the case of other conventions, when the shipper has made a declaration of value in the transport document (B/L *ad valorem*), compensation will be paid up to this amount.

Notwithstanding the above, it should be noted that, according to Article 80,<sup>32</sup> special rules for “volume contracts” can be agreed upon by the con-

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<sup>29</sup> *Article 59. 3.* The unit of account referred to in this article is the Special Drawing Right (SDR) as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgment or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

Currently, 1 SDR is equivalent to 1.12 EUR (February 2010) or 1.53 USD (February 2010).

<sup>30</sup> United Nations Convention on International Multimodal Transport of Goods, established in Geneva on May 24, 1980.

<sup>31</sup> *Article 59. Limits of liability. 1.* Subject to articles 60 and 61, paragraph 1, the carrier’s liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

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

<sup>32</sup> *Article 80. Special rules for volume contracts. 1.* Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.

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

tracting parties without being subject to the rules of the Convention. Thus, the parties are able to fix lower limits for this specific type of traffic than those established by the Convention.

## V. CONCLUSIONS

This convention is the result of extensive and, at times, difficult international negotiations. Seeking consensus inevitably leads to compromises and a delicate balance between different viewpoints, legal traditions and interest groups. The compromises reached at international conferences often produce texts with a certain degree of ambiguity or deliberate silence, something outsiders often fail to notice.<sup>33</sup> The Rotterdam Rules are no exception

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

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

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

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

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

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

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

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

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

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

<sup>33</sup> Roy Goode, *Reflections on the Harmonization of Commercial Law*, 1 UNIFORM L. REV. 54, 73 (1991) (stating that "those who pick to pieces the open texture or verbal infelicities of an international convention rarely pause to consider how, when legislation prepared in a single legal system is generally so verbose, obscure and generally badly drafted, one can reasonably expect more of the product of many hands drawn from widely differing legal systems with different cultures, legal structures, and methods of legal reasoning and decision making, entailing maximum flexibility, co-operation and compromise").

to this general rule. International conventions also reflect the time at which they were negotiated.

Today's world is very different from the world at the time the Hague Rules and even the Hamburg Rules were negotiated.<sup>34</sup> The complexity of the Convention, one of the most common complaints made by innocent readers, is partly due to the efforts to solve every possible issue as explicitly as possible. It would be unfair to criticize the complexity of the text, because it comes from the complexity of the issues themselves, rather than from poor drafting. Given the value of a comprehensive regime for international carriage, we believe<sup>35</sup> that this is the price we have to pay.

Besides the issues mentioned above (in particular, the increase of the limits of liability and a modifiable decrease in volume contracts), one of the most remarkable innovations brought about by the Rotterdam Rules is the extension of the claim period to two years. Moreover, the Convention seems to have returned to the first quarter of the twentieth century, in terms of liability of the carrier and burden of proof (not to mention the shipper's obligation to claim). Taking into account the mentioned innovations, modernity and technical developments in the field of electronic recording, the new instrument can, in my opinion, be classified as neoconservative, a style certainly prevalent among big shipping companies, major terminal operators, exporters and large multinational trading companies.

All in all, the future of the Convention remains unclear, but if it is finally ratified by a sufficient number of countries and attains an acceptance similar to that of the Hague-Visby Rules, it should definitely produce the desired international uniformity, regardless of the critical observations offered here. It is difficult to predict whether this Convention will become the dominant international liability regime for maritime carriage.<sup>36</sup> However, provided that the United States, China, and a few other important trading nations ratify the Convention in a few years time, it is likely to become a huge success; if not, it will end up in the UN cemetery for dead conventions.<sup>37</sup>

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<sup>34</sup> Ownership of the international merchant fleet has changed dramatically in the few last decades. Although many European countries still maintain their position as maritime powers, ten of the world's twenty largest containership operators come from countries in the Far East.

<sup>35</sup> See also Fujita Tomotaka, *The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implications*, 44 TEXAS INTERNATIONAL LAW JOURNAL 349-373 (2009).

<sup>36</sup> Although the Convention has been signed by 21 States (see *supra* 1), it cannot yet be assured that the *Rotterdam Rules* will eventually replace the existing texts. This is because, although it has been signed by 21 States, including the U.S., the *Rotterdam Rules* have not been *ratified* by any State. Article 94 of the Convention states: "1. This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of *ratification, acceptance, approval or accession.*"

<sup>37</sup> Johan Schelin, *The UNCITRAL Convention on Carriage of Goods by Sea: Harmonization or De-Harmonization?*, 44 TEXAS INTERNATIONAL LAW JOURNAL 327 (2009).