

Madeleine Martinek\*

## The Rotterdam Rules – Sinking Ship or Maiden Voyage?

### Abstract

The existing legal chaos of maritime transport regimes with outdated provisions in all the instruments has incited the project of creating a modern, global convention for maritime carriage of goods: The Convention on the Contract of International Carriage of Goods Wholly or Partly by Sea (so called Rotterdam Rules).

This paper seeks to give a description of the background and history of the Rotterdam Rules. It emphasizes the importance of uniformity of rules and illuminates the status quo of the existing old-fashioned legal framework. By focusing on the content of the Convention the paper concerns itself with the question whether the Rotterdam Rules are likely to achieve harmonization across the global trading environment of the 21st century.

---

\* The author is a third year law student at the University of Heidelberg and student assistant to *Professor Dr. Dr. h. c. Herbert Kronke* at the Institute of Foreign and International Private and Business Law. This paper was written for the seminar on “Transnational Commercial Law” conducted by *Professor Kronke*.

## I. Introduction – The state of the art

### 1. Importance of sea carriage – The need for uniform rules

“Shipping is truly the lynchpin of the global economy. Without shipping, intercontinental trade, the bulk transport of raw materials and the import and export of affordable food and manufactured goods would simply not be possible.”<sup>1</sup> This statement clearly expresses the significance of sea carriage in today’s global world: About 90 % of world trade is carried by the international shipping industry on some 50,000 merchant ships trading internationally, transporting every kind of cargo.<sup>2</sup> Not only the increasing industrialisation but also advances in technology have made shipping an efficient and expeditious mode of transport. Due to shipping being a global industry, rules must also be international, meaning widely accepted in order to guarantee legal certainty and uniformity, thus reducing conflicts of rules which would otherwise demand a variety of insurances at a growing expense and cause confusion and an increase in litigation.<sup>3</sup> A fragmented set of rules, dominated by single national legal regimes hinders worldwide trade such as shipping. Particularly in the field of sea carriage, there is a compelling need in practice for uniform rules regarding the liability system and legal certainty – a precondition for the success of a uniform regulation.<sup>4</sup> Taking into consideration that regionalism constitutes an impediment of harmonization of legal systems, internationally applicable rules are of vital importance to all stakeholders and international trade at large in order to achieve the objective of sustainable mobility and transport. The international trade also comprises the contract of carriage by sea. This is a contract entered into by a carrier (may be a shipowner) and a shipper (who usually delivers the goods to the carrier) for the purpose of transporting goods from one place to another by sea.

Evolving from an original initiative of the Comité Maritime International (CMI), Working Group III (Transport Law) of the United Nations Commission on International Trade Law (UNCITRAL) has embarked on the creation of a new convention called “United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea”, known as the Rotterdam Rules (RR). It is recognized that the RR to a great extent achieve modernization and uniformity in the field

1 Opening address by *Mitropoulos* World Maritime Day Parallel Event, online available at: [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=1028&doc\\_id=5415](http://www.imo.org/Newsroom/mainframe.asp?topic_id=1028&doc_id=5415).

2 See e. g. *International Maritime Organization* International Shipping and World Trade, p. 7, online available at [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D26834/InternationalShippingandWorldTrade-factsandfiguresfinal26October2009\\_.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D26834/InternationalShippingandWorldTrade-factsandfiguresfinal26October2009_.pdf).

3 Cf. *International Chamber of Shipping* The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The “Rotterdam Rules”) – A Position Paper by the International Chamber of Shipping, p. 1, online available at: [http://www.uncitral.org/pdf/english/texts/transport/rotterdam\\_rules/ICS\\_PositionPaper.pdf](http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/ICS_PositionPaper.pdf).

4 *Li* Reunification of Certain Rules Relating to Sea Transport Documents: Some Observations on the UNCITRAL Draft Instrument on Transport Law Unif. L. Rev. 2007, 121 (123); *Sturley* Uniformity in the Law Governing the Carriage of Goods by Sea JMLC 1995, 553 (559).

of maritime carriage which indicates that the Rules might – as a successful uniform global regime for maritime transport – enjoy a “maiden voyage”. However, general criticism concerning the complexity and some doubtful provisions of the Convention remain.

In order to assess the RR in a differentiated way, it has to be clarified whether the RR are to experience a “maiden voyage” or whether they are doomed to fail as a “sinking ship”.

## 2. Existing international rules of maritime carriage

The complex background of the RR can best be understood if one takes a closer look at the long path of evolution from The Hague to Rotterdam via Hamburg. It shows that maritime transport law is internationally at least partly unified by two sets of International Conventions: By the so-called Hague Rules, the Brussels Convention of 1924, revised and amended by the so-called Visby Rules, the Brussels Protocol of 1968 on the one hand and the so-called Hamburg Rules, the UN Convention of 1978, on the other. Due to the fact that two of the most crucial areas of transport law are insurance and a shipper’s, carrier’s, or intermediary’s exposure to liability, it should be noted that the international treaties governing international transport aim to achieve a balance between the interests of shipowners and those of cargo owners: Such a balance can be realized by firstly keeping the shipowner’s fault-based liability on a decent level in order to prevent a tremendous rise in insurance costs which would again increase the freight costs, secondly, by allocating the burden of proof and, thirdly, by increasing the limits of liability.<sup>5</sup>

### a) Hague and Hague-Visby Rules

The idea to restore unification to the field of maritime carriage and transportation law was first realized in the form of the Hague Rules which soon became a general scheme for basic obligations and responsibilities of the shipper and ocean-carrier for goods covered under a bill of lading.<sup>6</sup> These rules were the result of widespread dissatisfaction among shippers and their insurers with arbitrary restrictions imposed by carriers to limit their liability in case of loss of, or damage to, cargo.<sup>7</sup> This also shows the unequal bargaining power between carrier and shipper. Despite their high level of international acceptance (70 states are party to the Hague Rules), they have not been uniformly implemented or applied and do not adequately take into account modern

5 See e. g. *Si/Li* The New Structure of the Basis of Liability for the Carrier, p. 9, online available at: <http://www.rotterdamrules2009.com/cms/uploads/Final%20Paper%20of%20Prof%20Si%20and%20Li%20for%20the%20Rotterdam%20Rules%202009%20Colloquium.pdf>.

6 Cf. *Herber* Seehandelsrecht 1999, p. 308 ff.

7 *Reynolds* The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules, p. 16 (18 f.), online available at: <http://www.austlii.edu.au/au/journals/ANZMLJ/1990/2.pdf>; *von Ziegler* Main concepts of the new Convention: Its aims, structure and essentials *TranspR* 2009, 346 (347).

transport practices.<sup>8</sup> Attempts were made to modernize the regime through the Visby Protocol in 1968. In general, the system was seen as still being too carrier-friendly<sup>9</sup>: Cargo interests (shipper, consignee, holder) have criticised the fact that carriers can escape liability under Art. 4.2 (a) and (b) in circumstances where cargo has been lost or damaged due to the negligence of its servants or agents (so-called nautical fault exemption).<sup>10</sup>

#### b) Hamburg Rules

To meet these criticisms, the Hamburg Rules were drafted. Dating from 1978 and seen as a “counter-offer” for an international harmonization in this field<sup>11</sup> they increased the carrier’s liability by abolishing the nautical fault exemption for example. In general they were considered to be too shipper-friendly<sup>12</sup> and were never broadly adopted by the world’s major trading nations (only 34 states are party to the Hamburg Rules). The failure of the Hamburg Rules was a significant regress concerning the international effort to modernize the rules governing international transport.<sup>13</sup>

For this reason it was high time to draft a new convention that reunifies maritime law, reinforces international cargo shipping and strikes a proper balance of risk between carrier and shipper interests.

## II. The content of the UNCITRAL Convention (Rotterdam Rules)

### 1. Current status

The Convention was approved by UNCITRAL in July 2008 and adopted in December 2008 by the UN General Assembly. Having held the signing ceremony in Rotterdam from 21 to 23 September 2009, the number of signatories to the RR now stands

8 *Herber* (supra n. 6), p. 308; *Sturley* Modernizing and Reforming U.S. Maritime Law: The Impact of the Rotterdam Rules TILJ 2009, 427 (430); *Ramming* Reform des Seehandelsrecht – eine erste Stellungnahme zum Abschlussbericht der Sachverständigenengruppe, *Hamburger Zeitschrift für Schifffahrtsrecht* 2009, 357.

9 *Lannan* The Rotterdam Rules – A Win-Win Proposition, online available at: [http://www.planetearth-india.info/mgw/index.php?option=com\\_content&view=article&id=123:the-rotterdam-rules-a-win-win-proposition&catid=34:rokstories](http://www.planetearth-india.info/mgw/index.php?option=com_content&view=article&id=123:the-rotterdam-rules-a-win-win-proposition&catid=34:rokstories); *Baughen* Shipping Law 2004, p. 147.

10 Cf. *Organisation for Economic Co-operation and Development* (OECD) Hague Rules of 1924, online available at: [http://www.oecd.org/document/39/0,3343,en\\_2649\\_34367\\_2086825\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/39/0,3343,en_2649_34367_2086825_1_1_1_1,00.html).

11 See *von Ziegler* (supra n. 7), 347.

12 See *Ministerie van Justitie* Rotterdam Rules modernize shipping by sea throughout the world, online available at: <http://english.justitie.nl/currenttopics/pressreleases/archives-2009/rotterdam-rules-modernise-shipping-by-sea-throughout-the-world.aspx?cp=35&cs=1578>.

13 See *Sturley* (supra n. 4), 578; *Herber* (supra n. 6), p. 310; *id.* Symposium der Deutschen Gesellschaft für Transportrecht in Hamburg am 1.4.2004: Welcome and Introduction TransPR 2004, 274.

at 21.<sup>14</sup> The 21 signatories represent a mix of developing and developed countries, including several major trading and maritime nations. The original sixteen states are as follows: Denmark, Greece, Norway, Netherlands, United States of America, France, Gabon, Ghana, Guinea, Nigeria, Poland, Senegal, Spain, Switzerland, Togo, Republic of Congo. Since the signing ceremony, five more countries signed the Convention: Madagascar, Armenia, Cameroon, Niger and Mali. Recently (on 3 February 2010), the so-called Alexandria Declaration 2010 was set out, recommending to the Arab League transport and trade ministers to jointly sign the RR.<sup>15</sup> According to Art. 94.1 RR the Convention will enter into force twelve months after ratification by at least 20 states. It then will replace the Hague, Hague-Visby and Hamburg Rules.

The RR aim to bring international maritime shipping into the 21st century by establishing a more modern, uniform legal regime governing the rights and obligations of shippers, carriers and consignees under a contract for ‘door-to-door’ shipments (manifested in Arts. 5 and 12.1 RR) that involve international sea transport.<sup>16</sup>

## 2. Essential incitements for creating the new UNCITRAL instrument

### a) Challenging new developments of international transport industry

The major reason for the failure and loss of relevance of the international rules of maritime carriage in today’s global, modern world lies in the challenging new developments of the transport industry. There is a rapid increase in the volume of container transport (reference in Arts. 14 (c), 40 and 27.3 RR), which makes it possible to move goods more quickly, more inexpensively, and more efficiently from their place of manufacture to their final destination. This often requires a combination of different modes of transport, so called multimodal transport, in which the ocean portion cannot be easily disentangled. In this regard, the ‘door-to-door’ transport comes into play (Arts. 5 and 12.1 RR).<sup>17</sup> Due to the advent and now dominance of multimodal transport, the scope and period of the carrier’s responsibility, comprising – under the current international legal regimes – solely the section from the point of loading to the point of discharging (‘port-to-port’ transport in case of the Hamburg Rules (Art. 4.1) or from the point when the tackle is hooked on to the goods until the tackle is removed from the goods on delivery (‘tackle-to-tackle’ transport in case of the Hague and Hague-Visby Rules (Art. 1 (e) RR),<sup>18</sup> have to be extended to ‘door-to-door’ coverage where a cargo is moved from its point of origin to its destination. The

14 See *Arab Academy for Science Technology & Maritime Transport Alexandria Declaration 2010*, p. 1, online available at: <http://www.uncitral.org/pdf/english/news/ArabPressReleaseRR.pdf>.

15 See *UNCITRAL United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea – the “Rotterdam Rules”*, available online at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/transport\\_goods/2008rotterdam\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html).

16 Cf. *Arab Academy for Science Technology & Maritime Transport* (supra n. 14), p. 1.

17 See *Sturley* (supra n. 8), 434.

18 *Moens/Gillies International Trade and Business: Law, Policy and Ethics 1998*, p. 190.

existing international rules governing the carriage of goods by sea, however, do not take adequately into account this new phenomenon of containerization.<sup>19</sup>

In addition, modern commerce entails a recent growth of paperless, i. e. electronic, transactions. Given the age of the current regimes, they only apply to carriage of goods by sea under a bill of lading thus preventing the regime from accommodating different forms of transport documents, including electronic forms. A reliable legal basis for the replacement of traditional transport documents, such as bills of lading, is not offered by the existing conventions.

#### b) Fragmentation of legal rules for maritime transport

As a consequence the existing international maritime transport regimes leave a number of important aspects of international maritime transport, particularly concerning the modernization of the transport industry, unregulated and therefore, subject to national law as a means of filling the legal gaps of the existing regimes or as a substitute for them altogether.<sup>20</sup> This is due to judges and arbitrators trying to adjust the old, outdated law to the new environment, thus provoking a process of crumbling which leads to further fragmentation in the international law<sup>21</sup> and drastically weakens legal certainty and predictability – a nightmare for legal practitioners and their clients in terms of conflict of laws issues.<sup>22</sup> This is also manifested in the proliferation of national ‘hybrid’ systems that apply part of the Hague Rules and part of the Hamburg Rules.<sup>23</sup> In order to replace the present fragmentation in this area of maritime law,<sup>24</sup> the CMI and UNCITRAL have joined forces to promote a convention instrument referred to as Rotterdam Rules, which meets the needs of today’s trading environment.

### 3. Major changes and innovations

#### a) Beneficial improvements

##### aa) ‘Door-to-door’ coverage

In line with the basic starting point of deciding to cover the entire duration of custody of the goods by the carrier rather than be only applicable to the maritime leg between “tackle to tackle” or between “port to port”, the scope of application also

19 *Sturley* (supra n. 8), 430.

20 *International Chamber of Shipping* (supra n. 3), 5.

21 *Hailey* Questions of balance in the Rotterdam Rules, p. 1, online available at: <http://www.rotterdamrules.com/pdf/Questions-of-balance-in-the-Rotterdam-Rules-Lloyd%27s-List-27-08-2009.pdf>.

22 See e. g. *Mukherjee/Bal* A Legal and Economic Analysis of the Volume Contract Concept under the Rotterdam Rules: Selected Issues in Perspective, p. 2, online available at: <http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20Abhinayan%20Basu%20Bal%20-%20Volume%20Contract%20Final.pdf>.

23 Cf. *International Chamber of Shipping* (supra n. 3), p. 1; e. g. Chinese Maritime Code which is a mixture of Hague, Hague-Visby, Hamburg and a number of unique Chinese elements.

24 See *Sturley* (supra n. 4), 556, 560.

comprises places where the custody started (place of receipt) and where it ended (place of delivery). If any of those places including port of loading and port of discharge is located in different states, pursuant to Art. 5.1 RR the Convention will apply. This extended scope reflects the ‘door-to-door’ scope of the new instrument. Bringing the transport liability regime in line with the advent of containerization – the striking characteristic of modern transport – and with the resulting dominance of multimodal transportation in the industry, is a key purpose of the Rules: The carrier undertakes responsibility for the maritime leg as well as for the intermediate and final land, waterway or air leg, from receipt of goods from the shipper until final delivery to the receiver. This is to say that a single legal regime covers the entire performance of the contract of carriage, rather than the current system in which there are separate contracts and different legal regimes for each modality of transport. Particularly in an era where most contracts of carriage and insurance contracts are now concluded on a ‘door-to-door’ basis, the Convention will facilitate multimodal transportation. However, it should be noted that the Rules are still intended to cover carriage of goods wholly or partly by sea, and according to Art. 6 RR the Rules only apply to a multimodal transport that includes a sea leg. Therefore, it operates as a “maritime plus convention” and not as a fully-fledged multimodal convention.<sup>25</sup>

bb) Electronic transport documents

The international trade with goods carried by sea cannot do without the existence of transport documents, which cover the unique character of the contract of carriage by sea marked by unforeseen perils that bring the carrier to exempt itself from liability for loss or damage of the goods.<sup>26</sup> The most important sea transport document is the bill of lading. This form of transport document serves as a receipt for goods, an evidence of the contract of carriage, and a document of title to the goods, which enables its holder to dispose of the document and the goods or property listed therein.<sup>27</sup> By now, the law has gained in maturity and e-commerce as well as information technology (IT) are developing in a speedy manner. Bearing this in mind, it is obvious that changes must also occur in the field of international maritime trade, where delays and high costs due to the issuing of traditional paper bills of lading could be avoided by a replacement of a dematerialised transport document, a modern electronic bill of lading.<sup>28</sup> Nowadays it is much more convenient to

25 *Baatz/Debattista/Lorenzon/Serdy/Staniland/Tsimplis* The Rotterdam Rules – A Practical Annotation 2009, Art. 5 (5-01); *Thomas* And then there were the Rotterdam Rules JIML 2008, 189 (190); *Schelin* The UNCITRAL Convention on Carriage of Goods by Sea: Harmonization or Deharmonization? TILJ 2009, 321 (324).

26 *Li* (supra n. 4), 127; *Herber* (supra n. 6), p. 5.

27 Definition of “bill of lading” see *Prüßmann/Rabe* Seehandelsrecht Kommentar, Vor § 642, I A, II A 2; *Van der Ziel* Chapter 10 of the Rotterdam Rules: Control of Goods in Transit TILJ 2009, 375 (376). The UNCITRAL Convention does not use this term anymore; it makes a distinction between negotiable and non-negotiable documents (Art. 1 XV, XVI).

28 Cf. report by UNCTAD secretariat, “Electronic transport and International transport services”, p. 6 ff., 15, online available <http://www.unctad.org/en/docs/c3em12d2.en.pdf>.

process the flow of goods using IT than with the use of the classical paper documents such as the bill of lading. The shorter processing times and smaller chance of error lead to lower transaction costs but also to reduction of fraud often caused by forged bills.<sup>29</sup> In addition, electronic trading is plausible to increase efficiencies in data transfer between parties. Taking into account these advantages of electronic commerce, the RR deal with electronic transport documents. The Hague, Hague-Visby and Hamburg Rules – due to their age – fail to contain provisions regulating electronic commerce. The RR however contain an entire chapter (chapter 3) intended to facilitate the use of electronic transport records in lieu of paper transport documents, and to establish a legal infrastructure for the development of electronic commerce in maritime transport. And yet, it must not be overlooked that the Convention does not reveal how to deal with electronic transport documents. It does not answer the question of how a negotiable electronic transport document can be endorsed. Nor does it address problems peculiar to the use of new technologies for electronic transport records, for example in terms of the legal validity of electronic signatures and authentication matters.<sup>30</sup> Art. 9 RR solely concentrates on the content of the procedures for use of negotiable electronic transport records but not how these procedures can be put into action.<sup>31</sup>

cc) Balance of risk between carrier and cargo interests –  
Increased liability of the carrier

The RR have made a number of changes in terms of the liability of the carrier compared with that of previous regimes: The adoption of the Hague Rules in 1924 was the first time that a fair balance between the ship interests and the cargo interests at an international level was established under the given circumstances of 1924. With the development of the international trade and shipping, the Hamburg Rules may be considered the first trial to maintain or adjust the changed balance of interests between the ship and cargo.<sup>32</sup>

(1) Extension of due diligence and removal of nautical fault

Importantly, the carrier's obligation to exercise due diligence to make the ship seaworthy is according to Art. 14 (a) RR extended to cover the entire voyage not only before and at the beginning of voyage as it is expressed in the Hague and Hague-Visby Rules. Not only the application of the Rules is extended from 'tackle-to-tackle' to 'door-to-door' but also the period of liability of the carrier. That is to say that the liability of the carrier under the RR includes for example the time when the

29 *Transport Weekly* "Rotterdam Rules" in goods transport, online available at: <http://www.transportweekly.com/pages/en/news/articles/64153/>; Ritter/*Gliniecki* International Electronic Commerce and Administrative Law: The Need for Harmonized National Reforms, Harv. J. L. & Tech 1993, 263 (263 ff.).

30 For further information see *Carr* International Trade Law 3rd edition (2005), p. 116.

31 Disapproving the electronic transport documents, see e. g. *Van der Ziel* (supra n. 27), 386.

32 Cf. *Herber* (supra n. 6), p. 310 ff.

goods are under the custody of a port terminal that has received the goods for and after carriage.<sup>33</sup>

Furthermore, Art. 17 RR contains an omission of the nautical fault exemption. The nautical fault exemption means – as it is prescribed in the Hague Rules and the Amended Hague Rules (see Art. 4.2 (a)) as well as in § 607 subsection 2 of the German Commercial Code (HGB) – that the carrier is not liable for any error in navigation and management of the ship caused by servants or crew members. This regulation is an exception of the general legal principle of vicarious liability<sup>34</sup> pursuant to which the shipowner will remain responsible for the crew's defaults unless they can be said to constitute a "frolic on their own",<sup>35</sup> that is to say the employee's activity is obviously unrelated to the employer's business. This exculpatory exception was constructed during a time when the conditions in shipping business were still marked by the reliance on sextants and stars,<sup>36</sup> which most of the time failed to master poorly charted areas or risky maritime adventures. If the carrier had been made liable for loss arising from nautical fault, his economic future could have been put in danger. Considering the tremendous development in technology as well as the progress in insurance industry, today, many of the risks a ship must face can be predicted and prevented with radars, satellites and warning systems in the machinery.<sup>37</sup> In this light of how shipping is performed nowadays the drafters of the RR did not find it justified to maintain the nautical fault exemption but to delete it: The carrier has – under the RR – lost its defence to claims for loss or damage that were due to the carrier's fault or to its fault in the management of the ship. Thus, the deletion of the nautical error exoneration corresponds to the new developments of shipping technology.

## (2) Maritime performing parties (subcontractors) and "Himalaya Clause"

The question of who is entitled to a defence and limitation of liability is answered by the so-called Himalaya Protection. A "Himalaya Clause" is a contractual provision expressed to be for the benefit of a third party who is not a party to the contract.<sup>38</sup>

33 See *Esteban Chami* The Obligations of the Carrier, p. 3, online available at: <http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20Diego%20Chami%20-%20Obligations%20of%20the%20Carrier.pdf>.

34 Cf. *Kronke* Seefrachtvertragsrechtliche Gehilfenhaftung – Zeitgemäßheit, Vorbildlichkeit oder Nachholbedarf einer Sonderrechtsmaterie? *TranspR* 1988, 89 (95); *Prüßmann/Rabe* (supra n. 27), § 607 A 1.

35 See *Joel v. Morison* [1834] 6 C&P 501, [1834] 172 E. R. 1338; *Baughen* (supra n. 9), p. 261.

36 Cf. *Jansson* The consequences of a deletion of the nautical fault, p. 12, online available: [http://gupea.ub.gu.se/dspace/bitstream/2077/7337/1/Nautical\\_Fault\\_Madeleine\\_Jansson.pdf](http://gupea.ub.gu.se/dspace/bitstream/2077/7337/1/Nautical_Fault_Madeleine_Jansson.pdf).

37 Agreeing that the "Nautical fault exemption" is outdated, *Ramming* (supra n. 8), 357; *Kronke* (supra n. 34), 95; *Prüßmann/Rabe* (supra n. 27), § 607 A 1; cf. *Moens/Gillies* (supra n. 18), p. 188.

38 Cf. *Tetley* The Himalaya Clause – Heresy or Genius? *JMLC* 1977, 111; The "Himalaya Clause" derives its name from an English case, known as "The Himalaya" and reported as *Adler v Dickson* [1954] 2 Lloyd's Rep 267, [1955] 1 QB 158; for the modern "Himalaya Clause" see *The Cleveland (Eisen und Metall AG v. Ceres Stevedoring Co. Ltd. and Canadian Overseas Shipping Ltd.)* [1977] 1 Lloyd's Rep. 665 (Que. C. A.).

Usually the “Himalaya Clause” will be placed within the bill of lading or such other transport document.<sup>39</sup> Neither the Hague Rules nor the Hague-Visby Rules (Art. 4.2 RR) dealt expressly with third parties who were independent contractors. The Hamburg Rules covered the servants and agents of the carrier (e. g. Arts. 5.1 and 10.1 RR) but again, these provisions do not deal with independent contractors (subcontractors).<sup>40</sup> The RR introduce a new concept of “maritime performing party” – a performing party who according to Art. 1.7 RR offers services related to sea carriage and which will be subject to the same rights and obligations as a carrier: Art. 4.1 RR is the Convention equivalent of the “Himalaya Clause”.<sup>41</sup> This article provides that in addition to the carrier and its employees, maritime performing parties (and their employees) and persons performing services on board a ship, are entitled to the protection of the Rotterdam Rules. Thus, the RR provide automatic protection to the carriers’ employees, agents and independent contractors. Art. 20.1 RR points out that the maritime performing party is jointly and severally liable along with the carrier (see also Art. 19.1 RR). However, it should be noted that the “Himalaya Clause” has not become superfluous: The RR do not prevent the parties of a contract of carriage from agreeing on a “Himalaya Clause” for the benefit of non-maritime performing parties or other parties who are not covered by Art. 4.1 RR. This issue of liability of such persons including the validity of the “Himalaya Clause” is left to national law.<sup>42</sup>

b) Controversial issues

aa) Conflict with other conventions

A convention governing international maritime transport and trying to achieve an overall uniformity does not only feature beneficial improvements (as shown above) but also incites negative criticism:

Due to the wide application, covering both a sea-leg and a land-leg which is based on the increased importance of multimodal transports, the question rises of how potential conflicts of the Convention with other unimodal regulations are to be estimated: There may be a conflict with the 1956 Convention on the Contract of the International Carriage of Goods by Road (CMR) if the carrier undertakes to carry goods by a truck and by a sea-going vessel whereby the goods remain on the truck during the carriage by sea, since both the CMR, according to its Art. 2.1 as well as the RR re-

39 *Tetley* (supra n. 38), 111.

40 *Baatz/Debattista/Lorenzon/Serdy/Staniland/Tsimplis* (supra n. 25), Art. 4 (4–02).

41 More details on Art. 4 RR and its connection to the “Himalaya Clause” see e. g. *Sturley* (supra n. 8), 449; *Fujita* Performing Parties and Himalaya Protection, p. 4 ff., online available at: <http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20Tomotaka%20Fujita%2022%20Okt29.pdf>.

42 See *CMI International Working Group on the Rotterdam Rules* Questions and Answers on the Rotterdam Rules, p. 8, also available online at: <http://www.comitemaritime.org/draft/pdf/QandAnsRR.pdf>; *Sturley* (supra n. 8), 449 ff.

quire their application.<sup>43</sup> As a consequence, the international road transport operation could be subject to the conditions of both the CMR and the RR, thus, causing confusion and unpredictability.<sup>44</sup> Before analyzing this problem more closely, the focus lies on the essential provisions of the two Conventions:

A provision has been adopted in Art. 26 RR pursuant to which other international instruments have precedence over the provisions of the RR if the goods are damaged before or after loading and/or discharge from the ship. Art. 26 RR applies the so-called network liability system, typical of multimodal transport legislation<sup>45</sup> – however, the Rotterdam Rules are not a multimodal transport convention. The basic idea of the ‘network system’ is that in cases where a damage or loss can be localized (i. e. where it is known at what particular stage of transport a damage or loss occurred), the legal system covering that particular stage of transport shall apply, meaning recourse to existing unimodal rules is made, whereas in cases where damage cannot be localized recourse to a multimodal system (here: the maritime liability regime of the RR) is taken.<sup>46</sup> This principle is adopted in Art. 26 (a) RR which states that the RR provisions that govern the carrier’s liability, limitation of liability and time for suit will give way to those provisions of an international unimodal convention that would have applied if a separate contract of carriage had been concluded for that leg of the transport.

Transferring this to the problem stated above, the carriage of goods by a truck and by a sea-going vessel whereby the goods remain unloaded on the truck during the sea voyage, is on the one hand a CMR transport “with a sea leg” to which the CMR Convention compulsorily applies (Art. 2 CMR). On the other hand, it is also an international carriage of goods partly by sea to which the RR compulsorily apply (Art. 5 RR). This is to say that, if a damage in such a transport obviously occurred before or after the sea leg (e. g. in a road accident), according to Art. 26 RR, the liability of the carrier will be governed by the provisions of the CMR Convention. However, if the damage is localized to the sea leg, the road carrier will be liable according to the maritime convention in force. So far, no conflict arises. Notably, as it

43 This apprehension is expressed i. a. by the *European Shipper’s Council (ESC) View of the European Shippers’ Council on the Convention on Contracts for the International Carrying of Goods Wholly or Partly by Sea* also known as the “Rotterdam Rules”, p. 2, online available at: <http://www.comitemaritime.org/draft/pdf/2ESC.pdf>; *Tetley A Summary of General Criticisms of the UNCITRAL Convention*, p. 2, online available at: [http://www.mcgill.ca/files/maritimelaw/Summary\\_of\\_Criticism\\_of UNCITRAL\\_No\\_1.pdf](http://www.mcgill.ca/files/maritimelaw/Summary_of_Criticism_of UNCITRAL_No_1.pdf); dealing with this problem, see e. g. *Berlingieri Multimodal Aspects of the Rotterdam Rules*, p. 4 ff., online available at: <http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20F.%20Berlingieri%2013%20OKT29.pdf>.

44 Elaborating on this problem, see e. g. *Czerwenka Scope of Application and Rules on Multimodal Transport Contracts* *TranspR* 2004, 297 (302).

45 *Baatz/Debattista/Lorenzon/Serdy/Staniland/Tsimplis* (supra n. 25), Art. 26 (26–01).

46 *Faghfour* *International Regulation of Liability for Multimodal Transport* *WMU Journal of Maritime Affairs* 2006, 95 (109), online available at: [http://www.immta.org/uploads/International\\_Regulation\\_of\\_liability.pdf](http://www.immta.org/uploads/International_Regulation_of_liability.pdf).

is clear from its wording, Art. 26 RR only applies to the carrier's liability for localized damage.<sup>47</sup>

In respect of unlocalized damage, the idea is that this should be dealt with solely by the RR. This creates a problem because the other Conventions, e. g. the CMR, also include provisions for unlocalized damage (e. g. Art. 2.1 CMR) – there is a striking conflict of the liability provisions of the two Conventions.<sup>48</sup> However, in addition to Art. 26 RR, in order to guarantee clarity in terms of the interaction between the Rotterdam Rules and unimodal inland conventions, the RR also contain a provision (Art. 82 RR) that prevents them from affecting the application of inland conventions in respect of the carriage of goods by air, road, rail or inland waterway that regulate the liability of the carrier for loss of or damage to the goods, and that could apply to a contract of carriage subject to the RR. The question is whether Art. 82 RR serves as a “conflict rule” with the effect that it resolves the conflict between RR and the CMR<sup>49</sup> or whether it also solely refers to a removal of conflicts concerning localized damage. The wording and intention of the qualifications – in Art. 82 (a) to (d) RR – speaks for a reference to localized damage. However, even if Art. 82 RR can be seen as a “conflict rule,” implying that the RR recognized that, by taking a “maritime plus,” approach possible conflicts with the existing unimodal inland conventions could be raised, the result is nevertheless questionable: For each transport it has to be determined which convention will be applicable. Thus, it will be difficult for the parties to the contract of carriage to predict the applicable limit. Being forced to look to other unimodal conventions, the feature of the RR to be a “binding universal regime to support the operation of contracts of maritime carriage involving other modes of transport” as announced in the Preamble of the RR, is substantially weakened.

#### bb) Volume contracts

Another key aspect and highly contentious issue of the RR is the provision on volume contracts. The main feature of a volume contract, as stated in Art. 1.2 RR, is the specification of a quantity of cargo to be shipped in more than one shipment throughout a specified period of time. The volume contract concept recognizes the needs of those cargo interests requiring individual, tailor-made agreements for their trading activities. The Ocean Liner Service Agreement (OLSA) used in the US illustrates this. OLSA is otherwise known as service contracts, suggesting that it is included within the scope of the Rules but that in respect of such agreements certain provisions of the Rules is made non-mandatory.<sup>50</sup>

47 Explaining this more closely, see *Røsæg Conflicts of Conventions in the Rotterdam Rules* JIML 2009, 238 (241).

48 *Røsæg* (supra n. 47), 241; *Foglar Evaluation of the New Convention from the Perspective of Insurers* TranspR 2009, 366 (368); *Baatz/Debattista/Lorenzon/Serdy/Staniland/Tsimplis* (supra n. 25) Art. 82 (82–01); concerning the extensive interpretation of scope of the CMR, also contributing to causing conflicts c. f. *Haak/Hoek Arrangements of Intermodal Transports in the Field of Conflicting Conventions* JIML 2004, 422, (430 f.).

49 *Røsæg* (supra n. 47), 245 ff.

50 See *Mukherjee/Ba* (supra n. 22), p. 5 ff.

In order to overcome the challenges of today's new transport developments, i. e. nearly 90 % of container shipments involve a carriage of large volumes,<sup>51</sup> causing fierce competition, the RR contain provisions on volume contracts. The striking characteristic of such volume contracts is that they may derogate from the Rules by lessening the rights, obligations and liabilities imposed by the Rules on ocean carriers or shippers (Art. 80.1 RR). For example, where large amounts of low value goods are transported, the shipper and carrier will in this situation have the possibility to agree on lower limitation levels in return for lower freight rates to the benefit for both parties. However, there are a number of provisions from which a volume contract can never derogate (Art. 80.4 RR): the carrier's ongoing obligation to make and keep the ship seaworthy, and to properly crew, equip and supply the ship. Also the shipper's obligation, for example, to provide information, instructions and documents is still maintained (Arts. 80.6 and 29 RR).

And yet, there are some concerns as to whether volume contracts constitute a significant risk particularly for small shippers. It is alleged that the liability regime in the RR is such that its mandatory character can easily be diluted in the context of volume contracts<sup>52</sup>: Significant shipper-protective provisions of the RR need not apply, for example: It is not obligatory, when a volume contract is agreed, that the carrier must make and keep the holds and any containers supplied fit and safe for the reception, carriage and preservation of goods (Art. 14 (c) RR). Consequently, shippers would be hurled back to the chaotic pre-1924 era of freedom of contract.<sup>53</sup> Another relevant issue, which contributes to the potential abuse by the carrier, is the vague wording of Art. 80 RR, thus constituting a risk of inconsistent application of the Convention: There is no minimum quantity, period of time or frequency. As a result, the (mandatory) Rules can easily be circumvented. Furthermore, it has been stated, that, although the volume contract must contain a prominent statement that it derogates from the Convention, thus making the shipper alert of the implications of a volume contract, shippers are, considering today's economic stress, under huge pressure to accept greater risk in return for promises of price reductions.<sup>54</sup>

However, these objections raised with respect to volume contracts are partly unjustified: The allegation that the volume contract regime is a regress to the chaotic domain of freedom of contract that prevailed in the pre-Hague Rules, is not convincing: Such would have been the case only if unlimited freedom of contract was allowed to prevail in all situations covered by the Rules. However, the provisions of Art. 80.2 RR are such

51 *UNCITRAL* Factsheet United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("The Rotterdam Rules"), available online at: <http://www.unis.unvienna.org/unis/pressrels/2009/unisl131.html>.

52 Cf. *Schelin* (supra n. 25), 325.

53 See e. g. *ESC* (supra n. 43), p. 2 ff.; *CLECAT* United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea – the "Rotterdam Rules", p. 2, online available at: [http://www.uncitral.org/pdf/english/texts/transport/rotterdam\\_rules/CLECAT-paper.pdf](http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/CLECAT-paper.pdf); *Bonnevie* Evaluation of the New Convention from the Perspective of Cargo Interests TranspR 2009, 361 (366).

54 *Bonnevie* (supra n. 53), 366.

as to ensure protection of the shipper: The shipper is, according to Art. 80.2 (c) RR, always given opportunity and notice of that opportunity, to insist that despite shipping under a volume contract, all provisions of the Convention will apply to the contract of carriage without derogation. Another protection inserted for the benefit of the shipper includes the requirement that the volume contract pursuant to Art. 80.2 (b) RR must be individually negotiated or specify the sections of the contract that contain the derogations. These apparent safeguards intended to alert the shipper to the fact that the RR will no longer apply if “negotiated away” clearly show that any fears that the acceptance of reduced carrier’s liability would represent a serious risk to shippers that were not completely aware of the implications, are to a great extent unsubstantiated.<sup>55</sup> The current market situation has to be taken into account: On the one hand, it is reasonable to presume that shipowners, due to the strong competition in the market, have the opportunity to force even smaller business partners to conclude such contracts and thereby lower the carriers’ liability. In this light, it is comprehensible that opponents of volume contracts prefer a more regulatory approach to trade issues. On the other hand, it seems to be much more likely with regard to the objectives and features of a volume contract, that its contracting parties usually are equal strong partners in terms of economical power, that is to say, they are commercial actors on a reasonably level playing field in terms of bargaining power.<sup>56</sup> Therefore, it can also very well be, that it is the shippers that request from their transportation partners (freight forwarders and carriers) the entry into complex frame agreements such as volume contracts, thus asserting strict terms relating to its responsibilities.<sup>57</sup>

The changing needs of the transport industry have made the application of the volume contract concept inevitable and indispensable – despite its somewhat complex and controversial content. It must not be overlooked that the volume contract regime is one that provides for open market negotiation of economic trade advantages between carrier and shipper, which again fosters competition.

cc) Complexity and verbosity

In some quarters, the RR are criticized as too detailed and lengthy: The European Shippers’ Council (ESC) described them even as “undoubtedly the most complex international convention on liability and conditions of carriage there has ever been.”<sup>58</sup>

55 See e. g. *Rasmussen* Evaluation of the New Convention from the Perspective of Carriers *TranspR* 2009, 357 (358).

56 See *The National Industrial Transportation League* Response of the National Industrial Transportation League to the European Shippers’ Council Position Paper on the Rotterdam Rules, p. 10 ff., online available at: [http://www.uncitral.org/pdf/english/texts/transport/rotterdam\\_rules/NITL\\_ResponsePaper.pdf](http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/NITL_ResponsePaper.pdf).

57 Cf. *Economic Commission of Europe Inland Transport Committee* The Rotterdam Rules: An attempt to clarify certain concerns that have emerged, p. 6, available at: <http://www.unece.org/trans/wp24/wp24-inf-docs/documents/id09-2e.pdf>.

58 Cf. *ESC* (supra n. 43); furthermore *The Journal of Commerce* of 06/07/2009, Rotterdam Rules, p. 4, online available at: [http://www.uncitral.org/pdf/english/texts/transport/rotterdam\\_rules/JOC\\_editorial\\_6July09.pdf](http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/JOC_editorial_6July09.pdf); *Thomas* (supra n. 25) 190.

In the opinion of the International Federation of Freight Forwarders Associations (FIATA) Working Group, the Convention invites misunderstanding and misinterpretations.<sup>59</sup> For such reason the RR “will fail in reaching their main objective to unify the law of carriage of goods by sea”. Contributing to the excessive detail of the RR are for example the provisions on a detailed set of three types of transport documents: the negotiable transport documents (i. e. bill of lading), the non-negotiable instruments (sea waybills) and the straight bill of lading (non-negotiable bill of lading). The question arises whether the average shipper or carrier will be able to distinguish between these different types of transport documents or whether the RR are only suitable for a small selected group of trained lawyers.<sup>60</sup> Moreover, the preamble states that the adoption of the RR will facilitate new access opportunities for previously remote parties and markets. However, considering the complex regulation, it seems very doubtful that this aim will be achieved since it is likely that especially states whose trade is not primarily based on maritime transport will have difficulties in understanding the Convention.<sup>61</sup> The verbosity of the RR<sup>62</sup> can also be seen in the volume of 96 articles compared to the Hague Rules with 16 articles or the Hamburg Rules with 34 articles.

Yet, the complexity and difficulty of application of a convention should not be assessed by the number of articles. It should be noted that the RR being more comprehensive than the present conventions, cover additional areas such as the extended scope to both sea-leg and land-leg or the use of electronic transport records. Thus, the harshly criticised complexity is the result of having taken the essential needs of modern shipping into consideration. Furthermore, the word ‘complication’ is inappropriate, because the RR deal with certain areas that the present conventions do not cover and where therefore at present is no uniformity. It seems more reasonable to describe the current status of rules as complicated in terms of the application of different national rules rather than referring to the future when uniform rules apply. Besides, the argument, the Rules would not achieve uniformity due to the arising misunderstandings and misinterpretations, is not plausible: Different interpretations cannot – even in national laws – be avoided, thus, a uniform regime will not be free of diverse interpretations either. However, this should not serve as a reason not to attempt to ensure international uniformity. Otherwise, if the danger of misinterpretations constitutes a failure of attempts to substantive uniformity, all attempts to such uniformity have been – and will be in the future – a failure.<sup>63</sup>

59 Cf. *FIATA Position on the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, p. 1, available online at: [http://www.uncitral.org/pdf/english/texts/transport/rotterdam\\_rules/FIATApaper.pdf](http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/FIATApaper.pdf).

60 See *Tetley* (supra n. 43), p. 2 f.

61 More exactly expressed, see *Deutscher Anwaltsverein Stellungnahme des Deutschen Anwaltsvereins zu den Rotterdam Regeln*, p. 3.

62 Disapproving the verbosity *Deutsche Gesellschaft für Transportrecht UNCITRAL-Entwurf eines Übereinkommens über Verträge über die internationale Beförderung von Gütern ganz oder teilweise auf See*, p. 5, online available at: [http://www.transportrecht.org/html/dst\\_Stellungn\\_%20zum\\_UNCITRAL\\_Vorentwurf\\_%20endg%20%20\\_8\\_4.pdf](http://www.transportrecht.org/html/dst_Stellungn_%20zum_UNCITRAL_Vorentwurf_%20endg%20%20_8_4.pdf).

63 See *Economic Commission of Europe* (supra n. 57), p. 13.

### III. Summary and prospects

Deducing from the remarks above, is there a chance that the Rotterdam Rules will enjoy a “maiden voyage”, thereby replacing the Hague, Hague-Visby and Hamburg Rules, so that a ratification of the Convention would be important and fruitful?

One can conclude that with regard to the economical innovations and evolutions, the status quo of the existing regimes such as Hague, Hague-Visby and Hamburg Rules will not remain because they do not meet the challenges and needs of today’s trading environment. The RR, however, are forward-looking and able to respond to the changing needs of industry, i. e. electronic commerce or containerization. In this respect it has to be emphasized, that the RR are not restricted to a sea-leg but also cover land-leg, thus taking into account the rise in container transportation. Although potential conflicts with other unimodal conventions can occur, the extended scope of the Rules contributes to facilitating multimodal transportation (particularly in an era where most contracts of carriage and insurance contracts are now concluded on a ‘door-to-door’ basis). And yet, it may seem somewhat doubtful whether an international instrument will indeed become successful if it does not regulate any multimodal transport contract but only maritime plus contracts.

Concerning the provisions on volume contracts, they reflect present day contracting practices and provide for commercial flexibility, even if small shippers might not always benefit from concluding volume contracts. Furthermore, the RR set forth a rebalance of risk between cargo and carrier interests by on the one side extending the carrier’s liability and on the other side clearly pointing out the shipper’s obligations and responsibilities.

It can be recognized that the Convention contains obvious shortcomings, but being imperfect is a trait that the Rules share with probably all international conventions that attempt to achieve uniformity and harmonization. However, international legal uniformity, the primary aim of the Rules, should – in my opinion – have higher value than potential problems with the practical use of the rules or its scope of application. With all its imperfections the Convention, representing at the moment the only international solution, should be promoted and quickly ratified.

The gist of my paper is: The “maiden voyage” is about to commence!