The Rotterdam Rules: A South African Perspective

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In the interest of simplicity, the author has opted to use only the masculine. This is meant to refer equally to the masculine and the feminine.

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Introduction

The objective of this paper is to investigate the Rotterdam Rules, and to ascertain whether South Africa should accede to or ratify them. In order to accomplish this, South Africa's current maritime transport regime will be examined, and existing "problem areas" will be identified. This will be followed by a comparative analysis between the Rotterdam Rules and the Hague-Visby Rules, which South Africa applies as part of national law to regulate the carriage of goods by sea. As a new maritime Convention, the Rotterdam Rules have attracted widespread criticism and support, and whether such is justified will also be considered. Finally potential considerations South Africa should take into account in electing whether or not to accede or ratify the Rules have been assessed from a political, economic, social, technological, legal and environmental standpoint as at 31 December 2011.

Background

Carriers and shippers enter into "contracts of carriage" to regulate each party's obligations and liabilities for the carriage of goods by sea. The terms of this contract are often evidenced in a document known as a "bill of lading".[1] A bill of lading has three characteristics: first, it is a document of title, secondly, it is a receipt and, thirdly, it constitutes the contract itself.[2]

Prior to the establishment of international conventions and domestic statutes regulating the carriage of goods by sea, parties contracting under common law had complete freedom to negotiate their own terms in the bill of lading. Carriers naturally had stronger bargaining power than shippers when the contracts were entered into, because if a shipper did not like the carrier's terms, the shipper would have to find another carrier.[3] As a result of their stronger bargaining position, most carriers incorporated liability exclusion clauses into these contracts; and shippers were expected to ship their cargo under the terms dictated by the carrier – or not at all.[4] This exploitation made it evident that legal instruments were needed to

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[1] A Wanigasekera "Comparison of Hague-Visby and Hamburg Rules" Available: http://www.juliusandcreasy.com/inpages/publications/pdf/comparison_of_hague_and_hamburg-AW.pdf (accessed 14 February 2010).
[2] W Tetley *Marine Cargo Claims* Volume 2 4 ed (2008) 2290.
[3] Wanigasekera "Comparison of Hague-Visby and Hamburg Rules".
[4] Wanigasekera "Comparison of Hague-Visby and Hamburg Rules".

"level the playing field" between shippers and carriers.[5] Four international conventions have subsequently been formulated over the past approximately 90 years to regulate the carriage of goods by sea.

1.1 The Hague Rules

The first domestic codification of law relating to the carriage of goods by sea was the Harter Act, enacted in the United States in 1893. This was followed by the Australian Carriage of Goods Act of 1904, as well as the Carriage of Goods by Water Act enacted in Canada in 1910.[6] These three Acts formed the basis of the first international convention regulating the carriage of goods by sea – the Brussels Convention[7] – which is more commonly known as "The Hague Rules".[8]

The Hague Rules were adopted by a diplomatic convention in Brussels in 1924, and they represent the first internationally established control of the terms of bills of lading.[9] These rules are a hybrid of civil and common law, and represent a compromise between shippers' and carriers' interests which existed at that time.[10] William Tetley, therefore, submits that they may be referred to as a "codifying statute".[11] A major problem with bills of lading at that time was that they were not uniform, which made obtaining financing from banking institutions difficult as the bills had to be consulted carefully to establish what liability was involved.[12] The Hague Rules attempted to bring uniformity to bills of lading, and were the first international maritime instrument to gain widespread acceptance – indeed, more than 50 countries still apply the Hague Rules, or a variation of them, today[13] – including Brazil,

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[5] Wanigasekera "Comparison of Hague-Visby and Hamburg Rules".
[6] Wanigasekera "Comparison of Hague-Visby and Hamburg Rules".
[7] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels, 25 August 1924 and in force from 2 June 1931.
[8] Wanigasekera "Comparison of Hague-Visby and Hamburg Rules".
[9] F Reynolds "The Hague Rules, the Hague-Visby Rules and the Hamburg Rules" (1990) 7 *MLAANZ Journal* 16 at 16.
[10] Ibid.
[11] Tetley 2004 *JIML* 44.
[12] Reynolds 1990 *MLAANZ Journal* 17 and 18.
[13] Hill Dickinson "Cargo Conventions: Comparing the Hague, Hague-Visby, Hamburg and Rotterdam Rules" (2009) Available: http://www.hilldickinson.com/ pdf/Shipping %20Guide%201%20-%20Cargo%20Conventions.pdf (accessed 10 January 2010).

Cuba, Iran, Madagascar, Pakistan and the United States.[14] The Hague Rules have been described as the most successful instrument of its kind to date.[15]

A main objective of the Hague Rules was to prevent carriers from abusing their position as the dominant party in their negotiations with shippers, as mentioned above. This was accomplished through the incorporation of standard clauses into bills of lading that defined the risks which the carrier must bear, and specifying the maximum protection he could claim from exclusionary and limitation of liability clauses.[16]

1.2 The Hague-Visby Rules

The Hague-Visby Rules were intended to amend the Hague Rules, as certain inadequacies in the latter rules became evident in the approximately 40 years of their coming into operation.[17] The Comité Maritime International (CMI); which is a representative body of National Maritime Law Associations and whose primary objective is the unification of maritime laws,[18] was instrumental in the production of these rules.[19] They were adopted in Brussels in 1968, and are officially called the "Brussels Protocol to the 1924 Convention".[20] The rules as amended are more commonly referred to as "the Hague-Visby Rules" and they received sufficient ratifications to come into effect in 1977.[21] The Hague-Visby Rules or a variation thereof are applied by many of the world's major shipping nations (ie in more than 50 countries), including South Africa, New Zealand, the United Arab Emirates and the United Kingdom.[22]

1.3 The Hamburg Rules

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[14] Hill Dickinson "Cargo Conventions".
[15] Minister C Eurlings "Rotterdam Rules" (2009) Available: http://www.verkeerenwaterstaat.nl/actueel/toespraken/rotterdamrules.aspx (accessed 20 February 2010).
[16] Wanigasekera "Comparison of Hague-Visby and Hamburg Rules".
[17] Reynolds 1990 *MLAANZ Journal* 19.
[18] Wanigasekera "Comparison of Hague-Visby and Hamburg Rules".
[19] Reynolds 1990 *MLAANZ Journal* 22.
[20] J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) 624.
[21] Reynolds 1990 *MLAANZ Journal* 22.
[22] Hill Dickinson "Cargo Conventions".

The Hamburg Rules originated from a report written by the Secretariat of the United Nations Conference on Trade and Development (UNCTAD) in the 1970s which drew attention to defects in the Hague and Hague-Visby Rules. One of the defects identified was that the rules were disadvantageous to cargo-owning countries and to developing countries, because they were perceived to operate in such a manner as to benefit carriers, who are usually from developed countries, more than they benefitted shippers.[23] These rules also appeared to offer more protection to shipowners and to create double insurance situations for the shipper.[24] Issues were also identified regarding provisions relating to "excepted perils", delays, the period for which the rules should be applied, the time-bar clauses, the package or unit limitations, jurisdiction and arbitration, differing burdens of proof in different countries and the "split-risk regime" which had originated in the Harter Act.[25] The Hamburg Rules aimed to remedy many of these issues and were first signed at a conference in Hamburg on 31 March 1978.[26] They were intended to replace the 1924 Hague Rules together with the 1968 Visby amendments; their official title is the United Nations Convention on the Carriage of Goods by Sea, 1978.[27] However, the Hamburg Rules have not proved popular, despite taking 14 years to come into force, and to date only 33 states have ratified or acceded to them.[28] It is noteworthy that none of these states are major sea-trading nations; rather, they are predominantly developing African and South American countries.

1.4 South Africa's Current Regime

Chapter VII of the Merchant Shipping Act of 1951[29] was the first South African Act giving effect to an international maritime convention, namely the Hague Rules. This was updated in 1986 by the Carriage of Goods by Sea Act (COGSA),[30] which incorporates the Hague-Visby Rules as Schedule 1 to the Act. The limits of liability as contained in the Hague-Visby Rules as they applied in South Africa were amended in 1997, introducing Special Drawing Rights (SDRs) in the Shipping General Amendment Act.[31] COGSA has eight sections which are required to be read in conjunction with the Hague-Visby Rules.

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[23] Reynolds 1990 *MLAANZ Journal* 27.
[24] Ibid.
[25] Reynolds 1990 *MLAANZ Journal* 29.
[26] Wanigasekera "Comparison of Hague-Visby and Hamburg Rules".
[27] Wanigasekera "Comparison of Hague-Visby and Hamburg Rules".
[28] Tetley *Marine Cargo Claims* xv.
[29] 57 of 1951.
[30] 1 of 1986.
[31] 23 of 1997.

Professor John Hare states that:

> "as the [Hague-Visby] Rules are enacted verbatim in the schedule to COGSA, their interpretation would be governed primarily by the normal rules of the interpretation of statutes in South Africa".[32]

As there have not been many cases concerning these rules or this Act in South African courts, Hare comments that English decisions on the rules would probably be the most persuasive in South African courts if outside sources were needed to give guidance to our courts.[33]

The eight sections of COGSA, which are applied with the Hague-Visby Rules, often have the affect of allowing the rules to apply in circumstances in South Africa which are not strictly in line with the provisions given in the rules themselves, as is discussed below.

The Hague-Visby Rules exclude the carriage of live animals and cargo which is stated in the contract as being carried on deck and which is so carried. From the application of these rules,[34] COGSA, however, states that:

> "deck cargo or live animals, if and so far as the contract contained in or evidenced by a bill of lading or receipt ... applies to deck cargo or live animals, as if article 1(*c*) of the Rules did not exclude deck cargo and live animals".[35]

Hare states that the effect of this enactment is that the South African Act extends the application of the rules when the contract of carriage contains a clause which provides that the Hague-Visby Rules will govern the carriage of goods or live animals on deck and they are so carried.[36] In these cases, carriage of cargo on deck and carriage of live animals are included under the application of the rules in South African law.[37] However, goods carried on deck and live animals carried on a vessel may be excluded from the application of the rules if there is no specific clause in the contract which extends their application to these types of cargo.[38]

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[32] Hare *Shipping Law* 650.
[33] Ibid.
[34] Article 1(*c*).
[35] COGSA s 1(1)(*d*).
[36] Hare *Shipping Law* 653–654.
[37] Hare *Shipping Law* 654.
[38] Ibid.

The rules are applied in cases where the contract is covered by a bill of lading, or a similar document of title.[39] At the time of the formulation of the rules the main shipping documents which were being used in trade were negotiable "shipped" bills of lading and "received for shipment" bills of lading.[40] However, since that time sea waybills and non-negotiable receipts have become more common in transactions that are not similar documents of title.[41] As a result, in COGSA, South Africa has extended the application of the rules to cover waybills and non-negotiable receipts which contain a clause paramount, as discussed above.[42]

South Africa's COGSA limits the application of the rules to sea carriage in ships.[43] The rules themselves state that they apply only to sea carriage,[44] and more specifically to the tackle-to-tackle period of carriage.[45]

COGSA further states that the common-law absolute undertaking of the carrier to supply a seaworthy ship shall not be implied by any contract to which the rules apply.[46] This is in line with the Hague-Visby Rules, which themselves do not call for an absolute undertaking of seaworthiness, rather that the carrier must be duly diligent to make sure the vessel is seaworthy.[47] Hare states that this was one of the trades-offs shippers conceded in the rules.[48]

The carrier must exercise due diligence to make the ship worthy at the beginning of the voyage.[49] The carrier is also obliged to "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried".[50] The Cape High Court considered the proper care of cargo in *MV Sea Joy*.[51] In this case, the court had to consider whether cargo which was stowed FIOS (Free In and Out Stowed) meant that the carrier was not liable for cargo which was badly stowed. FIOS refers to the situation when a shipper undertakes to arrange and pay for the stowage of the cargo.[52] Even though in this case, due to a misunderstanding,

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[39] Article 1(*b*).
[40] Hare *Shipping Law* 654.
[41] Ibid.
[42] COGSA s 1(1)(*c*); Hare *Shipping Law* 654.
[43] COGSA s 1(1)(*a*).
[44] Article I(*b*).
[45] Article I(*e*); the tackle-to-tackle period is the period between loading and discharge of the cargo.
[46] COGSA s 2.
[47] Article III r 1.
[48] Hare *Shipping Law* 656.
[49] Article III r 1.
[50] Article III r 2.
[51] *MV Sea Joy: Owners of the Cargo Lately Laden On Board the MV Sea Joy v The MV Sea Joy* 1998 (1) SA 487 (C).
[52] MV Sea Joy: *Owners of the Cargo Lately Laden On Board the MV Sea Joy v The MV Sea Joy* 1998 (1) SA 487 (C).

the charterer's stevedores stowed the cargo instead of the shipper's stevedores under the supervision of the master, the court found that FIOS did not mean that the owners as the carrier did not still have the residual obligation to ensure that the cargo was properly stowed in the vessel, and so he would still be liable for badly stowed cargo which was damaged.[53] Hare states that this is at odds with English law, which does not hold the carrier liable in such circumstances, for commercial reasons.[54]

1.5 The Sea Transport Documents Act[55]

The aim of this Act,[56] as stated in the preamble, is to "make provision with regard to certain documents relating to the carriage of goods; and to provide for incidental matters". This Act regulates goods carried under bills of lading, sea waybills, consignment notes, through bills of lading, combined transport bills of lading, combined transport documents or other similar documents relating to the carriage of goods.[57] This Act, unlike Acts in other commonwealth jurisdictions, does not provide a precise definition of a bill of lading; however, it does provide that only negotiable or transferable sea transport documents may entitle a claimant to sue.[58]

Application of the Act

The Act applies to all sea transport documents issued in South Africa, including those which were issued before the commencement of the Act.[59] This is unlike other commonwealth Acts, which do not have retrospective effect; however, the purpose in South Africa of making the Act retrospective was in order to avoid conflicts with the Admiralty Jurisdiction and Regulation Act.[60] It further applies to all goods which are "consigned to a destination" in South Africa[61] or which are "landed, delivered or discharged in the Republic",[62] irrespective of whether the transport documents were issued in South Africa. This means that in cases

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[53] 1998 (1) SA 487 (C).
[54] Hare *Shipping Law* 661.
[55] 65 of 2000.
[56] 65 of 2000.
[57] Hare *Shipping Law* 669.
[58] S Girvin "Carriage by Sea: The Sea Transport Documents Act 2000 in Historical and Comparative Perspective" (2002) 119 *SALJ* 317 at 344; s 2(2).
[59] Section 2(1)(*a*); Girvin (2002) 119 *SALJ* 344.
[60] Act 105 of 1983.
[61] Section 2(1)(*b*)(i).
[62] Section 2(1)(*b*)(ii).

where the transport documents were not issued in South Africa, the Act applies only to cargo coming into South Africa.[63] It also applies to any sea transport documents and goods in respect of which proceedings have been brought in a South African court or arbitration tribunal, irrespective of whether the cause of action arose before the commencement of the Act.[64] Hare comments that the intention of this provision is to "bind the *lex fori* to the terms of the Act",[65] and so regulating existing and future cargo claims relating to all goods and all types of transport document.[66]

Transfer and negotiation

Section 3 of the Act deals with how a sea transport document may be transferred and who may transfer it,[67] and further defines who may be considered a holder of a sea transport document.[68] The sea transport document may be transferred by delivery, endorsement if necessary, or by use of an electronic telecommunications system.[69] This section also makes provision for situations where the original document has been lost and for proof of entitlement to the document, as though it were not lost.[70] Section 4 deals with the transfer of rights and obligations from the person to whom the document was issued to the new holder to whom it has been transferred. Basically, this section states that the holder is then subject to the same obligations and rights as the original holder[71] and is the cessionary of all rights of action for loss of or damage to the goods referred to in the document unless the rights or obligations relate to a *delectus persona* which relates to the original holder.[72] The purpose of this section is to prevent the shipper, who may be bound particularly to the carrier, from resiling himself from his obligations simply by ceding the document to a third party.[73] Hare comments that this is in accordance with South Africa's common law of cession in which a creditor must consent to the transfer of rights from a particular debtor.[74]

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[63] Hare *Shipping Law* 669.
[64] Section 2(1)(*c*).
[65] Hare *Shipping Law* 670.
[66] Ibid.
[67] Section 3(1).
[68] Section 3(2).
[69] Section 2(2); Girvin (2002) 119 *SALJ* 345.
[70] Section 3(3).
[71] Section 4(1)(*a*).
[72] Section 4(1)(*b*).
[73] Hare *Shipping Law* 671.
[74] Ibid.

Evidence

Section 6 deals with the evidence of shipment. It states that a sea transport document which represents goods to have been shipped on a vessel or the goods being received for shipment on board that vessel and which has been signed on behalf of the carrier will be *prima facie* evidence in favour of the shipper, and conclusive evidence for a subsequent holder that the goods have been so shipped or so received.[75] This represents statutory estoppel against the carrier.[76] This is in common with other commonwealth jurisdictions.[77]

Delivery

Hare states that a problem which carriers have faced regarding delivery of goods in relation to documents other than those shipped under straight bills of lading is the extent to which a carrier is entitled to deliver the goods to a person who presents the document, if that person is not the original holder.[78] Section 7 of this Act states that the carrier will be discharged from his obligation to deliver the goods when the goods are handed over to the person presenting the sea transport document which relates to those goods. The carrier may also require that person to establish a right to delivery.[79] However, this section also states that if the carrier delivers the goods in terms of this section, then delivery made in terms of this section does not affect any right to damages.[80] The only way a carrier may circumvent the possibility of being liable for damages is if he applies for a court order which authorises delivery.[81]

Bad faith

This Act also contains an entire section relating to persons acting in bad faith.[82] This section states that any person who makes delivery to anyone whom they suspect on reasonable grounds has no right to receive delivery; or anyone who seeks delivery in the knowledge that they are not entitled to delivery because of an invalid transfer of documents, or in the

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[75] Section 6.
[76] Hare *Shipping Law* 671.
[77] Girvin (2002) 119 *SALJ* 346.
[78] Hare *Shipping Law* 672.
[79] Section 7(3)(*a*).
[80] Section 7(4).
[81] Hare *Shipping Law* 672.
[82] Section 8.

knowledge that the goods evidenced by the document have not been shipped or received for shipment, then these individuals acquire no rights in terms of the Act.[83]

Regulations

The Act[84] also makes provision for the use of electronic data interchange.[85] The Minister is empowered to prescribe circumstances and conditions in which electronic records or documents mat be regarded as transport documents.[86] The Minister also has a mandate generally to make regulations regarding all matters which are "reasonably necessary or expedient to achieve the objects of the Act".[87]

The owner

The Act further amends the Admiralty Jurisdiction Regulation Act[88] in section 10. This amendment states that a demise charterer will be deemed to have been the owner of the vessel during the period of the charterparty for the purposes of any cargo claims arising during this time which are enforced by an action *in rem* under the Act.

The carriage of goods by sea in South Africa is therefore regulated by the COGSA, the Hague-Visby Rules and the Sea Transport Documents Act. The question is whether, given the changing face of maritime carriage, it is sufficient and desirable to maintain the current *status quo*, or if an alternative, modernised regime should be considered.

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[83] Section 8.
[84] 65 of 2000.
[85] Section 9.
[86] Section 9(1)(*a*).
[87] Section 9(1)(*b*); Girvin (2002) 119 *SALJ* 348.
[88] 105 of 1983.

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Inadequacies of the Current Regimes

It has been stated that international uniformity in shipping law, which was achieved under the Hague and the Hague-Visby Rules, has been eroded over recent decades.[1] This may partially be blamed on the fact that the Hague Rules, which were only slightly amended by the Hague-Visby Rules, are based on shipping practices formulated when sailing ships were still on the seas.[2] In a nutshell, these rules are outdated and do not take into consideration the needs of today's commerce. International trade today includes better and faster technologies to facilitate transactions, such as the World Wide Web. Other factors which have influenced maritime trade include higher levels of containerisation, efficient and growing e-commerce, globalisation, fast electronic communications and the fact that many contracts of carriage are now multimodal.[3]

Professor Michael Sturley, commenting on the uniformity of laws governing carriage by sea, points out that today states apply either the Hague, the Hague-Visby or the Hamburg Rules, or a combination of them, as interpreted by their national courts.[4] This means that there is virtually no "standardisation" of international Maritime Law. This in turn may lead to conflict of laws, and has the effect that a highly fragmented system governs international transactions.[5] This often creates legal uncertainty and higher transaction costs than would arise under a single regime.[6]

A major issue with the current regimes is that they do not make provision for contracts of carriage which include different modes of carriage. These may be carriage of goods which occurs by sea and air, or sea and road, or sea, air and road. These are known as "multimodal" contracts of carriage as more than one "mode" is used to transport goods from, for example, their place of manufacture to their final destination.

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[1] W Tetley *Marine Cargo Claims* Volume 2 4 ed (2008) xv.
[2] R Hailey "Questions of Balance in the Rotterdam Rules" (2009) Available: fhttp://www.rotterdamrules.com/pdf/Questions-of-balance-in-the-Rotterdam-Rules-Lloyd's-List-27-08-2009.pd (accessed 14 February 2010).
[3] Hailey "Questions of Balance in the Rotterdam Rules".
[4] Hailey "Questions of Balance in the Rotterdam Rules".
[5] Minister C Eurlings "Rotterdam Rules" (2009) Available: http://www.verkeerenwaterstaat.nl/actueel/toespraken/rotterdamrules.aspx (accessed 20 February 2010).
[6] Minister Eurlings "Rotterdam Rules".

The Hague Rules apply only to sea transport[7] and, more specifically, only to the "tackle-to-tackle" period. The tackle-to-tackle period is the period between loading and discharge of the cargo. These rules do not even apply to the time when the goods are under the carrier's control in the port area.[8] The Hague-Visby rules, according to Sturley, were negotiated in the "container revolution",[9] which was the time before multimodal contracts were common business agreements.[10] Owing to this, the drafters of the Visby amendments did not find it necessary to change the period of responsibility of the carrier and, as a result, the position is the same as that under the Hague Rules.[11] The Hamburg Rules also provide for unimodal transport only, but do extend the period of the carrier's responsibility slightly to cover the time when the cargo is under the ocean carrier's control in the port area – the "port-to-port" period.

Historically, the international transport of goods between two countries would travel under three separate contracts of carriage.[12] The first of these would cover when the cargo was carried overland under a railway or trucking bill of lading from, for example, a manufacturing plant to the port where it would be loaded.[13] The second covered the period when the cargo travelled by sea under an ocean bill of lading to the port of discharge.[14] The cargo would then complete its journey inland under another railroad or trucking bill of lading.[15] Sturley states that each of these three separate contracts of carriage would be "legally distinct" and so each would be subject to their own legal regime.[16]

The limited periods of responsibility for carriers provided for in the first three international maritime conventions means that other laws have had to be enacted so as to provide for multimodal contracts of carriage. In some regions – mainly in Europe – regional unimodal conventions apply to international road and rail carriage.[17] Some countries apply mandatory

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[7] Article 2.
[8] The Hague Rules [the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading – Brussels Convention 1924].
[9] MF Sturley "Sea Carriage Goes Ashore: The Relationship Between Multimodal Conventions and Domestic Unimodal Rules" (2007) Available: http://www.uncitral.org/pdf/english/congress/Sturley.pdf (accessed 10 January 2010).
[10] Sturley "Sea Carriage Goes Ashore".
[11] Sturley "Sea Carriage Goes Ashore".
[12] Sturley "Sea Carriage Goes Ashore".
[13] Sturley "Sea Carriage Goes Ashore".
[14] Sturley "Sea Carriage Goes Ashore".
[15] Sturley "Sea Carriage Goes Ashore".
[16] Sturley "Sea Carriage Goes Ashore".
[17] Sturley "Sea Carriage Goes Ashore".

domestic law to inland carriage, which may be dissimilar to that which prevails in other countries. Some other, mainly European, countries have linked their domestic law to existing regional regimes.[18] Many countries, however, do not have mandatory law governing this, and so the parties should address which law will apply to each "leg" of the voyage in their contracts of carriage.[19] Accordingly, today, each distinct segment of a multimodal journey may be governed by a different legal regime while under a single contract of carriage. This can be fairly complicated for all parties involved and does nothing to promote legal certainty in the international transportation of goods.

Countries such as the United States have recognised the need for a single legal regime which will apply to an entire contract of carriage, even a multimodal one. As the Supreme Court stated in *Norfolk Southern Ry Co v James N Kirby, Pty Ltd*,[20] "confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning."[21]

In an attempt to regulate multimodal contracts for the carriage of goods, the United Nations Commission on International Trade Law adopted a multimodal convention in 1980.[22] This convention was designed to regulate the multimodal carriage of goods; however, it has never received the requisite support that would enable it to come into force.[23] Professor Tetley submits that this has left a "yawning gap in global sea-carriage law".[24]

Carriage of goods by sea has become easier in recent decades, mainly because of containerisation. "Containerisation", which refers to the shipping of goods in containers, has become an increasingly popular way to transport goods.[25] In fact, the shipping container market has been growing at nearly three times the rate of the world economy.[26] A significant driver behind the growth of containerisation is the need to transport high volumes of goods and materials between countries. Asia serves as the world's manufacturing hub, while the United States and Europe are the main consumers of their products' and between them lie

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[18] Sturley "Sea Carriage Goes Ashore".
[19] Sturley "Sea Carriage Goes Ashore".
[20] 543 US 14, 29, 2004 AMC 2705, 2715 (2004).
[21] 543 US 14, 29, 2004 AMC 2705, 2715 (2004).
[22] Tetley *Marine Cargo Claims* xvi.
[23] Ibid.
[24] Ibid.
[25] A Jung "The Box that Makes the World go Round" (2005) Available: http://www.spiegel.de/international/spiegel/0,1518,386799,00.html (accessed 20 February 2010).
[26] Jung "The Box that Makes the World go Round".

hundreds of kilometres of ocean.[27] As a result, the seven seas are globalisation's "home field".[28] Containers are crucial to today's trade because almost anything can be shipped in a container – from frozen goods to motor vehicles.[29] An additional benefit of containerisation is that the larger the volume of goods shipped at one time, the less each unit costs to transport.[30]

Container ships usually accommodate between 6 000 and 7 000 containers on a single journey. New plans are being drawn up for giant freighters capable of accommodating 13 000 containers per voyage.[31] A network of shipping lanes spans the globe and there is no indication of the traffic decreasing in the future.[32]

In today's world of globalised trade, a single multimodal contract of carriage often covers the transport over sea as well as one or both of the inland legs.[33] A shipper will not have separate contracts for each part of the cargo's journey, but will have a single contract with the carrier, who may have separate subcontracts for each leg of the carriage.[34] As early as 2002, 50 per cent of containers carried by sea were carried "door-to-door".[35] From the shipper's standpoint, there is only a solitary contract of carriage which governs both land and sea travel, and so it would be useful if these types of contract could be subject to a single legal regime.[36]

The existing regimes, moreover, do not contain provisions regulating paperless transactions, also known as "e-commerce".[37] This is due to the fact that these regimes were formulated before the internet came into existence and became a worldwide phenomenon.[38] E-commerce has almost become the norm nowadays, as the internet is the fastest and most convenient way for people in different countries to communicate. The internet is commonly used in business transactions, with contracts being emailed to and from different places and many payments

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[27] Jung "The Box that Makes the World go Round".
[28] Jung "The Box that Makes the World go Round".
[29] Jung "The Box that Makes the World go Round".
[30] Jung "The Box that Makes the World go Round".
[31] Jung "The Box that Makes the World go Round".
[32] Jung "The Box that Makes the World go Round".
[33] Sturley "Sea Carriage Goes Ashore".
[34] Sturley "Sea Carriage Goes Ashore".
[35] UNCITRAL Note by the Secretariat, document A/CN.9/WG.III/WP.29 para 25.
[36] Sturley "Sea Carriage Goes Ashore".
[37] Minister Eurlings "Rotterdam Rules".
[38] Minister Eurlings "Rotterdam Rules".

are also made using online banking. It is imperative that that a modern shipping Convention makes provision for the regulation of e-commerce.

What is more, the current regimes regulating the carriage of goods by sea do not cover a number of important commercial matters, such as the position of the banks in trade finance.[39] These banking and other customs, industry practices and previous case law surrounding a typical bill of lading would benefit from being codified so as to promote regularity and harmonisation in Maritime Law and international business transactions.[40]

A single legal regime which modernises the legal side of the maritime industry, taking into account e-commerce, containerisation, globalisation and the pressing need for a legal instrument which incorporates modern multimodal transport would be of great use in the shipping industry. Such a mechanism, if it receives sufficient support, could increase legal certainty and synchronise industry practices and customs with the requirements of today's commerce. As mentioned previously, there is a very real danger that should an updated and acceptable international instrument not be forthcoming, nations will enact their own national legislation to cover the carriage of goods in their waters, and carriages conducted by their carriers and shippers. This will result not only in regionalism but also in the law becoming more fragmented, with legal uncertainty becoming even more prevalent. This could have a majorly negative impact on trade and the global economy. Consequently, it is apparent that a strong new convention incorporating all of these aspects, which takes into account industry interests and encourages global participation may be the answer to standardising international trade.

2.1 Criticisms and Concerns Regarding Specifically the Hague-Visby Rules

The Hague-Visby Rules came into effect in 1977 after receiving the required number of ratifications for this to occur.[41] South Africa has not formally ratified the Hague-Visby Rules, but enacts them as part of its national law.[42] They are attached as a Schedule to the South African Carriage of Goods by Sea Act (COGSA).[43]

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[39] Hailey "Questions of Balance in the Rotterdam Rules".
[40] Hailey "Questions of Balance in the Rotterdam Rules".
[41] F Reynolds "The Hague Rules, the Hague-Visby Rules and the Hamburg Rules" (1990) 7 *MLAANZ Journal* 16 at 22.
[42] Infomare "International Conventions Membership List" (2010) Available: http://www.informare.it/dbase/convuk.htm (accessed 10 March 2010).
[43] Act 1 of 1986.

As the Hague-Visby Rules have been in operation for more than 30 years, they are outdated, given the huge growth in the globalisation and modernisation of the shipping industry.[44] The Visby Amendments to the Hague Rules are also not considered to fully embrace consumer needs.[45] This is because many developing nations who rely heavily on importing goods and who have no or few shipowning enterprises, perceive these rules still to benefit the carrier more so than the shipper or receiver.[46] This is particularly true in relation to the many defences, exceptions and immunities available to a carrier under provisions regulating nautical fault.[47]

Shipowners have also had cause to express dissatisfaction with the Hague-Visby Rules, given the outcome of the famous case of *The Muncaster Castle*,[48] in which the Hague-Visby Rules applied. In this case the House of Lords found that the shipowners were liable for a shipfitter who did not properly re-tighten nuts on an inspection cover on a vessel; these nuts worked loose during heavy weather and resulted in a cargo of ox tongues being wetted. Shipowners found this outcome to be – perhaps understandably – harsh. Third-party contractors have also lobbied for reform, after the 1962 case of *Scruttons v Midlands Silicones*.[49] In this case, stevedores employed by a shipowner had it written in their contract that they would be liable for their own negligent acts, but that they could rely on the terms, conditions and exceptions of the shipowner's bill of lading regarding liability, were held not to be able to rely on the package limitation of the Hague Rules as they were not considered to be parties to the contract of carriage.

The Hague-Visby Rules have been criticised for the requirement in article X that a bill of lading must be issued for the rules to apply,[50] instead of including a general requirement that ports of loading and discharge or places of loading and receipt must be in contracting states for a set of rules to apply or including other documents with similar properties to a bill of

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[44] Hailey "Questions of Balance in the Rotterdam Rules".
[45] Hare *Shipping Law* 625.
[46] Ibid.
[47] Ibid; art 2.
[48] *Riverstone Meat Company, PTY., LTD. v. Lancashire Shipping Company, LTD.* (The "Muncaster Castle") Lloyd's law reports , [1961] 1 Lloyd's rep. 57.
[49] [1962] AC 446.
[50] Hill Dickinson "Cargo Conventions: Comparing the Hague, Hague-Visby, Hamburg and Rotterdam Rules" (2009) Available: http://www.hilldickinson.com/ pdf/Shipping %20Guide%201%20-%20Cargo%20Conventions.pdf (accessed 10 January 2010).

lading. This alternative, it is argued, would allow more transactions to be "covered" by international rules, which may increase legal certainty.[51]

In addition, article 1(*b*) of the Hague-Visby Rules, which states that only contracts of carriage where a bill of lading or similar document has been issued are covered by the rules, is very restrictive,[52] as this clearly applies only to transport by sea. Given the rise of multimodal transport,[53] it is evident that a contract of carriage "from one place to another" would be more beneficial as this would include different forms of transport. This also means that there need not be a transport document or a document of title and that electronic transport records would suffice.

The Hague-Visby Rules have been criticised on the ground that the carrier's responsibility is only "tackle-to-tackle".[54] It may even be argued that a period of responsibility of "port-to-port" for the carrier is not wide enough, given the growing use of multimodal contracts. It may be argued that a single legal regime which regulates the time from which the carrier or "performing party" receives the goods for carriage until the time of the delivery would enable all industry participants to benefit from legal certainty and would make transactions easier.[55]

Also, in these rules the carrier is defined only as the "owner" or "charterer" who enters into a contract of carriage with a shipper.[56] Consequently, duties and obligations do not extend to "performing parties" acting at the carrier's request or under the carrier's supervision and control.[57] Given that carriers frequently subcontract part of such a contract, as previously mentioned, a shipper may encounter difficulties if their goods are damaged while they are not under the shipper's or carrier's control but rather under a third party's control.[58] It may be argued that the definition does not extend who may be considered to be a "carrier" far enough to cover all aspects of potential liability, and that an international instrument should take into account that there are often more than two parties involved in such a transaction.

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[51] Hill Dickinson "Cargo Conventions".
[52] Hill Dickinson "Cargo Conventions".
[53] Jung "The Box that Makes the World go Round".
[54] Article 1(*e*); Hill Dickinson "Cargo Conventions".
[55] Hill Dickinson "Cargo Conventions".
[56] Article 1(*a*).
[57] Hill Dickinson "Cargo Conventions".
[58] Sturley "Sea Carriage Goes Ashore".

In addition, article IV*bis* states that the Hague-Visby Rules apply only to contractual and delictual claims. Obviously, this means that defences and limitations of liability apply to claims for loss, damage or delays only if they fall within the bounds of contract or delict. This is restrictive because if a shipper's claim falls outside these parameters, then the rules will not apply.

Article III of the Hague-Visby Rules restricts the carrier's duty of seaworthiness to commencing before and at the start of a voyage.[59] This means that should any complications arise because the vessel becomes unseaworthy during the voyage, the carrier will not be liable for not being "duly diligent" during the journey, even if he could have corrected the problem and so avoided damage to the goods. There seems to be no reason why a reasonable duty of "due diligence" should not extend to the entire voyage.[60]

Moreover, the Hague-Visby Rules have also been criticised on the basis that they do not clearly state who must prove what in order for a claim in court to succeed, with the exception of article IV(2)(*q*).[61] This may be because the drafters expected national law to cover this burden of proof. However, it would provide clarity if the rules at least stated that the claimant should be able to show that the loss, damage or delay occurred during the carrier's period of responsibility. Then the onus would be on the carrier to prove that the cause of the damage, delay or loss was not attributable to fault on his part, or that of the master, crew or employees of the carrier.[62] This does not seem unreasonable and would aid in standardising how national courts approached these sorts of claim.

As previously mentioned, the Hague-Visby Rules exclude from the application of the rules live animals carried as cargo.[63] Consequently, if contracting parties are not from states such as South Africa where this is regulated by national law, parties may have their own unique provisions in the contract between them to regulate this, if necessary. This obviously means that there is virtually no "standard" for the carriage of live animals or deck cargo in

[59] The West of England Ship Owners Mutual Insurance Association (Luxembourg) "Rotterdam Rules Review" (2010) Available: www.westpandi.com/Documents/News/ROTTERDAMRULESReview.pdf (accessed 10 February 2010).
[60] The West of England Ship Owners Mutual Insurance Association (Luxembourg) "Rotterdam Rules Review".
[61] Hill Dickinson "Cargo Convention".
[62] Hill Dickinson "Cargo Conventions".
[63] Article 1(*c*).

International Trade Law.[64] Given that cargo is nowadays often carried on deck, it seems to be practical for an international convention to include provisions regulating this type of carriage, even if only to provide some sort of guideline.

Article 1(*c*) of the Hague-Visby Rules excludes from the application of the rules cargo carried on the deck of a ship, if it is declared on the bill of lading that it will be carried on deck. This was a recognised problem with the rules even before the Hamburg Rules were drafted.[65] Carriage of goods on deck is occasionally a usage or custom of a particular trade or it is required by statutory rules or regulations.[66] In these situations it makes no sense for international conventions not to apply, and for national laws or contracts between the parties having to regulate this instead. This appears to be perpetuating one of the issues international conventions were meant to solve, that is, carriers being able to dictate their terms to shippers for the carriage of goods.

While the Hague-Visby Rules do provide limits of liability for goods lost or destroyed in transit,[67] there is no provision that these limits should have increased with inflation over the past three decades since their inception.[68] Consequently, it may be argued that they are far lower than they should be and so afford carriers an unfair benefit. In addition, the Hague-Visby Rules do not provide any guidelines for the limits of liability for delayed goods. This was recognised as an oversight and remedied by article 6 of the Hamburg Rules,[69] which South Africa does not apply, nor is it addressed in COGSA.

Article VI of the Hague-Visby Rules only allows lower limits of liability by agreement between shippers and carriers in "special circumstances". However, it is a usual practice in today's world of modern commerce for shippers to have a consistent volume of goods carried to various places.[70] Thus, shippers generally negotiate "volume contracts" which are not considered to be "special circumstances" under the Hague-Visby Rules; rather, they are

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[64] Minister Eurlings "Rotterdam Rules".
[65] Hill Dickinson "Cargo Conventions".
[66] Hill Dickinson "Cargo Conventions".
[67] Article IV r 5.
[68] Hill Dickinson "Cargo Conventions".
[69] United Nations Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978) ("the Hamburg Rules").
[70] F Berlingieri, P Delebecque, T Fujita, R Illescas, M Sturley, G van der Ziel, A Von Ziegler and S Zunarelli "The Rotterdam Rules: An attempt to clarify certain concerns that have emerged" (2009) Available: http://www.comitemaritime.org/draft/pdf/5RRULES.pdf (accessed 20 December 2009).

"usual commercial transactions" so special terms cannot apply. Volume contracts occur when shippers negotiate impromptu contracts with carriers with the aim of obtaining special freight rates and guaranteed availability of container space on a vessel at a specified time.[71] In these situations, carriers quite naturally require a *quid pro quo* agreement for a reduction of freight rates and guaranteed space, and so arguably they should have limited freedom to contract out of some liability in order not to affect international trade unfavourably;[72] but the Hague-Visby Rules do not allow for this.

Article III rule 3 of the Hague-Visby Rules also states very briefly what a bill of lading must contain, that is: leading marks necessary for identifying the goods, the number of packages or pieces, or the quantity or weight of the goods shipped as well as the apparent condition and order of the goods. This was recognised as insufficient even before the Hamburg Rules were drafted.[73] The Hamburg Rules in article 15 increase the terms that need to be in a bill of lading by another 12 requirements,[74] clearly showing the deficiency of the Hague-Visby Rules in this regard.

In article III rule 5 the Hague-Visby Rules stipulate the duties of a shipper in supplying a carrier with information. The shipper is deemed to guarantee the accuracy of the statements regarding the weight and quantity of the cargo, and the shipper is to indemnify the carrier from loss resulting from errors in this regard. This has been criticised in that other information provided by the shipper is not guaranteed, and all the information he provides should be guaranteed so as to lessen the burden on the carrier for the shipper's errors.[75]

In addition, the Hague-Visby Rules contain no specific provisions relating to the effectiveness of a letter of indemnity issued by a shipper for a carrier not clausing the bill of lading.[76] This is deemed to be void under English law, as illustrated in the case of *Brown Brown Jenkinson & Co Ltd v Percy Dalton*;[77] however, this may differ from nation to nation. If this were regulated by an international maritime instrument it would promote legal

[71] Berlingieri "The Rotterdam Rules".
[72] Berlingieri "The Rotterdam Rules".
[73] Hill Dickinson "Cargo Conventions".
[74] United Nations Convention on the Carriage of Goods by Sea ("the Hamburg Rules").
[75] Hill Dickinson "Cargo Conventions".
[76] Hill Dickinson "Cargo Conventions".
[77] [1957] 2 Lloyds Rep 161.

certainty, reliability and equality before law and aid in decreasing the risks of legal fragmentation in this regard internationally.

Article III rule 6 of the Hague-Visby Rules states that notice of damage to goods which occurred during transit must be given in writing to the carrier or his agent immediately on the day of delivery of the goods or within three days where the damage is latent. This is a very short period of time and it may be argued that it is unreasonable, given the demands of modern commercial practice and the shipping industry,[78] as it is unrealistic to expect the shipper to identify damage and report it in writing to the carrier immediately, particularly as large quantities of goods are often shipped.[79] Even the Hamburg Rules in article 19 extend this period of notice.

Article III rule 6 of the Hague-Visby Rules states, moreover, that if the shipper does not notify the carrier of loss, damage or delay within the time stipulated, the bill of lading will be considered *prima facie* proof of delivery of the goods in the condition described in the bill of lading. The rules, however, are silent on whether failure to give notice affects the shipper's right to claim for compensation for loss or damage or whether it affects the burden of the allocation of proof in these cases.[80] This may be interpreted in diverse ways in different jurisdictions, which again has the effect that the law in this regard is not standardised worldwide.

The Hague-Visby Rules article III rule 6 states that a suit must be brought within a year of the date of delivery of the goods, or within a year of the time when they should have been delivered. This period is again arguably too short as the goods may be delivered late and it may take a long time to institute court proceedings in the necessary jurisdiction. This provision appears to benefit only the carrier at the cost of the shipper.[81]

Another significant issue that has been identified regarding the Hague-Visby Rules is that they are silent on the issue of jurisdiction, that is, where a cargo shipper can commence court proceedings against a carrier.[82] This is clearly an area of concern because, besides the short

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[78] Hill Dickinson "Cargo Conventions".
[79] Hill Dickinson "Cargo Conventions".
[80] Hill Dickinson "Cargo Conventions".
[81] Hill Dickinson "Cargo Conventions".
[82] Hare *Shipping Law* 52.

periods in which to bring a claim, courts may refuse to hear a case that they consider to be outside their jurisdiction, and countries may have different requirements to ascertain whether a court in their state may hear a certain claim. A shipper may institute proceedings in the "wrong" place, and it may be too late for him to still bring a claim, given the time periods in the rules, when the court he approached determines that that court does not have jurisdiction. An international maritime instrument should make provision for the court which will have jurisdiction in these sorts of situation. Important considerations may include the domicile of the carrier, contractual terms under the agreement between the shipper and carrier, the place of receipt of the goods, the place of delivery of the goods, the port of loading or discharge, and whether an "arrest" of a ship will convey jurisdiction to the country where it is docked.[83] This will increase legal certainty in this regard, and will ensure that a carrier cannot escape liability too easily.

The Hague-Visby Rules also make no mention of arbitration or mediation proceedings, and parties are left to include their own arbitration clauses in their contracts if they choose.[84] It is recognised that arbitration and/or mediation proceedings are faster, easier and cheaper for parties to engage in rather than court proceedings,[85] since the rules of evidence and procedure are usually less stringent in these types of proceeding and the parties usually represent themselves. It is significantly less expensive in terms of money and time to engage in arbitration or mediation proceedings instead of in a court case.[86] An international maritime instrument should contain provisions regulating arbitration and mediation, as industry participants may choose to use one of these routes instead of indulging in a lengthy and costly court case.

Owing to all of the factors discussed above, it is quite clear and evident that the Hague-Visby Rules are deficient in many respects, and any new international maritime convention should ensure that these aspects are covered within such an instrument.

The Comité Maritime International (CMI), conscious of existing deficiencies in the Hague-Visby and subsequent Hamburg Rules, began in the late 1990s to assess the national

[83] Hill Dickinson "Cargo Conventions".
[84] Hill Dickinson "Cargo Conventions".
[85] T Pedreira "Arbitration" (2010) Available: http://research.lawyers.com/Arbitration-and-Mediation.html (accessed 24 March 2010).
[86] Pedreira "Arbitration".

requirements of states regarding the carriage of goods by sea.[87] Also, the CMI has been joined by a number of other parties whom Tetley submits are the "principal catalysts of reform in world cargo liability law".[88] These include the International Maritime Organisation (IMO), the United Nations Conference on Trade and Development (UNCTAD) and UNCITRAL.[89]

The South African Maritime Law Association (SAMLA) responded wholeheartedly to the CMI's efforts, presenting a position paper which rejected the Hamburg Rules and pointed out the inadequacies in the Hague-Visby Rules.[90] SAMLA specifically called for revision of the Hague-Visby Rules relating to electronic documents, stricter standards of seaworthiness, a clearer identification of the carrier, and the narrowing of the nautical fault exception.[91]

Interestingly, at a CMI conference in New York in 2000, South Africa was one of two states to call for a start to be made on the preparation of a new instrument.[92] This appears to be irrefutable evidence that the maritime industry in South Africa is not satisfied with COGSA and the Hague-Visby Rules, and does not find them suitable for the regulation of the carriage of goods by sea.

It is also noteworthy that political and commercial power has shifted over the past two decades from "traditional seafaring nations"[93] such as Europe and the Americas to states in the Pacific Rim.[94] Particularly China, as well as India and Japan, are economic powerhouses, or well on their way to becoming such.[95] Consequently, nations wishing to develop their trade ties with these nations should take heed of their maritime regimes and attitude towards the Rotterdam Rules.

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[87] Hare *Shipping Law* 632
[88] Tetley *Marine Cargo Claims* xvii.
[89] Ibid.
[90] Hare *Shipping Law* 632.
[91] Ibid.
[92] Ibid.
[93] Tetley *Marine Cargo Claims* xvii.
[94] Ibid.
[95] Ibid.

3
The Evolution of Shipping Law

The current international regimes governing the carriage of goods by sea are the 1924 Hague Rules,[1] the Hague-Visby Rules[2] and the Hamburg Rules,[3] which followed a mere ten years after the Hague-Visby Rules were created. As there are three separate instruments regulating international shipping trade, and each regime has its own set of states applying its provisions in a national context, it is quite evident that this has led to fragmentation, disunity and complexity in the law in this regard.

The Hague Rules, which have been in existence for more than 80 years, have gained the greatest level of acceptance from states internationally,[4] and yet have not been uniformly applied by member-states[5] and, again, an instrument which has existed unamended for such a long period of time is clearly going to be outdated and so make limited allowances for modern commercial and transport needs. The Hague-Visby Rules and the Hamburg Rules were intended to update and modify the original Hague Rules with the objective of making them more current and applicable to contemporary carriage of goods by sea. Indeed, at the time, they arguably did. However, neither the Hague-Visby nor in particular the Hamburg Rules have received the necessary support in order to make them a truly successful international instrument.[6] In addition, both of these instruments came into existence more than 40 and 30 years ago, respectively, when the drafters could not have predicted the evolution of sea transport to include containerisation and e-commerce, to mention but two of the components which need to be regulated by an international shipping convention today.[7] This is necessary as a number of states – including one of the world's major trading nations, the United States – have indicated that they are intent on pursuing a modern answer to

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[1] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Brussels, 1924) ("the Hague Rules").
[2] The Hague Rules, as amended by the Visby Amendments, the Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 1968) ("the Hague-Visby Rules").
[3] United Nations Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978) ("the Hamburg Rules").
[4] K Lannan "The Launch of the Rotterdam Rules" (2009) Available: http://www.shhsfy.gov.cn/hsinfoplat/platformData/infoplat/pub/hsfyenglish_42/docs/200911/20.doc (accessed 14 June 2010).
[5] Lannan "The Launch of the Rotterdam Rules".
[6] Lannan "The Launch of the Rotterdam Rules".
[7] Lannan "The Launch of the Rotterdam Rules".

carriage by sea,[8] even if it means enacting their own domestic legislation to accomplish this, which would result in regionalism. Regionalism will have the effect of making the law governing international trade even more fragmented and uncertain than it is at present.

3.1 Origin of the Rotterdam Rules

The Rotterdam Rules came into contemplation in 1994, through the work of the United Nations Commission on International Trade Law's (UNCITRAL) Working Group on Electronic Data Interchange (EDI).[9] In 1995 the UNCITRAL Commission endorsed the EDI's suggestion that a background study should be undertaken concerning the issue of the transferability and negotiability of rights and goods in a computer-based environment, with specific emphasis being placed on maritime transport instruments.[10] The Commission tasked the Secretariat with taking into consideration other work being undertaken by other international organisations such as the CMI, and with the consultation of other relevant industry groups and organisations.[11]

This marked the beginning of cooperation between the two bodies, UNCITRAL and the CMI, which ultimately led to the groundwork for the Rotterdam Rules being laid.[12] The CMI was responsible for a number of important industry groups becoming involved in the process of creating the Rotterdam Rules, including the Baltic and International Maritime Council (BIMCO), the British Chamber of Shipping, the International Chamber of Shipping (ICS), the International Chamber of Commerce (ICC), the Institute of Chartered Shipbrokers, the Fédération Internationale des Associations de Transitaires et Assimilés (FIATA), the International Union of Marine Insurance (IUMI), the International Group of P&I Clubs, the World Shipping Council (WSC), the National Industrial Transportation League (NITL) as well as the International Association of Ports and Harbours (IAPH).[13] Consultations with all of these groups, organisations and key industry stakeholders meant that the needs and desires of the industry were identified and considered in the Rotterdam Rules – crucial for an international instrument.[14]

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[8] International Chamber of Shipping "Position Paper."
[9] Lannan "The Launch of the Rotterdam Rules".
[10] Lannan "The Launch of the Rotterdam Rules".
[11] Lannan "The Launch of the Rotterdam Rules".
[12] J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) 632.
[13] Lannan "The Launch of the Rotterdam Rules".
[14] Lannan "The Launch of the Rotterdam Rules".

Over a six-year period between 1996 and 2001 the CMI and UNCITRAL canvassed and gathered information concerning the maritime transport industry.[15] The CMI also reported that industries in which areas were identified which required unification and harmonisation had expressed a high level of interest in the project and had offered their assistance in finding workable solutions.[16]

At the 34th session of UNCITRAL in 2001, the commission considered the report of the CMI, which gave considerations and suggestions relating to a new maritime instrument, had been identified by the CMI subcommittee, and had taken into account industry contributions.[17] The report recommended that any future instrument should consider the following issues:[18]

- the scope of the application of the instrument;
- the period of responsibility of the carrier;
- the obligations of both the carrier and the shipper;
- the liability of the carrier;
- all forms of transport document;
- freight;
- delivery to a consignee;
- the right of control over cargo;
- the transfer of rights over goods;
- the right of suit against the carrier, and
- the time periods for such a suit.

The UNCITRAL Secretariat also reported to the commission at this time that the discussions it had been involved in indicated that work could commence on an international instrument that would encompass the latest technological developments and combat the legal difficulties that had been identified by participants, and which would ultimately modernise the law governing international carriage.[19] UNCITRAL then established a working group to consider

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[15] Hare "*Shipping Law*" 632-633.
[16] Lannan "The Launch of the Rotterdam Rules".
[17] UNCITRAL (2001) "Report of the United Nations Commission on International Trade Law at its 34th session"Available:http://daccess-ddsny.un.org/doc/UNDOC/GEN/V01/861/06/PDF/V0186106.pdf?OpenElement 60-65 (Accessed 19 December 2011)
[18] UNCITRAL (2001) "Report of the United Nations Commission on International Trade Law at its 34th session"Available:http://daccess-ddsny.un.org/doc/UNDOC/GEN/V01/861/06/PDF/V0186106.pdf?OpenElement 60-65 (Accessed 19 December 2011)
[19] Lannan "The Launch of the Rotterdam Rules".

the preliminary text of a possible future convention, and the commission gave the working group a wide mandate, requesting them to incorporate liability issues and the feasibility of including door-to-door transport transactions in the instrument.[20]

In 2001 the draft text of the instrument was circulated for comment to all national Maritime Law associations and a number of international maritime and business organisations. The draft instrument was then refined twice more, with these associations and organisations observations being taken into account.[21] On 11 December 2001 this draft instrument was submitted to UNCITRAL, signifying the end of the preparatory work on the instrument and paving the way for intergovernmental negotiations between member-states of the United Nations.[22]

Consequently, the first step of preparation of the Rotterdam Rules arose from strong industry involvement, and the key issues to be dealt with in the new regime were identified by industry stakeholders.[23] The next step was to introduce the issues identified by key stakeholders to government representatives for further negotiation and deliberation.[24] This allowed government participation, undoubtedly with the aim of promoting the goal of international acceptance of the instrument.[25]

Deliberations on the Rotterdam Rules began during UNCITRAL's Working Group III on Transport Law at its 9th session in 2002, and continued biannually until January 2008. Consequently, discussions spanning 25 weeks, with input from top maritime experts, state representatives and industry participants, took place on the draft Rotterdam Rules.[26] Active participation was encouraged from a number of industry participants, including the CMI, the UN Conference on Trade and Development (UNCTAD), the United Nations Economic Commission for Europe (UNECE), the ICC, IUMI, FIATA, the ICS, BIMCO, P&I Clubs, IAPH, NITL, the WSC, the European Commission, the Association of American Railroads, the Intergovernmental Organization for International Carriage by Rail, the European Shippers Council (ESC), the International Road Transport Union, the World Maritime University, the

[20] Lannan "The Launch of the Rotterdam Rules".
[21] Lannan "The Launch of the Rotterdam Rules".
[22] Hare "*Shipping Law*" 633.
[23] Lannan "The Launch of the Rotterdam Rules".
[24] Lannan "The Launch of the Rotterdam Rules".
[25] Lannan "The Launch of the Rotterdam Rules".
[26] Hare "*Shipping Law*" 633.

International Multimodal Transport Association as well as el Instituto Iberoamericano de Derecho Maritimo (IIDM).[27]

In addition, states participating in the intergovernmental negotiation process also consulted their own domestic industry stakeholders.[28] So, importantly, whereas governments made all of the final policy decisions regarding the Rotterdam Rules, they did so only after extensive discussions with national and international industry stakeholders and representatives.[29]

The Rotterdam Rules were duly adopted by the UN General Assembly on the 17th of November 2008, by resolution A/63/A38.[30]

3.2 Innovations: The Rotterdam Rules

In comparison to the Hague-Visby Rules, which comprise ten articles, and the Hamburg Rules, which are made up of the 34 articles, the Rotterdam Rules boast a massive 96 articles in 18 chapters.[31] This means that the Rotterdam Rules provide a far more extensive scope than either of the two existing conventions, and regulate more specifically a number of provisions contained in the previous regimes, as well as taking into account a number of novel provisions that are the result of changes and customs in the international transport industry which have occurred over time.

Stuart Beare comments that the Rotterdam Rules are "wide-ranging and ambitious".[32] Areas regulated by Chapters 9–13 are not regulated in any other international regime, but are areas the CMI considers would benefit from international uniformity.[33] These chapters regulate freight, delivery, the right of control, the transfer of rights and rights of suit against a carrier.[34]

Scope of application

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[27] Lannan "The Launch of the Rotterdam Rules".
[28] Lannan "The Launch of the Rotterdam Rules".
[29] Lannan "The Launch of the Rotterdam Rules".
[30] Hare "*Shipping Law*" 633.
[31] BIFA "So what are the Rotterdam Rules" (2009) Available: http://www.bifa.org/_attachments/Resources/1003_S4.pdf (accessed 14 June 2010).
[32] S Beare "Liability Regimes: Where We are, How We got There and Where We are Going" (2002) 3 *LMCLQ* 306 at 309.
[33] Ibid.
[34] Ibid.

As modern container transport contracts typically involve door-to-door carriage, it is logical that any progressive legal instrument should regulate this, and so the Rotterdam Rules incorporate these types of contract into their scope of application.[35] However, as David Glass states, international attempts at regulating multimodal transport have not been successful,[36] mainly due to international regimes which govern particular modes of transport, and so to be successful, must provide a solution which accommodates such.[37]

The Rotterdam Rules extend the carrier's period of responsibility: the carrier is responsible for the cargo from the time that the goods are received until they are delivered to the consignee.[38] This significantly increases the period of the carrier's responsibility when compared to existing regimes. The rules extend the period of the carrier's responsibility to incorporate door-to-door carriage, unless otherwise agreed between the contracting parties – which will depend on their individual commercial and trade needs.[39] So a single regime is able to cover the entire performance of the contract of carriage, which will arguably aid in achieving uniformity, predictability and certainty in international transport, rather than under previous regimes where each "stage" of carriage was typically regulated by a different instrument.[40] The carrier may also subcontract obligations to other "performing parties".[41]

It must be noted in this respect, however, that the Rotterdam Rules do not establish a full multimodal system.[42] The contract of carriage must include an international sea-leg in order for the convention to apply, which has led to the rules being correctly described as a "maritime-plus" instrument.[43] The rules have in fact taken the "limited network approach" in order to avoid conflict with existing unimodal conventions.[44] This means that when damage may be localised as having occurred during an inland leg of the transport, the rules allow these situations to be governed by other international instruments such as the CIM[45] and the

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[35] Hare "*Shipping Law*" 634.
[36] United Nations Convention on International Multimodal Transport of Goods (Multimodal Convention (1980)
[37] D Glass "Meddling in the Multimodal Muddle, a network of conflict in the UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly][by sea]" (2006) 3 *LMCLQ* 307 at 307.
[38] Article 12.
[39] Hare "*Shipping Law*" 634.
[40] Lannan "The Launch of the Rotterdam Rules".
[41] Hare "*Shipping Law*" 634.
[42] Lannan "The Launch of the Rotterdam Rules".
[43] Lannan "The Launch of the Rotterdam Rules".
[44] Article 82; Lannan "The Launch of the Rotterdam Rules".
[45] 1980 Convention Concerning International Carriage by Rail (COTIF) agreement, with its annexes CIV (for passengers and luggage) and CIM (for freight).

CIR;[46] as though a separate contract of carriage had been concluded for that particular leg of the transportation.[47] If the damage cannot be localised, then the provisions of the Rotterdam Rules will apply in full, so that liability may be established. In addition, the Rotterdam Rules apply to both inbound and outbound cargo from a contracting state,[48] unlike the Hague-Visby Rules, where only outbound shipments are subject to the application of the rules.[49]

Apart from the rules applying both to inbound and outbound cargoes from contracting states,[50] they also cover cargo carried on deck where it is a trade custom to do so, or where the cargo is carried on vessels built for that purpose.[51] They do not, however, cover charterparty contracts.[52]

Electronic commerce

As the Hague-Visby Rules were all drafted before the advent of the World Wide Web and the internet, they do not regulate electronic commerce at all. Electronic innovations have made transactions faster and cheaper – the fact that the use of electronic means to conduct transactions in the maritime industry is not widespread may arguably be blamed on the fact that there has been no international instrument regulating this practice.[53]

The Rotterdam Rules contain an entire chapter aimed at regulating electronic commerce.[54] This is to allow contracting parties to engage in paperless transactions, and to provide an effective legal framework to govern electronic commerce in the maritime industry.[55]

The Rotterdam Rules recognise all forms of electronic commerce, and allow negotiable electronic records to take the place of negotiable transport documents.[56] Doubts have been raised as to whether the nature of electronic records allows them to be negotiable, as generally a negotiable transport document is an original bill of lading, which has value and

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[46] Convention on the Contract for International Carriage of Goods by Road, 1956 (CMR).
[47] Article 26.
[48] Article 5.
[49] Lannan "The Launch of the Rotterdam Rules".
[50] Hare *Shipping Law* 634.
[51] Article 26.
[52] Article 6.
[53] Lannan "The Launch of the Rotterdam Rules".
[54] Chapter 3.
[55] Lannan "The Launch of the Rotterdam Rules".
[56] Hare *Shipping Law* 635.

this allows it to be traded[57]. An electronic version of the negotiable transport document cannot be anything but information, or a copy of the bill; so how this will be traded has yet to be seen[58]. However, Hare comments that the provisions contained in these rules are "technologically neutral to allow for future developments in e-commerce".[59]

Containerisation

While the Hague-Visby Rules' only reference to containerisation is the "container clause" in limitation of the carrier's liability,[60] containerisation is a huge part of modern maritime transport, and thus is recognised in a number of provisions in the Rotterdam Rules. These include the provisions on door-to-door transport; the due diligence obligation of the carrier extending to containers provided by the carrier;[61] the qualification of information on goods in the contract now takes into account that the carrier does not always have the chance to inspect the contents of a container;[62] and that a shipper who packs a container must ensure the goods are stowed properly and securely so as to avoid causing any harm.[63] These are just some of the provisions which account for containerisation in current international transportation.

Carrier liability

The Rotterdam Rules contain a number of new provisions relating to carrier liability that were not covered in previous maritime regimes. Most importantly, the carrier's obligation of due diligence has been expanded from that as given by the Hague Rules and the Hague-Visby Rules to include making the vessel seaworthy and cargoworthy for the entire duration of the voyage, as opposed to "prior" to the journey, as was contained in these other regimes.[64] The carrier is liable for all loss, damage or delay unless he can prove that there was no fault on his

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[57] T Young (2005) "Highlights of the CIFFA Commentary on the Electronic Commerce Issues in the Carriage of Goods by Sea" Available: http://www.forwarderlaw.com/library/view.php?article_id=110 (accessed 30 January 2012)
[58] T Young (2005) "Highlights of the CIFFA Commentary on the Electronic Commerce Issues in the Carriage of Goods by Sea" Available: http://www.forwarderlaw.com/library/view.php?article_id=110 (accessed 30 January 2012)
[59] Ibid.
[60] Lannan "The Launch of the Rotterdam Rules".
[61] Article 14(*c*).
[62] Article 40.
[63] Article 27(3).
[64] Article 14.

part or that of any of his performing parties.[65] The presumption of fault is rebuttable only on the basis of the excepted perils which are contained in article 18.2 of the rules.[66]

In addition, the Rotterdam Rules do not allow for "an error in navigation" and the exception for fire has been altered so as to make the carrier still liable for loss or damage to goods if the fire is the fault of the carrier or any party acting on his behalf.[67] John Hare comments that these exceptions do not have to be the "dominant cause" of the loss, damage or delay, but rather they must have "contributed" to the loss, damage or delay.[68]
In particular, the deletion of "error in navigation" as an exception to avoid liability is in line with modern sensibilities, given today's satellite navigation and global positioning systems (GPSs).[69] In addition, the Rotterdam Rules include specific provisions relating to deck cargo,[70] which the Hague-Visby Rules do not, but which is regulated by some national instruments – such as South Africa's COGSA.

John Hare comments that the removal of "nautical fault" as an exception will prove to be very popular with nations which predominantly ship goods,[71] while the extension of the regime to cover multimodal transport should be welcomed by carriers.[72]

Liability of maritime performing parties

Traditionally, third parties performing under a contract of maritime carriage have attempted to rely on the carrier's defences and limitations of liability.[73] This was not covered at all in the Hague Rules and, whereas the Hague-Visby Rules contain provisions regulating the liability of servants and agents,[74] the rules are "vague" when the third party is an independent contractor.[75] The Hamburg Rules give options to the carrier's servants and agents,[76] but do not take into account independent contractors. Lannan states that court decisions on the

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[65] Hare *Shipping Law* 635.
[66] Ibid.
[67] Article 17.
[68] Hare *Shipping Law* 636.
[69] Lannan "The Launch of the Rotterdam Rules".
[70] Article 25.
[71] Hare *Shipping Law* 638.
[72] Ibid.
[73] Lannan "The Launch of the Rotterdam Rules".
[74] Article IV*bis*2.
[75] Lannan "The Launch of the Rotterdam Rules".
[76] Articles 5 and 10.

subject are "inconsistent at best, but the general rule has appeared to be that third parties are protected by the carrier's defences and limitations of liability if the bill of lading contains an appropriate "Himalaya clause"".[77] A Himalaya clause is found in an ocean bill of lading, and has the effect of extending carrier defences to others involved in the transportation of the goods, who are in a different industry and who are not protected by statute.[78] Under the Rotterdam Rules, all performing parties, including the carrier's employees, agents and third parties, provided that they are subject to suit under the rules, are automatically protected by the rules;[79] this has the effect that a maritime performing party is jointly and severally liable along with the carrier.[80]

Defences and limitations apply equally to claims brought in contract or in delict under the Rotterdam Rules, but are available in the instance of delict only to the performing party and the master and crew of the vessel carrying the goods.[81] John Hare comments that this was included because "freight forwarders and land carriers have difficulty with accepting the basis of the liability of a carrier at sea".[82]

The identity of the carrier

Clarity is provided in the Rotterdam Rules on who exactly a carrier is, which was a point of contention as late as 2005 in the House of Lords.[83] The Rotterdam Rules state in article 39 that:

> "If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification."

Control and transfer of rights

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[77] Lannan "The Launch of the Rotterdam Rules".
[78] D Moran Bovio "Ocean Carriers Duty of Care to Cargo in Port: The Rotterdam Rules of 2009" (2009) 32(4) *Fordham International Law Journal* 1162 at 1171.
[79] Articles 18 and 19.
[80] Article 20.
[81] Article 4 read with art 20.
[82] Hare *Shipping Law* 636.
[83] *J. I. Macwilliam Co. INC. v. Mediterranean Shipping Co. S.A.* (The "Rafaela S") Lloyd's Law Reports , [2005] 1 Lloyd's Rep. 347.

None of the Hague, Hague-Visby or Hamburg Rules deals with the "controlling party", the "right of control" and the "transfer of rights", which are needed when dealing with negotiable electronic transport records and permitting certainty with respect to financial institutions' security interests in cargo.[84]

A "controlling party" is introduced in Chapter 10 of the Rotterdam Rules: a "controlling party" has the power to conclude variation agreements with the carrier, and to instruct the carrier to deliver the goods.[85] The shipper is the controlling party under the contract unless he designates the consignee, documentary shipper or another party as the controlling party when the contract is concluded.[86]

Lannan comments that the right to provide instructions to the carrier regarding cargo in transit will allow the shipper to dispose of the goods during the voyage or, alternatively, will allow an institution or individual with an interest in the goods to preserve control over those goods while the goods are being transported.[87] As these matters have been generally regulated by national law, the Rotterdam Rules may provide a platform for uniformity and enhanced certainty globally in these respects.

Limitation amounts on carrier liability

Previous maritime regimes provided for levels of limitation of the carrier's liability, the most recent being the Hamburg Rules, which set these limits at 835 SDRs per package and 2.5 SDRs per kilogram.[88] The Rotterdam Rules increase these limits to 875 SDRs per package, and 3 SDRs per kilogram.[89] As with current conventions, the carrier may limit liability unless the loss, damage or delay was caused by his personal act or omission which was performed with intent, or the carrier was reckless, knowing loss would probably result from his actions.[90] Lannan suggests that these higher limits will not have a heavy impact on international trade as containerisation has led to carriers' being able to transport cargo in

[84] Lannan "The Launch of the Rotterdam Rules".
[85] Hare *Shipping Law* 637.
[86] Hare *Shipping Law* 637.
[87] Lannan "The Launch of the Rotterdam Rules".
[88] Article 6(1).
[89] Article 49.
[90] Hare *Shipping Law* 636.

smaller packages, and consequently higher recoveries will occur only in cases of non-containerised cargo, such as that for heavy machinery.[91]

Delivery of goods to the consignee

None of the current conventions contains any provisions regarding delivery of the goods, which, while it may be an obvious duty, may result in an array of issues in practice.[92] The Rotterdam Rules contain an entire chapter[93] regulating the delivery of goods, which will increase legal certainty in this respect.

The obligations of the shipper

The Hague-Visby Rules place only two obligations on a shipper: that a shipper and/or a shipper's servants are liable for their own negligence,[94] and that a shipper will be liable for damage or expenses caused by dangerous goods he has shipped.[95] The Rotterdam Rules expand on these provisions, and Chapter 7 of the rules set out clearly the obligations a shipper owes to a carrier. The shipper continues to be liable for loss or damage caused in certain circumstances relating to dangerous goods;[96] however, the shipper is now also obliged to guarantee the correctness of the information he provides to the carrier.[97] Should he fail to provide the necessary information or instruction to the carrier for the safe or proper carriage of the goods, and damage or loss occurs to the carrier as a result of this, the shipper will be held strictly liable.[98]

In addition, if a shipper is to stuff a container, he must properly and carefully stow, lash and secure the contents in or on the container in such a way that it will not cause harm to persons or property.[99] Article 31 makes a shipper liable for:

> "[L]oss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention."

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[91] Lannan "The Launch of the Rotterdam Rules".
[92] Lannan "The Launch of the Rotterdam Rules".
[93] Chapter 9.
[94] Hague and Hague-Visby Rules art 4(3).
[95] Hague and Hague-Visby Rules art 4(6).
[96] Rotterdam Rules arts 30 and 32.
[97] Articles 30 and 31.
[98] Articles 29 and 30.
[99] Hare *Shipping Law* 637.

Hare comments that this includes damages resulting from "a misdescription of cargo or shipping of undeclared dangerous cargoes".[100]

Time for suit

Under the Hague Rules and the Hague-Visby Rules a cargo claimant must file an action against a carrier within one year,[101] whereas under the Hamburg Rules such a claim may be made within two years.[102] The Rotterdam Rules, as with the Hamburg Rules, provide that a claimant will have two years to bring such a claim.[103] As the majority of states globally did not support the Hamburg Rules, should the Rotterdam Rules garner international acceptance, many claimants would benefit from this provision.

Arbitration and jurisdiction

Neither the Hague Rules nor the Hague-Visby Rules contain provisions dealing with arbitration and jurisdiction, whereas the less popular Hamburg Rules do, in articles 21 and 22. The Rotterdam Rules have two chapters regulating jurisdiction and arbitration – Chapters 14 and 15, respectively – which are based on the articles contained in the Hamburg Rules.[104] Lannan states that the provisions on arbitration contained in the rules were drafted in consideration of the key principles of commercial dispute resolution set out in UNCITRAL's instruments on the subject. The manner in which they were drafted is intended to "preserve freedom of arbitration in non-liner transportation".[105] In addition, the arbitration provisions have been designed to allow freedom in non-liner transportation while simultaneously protecting the cargo claimant by ensuring that the claimant's right to select the place of jurisdiction may not be circumvented by applying the arbitration rules instead.[106] Lannan states that the chapters on jurisdiction and arbitration were the subject of focused discussions, and that the resulting "opt-in" provision was included in order to compromise between states

[100] Ibid.
[101] Article 3(6).
[102] Article 20.
[103] Article 62.
[104] Lannan "The Launch of the Rotterdam Rules".
[105] Lannan "The Launch of the Rotterdam Rules".
[106] Lannan "The Launch of the Rotterdam Rules".

and organisations who would rather these areas were regulated by domestic law.[107] The "opt-in" clause means that states who ratify the Rotterdam Rules may choose to include the chapters on jurisdiction and arbitration in the practical application of the rules.

John Hare comments that South Africa should not opt-into the chapter on jurisdiction if they decide to sign and ratify the rules[108] because, whereas article 73 allows arrest or protective measures, it does not allow the merits of a claim to be heard in the arresting jurisdiction unless "an international convention that applies in that state so provides". South Africa's domestic Admiralty Jurisdiction and Regulation Act 105 of 1983 deals with maritime claims in the Republic, and section 2 of the Act gives the High Court the jurisdiction to "hear and determine any maritime claim, irrespective of the place where it arose, of the place of registration of the ship, of the place of the registration of the ship concerned or of the residence, domicile or nationality of its owner".

Volume contracts

An innovative yet controversial inclusion in the Rotterdam Rules are the provisions on "volume contracts". Article 1(2) of the Rotterdam Rules defines a 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." Volume contracts have been incorporated in order to account for situations where parties have relatively equal bargaining power, and for commercial reasons find it preferable to contract under a volume contract which allows a limited freedom of contract.[109]

Volume contracts are regulated by article 80 of the Rotterdam Rules, and basically allow parties who agree, to negotiate contractual terms which deviate from the Rotterdam Rules. In order to protect the shipper in these circumstances, the Rotterdam Rules contain a number of strict requirements; for example, even when shipping under a volume contract a shipper must be given the opportunity to have the rules apply as though there were no volume contract.[110] A shipper may also elect to enter a usual contract for each separate shipment so that the rules

[107] Lannan "The Launch of the Rotterdam Rules".
[108] Hare *Shipping Law* 639.
[109] Lannan "The Launch of the Rotterdam Rules".
[110] Article 80.

will apply in full.[111] In addition, the volume contract must contain a prominent statement that it derogates from the convention; the volume contract must be individually negotiated or specify the sections of the contract that contain the derogations; and the derogation cannot be incorporated by reference from another document, nor included in a contract of adhesion that is not subject to negotiation.[112] All of these provisions are designed to protect the shipper. Furthermore, article 80(4) gives a number of provisions which contractual parties may never derogate from: these are the carrier's ongoing obligation to make and keep the ship seaworthy; also his duty to properly crew, equip, and supply the ship;[113] and the shipper's obligation to provide information, instructions and documents;[114] the rules relating to the carriage of dangerous goods;[115] and the loss of the benefit of the limitation on liability of the carrier.[116] Third parties to a contract are protected under the provisions relating to volume contracts as they must also be informed that the contract derogates from the rules,[117] and the third party must give their express consent to be bound by these derogations.[118] Also, if a suit arises, whichever party claims the benefit of the derogation must prove that the conditions for derogation have been met in full.[119]

Conclusion

The Rotterdam Rules are the result of state and industry discussions and negotiations over many years, the result of which is a convention that covers a range of important issues, some new and some which have existed for decades. The Rotterdam Rules are a codification of industry practice and jurisprudence which have developed since the Hague Rules came into existence and so arguably offer a comprehensive solution to problems encountered in modern international Trade Law. Whether these rules will be beneficial to all states, particularly South Africa, remains to be seen.

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[111] Article 80.
[112] Article 80(2).
[113] Rotterdam Rules arts 14(*a*) and (*b*).
[114] Rotterdam Rules art 29.
[115] Rotterdam Rules art 32.
[116] Rotterdam Rules art 60.
[117] Article 80(5).
[118] Article 80(5).
[119] Article 80(6).

4
Comparing the Hague-Visby and Rotterdam Rules

In assessing the Rotterdam Rules, it is useful to compare them with the Hague-Visby Rules in order to establish whether this new regime adds significantly to the provisions of the Hague-Visby Rules. In doing so, the "latest innovations" of the rules may be identified.

4.1 Definitions

The United Nations Commission on International Trade Law (UNCITRAL) Working Group illustrates in comparative tables that the "definitions" as contained in the Rotterdam Rules are far more numerous and extensive than those contained in the Hague-Visby Rules, the Convention on the Contract for the International Carriage of Goods by Road (CMR) and the Comité Maritime International (CMI).[1] This is to be expected, because the Rotterdam Rules are a multimodal instrument with a broader scope than any of these other unimodal conventions, and this should aid in allowing more uniform interpretation and application of the instrument.

Definition of a "contract of carriage"

The Hague-Visby Rules do not contain a definition of a contract of carriage; rather, they state that the rules are applicable if a bill of lading or other similar document of title is issued to regulate the contract of carriage by sea.[2] "Straight" bills of lading are also considered to be documents of title under these rules.[3] Berlingieri consequently submits that these rules adopt a "documentary approach".[4] The Rotterdam Rules contain a definition of a "contract of carriage", which states that they apply to the carriage of goods from one place to another

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[1] UNCITRAL Working Group III (2003) "The UNCITRAL Draft Instrument on the Carriage of Goods by Sea and other transport Conventions" Available: http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V02/607/91/PDF/V0260791.pdf?OpenElement (accessed 15 August 2010).

[2] Article 1(*b*).

[3] *J. I. Macwilliam Co. INC v. Mediterranean Shipping Co. S.A.* (The "Rafaela S") [2002] EWCA Civ 556 Lloyd's Law Reports , [2003] 2 Lloyd's Rep. 113; A straight bill of lading is one which is made out to a named consignee without adding the words "to order", so the cargo is deliverable straight to the named consignee and non-transferrable.

[4] F Berlingieri "A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules" (2009) Available: http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20F.%20Berlingieri%2013%20OKT29.pdf (accessed 20 June 2010) 2.

location, and may include other modes of transport than just sea carriage, obviously if the parties to the contract of carriage so agree.[5]

Sturley comments that under current commercial practice, it is often difficult to identify whether a shipment is carried under a bill of lading or a similar document of title or when instead it is carried under a charterparty, due to the fact that many liner shipments are nowadays carried under documents which do not qualify as bills of lading in many legal systems, and it appears that future liner transportation might continue without the issuance of any documents at all.[6] Thus the intent behind the Rotterdam Rules is to cover traditional bills of lading as well as whatever substitutes, if any, may develop in time.[7]

As previously discussed, South Africa has extended the application of the rules to cover more than instances when a bill of lading has been issued.

4.2 Voyages that are Covered

All of the existing conventions state that the carriage regulated must be international and must have some connection to a contracting state. The Hague-Visby Rules in article 10 require that the port at which the goods are loaded must be in a contracting state or that the bill of lading has been issued in a contracting state, or that the rules are incorporated by reference into the contract of carriage, or they are applied through the application of national law.[8] Professor Michael Sturley highlights that the Hague-Visby Rules apply generally to outbound carriage only, which is carriage *from* contracting states, and not carriage *to* contracting states.[9]

Fujita comments that the Hague-Visby Rules do not cover any activities outside the port area, such as the incidental carriage to and from the ports of loading and discharge.[10]

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[5] Article 1.
[6] Professor MF Sturley "Scope of Coverage under the UNCITRAL Draft Instrument" (2004) 10 *JIML* 2 at 141.
[7] Sturley (2004) 10 *JIML* 141.
[8] Article 10.
[9] Sturley (2004) 10 *JIML* 154.
[10] Professor T Fujita "The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implications" (2009) 44 *Texas Int'l LJ* 349 at 350.

Interestingly, in the case of *The Hollandia*,[11] a shipment out of Scotland in a Dutch vessel, which was under a bill of lading governed by Dutch law, the bill expressly stated that in case of dispute that the Netherlands would have jurisdiction. In the Netherlands the Hague Rules were in effect with the lower per package limit than that contained in the Hague-Visby Rules. A dispute arose and the case came before an English court. England applied the Hague-Visby Rules, and the English court came to the conclusion that the Netherlands did not have jurisdiction in the case even though it was stated in the bill of lading, because this clause on "jurisdiction" reduced the carrier's liability, which is not permitted under article III(8) of the Hague-Visby Rules. The court therefore held that an English court should have jurisdiction instead.

Professor David Moran Bovio illustrates the difficulties which arose under the rules, such as the Hague-Visby Rules, that apply "tackle-to-tackle".[12] In liner practice, the carrier usually takes custody of the cargo before loading it onto the vessel and keeps it in his possession after it is unloaded at the port of discharge.[13] If the goods are damaged during the time that the carrier is in control, the carrier is responsible, even if no bill of lading has yet been issued.[14] Consequently, the "tackle-to-tackle" provision sets a boundary that is contradicted in terms of practice and custom in the industry.[15] Fujita further states that the "tackle-to-tackle" and even the "port-to-port" application of transport conventions has become obsolete, and has the effect of separating the contracted transport artificially; into a "covered" and a "non-covered" period, and also creates gaps between mandatory liability regimes that apply to each separate stage in the transport of goods.[16]

In comparison to the Hague-Visby Rules, the Rotterdam Rules apply when the ports of loading and discharge are in different states or, importantly, when the places of receipt and delivery of the goods are in different states;[17] this has been included because of the multimodal door-to-door nature of the Rotterdam Rules. Hannu Honka comments that these

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[11] *Hollandia, The* (Sub nom The Morviken), (H.L.) [1983] 1 Lloyd's Rep. 1; [1983] 1 A.C. 565.
[12] Professor DM Bovio "Ocean Carrier's Duty of Care to Cargo in Port: The Rotterdam Rules of 2009" (2009) 32 *Fordham Int'l LJ* 4 at 1172.
[13] Bovio (2009) 32 *Fordham Int'l LJ* 1172.
[14] Ibid.
[15] Ibid.
[16] Fujita (2009) 44 *Tex Intl LJ* 351.
[17] Article 5.

are "sensible" connecting factors between the rules and states.[18] In addition, no mention is made in the Rotterdam Rules of the rules applying when they are incorporated in a bill of lading or a similar document,[19] as the effect of such an incorporation may vary between jurisdictions.[20]

Bovio points out that there is no definition of what a "port" or a "port area" is in the Rotterdam Rules, and consequently national law will be used on a case-by-case basis to determine the "boundaries of the port area".[21] It must also be noted that the boundaries of the port will make a fundamental difference to who is considered to be a "performing party" as opposed to a "maritime performing party" (defined below in this chapter), both of which expressions are included in article 1 of the Rotterdam Rules. However, this does not seem to be unreasonable as it would be very difficult for an international instrument to define exactly what should be considered to be a "port area", because this will differ in terms of practice between nations, and even between ports.

Hannu Honka states that under the Rotterdam Rules the sea carriage must be international,[22] and thus two separate national sea carriages in two different states under the same contract of carriage will not be sufficient for the rules to apply, unless contracting states have extended the rules on a national basis.[23]

Sturley comments that the Rotterdam Rules contrast with previous maritime conventions in that coverage under the rules is contractual, that is, it is defined by the contract of carriage itself.[24] So, if the contract covers carriage by land prior to the loading of the cargo on a vessel for international sea travel, then the rules cover this whole period,[25] whereas, in the same

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[18] H Honka "United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: Scope of Application and Freedom of Contract" (2009) Available: http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20Hannu%20Honka.pdf (accessed 1 August 2010) 6.
[19] Honka "United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea" 5.
[20] Berlingieri "A Comparative Analysis" 3.
[21] Bovio (2009) 32 *Fordham Int'l LJ* 1198.
[22] Article 5.
[23] H Honka "United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea" 6.
[24] Sturley (2004) 10 *JIML* 145.
[25] Article 82.

situation, if the contract is only for international sea carriage, then the rules will apply only to the sea carriage.[26]

4.3 Exclusions

The Hague-Visby Rules apply only to contracts of carriage which are "covered" by a bill of lading;[27] this has been extended in South Africa, as previously discussed. This is the case unless the parties agree to apply the rules to their contract.[28] This provision in the Hague-Visby Rules has created confusion, because article 3(3) provides that a carrier must issue a bill of lading at the shipper's demand, and under the rules a carrier may have freedom of contract when no bill of lading has been issued.[29] This means that the rules may sometimes apply before a bill of lading is issued, which can obviously create uncertainty.[30]

Berlingieri states that the Rotterdam Rules take basically a contractual approach, which is supplemented by a documentary and type–of-trade approach.[31] The Rotterdam Rules apply to liner transport, in which the contract is contained in or evidenced by a transport document, and do not apply to non-liner transport, which is usually governed by charterparty contracts.[32] Berlingieri states that the most noteworthy feature of provisions in the rules regarding the scope of their application is the protection granted to third parties.[33] Under the Hague-Visby Rules third parties are protected only if a bill of lading is issued and endorsed to a third party, while under the Rotterdam Rules, in all situations usually excluded from their scope of application, the rules will apply in respect of third parties, that is, of any party other than the original contracting party, irrespective of whether a negotiable transport document, or indeed any document, is issued.[34]

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[26] Sturley (2004) 10 *JIML* 145.
[27] Article 1(*b*).
[28] Article 10.
[29] Article 6.
[30] Berlingieri "A Comparative Analysis" 4.
[31] Ibid.
[32] Article 6.
[33] Berlingieri "A Comparative Analysis" 4.
[34] Article 7.

4.4 Period of Application and Period of Responsibility of the Carrier

The Hague-Visby Rules state that "carriage of goods" covers the "tackle-to-tackle" period.[35] Berlingieri states that in the liner trade it is most frequent practice for the carrier to take charge of the goods before they are loaded onto the ship, and to deliver them to a consignee in a warehouse in the port of discharge.[36] This means that under the Hague-Visby Rules there are periods in which the carrier has possession of the goods but these rules do not theoretically apply.

Since the Rotterdam Rules apply to a door-to-door contract in which the goods are usually delivered outside the port in which they were discharged, the period of responsibility of the carrier corresponds to whenever the carrier is in charge of the cargo, which is from wherever he receives it until wherever he delivers it.[37] This may be altered by agreement, and the actual period of responsibility of the carrier depends on the terms of the contract;[38] but generally the carrier's minimum period of responsibility is that from when the goods have been loaded to when they are discharged at the port of delivery.[39] The only restriction is the proviso contained in the rules which states that the time of receipt of the goods cannot be after their initial loading, and that the time of delivery cannot be prior to their final unloading.[40] This prohibits the parties from agreeing to a period of responsibility shorter than the original "tackle-to-tackle" period.[41] Fujita points out that "initial loading" does not mean when the goods are first loaded onto a vehicle to be brought to port if the carrier has assumed only "ocean carriage" under the contract of carriage;[42] the same would apply to "final unloading".

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[35] Article 1(*e*).
[36] Berlingieri "A Comparative Analysis" 5.
[37] Article 12.
[38] Fujita (2009) 44 *Tex Int'l LJ* 354.
[39] Hill Dickinson "Cargo Conventions: Comparing the Hague, Hague-Visby, Hamburg and Rotterdam Rules" (2009) Available: http://www.hilldickinson.com/ pdf/Shipping %20Guide%201%20-%20Cargo%20Conventions.pdf (accessed 10 January 2010) 5.
[40] Article 12(3).
[41] Fujita (2009) 44 *Tex Int'l LJ* 354.
[42] Ibid.

4.5 The Identity of the Carrier

The Hague-Visby Rules identify the carrier as the "owner" or "charterer" who enters into a contract of carriage with a shipper.[43] Hare comments that "the identity of the carrier is determined by a factual enquiry"[44] which begins with an examination of the bill of lading to establish whether the carrier is clearly identified on the face of the bill.[45]

Under the Rotterdam Rules a carrier is a person who or which enters into a contract of carriage with a shipper.[46] Hill-Dickinson notes that the carrier's obligations extend to "performing parties" acting at the carrier's request or under the carrier's supervision or control.[47]

4.6 Obligations of the Carrier

Berlingieri expresses the opinion that the nature of the Hague-Visby Rules as "standard bills of lading"[48] may account for the fact that the basic obligation of delivery is not mentioned at all in the rules.[49] Delivery as an obligation of the carrier is set out in article 11 of the Rotterdam Rules, which states:

> "The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee."

The Hague-Visby Rules contain provisions regarding the obligation of the carrier to exercise "due diligence" in making the ship seaworthy before the commencement of the journey and to care for the cargo in that the ship must be properly manned, equipped and supplied, the holds must be fit and safe for the reception and carriage and preservation of cargo and other requirements that the carrier must properly and carefully load, handle, stow, carry, keep, care for and discharge the goods.[50]

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[43] Article 1(*a*).
[44] J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) 708.
[45] Ibid.
[46] Article 1.
[47] Article 1; Hill Dickinson "Cargo Conventions" 5.
[48] "Standard" bills of lading include on the face of the bill that the goods must be delivered to the consignee.
[49] Berlingieri "A Comparative Analysis" 6.
[50] Articles 2 and 3.

As "seaworthiness" is not defined in the rules, one must consider the common law to establish what exactly is meant by this. In general, a seaworthy vessel is one which is fit to "encounter the ordinary perils of the voyage as to her structure and equipment (and considering the cargo she is intended to carry)".[51] A seaworthy vessel is one that is also required to be sufficiently crewed, therefore, if a vessel attempts to put into a port (which is unfamiliar to the master or crew) without the assistance of a pilot, the vessel may be considered "factually unseaworthy".[52]

The traditional obligations of the carrier to exercise due diligence and to make the ship seaworthy appear in the Rotterdam Rules,[53] with the novelty that the obligation of due diligence has been made continuous,[54] and so spans the entire voyage. Berlingieri comments that there is no reason why a carrier should be relieved of the duty of ensuring the ship remains seaworthy throughout the carriage, and he should take all reasonable steps to ensure this.[55]

The Hague-Visby Rules require that a carrier must issue a bill of lading for the rules to apply;[56] this has been extended under South Africa's COGSA, as discussed previously.

Chapter 8 of the Rotterdam Rules sets out provisions relating to transport documents and electronic transport records. Article 35 deals with the issuance of electronic transport documents and other transport documents. Under this article, a carrier is bound to issue, at the shipper's option, a negotiable or non-negotiable transport document unless it is a trade usage not to do so. Berlingieri comments that a carrier may issue only a negotiable transport document which states that the goods may be delivered without the surrender of the transport document, as envisioned by article 47, only if this is required by, or consented to by, the shipper.[57]

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[51] Hare *Shipping Law* 641 and 642.
[52] Hare *Shipping Law* 641.
[53] Article 13.
[54] Article 14.
[55] Berlingieri "A Comparative Analysis" 6.
[56] Article 1.
[57] Berlingieri "A Comparative Analysis" 7.

4.7 Contract and Delictual (Tort) Claims

The Hague-Visby Rules explicitly state that the rules cover both "contract and tort" claims.[58] The Rotterdam Rules expand upon this and state that the defences and limitations of liability as contained in the Rotterdam Rules apply to all cargo claims for loss, damage or delay, whether these claims are in contract, tort or otherwise.[59] This is quite obviously beneficial to any claimant as he may be certain that whatever claim he should make under a contract of carriage will be covered by the liability provisions etc of the Rotterdam Rules and will not be subject to some national law with which the claimant may be unfamiliar.

4.8 Liability of the Carrier and Allocation of the Burden of Proof

The Hague-Visby Rules do not include any provisions relating to liability for delay, whereas provision for this is incorporated into the Rotterdam Rules.[60] Berlingieri observes that as far as the basis of liability of the carrier is concerned, while the regimes are fault-based, there are significant differences between them in respect of the exceptions to the general rule (that is, that fault necessitates liability), as well as with regard to the burden of proof.[61]

Under the Hague-Visby Rules the carrier is relieved of liability in respect of loss or damage arising from an error in navigation or management of the ship. Article IV(2)(*a*) of the Hague-Visby Rules states that:

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

Tetley submits that an error in navigation relates to the crew and master's seamanship, and is a mistake or negligence which affects the safety of the vessel or crew and which results in cargo loss or damage,[62] whereas an error in management refers to some sort of failure in the everyday operations of the vessel, which is an objective test in each case.[63]

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[58] Article IV*bis*; Hill Dickinson "Cargo Conventions" 5.
[59] Article 4.
[60] Article 17.
[61] Berlingieri "A Comparative Analysis" 8.
[62] W Tetley *Marine Cargo Claims* Volume 2 4 ed (2008) 956.
[63] Ibid.

Jannson states that the "error in navigation" as a carrier defence arose from a time when carriers were dependent on stars and sextants, and large crews handled machinery and sails, and in such situations an error in navigation could result in the grounding, collision or sinking of the vessel.[64] Given today's global positioning systems (GPS) and satellite navigation, it is quite apparent that it is far less likely that an error in navigation could occur today.

The Rotterdam Rules remove the defence of "error in navigation" in its entirety, so an error in navigation is no longer a defence, unless the carrier and other performing parties can show that they were not at fault in any way as envisaged by article 17(3).

Under the Hague-Visby Rules, the carrier will not be liable due to the unseaworthiness of the vessel unless such was caused by a breach of the carrier's obligation to exercise due diligence[65]. For example, in the case of *Riverstons Meat Co Ltd v Lancashire Shipping Co Ltd*[66] the carrier had engaged a firm of reputable repairers to repair the vessel prior to commencement of the voyage; however, they were negligent, which resulted in water damage to the claimant's goods. Lord Radcliffe held that the carrier was responsible, as the carrier's duty is to exercise due diligence personally, and not due diligence in securing the services of a professional to fulfil that task.

In comparison, under the Rotterdam Rules, the carrier is always liable for the loss, damage or delay of the goods, if this is caused by the fault of the carrier, his servant or agents.[67] The Hague-Visby Rules do not cover the carriage of live animals unless such is included by national law, such as South Africa's COGSA, while under the Rotterdam Rules no particular rules are given governing the carriage of live animals; but freedom of contract is allowed by article 81(*a*). Thus the carrier will not be liable for loss or damage to live animals which are being transported, except where the loss, damage or delay is the result of an act or omission of the carrier or other person mentioned in article 18, and such was done with the intent to cause the loss, damage or delay, or done recklessly with the knowledge that some manner of harm would probably result.[68]

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[64] M Jannson "The Consequences of a deletion of nautical fault" (LLM Thesis, Göteborg University, 2007) Available: http://gupea.ub.gu.se/bitstream/2077/7337/1/Nautical_Fault_Madeleine_Jansson.pdf (accessed 1 August 2010) page 12.
[65] Article 4.
[66] *The Muncaster Castle* (1961) 1 Lloyd's Rep 57 (HL).
[67] Articles 5 (Hamburg) and 17 (Rotterdam).
[68] Article 17.

Under the Hague-Visby Rules, the carrier is liable for cargo damage caused by fire,[69] provided that the fire is caused by the carrier or by someone for whom he is responsible. If the fire is caused due to the vessel's being unseaworthy, then the carrier is liable unless he exercised proper due diligence prior to the commencement of the voyage.[70] The Rotterdam Rules are very similar to the Hague-Visby Rules regarding fire: there is no specific reference to loss by fire other than as a defence for a carrier.[71] Evidently, the drafters of the rules did not see the need for the reform of this aspect.

As far as deviations are concerned, the deviating carrier may lose his right to rely on defences in the Hague-Visby Rules and lose his right to limit liability[72] unless the deviation is reasonable or an attempt to save life or property at sea.[73] The Rotterdam Rules, on the other hand, do not deprive the carrier of any defence or limitation for deviation,[74] except to the extent provided in article 61. So under the Rotterdam Rules the carrier may deviate for any reason, not just for attempting to save life or property, which gives a carrier more freedom.

With regard to the allocation of the burden of proof, none of the Hague, Hague-Visby or Hamburg Rules includes any mention of the initial burden of proof being borne by the claimant.[75] The Rotterdam Rules, on the other hand, do; which is in line with most common law.[76]

The Rotterdam Rules provide that the carrier is liable if the claimant proves that the loss, damage or delay occurred during the period in which the carrier was responsible for the goods.[77] The burden of proof is then transferred to the carrier. The rules provide two alternative defences in this regard – the first being that the loss, damage or delay is not attributable to the fault of the carrier or his servant or agent, and the second being a presumption of an absence of fault on the part of the carrier if the carrier is able to show that the harm came about as a result of the occurrence of an excepted peril.[78] The Hamburg Rules

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[69] Article 2(*b*).
[70] Articles 3 (Hague) and IV (Hague-Visby).
[71] Article 17.
[72] Hill Dickinson "Cargo Conventions" 9.
[73] Article 4.
[74] Article 24.
[75] Berlingieri "A Comparative Analysis" 8.
[76] Hare *Shipping Law* 788.
[77] Article 17(1).
[78] Articles 4 (Hague-Visby) and 17 (Rotterdam).

only allow for the reversal of the burden of proof in this manner with regard to fire.[79] The burden of proof is then subsequently on the claimant, which the Rotterdam Rules regulate in detail.

The claimant may then show that the excepted peril which was experienced was the fault of the carrier or one of his performing parties, or that the event which contributed to or caused the harm was not an excepted peril.[80] The Rotterdam Rules also provide another alternative to the claimant, which is that the carrier may not escape liability if the claimant can show that the harm was probably caused by or contributed to by the vessel's being unseaworthy, and the carrier will be liable unless he can prove that he exercised due diligence in making and keeping the vessel in a seaworthy condition.[81]

Berlingieri contends that the Rotterdam Rules have codified jurisprudence which has arisen through carriage by sea, that the carrier may bring up an excepted peril as a defence and the claimant may defeat the presumption of absence of fault by showing the event claimed by the carrier was caused by or contributed to by the carrier himself.[82] Further, the requirement that the claimant must identify the event which contributed to the loss or damage is a logical progression from the fact that the carrier himself identified the event which caused the loss or damage to the goods in order for the presumption of no fault to apply.[83] In order to defeat this presumption, the claimant must show the fault of the carrier relating to the event, or that another event besides that claimed by the carrier caused harm to the goods.[84]

In addition, the burden on the claimant under the Rotterdam Rules relating to unseaworthiness is less onerous than that which exists under the Hague-Visby Rules. Under the Hague-Visby Rules, if the claimant alleges that the loss or damage of the goods was due to the vessel's being unseaworthy, he must prove his allegation, and then the carrier may rebut this by showing he exercised due diligence.[85] This, then, takes place while under the Rotterdam regime the claimant has to show that unseaworthiness probably caused the loss of

[79] Article 5.
[80] Article 17.
[81] Article 17.
[82] Berlingieri "A Comparative Analysis" 9.
[83] Ibid.
[84] Ibid.
[85] Article 4(1).

or damage to the goods.[86] So under the Rotterdam Rules the claimant must merely adduce sufficient proof that unseaworthiness was the *probable* cause of the harm to the goods, not *certainly* the cause, as is the requirement under the Hague-Visby Rules.

Thus the burden on the claimant is less under the Rotterdam Rules than under the Hague-Visby regime – as it would most likely be difficult for the claimant to prove that unseaworthiness was certainly the cause of the loss. This may be challenging as the claimant was obviously not on the vessel himself at the time, and so it seems that the burden under the Rotterdam Rules is more "claimant-friendly".

The carrier's liability for other persons

Berlingieri comments that the categories of person for whom the carrier must assume liability has gradually increased through each regime.[87] In the Hague-Visby Rules, except for the exonerations contained in article 4(1)(*a*) and (*b*) the carrier is liable, by implication, in article 4(2)(*q*), for the faults of his servants and agent; further, article 4*bis*(2) excludes independent contractors from being "agents" or "servants" of the carrier. As the Hague-Visby Rules apply only to tackle-to-tackle, any operators who manage the goods before or after the goods are loaded onto or discharged from the vessel may be totally unaffected by the Hague-Visby Rules unless they are operating under a contract which states this regime will apply to them. Berlingieri states, in the case of these rules, that "agents" envisioned by these regimes are most probably the master and crew of the ship if they are not under the direct employment of a carrier, as may occur in time charters.[88]

Sturley highlights the fact that under the Hague-Visby Rules the only relationship that is regulated is that which exists between the "shipper" and the "carrier".[89] It is modern commercial practice for the carrier to seldom, if ever, perform all of his duties envisioned by the contract of carriage.[90] While many carriers are corporations acting through agents, most others subcontract with specialised professionals to perform certain obligations that would otherwise be theirs. Carriers also customarily often contract with independent stevedores to

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[86] Article 17(5)(*a*).
[87] Berlingieri "A Comparative Analysis" 13.
[88] Ibid.
[89] Sturley (2004) 10 *JIML* 148.
[90] Ibid.

load and unload their ships, and with private terminal operators to store goods before loading and after discharge.[91] Even though the Rotterdam Rules allow for a door-to-door contract, very few carriers will have the physical capacity or indeed the inclination to perform all of the obligations under such a contract.[92] Thus it is important that the Rotterdam Rules address the situation when a carrier will be liable for other performing parties or maritime performing parties' actions.

Berlingieri observes that the carrier is responsible for many more categories of person under the Rotterdam Rules than under any other existing regime.[93] Article 18 sets out the actions for which the carrier is liable under the rules. These include any actions by a performing party, who may be involved in the maritime aspect of the carriage or in the land-leg of carriage if they are a subcarrier of the carrier.

The number of parties for whom the carrier is responsible under the Rotterdam Rules is evidently due to modern commercial practice, and the recognition that contracts of carriage are increasingly being entered into to cover door-to-door carriage. A claimant will be able to make claims safe in the knowledge that "someone" will be liable under the rules. In addition, the joint and several liability of carriers and their contractors[94] means that performing parties will not have to bear the full burden of the claim alone.

4.9 Liability of Agents, Servants and Independent Contractors

The Hague-Visby Rules provide that if an action is brought against agents or servants of the carrier, they are entitled to the same defences and limitation of liabilities as the carrier himself has, so long as the loss was not caused intentionally or due to reckless behaviour in the knowledge that loss would probably result.[95]

The Rotterdam Rules provisions in this regard are similar to those of the Hague-Visby Rules.[96] However, with the broad categories of person who may be considered a "performing party" as well as the statement that all of these parties are subject to the obligations and

[91] Ibid.
[92] Ibid.
[93] Berlingieri "A Comparative Analysis" 13.
[94] Article 20.
[95] Article 4*bis*(1) Hague-Visby.
[96] Article 19 (Rotterdam).

liabilities of the carrier as performing parties,[97] the action against any of these parties will be in terms of a contract.[98] This means that it will be easier for the claimant to sue, as instead of proving all of the elements of a delict occurred, he will merely have to show that the contract was breached in some way.

4.10 Notice of Loss, Damage or Delay

Under the Hague-Visby Rules notice of loss, damage or delay must be given to the carrier before or at the time of delivery; if the damage is latent, then notice must be given within three days of delivery of the goods.[99] The nature of the loss or damage must be contained in the notice, and must be "sufficiently precise".[100] This regime provides that if such notice is not given, then delivery will be considered *prima facie* evidence of delivery of the goods as described in the transport document or bill of lading.[101] If such notice is not given, the claimant may still sue, but it is then up to the claimant to adduce evidence that the loss or damage occurred during the carriage of the goods – which may be a heavy burden to discharge.[102]

The Rotterdam Rules state that notice of loss or damage must be given before or at the time of delivery or, if the loss or damage is not apparent, within seven days of delivery.[103] Should notice not be given, the rules then regulate the consequence of the failure to give such notice by stating that the failure to give notice does not affect the claimant's right to claim compensation or the allocation of the burden of proof.[104]

Berlingieri comments that the wording of this section is not satisfactory, as the intention was to make it clear that the notice, not the failure to give it, will not affect the allocation of the burden of proof as contained in article 17.[105] Thus the notice or lack thereof does not relieve

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[97] Article 19.
[98] Berlingieri "A Comparative Analysis" 14.
[99] Article 3.
[100] Tetley *Marine Cargo Claims* 363.
[101] Articles 3 (Hague/Hague-Visby) and 19 (Hamburg).
[102] Tetley *Marine Cargo Claims* 363.
[103] Article 23.
[104] Article 19.
[105] Berlingieri "A Comparative Analysis" 16.

the claimant from proving that the loss of damage occurred during the time when the carrier was responsible for the goods.[106]

4.11 Obligations and Liability of the Shipper

The Hague-Visby Rules contain three provisions regulating the obligations and liabilities of the shipper. First, the shipper is deemed to have guaranteed to the carrier the correctness of the marks, number, quantity and weight of the goods at the time of shipment as given in the bill of lading.[107] Tetley comments that the purpose of this provision is to "preserve the integrity of the bill of lading as a document of commerce and title".[108] Secondly, these rules provide that the shipper is not responsible for loss or damage to the carrier or the vessel which may result from any cause so long as the cause was not the result of the shipper's act, fault or neglect.[109] Berlingieri states that this provision implies that if the loss or damage suffered by the carrier or the ship was caused by the shipper's act, fault or neglect, then the shipper will be liable.[110] Thirdly, these rules state that the shipper is liable for all damages and expenses which directly or indirectly result from the shipment of dangerous goods when the carrier was not informed of the goods' nature, nor consented to carry them.[111] Berlingieri submits that there is strict liability in the first and third cases mentioned here and fault-based liability for the second under these two regimes.[112]

Chapter 7 of the Rotterdam Rules regulates the obligations and liability of the shipper. These include that the shipper must deliver the goods in such a condition that they will withstand the intended carriage including the handling, loading, lashing and unloading of the goods.[113] The shipper must also provide information, instructions and documents relating to the goods which are not otherwise available to the carrier, and which are necessary for the proper handling and carriage of the goods and will allow the carrier to comply with laws and regulations which apply to the intended carriage.[114] In addition, the shipper must provide information that is needed in order to compile the contract and to issue the correct

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[106] Ibid.
[107] Article 3(5).
[108] Tetley *Marine Cargo Claims* 1104.
[109] Article 4(3).
[110] Berlingieri "A Comparative Analysis" 18.
[111] Article 4(6).
[112] Berlingieri "A Comparative Analysis" 18.
[113] Article 27.
[114] Article 29.

documentation.[115] The rules further state that a shipper will be liable for loss or damage caused by dangerous goods if he did not inform the carrier of the nature of the goods, and if the carrier did not otherwise have knowledge of the goods' dangerous nature.[116] The liability for these last two obligations mentioned is strict, whereas for the others it is clearly fault-based.[117]

Delivery of the goods for carriage

The Hague-Visby Rules do not specify the shipper's obligations regarding the preparation of goods for carriage, which the Rotterdam Rules do.[118] Berlingieri comments that even if these instruments do not specifically mention this obligation, it still exists, and the exception in the Hague-Visby Rules which relieves the carrier of liability if there is "insufficient packing"[119] is a clear example of this.[120] "Sufficent packing" is the packing which is the customary or usual packing for the trade of that particular type of goods.[121] The object is to enable the goods to withstand the normal hazards of the particular type of journey, and to ensure that only minimal damage to the goods can occur under usual conditions of "care and carriage".[122] If goods contained in the customary packaging are damaged during transit, this suggests the carrier did not exercise proper care in the handling of those goods.[123]

Berlingieri further contends that while no explicit reference is made regarding the burden of proof in the Hague-Visby Rules; the wording used in this instrument clearly suggests that that burden is on the carrier.[124] Tetley states there are four basic common-law general principles regarding the burden of proof:[125]

- First, a carrier will be *prima facie* liable for loss or damage to goods which he received in good order, and which were short delivered or received in a damaged state.[126]

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[115] Article 31.
[116] Article 32.
[117] Berlingieri "A Comparative Analysis" 19.
[118] Article 27.
[119] Article 4(2)(*n*).
[120] Berlingieri "A Comparative Analysis" 19.
[121] Tetley *Marine Cargo Claims* 1178.
[122] Ibid.
[123] *The Lucky Wave* [1985] 1 Lloyds Rep 80 at 86 Queens Bench Division (Admiralty Court).
[124] Berlingieri "A Comparative Analysis" 19.
[125] Tetley *Marine Cargo Claims* 315.
[126] Tetley *Marine Cargo Claims* 316.

- The second principle is that the parties must prove all of the facts available to them.[127] this makes sense as while the carrier will bear the principal burden of proof, the shipper will know how the goods were packed and the consignee would have identified the damaged goods on delivery.[128]
- The third principle is that the onus of proof must be taken to a reasonable degree, so as to allow a court or tribunal sufficient information to make a ruling or award.[129]
- The fourth principle, which does not always arise, is that should a party conceal, modify or destroy evidence, other evidence given by that party will be treated with caution.[130]

Tetley comments that while the Hague-Visby Rules do not prescribed a specific order of proof, there are many similarities in the order of proof required by the courts in states that have adopted these rules.[131]

In the Rotterdam Rules it is unambiguously expressed in article 30(1) that:

> "The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this convention."

Berlingieri observes that the reference in article 27(2), which relates to the shipper's properly and carefully loading, stowing and unloading the goods,[132] if the shipper has agreed to perform these tasks, does not affect the allocation of the burden of proof as set out in article 30(1).

As mentioned previously, the requirement that the goods be carefully loaded etc has arisen from the fact that there is a growing incidence of damage and injury resulting from goods which are not properly secured on a vessel.[133] Thus if the shipper chooses to assume the

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[127] Tetley *Marine Cargo Claims* 328.
[128] Tetley *Marine Cargo Claims* 328–329.
[129] Tetley *Marine Cargo Claims* 341.
[130] Tetley *Marine Cargo Claims* 343.
[131] Tetley *Marine Cargo Claims* 351.
[132] Article 13(2).
[133] UNCITRAL Working Group III "Report of Working Group III (Transport Law) on the Work of its Sixteenth Session (Vienna, 28 November– 9 December 2005)" (2005) Available: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V06/500/31/ PDF/V0650031.pdf?OpenElement (accessed 28 July 2010) 32.

obligation of loading himself, it is quite reasonable that he do so properly, or be held liable for loss or damage that occurs.

Obligation to provide information, instructions and documents

Unlike the Hague-Visby Rules, the Rotterdam Rules expressly govern a shipper's obligation to supply the carrier with information, instructions and documents.[134] Berlingieri observes that these obligations are in accordance with usual commercial practices of carriage of goods by sea, and so this obligation presented by the Rotterdam Rules is merely a codification of industry custom.[135]

Dangerous goods

None of the conventions contains a definition of what exactly "dangerous goods" are. The Hague-Visby Rules contain a reference to the inflammable, explosive or the dangerous nature of goods.[136] In the Rotterdam Rules, however, the danger is related to persons, property and the environment.[137]

Under the Hague-Visby Rules, the shipper will be liable for harm caused by dangerous goods if the goods were shipped without the carrier being informed of their dangerous nature;[138] so it follows that, if the carrier had been informed, the shipper would escape liability.

The only South African case dealing with the shipment of dangerous goods is a Supreme Court judgment in *MV Recife.*[139] In this case, a container loaded with calcium hypochloride tablets exploded spontaneously on board the vessel and caused a fire. The shipper was the applicant and the carrier the respondent. The respondent had to prove that the fire was caused by, on a balance of probabilities, the defective or contaminated state of the tablets. The learned judge held that the respondent had failed to discharge this burden of proof, and that consequently he had failed to show that the tablets were carried without the consent of the

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[134] Article 29.
[135] Berlingieri "A Comparative Analysis" 20.
[136] Article 4(6).
[137] Article 32.
[138] Article 4.
[139] *MV Recife: Control Chemicals (Pty) Ltd v Safbank Line Ltd SCA* 2000 (3) SA 357 (SCA).

carrier, master or agent. Consequently, the applicant was granted absolution from the instance.

Two obligations relating to dangerous goods are found in the Rotterdam Rules. First, the shipper must inform the carrier of the nature of the goods and, secondly, he must mark and label them in accordance with applicable law, regulations or other requirements of public authorities.[140] If the shipper does not comply with the first obligation and the carrier is not otherwise aware of the nature of the goods, the shipper will be held strictly liable.[141] The second of these obligations is merely a codification of existing practice, as shippers will have to comply with regulations when they contract under any regime.[142] In addition, a carrier or performing party may refuse to receive or load dangerous goods and may destroy them or render them harmless if the goods do, or appear to be likely to, cause harm to persons, property or the environment while they are under the carrier's control.[143] These obligations are reasonable as obviously the goods will need to be labelled in accordance with the requirements of public authorities or their transportation may be illegal; and if a carrier is to keep his ship seaworthy, he must know of the dangerous nature of the goods he is carrying.

4.12 Contract Documents

The Hague-Visby Rules state that after the carrier receives the goods, he must supply the shipper with a bill of lading if the shipper requests one[144] and further that after the goods are loaded the carrier must issue a "shipped" bill of lading.[145] In addition, the carrier must indicate the particulars of the goods in the bill of lading, unless he has reasonable grounds for suspecting that the particulars do not accurately represent the goods.[146] The Hague-Visby Rules also include protection for a *bona fide* holder of the bill which states that if the bill has been transferred to a third party acting in good faith, then proof to the contrary of the description of the goods given in the bill is inadmissible.[147]

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[140] Article 32.
[141] Article 32.
[142] Berlingieri "A Comparative Analysis" 20.
[143] Article 15.
[144] Article 3(3).
[145] Article 3(7).
[146] Article 3(3).
[147] Article 3(4).

Chapter 8 of the Rotterdam Rules regulates transport documents. Issuing a transport document is the usual practice. However, it is not a condition not to have the Rotterdam Rules apply, as the carrier is not required to issue one if a custom, usage or practice exists where a carrier does not issue a transport document; or if the shipper agrees that one should not be issued.[148] The list of particulars to be included in a transport document, if one is issued, does not differ greatly from the Hamburg Rules, but these particulars are divided into three sections:

- the first, which lists the particulars to be supplied by the shipper;
- the second, those particulars to be included by the carrier, and
- lastly, other particulars that may or may not be required according to the particular circumstances and may be supplied by the shipper (name and address of consignee) and other by the carrier (name of vessel, ports of loading and discharge, etc).[149]

The Rotterdam Rules differ from the Hague-Visby Rules in that the carrier must qualify information when he has reasonable grounds to believe that it is false or misleading in any way,[150] and different rules are set out in respect of goods which are and are not delivered in a closed container.[151]

Another novel provision is one relating to the identity of the carrier, which Berlingieri submits will be of considerable assistance to claimants.[152] Article 47 provides that, if a carrier is identified by name in the contract particulars, any other information in the contract document regarding the name of the carrier will have no effect. If no person is identified as the carrier and the transport document contains the name of the ship, then the registered owner of that vessel shall be deemed to be the carrier – unless he is able to prove that the ship was, at that time, under a bareboat charter. The owner must be able to identify the charterer and give his address, or the registered owner may identify the carrier and indicate his address, and the bareboat charter may do the same.[153] These provisions, Berlingieri submits, make the Rotterdam Rules clearer and more complete than existing regimes,[154] and will be useful to a claimant should he wish to take action against a carrier.

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[148] Article 35.
[149] Article 36.
[150] Article 40.
[151] Article 40.
[152] Berlingieri "A Comparative Analysis" 24.
[153] Article 37.
[154] Berlingieri "A Comparative Analysis" 25.

4.13 The Effect of Statements in a Bill of Lading

The Hague-Visby Rules state that a bill of lading is *prima facie* evidence when it is in the hands of the shipper, but should it be in the hands of a third party, such as a consignee who received the bill in good faith, then the bill is considered to be conclusive evidence.[155]

The Rotterdam Rules provide that any statements in a transport document or electronic transport document are *prima facie* evidence of the carrier's receipt of the goods as stated in it[156]. Proof to the contrary is inadmissible against a third party who has received the document in good faith.[157] If the contract states "freight prepaid", this will be considered conclusive proof if held by a third party, but not if held by the shipper himself.[158]

4.14 Limitation of Liability

The scope of liability under the Rotterdam Rules is much broader than under any other existing maritime convention. The Hague-Visby Rules cover loss of and damage to the goods, while the Rotterdam Rules cover all breaches of the carrier's obligations as they exist in the rules.[159] Besides the timely delivery of the goods in the same quality and condition as they were received, obligations also include those relating to the issuance of a transport document;[160] they also include those to qualify the information relating to the goods if the carrier has actual knowledge or has reasonable grounds to believe that any material statement in the transport document is false or misleading,[161] those relating to delivery of the goods[162] as well as those obligations to perform in compliance with the instructions of the controlling party.[163] All obligations in fact relate to the goods, because the limits given refer to the goods "that are subject to claim or dispute".[164]

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[155] Article 3(4).
[156] Article 41.
[157] Article 41.
[158] Article 42.
[159] Article 59.
[160] Articles 35 and 36.
[161] Article 40.
[162] Articles 45–47.
[163] Article 52.
[164] Article 59(1).

The Hague-Visby Rules limit of liability is given as 666,67 SDRs per package or unit and 2.5 SDRs per kilogram.[165] Wanigasekera comments that problems arose under the Hague Rules in the interpretation of "package" as contained in the Hague Rules.[166] In illustration of this point is the case of *The Mormaclynx*,[167] in which the cargo as described in the bill of lading was "one container" which contained 99 bales of leather; in this case it was held that each bale constituted a separate package. In comparison, in the case of *Standard Electrica S/A v Hamburg Sudamerikanische Dampfschiffahrts- Gesselschaft and Columbus Lines, INC*[168] it was held that a bill of lading which referred only to the container and did not list its contents would be treated as one package, and again, in the case of *The Kulmerland*,[169] where a consignment of machines were shipped in a single container but had each been individually sealed in cartons was considered as individual packages. This clearly illustrates that users of the convention found the interpretation of "package" difficult and consequently the Hague Rules are insufficient in this respect and this is the reason behind the Hague-Visby ' including an alternative formula based on the weight of the cargo[170] – the per kilogram unit, with the shipper being entitled to use whichever alternative produces the higher gain for himself.[171]

The Rotterdam Rules increase these limits to 875 SDR per package and 3 SDR per kilogram,[172] which represents a 31.25 per cent increase for the package limit and of 20 per cent increase for the kilogram limit compared to the Hague-Visby Rules.

Berlingieri states that the increase in the limit per kilogram given in the Rotterdam Rules is the result of extensive negotiations between all interested parties, though the Chinese Delegation considers it too high and other delegations, including Germany and Sweden, consider it to be too low.[173] However, considerations which were taken into account included

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[165] Article 4.
[166] A Wanigasekera "Comparison of Hague-Visby and Hamburg Rules" Available: http://www.juliusandcreasy.com/inpages/publications/pdf/comparison_of_hague_and_hamburg-AW.pdf (accessed 14 February 2010) 3.
[167] *Leather's Best INC. v. The "Mormaclynx", Moore-McCormack Lines INC., Tidewater Terminal INC. and Universal Terminal and Stevedoring Corporation* (The "Mormaclynx") Lloyd's Law Reports , [1971] 2 Lloyd's Rep. 476.
[168] [1967] 2 Lloyd's Rep. 193.
[169] *Royal Typewriter CO., Divison Litton Business Systems INC. v. M.V. "Kulmerland" and Hamburgamerika* (The "Kulmerland") Lloyd's Law Reports , [1973] 2 Lloyd's Rep. 428.
[170] Article IV r 5(*a*).
[171] Wanigasekera "Comparison of the Hague-Visby and Hamburg Rules" 4.
[172] Article 59.
[173] Berlingieri "A Comparative Analysis" 33.

the average value of goods carried by sea as well as the cost of insurance of the carrier and its corresponding impact on freight, and this led the substantial majority of delegations to voice their support of the new limits.[174]

The Hague-Visby Rules contain no specific provision for economic loss due to delay. The penalty for delay under the Rotterdam Rules is two-and-a-half times the freight payable in respect of the delayed goods.[175]

The provisions relating to the loss of the right to limit liability in the in the Rotterdam Rules[176] are almost identical to those in the Hague-Visby Rules[177] and the Hamburg Rules.[178] The exception is that there is a reference in the Hague-Visby Rules to the carrier's knowledge that damage would probably occur.[179] The Rotterdam Rules refer to this:

> "If such loss was caused deliberately by the carrier or his servants or agents, or if the loss was the result of the carrier or his servants or agents acting recklessly in the knowledge that if proper care was not taken such loss would "probably result."[180]

Under the Rotterdam Rules the loss in question is "the loss resulting from the breach of the carrier's obligation under this convention".[181] This is closely related to the provision on the limitation of liability, which is: "the carrier's liability for breaches of its obligations under this convention is limited to ... of the goods subject to the claim or dispute".[182] Berlingieri maintains that the loss that is meant in these provisions is financial loss, not loss of the actual property in and that the same is the case for any delay in the delivery of the goods.[183] In addition, in the Hague-Visby Rules reference is made to the acts or omissions of the carrier,[184] which Berlingieri argues has resulted in confusion as to whether acts and omissions of the servants or agents of the carrier may be relevant in this regard.[185] This has been

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[174] Ibid.
[175] Article 60.
[176] Article 61.
[177] Article 4.
[178] Article 8.
[179] Article 4.
[180] Article 61.
[181] Article 61(1).
[182] Article 51.
[183] Berlingieri "A Comparative Analysis" 33.
[184] Articles 4 (Hague-Visby) and 6 (Hamburg).
[185] Berlingieri "A Comparative Analysis" 34.

clarified in the Rotterdam Rules, where reference is made to the personal act or omission of the individual claiming the right to limit.[186]

Thus the regime introduced by the Rotterdam Rules clarifies that the carrier will be liable should he breach the rules in any way. This will be helpful to claimants and makes the position of all parties clear.

Lower limits by agreement

The Hague-Visby Rules allow parties to agree on lower limits of liability when the shipment is not an "ordinary commercial shipment" made in the "ordinary course of trade".[187] The Rotterdam Rules take a much firmer stance and state that any terms which directly or indirectly exclude or limit the obligations or liability of the carrier will be void,[188] with the exception of volume contracts.[189]

Higher limits by agreement

The Hague-Visby Rules allow the carrier and the shipper to agree on higher limits, but this must be recorded in the bill of lading.[190] As a bill of lading is not necessary in transactions between a shipper and a carrier under the Rotterdam Rules; all that is required in this instance is for the parties to agree to higher limits.[191] As is the usual case, such an agreement should be in writing so that it may be easily proved.

4.15 Time for Suit

Berlingieri observes that the provisions relating to the "time for suit" differ greatly in the Hague-Visby and the Rotterdam Rules, as the Rotterdam Rules consider time from the position of the claimant, whereas the Hague-Visby Rules approach it from the position of the defendant.[192] He further states that under the Rotterdam Rules this is the case for any action

[186] Article 61.
[187] Article 6.
[188] Article 79.
[189] Article 80.
[190] Article 5.
[191] Article 59.
[192] Berlingieri "A Comparative Analysis" 36.

of the shipper or consignee brought against the carrier or any maritime performing party; and the same for any action brought by the carrier or any maritime performing party against the shipper, documentary shipper controlling party or consignee.[193]

The limitation period also differs, being one year in terms of the Hague-Visby Rules[194] and two years in the case of the Rotterdam Rules.[195] The provisions relating to the commencement and extension of the limitation period and on actions for indemnity are virtually identical under both regimes; however, the Hague-Visby Rules contain no regulations relating to the suspension or interruption of such period, whereas suspension and interruption are expressly excluded under the Rotterdam Rules.[196]

A unique provision appears in the Rotterdam Rules with respect to the actions against the person who is identified as the carrier.[197] This is in those cases where an action may be instituted after the expiration of the two-year limitation period – actions may be instituted either during the time given by applicable law in the jurisdiction where proceedings are instituted or 90 days after the carrier has been identified, whichever is the later.[198]

4.16 Freedom of Contract

Berlingieri comments that the Hague-Visby Rules generally allow freedom of contract in situations where they do not apply. Indeed, in article 3(8) this regime provides that any clause which relieves the carrier of liability otherwise than provided for by this regime is null and void, and then further states in article 6 that the carrier may enter into an agreement in respect of its obligations and liability if no bill of lading is or has been issued and the goods which are being carried are not ordinary commercial shipments. Article 7 further states that freedom of contract is allowed before loading and after the discharge of the goods.

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[193] Ibid.
[194] Article 3.
[195] Article 62.
[196] Articles 63 and 64.
[197] Article 37(2).
[198] Article 65.

In order to offer maximum protection to all parties, the Rotterdam Rules generally provide, with the exception of volume contracts, that the rules regarding the liability of the carrier, the shipper, the maritime performing parties as well as the consignee are mandatory.[199]

The United States initially suggested the concept of "volume contracts", which allow limited freedom of contract to the parties under certain regulated circumstances.[200] Volume contracts are a sort of "package deal"[201] by which shippers and carriers agree on a series of shipments of a specified quantity of goods over an agreed time. Volume contracts as envisaged by the Rotterdam Rules have traditionally been implemented through liner or charterparty agreements.[202] This is one of the main reasons why volume contracts were included in the application of the rules: so that the objective of having "most" of the liner trade operating under the rules could be met.[203] Berlingieri states that the justification behind allowing freedom of contract regarding volume contracts is to allow for situations where the parties have relatively equal bargaining power.[204]

Berlingieri comments, however, that the definition of "volume contracts" in the rules is wide enough to include small contracts, in which it is unlikely that the contracting parties will have equal bargaining power.[205] Hannu Honka also points out that in some cases it is the shipper who is the stronger party in any negotiation.[206] However, Berlingieri observes that since all attempts to restrict the definition to contracts covering a "significant" amount of cargo failed in the negotiation stage,[207] the decision was reached to protect smaller shippers through the inclusion of certain provisions on volume contracts in the Rotterdam Rules. These are that contracts should not be contracts of adhesion and so are subject to negotiation, and that shippers should be given the opportunity to contract on terms that do not derogate from the rules.[208]

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[199] Article 79.
[200] Berlingieri "A Comparative Analysis" 38.
[201] Honka "United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea" 11.
[202] Ibid.
[203] Ibid.
[204] Berlingieri "A Comparative Analysis" 38.
[205] Ibid.
[206] Honka "United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea" 7.
[207] Berlingieri "A Comparative Analysis" 39.
[208] Article 80.

Certain exclusions have also been made, but shippers and carriers may not exclude the obligations of seaworthiness, the shipper's obligation to provide information in terms of dangerous goods, and generally the information required for the proper handling of the goods,[209] whereas, third parties are not bound by the terms of a volume contract unless they expressly agree to them in writing.[210]

4.17 Matters not Regulated by the Hague-Visby Rules

Deck cargo

The Hague-Visby Rules state that if it is specified in a bill of lading that goods will be carried on deck and this is where they are actually stowed, then the cargo is excluded from the application of these Rules.[211] Courts have taken this exclusion quite seriously. For example, in the case of *Svenska Traktor Aktiebolaget v Maritime Agencies (Southhampton) Ltd.*[212] a consignment of tractors was shipped under a bill of lading which stated that the carrier could, if he so chose, carry the cargo on deck. In this case, the tractors were indeed carried on deck and one of them was washed overboard. The ship owner attempted to rely on a clause in the bill which excluded his liability for loss or damage to cargo carried on deck. The court in this instance held that he was not entitled to do so since a "general liberty" to carry the goods on deck is not a statement in the contract that the goods would actually be carried on deck. English case law, however, does allow a carrier still to rely on the package limitation contained in these rules, as evidenced by *The Kapitan Petko Voivoda.*[213]

The Rotterdam Rules permit the carriage of goods on deck in four situations.[214] The first three of these are: when it is in accordance with usage of the trade in question, or when it is required by statutory rules or regulations, or when the shipper agrees.[215] In the case where no express permission is given in a bill of lading for the carrier to stow the goods on deck, the carrier has unlimited liability if he carries the goods on deck unless he can prove that he

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[209] Article 80.
[210] Article 80.
[211] Article 1(*c*).
[212] [1953] 2 Q.B 295.
[213] *Daewoo Heavy Industries LTD. and Another v. Klipriver Shipping LTD. and Another* (The "Kapitan Petko Voivoda") [2003] EWCA Civ. 451 Lloyd's Law Reports , [2003] 2 Lloyd's Rep. 1.
[214] Article 25.
[215] Article 9.

received permission to do so. The fourth situation which Berlingieri remarks on is, in today's commercial world, of great importance:[216] where goods may be carried on deck when "they are carried in or on containers or vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or vehicles".[217] Berlingieri states that this brings the rules in line with modern carriage of goods on container ships as well as with the carriage of vehicles on today's "roll-in" and "roll-off" ships used in transporting vehicles.[218] If there was an express agreement for the goods to be carried below deck, the carrier will not be able to limit his liability in any way.[219]

Live animals

The Hague-Visby Rules do not permit the carriage of live animals, whereas the Rotterdam Rules allow for freedom of contract between parties where live animals are concerned.[220]

Obligations and liability of maritime carrier and maritime performing parties

The Rotterdam Rules do not refer to the "actual carrier", but rather to the "maritime performing party", which is defined as:

> "a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area."[221]

A "performing party" is defined as:

> "a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person

[216] Berlingieri "A Comparative Analysis" 43.
[217] Article 25.
[218] Berlingieri "A Comparative Analysis" 43.
[219] Articles 9 (Hamburg) and 25 (Rotterdam).
[220] Article 81.
[221] Article 1(7).

acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control."[222]

The maritime performing party is generally subject to the same obligations and liabilities as the carrier, and is entitled to make use of the carrier's defences and limitations of liability.[223]

Jurisdiction

The Rotterdam Rules contain provisions regulating the jurisdiction for claims.[224] The rules allow contracting states to "opt-in" to jurisdiction provisions;[225] if a state does opt in, the following applies when selecting a place in which to sue: the domicile of the carrier, the place of receipt of the goods under the contract of carriage, the place of delivery of the goods under the contract of carriage, the port of loading or of discharge, or where the parties have agreed in the contract of carriage.[226] The rules state that the arrest of a vessel does not convey substantive jurisdiction.[227]

John Hare comments that this chapter is not in South Africa's best interests,[228] because while article 73 allows for arrest or protective measures, it does not allow the merits of a claim to be heard in the arresting jurisdiction unless "an international convention that applies in that state so provides". South Africa's domestic Admiralty Jurisdiction and Regulation Act of 1983 deals with maritime claims in the Republic, and section 2 of the Act gives the High Court the jurisdiction to:

"hear and determine any maritime claim, irrespective of the place where it arose, of the place of registration of the ship, of the place of the registration of the ship concerned or of the residence, domicile or nationality of its owner."

The Rotterdam Rules also allow "exclusive jurisdiction clauses" in respect of volume contracts.[229] Such clauses will be binding on third parties only if certain conditions are met. These are: that the court which is chosen is in one of the places designated in article 66(*a*);

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[222] Article 1(6).
[223] Article 19.
[224] Chapter 14 (Rotterdam) and art 21 (Hamburg).
[225] Article 74.
[226] Article 66.
[227] Article 70.
[228] Hare *Shipping Law* 639.
[229] Article 67.

that the clause is contained in a transport document or electronic record; that the third party is given adequate notice of the chosen court and that its jurisdiction is exclusive; and that the law of the court seized recognises that that person may be bound by such a clause.[230]

Arbitration

Under the Rotterdam Rules states may again "opt in" to the provisions on arbitration.[231] In addition, defences and limitations of liability apply to arbitral proceedings[232] and, furthermore, parties may agree to refer disputes to arbitration.[233] Under the Rotterdam Rules, if the volume contract contains a designation of the place of arbitration, this will be binding on the parties to the agreement as well as to third parties, subject to the same conditions mentioned for jurisdiction, except that reference is made to "applicable law" instead of "the law of the court seized".[234] The "applicable law" is the national law of the place where the arbitration proceedings are instituted by the claimant.[235]

Carriage prior to or after the "sea-leg"

Berlingieri remarks that for more than four decades the transportation industry has felt the need for a unique instrument to govern multimodal transport transactions, that is, a single contract for the carriage of goods by at least two different modes of transport.[236]

Sturley comments that the Rotterdam Rules deal with these concerns by proposing a narrow network system.[237] A full network system would mean that the rules would take precedence over existing unimodal land conventions.[238] However, under a narrow network system liability is based on the relevant unimodal regime if damage can be localised as having occurred during the "land-leg"; if damage cannot be localised, then the Rotterdam Rules will apply fully.[239]

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[230] Article 67.
[231] Article 78.
[232] Article 4.
[233] Article 75.
[234] Article 76.
[235] Berlingieri "A Comparative Analysis" 49.
[236] Berlingieri "A Comparative Analysis" 52.
[237] Sturley (2004) 10 *JIML* 146.
[238] Ibid.
[239] Ibid.

Berlingieri submits that the Rotterdam Rules were conceived with a view to regulating carriage by sea and, furthermore, when a carrier agrees to extend its services also to transport by other modes.[240] This may occur prior to, or following from, that sea carriage, and consequently they are not a true multimodal instrument, as carriage by other means must be attached to carriage by sea.[241]

This is clearly evidenced by the definition of a "contract of carriage" as contained in the rules, that is: "Contract of carriage" means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage."[242] The rules further state in the general scope of application that: this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different states, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different states, if, according to the contract of carriage, any one of the following places is located in a contracting state:

"(*a*) the place of receipt;

(*b*) the port of loading;

(*c*) the place of delivery; or

(*d*) the port of discharge."[243]

Obviously, if the contract is wholly by sea, then only the ports of loading and discharge are relevant. If the contract is for partly sea carriage, then the places of receipt and delivery of the goods may be relevant. This widens the scope of application of the Rotterdam Rules considerably with respect to the Hague-Visby Rules. The provisions which regulate door-to-door carriage are found in articles 26 and 82 of the Rotterdam Rules.

Article 26

Article 26 deals with loss of, damage to or delay of goods before loading, or after discharge of the goods from a vessel, but while they are still the responsibility of the carrier, and which

[240] Berlingieri "A Comparative Analysis" 52.
[241] Ibid.
[242] Article 1(1).
[243] Article 5.

would have been regulated by another international instrument if the Rotterdam Rules had not applied.

There are three stipulations which must be met in order for article 26 to operate. First, the loss or damage to the cargo or the circumstances which caused the delay must have occurred before the loading or after the discharge of the goods from the vessel. Secondly, there must be an international instrument which would have regulated that particular stage of the carriage if the shipper had made a separate contract with a carrier in respect of that stage of carriage. Finally, the provisions in that instrument concerning the carrier's liability, limitation of liability or time for suit must be mandatory or, alternatively, cannot be departed from if they would put the shipper at a disadvantage.

In Europe, for example, the CMR[244] and the CIM[245] would usually apply to road and rail transport, respectively. Thus the Rotterdam Rules introduce a "limited network system", so as to minimise conflict with existing unimodal conventions.[246] What this provision essentially entails is that when damage can be localised as having occurred during an inland leg of the transport, and there is another international instrument to govern damage in such situations, that other instrument may be applied in the place of the Rotterdam Rules, as though a separate contract had been created for that particular stage of the transport.[247] If the damage cannot be localised as having occurred during an inland leg, the provisions of the Rotterdam Rules will apply in full, and so regulate the liability regime of the parties as would usually apply under the rules. Fujita points out that article 82, which governs localised damage, states that the rules do not affect the "application" of any international convention, but they do not say that that convention and its provisions must apply; consequently, this may be interpreted differently in various jurisdictions – which may be an oversight on the part of the makers of the rules.[248]

Article 82

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[244] Convention on the Contract for International Carriage of Goods by Road, 1956 (CMR).
[245] 1980 Convention Concerning International Carriage by Rail (COTIF) agreement, with its annexes CIV (for passengers and luggage) and CIM (for freight).
[246] Lannan "The Launch of the Rotterdam Rules".
[247] Lannan "The Launch of the Rotterdam Rules".
[248] Fujita (2009) 44 *Tex Int'l LJ* 360.

Article 82 of the Rotterdam Rules states that the rules do not affect the application of inland conventions which regulate carriage by air, rail, road or inland waterway and which control the carrier's liability for loss or damage to the goods being transported.

Article 82(a): Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage ...

The convention which would most probably be relevant for carriage by air is the Montreal Convention.[249] The most relevant aspect to consider with regard to this convention is the limit of liability a carrier would face should the Montreal Convention be applicable instead of the Rotterdam Rules. The Montreal Convention provides a limitation of liability, which is 17 SDRs per kilogram. So it is equal to the per package limit under the Rotterdam Rules (875 SDRs) if the package weighs more than 51.47 kilograms, which Berlingieri states is not common for packages couriered by air, and so the carrier will usually benefit from the lower liability under the Montreal Convention.[250]

Article 82(b): Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship.

A convention that may well be applicable here is the CMR.[251] Again, as far as limitations of liability are concerned, the CMR's sole limit is 8.33 SDR per kilogram compared to the Rotterdam Rules' 3 SDRs per kilogram. Thus the CMR limit is equal to the Rotterdam Rules package limit (875 SDRs) if the package weighs 105.04 kilograms. Thus the shipper may very well benefit from the higher limitations of liability per kilogram under the CMR.

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[249] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as amended by the Protocol signed at The Hague on 28 September 1955 and by the Protocol 4 signed at Montreal on 25 September 1975.

[250] Convention for the Unification of Certain Rules Relating to International Carriage by Air.

[251] CMR.

Article 82(c): Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail ...

Regarding this provision, the CIM would probably be the convention in question. It has the same limitation of liability as the CMR, as mentioned above. A noteworthy point in this section is the use of the word "supplement", which suggests that the sea carriage and the road carriage cannot exist independently, but complement each other[252]. Berlingieri comments that distance may be a relevant consideration to take into account in assessing whether a maritime leg may be qualified as a "supplement" to the rail travel of the goods.[253]

Article 82(d): Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea ...

Berlingieri comments that the CMNI[254] may be a significant convention in this respect. The CMNI states that "the Convention applies unless a marine bill of lading is issued in accordance with the Maritime Law applicable or the distance travelled in waters to which maritime regulations apply is greater".[255] Berlingieri remarks that this means that the possibility of conflict is very minor, as the distance travelled by sea will usually be greater, and further that the transport document a carrier will issue under the rules will be considered the equivalent of a "marine bill of lading".[256]

Electronic records

One of the pioneering provisions of the Rotterdam Rules is the regulation of electronic records as a substitute for the transport document.[257] As the UNCITRAL Working Group illustrates, electronic communications and commerce are not regulated by any other existing

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[252] Berlingieri "A Comparative Analysis" 55.
[253] Ibid.
[254] Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2000.
[255] Article 2(2).
[256] Berlingieri "A Comparative Analysis" 55.
[257] Chapter 3.

international transport conventions – even those which date from 1999 and 2000.[258] These conventions include the Hague Rules,[259] the Hague-Visby Rules[260] and the Hamburg Rules[261] as well as the Multimodal,[262] CMR,[263] COTIF-CIM 1999,[264] CMNI,[265] Warsaw[266] or Montreal conventions.[267] As electronic communications are continually developing, the provisions contained in the Rotterdam Rules allow for future innovations in this regard.[268] Berlingieri states that this has been achieved by allowing electronic transport records to be used as a substitute for the usual paper transport documents.[269] The rules set out the basic conditions for the use of electronic transport documentation as well as the rules to regulate the replacement of transport documents with transport records, and *vice versa*, throughout the rules, as reference to electronic transport records is made in all the provisions that deal with transport documents.[270]

Obligations and liabilities of maritime performing parties

Berlingieri comments that when UNCITRAL considered whether and to what extent the performing parties or subcontractors of the carrier should be subject to the rules and be liable to a claim made by a shipper or a consignee, it was decided for the sake of convenience that this should be possible only for services rendered at sea or in ports. This resulted in the term "maritime performing party" being coined – incorporating into the rules the principles on which the Himalaya clause is based.[271] The Rotterdam Rules provide that a maritime performing party is subject to the same obligations and liabilities as imposed on the carrier and is also entitled to make use of a carrier's defences and limitations of liability as provided

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[258] UNCITRAL Working Group III "The UNCITRAL Draft Instrument on the Carriage of Goods by Sea and other Transport Conventions" 11.
[259] The Hague Rules [the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading – Brussels Convention 1924].
[260] The Hague Rules, as amended by the Visby Amendments, the Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 1968) ("the Hague-Visby Rules").
[261] United Nations Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978) ("the Hamburg Rules").
[262] United Nations Convention on International Multimodal Transport of Goods, Geneva, 24 May 1980.
[263] CCMR.
[264] COTIF and CIM.
[265] Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2000.
[266] Convention for the Unification of Certain Rules Relating to International Carriage by Air.
[267] Convention for the Unification of Certain Rules for the International Carriage by Air.
[268] Berlingieri "A Comparative Analysis" 57.
[269] Ibid.
[270] Articles 35, 36, 37, 38, 40, 41, 45, 47, 51, 57 and 58.
[271] Berlingieri "A Comparative Analysis" 57.

in the rules.[272] It is essential that the maritime performing party who acts as a sub-carrier receive the goods for carriage or deliver them in a contracting state, or that onshore services as the case may be, are performed in port of a contracting state in order for the Rotterdam Rules to be applicable.[273]

Berlingieri observes that the incorporation of the principles of the Himalaya clause into the rules has been criticised as it may prevent certain service providers such as freight forwarders from using their usual freedom of contract.[274] Berlingieri points out, however, that this type of freedom of contract is today quite restricted and so these parties may rather benefit from being included under the provisions of the rules.[275] In addition, this extension of the rules to include ancillary service providers in ports of loading and discharge will ensure uniformity and certainty in this area of the law, which has traditionally been regulated by many differing national laws.[276]

Delivery of the goods

The Hague-Visby Rules do not regulate the rights and obligations of parties regarding the delivery of goods once they have arrived at their destination. Berlingieri observes that this "has led to a number of issues across the industry, such as whether the carrier has the right to withhold goods until freight has been paid, what must happen if no one takes delivery of the goods, or if a person who has not been properly identified attempts to claim the goods, or cannot, or will not surrender the negotiable transport document".[277] These issues have customarily been solved by the applicable law of contract or under the appropriate national laws, which has created global uncertainty regarding the delivery of goods.[278]

The Rotterdam Rules regulate delivery, as they contain provisions regarding the rights and obligations of the parties. The obligation of the carrier to deliver the goods is subject to whether a negotiable transport document or electronic record has been issued or not[279]. If one

[272] Article 19(5).
[273] Article 19.
[274] Berlingieri "A Comparative Analysis" 59.
[275] Ibid.
[276] Ibid.
[277] Berlingieri "A Comparative Analysis" 60.
[278] Ibid.
[279] Articles 43–49.

has been issued, then the consignee must surrender the document or record to the carrier.[280] If such a document or record has not been issued, then the consignee is required to identify himself properly.[281] In addition, if a transport document or record has been issued, in order to protect the holder, the carrier possesses the right to not deliver the goods, and the obligation to refuse delivery of the goods if such a document or record is not surrendered, except when the document or record expressly states that such does not have to be surrendered.[282]

Another area which the Rotterdam Rules regulate which has not previously been governed by an international instrument are the rights and obligations of the carrier in cases when the goods remain undelivered; because either the consignee does not accept delivery or the person to whom delivery is meant to be made cannot be located, or when the carrier is entitled to refuse delivery.[283] Article 48 of the rules sets out the manner in which the carrier in case of such an event may dispose of the goods in question as well as the conditions with which he must comply.

Rights of the controlling party

Berlingieri observes that in cases where goods are sold in transit, the shipper often has to give instructions to the carrier, or change existing instructions.[284] Chapter 10 of the Rotterdam Rules governs these situations, and refers to the right to give instructions as the "right of control" and the party who has such a right is referred to as the "controlling party". The rules set out the rights of the party, which include the right to give or modify instructions regarding the cargo which do not constitute a variation of the original contract of carriage; they also include the right to obtain delivery of the goods at any scheduled port of call.[285] Should the alteration take place regarding carriage overland, then delivery may be taken at any place *en route* and the consignee may also be replaced.[286] The rules also identify who the controlling party is and regulate the conditions under which the carrier is bound to carry out

[280] Articles 43 and 44.
[281] Article 45.
[282] Article 45.
[283] Article 48.
[284] Berlingieri "A Comparative Analysis" 63.
[285] Article 50.
[286] Article 50.

instructions.[287] These may be the reasonable possibility of executing the instructions whenever they are given and the right of the carrier to obtain security for related costs.[288]

Transfer of rights

Chapter 11 regulates the manner in which the holder of a negotiable transport document may transfer his rights obtained by virtue of the document.[289] The rules also regulate situations in which the holder of a negotiable transport document (who is not the shipper) will not incur any liabilities under the contract, unless he exercises any right under the contract, in which case he will be liable but only to whatever extent the liabilities are included in or evident from the document.[290]

Conclusion

It is thus quite apparent that carriage by sea has evolved since the inception of the Hague Rules in 1924. While both the Hague-Visby and Hamburg Rules have updated the provisions given in the Hague Rules, there have been significant advances in this industry which are not included in any of these regimes, most notably e-commerce and containerisation as well as the practice of door-to-door contracts. All of these advances need to be regulated by a new international instrument. There is a need to update and modernise Maritime Law, to promote uniformity and certainty in international transport and also to prevent regionalism. A workable answer appears to be the Rotterdam Rules. The rules also contain codifications of industry practice and customs, and regulate issues – delivery, to name one – which have not been explicitly regulated in any previous international maritime regime.

[287] Article 52.
[288] Article 52.
[289] Article 57.
[290] Article 58.

5
Criticisms of the Rotterdam Rules

The Rotterdam Rules have been met with derision by many freight associations, national delegations and academic authors. Critics who have made their views known include the European Shipper's Council (ESC), the International Federation of Freight Forwarders (FIATA)Comité de Liaison Européen des Commissionnaires et Auxiliaires de Transport (CLECAT), which is the "Representative body of European freight forwarders, logistics providers and Customs Agents", the Belgian Maritime Law Association (BMLA), the Australian Delegation which participated in the United Nations Commission on International Trade Law (UNCITRAL) Working Group that produced the Draft Rotterdam Rules, the Canadian International Freight Forwarders Association (CIFFA), Professor William Tetley of the United States and other academics, including Thomas, Johansson, Oland, Pysden, Ramburg and Schmitt.

5.1 The European Shipper's Council

The European Shipper's Council (ESC) represents the freight transport interests of approximately 100 000 companies, comprising manufacturers, retailers and wholesalers throughout Europe.[1] These companies take a strong interest in international conventions as their goods move as imports and exports across the European Union (EU) and across international borders – making use of an array of modes of transport.[2]

The ESC submits that the Rotterdam Rules may put some shippers "in a worse position than that of the pre-1924 liability environment, before the introduction of the original Hague-Rules".[3]

The ESC has identified six key areas which they consider to be the most disturbing parts of the new convention. These concerns relate predominantly to the view that the Rotterdam Rules introduce unequal obligations and liabilities between the shipper and the carrier in

[1] European Shipper's Council (ESC) "View of the European Shippers' Council on Convention on Contracts for the International Carrying of Goods Wholly or Partly by Sea also known as the 'Rotterdam Rules'" (2009) Available: http://www.comitemaritime.org/draft/pdf/2ESC.pdf (accessed 3 January 2010) 1.
[2] Ibid.
[3] Ibid.

which the carrier is favoured, as well as the lessening of protective measures for shippers which have been in place under previous maritime regimes, particularly regarding volume contracts.[4]

Inconsistent with other conventions

The first of the areas of concern for the ESC is that they are of the opinion that the Rotterdam Rules may conflict with other conventions.[5] In support of this position, the ESC emphasises that the Rotterdam Rules are far broader in application than previous conventions, applying to "contracts of carriage"[6] rather than "shipment of goods" when the place of receipt and place of delivery are in different states and where ports of loading and discharge are in different states.[7] The rules state that the contract must provide for carriage by sea, and may also provide for carriage by land.[8] The ESC suggests that this has the potential to bring the rules into conflict with international conventions which regulate road and rail transport of goods but which may also include specific maritime transport, such as the CMR,[9] which governs international road carriage, and CIM,[10] which governs international rail carriage.[11] The ESC comments that the CMR and CIM will apply in practice only where the source of any damages can be pinpointed,[12] which in reality is difficult to identify in most cases.[13] In addition, the "more favourable" terms and conditions of conventions such as CMR and CIM, will not extend to short sea shipping, which may have the effect of European shippers' electing not to use short sea shipping services because these contracts would then be regulated by the Rotterdam Rules, which have far harsher provisions controlling liabilities and obligations than under other conventions.[14] This may obviously negatively affect any transporters involved in short sea shipping.

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[4] Ibid.
[5] ESC "View on the Rotterdam Rules" 2.
[6] Article 1(1).
[7] ESC "View on the Rotterdam Rules" 2.
[8] Ibid.
[9] Convention on the Contract for International Carriage of Goods by Road, 1956 (CMR).
[10] 1980 Convention Concerning International Carriage by Rail (COTIF) agreement, with its annexes CIV (for passengers and luggage) and CIM (for freight).
[11] ESC "View on the Rotterdam Rules" 2.
[12] Article 26.
[13] ESC "View on the Rotterdam Rules" 2.
[14] Ibid.

The ESC does not appear to understand that the rules may be beneficial in providing international uniformity in cases where damage cannot be localised. In addition, the UNCITRAL Working Group observes that it can be misleading to compare liability limits and regimes from unimodal transport conventions, due to the fact that each convention contains provisions which are particularly geared to the type of transport they regulate.[15] The Working Group maintains that limits of liability as contained in instruments such as the CMR and CMI are not directly comparable to those in maritime transport conventions, for the reason that most unimodal instruments contain only per kilogram limitation levels. The Working Group states that there is evidence that the level of recovery in matters which proceed to court or other proceedings is much greater under instruments with a "per package limitation level".[16] The Working Group also draws attention to the fact that whereas instruments such as the Montreal Convention have a higher limitation liability when compared with other transport conventions, they also contain provisions which render these limits incapable of being exceeded, even in the cases of intentional acts or theft.[17] Obviously this may be impractical for shipping where enormous volumes of goods may be shipped at once. It should also be noted that the levels of freight payable for many unimodal types of transport are much higher than those under any maritime conventions.[18]

Balancing obligations and liabilities between shippers and carriers

The ESC contends that the Rotterdam Rules present unequal obligations and liabilities for shippers[19] and carriers.[2021] The ESC is of the opinion that the Rotterdam Rules will allow a carrier to offer sea carriage only under a shipping contract, and in doing so may limit their period of responsibility of the shipment to exclude loading, handling, stowing and unloading, if the shipper agrees to such terms.[22] The ESC submits that the shipper may accept terms such

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[15] UNCITRAL Working Group III "Report of Working Group III (Transport Law) on the Work of its Twentieth Session (Vienna , 15–25 October 2007)" (2007) Available: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V07/879/10/PDF/V0787910.pdf?OpenElement (accessed 28 July 2010) 35.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Chapter 7 (arts 27–34).
[20] Chapter 4 and Chapter 5 (arts 11–23) and Chapter 12 (arts 59–61).
[21] ESC "View on the Rotterdam Rules" 2.
[22] Article 13(2); ESC "View on the Rotterdam Rules" 2.

as these without knowing any better, but this would be equivalent to "not renewing one's insurance policy in order to save money".[23]

Volume contracts

The ESC expresses great concern relating to provisions regulating "volume contracts" under the Rotterdam Rules.[24] The ESC believes that the way in which these provisions have been structured may mean that they could hypothetically apply to contracts for three containers shipped on three separate occasions over a period of a year or more.[25] Therefore, signing a volume contract may expose a shipper to greater risk, if they were not completely aware of the implications of contracting under these types of contract, as under these types of contract some provisions aimed at protecting the shipper will not always apply.[26] For example, it is an industry custom for the carrier to make and keep the supplied holds and containers fit and safe for the reception, carriage and preservation of goods,[27] which is not required for volume contracts under the Rotterdam Rules and may therefore be contracted out of by an astute carrier.[28]

Creating problems

Moreover, the ESC believes that the current provisions contained in the Rotterdam Rules may create issues and questions.[29] In particular, the ESC states that while there appear to be apparent safeguards[30] to alert the shipper that the rules will not apply if they are "negotiated" away,[31] it is unclear how these will work in practice and how effective they will actually be.[32] The ESC stresses that shipping is excluded from EU law relating to unfair contracts, and this

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[23] Ibid.
[24] Ibid.
[25] ESC "View on the Rotterdam Rules" 3.
[26] Ibid.
[27] Article 14.
[28] ESC "View on the Rotterdam Rules" 3.
[29] Ibid.
[30] Article 80(2).
[31] Article 80.
[32] ESC "View on the Rotterdam Rules" 3.

will accordingly put a shipper at an even greater risk of being persuaded to enter volume contracts on terms that may present risks to the shipper.[33] In addition, the ESC notes that parties may contract out of the application of the rules, and theoretically from the application of national law, which will lead to increased legal uncertainty and a possible lacuna in the application of shipping law.[34]

The ESC also maintains that the rules are unclear on how competition rules would be applied under circumstances where it is alleged a dominant party abused a weaker party.[35] The ESC also assumes that volume contracts will offer lower rates to reflect the decrease in liability of the carrier, or increased rates to reflect the increased liability of a carrier, which is not regulated in the rules themselves.[36] The ESC fears that bills of lading in these situations may be rewritten in order to present shippers with rate reductions that may be more illusory than real, because whereas a shipper could not be forced into accepting a contract which excludes the application of the Rotterdam Rules, it is possible that rates may be manipulated so as to make a refusal more costly for the shipper – for example, if a rates penalty was imposed for a shipper's refusal to sign a volume contract.[37] The ESC also stresses that small shippers would be most likely to be affected by these provisions, as they are most often the far weaker party in any shipping transaction or negotiation with a carrier.[38]

The UNCITRAL Working Group on the Rotterdam Rules has reviewed and re-reviewed provisions relating to "volume contracts" since 2003.[39] Obviously, as "volume contracts" and the special rules which accompany them have never been included in an international maritime convention, these rules were of special importance and so considerable amounts of time, deliberation and negotiation were necessary to enable the Working Group to produce a workable solution as satisfactory as possible to all parties involved in negotiations. The aim of the Working Group was to provide rules which reflected the "best possible consensus solution" in addressing concerns "in a manner which allows for practical and commercially

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[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] UNCITRAL Working Group III "Report of Working Group III (Transport Law) on the Work of its Fifteenth Session (New York, 18–28 April 2005" (2005) Available: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V05/843/75/PDF/V0584375.pdf?OpenElement (accessed 28 July 2010).

meaningful party autonomy in volume contracts".[40] The Working Group attempted to find the best possible solution, taking into account conflicting viewpoints on volume contracts, and aimed not to include proposals which were previously unpopular abroad.[41]

The Working Group originally specified that "volume contracts" would include those which in practice "were generally subject to extensive negotiations between shippers and carriers, and not those which did not require, or where commercial practice did not allow for levels of variation in the contract to meet certain individual needs in the contractual situation".[42] This is due to the fact that contracts which do not require extensive variation are often contracts of adhesion, which usually require the protection of mandatory law.[43]

The Working Group acknowledged the need for volume contracts to provide an appropriate balance between commercial flexibility (allowing derogation from the convention in certain situations) while at the same time providing adequate protection for contracting parties.[44] Consequently, strong support was expressed within the group that certain provisions should be mandatory, and so could not be removed even in terms of a volume contract.[45] These are those now expressed under article 80(4) of the Rotterdam Rules.

The Working Group did consider concerns regarding small shippers with weak bargaining power and whether they could be subject to abuse from "stronger" carriers if they contracted under volume contracts.[46] However, the view was expressed that in current trade practices, small shippers most often use "rate agreements", which are not contracts of carriage but instead guarantee a maximum rate without specifying volume, and these agreements are not considered to be volume contracts.[47] The appeal of rate agreements when combined with market forces would probably have the effect that small shippers would rather contract under rate agreements than volume contracts.[48]

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[40] UNCITRAL Working Group III "Report of Working Group III (Transport Law) on the Work of its Twenty-first Session" (Vienna, 14–25 January 2008) (2008) Available: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V08/507/44/PDF/UNCITRAL WORKING GROUP III "TWENTY FIRST SESSION".pdf?OpenElement (accessed 28 July 2010) 50.
[41] UNCITRAL Working Group III "Twenty-first Session" 51.
[42] UNCITRAL Working Group III "Twenty-first Session" 47.
[43] Ibid.
[44] UNCITRAL Working Group III "Twenty-first Session" 49.
[45] Ibid.
[46] UNCITRAL Working Group III "Twenty-first Session" 47.
[47] Ibid.
[48] Ibid.

The Working Group points out that any shipper who is dissatisfied with the terms of a volume contract always has the right to refuse to enter into the contract, and instead may enter into the contract on standard terms.[49]

In addition, any derogation under article 80(2) will not be binding on the parties if "any condition is not effectively met" and so, should this occur, the entire contract would revert back to the standard provisions of the Rotterdam Rules, as the derogation would not be binding in these cases.[50]

Further chapters on jurisdiction and arbitration are binding only on states which declare those chapters to be binding, and consequently "disadvantageous" choice-of-court agreements will not present a particular problem.

A new liability regime

The ESC has serious qualms concerning the new liability regime introduced by the Rotterdam Rules, in that they submit that under the rules it will be more onerous for a shipper to prove fault than under other maritime regimes.[51] Excepting when contrary provisions are contained in a volume contract,[52] "the carrier will be liable for all or part of the loss, damage or delay to the goods during the period of the carrier's responsibility as proved by the claimant".[53] Unless either the carrier is able to show that the cause or one of the causes of the loss is not attributable to his fault or that of one of his contractors,[54] or the carrier is able to prove that a peril contained in the list of excepted perils in the rules caused or contributed to the loss or damage suffered by the shipper.[55] The ESC further submits that the choice of which of these two defences to use is open to the carrier, but if the carrier elects to use the list of exceptions supplied in the rules, and if the shipper then still wants to succeed in their suit, the shipper then has the obligation of proving that the loss was or was most probably caused by or contributed to by the ship's being either unseaworthy or due to inadequate holds or

[49] UNCITRAL Working Group III "Twenty-first Session" 53.
[50] Ibid.
[51] ESC "View on the Rotterdam Rules" 4.
[52] Article 80.
[53] Article 17(1).
[54] Article 17(2).
[55] Article 17(3); ESC "View on the Rotterdam Rules" 4.

containers, or improper crewing of the vessel.[56] The ESC then questions how shippers are meant to be able to prove this type of fault, and further that the carrier may also be liable for only that part of the loss which it may be proved as being the carrier's fault.[57]

In considering the basis of carrier liability as contained in article 17 of the Rotterdam Rules, the UNCITRAL Working Group took into consideration that some delegations felt that the article did not provide sufficient balance between the interests of the carrier and those of the shipper.[58] However, the Working Group believes that the article, which they consider to be one of the "most important Articles with significant practical implications", is a "well-balanced compromise achieved through serious deliberation".[59] In addition, the Working Group states that this article is a central element in the "package of rights and obligations" and that the current article was fully considered and approved by the Working Group before inclusion.[60]

Also, once the carrier has stated that the loss, damage or delay is not attributable to his fault or that he is relieved of liability due to an "excepted peril",[61] then in order to succeed with his claim the shipper must show that the loss, damage or delay was or was *probably* caused by unseaworthiness, etc.[62] It is submitted that the inclusion of the word "probably" means that the burden on the shipper is not too onerous in this regard.

Compensation

The ESC believes that under the Rotterdam Rules it will be more difficult for a shipper to claim compensation from a carrier.[63] With the exclusion of volume contracts, compensation is limited to 875 SDRs per package, or 3 SDRs per kilogram[64] of the gross weight of the goods; but when goods are containerised, the package limit may be invoked only if the

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[56] Article 17(4); ESC "View on the Rotterdam Rules" 4.
[57] Article 17(5); ESC "View on the Rotterdam Rules" 4.
[58] UNCITRAL Working Group III "Twenty-first Session" 16.
[59] UNCITRAL Working Group III "Twenty-first Session" 17.
[60] Ibid.
[61] Article 17(3).
[62] Article 17(5).
[63] ESC "View on the Rotterdam Rules" 4.
[64] Article 59(1).

packages are itemised in the transport document;[65] an oversight in this regard may leave a shipper unable to claim damages from the carrier.[66]

The ESC also comments that due to the current wording of the Rotterdam Rules, it appears possible to increase these limits of liability by agreement in a contract between the shipper and the carrier without their having to enter into a volume contract.[67] In addition, compensation for delay in non-volume contracts is limited to two-and-a-half times the amount of freight payable on the goods delayed;[68] but delay may occur only when goods are not delivered within the time stated in the contract,[69] so if no delivery day or time is stated in the contract, the shipper will receive no compensation for any delays.[70] The ESC submits that it is currently uncommon for a delivery time to be specified on a contract between a shipper and a carrier, especially for consignments which involve smaller-volume shippers.[71] The ESC suggests that "wilful conduct" for which a carrier may never contract out of liability will be very difficult to show, as carriers under the Rotterdam Rules will now be liable without limit only for a personal act or omission, which must be performed with the intent to cause loss through a reckless act.[72] There will also be a presumption of safe delivery unless a notice of loss or damage is given by the shipper at the time of delivery or before delivery or within seven working days after the delivery – if the damage was latent.[73] The rules allow a claimant two years in which to bring a claim against a carrier or a shipper[74]. However, a time-barred claim may be used as a defence by either party, or by way of set-off against the claim.[75] In addition, the choice of jurisdiction will be applicable only if the state concerned has chosen to apply the relevant jurisdiction provisions.[76] An exclusive jurisdiction clause may very well be validly contained in volume contracts; it is thus the ESC's opinion that dominant carriers will be able to dictate jurisdiction in many cases.[77]

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[65] Article 59(2).
[66] ESC "View on the Rotterdam Rules" 4.
[67] Ibid.
[68] Article 60.
[69] Article 21.
[70] ESC "View on the Rotterdam Rules" 4.
[71] Ibid.
[72] Article 61; ESC "View on the Rotterdam Rules" 4.
[73] Article 23(1); ESC "View on the Rotterdam Rules" 4.
[74] Article 62.
[75] Article 62, ESC "View on the Rotterdam Rules" 4.
[76] Article 74.
[77] ESC "View on the Rotterdam Rules" 5.

The Working Group states that many discussions took place in order to reach a compromise agreeable to all parties involved in the formation of the convention regarding provisions relating to delay, and that the effect of requirements relating to delay as contained in the Rotterdam Rules reflect "a genuine compromise forming an integral part of the 'delicate balance' of rights and obligations in the Convention".[78]

As far as article 23 – relating to notice in case of loss damage or delay – is concerned, the UNCITRAL Working Group comments that this provision is intended to have the effect of requiring notice of the loss or damage to be given as soon as possible to the carrier. This will enable the carrier to inspect the goods, provided that there was no joint inspection.[79] The Working Group further states that this article is not intended to affect the right of cargo interests to make claims and, particularly, it is not intended to affect the liability regime and burdens of proof as set out in article 17.[80] The Working Group was further in full consensus that the time period of seven days was sufficient for notice.[81]

Arduous obligations for shippers

Finally, the ESC's last criticism of the Rotterdam Rules is that shippers' obligations are "more onerous" under the Rotterdam Rules than under previous maritime conventions.[82] The ESC maintains that the provision relating to the shipper's delivery of the shipment – which is that he must ensure the goods he delivers are in such a condition as to withstand the carriage, and that they are suitable for loading, handling, stowing, lashing, securing and unloading, and that they will not cause harm to persons or property[83] – places too great a burden on the shipper, and that the carrier should have some responsibilities in this regard.[84] Furthermore, the rules would usually apply to deck cargo and live animals,[85] but cargo carried on deck may not incur the same rights for the shipper as he would have had they been carried below

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[78] UNCITRAL Working Group III "Twenty-first Session" 19.
[79] UNCITRAL Working Group III "Report of Working Group III (Transport Law) on the Work of its Nineteenth Session (New York, 16–27 April 2007)" (2007) Available: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V07/837/76/PDF/V0783776.pdf?OpenElement (accessed 28 July 2010) 25.
[80] UNCITRAL Working Group III "Nineteenth Session" 25.
[81] UNCITRAL Working Group III "Nineteenth Session" 26.
[82] ESC "View on the Rotterdam Rules" 5.
[83] Article 27(1).
[84] ESC "View on the Rotterdam Rules" 5.
[85] Article 25.

deck.[86] The ESC is of the opinion that this may allow a carrier to limit his liability as there is no requirement that the carrier inform the shipper where his goods will be stowed.[87]

The UNCITRAL Working Group states that article 27(1) of the rules received "strong support from the majority of delegations involved in the formation of the Rules".[88] The Working Group considered that there is a growing incidence of damage and injury to crew and the vessel as a result of cargo which is not properly secured on a vessel, and there is a need to emphasise the value of properly securing goods in order to ensure that they will be able to withstand the proposed carriage without "causing harm to persons or property".[89] Whereas the carrier may usually have the duty of stowing the goods, it is not unreasonable to expect the shipper to deliver the goods in such a condition that they will not cause harm to persons or property when they are properly stowed. In addition, this obligation is even more important should the shipper stow the goods himself, pursuant to article 13.

Transport documents

The shipper must also provide the carrier with "all information, instruction and documents reasonably necessary for the proper handling and carriage of the goods shipped, and this must be in compliance with the law".[90] The shipper must complete the transport document and is considered to guarantee the accuracy of the information supplied.[91] The ESC objects to this as it has developed an agreement with the liner shipping industry and the European Freight Forwarders Association (EFFA) which is a structure of joint responsibility and best practice, which they maintain ensures "accuracy, timeliness and quality in the production of transport documents".[92] The ESC submits that the system proposed by the Rotterdam Rules places all responsibility on the shipper and removes the fairer concept of "shared responsibility".[93] In addition, there is no requirement for the carrier to qualify information contained in the transport document, particularly if it is not "commercially reasonable" to check the

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[86] Article 25.
[87] Article 25; ESC "View on the Rotterdam Rules" 5.
[88] UNCITRAL Working Group III (2005) "Report of Working Group III (Transport Law) on the Work of its Sixteenth session (Vienna, 28 November–9 December 2005)" Available: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V06/500/31/PDF/V0650031.pdf?OpenElement (accessed 28 July 2010) 32.
[89] UNCITRAL Working Group III "Sixteenth Session" 32.
[90] Article 29.
[91] Article 31(2).
[92] ESC "View on the Rotterdam Rules" 5.
[93] Ibid.

information.[94] Consequently, carriers may just take the word of the shipper that the documents are correct, which could be hazardous to the vessel or detrimental to the carrier; the ESC also submits that this may affect the value of transport documents being used as letters of credit.[95]

With regard to the shipper's obligation to provide information which is guaranteed to be correct, the UNCITRAL Working Group comments that these obligations were inserted in order to "keep in line with antecedents found in the Hague-Visby and Hamburg Rules".[96] The Working Group explained that it had decided that the failure of the shipper to provide correct information should be subject to strict liability, while the failure to provide timely information should be subject only to liability based on the fault of the shipper.[97]

In addition, the UNCITRAL Working Group states that the requirements regarding the carrier qualifying information relating to the goods as contained in the contract particulars[98] is based on the supposition that a shipper is always entitled to acquire a transport document or an electronic transport document which reflects the information provided to the carrier, but that in certain situations the carrier should be permitted to qualify such information.[99] The term "commercially reasonable"[100] is intended to include that "the carrier is not obliged to include lengthy descriptions irrelevant to the contract of carriage or detailed technical descriptions of the goods which, even if controllable by the carrier, are not necessary in order to reasonably identify the goods or may impose an undue burden of control upon the carrier" and further that do not "require technical expertise or costs other than what follows from a customary examination of the goods".[101]

This appears to indicate that "commercially reasonable" is not an excuse for the carrier merely not to qualify the goods if it is inconvenient for him to do so.

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[94] Article 40.
[95] ESC "View on the Rotterdam Rules" 5.
[96] UNCITRAL Working Group III "Nineteenth Session" 58.
[97] Ibid.
[98] Article 40.
[99] UNCITRAL Working Group III (2006) "Report of Working Group III (Transport Law) on the Work of its Eighteenth session (Vienna , 6–17 November 2006)" Available: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V06/586/90/PDF/V0658690.pdf?OpenElement (accessed 28 July 2010) 10.
[100] Article 40.
[101] UNCITRAL Working Group III "Eighteenth Session" 11.

Moreover, the rules state that a consignee must accept delivery at the time or within the agreed period of time.[102] Novel provisions will allow the carrier to deliver goods under a negotiable transport document without surrendering the document.[103] The ESC fears that this may have the effect of causing problems with letters of credit, as could the carrier's new rights relating to goods which the carrier deems undeliverable.[104]

The UNCITRAL Working Group states that the new provision which allows a carrier to deliver goods without the surrender of the negotiable transport record or electronic document is meant to be a solution to a problem encountered in shipping transactions today, which is that clauses in some sales contracts coupled the length of voyages – which means that goods are often delivered without the presentation of any document in certain trades, particularly in the oil industry.[105] The Working Group further comments that nowadays the carrier is able to communicate directly with the holder of the document, regardless of their location.[106] Consequently, the onus is on the carrier to find the shipper, or the controlling party, in order to obtain delivery instructions.[107] Further, the Working Group expresses the view that this provision does not undermine the system of bills of lading, rather that this provision is intended to restore the "value and integrity" of the conventional bill of lading system.[108]

The shipper has unlimited liability for loss or damage sustained by the carrier if the carrier is able to prove that "the damage or loss was caused by a breach of the shipper's obligations under the Rotterdam Rules".[109] The shipper is also liable for "any and all inaccuracies" in information supplied for the transport document, and wholly indemnifies the carrier in this regard.[110] Similar strict liability applies in the case of dangerous goods.[111] In other instances the shipper may be relieved of liability if the loss or cause of the loss is not attached to himself or any of his agents.[112] These liabilities may be modified under a volume contract, but not in relation to a transport document or to the carriage of dangerous goods.[113] The

[102] Article 43.
[103] Article 47.
[104] Article 48; ESC "View on the Rotterdam Rules" 5.
[105] UNCITRAL Working Group III "Twentieth Session" 15.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Article 30(1), ESC "View on the Rotterdam Rules" 6.
[110] Article 31.
[111] Article 32; ESC "View on the Rotterdam Rules" 6.
[112] Article 32; ESC "View on the Rotterdam Rules" 6.
[113] Ibid.

shipper is also liable for the actions of all parties who are used to perform his obligations, which is very onerous.[114]

The UNCITRAL Working Group states that the provision contained in the Rotterdam Rules that the shipper should be liable for the actions of parties who perform on his behalf[115] is intended to "duplicate the provisions relating to the liability of the carrier for its agents, employees and servants".[116]

As this is indeed the case, it seems unfair that the ESC only identifies the obligations relating to the shipper as "onerous" without mentioning that the carrier incurs that same liability for parties who perform his obligations under the contract of carriage, particularly as the Rotterdam Rules are a multimodal instrument covering door-to-door carriage, and consequently the carrier may be liable for more parties than he was under any convention previously.

The rules allow certain instructions to be given to the carrier regarding the goods in the course of transit.[117] In these situations, the:

> "[C]ontrolling shipper must reimburse the carrier for 'reasonable' additional expenses incurred in the carriage of the goods, and indemnify the carrier without limitation, against loss suffered in execution of the instructions, which includes, but is not limited to compensation payable to third parties."[118]

The carrier is entitled to require security before carrying out such instructions.[119] The rules also to do not require a bill of lading or other sea transport document to be supplied in order for the rules to apply, so the rules may apply when one of the parties does not expect them to.[120]

The UNCITRAL Working Group states that the word "diligently" has been inserted into the provision relating to the conditions under which a carrier may claim compensation so that the

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[114] Article 34; ESC "View on the Rotterdam Rules" 6.
[115] Article 34.
[116] Article 18; UNCITRAL Working Group III "Sixteenth Session" 46.
[117] Articles 50(1)(*a*) and 52.
[118] Article 52; ESC "View on the Rotterdam Rules" 6.
[119] Article 52(3); ESC "View on the Rotterdam Rules" 6.
[120] Article 5; ESC "View on the Rotterdam Rules" 6.

carrier is able to claim only for additional expenses or damages incurred in executing the controlling party's instructions when the expenses are not attributable to the carrier's lack of diligence in executing these instructions.[121] In addition, the term "reasonable" before "additional expense"[122] was included in the rules so that the controlling party would be protected from exorbitant reimbursement claims.[123] The Working Group also expressly declined to include "reasonably foreseeable loss or damage" or any provision which required the carrier to give notice to the controlling party about the possible loss or damage that the carrier could suffer in executing the controlling party's instructions.[124] The reason for this is that this could not be completely unforeseeable to a sensible controlling party, and further that this may have had the effect that the carrier might have had to bear any additional losses which exceeded the amount originally foreseen, which would not have been an equitable solution and would have prejudiced the carrier.[125] The Working Group also considered that it would be unjust and unfair on the carrier should the carrier be expected to anticipate all possible types of loss which may arise from the controlling party's instructions, and incur the penalty of absorbing loss or damage actually sustained merely because a particular situation was not unforeseeable.[126] This appears to be well considered and perfectly reasonable.

The ESC's concern that "the Rules may apply when parties do not expect them to" is completely fallacious, as any party to an agreement would presumably have the knowledge that their agreement would be governed by some legal regime. So it is quite ludicrous to assume that the applicability of the Rotterdam Rules would take any reasonable party by surprise.

5.2 Fédération Internationale des Associations de Transitaires et Assimilés

The Fédération Internationale des Associations de Transitaires et Assimilés (FIATA) is a non-governmental organisation (NGO) which represents approximately 40 000 forwarding and logistics companies in 150 countries.[127] FIATA has consultative status on a number of

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[121] UNCITRAL Working Group III "Twentieth Session" 23.
[122] Article 52(2).
[123] UNCITRAL Working Group III "Twentieth Session" 24.
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] FIATA "FIATA the Global Voice of Freight Logistics" (2010) Available: http://www.fiata.com/index.php?id=30 (accessed 9 December 2011).

United Nations bodies, including the United Nations Commission on International Trade Law (UNCITRAL), the United Nations Conference on Trade and Development (UNCTAD) and the Economic and Social Council of the United Nations (ECOSOC).[128] FIATA is recognised by many governments and private international organisations as being a foremost representative of the freight-forwarding industry.[129]

The FIATA Working Group on Sea Transport also recommends that association members of this international organisation should advise their governments not to accept the Rotterdam Rules.[130]

Convention too complicated for everyday use

In an argument supportive of their position, FIATA argues that the convention is very complex and consequently "too complicated for everyday use".[131] FIATA submits that this will lead to higher transaction costs and misinterpretations of the rules at both a national and international level.[132] FIATA fears that this may lead to "Convention States" interpreting the rules differently, and consequently the Rotterdam Rules will be unable to meet their objective of unifying the law of carriage of goods by sea and, in doing so, providing a truly international maritime instrument.[133]

Advantages for freight forwarders as carriers

FIATA states that freight forwarders, when acting as carriers or logistic service providers, will benefit from the Rotterdam Rules, particularly the right to limit liability for loss or damage to cargo as well as for "any breach".[134] The provision stating that there will be "no liability for delay unless a time for delivery was stipulated at the commencement of the contract" is also advantageous for carriers.[135] However, these same freight forwarders will be

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[128] FIATA "FIATA the Global Voice of Freight Logistics".
[129] FIATA "FIATA the Global Voice of Freight Logistics".
[130] FIATA Working Group Sea Transport "FIATA Position on the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules")" (2009) Available: http://www.comitemaritime.org/draft/pdf/3FIATA.pdf (accessed 10 January 2010) 1.
[131] FIATA "FIATA Position" 1.
[132] Ibid.
[133] Ibid.
[134] Article 30.
[135] Article 21.

in a precarious position when they act as shippers, or when compensation is demanded from the non-performing carriers[136] – the reasons for which have been discussed previously under the ESC position paper. FIATA is also of the opinion that the expansion of freedom of contract relating to volume contracts[137] will lead to shippers' finding it more difficult to obtain compensation from a non-performing carrier.[138]

FIATA raises the same concerns as the ESC, stating that there is an imbalance of protection between a shipper and a carrier, highlighting the fact that when a freight forwarder acts as a shipper, the freight forwarder will be subject to unlimited liability should they supply any incorrect information.[139] On the other hand, carriers enjoy the right to limit their liability to a shipper should the carrier be the party guilty of supplying incorrect information under the provision relating to "any breach".[140]

FIATA raises a further concern that the ESC did not consider in their "view of the Rotterdam Rules", which is that, currently, freight forwarders are frequently engaged in various capacities in all seaports.[141] These activities will expose them to liability under the rules as they will be considered "maritime performing parties".[142] FIATA states that, currently, stevedores and warehousemen have the benefit of freedom of contract that allows them to escape liability to the extent that their customers possess insurance for loss of damage to goods.[143]

Opposition from port enterprises and terminals

FIATA believes that in countries where stevedoring and warehousing enterprises are owned by or under the control of the government or national municipalities, the ratification of the rules would be strongly opposed in order to avoid the escalation of liability insurance premiums.[144] In addition, FIATA submits that multipurpose cargo terminals which are occupied as distribution centres as logistics operations would be strongly against a "maritime

[136] FIATA "FIATA Position" 1.
[137] Articles 1.2 and 80.
[138] FIATA "FIATA Position" 1.
[139] Article 31(2).
[140] Article 59.1.
[141] FIATA "FIATA Position" 2.
[142] Articles 1.7 and 19.
[143] FIATA "FIATA Position" 2.
[144] Ibid.

law injection" into their organisation, particularly as the Rotterdam Rules introduce a more sophisticated liability regime.[145] It must be said that these concerns do not appear to be justified, as it is quite unlikely that any reasonable escalation of insurance premiums would concern a government when they are considering what would be best for their worldwide trade in goods.

Administrative burden on multimodal freight forwarders

FIATA reacts most strongly with the assertion that should the rules enter into force, the administrative burden on freight forwarders would be increased significantly for the following reasons.[146]

FIATA states that they have consistently opposed any "maritime plus" (wholly or partly by sea) regime and have always instead supported port-to-port conventions,[147] which may be one of the root causes of their dissatisfaction with the rules.

While FIATA acknowledges that article 26 of the rules allows liability in some cases to be resolved by mandatory provisions of international instruments relating to non-maritime transport, this will not solve the issue that when the contract is concluded, the mode of transport to be used is not yet known, and so is unspecified.[148] FIATA deems it unacceptable and quite ridiculous that parties should have to later consider the way in which the contract was actually performed in order to decide which rules or regime should apply to a contract that may have been concluded months previously.[149] FIATA fears that it will be impossible to apply such a methodology to liability for non-performance under the contract.[150] FIATA raises concerns of how in these situations a party should decide which of all the hypothetically applicable conventions listed in the rules[151] apply in order to make certain that the acceptable transport document is issued.[152] FIATA is of the opinion that it may be inappropriate to apply the rules' lower limits of liability[153] in cases where there is concealed

[145] Ibid.
[146] Ibid.
[147] Ibid.
[148] FIATA "FIATA Position" 3.
[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] Ibid.
[153] Article 59.

damage, that is, where it cannot be established during which mode of transport in multimodal transport the damage occurred.[154] FIATA submits that the rules will create uncertainty in the realm of multimodal transport, which is intensely disturbing.[155]

It is submitted that, logically, parties will be aware, when they sign a contract, of which form of carriage their goods will or may take, because not knowing so is the equivalent of "going in blind". Any reasonable commercial trader will be aware of this, and so it is very unlikely that this problem will ever occur. It is quite obvious that, for example, goods which are being shipped from South Africa to the United States will definitely, at some point, include an international sea-leg, and so should the United States ratify the rules as they seem likely to do, then the rules will apply to this particular contract of carriage.

Benefits

FIATA admits that there are benefits to be had in applying the Rotterdam Rules rather than the Hague or Hague-Visby Rules, in that the former rules remove the defence of error in the navigation and management of the vessel,[156] as well as the increase of the liability limits,[157] and the addition of rules on electronic procedures.[158] However, FIATA is of the view that these benefits could be provided in a much simpler way, such as through amendments to the Hague, the Hague-Visby, or the Hamburg Rules.[159]

According to this analysis of the rules, FIATA feels that the concerns they have raised should be more than sufficient to ensure that governments do not ratify the rules.[160]

5.3 Comité de Liaison Européen des Commissionnaires et Auxiliaires de Transport

The Comité de Liaison Européen des Commissionnaires et Auxiliaires de Transport (CLECAT) represents the interests of more than 19 000 companies.[161] These companies are

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[154] FIATA "FIATA Position" 3.
[155] Ibid.
[156] Article 17(3).
[157] Article 59.
[158] Chapter 3 (arts 8–10); FIATA "FIATA Position" 5.
[159] Ibid.
[160] Ibid.

responsible for clearing approximately 95 per cent of all goods transported in Europe; they handle 65 per cent of cargo transported by air and sea and 95 per cent of cargo transported by road in Europe.[162]

CLECAT's membership includes many of the main users of shipping transport services.[163] CLECAT is of the opinion that the Rotterdam Rules do not have Europe's best interests at heart, in fact they comment that shadows prevail" in the new regime.[164]

Too complex; not fully multimodal

As with the view submitted by FIATA, CLECAT makes the observation that the Rotterdam Rules are an "extremely complex legal instrument"[165] and that the new features of the rules, when compared to previous regimes actually provide very few additional benefits.[166] CLECAT criticises the rules on the basis that they are not "fully multimodal".[167] CLECAT submits that a maritime convention should use a "network principle" in order to connect the port-to-port leg of the transport chain to that of other modes of transport, which, in their view, has only been partly incorporated into the rules.[168] In CLECAT's opinion partial incorporation is inadequate and this in itself has resulted in the rules being "complex and unmanageable".[169]

Legal and judicial uncertainty

CLECAT is of the view that the implementation of the Rotterdam Rules will result in international legal and judicial uncertainty.[170] CLECAT states that "the risk is that these uncertainties will end up adding a new liability regime side by side with existing ones, thus

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[161] CLECAT "Clecat European Association for Forwarding, Transport, Logistic and Customs Services" (2011) Available: http://www.clecat.org/index.php?option=com_content&task=view&id=41&Itemid=8 (accessed 9 December 2011).
[162] CLECAT "Clecat European Association for Forwarding, Transport, Logistic and Customs Services".
[163] CLECAT "Position Paper: RE: 2008 – United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea – the "Rotterdam Rules" (2009) Available: http://www.comitemaritime.org/draft/pdf/4CLECAT.pdf (accessed 7 January 2010) 1.
[164] Ibid.
[165] Ibid.
[166] Ibid.
[167] Ibid.
[168] Article 82; CLECAT "Position Paper" 1.
[169] Ibid.
[170] Ibid.

increasing confusion, rather than mitigating [sic] against it".[171] As with FIATA, CLECAT members are concerned that the "complications and uncertainties" in the rules may lead to different interpretations both nationally and regionally, which would not lead to the harmonisation or simplification of the law governing maritime transport.[172]

Inaccessibility; bias in favour of carriers; forwarders as "maritime performing party"

CLECAT lists their specific concerns as follows: first, CLECAT has reservations relating to the complexity of the rules, as mentioned, and states that this means they are not readily understandable to users, third parties, brokers or insurers, which leads them to conclude that insurance will become more expensive if these rules are adopted.[173] Secondly, CLECAT is of the view that the limitations of liability appear to favour carriers, without offering shippers or freight forwarders any relief.[174] Thirdly, CLECAT makes the point that freight forwarders are frequently engaged in many capacities in seaports, and the introduction of a "maritime performing party"[175] could mean that even a forwarder who collects a container from a port and then leaves would, for that time, become a maritime performing party, and consequently will be subject to the rules liability systems.[176] CLECAT is of the opinion that this point alone will create an unprecedented number of issues and litigation.[177]

As far as insurance is concerned, the UNCITRAL Working Group states that the inclusion of a "limit of liability" allows risk to be allocated between the parties, and so should have the effect of reducing insurance costs.[178] Furthermore, it is unlikely that the higher liability limits as envisaged by the rules will increase the carriers' liability insurance, when the comparatively small relative weight of insurance in freight costs is taken into account.[179] The Working Group points out that at the time of the Hamburg Rules' coming into force, a study was conducted to assess whether the higher liability limits contained in them would greatly increase costs and it was found that the new limits in those rules would influence liner freight rates by 0.5 per cent of the total freight rate at the most.[180] In addition, in some countries the

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[171] Ibid.
[172] Ibid.
[173] Ibid.
[174] CLECAT "Position Paper" 2.
[175] Articles 1.7 and 19.
[176] CLECAT "Position Paper" 2.
[177] Ibid.
[178] UNCITRAL Working Group III "Twentieth Session" 34.
[179] Ibid.
[180] UNCITRAL Working Group III "Twentieth Session" 32.

liability limits for domestic maritime carriage had, at the time of the study, been raised to 17 SDR per kilogram gross weight (which is almost five times more than that included in the Rotterdam Rules) without any noticeable adverse effect being felt by the transport industry concerned.[181] Under the Rotterdam Rules it is expected that the increase in the carriers' liability will shift to their insurers' part of the risk for which cargo owners purchase cargo insurance.[182] The Working Group comments that this may in itself prevent any increase in transportation costs, which would eventually affect consumers, because mutual associations, commonly Protection and Indemnity (P&I) Clubs which offer protection and indemnity insurance, are known for working efficiently and which may offer extended coverage to their associates at lower rates than those which commercial insurance companies offer to cargo owners.[183]

Only partial network system; dual system of contractual conditions conflictual

The Rotterdam Rules make provision for only a partial network system, whereas CLECAT is of the opinion that freight forwarders require a "full network system".[184] CLECAT does believe that the rules "as is" effectively allow private contractual conditions to override provisions in the rules, while they maintain that it would be best if only mandatory conventions, such as the CMR and CIM could do so.[185] Private contractual conditions between parties are fairly prevalent in shipping.[186] CLECAT fears that the confusion which may be created by conflicting provisions in conventions and private contractual rules may lead to a situation where there will be "mind-fraying litigations" worldwide.[187] CLECAT is of the view that the provisions relating to volume contracts[188] will allow large carriers to contract out of liability most of the time, whereas in their opinion, smaller freight forwarders are much less likely to be able to do so.[189] This may lead to freight forwarders' being sued far more frequently than the shipowner, which may be detrimental to the shipper and disasterous for the freight forwarder, as freight forwarders do not usually have the assets or capital of the owner or carrier.[190] CLECAT submits that this could lead to higher liability premiums, to the

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[181] Ibid.
[182] UNCITRAL Working Group III "Twentieth Session" 33.
[183] Ibid.
[184] Articles 26 and 82; CLECAT "Position Paper" 2.
[185] Articles 26 and 82; CLECAT "Position Paper" 2.
[186] Ibid.
[187] Ibid.
[188] Article 80.
[189] CLECAT "Position Paper" 2.
[190] Ibid.

extent that insurers would be unwilling to accept the contract, leaving freight forwarders and their customers without protection.[191]

As stated previously, the UNCITRAL Working Group is of the opinion that small shippers will be protected through "rate agreements"[192] and, further, that the rules themselves always give a shipper the right to enter into an agreement which does not derogate from the provisions contained in the Rotterdam Rules.[193]

Negotiable transport instruments not negotiable

Furthermore, CLECAT maintains that while carriers are required to issue negotiable transport documents, they retain the right to deliver the goods without obtaining the negotiable transport instrument in return;[194] CLECAT deems this contradictory, as what the rules call a "negotiable" instrument is, in their view, not negotiable at all.[195] CLECAT states that this feature is bound to create conflict and "complex international litigations", as well as potentially creating issues regarding payment of letters of credit.[196]

As mentioned earlier, the UNCITRAL Working Group states that the new provisions allowing a carrier to deliver goods without the surrender of the negotiable transport record or e-document is meant to solve the issue that due to certain sales contracts and the length of modern voyages, in certain trades goods are often delivered without the presentation of any documents.[197]

Foster protectionism

CLECAT maintains that "the entry into force of the rules will complicate the supply chain, making it more unwieldy, and in doing so will foster protectionism at the expense of free trade".[198]

5.4 The Belgian Maritime Law Association

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[191] Ibid.
[192] UNCITRAL Working Group III "Twenty-first Session" 47.
[193] UNCITRAL Working Group III "Twenty-first Session" 53.
[194] Article 47.2.
[195] CLECAT "Position Paper" 2.
[196] Ibid.
[197] UNCITRAL Working Group III "Twentieth Session" 15.
[198] CLECAT "Position Paper" 3.

The Belgian port of Antwerp is ranked 15th in the world based on the volume of container traffic in 2010.[199] As Belgium is centrally located and "at the heart of a highly industrialised region", the country is considered to be a "major player in world trade".[200]

The Belgian Maritime Law Association (BMLA) is of the opinion that the advent of the Rotterdam Rules is of considerable importance for Belgium, for a number of reasons.[201] These are that Belgium has a number of important seaports in what is a relatively small territory, and in 2007 a Royal Commission was instructed to review and reform the Belgian Maritime Code, which is outdated, so if Belgium ratifies the rules, the work of the Royal Commission would be affected.[202]

The BMLA has identified a number of aspects of the Rotterdam Rules which they consider troubling in comparison to those contained in the Hague-Visby Rules. The BMLA states that these aspects conflict with "perceptions of the Belgian industry's expectations of new maritime transport legislation".[203]

Insufficient protection to smaller shippers and freight forwarders; jurisdictional problems

The BMLA expresses the view that the freedom of contract provisions under "volume contracts"[204] contained in the rules do not offer sufficient protection to small shippers and freight forwarders, and may result in these parties being compelled to enter contracts offering less legal certainty than is currently the case under the Hague-Visby regime.[205] In addition, the BMLA considers that the shipper is subject to unlimited liability under the rules, and duties which have traditionally been the carriers – such as loading handling and stowing – may be transferred to the shipper, which places a more onerous burden on the shipper.[206] Also, the BMLA states that while the Belgian Working Group is in favour of a door-to-door

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[199] World Shipping Council Partners in Trade "Top 50 World Container Ports" (2011) Available: http://www.worldshipping.org/about-the-industry/global-trade/top-50-world-container-ports (accessed 9 December 2011).
[200] KUEHNE+NAGEL "Kuehne + Hagel Belgium" (2011) Available: http://www.kn-portal.com/locations/europe/belgium/ (accessed 9 December 2011).
[201] Belgian Maritime Law Association (BMLA) "The Belgian Position on the new UNCITRAL Convention: Position paper by the Belgian Maritime Law Association regarding the UNCITRAL Draft Convention on the Carriage of Goods Wholly or Partly by Sea" (2008) Available: www.mcgill.ca/files/maritimelaw/Belgian_Position_Paper.pdf (accessed 20 May 2010) 1.
[202] BMLA "Belgian Position" 1.
[203] BMLA "Belgian Position" 2.
[204] Article 80.
[205] BMLA "Belgian Position" 2.
[206] Ibid.

regime as opposed to the tackle-to-tackle regime which currently exists, the rules as a "maritime plus instrument" in its current form will create more anomalies than it would solve.[207] The BMLA remarks that an independent set of jurisdiction rules could have solved a number of "pressing problems" the Belgian courts currently experience in applying EU Regulation 44 of 2001.[208] However, the opting-out clause contained in article 74 of the rules in conjunction with the separate status of "regional economic integration organizations"[209] will, in their opinion, render these jurisdiction provisions useless for Belgium.[210]

Opposition to opting out

The BMLA does not support the freedom to opt out of many provisions in the convention, and also is of the opinion that, in reality, the convention's practical applicability to carriage other than sea carriage is complex and ambiguous; consequently, the BMLA does not advocate ratification of the rules.[211]

5.5 The Australian Delegation

Australia's economy is ranked as the 13th largest in the world, and the fourth-largest economy in the Asia-Pacific region.[212] Australia is ranked as the world's 15th largest exporter and 13th largest importer of goods;[213] it has been ranked as one of the top energy export producers, ranked fourth in the world, and possesses more than one-third of the world's economic uranium resources.[214] Australia's transport industry is vital to the country's economy and boasts one of the most modern and sophisticated rail services for passengers and freight.[215]

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[207] Ibid.
[208] Ibid.
[209] Article 93
[210] BMLA "Belgian Position" 2.
[211] Ibid.
[212] Australian Government "Benchmark Report 2011" (2011) Available: http://www.austrade.gov.au/Invest/Opportunities-by-Sector/Financial-Services/Data-and-Charts/default.aspx (accessed 9 December 2011) 2.
[213] Australian Government "Benchmark Report 2011" 13.
[214] Ibid.
[215] Australian Government "Transport" (2011) Available: http://www.austrade.gov.au/Buy/Australian-Industry-Capability/Transport/default.aspx (accessed 9 December 2011).

As early as 2008, the Australian Delegation involved in the UNCITRAL Working Group on Transport Law identified a number of areas of concern in the draft Rotterdam Rules.[216] The Australian delegation identified certain broad areas which they found troubling, as well as a number of more specific concerns.[217]

Rules too complicated to be uniformly applied

First, the Australians state that the instrument is too complex in that the current text of the rules is very different from other international law, and is also very complicated.[218] If this is the case, there is potential for lengthy and costly litigation, which may cement differing interpretations across regions.[219] This will undermine the goal of a new uniform maritime regime.[220]

It is quite apparent that any international instrument will have, and always has had, "different regional interpretations", which has not impeded the success of other instruments, such as the Hague-Visby Rules. In addition, the UNCITRAL's working papers on the rules, which are freely available, may provide an excellent aid in interpreting the rules.

Bias towards carriers; volume contracts too widely defined

The Australian Delegation comments that the rules appear to give the balance of power to carriers, and is of the opinion that this may have a negative impact on smaller and medium-sized shippers – who have significantly less bargaining power than most carriers.[221] Furthermore, the Australian Delegation considers the definition of "volume contracts" in article 1(2) of the rules "allows too broad an exemption from the mandatory liability regime".[222] They believe that carriers will prefer to enter into volume contracts above all others, and are concerned about possible insurance implications for shippers.[223]

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[216] Australian Delegation "Australian Comments on the UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea" (2008) 22 *Austrl & NZ Maritime Law Journal* 123–130.
[217] Australian Delegation (2008) 22 *Austrl & NZ Maritime Law Journal* 123.
[218] Ibid.
[219] Ibid.
[220] Ibid.
[221] Australian Delegation (2008) 22 *Austrl & NZ Maritime Law Journal* 123.
[222] Ibid.
[223] Ibid.

The Australian Delegation expresses the opinion that the definition of a volume contract is too wide in the rules, and that only parties with relatively equal bargaining power should be allowed to enter into volume contracts with each other.[224] The Australian Delegation states that the definition of a volume contract contained in article 1 of the rules is:

> "distinguished by its lack of limitation in terms of the duration of the contract and the number of shipments and the quantities carried; the delegation declares that the term 'specific quantity'[225] has no precise meaning, so gives the contracting parties and a court no particular guidance as to what was intended by the Rules".[226]

The Australian Delegation states that the rules are the only instrument of international carriage that allows such scope for freedom of contract and, as mentioned, this may have serious insurance implications for shippers and increases the potential for litigation.[227] The Australian Delegation expresses the view that certainty may be achieved if a certain number of containers need to be shipped within a certain time for volume contract provisions to apply.[228] The delegation believes that this would protect small and medium-sized shippers as it would require a "reasonable" quantity of goods to be shipped before the carrier could derogate from the mandatory liability regime contained in the rules.[229]

First, the Australian Delegation does not make any suggestions regarding how "bargaining power" could be assessed so as to determine whether the parties have similar bargaining power. It also seems unfair that if both parties are willing to enter into a volume contract on the basis that they will both benefit, that they should not be allowed to if they do not have equal bargaining power. The UNCITRAL Working Group also considered the inclusion of specific numbers in the definition of a volume contract; however, this proposal was ultimately rejected as it could lead to uncertainty, the example being given that if "fewer containers than the amount specified in the volume contract were actually shipped, this could lead to the contract being considered retrospectively void".[230]

Article 5 of the rules, which deals with the scope of application of the rules, states the following:

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[224] Australian Delegation (2008) 22 *Austrl & NZ Maritime Law Journal* 124.
[225] Article 1(2).
[226] Australian Delegation (2008) 22 *Austrl & NZ Maritime Law Journal* 124.
[227] Ibid.
[228] Australian Delegation (2008) 22 *Austrl & NZ Maritime Law Journal* 123.
[229] Australian Delegation (2008) 22 *Austrl & NZ Maritime Law Journal* 124.
[230] UNCITRAL Working Group III "Twenty-first Session" 52.

"1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:

(*a*) The place of receipt;

(*b*) The port of loading;

(*c*) The place of delivery; or

(*d*) The port of discharge.

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties."

Wording of article 5

The Australian Delegation is of the opinion that the way in which article 5 is worded places an emphasis on what the contract of carriage states, which may or may not be how the goods are actually transported.[231] The delegation believes that in theory the contract could identify ports of loading and discharge in different states so that the convention would apply, but there is in fact no requirement that the goods must actually be loaded or discharged at the ports mentioned in the contract.[232] The delegation also submits that if the contract of carriage does not mention any places or ports as listed in article 5(1)(*a*)–(*d*), then it is possible to interpret from the text of the rules that they would not apply, even if the manner in which the contract is executed means the rules should apply.[233] The delegation is concerned that dishonest parties may word their contract of carriage so as to either allow the rules to apply when they should not or alternatively to avoid the convention, which is to their benefit.[234]

Provisions of article 12(3)

The delegation expresses their reservations on the current provisions of article 12(3), which deals with the period of responsibility of the carrier. The current wording, they submit, could

[231] Australian Delegation (2008) 22 *Austrl & NZ Maritime Law Journal* 124.
[232] Ibid.
[233] Ibid.
[234] Ibid.

be interpreted to apply only to "tackle-to-tackle", which will provide less protection for shippers than existing Australian law.[235]

Wording of article 16

The Australian Delegation is also concerned about the provision related to the sacrificing of goods during the voyage by sea, now contained in article 16 of the rules, in that the wording of the provision means that a carrier could sacrifice goods even if the peril was due to the negligently caused unseaworthiness of the ship by the carrier himself.[236]

The alternative that the Australian Delegation seems to favour is that the carrier or performing party may not sacrifice goods at sea if the peril was caused in some way by the carrier or performing party, even if this means that human life or other property is endangered. This is quite clearly unreasonable. In addition, it is quite preposterous to assume that the shipper would have no recourse against the carrier or performing party if his goods had to be sacrificed due to the negligence of either of those participants.

Burden of proof of cause of loss of cargo

The delegation expresses an opinion that under the rules the burden of proof now falls on the claimant.[237] However, evidence concerning the causes of a loss of cargo will be difficult for the shipper or consignee to obtain; under the Hague, Hague-Visby and Hamburg Rules once the claimant had established a loss, the burden of proof relating to the cause of the loss fell on the carrier, who was in a much better position to adduce evidence as the goods were in his custody at the time of the loss.[238]

Difficulty in proving unseaworthiness

The Australian Delegation argues that the claimant (shipper) would experience difficulty in proving unseaworthiness, improper crewing, equipping or supplying, or that the holds were not fit for the purpose of carrying the cargo. This will affect a significant number of cargo claims and, further, shippers will be disadvantaged in cases where there are multiple causes

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[235] Australian Delegation (2008) 22 *Austrl & NZ Maritime Law Journal* 125.
[236] Australian Delegation (2008) 22 *Austrl & NZ Maritime Law Journal* 126.
[237] Article 17.
[238] Australian Delegation (2008) 22 *Austrl & NZ Maritime Law Journal* 126.

of the loss, particularly should the shipper have to prove the extent of the unseaworthiness contributing to the loss.[239]

As previously stated, the shipper does not have to prove definitively that the loss, damage or delay was definitely caused by the carrier; rather, that it was the *probable* cause, which is far less onerous for the shipper to show.

Increase in limits of liability

The Australian Delegation also notes that the rules increase the limits of liability to:

> "875 SDRs per package or other shipping unit, or 3 SDRs 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."[240]

The delegation states that as the rules are a multimodal transport instrument, these limits will now apply to other modes of transport in some given situations, and this may cause an issue, because other non-maritime conventions which may also apply when the rules apply have higher limits of liability than those provided in the rules.[241] This may be a problem when it is difficult to localise the damage.[242] The delegation is of the opinion that these liability limits may be undermined, given the provisions relating to freedom of contract contained under the rules provisions relating to volume contracts.[243] These are specific areas of concern identified by the Australian Delegation.

The UNCITRAL Working Group responds to criticisms that the liability limits contained in the Rotterdam Rules are lower than those under other international conventions relating to unimodal transport by commenting that the rules already represent a major shift in the allocation of risks, particularly as the carrier is now under a continuous obligation of seaworthiness.[244] It was also noted that many jurisdictions use limitations according to the Hague-Visby Rules or even lower ones, but still about 90 per cent of cargo loss is fully

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[239] Ibid.
[240] Article 59.
[241] Australian Delegation (2008) 22 *Austrl & NZ Maritime Law Journal* 129.
[242] Ibid.
[243] Article 80.
[244] UNCITRAL Working Group III "Twenty-first Session" 39.

compensated for under these regimes, as most cargoes carried by sea have a lower value than the Hague-Visby or other limits.[245] It was also observed that in today's age of "containerised transport" by larger ships, the levels of liability any higher than the ones in the rules would increase the carriers' financial exposure to a level which would result in such liability being nearly incapable of being insured at acceptable rates, so increasing the costs of transport, and ultimately the costs to be borne by the consumer.[246] So any higher increase than those contained in the rules would be unrealistic and not be motivated by trade needs, but rather for political reasons.[247]

5.6 Canadian International Freight Forwarders' Association

Canada was ranked as the 14th largest exporter of containerised cargo in 2009.[248] Canada has one of the most important ports in the world: the Port of Montreal is one of the busiest globally, and is a key transfer point for transatlantic cargo, offering the shortest route between major European and Mediterranean ports and North American markets.[249] This port also offers efficient and vast rail and road services for cargo.[250]

The Canadian International Freight Forwarders' Association (CIFFA) expresses the opinion that Canada should ratify the Rotterdam Rules as Canada and the United States share each other's seaports and are one another's "gateways" and the United States supports the ratification of the rules; however, this Canadian association has expressed a number of reservations over certain provisions contained in the rules.[251]

Liability of carrier for delay of goods

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[245] Ibid.
[246] Ibid.
[247] Ibid.
[248] World Shipping Council "Trade Statistics" (2011) Available: http://www.worldshipping.org/about-the-industry/global-trade/trade-statistics (accessed 9 December 2011).
[249] Port of Montreal "Gateway to North America" (2011) Available: http://www.port-montreal.com/site/1_0/1_1.jsp?lang=en (accessed 9 December 2011).
[250] Port of Montreal "Intermodal Hub" (2011) Available: http://www.port-montreal.com/site/1_0/1_4.jsp?lang=en (accessed 9 December 2011).
[251] Canadian International Freight Forwarders Association (CIFFA) "CIFFA Submission to Transport Canada: Commentary on the Rotterdam Rules" (2009) Available: http://www.ciffa.com/downloads/2009/03/30/CIFFA%20Submission%20to%20Transport%20Canada%20on%20the%20Rotterdam%20Rules%20March%202009.pdf (accessed 30 May 2010).

CIFFA states that under the rules, a new feature is that the liability of the carrier for delay of goods will be two-and-a-half times the freight payable[252] on the delayed goods if delivery did not take place "within the time agreed".[253] This does not take into consideration the normal risks of everyday carriage, such as port or railway or traffic congestion, which are the usual causes of delay and generally unavoidable.[254] The carrier is presumed to be at fault if the cause for delay is not found in the list of exemptions in article 17(3). CIFFA submits that due to the wording of article 17(1) the claimant does not need to prove there was economic loss caused by the delay, merely that there was a delay while the carrier was in control of the goods.[255] CIFFA is of the opinion that if there is no proven pecuniary loss, then it is unreasonable that the claimant should be able to make a claim under these circumstances, despite the agreed-upon delivery period.[256] CIFFA believes that this may have been an inadvertent oversight on the part of the drafters of the rules, as this is covered in the Hamburg Rules.[257] Under the Rotterdam Rules the carrier may be responsible for the faults of performing parties such as agents, warehouses, railways or truckers; and consequently CIFFA submits that it is doubtful that the carrier would agree to a time of delivery in the contract that would exist between themselves and the shipper purely to escape this liability.[258]

It must be noted that the Hague-Visby Rules do not contain any reference to "economic" or "pecuniary loss", and as this instrument has been used successfully on a much broader scale than the Hamburg Rules, it is unlikely that this will cause any issues under the Rotterdam Rules.

Agreed time of delivery

CIFFA then questions whether in these sorts of situation a court would interpret the carrier's advertised estimated time of arrival, or possibly the estimated time of arrival given on a booking note or arrival notice, as the "agreed time of delivery".[259] The rules are silent on how this type of issue is to be approached, and this may have the effect that if the "time of delivery" is not explicitly stated in the contract, courts will find that there is no liability for

[252] Article 60; CIFFA "CIFFA Submission" 3.
[253] Article 21; CIFFA "CIFFA Submission" 3.
[254] Ibid.
[255] Ibid.
[256] CIFFA "CIFFA Submission" 4.
[257] Ibid.
[258] Ibid.
[259] Ibid.

delay.[260] CIFFA believes that article 21 of the rules, which merely states "Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed", is much too broad.[261] CIFFA further queries which courts would be competent to hear what may be such small claim matters, particularly whether it would be at all feasible for the Federal Court of Canada to hear cases for claims of what may be a few hundred or a few thousand dollars and, if not, whether provincial Small Claims Courts could be competent to hear complicated maritime matters that are customarily of federal jurisdiction.[262] This could indeed be a situation which also occurs in other states.

CIFFA continues that the provisions for delay contained in the rules seem to give shippers the opportunity, if a shipment is delayed, to refuse to pay the owed freight, as the rules contain no stipulation against this or against "offsetting".[263] CIFFA points out that article 42 of the rules actually prohibits the carrier from withholding delivery if the contract states "freight prepaid" or a "statement of a similar nature", even if the freight has not been paid.[264] Further, given article 42, the carrier may encounter a multiplicity of small claims for a consignment of delayed containers, for which he is then liable for two-and-a-half times the freight paid on each.[265] CIFFA believes that, while this liability should be covered by the carrier's liability insurance policy, it is unfair that the carrier may be penalised if he had no control over the delay.[266]

Volume contracts: liability

CIFFA comments on volume contracts, stating that under these types of contract, a carrier, in agreement with a shipper, may waive liability completely or be party to a "custom-made" regime of liability.[267] CIFFA believes that what will undoubtedly happen in commercial practice is that the carrier will agree to be bound by the full liability regime of the rules, only if the shipper is willing to pay a higher price for the carriage of goods.[268] Otherwise, the shipper will be presented with a lower freight rate, if he agrees to a volume contract.[269]

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[260] Ibid.
[261] CIFFA "CIFFA Submission" 5.
[262] Ibid.
[263] Ibid.
[264] Ibid.
[265] Ibid.
[266] Ibid.
[267] CIFFA "CIFFA Submission" 6.
[268] Ibid.
[269] CIFFA "CIFFA Submission" 7.

CIFFA states that the shipper will probably prefer to pay higher rates and have the carrier accountable for the full amount of liability under the rules, particularly when the cost of cargo insurance is prohibitive.[270]

CIFFA makes the point that a single shipment may involve a "chain" of transactions.[271] For example, an ocean carrier may have a volume contract with a non-vessel-operating common carrier, which in turn will have dealings with a freight forwarder, who will in turn transact with a shipper for the same shipment, or transport of cargo.[272] Owing to article 20 of the rules, which states "if the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this convention", all parties will be jointly and severally liable. Consequently, this "chain" of volume contracts will ultimately result in "circular indemnity" clauses in volume contracts.[273] In simple terms, this means that the ocean carrier which enters into a no-liability contract with the non-vessel-operating common carrier, will insist that the non-vessel-operating common carrier defend and compensate the carrier for any claims brought against the carrier by the shipper or any other third party; similarly, the non-vessel-operating common carrier will demand the same from the freight forwarder and the freight forwarder will enter a volume contract with the shipper, and so ultimately any cargo claims will go back to the shipper himself.[274] CIFFA notes that without the operation of such a circular indemnity clause, volume contracts would be meaningless in terms of making the liability provisions under the rules inapplicable, as otherwise any or all of the parties could be sued by a third party or by the shipper.[275] CIFFA acknowledges that the freight forwarder who enters into the original volume contract with a shipper may also provide a "no subrogation" cargo insurance policy so that the shipper and other service-providers such as the carrier and the non-vessel-operating common carrier will be shielded from liability.[276] CIFFA is of the opinion, though, that whatever liability regime is concluded, or not, as the case may be, with the shipper, it will inevitably result in higher costs somewhere along the line of carriage.[277]

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[270] Ibid.
[271] Ibid.
[272] Ibid.
[273] Ibid.
[274] CIFFA "CIFFA Submission" 8.
[275] Ibid.
[276] Ibid.
[277] Ibid.

5.7 Academic critics

Professor William Tetley is a well-known name among Maritime Law academics and, indeed, the industry. He has published several "shipping" books and is currently the Chairman of the Board of Governors of the Association of Maritime Arbitrators of Canada and of the International Maritime Arbitration Organisation, and he is also an arbitrator for the China Maritime Arbitration Commission.[278]

Limited scope of application: multimodal transport

Professor Tetley expresses reservations regarding the Rotterdam Rules.[279] First, he points out that while the rules profess 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 rules, they apply to multimodal contracts only if they include a "sea-leg".[280] This limited scope of application of the rules means that if carriers and shippers should enter into an agreement that does not include an international sea-crossing, it will be necessary for them to look to other conventions to govern their transport contracts.[281] Consequently, Tetley submits that the rules succeed only in adding to the complexity of existing multimodal regimes and fail to create a uniform body of law for the regulation of multimodal transport.[282] Tetley proposes that the approach posed by the United Nations Convention on International Multimodal Transport of Goods,[283] which regulates the carriage of goods by at least two modes of transport,[284] neither of which needs to be conducted on an ocean, is far preferable.[285]

Tetley points out that the rules state that if goods are damaged before or after loading and/or discharge from the vessel, other international instruments or conventions have precedence

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[278] Mc Gill University "Professor William Tetley, CM, QC, LLL." (2011) Available: http://www.123people.ca/ext/frm?ti=personensuche%20telefonbuch&search_term=william%20tetley&search_country=CA&st=suche%20nach%20personen&target_url=http%3A%2F%2Fwww.mcgill.ca%2Fmaritimelaw%2Ftetley%2F&section=bing&wrt_id=430 (accessed 9 December 2011).

[279] W Tetley "Summary of Some General Criticisms of the UNICTRAL Convention (The Rotterdam Rules)" (2008) Available: http://www.mcgill.ca/files/maritimelaw/ Tetley_Criticism_of_Rotterdam_Rules.pdf (accessed 28 December 2009).

[280] Article 1(1); Tetley "General Criticisms" 1.

[281] Ibid.

[282] Ibid.

[283] Multimodal Convention (1980).

[284] Article (1).

[285] Tetley "General Criticisms" 1.

over the provisions contained in the rules.[286] Thus, should a contract be concluded in which there is a sea-leg and a road-leg, the rules may apply only to the sea-leg and not to the road-leg, which is the period before loading or after the discharge of the goods from the vessel, the "tackle-to-tackle" period – that is, to contracts wholly by sea.[287]

It is unclear why exactly this is a problem – the rules themselves state that they regulate only contracts of carriage which include an international sea-leg. The rules will provide certainty when there is no mandatory convention governing other modes of transport.

Unpredictability

Tetley further states that the limited scope of application of the rules will create unpredictability.[288] This is due to the fact that under article 26(*b*) of the rules, provisions of other instruments have primacy over the rules, whereas the rules provide a liability regime for all parties involved in the transaction.[289] This has the effect that two or more schemes of liability may govern the same contract, depending on when the loss or damage occurred, that is, during which "leg". Obviously, different unimodal international conventions and national laws do in fact contain different limits of liability, and so Tetley submits that it will be very challenging for contractual parties to predict which limit will be applicable, and when.[290] Tetley is of the opinion that article 26 of the rules will be especially arduous for the cargo claimant, who, in most cases, would be unfamiliar with the limitation provisions on the carrier's liability under various unimodal conventions and applicable national laws; this would lead to the claimant's having no ability to predict the potential outcome of his claim.[291]

Tetley does not consider that most countries apply the Hague or Hague-Visby Rules or some hybrid, including these rules. As previously mentioned, these regimes apply only to the maritime transport that is the "tackle-to-tackle" or "port-to-port" leg of the transport. Consequently, the carriage over land has always been governed by national law, or unimodal international instruments. Thus the regime envisaged by the rules is in no way different from current practice, which has not created problems in the past. The exception is that if damage cannot be localised, then the provisions of the rules will be those applied to limit liability.

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[286] Article 26.
[287] Tetley "General Criticisms" 1.
[288] Tetley "General Criticisms" 2.
[289] Chapters 5 and 7; Tetley "General Criticisms" 2.
[290] Ibid.
[291] Ibid.

This is clearly advantageous to the shipper as the shipper may be certain that in these cases the rules will definitely apply.

Chapters 14 and 15 non-compulsory

A further point of interest Tetley raises is that Chapters 14 and 15 of the rules, which deal with "Jurisdiction" and "Arbitration", respectively, are not mandatory.[292] This means that states which have signed and ratified the rules have the option of choosing to apply these provisions. Article 74 of Chapter 14 of the rules, that which deals with jurisdiction, and article 78 of Chapter 15, which deals with arbitration, state that the provisions on jurisdiction and arbitration contained in the rules shall bind only contracting states who declare they will be bound by these provisions. Evidently, this will lead to a situation where not all states which have signed and ratified the rules will be bound by these provisions.[293] This, in Tetley's opinion, will have the outcome that parties to a contract governed by the rules will have to specifically confirm that the relevant state has made a declaration to be bound by Chapters 14 and 15 of the rules and, if not, to include jurisdiction and arbitration clauses in their contract.[294] This will lead to situations where parties have their contracts governed by the rules, and at the same time, some other regime governing the jurisdiction and arbitration provisions of their contract. Tetley submits that the optional nature of these provisions does not contribute to obtaining uniformity and legal certainty in the multimodal transport industry, and instead adds to the complexity of existing regulatory regimes.[295]

The UNCITRAL Working Group has made it clear that the optional nature of the chapter on "jurisdiction" is in order for the rules to be most acceptable to the largest number of states and consequently encourage global acceptance, signatures and ratification.[296] Members of the Working Group were strongly in support of an "opt-in" provision concerning jurisdiction, as this will allow for flexibility.[297] The Working Group was also of the opinion that this approach will allow members of a group (such as the EU) to ratify the rules independently. Regarding arbitration, the Working Group expressed the goal of creating provisions in the "Arbitration chapter" parallel to those of the "Jurisdiction chapter" so as to protect cargo interests in that parties could not circumvent the jurisdiction provisions merely by using an

[292] Ibid.
[293] Ibid.
[294] Ibid.
[295] Ibid.
[296] UNCITRAL Working Group III "Eighteenth Session" 57.
[297] UNCITRAL Working Group III "Eighteenth Session" 58.

arbitration clause.[298] The Working Group considered whether the ability to "opt in" to the chapter on arbitration should be linked to whether the state had elected to "opt in" to the chapter on jurisdiction; however, it felt that this would be impossible as there are "differing competencies for the two subject matters as between major regional economic grouping and its member-states".[299]

Confusing array of documents

In addition, Tetley highlights that the rules provide a detailed set of regulations for three types of transport document, that is, bills of lading, negotiable transport documents and non-negotiable transport documents.[300] Tetley submits that these different types of document lead to "different results when determining the evidentiary effect of contractual terms,[301] delivery of goods[302] and the rights of the controlling party".[303] Tetley questions whether an average shipper or carrier will be able to distinguish between a "negotiable" and a "non-negotiable" transport document, which may lead to confusion and mistakes.[304]

It however seems unlikely that an "average shipper or carrier" will never have encountered negotiable and non-negotiable transport documents as they are prevalent in the shipping trade, and so presumably the "average carrier or shipper" will know what the difference is between these documents.

Excessive detail and ambiguities

As with the ESC and FIATA, Tetley argues that the excessive detail contained in the rules will most definitely "create uncertainty and hamper the goal of attaining legal certainty in the regulation of multimodal transport";[305] Tetley goes further and states that, due to this, "the Rotterdam Rules seem fit for only for a small select group of trained lawyers".[306]

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[298] UNCITRAL Working Group III "Twentieth session" 47.
[299] UNCITRAL Working Group III "Twentieth session" 49.
[300] Article 1; Tetley "General Criticisms" 2.
[301] Article 43.
[302] Chapter 9.
[303] Chapter 10.
[304] Tetley "General Criticisms" 2.
[305] Tetley "General Criticisms" 3.
[306] Ibid.

Tetley is also of the opinion that the rules are "riddled with ambiguities".[307] First, under article 17(6) of the rules, it is stated that "when the carrier is relieved of part of its liability, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable". However, the rules do not explain how this apportionment may be accomplished in practice.[308] Tetley remarks that to justify an apportionment, there must be:

> "[T]wo or more identifiable parts of the goods, for which the carrier is liable for one and not the other; or alternatively there may be an apportionment of the overall loss, based on the degree to which the carrier is responsible for aforesaid loss."[309]

Either of these routes may be the one intended by the rules; consequently, article 17(6) is ambiguous and will create uncertainty.[310]

The UNCITRAL Working Group makes the point that it is customary practice that once a claimant has shown that there were multiple causes of damage suffered, liability for damage is apportioned between different causes by a competent court according to national law.[311]

Thus this is presumably still intended to be the case under article 17(6) of the rules, although the Working Group does not make explicit reference to it.

Qualification of contractual particulars

Article 40 of the rules requires that in certain circumstances which are listed therein the carrier must qualify the contractual particulars to show that the carrier is not responsible for the accuracy of the information given by the shipper. Tetley argues that these "qualifications will in all probability be different in different contracting states, and may give rise to unnecessary litigation".[312] Tetley further contends that article 50(1)(*a*) of the rules, which allows the controlling party to give or to modify instructions regarding the contract of carriage, so long as these do not constitute a variation of the contract of carriage, is

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[307] Ibid.
[308] Ibid.
[309] Ibid.
[310] Ibid.
[311] UNCITRAL Working Group III "Report of Working Group III (Transport Law) on the Work of its Twelfth Session (Vienna , 6–17 October 2003)" (2003) Available: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V03/906/87/PDF/V0390687.pdf?OpenElement (accessed 28 July 2010) 28 and 34.
[312] Tetley "General Criticisms" 3.

contradictory.[313] He states that it is contradictory as "any modification of the instructions will result in a variation of the original instructions, so what will be deemed to be a variation".[314] There is no reference to how fundamental a change must be in order to be considered a "variation", and so not be permitted under the rules.[315]

In considering article 50 relating to "the exercise and right of control" as compared to article 54, that is "Variations to a contract of carriage", it becomes apparent that the term "variation" when considered in the context of article 54 refers to that situation when a controlling party agrees with a carrier on a variation of the contract of carriage. On the other hand, article 50 relates to when a controlling party may give unilateral instructions to a carrier. Thus William Tetley's argument that the term "variation" will create confusion appears to be erroneous.

Drafting deficiencies

Tetley is further of the opinion that there are drafting deficiencies in the rules.[316] For example, article 12(1) states that:

> "The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered."

Article 12(1)(*a*) and (*b*) provide specific criteria to determine when the period of responsibility begins and ends, so as to comply with national laws. At the same time, however, article 12(3) allows the parties to determine this period themselves, subject to two exceptions. Tetley submits that the current wording of article 12 may lead to mistakes and confusion, particularly if a reader does not read past article 12(1); so Tetley believes that "subject to paragraph 3" should be incorporated into article 12(1).[317]

It must be noted that the situation Tetley envisages here is unlikely. Article 12 is short and easy to understand and it is doubtful that any party reading the rules who wishes to determine the "period of responsibility of the carrier" will not read two paragraphs further than article 12(1).

Unreasonable provisions

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[313] Ibid.
[314] Ibid.
[315] Ibid.
[316] Tetley "General Criticisms" 4.
[317] Ibid.

Tetley further believes that the rules contain unreasonable provisions.[318] In support of this, he cites article 17(5)(*a*), which places the burden of proving the carrier's lack of due diligence on the claimant in the case. Tetley's view is that this "contradicts the first principle of proof", which is that the carrier, having received the cargo, is *prima facie* liable for loss or damage to the goods which occurred to them while they were in the possession of the carrier.[319] Tetley states that placing this burden of proof on the claimant contradicts "public order" and "public policy" and is also unreasonable as it would be very difficult for the claimant to obtain the information to do this.[320]

The UNCITRAL Working Group states in its considerations that the underlying approach to the "basis of liability" is that the carrier should be held liable for "unexplained losses".[321] In addition, the Working Group comments that the claimant is in the best position to prove the damage, as claimant need show only that the goods were delivered to the carrier in good condition, and that the consignee received them in a damaged condition.[322]

Article 51(2)(a) impractical

Tetley also questions article 51(2)(*a*) of the rules.[323] This article requires that when there is a non-negotiable transport document, the shipper (who is presumed to be the preliminary controlling party) must give all the original documents to whomever he wishes to transfer the right of control. Tetley submits that this is impractical, because if the individual who has the original copy cannot be located, it would be impossible to transfer the right of control.[324] Tetley proposes that it would be more practical if the carrier could just be informed of when and to whom the right of control was transferred, with all relevant information regarding the new controlling party being given to the carrier.[325] In addition, article 51(2)(*b*) does not allow the controlling party to exercise his right of control unless he is able to produce all of the original documentation. Tetley deems this to be unreasonable; he contends that if the shipper

[318] Ibid.
[319] Tetley "General Criticisms" 5.
[320] Ibid.
[321] UNCITRAL Working Group III "Twelfth Session" 34.
[322] UNCITRAL Working Group III "Twelfth Session" 35.
[323] Tetley "General Criticisms" 5.
[324] Ibid.
[325] Ibid.

has transferred the right of control to another party, that party should be able to exercise his right of control.[326]

The UNCITRAL Working Group comments that article 51(2)(*a*) of the rules was inserted in order to provide for delivery when a non-negotiable transport document is issued.[327] The Working Group acknowledged that these types of document are not known or used in all jurisdictions, but believed that provision must be made for where such documents exist.[328] The Working Group states that this article is intended to "preserve existing law and current practice relating to these types of documents".[329] Further, that while this provision is intended to preserve current practice, there is no uniformity in national law regarding the treatment of such documents, and that the aim in the convention is to establish a "clear predictable system".[330] The Working Group also explicitly states that the assumption underlying this article is that when parties agree to make use of a non-negotiable transport document which requires surrender; that the parties would have made a conscious decision to use these for their own purposes and reasons.[331] Consequently, as the parties choose to use this type of document, they must have had a reason for doing so and had they considered, as Tetley suggests, that transfer of the right of control would be impossible, then they would have used another sort of document, as allowed in the rules.

Professor Rhidian Thomas has been involved in shipping in both an academic and a practical manner. He has published several "shipping" books and has contributed to many journals; he has also lectured in International Trade and Shipping Law at many universities and is a member of the Chartered Institute of Arbitrators.[332]

Complexity leads to unclear rules and uncertainty

Rhidian Thomas believes that the "tortuous drafting" of the rules which was meant to promote clarity and certainty, in fact, achieves the very opposite.[333] He states that the complexity of the rules causes "a spectre to arise of a new and endless stream of contested

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[326] Ibid.
[327] UNCITRAL Working Group III "Twentieth Session" 9.
[328] UNCITRAL Working Group III "Twentieth Session" 10.
[329] Ibid.
[330] Ibid.
[331] UNCITRAL Working Group III "Twentieth Session" 11.
[332] Swansea University "Professor D Rhidian Thomas" (2011) Available: http://www.swan.ac.uk/law/istl/members/professorrhidianthomas/ (accessed 9 December 2011).
[333] D Rhidian Thomas "And then there were the Rotterdam Rules" (2008) 14 *JIML* 189.

litigation and arbitration".[334] Rhidian Thomas comments that the introduction of a "volume contract"[335] is a new and puzzling concept, the reasons for which, he believes, remain unclear; further that these "volume contracts" are able to act outside the scope of the convention, and so create legal uncertainty.[336] He comments that there is a need for reform in the maritime law arena; however, that it must not be forgotten that many states which use the Hague-Rules were opposed to the adoption of the Visby Protocol.[337] Many states also rejected the Hamburg Rules in their entirety, as well as the 1980 Convention on Multimodal Transport, which serves to illustrate that most states are content with the Hague Rules and resistant to radical change.[338] Rhidian Thomas is of the view that a small number of necessary amendments to the Hague Rules would be more acceptable globally, and more likely to succeed.[339]

Johansson, Oland, Pysden, Ramburg, Schmitt and Tetley co-authored a paper entitled "A response to the attempt to clarify certain concerns over the Rotterdam Rules" (published 5 August 2009),[340] which illustrates further unease over the rules; this paper illustrates various defects in the preparation of the rules, the rules themselves and in the adoption of the rules.[341]

This group of experts maintains that the process of drafting the rules was "flawed from the outset".[342] The CMI was responsible for the initial draft of the convention which was submitted to the UNCITRAL Working Group on Transport Law.[343] The primary consideration of the CMI was that the Hague concept of "tackle-to-tackle" no longer reflected the modern maritime era of containerised traffic, and so the CMI discussions focused on actions beyond the ships rail.[344] The CMI is essentially sea-related in its interests, and the central core of the convention is sea carriage. As a result, the group's ability to widen the convention beyond such has resulted in a maritime instrument with other transport modes

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[334] Ibid.
[335] Article 80.
[336] Rhidian Thomas "Rotterdam Rules" 189.
[337] Rhidian Thomas "Rotterdam Rules" 189–190.
[338] Ibid.
[339] Rhidian Thomas "Rotterdam Rules" 190.
[340] S Johansson, A Oland, K Pysden, J Ramberg, W Tetley and D Schmitt "A Response to the Attempt to Clarify Certain Concerns over the Rotterdam Rules" (2009) Available: http://www.mcgill.ca/files/maritimelaw/Summationpdf.pdf (accessed 3 January 2010).
[341] Johansson "A Response."
[342] Johansson "A Response" 1.
[343] Ibid.
[344] Ibid.

"tacked on".[345] In these authors' opinion, the rules are something of a hybrid, meaning that the parts other than those concerned with sea carriage are "effectively incidental and only partially covered"[346] and will have the effect of interfering with a "complex but perfectly working body of law" governing sea transport.[347] The authors state that the purpose of the rules was to end the fragmentation of carriage by sea, but the initial work on the convention done by the CMI was sea-based, whereas later work attempted to incorporate other transport modes.[348]

For the Rotterdam Rules to apply, a "multimodal contract" must contain a sea-leg. The authors of this paper state that this limited scope of the convention contradicts the goal of creating a binding and balanced universal regime to support the operation of contracts of carriage involving various modes of transport", as contained in the preamble of the rules, as well as a body of "uniform rules" – as parties will be forced to consult other conventions if the contract does not have a sea-leg.[349] Consequently, the authors hold that the rules are neither universal nor uniform and merely have the effect of adding to the complexity of current multimodal transport regimes.[350]

The UNCITRAL Working Group has stated that the general policy behind the rules is that the convention should cover door-to-door carriage of goods, whether single or multimodal, so long as an international sea-leg is incorporated in the contract of carriage.[351]

It is submitted that, given the aim of the UNCITRAL Working Group as expressed above, the rules do not and have never been intended to fully regulate all modes of transport. The convention is intended for goods which are carried wholly or partly by sea. Given the extensive time and amount of work that has been put in to the formation of such an instrument, it is quite evident that any undertaking to formulate an instrument which could regulate all modes of transport simultaneously is completely impractical and impossible; and, ultimately, if such were attempted, it would almost certainly be rejected by most states as it would require too great an upheaval in domestic law. Thus this group of authors' grievance in this regard is unfounded.

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[345] Ibid.
[346] Johansson "A Response" 2.
[347] Ibid.
[348] Ibid.
[349] Johansson "A Response" 3.
[350] Ibid.
[351] UNCITRAL Working Group III "Twelfth Session" 19.

Flawed basis of giving preference to one type of carriage

Johansson and his co-authors point out that carriage by sea, air, road and rail all have different risks, and maintain that to give preference to one type of carriage (sea carriage) was to approach the project from a "flawed basis".[352] The author's query: Why an international movement by sea, should be stretched to incorporate land movements, so long as they are not covered by any other international conventions which cover land transport?[353] The authors do not feel that it is just or equitable for an international regime to encroach on an essentially domestic movement, which would have been governed in these cases, by national domestic law.[354]

The authors do not consider here that the use of the rules will aid in creating uniformity and predictability in this regard, although they object to the rules not "creating uniformity" in their previous criticism.

Delegating operations to shipper unjustified and inequitable

The authors do not believe that the rules present a sufficient justification for the carrier to agree that loading, handling, stowing or unloading should be performed by the shipper,[355] as these operations are an essential part of the carriage of goods and should be the duty of the carrier.[356] These authors believe that this practice merely creates unequal obligations and liabilities between the parties.[357]

It is unclear how this creates unequal obligations and liabilities between the parties. A shipper may choose to perform these tasks in order to save himself costs, and further it is unlikely that a shipper who does not have the expertise to properly execute these types of undertaking, or finds it inconvenient to do so, will request the carrier to agree that he, the shipper, performs such tasks.

Carrier's rights to limit liability creates imbalance

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[352] Johansson "A Response" 3.
[353] Ibid.
[354] Ibid.
[355] Article 13(2).
[356] Johansson "A Response" 4.
[357] Ibid.

The authors further criticise the carrier's right to limit liability under the rules for breaches of the contract,[358] which they maintain creates an "imbalance of power in the contractual relationship".[359] The authors are of the view that it is "unacceptable" to limit liability to only one of the parties in the contractual relationship for the same type of breach, such as insufficient information.[360]

As the Rotterdam Rules apply door-to-door, the new limits of liability – 875 SDRs per package of 3 SDRs per kilogram – may apply both to the sea-leg and to the land-leg of the carriage. Under the Hague-Visby Rules, the limits applied only to the sea carriage, and so states party to that convention were free to regulate land carriage by national law. An interesting situation could arise should those countries now adopt and ratify the rules. The authors use Canada as an example. In Canada the maximum liability for road transport is currently regulated by provincial law, and stands at CA$4.41 per kilogram, regardless of the number of packages.[361] If a container which contained 1 000 packages with a weight of 10 000 kilogram was lost during road carriage, under the current Canadian regime the carriers maximum liability would be CA$44 100. However, should Canada sign, adopt and ratify the rules, the carrier's maximum liability will be CA$875 000. This is obviously an enormous increase for the carrier and as such may have considerable insurance implications.[362]

The authors do not take into account that under article 19 it is the "maritime performing party" who will be liable in such instances if the damage may be localised, and further that such party is entitled to all of the carrier's defences and limitations of liability. These include that the party is liable only for the loss, damage or delay which may be attributed to the event for which it is liable.[363] It is consequently very unlikely that such a large claim could be made against any performing party.

Volume contract exceptions

The authors express the opinion that the main flaw of the rules is that of the "volume contract exemptions",[364] which they state is "the single most inexplicable part of these Rules" and

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[358] Article 4.
[359] Johansson "A Response" 4.
[360] Ibid.
[361] Johansson "A Response" 5.
[362] Johansson "A Response" 6.
[363] Article 17(6).
[364] Article 80.

"totally fallacious and unacceptable".[365] The authors acknowledge that generally in commercial trade there should be a discount of price for volume, but that that should not lead to a change in liability, as liability is related to "the risks" of a venture, not the amount of business done.[366]

The authors do not consider that entering into a volume contract is completely voluntary under article 80 and that special provisions relating to derogations are contained in the rules, and further that the shipper must always be given the opportunity to conclude a contract which does not derogate from the convention.[367]

Removal of nautical fault as defence of carrier

In addition, the authors maintain that the idea that the removal of nautical fault[368] as a defence of the carrier is hugely beneficial to other parties is an erroneous one.[369] This is due to the existence of global positioning systems (GPSs) and satellite navigation, so the defence was no longer plausible in any way.[370]

Plausibility of convention questioned

The authors state that a problem with any new convention is issues in interpretation in different countries and jurisdictions, and query whether bringing a 96-article convention is at all plausible in attempting to bring uniformity, predictability and reliability to international Trade Law.[371] The authors continue by stating that the "loose wording" in many articles may lead to different interpretations, and consequently will have the propensity to create far more litigation than any convention before them.[372]

The authors fear that due to the volume contract exemption[373] and the failure of the rules to commit to a "full network liability system"[374] coupled with the fact that there are only five or six major shipping lines worldwide has the potential to result in a few high powered

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[365] Johansson "A Response" 6.
[366] Ibid.
[367] Article 80(2)(*c*).
[368] Article 17(3).
[369] Johansson "A Response" 9.
[370] Ibid.
[371] Ibid.
[372] Ibid.
[373] Article 80.
[374] Articles 26 and 82.

corporations' dominating the market at the expense of small and medium-sized businesses.[375] In particular, should these major groups act inappropriately, the worldwide supply chain could be rendered defective.[376] The authors state that this could be catastrophic as basic needs such as food, emergency supplies and medical supplies are delivered worldwide through the shipping industry on a daily basis.[377]

The authors also take strong exception to the rules' proclaiming to be "universal" and "uniform" given that they contain numerous "opting-out" provisions.[378] For example, the United Kingdom has a large arbitration centre in London, namely the London Maritime Arbitrator's Association (LMAA), and if they sign and ratify the rules, they will almost certainly "opt out" of provisions relating to arbitration contained in the rules so as to protect their domestic commercial interests.[379] Other shipper, carrier, or oil producer nations such as Norway could adopt the rules, but opt out of provisions they do not consider to be favourable to them.[380]

However, a reading of the rules indicates that only the chapters on jurisdiction and arbitration contain "opt-in" provisions, which have been previously discussed. Whether two such provisions may be called "numerous" is open to interpretation.

The authors conclude that the Rotterdam Rules will be a retrogressive step for global trade; that the rules merely partially advance the maritime regimes of the United States and other nations which did not adopt the Hague, Hague-Visby or Hamburg Rules and, consequently, that the Rotterdam Rules should not be signed or ratified.[381]

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[375] Johansson "A Response" 10.
[376] Ibid.
[377] Ibid.
[378] Johansson "A Response" 11.
[379] Johansson "A Response" 12.
[380] Ibid.
[381] Ibid.

6
Support for the Rotterdam Rules

The Rotterdam Rules have received strong support, both from the 24 states which have signed them to date[1] and from a number of organisations representing shipping industry interests which have made their views known publically. A number of concerns raised by critics of the rules have been answered in persuasive papers by industry interest groups as well as a group of experts who were involved in the formation of the Rotterdam Rules, which are discussed further below.

6.1 The American Bar Association

The American Bar Association (ABA) is the world's largest voluntary professional association, with almost 400 000 members.[2] ABA has urged the US Senate to ratify the rules.[3]

The United States, together with 15 other countries, signed the Rotterdam Rules on 23 September 2009; ABA comments that "the United States played a meaningful role throughout the negotiation of the rules, representing the concerns and interests of the maritime community of the United States".[4] ABA submits that by ratifying the rules the United States will remain a forerunner in world shipping.[5]

ABA remarks that the current regime where trading nations operate under the Hague Rules, the Hague-Visby Rules or the Hamburg Rules, or a cocktail of these regimes, creates complications and uncertainty.[6] The existing conventions remain subject to national

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[1] Armenia, Cameroon, Congo Brazzaville, the Democratic Republic of the Congo (DRC), Denmark, France, Gabon, Ghana, Greece, Guinea, Luxembourg, Madagascar, Mali, Netherlands, Niger, Nigeria, Norway, Poland, Senegal, Spain (ratified 19 January 2011), Sweden, Switzerland, Togo and the United States at 9 December 2011 Available: http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html (accessed 9 December 2011).

[2] American Bar Association (2011) "About the ABA" Available: http://www.americanbar.org/utility/about_the_aba.html (accessed 9 December 2011).

[3] WJ Marwedel, JR Tarpley and GP Hendrix "American Bar Association, Maritime Law Association of the United States, Tort Trial and Insurance Practice Section, Section of International Law: Report to the House of Delegates: Recommendation" (2010) Available: http://www.proctorinadmiralty.com/files/aba-rottedam-rules---resolution-2-8-2010.pdf (accessed 10 April 2010) 2.

[4] Ibid.

[5] Ibid.

[6] Ibid.

interpretation, and as sea carriage is an international activity, uniformity and predictability are much needed in this industry.[7]

At present, US maritime trade is regulated by the 1936 Carriage of Goods By Sea Act (COGSA), which is in essence "a domestic enactment of the Hague Rules of 1924";[8] consequently, the US maritime regime is outdated.[9] ABA submits that the Rotterdam Rules introduce "an evolutionary regime, which builds on existing maritime law and harmonizes and modernizes current law".[10] ABA is optimistic that the Rotterdam Rules may "aid in relieving port congestion", due to the fact that they provide terminals and carriers with a variety of options for storage of uncollected cargo outside the port, and further that the "one contract" regime which may cover an entire transaction will be helpful in creating legal certainty.[11] Furthermore, that the provisions in the rules regulating e-commerce will allow for "reduced processing times and less errors through the use of electronic transport documents".[12]

While ABA believes that the Rotterdam Rules may aid in relieving port congestion, and suggest that this is due to carriers and terminal operators being given options for storage of cargo outside ports, this is quite unlikely. None of the Hague, Hague-Visby or Hamburg Rules contains any provisions on how cargo should be stored at or outside a port. Consequently, terminal operators and carriers have been free to store the cargo wherever they wished, and the rules will not change this. Consequently, they will not "aid in relieving port congestion" as ABA suggests.

Under the current US regime, COGSA, a carrier's liability is limited to US$500 per "package". A "package" is not defined in COGSA, which has led to extensive litigation in the United States.[13] Furthermore, ABA states that while the US$500 limitation was sufficient to cover most cargo in 1936, it is now "woefully inadequate", given the dramatic change in the value of the dollar in the 70-plus years since then.[14] Thus ABA believes that "the limits given

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[7] Ibid.
[8] Marwedel "American Bar Association Report" 3.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] Ibid.

in the rules as well as the definition of 'package' contained therein will be greatly advantageous for maritime contracting parties".[15] ABA asserts that the countless technological and commercial advancements which have occurred since the inception of the current maritime regimes have been incorporated into the rules, and liability for loss, procedures for claims as well as the obligations of all parties have been encompassed in the rules in far greater detail than exists in any other maritime instrument.[16] ABA states that all parties involved in international sea carriage transactions will benefit from the "efficiency and predictability of a universally binding legal regime which makes provision for pure sea as well as multimodal carriage".[17]

Both the Hague-Visby and the Hamburg Rules contain a per-kilogram unit as well as a package limit for limitation of liability; so while a per-kilogram limit for liability may be new to the United States (which applies the Hague Rules) it will not greatly benefit other states that have applied a more modern regime. In addition, "package" is not clearly defined in the rules, and is not even included in the definitions section.

ABA stresses that the present regimes governing maritime trade are numerous and outdated; indeed, the "US's COGSA is the enactment of a convention drafted over 85 years ago".[18] While the Hague Rules and COGSA were "satisfactory at the time of their inception, the drafters could not have anticipated the age of containerization, multimodal transport and e-commerce which has changed the face of carriage by sea".[19] The rules address these issues and cover with greater clarity the rights and responsibilities of all interested parties, and in doing so will provide greater uniformity, efficiency, predictability and harmony in international shipping, and consequently should be ratified by the United States.[20]

6.2 The Alexandria Declaration

The Arab League is a voluntary association of Arab countries; its aim is to "strengthen ties among member-states, co-ordinate their policies, and promoting [sic] their common

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[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Ibid.

interests".[21] The Arab League serves as a forum for member-states to discuss their policy positions and deliberate on matters of common concern.[22]

On 3 February 2010, after a workshop hosted by the Arab Academy for Science, Technology and Maritime Transport (AASTMT) in Egypt, a group of more than 200 government and industry delegates and experts from 15 Arab League countries, including Egypt, Iraq, Jordan, Kuwait, Palestine, Qatar and Saudi Arabia, as well as non-government organisations (NGOs) including the Arab Federation for Sea Carriers, the Arab Federation for Freight Forwarders and Logistics (AFFFAL), Arab Sea Ports Federation (ASPF), Arab Federation of Chambers of Shipping (ArabFCS), Arab Federation of Chambers of Commerce and the Arab Society for Commercial and Maritime Law (ASCML), ended with a joint declaration, the "Alexandria Declaration 2010". The declaration recommended that the Arab League transport and trade ministers jointly sign the Rotterdam Rules.[23]

The AASTMT states that a joint signing of the 21 Arab League countries will show that the Arab region is "committed to the modernization of the international maritime transport industry as well as globalization".[24] The rules, the academy comments, are the "progressive answer" to current trends in the industry, including electronic transport documents, multimodal transport, the clarification of all parties' roles, rights, responsibilities and duties in the international carriage of goods as well as provisions to prevent the fraudulent use of bills of lading and the revision of liability limits.[25]

Thus, it has been recommended that the Arab countries sign and ratify the rules. If all agree, the number of signatories to the rules will increase to 43, which will be a clear indication that the rules have obtained significant global support; this may encourage other states to sign and ratify them.

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[21] Arabic German Consulting "The Arab League – The League of Arab States" (1999) Available: http://www.arab.de/arabinfo/league.htm (accessed 12 December 2011).
[22] Arabic German Consulting "The Arab League".
[23] Arab Academy for Science, Technology and Maritime Transport (AASTMT) "Press Release: Alexandria Declaration 2010: Released on recommendations of the Arab League Countries to jointly sign United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly By Sea ("The Rotterdam Rules 2008")" (2010) Available: http://www.uncitral.org/pdf/english/news/ArabPressReleaseRR.pdf (accessed 4 June 2010).
[24] AASTMT "Press Release."
[25] AASTMT "Press Release."

Despite this recommendation, no Arab countries have signed the rules as yet, though they are reportedly still involved in national negotiations regarding signing and ratifying them.[26]

6.3 The International Chamber of Shipping

The International Chamber of Shipping (ICS) is one of the principal international trade and employer associations for merchant shipping operators; it represents all types of trade, including approximately 80 per cent of the world merchant fleet.[27]

The ICS states that the Rotterdam Rules should be "supported, promoted and quickly ratified".[28] The ICS observes that approximately 50 000 merchant ships trade internationally, and at least 90 per cent of world trade includes sea travel; consequently, the rules that govern maritime shipping must be "truly international" in order to be widely accepted across various jurisdictions, to provide legal certainty and uniformity and so reduce conflict between rules which may lead to increased litigation and legal costs, confusion, and exponentially rising insurance costs.[29] Accordingly, the ICS notes that a modern legal regime governing international transport is of vital importance to all stakeholders in this industry.[30]

The ICS submits that the growing efficiency of shipping, with the development of faster ships, quicker port turn-around times, the use of e-commerce and e-communication as well as escalated growth in containerisation and the increasing frequency of door-to-door transport contracts, has created liability and documentary challenges which previous regimes are unable to meet.[31] Furthermore, that while some national solutions have been found to these sorts of issue, there has not yet been an international instrument that has been successful in this regard, which led to the United States' drafting a proposed new Act to regulate these matters nationally. The ICS states that this step represented "regionalism" that would have led to "chaos" in the international trade industry had others followed this example.[32]

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[26] Inchcape Shipping Services "Brussels Urges Speedy Ratification of the Rotterdam Rules" (2010) Available: http://www.iss-shipping.com/NewsDetails.aspx?newsid=4609 (accessed 1 August 2010).
[27] International Chamber of Shipping (ICS) "Homepage: The Voice of International Shipping" (2011) Available: http://www.marisec.org/ (accessed 9 December 2011).
[28] ICS "Position Paper" 1.
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] ICS "Position Paper" 2.

The ICS points out that the number of states, industry representatives and academics who participated in the formation of the rules is "unparalleled to any other initiative of this nature".[33] Further, that the convention was approved of and signed by many of the participating states.[34] This illustrates that the rules have the potential to be an international solution.[35] The United States, one of the world's major traders, has in fact made it clear that if the rules are not ratified, it will proceed with its own plan of regionalisation, which, the ICS submits, would result in a "failure of the Rules and the inglorious death of a prospective internationally accepted regime to regulate international shipping".[36] ICS states that they are aware that the European Union (EU) has plans to introduce their own multimodal instrument, which may regulate matters covered by the rules.[37] The ICS believes that if such proposals are introduced, this may prevent other EU states from ratifying the rules, and such a move would inevitably lead to major industry participants such as the United States "washing their hands" of the rules.[38] The ICS comments that for this reason alone it is "imperative that full support is given to the Rotterdam Rules, which will in turn cause the EU Commission not to introduce their own regime, and that it is only by showing strong political support that the attempts to introduce regional potentially overlapping rules will be eliminated"[39] – this, the ICS believes, is the highest priority for the international shipping industry, and ultimately for the consumer.[40]

The ICS declares that the aim of the rules is to modernise the customary "tackle-to-tackle" and "port-to-port" carriage of cargo.[41] In addition:

> "[P]ioneering solutions which have the aim of meeting the demands of the carriage of goods on 'door-to-door' terms are introduced and include that the carrier undertakes responsibility for inland carriage as well as transport by sea, from the time when the goods leave the custody of the shipper to when the receiver takes delivery."[42]

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[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid.

The ICS stresses that current regimes such as the Hague Rules are restricted in application to only the carriage of goods by sea, whereas the Rotterdam Rules are far broader in application: so long as there is an international "sea-leg" in any contract of carriage, then the rules will apply to that contract.[43]

The multimodal nature of the rules has been received with mixed reactions globally, some organisations such as FIATA and the ESC[44] believe the multimodal aspects of the rules will not be beneficial to claimants, as previously discussed. In addition, the contractual nature of the rules may cause issues. For example, if a contract states that an international sea-leg is included, the rules will apply; but if in practice, for whatever reason, the goods are not transported by sea but rather over land, will the rules still apply? This problem is compounded by the fact that the rules state that the provisions contained in them do not "prevail" over those of an international unimodal convention,[45] which at a literal reading may mean that the rules do not "prevail" over such a convention, but are not subservient to such, and so a court may choose to apply either. Given the generally lower limits in the rules than under unimodal instruments regulating carriage by road or rail, this may severely disadvantage a claimant.

Concealed damage

The ICS is in favour of the rules' applying in cases of concealed damage, that is, where damage cannot be localised, because the application of the rules means it is unecessary to establish a separate system of liability for concealed damage; and so the need for yet another set of rules has been circumvented.[46]

The ICS does not suggest any evidence to show that "concealed damage" has caused any issues under existing regimes, so this argument appears to be misleading.

More extreme geographical scope

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[43] Ibid.
[44] Chapter 4.
[45] Article 26.
[46] ICS "Position Paper" 3.

The ICS emphasises that the convention has a far more extensive geographical scope of application than the Hague Rules, because, unlike the Hague Rules, the Rotterdam Rules apply to both inward and outward carriage of goods.[47] The rules will apply to international contracts of carriage with an international maritime leg, where the place of receipt, loading, delivery or discharge is situated in a contracting state – which the ICS believes will enhance uniformity of the law.[48]

Again, the Rotterdam Rules will be subject to national interpretation, which may reduce the uniformity of application of the rules. For example, the rules do not specify which area is to be considered "port area" and obviously this may differ across varying jurisdictions, which in turn will affect which parties are considered to be "maritime performing parties" as opposed to "performing parties"[49] under the rules.

The ICS contends that shipowners will see:

> "a considerable increase in the cost of cargo liability claims due to the loss of the right to a nautical fault defence as well as higher limits of liability and an extension of the due diligence and seaworthiness obligations."[50]

E-commerce streamlined

However, shipowners will benefit from the regulation of multimodal transport, the provisions relating to network liability, the governance of concealed damage and, in particular, the regulation of e-commerce.[51] The ICS states that the rules give "functional equivalence" to customary bills of lading, way bills and electronic trading systems, so e-commerce will no longer be hindered by the shipper's demanding paper documentation prior to delivery of the cargo.[52] The ICS also believes that the use of encrypted electronic systems will aid in combating fraud, and the immediate transmission of e-documentation means that postal delays will be a thing of the past.[53] The ICS trusts that this will go a long way to overcoming

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[47] Ibid.
[48] Ibid.
[49] Article 1.
[50] ICS "Position Paper" 3.
[51] Ibid.
[52] ICS "Position Paper" 4.
[53] Ibid.

the situation where a carrier is pressurised to release cargo without documentation being presented.[54]

The ICS comments that the rules will be advantageous to shippers in that they apply to all transport documents connected to sea carriage and provide detailed regulations on all types of transport document. This will aid in creating certainty and uniformity on an issue that has until now been regulated by national rules and court decisions.[55] Furthermore, the ICS approves of the provisions on volume contracts which allow derogation from the rules by contractual arrangement and according to certain conditions so that all parties are protected.[56]

Cargo carried on and below deck

The rules apply to cargo carried both on and below deck, which avoids the difficulties encountered under the Hague and the Hague-Visby regimes – as these generally exclude cargo carried above deck.[57] The ICS asserts further that the rules provide for an "improved regime for deviation when compared with the Hague-Visby Rules in that where under a national law, there is a deviation, the rules will not dispossess the shipowner of the right to limitations and defences".[58]

Risk between shippers and carriers well-balanced

The ICS is also of the opinion that the rules provide a well-balanced allocation of risk between shippers and carriers, due to "all-embracing and more efficient and methodical provisions on liability of each party involved in the transaction".[59] A further advantage of the rules is that the carrier may, under certain codified circumstances, deliver the goods to a consignee without presentation of a negotiable transport document, while at the same time protecting the interests of the parties involved in the transaction.[60] The rules also include entire "optional" chapters on jurisdiction and arbitration, which the ICS believes may aid in

[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] ICS "Position Paper" 5.
[60] Ibid.

creating legal certainty in the carriage of goods by sea.[61] The ICS submits that it is unlikely that EU member-states will opt in to these provisions, whereas the United States is expected to opt in to both.[62]

The ICS states that the rules are a "distinct improvement" when considered alongside existing regimes, and that these rules may prove to be the most effective international maritime convention and constitute the only "international solution", so they should be supported and ratified as soon as possible.[63]

6.4 Comité Maritime International

The Comité Maritime International (CMI) is an international NGO which aims to contribute meaningfully to the unification of maritime law.[64] The CMI has given its support to the Rotterdam Rules.[65] The CMI states that in their opinion the rules generally achieve a "fair balance amongst the numerous interests in the shipping industry, and recognises that the Rules offer a unique opportunity to update and provide uniformity in maritime law and practice globally".[66] Consequently, the CMI has adopted and endorsed the rules.[67]

Again, the application of the rules is unlikely to be 'uniform", given that they will be subject to national interpretation, and the optional nature of the chapters on jurisdiction and arbitration will most definitely mean that the provisions contained therein will not result in global standardisation.

6.5 International Chamber of Commerce

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[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Comité Maritime International "Welcome to CMI" (2011) Available: http://www.comitemaritime.org/Home/0,271,1132,00.html (accessed 9 December 2011).
[65] Comité Maritime International "Resolution adopted by the 39th CMI Conference on the UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea in Athens 17 October 2008" (2008) Available: http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/CMI_endorsement_17October2008.pdf (accessed 4 June 2010).
[66] CMI "Resolution".
[67] CMI "Resolution".

The International Chamber of Commerce (ICC) is a representative body of corporations and associations from more than 130 countries.[68] The ICC viewpoint illustrates the "business opinion" on issues of trade, investment, transport policy and technical subjects; the ICC promotes open international trade and investment system and the market economy.[69]
The ICC remarks that as the "World Business Organisation", it recognises the importance of the development of a harmonised international ocean carriage regime that is "sensible, reasonable and balanced and which incorporates the needs of modern commerce in the maritime industry".[70]

The ICC urges governments to consider ratifying the rules, because they will "underpin perhaps the most important element of international commerce, which is shipping".[71] The ICC maintains that the rules will aid in preventing the regionalisation of Maritime Law and that a harmonised liability regime for maritime transport and related door-to-door transport is of paramount commercial importance.[72] Further, the rules clarify the burdens of proof for parties involved in a transaction, the defences available to carriers and intermediaries when a maritime claim is made, and the precision and intelligibility of the rules will minimise litigation in the maritime transport industry, and so benefit international trade.[73] The ICC also views the inclusion of customised liability allowed by volume contracts in a favourable light, and states that the rules "appropriately balance the risk allocation between all parties involved in international cargo carriage".[74] This, it believes, will provide increased legal certainty internationally to the business of shipping.[75]

The Rotterdam Rules, as an instrument incorporating many new provisions in comparison to existing regimes, do not make them more "precise" and "intelligible" to the average shipper or carrier, and arguably could increase maritime litigation.

In addition, the ICC pledges to:

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[68] International Chamber of Commerce (ICC) "Comments on the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules")" (2009) Available: http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/ICC_statement_27May2009.pdf (accessed 4 June 2010) 1.
[69] Ibid.
[70] Ibid.
[71] ICC "Comments on the Rotterdam Rules" 2.
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] Ibid.

"proactively facilitate a business contribution to national and international discussions on the potential ratification of the Rotterdam Rules, in order to assist in providing uniformity in international trade law."[76]

6.6 European Community Shipowners' Association

The European Community Shipowners' Association (ECSA) comprises the national shipowner associations of the EU and Norway. Their aim is to ensure the industry can best serve international and European international trade in a "competitive free enterprise environment" in order to benefit both consumers and shippers.[77] ECSA is strongly in favour of the Rotterdam Rules.[78] ECSA has urged all states globally to sign and ratify the rules, in order to "enable the much needed modernization of cargo liability rules, and to promote legal certainty in the maritime transport industry".[79]

ECSA states that they are firmly of the opinion that the Rotterdam Rules provide legal certainty and uniformity regarding cargo liability and address gaps which are prevalent in current maritime regimes, including, but not limited to, e-commerce.[80] ECSA submits that the rules will modernise maritime liability with the addition of multimodal transport rules, which they believe will facilitate international and European trade.[81] Further, that the rules take into account the interests of carriers and shippers and so provides "a well-balanced regime, which is recognized and endorsed by almost all shipper interests globally".[82]

As an increase in international trade is due to the economic climate and globalisation, it is difficult to imagine how a legal instrument that merely regulates the carriage of goods will "facilitate" increased international trade as envisioned by ECSA.

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[76] Ibid.
[77] ECSA "European Community Shipowners' Associations" (2011) Available: http://www.ecsa.be/ (accessed 9 December 2011).
[78] D Hughes "ECSA backs Rotterdam Rules" (2009) Available: http://www.mgn.com/news/dailystorydetails.cfm?storyid=10023 (accessed 4 June 2010).
[79] Hughes "ECSA backs Rotterdam Rules".
[80] Hughes "ECSA backs Rotterdam Rules".
[81] Hughes "ECSA backs Rotterdam Rules".
[82] Hughes "ECSA backs Rotterdam Rules".

ECSA also comments that it does not share the views of parties opposed to the rules,[83] In particular, that the ESC "misunderstand[s] the Rules and do[es] not take into regard the 'delicate compromises' achieved in multilateral negotiations between all interested parties during the formation of the Rules".[84]

ECSA is of the opinion that the rules represent a final attempt to allow for a harmonised cargo liability regime at an international level, and the modern rules and legal certainty and uniformity that will be provided by the rules will reduce conflict of laws relating to international carriage between various jurisdictions globally.[85]

6.7 World Shipping Council, Baltic and International Maritime Council, International Chamber of Shipping and European Community Shipowners' Association

In a joint press release the World Shipping Council (WSC), the Baltic and International Maritime Council (BIMCO), the International Chamber of Shipping (ICS) and the ECSA all urge ratification of the Rotterdam Rules.[86] ICS, ECSA, BIMCO and the WSC are international trade associations that collectively represent the interests of 90 per cent of the global shipping industry.[87] ICS and ECSA together represent the world's national shipowners' associations; the WSC represents the interests of global container ship operators, whereas BIMCO is the world's largest private shipping organisation, representing interests of a wide international membership of shipping companies who are responsible for the majority of world merchant fleet trade in all sectors and trades.[88]

These organisations agree that the rules will "provide legal certainty and uniformity" in maritime and connected transport.[89] At present, at least 90 per cent of world trade is transported on more than 50 000 merchant ships over an international sea – shipping is a global industry "which requires an extensively accepted set of international rules to govern

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[83] Hughes "ECSA backs Rotterdam Rules".
[84] Hughes "ECSA backs Rotterdam Rules".
[85] Hughes "ECSA backs Rotterdam Rules".
[86] World Shipping Council (WSC), Baltic and International Maritime Council (BIMCO), International Chamber of Shipping (ICS) and European Community Shipowners' Association (ECSA) "ICS / ECSA / BIMCO / WSC Press Release: The Rotterdam Rules – Wide Support by States at Signing Ceremony in Rotterdam" (2009) Available: http://www.uncitral.org/pdf/english/news/ICS_ECSA_BIMCO_WSC_press_release.pdf (accessed 4 June 2010) 1.
[87] WSC, BIMCO, ICS and ECSA "Press Release" 4.
[88] Ibid.
[89] WSC, BIMCO, ICS and ECSA "Press Release" 2.

trade".[90] Furthermore, these organisations maintain that the rules will provide a modernised regime for carriage of goods by sea; and that they encompass multimodal carriage of goods involving a "sea-leg" while simultaneously respecting and including existing unimodal conventions where necessary.[91] In addition, the rules will "address gaps" which have existed in international maritime law, including that of e-commerce, and that the rules "provide a balance" between the interests of carriers and shippers with regard to liability and the allocation of risk between these parties.[92]

This group of international trade associations comments that states which have signed the rules are leading the way to "international uniformity" and will help to give confidence to other states who have not yet signed the rules to do so, and will assist in dissuading other states who are contemplating the formation of regional instruments to regulate multimodal transport on a national basis.[93]

These organisations also urge all states who have signed the rules to ratify them as soon as possible – so as to ensure their early entry into force.[94] This, they believe, is crucial in order to obtain the benefits offered by the rules.[95] According to this group, benefits include uniform, harmonised and modernised rules on cargo liability at an international level, which will also avoid divisive and possibly opposing national and regional legislation regarding international carriage of goods.[96]

They further observe that the rapid ratification of the rules by major trading nations such as the United States will have the effect of shaping international transport law for the most important markets in international maritime commerce, which will help to achieve uniformity which is badly needed in international shipping law.[97]

This assembly of associations remark that the rules present the "opportunity for a global uniform regime to regulate maritime and multimodal transport".[98] This will benefit

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[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] WSC, BIMCO, ICS and ECSA "Press Release" 3.
[94] Ibid.
[95] Ibid.
[96] Ibid.
[97] Ibid.
[98] Ibid.

international trade and transport, as currently there is no other global instrument even contemplated which will allow for such, and consequently the rules are the only "real international solution".[99] As such, ICS, ECSA, BIMCO and the WSC believe that all states should sign the convention and ratify it at the earliest opportunity.[100]

6.8 The National Industrial Transportation League

The National Industrial Transportation League (NITL) is a national association representing more than 700 member companies which either tender goods to carriers or arrange or perform the transportation of goods in international and interstate transactions.[101] NITL's membership consists of large multinational and national corporations as well as small and medium-sized companies.[102] The greater part of NITL's members are shippers and receivers in a number of industries, including retail, petroleum, chemical, paper, computer and automotive organisations which use a range of modes of transportation for the carriage of both raw material and finished goods globally.[103]

NITL is of the opinion that current regimes governing the international transportation of goods are "outdated" and "applied inconsistently" worldwide.[104] NITL supports the adoption and ratification of the Rotterdam Rules as it believes that the rules take into account modern shipping and commercial practices, and will "update and replace" the decades-old "patchwork liability regimes" which currently apply internationally.[105] NITL served as an "industry advisor" to the US delegation involved in the formation of the rules.[106] NITL submits that the rules provide "a balanced cargo liability regime, and reflect significant law reform which will result in considerable benefits for all stakeholders, shippers and carriers involved in the marine carriage of goods".[107]

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[99] Ibid.
[100] Ibid.
[101] National Industrial Transportation League (NITL) "Response of the National Industrial Transportation League to the European Shippers' Council Position Paper on the Rotterdam Rules" (2009) Available: http://www.nitl.org/NITLRESPONSEPAPER.pdf (accessed 4 June 2010) page 2.
[102] Ibid.
[103] Ibid.
[104] NITL "Response" 1.
[105] Ibid.
[106] Ibid.
[107] Ibid.

Consequently, NITL strongly supports and has adopted the rules, believing that they are in line with modern shipping and commercial requirements, as well as providing significant improvements and advances when considered in comparison to existing cargo liability conventions. NITL also believes that the rules promote legal uniformity and harmonisation, reduce legal obstacles in the course of international trade; and that the "volume contract" provisions will allow participants to customise contracts between them to meet their own individual commercial and shipping requirements.[108]

NITL does not elaborate on how the rules will "reduce obstacles in the course of international trade" or what indeed these "obstacles" are, which suggests that this statement is unfounded.

6.9 Protection and Indemnity Clubs

Protection and Indemnity (P&I) Clubs are associations of shipowners and charterers that are owned and controlled by the insured shipowner or charterer "members".[109] They operate on a non-profit basis. The process entails members' pooling their resources jointly and making individual contributions called "mutual premiums" in order to meet losses suffered by each member of the club.[110]

The P&I Clubs have indicated their support for the Rotterdam Rules.[111] They remark that while they are of the opinion that the rules may add some additional costs to all parties, they believe a single global liability regime will speed up the payment of claims and reduce the costs of claims in the long term.[112] Michael Salthouse, a director of the North of England Club, states that the key driving force behind the clubs' support for the rules is "the need for a 'single standard' to reduce uncertainty and enable the fast settlement of claims".[113] He states that:

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[108] NITL "Response" 2.
[109] Steamship Mutual "What are P&I Clubs?" (2010) Available: http://www.simsl.com/what-are-pi-clubs.html (accessed 4 June 2010).
[110] Steamship Mutual "What are P&I Clubs?".
[111] Lloyds List "Rotterdam Rules: clubs in support of ratification" (2009) Available: http://www.rotterdamrules.com/pdf/Rotterdam-rules-clubs-in-support-of-ratification-Lloyd's-List-01-09-2009.pdf (accessed 4 June 2010).
[112] Lloyds List "Rotterdam Rules".
[113] Lloyds List "Rotterdam Rules".

"while there will be an increase in costs in certain areas, this is nothing as compared to the dire situation which would come about if the rules were not ratified, which would be countries enacting regional legislation."[114]

Consequently, P&I Clubs support the adoption and ratification of the Rotterdam Rules.[115]

It appears that P&I Clubs support the rules not because they believe them to be satisfactory, but rather because they fear the consequences if shipping law were addressed on a national and regional basis only.

The rules have received support from a number of maritime experts who were involved in their formation. They include Berlingieri and Zunarelli from Italy, Delebecque from France, Fujita from Japan, Illescas from Spain, Sturley from the United States, Van der Ziel from the Netherlands, and Ziegler from Switzerland.[116] In a joint paper, these eight shipping specialists have attempted to answer concerns raised regarding the rules.[117]

First, article 26 was "included in the rules in order to "avoid conflict" with other conventions."[118] Article 26 states that:

"[I]f loss or damage or delay occurs before or after goods are loaded onto a ship, the rules will not take preference over any other international convention which would have applied if a separate direct contract had been made between the shipper and the carrier in respect of that particular stage of carriage."[119]

As already mentioned, the fact that the rules do not "prevail" over other conventions may give the impression that *either* the provisions of the rules *or* those of some other unimodal convention will apply in these situations.

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[114] Lloyds List "Rotterdam Rules".
[115] Lloyds List "Rotterdam Rules".
[116] F Berlingieri, P Delebecque, T Fujita, R Illescas, M Sturley, G van der Ziel, A Von Ziegler, S Zunarelli "The Rotterdam Rules: An attempt to clarify certain concerns that have emerged" (2009) Available: http://www.comitemaritime.org/draft/pdf/5RRULES.pdf (accessed 20 December 2009).
[117] Berlingieri "The Rotterdam Rules" 4.
[118] Ibid.
[119] Article 26.

This group of experts states that the following criticisms have been made regarding this provision:

(1) that the claimant must prove the event did not occur during the sea-leg of the carriage;
(2) that this allows only for a "limited network system";
(3) that the more favourable terms of conventions other than the rules would not extend to short sea shipping, and
(4) that shippers may choose not to utilise short-sea services lest the less favourable provisions of the rules apply instead of another convention.[120]

In answer to these criticisms the experts comment that, first, the identification of the time when the loss occurred is necessary in order to identify which regime is applicable, and so it is "unavoidable that one party must have the burden of proving this."[121] In addition, as the proof of the place where the damage occurred is intended to benefit the claimant, general principles relating to proof require "that the party who will profit from such proof should be the party who carries this burden".[122] This principle has existed for many decades internationally without criticism.[123]

Secondly, these experts submit that certain provisions should:

> "not differ according to the stage of carriage, and that the regulations in the rules relating to transport documents, the provisions relating to the rights and obligations of the parties regarding delivery as well as the provisions relating to the right of control during transport, are far more comprehensive and clear in the Rotterdam Rules than others currently existing in unimodal international conventions".[124]

Furthermore, the more favourable terms of conventions other than the rules will extend to short sea shipping, because article 82 of the rules provides expressly that the rules will not "prevail" over other international conventions such as CMR[125] and CMI.[126]

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[120] Berlingieri "The Rotterdam Rules" 4.
[121] Ibid.
[122] Berlingieri "The Rotterdam Rules" 5.
[123] Ibid.
[124] Ibid.
[125] Convention on the Contract for International Carriage of Goods by Road, 1956 (CMR).
[126] 1980 Convention Concerning International Carriage by Rail (COTIF) Agreement, with its Annexes CIV (for passengers and luggage) and CIM (for freight).

The experts maintain that the scope of a "contract of carriage" cannot be set out mandatorily in a convention, because, while door-to-door carriage has become more frequent, there are still many contracts which are concluded on a port-to-port basis.[127] Further, that the provision contained in article 13(2) – that the parties may agree that loading, handling, stowing or unloading of the goods is to be the responsibility of the shipper – will not bring about unequal obligations and liabilities, this is due to the fact that shippers may include this in contracts for their own reasons.[128] In consequence, it would be inappropriate to have any requirement making it mandatory for a carrier to be responsible for any specific phase of loading or discharging.[129]

The provisions contained in the rules relating to volume contracts have received widespread criticism.[130] However, this group of shipping experts declare that it is:

> "normal practice in today's commercial world for shippers with a consistent volume of goods to be carried to numerous destinations to often negotiate contracts with carriers with the aim of obtaining guaranteed availability of space on a vessel at a specific time, at a special freight rate."[131]

A "*quid pro quo*" is often required in these sorts of contract for a reduction of the freight rates, and so it has appeared appropriate in such cases to allow the parties limited freedom of contract.[132] These experts comment that this could have been accomplished theoretically by requiring a minimum volume of goods to be shipped for the freedom of contract to apply or by ensuring certain protection for shippers of consignees; but because the minimum volume may vary depending on the trade and/or nature of the goods, it would be unsuitable to require a minimum volume of goods.[133] Consequently, the subject-matter of the contract of carriage is a specific number of goods to be carried in a series of shipments. If a shipper is not interested in entering a volume contract for any reason, he is free to negotiate individual contracts of carriage for each shipment as discussed; if he chooses to enter into a volume contract he must have an interest in doing so.[134] In addition, these experts submit that the

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[127] Ibid.
[128] Ibid.
[129] Ibid.
[130] Berlingieri "The Rotterdam Rules" 6.
[131] Ibid.
[132] Ibid.
[133] Ibid.
[134] Ibid.

shipper or consignee is protected in that derogations which may affect safety are not permitted under volume contracts, and the rules attempt to ensure that the contract is freely negotiated.[135] This is achieved, first, by making certain provisions non-negotiable and by making any derogation subject to a series of conditions.[136] These conditions include evidence "that the shipper has been given notice and an opportunity to contract under the usual terms and conditions in the Rules";[137] and also if a shipper chooses to enter into a volume contract, the carrier must include a "prominent statement in the contract that it derogates from the Rules".[138] Third parties are offered protection under the rules, because the third party must be:

> "informed that the contract is a volume contract which derogates from the rules, and the party must give express consent in writing to be bound by such a derogation."[139]

In addition, these experts point out that in the modern market situation shippers often request freight forwarders and carriers to enter into complicated "frame agreements".[140] These are very similar to volume contracts.[141] Frame agreements frequently require the carrier to agree on strict terms regulating his responsibilities; which commonly extend what would be required by current transportation laws.[142] It is not just major shippers who are habitually involved in such dealings: an increasing number of smaller companies are engaging in similar arrangements with their logistical partners.[143]

Burden of proof of liability

These experts consider the rules to introduce no significant changes to the current method regulating the burden of proof, as contained in the Hague Rules and the Hague-Visby Rules.[144] The only novelty is that the rules spell out each of the aspects relating to this,[145] which provides clarity for all parties.[146] The experts submit that article 17 does not state that

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[135] Berlingieri "The Rotterdam Rules" 7.
[136] Article 80.
[137] Article 80(2)(*c*).
[138] Berlingieri "The Rotterdam Rules" 7.
[139] Article 3.
[140] Berlingieri "The Rotterdam Rules" 7.
[141] Ibid.
[142] Ibid.
[143] Berlingieri "The Rotterdam Rules" 8.
[144] Ibid.
[145] Article 17.
[146] Berlingieri "The Rotterdam Rules" 8.

the shipper must prove the unseaworthiness of the vessel if the carrier invokes an excepted peril to account for loss or damage; rather that the carrier has the "burden of proving absence of fault".[147] The experts maintain that the process followed on proper interpretation and reading of the rules, given in article 17, is the following:

- First, the claimant must prove that the loss, damage or delay occurred during the carrier's period of responsibility, and such proof entails a presumption of liability on the part of the carrier, which codifies a general principle on the allocation of the burden of proof in contractual obligations.[148] Although this does not appear clearly from the text, it is the virtually universal interpretation of the Hague Rules and the Hague-Visby Rules.[149] This principle is also found in article 5(1) of the Hamburg Rules.[150]
- Secondly, pursuant to article 17(2) and (3), in order for the carrier to overcome this presumption of fault, he must either prove the absence of fault on his part or, alternatively, he must prove that the loss, damage or delay was caused by, or contributed to, by any one of the excepted perils contained in article 17(3).[151]

The experts are of the opinion that proof of an absence of fault will relieve the carrier from liability.[152] However, if the carrier attempts to prove absence of fault by using an excepted peril, the claimant may in turn defeat the carrier by proving that the fault of the carrier himself either caused or contributed to the occurrence of the excepted peril. Or he may show that an event other than an excepted peril caused or contributed to the loss, damage or delay, or that the loss, damage or delay was caused or probably caused by the ship's being unseaworthy, improperly crewed or inadequately equipped or supplied.[153]

The experts state that article 17 as contained in the rules has emerged as a codification of the "best jurisprudence" established under the Hague Rules and the Hague-Visby regimes, as the allocation of the burden of proof is clearly set out.[154] In addition, if the claimant chooses to show that the unseaworthiness of the ship resulted in the damage, delay or loss of the goods,

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[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] Ibid.
[153] Berlingieri "The Rotterdam Rules" 9.
[154] Ibid.

the claimant does not have to prove unseaworthiness without a reasonable doubt, but rather on a balance of probabilities. This is evident from the words "probably caused" in article 17(5)(*a*).[155] So, in fact, the claimant only has to show that on a balance of probabilities unseaworthiness was the probable cause of the loss, damage or delay. The carrier must then prove the exercise of due diligence in order to avoid liability.[156]

Claims for damages

The requirement that the limit per package may only be used for packages which have been itemised in the relevant transport document is not novel to the Rotterdam Rules, in fact, it exists in a similar form in the Hague-Visby Rules[157] and the Hamburg Rules.[158] This is also a common requirement for customs purposes.[159] Further, shippers are generally less concerned with a specific delivery date than they are that the transport document is issued by a certain date so that they will be able to negotiate the document in time when a letter of credit has been issued by the buyer.[160] Consequently, this provision will probably not lead to extensive litigation as some parties have suggested.[161] It is a common feature of transport conventions that "goods are presumed to have been delivered in accordance with their portrayal in the transport document if timely notice of loss, delay or damage is not given".[162]

These experts contend that it is "easier" for shippers to claim compensation successfully under the rules than it is under the Hague Rules and the Hague-Visby Rules, for a number of reasons.[163] First, the period of notice has been extended to seven days, and the time bar for claims has been extended to two years.[164] Owing to the joint and several liability of a performing party and a carrier, a shipper will almost always have at least one debtor with assets to claim against.[165] The shipper is also permitted access to the carrier's internal records

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[155] Ibid.
[156] Berlingieri "The Rotterdam Rules" 10.
[157] Article 4(5)(*c*).
[158] Article 6(2)(*a*).
[159] Berlingieri "The Rotterdam Rules" 10.
[160] Ibid.
[161] Ibid.
[162] Ibid.
[163] Berlingieri "The Rotterdam Rules" 11.
[164] Article 20.
[165] Berlingieri "The Rotterdam Rules" 12.

and documents,[166] which may be invaluable in proving claims, and it is considered to be highly advantageous to the shipper that a time-barred claim may be used as a defence.[167]

Shipper's obligations and liabilities

These experts indicate that whereas the rules contain more provisions regulating the shipper's obligations and liabilities than was the case under previous conventions, this does not have the effect of the shipper having "more" obligations and liabilities.[168] Under previous regimes this was usually covered by national laws, or was dealt with clearly in a bill of lading.[169] While the rules appear to impose additional obligations and liabilities, in practice they will not, and this will help to promote certainty and uniformity of law in this regard.[170]

Fault-based liability for the shipper is contained in article 30 of the rules, which requires the carrier to prove the shipper's breach of obligations found in the rules – which is a very similar burden of proof as would be found if the same claim were made in delict under national law. The rules also prohibit the contract from imposing more liability on the shipper than the rules themselves impose.[171]

These experts also state that the shipper's obligation to deliver goods in a fit condition to withstand carriage is "not unreasonable".[172] The rules state further that the carrier and the shipper have an obligation to supply one another with instructions to enable the proper handling of the goods during carriage, if so requested by the other party.[173]

This group of experts notes that it would be impossible to "give the shipper a document stating that his goods will be carried on deck at the time of the making of the contract: [because] when a bill of lading is issued it is often not known whether a container will be carried above or below deck".[174] The rules will still benefit the shipper in that the carrier may load goods above deck only if it is normal to do so with that particular type of cargo, and a

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[166] Article 23(6).
[167] Berlingieri "The Rotterdam Rules" 12.
[168] Ibid.
[169] Ibid.
[170] Ibid.
[171] Article 79(2).
[172] Berlingieri "The Rotterdam Rules" 13.
[173] Article 28.
[174] Berlingieri "The Rotterdam Rules" 13.

procedure practised by professional shippers.[175] Further that when goods are loaded on deck without this being contained in a negotiable bill of lading, a third-party holder of such a bill may treat the goods as though they were carried below deck.[176] Finally, the carrier may not limit his liability if he contracted to carry the goods below deck and he did not, and as a result the goods were damaged in some way.[177]

In addition, the experts emphasise that a consignee is only "obliged to accept delivery of goods if he demands delivery".[178] While the carrier has the power to deliver goods without the surrender of a negotiable transport document, this power may be exercised only when the transport document expressly states that the goods may be delivered without surrender of the document.[179] It is submitted that the holder of the document is aware that if article 47(2) is applicable to that situation, then the goods may be delivered on the shipper's instructions only when it is impossible for the carrier to obtain instruction from the consignee.[180]

Furthermore, the provisions regarding the liability of the shipper in cases of incorrect information being supplied by the shipper are identical to the equivalent provisions in the Hague-Visby Rules[181] and the Hamburg Rules,[182] and so the rules in fact introduce no new liability in this regard.[183]

Volume contracts

With regard to volume contracts, the shipper's obligations relating to providing correct information, instructions and documents[184] as well as liability in connection with dangerous goods[185] may not be altered, although other rights and obligations may be agreed upon.[186] The reason for this is that the carrier must make and keep the ship seaworthy according to the rules, and a breach of the shipper's obligations relating to dangerous goods may endanger the

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[175] Ibid.
[176] Ibid.
[177] Ibid.
[178] Article 43.
[179] Article 47(2).
[180] Berlingieri "The Rotterdam Rules" 14.
[181] Article 3(5).
[182] Article 17(1).
[183] Berlingieri "The Rotterdam Rules" 15.
[184] Article 29.
[185] Article 32.
[186] Article 80(4).

safety of the ship.[187] The failure of the shipper to provide correct information to the carrier could also make the carrier liable for damage to consignees for damage to goods, or create issues at customs, and so these provisions are not unreasonable.[188]

Equity between shippers and carriers

According to the specialists, the rules "ensure equity between the parties as both the carrier and the shipper are liable for the acts of any and all of their respective 'performing parties'", as stated in articles 18 and 34, respectively. This is a mutual obligation and it imposes an equal burden on both parties.[189]

Rotterdam Rules promote uniformity, less complexity

This group of experts is of the opinion that while the Rotterdam Rules have a broader scope than any of the Hague, the Hague-Visby or the Hamburg Rules, this does not lead to their being complicated.[190] Rather, that they will aid in making international maritime law more uniform, as areas that were previously covered only by national law are now regulated by an international instrument, which will, in turn, make the law in this regard less complicated.[191] Furthermore, they submit that while even a uniform regime may have different interpretations at a national level, all parties will "at least begin at the same point", which should at least result in a substantive level of standardisation of the law.[192] An unbiased outsider though may find it difficult to believe that a Convention which is at least three times longer than most previous ones will really have the practical effect of making the law less complex.

Freight forwarders acting as shippers, not carriers

In addition, freight forwarders may not be disadvantaged when acting as shippers instead of carriers.[193] This is because under the rules shippers will benefit from the now continuous obligation of a carrier to exercise due diligence and maintain a seaworthy ship, as well as

[187] Berlingieri "The Rotterdam Rules" 15.
[188] Ibid.
[189] Berlingieri "The Rotterdam Rules" 16.
[190] Ibid.
[191] Ibid.
[192] Ibid.
[193] Ibid.

from the increases in carrier liability, and the fact that fault in the navigation or management of a ship will no longer allow a carrier to escape liability.[194] Further, that a carrier's "due diligence" obligation is extended to cover containers also.[195] Moreover, freight forwarders may benefit significantly from volume contracts, in that they may be able to trade some aspects of liability against beneficial freight arrangements.[196]

Freight forwarders acting as stevedores and warehousemen; multimodal terminals

FIATA criticised the rules, stating that freight forwarders would be adversely affected by the liability regime applicable to performing parties. More specifically, three concerns were raised:

(1) freight forwarders who act as stevedores and warehousemen enjoy freedom of contract while under the rules they will become performing parties and be subject to the liability regime of carriers;

(2) in countries where stevedoring and warehousing enterprises are owned or controlled by governments, any movement towards ratification will presumably be opposed;

(3) multipurpose cargo terminals engaged as distribution centres in logistics operations would strongly oppose a sort of Maritime Law injection.[197]

In a response to these criticisms, the experts explain that when considering whether the provisions of the rules are applicable to freight forwarders, one must take into account "which particular contractual relationship is being scrutinized" as well as freedom of contract "with whom" in each case.[198] Should a forwarder act as a stevedore, then the contract between him and the carrier will not be affected by the rules, because for the rules to apply there must be a "contract of carriage" as defined in the rules.[199] In addition, with regard to the freight forwarder's relationship with the consignee or the shipper, the rules simply make the carrier and the forwarder jointly liable to the shipper or consignee as the forwarder is acting as a maritime performing party.[200] Indeed, this may be advantageous to the forwarder, because he will benefit from the right of limitation contained in the rules, whereas at present

[194] Ibid.
[195] Ibid.
[196] Ibid.
[197] FIATA "FIATA Position" 2.
[198] Berlingieri "The Rotterdam Rules" 19.
[199] Article 1(1).
[200] Berlingieri "The Rotterdam Rules" 19.

the forwarder may be liable without limitation if he is sued in delict.[201] The experts comment that it is consequently farcical to complain that carriers are given greater protection under the rules and a forwarder is not.[202] The experts believe that the same comment applies in respect of multimodal cargo terminals which are engaged as distribution centres, and accordingly the inclusion of a "maritime performing party" in the rules will not lead to an increase in liability for freight forwarders when compared to the existing situation.[203] In addition, these experts are of the opinion that it is simply not credible that any government would choose not to sign or ratify the rules merely because such government operates a stevedoring or warehousing venture.[204]

Delivery of goods without negotiable transport document

The experts stress that "it is incorrect to state that a carrier has the right to deliver goods without obtaining a negotiable transport document in return".[205] Article 47(2) allows that, if goods are not deliverable, the carrier may request instructions from the shipper in respect of delivery, irrespective of whether the shipper is or is not holding the transport document at that time, and the carrier will be discharged from any liability if he complies with such instructions. However, this will not affect a third party who holds such a bill in good faith, as article 47(2) applies only "if the negotiable transport document or the negotiable transport record expressly states that the goods may be delivered without surrender of the transport document or the electronic transport record". Consequently, the holder will know that this may occur if the conditions envisaged in article 47 materialise. These conditions are that, first, the holder has not claimed delivery after the arrival of the goods at destination, or, secondly, the carrier has refused delivery because the person claiming delivery has not properly identified himself and the carrier has, after reasonable efforts, been unable to locate the holder in order to request delivery instructions. It does not seem unreasonable that in these types of situation the carrier may request and act on the instructions of the original shipper, in fact, this seems to be the most sensible approach.[206]

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[201] Ibid.
[202] Ibid.
[203] Ibid.
[204] Berlingieri "The Rotterdam Rules" 20.
[205] Berlingieri "The Rotterdam Rules" 21.
[206] Ibid.

6.10 The National Industrial Transportation League Responds to the European Shippers' Council's Criticisms of the Rotterdam Rules

In their supportive paper on the Rotterdam Rules, the NITL disparages criticisms of the European Shippers Council (ESC),[207] stating that the ESC demonstrates fundamental misunderstandings of the workings of the rules.[208]

Conflict with other conventions

The NITL states that the ESC's contention that the rules may conflict with CMR[209] and CIM[210]is incorrect.[211] The rules expressly provide that international conventions are not prevailed over by the rules in those situations stated in the rules.[212] Further, the ESC argues that the rules may discourage shippers from embarking on short-sea shipping transactions which may be governed by the rules instead of the CMR or the CMI as the case may be. NITL states that this concern is "more appropriately aimed at the limited scope of the CMR and CIM" and, further, ignores the likelihood that the "economics of short-sea shipping arrangements will determine whether shippers utilise short-sea shipping services or not".[213]

Unequal obligations and liabilities between the parties

The ESC claims that under the rules, carriers will be able to offer purely sea carriage, while limiting their period of responsibility to exclude, with the shipper's consent, loading, stowing, handling and unloading of the goods.[214] NITL submits that even if a carrier were to offer sea-carriage only, a shipper would in fact face no greater burden than they face under current maritime regimes, as the Hague Rules and the Hague-Visby Rules apply only to the tackle-to-tackle period and the Hamburg Rules are applicable only to the port-to-port stage.[215] Furthermore, the limitations relating to the carrier stowing, loading, unloading and handling

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[207] ESC "View on the Rotterdam Rules."
[208] NITL "Response" 6.
[209] Convention on the Contract for International Carriage of Goods by Road, 1956 (CMR).
[210] 1980 Convention Concerning International Carriage by Rail (COTIF) Agreement, with its Annexes CIV (for passengers and luggage) and CIM (for freight).
[211] ESC "View on the Rotterdam Rules" 2; NITL "Response" 6.
[212] Article 82.
[213] NITL "Response" 6.
[214] ESC "View on the Rotterdam Rules" 2.
[215] NITL "Response" 7.

the goods[216] are simply a codification of existing commercial practice which occurs predominantly in bulk trading, in which the shipper or consignee prefers to take responsibility for these tasks.[217] It should be noted that the shipper must express his consent before the carrier may be relieved of these duties, and this must be stated in the contract of carriage that exists between the parties.[218] Consequently, the NITL comments that in most cases it would be the shipper who would request this sort of arrangement, and in any case the carrier may not unilaterally elect not to perform in terms of these responsibilities.[219]

Volume contracts

The ESC states that the provisions they find most disturbing about the Rotterdam Rules are those relating to volume contracts.[220] Volume contracts allow the shipper and the carrier in agreement to modify almost all of the provisions of the rules.[221] The ESC believes that this will leave smaller shippers at the mercy of carriers' demands as they often have significantly less bargaining power in the relationship.[222] However, the NITL submits that this is directly opposite to the practical experience US shippers have had in their dealings with ocean carriers.[223] Service contracts, which are very similar to volume contracts, are "formally recognised under shipping law in the US, have been used effectively by all of small, medium and large shippers for over a decade".[224] NITL is of the opinion that, like these service contracts, volume contracts will be "bilateral, individually negotiated, customized contracts".[225] Also, according to the rules, if parties to a volume contract choose not to negotiate special liability terms, the provisions of the rules will apply as usual.[226] Consequently, NITL fervently believes that departures from the convention would be the exception and not the norm.[227]

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[216] Articles 12 and 13.
[217] NITL "Response" 7.
[218] Ibid.
[219] Ibid.
[220] ESC "View on the Rotterdam Rules" 2.
[221] Article 80.
[222] ESC "View on the Rotterdam Rules" 3.
[223] NITL "Response" 8.
[224] Ibid.
[225] Ibid.
[226] Article 6(1).
[227] NITL "Response" 8.

In addition, the NITL believes that the ESC overstates the risk shippers may face regarding volume contracts and ignores the specific protections and procedures which are necessary in terms of the rules before a volume contract may be entered into by the parties.[228] In order to derogate from the terms contained in the rules parties must comply with a number of requirements, as previously discussed.[229]

NITL states that these provisions provide clear protection to all parties, particularly because any derogation must be "prominently stated". This means that any party will have clear notice that the contract derogates from the rules.[230] In addition, the shipper is perfectly able to refuse to ship under a volume contract if he does not fully agree with the terms contained in it, which should encourage carriers to offer more favourable terms which are more consistent with the provisions contained in the rules.[231] In addition, the NITL observes that even without these protective stipulations found in the rules, most shipping markets are very competitive, and offer abundant alternatives to shippers.[232] Owing to the ample choice of service provider in most trades, a shipper will never be "forced" into contracting under unfavourable terms with a carrier.[233]

The NITL notes that when shippers and carriers choose to enter a volume contract as allowed by the rules, it is "the duty of each party to review the terms and conditions of the contract before signing it – which is merely prudent and reasonable business practice".[234] The NITL does not accept that shippers should be protected from their "own failure to negotiate, read and understand a contract before accepting the terms contained therein".[235] Consequently, NITL is of the opinion that the provisions of the rules relating to volume contracts reflect existing contracting practices and allow commercial flexibility, which in turn enables shippers and carriers to develop their own customised contracts for shipping goods that meet their individual business needs, while simultaneously providing protection to parties who may have inadequate negotiating leverage due to their size or any other circumstance.[236]

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[228] NITL "Response" 9.
[229] Article 80.
[230] NITL"Response" 9.
[231] Ibid.
[232] Ibid.
[233] Ibid.
[234] NITL "Response" 10.
[235] NITL "Response" 11.
[236] Ibid.

Proving fault

The ESC has also indicated that they are not pleased with the burdens of proof included in the rules.[237] The ESC contends that they are concerned with the ability of shippers to prove the carrier's fault in situations where the carrier asserts that one of the exceptions to liability is applicable.[238] NITL concedes that this burden has existed for decades under the Hague-Visby Rules and, further, that the burden on the shipper is not "insurmountable".[239] Furthermore, regarding the new rule in the rules that apportions liability when there are two or more causes of damage, and which is based on the events over which the carrier had control, the NITL is of the opinion that this compromise is reasonable as a shipper benefits from the deletion of the error in navigation defence and other provisions under the convention.[240]

Claiming compensation (liability provisions)

The ESC also criticises the new liability provisions contained in the rules that apply to loss, damage and delay.[241] However, the NITL states that the ESC does not mention that the liability limits in the rules[242] exceed those contained in any other existing international maritime liability system.[243] In addition, the NITL observes that the new rules provide shippers with the "long-desired" recovery of economic losses arising from delayed shipments which does not exist under the Hague Rules or Hague-Visby Rules, as well as providing two-and-a-half-times higher compensation for freight.[244] The ESC does not acknowledge this as beneficial.[245] Instead, it focuses on the need for the parties to agree on a time of delivery[246] in order for the carrier to incur liability for delays.[247] The NITL is of the opinion that it is not unreasonable for a shipper to provide notification of the date by which delivery is required and for the carrier to agree to perform within that period. Indeed, in the explanatory report of the rules a number of delegations support the position that the delivery time need not be expressed, but rather may be inferred or implied based on the facts and circumstances

[237] ESC "View on the Rotterdam Rules" 4.
[238] Article 17.
[239] NITL "Response" 12.
[240] Ibid.
[241] ESC "View on the Rotterdam Rules" 4.
[242] Article 59.
[243] NITL "Response" 12.
[244] NITL "Response" 13.
[245] Ibid.
[246] Articles 21 and 60.
[247] ESC "View on the Rotterdam Rules" 4.

surrounding the contract and shipment.[248] The ESC also alleges that it is not usual for a delivery time to be agreed upon in shipping contracts today.[249] However, the NITL submits that this is almost certainly because liability for delay is unavailable under all regimes except the unpopular Hamburg Rules.[250] Consequently, should the rules be ratified, the NITL is of the opinion that it would become more usual for delivery times to be contained in contracts.[251] In addition, a shipper can request an intermediary to contract with a carrier for a time of delivery, if the shipper is not contracting with the carrier directly.[252]

The ESC recognises that the provisions relating to jurisdiction apply only if a state has opted in and disapproves of this provision,[253] but NITL states that this approach was adopted at the request of the EU.[254] Furthermore, the ESC's fear that jurisdiction will be dictated by carriers[255] is "completely unfounded" in the opinion of the league, as this is seldom the case under the US "service contracts" which are similar to volume contracts.[256]

Shipper obligations

The ESC is against certain provisions relating to shipper obligations contained in the rules: specifically, the stipulations that a shipper must ensure that the cargo is in a proper condition to withstand carriage; that it will not cause harm to persons or property,[257] and those which require the shipper to supply information regarding the goods.[258] The NITL, however, believes that these obligations are reasonable and are, at most, "a codification of current industry practice".[259] The rules also contain a new obligation for shippers in article 31, that is:

(1) The shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 36, paragraph 1; the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to

[248] NITL "Response" 13.
[249] ESC "View on the Rotterdam Rules" 4.
[250] NITL "Response" 13.
[251] Ibid.
[252] Ibid.
[253] ESC "View on the Rotterdam Rules" 4.
[254] NITL "Response" 14.
[255] ESC "View on the Rotterdam Rules" 4.
[256] NITL "Response" 14.
[257] Article 28.
[258] Article 29.
[259] NITL "Response" 14.

whose order the transport document or electronic transport record is to be issued, if any.

(2) The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this article. The shipper shall indemnify the carrier against loss or damage resulting from the inaccuracy of such information.

The reason for this, the NITL remarks, is that this provision is "intended to reflect enhanced responsibilities of the shipper, due to international antiterrorism measures becoming a significant global consideration".[260]

The ESC believes that the rules impose "special rules" on shippers regarding the carriage of goods.[261] These are that the shipper must give notice to the carrier of the dangerous nature of the cargo, and mark or label the goods as required by applicable laws, as well as the shipper being held liable if he breaches this obligation. These rules are contained in articles 32 and 30, respectively. The NITL points out that these provisions were supported by most delegations during the formation of the rules, on the basis of safety and public policy, and further that these specific requirements are to a large extent similar to existing requirements for potentially harmful cargoes.[262]

This leads the NITL to state that the rules do not create new obligations or impose any additional burden on shippers other than those that they are already exposed to in terms of both national and international laws and regulations.[263] The NITL further comments that the shipper's obligations contained in the rules reflect existing law and modern commercial practices, and the new responsibilities are reasonable with reference to present conditions and considerations in the international transport industry.[264]

The NITL states that the rules should not be more favourable to either shippers or carriers, but rather should reflect a balance of competing interests, and because the rules provide a real opportunity to update the cargo liability rules that apply to carriage by sea as well as enhance

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[260] NITL "Response" 15.
[261] ESC "View on the Rotterdam Rules" 6.
[262] NITL "Response" 15.
[263] Ibid.
[264] Ibid.

widespread efficiency, uniformity and harmony of the carriage of goods internationally, the NITL strongly recommends the adoption of the rules by trading nations worldwide.[265]

It is evident that all of the supporters of the Rotterdam Rules believe that they will provide uniformity, harmony and certainty in what has been a legally fragmented industry. Also, that the rules are a codification of industry practice and jurisprudence which has evolved since the inception of the Hague Rules in 1924, and arguably represent an "international solution" to shipping and international transport laws. Furthermore, that the rules may be the only "workable solution" in avoiding regionalism in shipping laws, which would be detrimental to international trade and which would have the effect of making shipping law even more disjointed and lacking in certainty and consistency internationally.

6.11 Motives Behind Support for the Rotterdam Rules

Political context

Twenty-four nations, who collectively make up more than 25 per cent of the volume of global trade, have so far signed the rules.[266] Germany, who was the world's leading merchandise exporter in 2008 with a 9.1 per cent of market share globally in merchandise exports, and the second largest importer, with a 7.3 per cent share globally of merchandise imports, has been reported to be one of many EU countries who are waiting to see whether the United States and China, two of the world's largest manufacturing and maritime nations, sign and ratify the rules, before pledging themselves to signing the convention.[267] The United States has subsequently signed the rules; however, China has not committed itself to signing, or not signing, as yet.[268]

Other factors which may influence states to consider signing the rules include the state of their own Maritime Law regimes. Australian lawyer Stuart Hetherington comments that

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[265] Ibid.

[266] Australian Transport News "Australia must back Rotterdam Rules" (2009) Available: http://www.fullyloaded.com.au/industry-news/articleid/60944.aspx (accessed 15 August 2010).

[267] Lloyds List "Germany set to delay signing Rotterdam Rules" (2009) Available: http://www.rotterdamrules.com/pdf/Germany-set-to-delay-signing-Rotterdam-Rules-Lloyds-List-21-07-2009.pdf (accessed 15 August 2010); R Hailey "Questions of balance in the Rotterdam Rules" (2009) Available: http://www.rotterdamrules.com/pdf/Questions-of-balance-in-the-Rotterdam-Rules-Lloyd's-List-27-08-2009.pdf (accessed 15 August 2010).

[268] Inchcape Shipping Services "Brussels Urges Speedy Ratification of the Rotterdam Rules" (2010) Available: http://www.iss-shipping.com/NewsDetails.aspx?newsid=4609 (accessed 1 August 2010).

Australian Maritime Law is "based on the original 'archaic' Hague Rules, and the modern regime as proposed by the Rotterdam Rules reflects current shipping practices, thus Australia would benefit from signing the Rules".[269] He further remarks that if the major maritime nations sign the rules, the other nations who choose not to sign them may suffer from a reduction in trade.[270] It must be said that this seems possible, but not likely, as it makes economic sense for trade to be carried out on as wide a basis as possible.

The United States

The United States regulates maritime carriage of goods by means of a 1936 Act, called the Carriage of Goods by Sea Act.[271] Sturley observes that the shipping industry has changed remarkably over the past eighty plus years since the enactment of the Hague Rules.[272] He maintains that the US COGSA is even more outdated than more modern regimes which most of the world's "commercial powers" and many US trading partners use to govern the carriage of goods by sea.[273] He also points out that "unique US doctrines" have developed over the many years since the implementation of COGSA, and this has resulted in a regime in the United States which differs from modern international instruments, with the additional burden of being "out of sync with international understandings of the Hague Rules".[274]

Having recognised the inadequacies of the US COGSA, the United States implemented an initiative in the early 1990s to modernise US Maritime Law, before joining fully in the negotiations and formation of the rules.[275] The United States has subsequently made it clear that having deferred its own national proposals in 1993, if there is not widespread ratification of the rules, then it will proceed with its own regional plan.[276] This will obviously result in regionalism and will be chaotic for international Maritime Law for reasons previously stated.

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[269] Australian Transport News (2009) "Australia must back Rotterdam Rules."
[270] Australian Transport News (2009) "Australia must back Rotterdam Rules."
[271] The Carriage of Goods by Sea Act 46 USC 1300–1315 (1936) also known as COGSA 36.
[272] MF Sturley "Modernizing and Reforming US Maritime Law" (2009) 44 *Tex Intl LJ* 427 at 430.
[273] Ibid.
[274] Ibid.
[275] ICS "Position Paper" 1.
[276] ICS "Position Paper" 2.

Thus the United States has been very involved in the formation of the rules, and was a major advocate behind the provisions relating to "volume contracts".[277] These types of contract, known as "service contracts" in the United States, are the type of contract used in moving between 80 and 85 per cent of container traffic in that country.[278]

The United States is also the world's leading importer: in 2008, 13.2 per cent of all world trade shipments were destined for US shores.[279] These merchandise shipments were worth a staggering US$2.17 trillion.[280] The United States was also ranked in the top three exporters in 2008, exports from the United States totally US$1.3 trillion in 2008, which is 8.1 per cent of official world exports for 2008.[281]

Given the sheer volume of world trade that the United States engages in annually, as well as their antiquated legislation governing carriage of goods by sea and their input into the formation of the rules, it is not suprising that the United States provides vociferous support for them. Indeed, the sheer power and influence that the United States has globally means that states which may not otherwise have signed the rules may do so.

China

One of the world's largest trading nations, China has a national Maritime Code to regulate the carriage of goods by sea, which is a hybrid of the Hague-Visby and the Hamburg Rules as well incorporating unique Chinese law elements.[282] China is ranked as the second-largest exporter in the world, with merchandise exports to the value of US$1.43 trillion having been shipped in 2008.[283] This gives China 8.9 per cent of the world's share of exports.[284] China is

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[277] UNCITRAL Working Group III "Report of Working Group III (Transport Law) on the Work of its Eleventh Session (New York, 24 March–4 April 2003)" (2003) Available: http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V03/808/18/PDF/V0380818.pdf?OpenElement (accessed 14 August 2010) 7.

[278] Ibid.

[279] World Trade Organisation (WTO) "WTO sees 9% Global Trade Decline in 2009 as Recession Strikes." (2009) Available: http://www.wto.org/english/news_e/pres09_e/pr554_e.htm#appendix3 (accessed 15 August 2010).

[280] WTO "WTO sees 9% Global Trade Decline".

[281] WTO "WTO sees 9% Global Trade Decline".

[282] PK Mukherjee and AB Bal "A legal and economic analysis of the Volume Contract Concept Under the Rotterdam Rules: Selected Issues in Perspective." (2009) Available: http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20Abhinayan%20Basu%20Bal%20-%20Volume%20Contract%20Final.pdf (accessed 15 August 2010).

[283] WTO "WTO sees 9% Global Trade Decline".

[284] WTO "WTO sees 9% Global Trade Decline".

also ranked as the third-largest importer globally, having imported merchandise worth US$1.13 trillion, or a 6.9 per cent share of world imports in 2008.[285]

China is also home of the largest and busiest container port in the world, namely Hong Kong,[286] as well as a host of other ports and extensive road and inland waterway links.[287] The port of Hong Kong is a "shipping hub" and has been described as the "anchor of China's transport network".[288] In addition, low ship registration and mortgage fees for ship owners in Hong Kong has resulted in more than ten million ships having been registered there since 2000.[289] International shipping traffic through Chinese ports reached 360 million tonnes in 1998, with the international movement of goods being transported between Chinese ports predominantly by road.[290] COSCO, the world's third-largest shipping company with a fleet of more than 540 vessels, is the main provider of maritime links with China.[291] China's election to sign and ratify the rules will be a very important influencing factor in other states signing or not.

Despite being integrally involved in the formation of the rules,[292] the Chinese have not yet indicated whether they will sign and ratify them.[293] However, negotiations and discussions are currently underway in China and the rest of Asia on the issue of whether or not to sign the convention.[294] Their decision is sure to have considerable repercussions. If China supports the rules, coupled with the determined support that the United States has already given them, this will in all probability lead to a flurry of signatories. However, if China elects not to sign the rules, other states might reconsider their positions.

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[285] WTO "WTO sees 9% Global Trade Decline".
[286] United Nations "Review of Maritime Transport, 2001: Chapter VII)" (2001) Available: http://www.unctad.org/en/docs/rmt2001ch7_en.pdf (accessed 15 August 2010) page 94.
[287] Ibid.
[288] United Nations "Review of Maritime Transport" 97.
[289] Ibid.
[290] United Nations "Review of Maritime Transport" 98
[291] United Nations "Review of Maritime Transport" 101.
[292] United Nations Commission on International Trade Law "UNCITRAL Yearbook Volume XXXIV B: 2003" (2003) Available: http://www.uncitral.org/pdf/english/yearbooks/YB2003_B_E.pdf (accessed 21 August 2010).
[293] Inchcape Shipping Services "Brussels Urges Speedy Ratification of the Rotterdam Rules" (2010) Available: http://www.iss-shipping.com/NewsDetails.aspx?newsid=4609 (accessed 1 August 2010).
[294] Inchcape Shipping Services "Brussels Urges Speedy Ratification of the Rotterdam Rules".

Other factors

A factor which cannot be ignored in ascertaining why some of these organisations are voluble in their support of the rules is their involvement in the formation of the rules. The CMI in particular was the initial group that worked on the rules; the CMI also has consultative status at the United Nations.[295] The WSC spent seven years participating in the formation of the rules as part of the US Delegation to the UNCITAL.[296] The NITL was also an industry advisor to the US Delegation involved in the negotiation of the rules between 2002 and 2008.[297] Logically, it makes sense for groups who were integrally involved in the inception and formation of the rules to express their support for them.

Another interesting point is that the WSC, BIMCO, ICS and ECSA are all groups with shipowners as members. Thus the true position, it may be argued, is that the "carriers" support this regime. This may or may not be closely related to the freedom contract carriers will enjoy under volume contracts and suggests that carriers will find the rules beneficial to them and not necessarily towards shippers.

Furthermore, academic authors who have written supportive papers on the rules have often been involved in their formation, most notably Michael Sturley and Francesco Berlingieri, who have been personally involved in the formation of the rules in "various forms and in various forums" for a period spanning more than 35 years between them.[298] It makes sense that these authors would be unflinching in their support for the rules, and it is indeed very unlikely that they could view them with an unbiased eye.

Thus, while the rules have received support from states, industry representative organisations and academic authors, it is questionable whether these parties can view the existing instrument dispassionately, given that a number of them have been involved in the development of the rules. In a political context, some states appear to be taking the approach

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[295] University of Cape Town "CMI" (2010) Available: http://web.uct.ac.za/depts/shiplaw/cmi/cmi.htm (accessed 21 August 2010).
[296] NITL "Response" 1.
[297] Ibid.
[298] MF Sturley "Jurisdiction under the Rotterdam Rules" Available: http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20Michael%20Sturley%2023%20OKT29.pdf (accessed 15 August 2010).

of "We will wait and see what stance the United States and China take on signing and ratifying the Rules." So, while the rules have received glowing support, they may not be seen to be deserving of such.

7
Potential Implications of the Rotterdam Rules: A South African Perspective

The Rotterdam Rules are a convention that has the ability to affect the macro-environments of states and organisations. A macro-environment may be defined as follows:

> "[T]he broad condition which operates outside an industry and markets, the macro-environment exerts forces which are beyond the control of organizations which participate in the industry, and further has a major influence on the industry environment in which an organization has its sphere of operations."[1]

In order to assess the potential impact of the rules, it is necessary to consider how states may be affected from a political, economic, social, technological, legal and environmental standpoint.[2]

7.1 The Political Implications of the Rotterdam Rules

A number of governments, including those of the United Kingdom[3] and China,[4] are entering into consultation exercises with industry players, special interest groups and legal experts to establish whether or not it will be beneficial to these countries to sign and ratify the rules. Obviously, governments must consider how the rules will affect their economies, whether they will be advantageous in promoting their trades, and whether the benefits of the rules will outweigh any potential issues and risks.

A factor that may well influence a state to become a signatory to the rules is whether or not its top trading partners elect to sign and ratify the rules. It is quite evident that it will be simpler and less expensive if trading partners use the same regime to govern international maritime trade. For example, if country A trades predominantly with country B, and country B signs and ratifies the rules while country A does not, then should a dispute arise there will be significant issues in that the rules apply to both inbound and outbound carriage from a

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[1] L Louw and P Venter *Strategic Management: Winning in the Southern African Workplace* (2006) 81.
[2] Louw *Strategic Management* 84.
[3] Press Digest "United Kingdom: The arrival of the Rotterdam Rules" (2010) Available: http://en.portnews.ru/digest/1790/ Information Agency: Port News (accessed 10 September 2010).
[4] W Han "China: China Update – New Regulations on the Prevention and Control of Marine Pollution from Ships in China" (2010) Available: http://www.mondaq.com/article.asp?articleid=98072 (accessed 10 September 2010).

contracting state,[5] while under other international maritime regimes the rules will apply only to outbound carriage.[6] Thus if it is not specified in the contract of carriage which rules will apply when B is importing goods from A and a dispute arises, there may be a conflict between the parties as to which regime should apply. This will have the effect of creating a dispute over the jurisdiction, and may very well be costly to both parties in establishing which courts have jurisdiction to hear the matter as well as which regime should apply.

In addition, if the state in question is a member of the United Nations or, more importantly, participated in the United Nations Commission on International Trade Law's (UNCITRAL's) drafting of the Rotterdam Rules, that state may be more pressurised by the international community to sign and ratify the rules than other states who are not members or did not participate in the drafting of the rules.

Furthermore, states assert that they need to consult with special interest groups and industry participants in order to assess stakeholder needs and demands. This may be quite a taxing process, particularly if a state has members in rival opinion groups, such as in the European Shippers Council (ESC) and the International Chamber of Commerce (ICC), which have opposing viewpoints on the subject of the rules, as previously discussed.[7] Thus the process of state consultations looks to be long and involved.

As far as South Africa is concerned, there are many important aspects that should be considered by the government in determining whether or not to sign and ratify the rules. South Africa has been described as the "economic powerhouse" of Africa, leading the continent in industry, mineral output and in generating a large proportion of Africa's electricity.[8] South Africa boasts abundant natural resources, a stock exchange ranked 17th in the world,[9] coupled with well-developed legal and financial sectors.[10] South Africa is also known as "the gateway to Africa", and plays a significant role in supplying other African

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[5] Article 1.
[6] The Hague Rules, the Hague-Visby Rules.
[7] Chapter 4.
[8] SAinfo "South Africa's Energy Supply" (2010) Available: http://www.southafrica.info/business/economy/infrastructure/energy.htm (accessed 22 October 2010).
[9] SAinfo "JSE unveils Listing, BEE Plans" (2010) Available: http://www.southafrica.info/business/investing/opportunities/jse-listing.htm (accessed 22 October 2010).
[10] Brand South Africa "South Africa's Financial Sector" (2010) Available: http://www.southafrica.info/business/economy/sectors/financial.htm (accessed 22 October 2010).

countries with energy, relief aid, investment opportunities, transport and communications.[11] South Africa is, in addition, a member of the Southern African Development Community (SADC) and the Southern African Customs Union (SACU).[12] Principal foreign-policy objectives include promoting economic, political and cultural regeneration of Africa.[13] The New Partnership for Africa's Development (Nepad) aims to promote peaceful conflict resolution in Africa and to use multilateral bodies as platforms for ensuring that developing countries have a say in international issues.[14]

South Africa has one of the most considerable international presences in comparison to other African countries.[15] The country was a founding member of the League of Nations and rejoined the Commonwealth in 1994, as well as serving as the first president of the African Union (AU) from 2003 to 2004; it is also a member of the World Trade Organisation (WTO).[16] Owing to a trade deal, most of South Africa's products can enter the United States markets duty free under the African Growth and Opportunity Act (AGOA).[17] In addition, South Africa is a member of UNCITRAL until 2013.[18]

South Africa's top trading partner is currently the European Union (EU), which accounted for 28 per cent of the value of total South African trade flows in 2009.[19] China ranks as the largest "individual" country as a trading partner of South Africa, with a trade volume of R32.4 billion being conducted between the two countries in the first half of 2009.[20] In second place is the United States, followed by Japan, Germany and the United Kingdom.[21] It must also be noted that the United States and South Africa launched a "strategic" dialogue aimed at deepening cooperation between the two countries, and the United States provides

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[11] South African Consulate General "South Africa: Open for Business" (2010) Available: http://www.southafrica-newyork.net/consulate/openforbusiness.htm (accessed 22 October 2010).
[12] African Union (AU) "NEPAD Planning and Coordinating Agency" (2010) Available: http://www.nepad.org/ (accessed 22 October 2010).
[13] AU "NEPAD Planning and Coordinating Agency".
[14] AU "NEPAD Planning and Coordinating Agency".
[15] AGOA "Summary of African Growth and Opportunity Act" (2010) Available: http://www.agoa.gov/agoalegislation/index.asp (accessed 22 October 2010).
[16] AGOA "Summary of African Growth and Opportunity Act".
[17] AGOA "Summary of African Growth and Opportunity Act".
[18] United Nations Commission on International Trade Law "Origin, Mandate and Composition of UNCITRAL" (2010) Available: http://www.uncitral.org/uncitral/en/about/origin.html (accessed 10 October 2010).
[19] European Union "EU–South Africa Summit (Brussels, 28 September 2010)" (2010) Available: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/116717.pdf (accessed 22 October 2010).
[20] Radio Netherlands Worldwide (RNW) "China becomes South Africa's Biggest Trading Partner" (2009) Available: http://www.rnw.nl/africa/article/china-becomes-south-africas-biggest-trading-partner (accessed 5 September 2010).
[21] RNW "China becomes South Africa's Biggest Trading Partner".

assistance through the United States Agency for International Development (USAID) to aid South Africa in meeting its developmental goals.[22]

As South Africa is considered to be the African "powerhouse" and the "gateway" to the rest of Africa, it is quite possible that the country's decision to ratify or not to ratify the rules may influence other African countries. African countries which have already signed the convention to date include Cameroon, Gabon, Ghana, Guinea, Madagascar, Mali, Niger, Nigeria, Senegal and Togo.[23] Should South Africa sign, many other African countries may also be persuaded to follow suit.

South Africa must also consider the decision their major trading partners take on whether or not to adopt the rules: whereas the United States has voiced their full-throated support of the rules and signed them at the opening ceremony, China, Japan, Germany and the United Kingdom are still conducting discussions on whether or not to sign and ratify the rules.

A further factor to consider is current government maritime policy. South Africa's Department of Transport states that, given South Africa's geographic location relative to its main trading partners, it is imperative that maritime transport is efficient, innovative and reliable, because as transportation is a significant element in the pricing of South African goods.[24] Efficient transport services and the safe and timely arrival of freight are necessary for competitive and successful trading.[25] The aim of South Africa's maritime transport policy is to create a policy environment that facilitates the growth and development of the maritime transport sector to its full potential, in order to support economic growth and sustainable social development.[26]

The Department of Transport acknowledges that almost all of South Africa's trade, by volume and value, is seaborne.[27] Tsietsa Mokhele, Chief Executive Officer of the South

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[22] United States Department of State "Background Note: South Africa" (2010) Available: http://www.state.gov/r/pa/ei/bgn/2898.htm (accessed 10 October 2010).
[23] United Nations "Transport and Communications" (2010) Available: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-8&chapter=11&lang=en (accessed 30 September 2010).
[24] South Africa, Department of Transport "Draft South African Maritime Transport Policy 2008" (2008) Available: http://www.info.gov.za/view/DownloadFileAction?id=88424 (accessed 10 October 2010) 7.
[25] South Africa, Department of Transport "Draft South African Maritime Transport Policy 2008".
[26] South Africa: Department of Transport "South African Maritime Policy" 11.
[27] South Africa, Department of Transport "South African Maritime Policy" 12.

African Maritime Safety Authority (SAMSA), comments that South Africa is a "trade-dependent economy", with 58 per cent of the country's gross domestic product (GDP) coming from trade, of which 98 per cent is seaborne on merchant fleets.[28] However, these 430 million tons of seaborne freight are transported by a fleet which is predominantly foreign registered and controlled, and which employs more than 200 000 seafarers, of which fewer than 1 000 are South African citizens.[29] This is a driving factor behind South Africa's government recognising transport as one of five "priority areas" for social and economic development.[30]

The Department of Transport states that there are a number of crucial needs at present in the South African maritime industry.[31] These include:

- The need for a firm shipyard industrial base.
- The efficient, visible and reliable transportation of cargo and passengers.
- Flexibility to allow for new technologies, business models and changing market conditions.
- The advancement and protection of national interests and the preservation and improvement of citizen employment participation.[32]

Consequently, South African maritime policy aims to "ensure the competitiveness of South Africa's international trade through efficient and reliable maritime supply-chain systems".[33] The goals are to "grow South Africa's maritime presence and influence domestically and internationally, to ensure compliance with multilateral instruments, to increase the participation of South Africans in the industry and to encourage South African ownership of vessels and promot[e] the increase of ships on the South African flag as well as provid[e] a clear framework so that investors and funders can participate in maritime projects and so grow the industry in South Africa".[34]

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[28] SAMSA "Custodians of South Africa's Maritime Legacy" *Sawubona* – South African Airways In-flight Magazine (September 2010) 80.
[29] Ibid.
[30] South Africa, Department of Transport "South African Maritime Policy" 13.
[31] South Africa, Department of Transport "South African Maritime Policy" 15.
[32] Ibid.
[33] South Africa, Department of Transport "South African Maritime Policy" 16.
[34] Ibid.

It is apparent that the South African government's policy on maritime trade is to increase South Africa's competitiveness on a broad scale. It is particularly risky for South Africa to be 100 per cent dependent on foreign carriers for 98 per cent of the connection to the country's markets.[35] This does not have the effect of promoting investment or of stabilising the economy. In addition, there are approximately 1.5 million seafarers in the world fleet, and a proportionate target for South Africa would be over 40 000 jobs,[36] thus the growth and stimulation of the South African maritime sector may greatly aid in reducing unemployment levels. It is past time that South Africa became more involved in the maritime sector, and the multimodal and modern nature of the rules may help to realise these policy objectives.

7.2 The Economic Implications of the Rotterdam Rules

The Rotterdam Rules may have serious economic implications for all states internationally – as a new international legal regime may affect local economies, given the growth of globalisation. Factors that may be considered are the current economic situation of states, the volume of trade through their territorial waters, the geographical importance of their ports, their import and export ratios, national production levels, foreign investment, taxation levels, as well as exchange rates.

According to Chasomeris, the commercial shipping policy of a state is "reflected by the legislative, administrative and economic measures that the state uses to regulate shipowning and the operation of vessels in the national economy and international markets for sea transport"; and whether these measures may deal with its own merchant fleet or be directed at foreign shipping, the effect will be felt domestically and internationally.[37] Thus, as Floor submits, national shipping policies are matters of domestic and international concern.[38] Marlow in turn comments that the potential benefits of a shipping industry include a contribution to the national economy through balance of payments, employment opportunities to seafarers and shore-based management activities, its value to shipping centres, and the resultant flow of taxes to the national government.[39] It is therefore quite

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[35] SAMSA "Custodians of South Africa's Maritime Legacy" 80.
[36] Ibid.
[37] M Chasomeris "South Africa's Maritime Policy and Transformation of the Shipping Industry" (2005) Available: http://www.essa.org.za/download/2005Conference/Chasomeris.pdf (accessed 1 October 2010) 4.
[38] B Floor *Report of the Committee of Enquiry into a National Maritime Policy for the Republic of South Africa (Floor Report)* Annexure C: Clause 2.7, (1993) Republic of South Africa.
[39] P Marlow "Ships, Flags and Taxes" in CTh Grammenos (ed) *The Handbook of Maritime Economics and Business* (2002) 527.

evident that shipping policy and economics are closely linked, and a policy which embraces free trade and maritime activities will be beneficial to an economy.

Globalisation

Globalisation has increased exponentially over recent decades,[40] and refers to "the increase in international trade and cultural exchange, where people around the world are connected by transport and quick and effective communication of information".[41] National economies are increasingly becoming interdependent, with the fast and efficient flow of goods, global communication and travel.[42] Free trade between states leads to a more efficient allocation of resources, with all nations benefitting from increased trade, which leads to lower prices, higher levels of employment and increased production.[43] Thus it is clearly evident that if, ideally, all nations were to operate under the same international transport regime which took into account all aspects of globalisation, trade costs would be minimised and legal certainty would increase.

Current economic situation of states

Trade has positive effects on economic development,[44] and industrialised countries dominate world trade.[45] All states are seeking to produce the economic output of goods and services that meets the demand for such, both nationally and internationally. A new legal regime such as the Rotterdam Rules which seeks to streamline trade through its multimodal nature, may be less beneficial to some states than to others. This will be the case particularly should a state's local rail and road networks be inefficient, insufficient or badly maintained. Should a state not be a signatory to an international convention which covers road or rail transport and it signs and ratifies the rules, this will have the effect that the limits of the rules will apply in

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[40] F MacDonald and J Midgley "Introduction: Globalization, Social Justice and Social Welfare" (2007) Available: http://findarticles.com/p/articles/mi_m0CYZ/is_2_34/ai_n27265531/ (accessed 22 October 2010).
[41] S Gallacher "The Economic and Social Impacts of Globalisation: New Zealand's Place in a Multilateral Rules-based Trading System" Available: http://www.minterellison.co.nz/New%20Zealand%20International%20Review.pdf (accessed 15 September 2010).
[42] Gallacher "Economic and Social Impacts of Globalisation".
[43] Gallacher "Economic and Social Impacts of Globalisation".
[44] DR Appleyard, AJ Field and SL Cobb *International Economics* 6 ed (2008) 426.
[45] Appleyard *International Economics* 3.

respect of liability for loss, damage or delay of goods,[46] to international maritime, road and rail carriage of goods performed in that state. These limits may exceed the limits contained in the states' domestic laws. This could be a serious obstacle for landlocked countries that have to rely on transit countries for their exports and imports to reach their borders. In addition, as the rules contain extensive provisions regulating "delay",[47] carriers may elect to make use of states with the most efficient ports with up-to-date cargo-handling tools so as to ensure that cargo arrives at its destination on time.

Michael Avery remarks that the freight system in South Africa is "fraught with inefficiencies" at both system and firm levels.[48] This is due to infrastructural shortfalls and mismatches, the inappropriate structure of the freight sector, the lack of integrated planning, poor communication between parties and a deficient skills base as well as the current regulatory framework being incapable of resolving issues within the industry.[49] Comments such as these make it quite evident that while South Africa may benefit from signing and ratifying the rules in that sea- based freight would be subject to an up to date international system, it is equally evident that signing and ratifying the rules will not magically correct the deficiencies in South Africa's freight system, which, it appears, may be "fixed" only with extensive government intervention.

Volume of trade through territorial waters and geographical importance of ports

Traditionally, a major shipping route has passed through the Suez Canal.[50] However, given the recent unrest in Yemen, Somalian piracy and the war in Iraq, and the local and physical constraints of the shores such as water depth and existing facilities and infrastructure, an increasing number of ships are now avoiding that passage and taking the longer route around Africa.[51]

Thus the volume of trade in African waters has increased. Since African ports may be used to discharge cargo from one vessel and load it onto another to complete a journey, it must be

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[46] Article 4.
[47] Articles 4, 17 and 21.
[48] M Avery "Moving SA, Again" (2006) 6(7) *Without Prejudice* 50.
[49] Ibid.
[50] United Nations Trade and Development Secretariat (UNCTAD) "Review of Maritime Transport 2009" (2009) Available: http://unctad.org/en/docs/rmt2009_en.pdf (accessed 10 September 2010) 164.
[51] UNTAD "Review of Maritime Transport" 163.

recalled that the rules apply to inbound and outbound carriage from contracting states as well as when goods are loaded or discharged in a contracting state.[52] This may create issues for states who participate in getting goods to their destination, but which are not signatories to the rules. An example follows which illustrates the above point.

The United States, which has already signed the rules, ratifies them, and ships goods to Madagascar, which has also signed the rules, and the goods are transported by ship from New York to Cape Town in South Africa, which has not signed and ratified the rules. A South African trucking company moves the goods by road from Cape Town harbour to Durban harbour in South Africa. The goods are again loaded onto a different ship and continue their journey to Madagascar where they are finally delivered. The contract of carriage between the US and Madagascan parties will be governed by the rules as it is international carriage as foreseen by the rules. However, should damage occur to the goods during the South African "land-leg" which is conducted by a South African transporter, and given that South Africa does not use an international convention to regulate carriage by road, then the rules may apply if the road carrier is considered to be a "performing party", and thus the South African carrier may find themselves liable under the rules, which may be completely out of their experience.

However, while more vessels may be travelling around the Cape of Good Hope, there are good reasons for them to choose to refuel or dock in countries other than South Africa's ports. This is because South Africa's ports are among the most expensive ports to use in the entire world.[53] South Africa's ports are operated as a monopoly by Transnet[54] and while cargo duties are unique to South Africa, based on 2006 data, dues for an average container vessel offloading or loading goods at Durban harbour (South Africa's largest port) were US$306 000, and if terminal handling costs are included, the average sum paid by carriers to use the port facilities were US$488 000 per cargo.[55] This is between 80 and 170 per cent higher than the costs incurred at major European ports, and eight times more expensive than costs at Buenos Aires, Latin America's most expensive port.[56] This is one of the reasons that the International Finance Corporation's study "*Doing Business 2010*" ranks South Africa

[52] Article 5.
[53] S Thomas "Ports: Pay Up and Wait" *Financial Mail* (20 August 2010) 45.
[54] Ibid.
[55] Ibid.
[56] Ibid.

148th globally in terms of cross-border trade efficiency.[57] Grindrod freight services Managing Director, Dave Rennie, comments that "high costs would be acceptable if coupled with high levels of efficiency" – sadly, this is not the case in South Africa's ports.[58]

In shipping, "port efficiency" refers to the turnaround time of a vessel in harbour, and in a container port this is heavily dependent on the speed with which containers are loaded and offloaded.[59] The Automotive Industry Development Centre (AIDC) which promotes vehicle manufacturers' global competitiveness, states that an average ship incurs costs of around US$35 000 per day while waiting for a berth or in a harbour.[60] The costs of delays have traditionally been passed on to customers. South African ports efficiency levels compared to similar ports globally is only between 50 and 70 per cent.[61] Part of the reason for this is low container handling speeds; in 2009 the Durban container terminal achieved an average of 23 units per crane hour, which is significantly below the international average of 35 units per hour.[62] This problem has been exacerbated by Transnet's freight rail's inability to meet demand, and has meant that the majority of customers use more expensive road transport to move cargoes.[63] This has in turn resulted in excessive congestion at harbours. Fanie Pretorius, the chairman of the South African Shipping Council (SASC), points out that it can take a truck up to six hours to move in and out of Durban harbour.[64] However, the rate of growth of container traffic at Durban harbour illustrates how important a port it is: besides generally handling two-thirds of South Africa's container traffic, traffic in this port has been growing at between 6 and 8 per cent a year, and by 7.8 per cent in the first four months of 2010.[65]

The fact that carriers are still willing to use South Africa's ports even though they are quite clearly inefficient and overpriced illustrates how important South African harbours are for international trade. If South Africa chooses to sign and ratify the rules, it may be seen by the international community as a small step towards bringing South Africa's ports in line with international expectations and standards; which may be beneficial for South Africa's trade and international image.

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[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.

Import and export ratios

As mentioned previously, the rules apply to contracts of carriage to and from contracting states.[66] Consequently, whether or not a state adopts the rules, it is almost certain that the rules will apply to some contracts of carriage in which goods are delivered or discharged in any state, so long as the "exporting state" has signed and ratified the rules. The frequency with which a state that does not sign the rules will be exposed to the rules will depend on their import and export ratios. Obviously, a state with a large number of trading partners and high levels of importing and exporting of goods will be more likely to encounter the rules than a state with few trading partners.

National production levels

As already stated, the rules apply to both inbound and outbound carriage from a contracting state.[67] If a state has high levels of production of goods, companies will engage in international trade to sell surplus goods in order to make a profit. As previously discussed, states which have high levels of trade with many trading partners are certain to be affected by the rules, whether or not they elect to sign and ratify the rules themselves.

Foreign investment and taxation levels

Many countries encourage foreign investment as it is can be a means of fostering economic growth and high levels of profits. The United States engages in extensive foreign investment, with more than US$2 070 billion dollars being invested in foreign economies during 2005, of which only US$24.3 billion dollars have been invested in African economies.[68] Foreign investment may benefit a host country as it may lead to the increased output of goods, higher wages and employment levels and increased tax revenues, and allows for scale economies to be realised.[69] A number of factors encourage foreign investment: these are if the host country has large or growing markets, a high per capita income, access to raw materials or mineral deposits, low relative wages, tariffs, and risk diversification.[70] Obviously, if a state wishes to

[66] Article 5.
[67] Article 5.
[68] Appleyard *International Economics* 228.
[69] Appleyard *International Economics* 237.
[70] Appleyard *International Economics* 231.

encourage foreign investment, signing the rules will be a good idea if they are signed and ratified by a number of large nations that are involved in foreign investment initiatives. This is due to the fact that those nations will then be familiar with the legal regime used for the import and export of goods by sea. Taxes may also be used to encourage foreign investment and can be used by the tax authorities to entice multinational and other firms to locate to their countries through tax initiatives and lower tax rates than in other states.[71]

South Africa, Botswana, Lesotho, Swaziland and Namibia have an agreement through the South African Customs Union (SACU) to allow goods to be freely exchanged between their countries.[72] If, for example, Namibia signs and ratifies the Rotterdam Rules, shippers transporting goods to Namibia may be liable for higher damages under the increased limits of the rules than those which South Africa would apply to Namibian goods, under the Hague-Visby Rules – which will be detrimental to South African shippers. However, it must be noted that under the SACU South Africa has historically subsidised other member-states in return for the right to "steer" industrial policies and regional trade and set tariffs,[73] and as SACU's income accounts for over half over Lesotho's and Swaziland's and more than 20 per cent of Namibia's and Botswana's budget revenue,[74] it is expected that these countries would not sign and ratify the rules without South Africa's blessing. However, given that Botswana, Lesotho and Swaziland have all recently signed individual Economic Partnership Agreements (EPAs) with the EU in contravention of SACU's rules and that South Africa and Namibia object strenuously to these,[75] what is "expected" of member countries is not always the result that occurs.

Exchange rates

The "rate of exchange" refers to the relative price of foreign versus domestic goods.[76] The exchange rate affects a state's competitiveness, as a low value of a domestic currency makes

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[71] P Black, E Calitz and T Steenkamp *Public Economics* 4 ed (2008) 147.
[72] Black *Public Economics* 148.
[73] M Cohen "SACU Members Gather to Iron Out Differences" (2010) Available: http://www.busrep.co.za/index.php?fSectionId=561&fArticleId=5557307 (accessed 22 October 2010).
[74] Cohen "SACU Members Gather".
[75] Cohen "SACU Members Gather".
[76] F Mishkin *The Economics of Money, Banking, and Financial Markets* 8 ed (2007) 434.

foreign goods more expensive to consumers in that state, but, conversely, makes that state's goods cheaper in comparison to other states' domestic products and so increases the level of that state's exports.[77] Factors which influence the exchange rate include expected return on foreign deposits, expectations regarding the price level, inflation, trade barriers, productivity, import demand, export demand, and the supply of money.[78] The rules contain higher limits of liability than any other maritime instrument, and because of this carriers may wish to increase their level of insurance. If carriers need to increase their insurance premiums, they will in turn charge higher freight rates. Consequently, shipping will become more expensive for shippers, and ultimately this increase in price will make goods more expensive, so the cost will be borne by the consumers of goods. This may have the effect that the export demand for goods from countries which sign and ratify the rules may decrease; on the other hand, import levels may increase for those states from other countries which ship their goods more cheaply.

It must be noted that the exchange rate is an international "hot-topic" at the moment, with fears that the "currency-war" at play at the moment (the United States and China being the main contenders) may lead to "trade-wars"[79] that would obviously be detrimental to global trade.

7.3 Possible Social Implications

The rules may also indirectly have a social impact on the world too, because the limits contained in the rules are significantly higher than those in any other existing maritime instrument and the rules also contain provisions regarding liability for delay. This is novel, and could result in carriers' paying higher rates of insurance in order to meet potential claims. This in turn will cause carriers to raise their freight rates, shippers will need to pay more to transport their goods, and ultimately goods which are more expensive will reach the consumer at the end of the line.

Goods which are slightly more expensive, whether or not due to increased shipping rates, may have no effect on consumers with larger purchasing power and a decent income.

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[77] Ibid.
[78] Ibid.
[79] G Steyn "Perils of Protectionism" (2010) Available: http://www.fin24.com/Columnists/Greta-Steyn/Perils-of-protectionism-20101019 (accessed 22 October 2010).

However, people affected by poverty may find that they can no longer afford the same basket of goods as they could previously, and so they may look for cheaper substitutes. If none are available, they will have to reduce their consumption, which has the potential to increase starvation rates globally.

The international prices of basic food commodities have been steadily on the rise since 2001, and were accelerating during 2007 and 2008, according to the Food and Agricultural Organisation of the United Nations (FAO) in a joint paper with the International Fund for Agricultural Development (IFAD) and the United Nations World Food Programme (WFP).[80] This has been due to poor harvests as a result of extreme weather, increasing input and transport costs, the demand for crops as biofuels, a rising demand for foodstuffs, trade policies, climate change, oil depletion and water scarcity.[81] In addition, most institutions predict that the average prices of food commodities over the next ten years will be higher than over the previous ten years.[82] This prediction is made on the basis of the persistence of the demand for biofuels, the changing structure of food demand in which meat and dairy products are replacing starches in upper-income households, as well as climate change; which is expected to reduce food production in warmer climates.[83]

These rising prices will affect states differently depending on whether they predominantly export or import food.[84] Obviously, countries that export food will benefit and experience increased levels of trade, whereas countries that import a lot of food will be faced with a large food import bill.[85] What is particularly worrying in this scenario is that the majority of net food-importing countries are developing countries: almost all African countries are net importers of food.[86] As food imports are essential for many developing countries, increasing food prices and export restrictions as well as increasing export taxes, bans and restrictions have all contributed to exacerbating tightness in world grain markets.[87] The International Monetary Fund (IMF) calculates that in the years between 2000 and 2006 the direct impact of

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[80] Food and Agricultural Organisation of the United Nations (FAO), International Fund for Agricultural Development (IFAD) and the United Nations World Food Programme (WFP) "High Food Prices: Impact and Recommendations for Action" (2008) Available: http://www.uneca.org/nepad/RCM9/High-food-prices.pdf (Accessed 15 September 2010) page 1.
[81] FAO, IFAD and WFP "High Food Prices" 2.
[82] Ibid.
[83] Ibid.
[84] FAO, IFAD and WFP "High Food Prices" 3.
[85] Ibid.
[86] Ibid.
[87] Ibid.

rising food prices on inflation was on average 26.6 per cent on the world, but was a staggeringly high 46.5 per cent average in Africa.[88]

The impact of food prices on households is generally group-specific, with those lower-income groups being more susceptible to higher food prices than higher-income households.[89] This is due to the fact that lower-income groups typically spend a larger portion of their income, in some cases almost all of their income, on food purchases.[90] Low-income groups include the urban poor, rural landless, small-scale subsistence farmers and pastoralists.[91] For low-income households, higher food prices will have an immediate impact on the quantity and quality of food these households are able to consume.[92] This will reduce the size of these households' meals and the variety of food they can consume, with less income being spent on non-staple food, generally meat and dairy products.[93] In addition, this may lead to households' reducing expenditure on other basic needs such as education or health.[94] Furthermore, as high food prices and the increasing demand for bio-fuel crops increase, land will become more valuable which may have the effect that poor rural families without tenure rights are pushed off their land.[95] This is sure to present a quandary for countries which have embarked on land redistribution programmes with the aim of returning "cultural land" to the poor and landless. In addition, countries with a high unemployment rate such as South Africa are sure to feel the impact of these higher food prices.

The Human Development Network (HDN) and the Poverty Reduction and Economic Management (PREM) Network in conjunction with the World Bank, comment that while food and fuel prices are decreasing from their recent peaks, it is predicted that they will remain high over the medium term.[96] Furthermore, that while the number of poor is increasing due to the food crisis, the most profound impact will be felt by those individuals who are already poor and who face falling deeper into poverty, because the substitution of food for health and education will have long-term effects on prospects for employment and

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[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] FAO, IFAD and WFP "High Food Prices" 4.
[93] Ibid.
[94] Ibid.
[95] Ibid.
[96] Human Development Network (HDN), Poverty Reduction and Economic Management (PREM) Network and the World Bank "Rising food and fuel prices: Addressing the Risks to future generations" (2008) Available: http://siteresources.worldbank.org/DEVCOMMEXT/Resources/Food-Fuel.pdf (accessed 13 September 2010) 2.

medical costs.[97] Higher food prices also have the potential to lead to "distress sales" of worthwhile assets, including household equipment, furniture and bedding, livestock and vehicles, which will aggravate chronic poverty.[98] While the direct impact of rising oil prices is generally less than that of rising food prices, the indirect effects can be very significant – while in the typical household budget fuel expenses rank well below food expenses, the increase in the price of fuel coupled with higher food prices will cause households to choose cheaper, but sometimes more harmful fuels such as biomass. This will mean people will have to spend more hours unproductively collecting fuel, which will result in increased indoor air pollution and deforestation in densely populated rural areas.[99] In areas which are predominantly savannah, people will have to search further and harder for biomass products to use as fuel.

Eating less and switching to lower-cost coarse cereals will have irreversible nutritional consequences, particularly for vulnerable people such as pregnant woman, infants, young growing children and the elderly.[100] Malnourishment has the potential to affect both physical and mental development, and so it should be limited at all costs.[101] The deterioration of household food security has dramatic effects on people's livelihoods. This may include a change in livelihood activities, reduced expenditure on non-essential food items, reduced expenditure on education, increased use of credit and growing indebtedness, the selling of assets, and engaging in illegal or hazardous activities in order to obtain income for food.[102] These will have a great impact on countries which already suffer from high rates of crime, such as South Africa. People may also increasingly migrate to urban areas in the hope of obtaining some sort of employment or more opportunities to engage in illegal activities. In South Africa, given the high levels of unemployment and the fact that there is less employment due to the implementation of a mandatory minimum wage,[103] the urban migration of people will most probably only result in higher crime levels.

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[97] HDN, PREM and the World Bank "Food-fuel" 3.
[98] Ibid.
[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] HDN, PREM and the World Bank "Food-fuel" 4.
[103] T Sowell "Something for Nothing: Living Wage and Unemployment" (2006) Available: http://www.capitalismmagazine.com/markets/business/4591-Something-for-Nothing-Living-Wage-and-Unemployment.html (accessed 22 October 2010).

In addition, as food costs increase, people are forced to change their eating habits to include cheaper and lower-quality foods, and will reduce the diversity of the food they consume. For individuals without excess income, this will result in poor nutrient intake, reduced size and number of meals, the consuming of wild foods, immature crops and seed stocks, begging for food, skipping entire days of eating and consuming items such as insects.[104] This will have a substantial impact on the health of these individuals, as the depletion of micro-nutrients results in lowered immunity, a potentially life-threatening situation for people with Aids and HIV.[105] People will become more underweight and pregnant woman will remain malnourished during pregnancy, which will affect the foetus, and wasting will increase. Susceptible groups such as children may be so severely affected that they will die.[106]

Sub-Saharan Africa (SSA) already has a rate of 24 per cent of children stunted due to malnutrition.[107] The FAO estimates that malnourishment levels are rising globally due to the increase in food prices, from 848 million in 2004 to 923 million in 2007, increasing to 967 million in 2008.[108] It is obviously the very poor who and particularly developing countries that are most drastically affected, accounting for 907 million of those involved.[109] In SSA alone, there were an additional 24 million people who were malnourished in 2007 as compared to previous years.[110] Indeed, most of the increase in chronic hunger since the World Food Summit benchmark period of 1990–1992 has occurred in SSA, where the absolute number of hungry people increased by 43 million, from 169 million to 212 million in 2003–2005.[111] SSA also has the second largest number of children globally who are under the age of five years and undernourished.[112]

While economic growth aids in reducing undernourishment, analyses suggest that economic growth without specific measures to combat hunger, has the result that a large number of people, particularly in rural areas, will remain hungry for a long time.[113] In addition, a study

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[104] HDN, PREM and the World Bank "Food-fuel" 4.
[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Food and Agricultural Organization of the United Nations (FAO) "Briefing Paper: Hunger on the Rise" (2008) Available: http://www.fao.org/newsroom/common/ecg/1000923/en/hungerfigs.pdf (accessed 20 September 2010).
[110] FAO "Hunger on the Rise".
[111] FAO "Hunger on the Rise".
[112] FAO "Hunger on the Rise".
[113] FAO "Hunger on the Rise".

conducted by the FAO contained in "The State of Food Insecurity in the World (2004)" concludes that the loss of productivity due to people whose physical and cognitive abilities are impaired by a low birth weight, malnutrition and the lack of essential vitamins can reduce the GDP of a developing country by between 5 and 10 per cent.[114] According to the FAO, the countries hardest hit by the food shortage are in Africa, and will require at least US$30 billion annually to ensure food security and revive agricultural systems.[115]

Crude oil prices also have an impact on countries that import oil. South Africa imported more than 96 per cent of crude oil for its domestic requirements in 2003; oil also makes up 6 per cent of all imported items into this country.[116] The economic impact of an oil price increase results in a transfer of income to the exporting country, reduces the real national income of the importing country and limits the ability of the citizens of that country to purchase other goods and services.[117] As world oil sales are denominated in United States dollars, the exchange rate also has an effect on how much can be purchased.[118] The South African rand is traditionally weaker than the dollar, which means that more rands are paid for crude oil, and consequently the fuel prices in South Africa are quite high[119] in comparison to those paid in the United States.[120] Given South Africa's dependence on imported crude oil, the country is exposed to increased input prices as well as imported inflation.[121] In the absence of a strong South African rand, a high oil price leads to increased interest rates, further limits consumer expenditure and halts the growth of disposable income.[122] Again, it is the poor who are most affected as the price of fuel rises, because lower-income houses in South Africa use paraffin as their predominant source of fuel.[123]

Stuart Gillespie states that the increase in food prices is driven by "rising energy prices, subsidized biofuel production, income and population growth as well as increasing levels of

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[114] FAO "Hunger on the Rise".
[115] FAO "Hunger on the Rise".
[116] JC Nkomo "Crude Oil Price Movements and their Impact on South Africa" (2006) 17(4) *Journal of Energy in Southern Africa (JESA)* 25.
[117] Nkomo (2006) 17(4) *JESA* 28.
[118] Nkomo (2006) 17(4) *JESA* 29.
[119] Ibid.
[120] Gasbuddy "Find Local Gas Prices" (2010) Available: http://gasbuddy.com (accessed 22 October 2010).
[121] Nkomo (2006) 17(4) *JESA* 29.
[122] Nkomo (2006) 17(4) *JESA* 30.
[123] Ibid.

urbanisation".[124] Whereas the food supply is impaired by land and water constraints, underinvestment in rural infrastructure and agriculture, a lack of access to the necessary inputs and weather disruptions.[125] In addition, hunger and HIV often coexist – 22 of the 30 "high-risk countries" in need of external food assistance are in SSA, many of which are suffering from HIV as a hyper-epidemic.[126] Adults living with HIV require between 10 and 30 per cent more energy than before they were infected, while children require up to 100 per cent more in order to maintain an adequate standard of living.[127] Consequently, high food prices mean that many of these people, who are often suffering from poverty, cannot afford to meet their dietary needs. This may lead to more frequent and severe opportunistic infections, which will in turn lead to a more rapid progression to Aids and an increased mortality rate.[128] Further, for people living with HIV who are on antiretrovirals (ARVs), nutrition is important in order to increase treatment adherence, as many negative effects of these medicines are reduced if they are taken with food; in addition, these medicines often create a heightened appetite.[129] In addition, people who need to travel to get their medicines may choose instead to buy food with their "travel money", and people who are receiving treatment in urban areas may migrate back to rural areas when they can no longer afford to live in a city.[130] People who do not comply with treatment adherence may develop viral resistance to first-in-line drugs, and studies show that people who begin treatment when they are undernourished have much lower survival rates.[131] While governments are attempting to help these people through food aid, the rising prices of foodstuffs have made this more difficult – in South Africa a feeding programme for orphans and vulnerable children is cutting back on the quality and quantity of the food supplied as a consequence of high food prices.[132]

Research conducted in South Africa has revealed that 60% of the population is worried about the recent economic crisis, which is causing a dramatic change in their buying patterns.[133] Indeed, 79% of South Africans report having experienced tangible consequences of the

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[124] S Gillespie "Food Prices and the Aids Response: How They are Linked and What can be Done" (2008) Available: http://programs.ifpri.org/renewal/pdf/RFbrief01.pdf (accessed 25 September 2010).
[125] Gillespie "Food Prices and the Aids Response".
[126] Gillespie "Food Prices and the Aids Response".
[127] Gillespie "Food Prices and the Aids Response".
[128] Gillespie "Food Prices and the Aids Response".
[129] Gillespie "Food Prices and the Aids Response".
[130] Gillespie "Food Prices and the Aids Response".
[131] Gillespie "Food Prices and the Aids Response".
[132] Gillespie "Food Prices and the Aids Response".
[133] J Simpson "SA Consumer Research Reveals Recessionary Buying Patterns" (2009) Available: http://www.bizcommunity.com/Article/196/168/35914.html (accessed 25 September 2010).

economic crisis, and a further 76% state they are now more cautious with their spending.[134] In addition, approximately 20% of South African land is arable, and susceptible to prolonged droughts[135] – South Africa also lacks important arterial rivers and lakes and requires extensive water conservation measures.[136] The HIV/Aids prevalence rate in South Africa was 28% in 2007, which means more than 5.7 million people are currently living with HIV/Aids in the country.[137] GDP, or the real growth rate, was −0.05 % in 2009, 24% of the population was unemployed in 2009 and 50% of South Africans live below the poverty line.[138]

The South African government, like many other developing countries, will be forced to assess whether the probable increase in trade costs which could result from the Rotterdam Rules, as well as predicted increased food prices and a serious problem with HIV/Aids, will make it worth their while and whether it will be affordable for the state to ratify the rules. This will have to be balanced against the probable benefits of the rules, such as increased trade.

7.4 The Technological Implications of the Rotterdam Rules

The fact that the rules no longer contain an exception for "nautical fault",[139] unlike all existing maritime conventions, coupled with the fact that liability for delay is now regulated in the rules, means that carriers will find it even more pertinent not to deviate from their course and to ship goods in as fast a time as possible so as not to incur liability for delay.

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[134] Simpson "SA Consumer Research".
[135] United Nations Environment Programme "Southern Africa and Land Resources" (2008) Available: http://www.eoearth.org/article/Southern_Africa_and_land_resources (accessed 22 October 2010).
[136] Africa Review "South Africa Country Profile" (2009) Available: http://www.africareview.com/Country%20Profiles/-/979196/983060/-/d6c78az/-/index.html (accessed 22 October 2010).
[137] AVERT "South Africa HIV & AIDS statistics" Available: http://www.avert.org/safricastats.htm (accessed 22 October 2010).
[138] Mail&Guardian online "South Africa's GDP 'will get worse before it gets better" (17 March 2009 – online edition) Available: http://www.mg.co.za/article/2009-03-17-south-africas-gdp-will-get-worse-before-it-gets-better (accessed 22 October 2010).
[139] Article 17.

As nautical fault is no longer an accepted reason for a carrier to stray from his course, it is imperative that the carrier does not commit any errors in navigation. This means that carriers will have to invest in sophisticated navigation and global positioning systems, if they have not already done so, and in addition may have to consider a back-up system in case an error occurs with the first system.

In addition, as electronic commerce is now accepted and regulated by the rules,[140] carriers will have to ensure that their communication systems and software are up to date and reliable. States signing the rules will also need to ensure that their telecommunications networks are able to cope with the needs of electronic commerce, which may be an issue for some poor states, particularly in Africa. South Africa currently has the most sophisticated telecommunications network in Africa[141] but, even then, it does not compare to the sophistication and reach of most developed states' communication networks.

Furthermore, owing to the prospect of being held liable for delay, carriers will be willing to use only those ports that are reliable, that have sufficient infrastructure and that do not have excessive turnaround times as the carrier will be liable for delays. Consequently, carriers may avoid some states whose ports are insufficient for their requirements, which will affect the volume of port traffic and income experienced by these states. Alternatively, carriers may demand higher freight rates from customers who ship to these ports.

7.5 Legal Implications of the Rotterdam Rules

Before states sign and ratify the rules, they should consider the way in which their legal systems may be influenced by them. Points for consideration include current shipping legislation, as well as legislation governing road and rail transport if that state is not party to an international convention (or conventions) which governs such, due to the multimodal regulatory nature of the rules. States may also consider industry regulations, competition regulations, regulatory bodies and soft law, that is, codes of conduct that exist in the transport industry.

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[140] Chapter 3.
[141] SAinfo "South Africa's Telecommunications" (2010) Available: http://www.southafrica.info/business/economy/infrastructure/telecoms.htm (accessed 22 October 2010).

In South Africa, there are a substantial number of legislative Acts which deal with maritime transport and related matters. These include the Merchant Shipping Act,[142] the South African Maritime Safety Authority Act,[143] the Marine Traffic Act,[144] the Ship Registration Act,[145] the Carriage of Goods by Sea Act,[146] the Sea Transport Documents Act,[147] the Legal Succession to the South African Transport Services Act,[148] the National Ports Act,[149] the Sea Shore Act,[150] the Maritime Zones Act[151] and the Admiralty Jurisdiction Regulation Act,[152] to name but a handful.

The legislation that will be most prominently affected in South Africa by the rules are the Carriage of Goods by Sea Act[153] and the Sea Transport Documents Act.[154]

South Africa passed domestic legislation giving effect to the Hague Rules in 1951;[155] this legislation was updated in 1986, in the Carriage of Goods by Sea Act (COGSA),[156] to which the Hague Rules as amended by the Brussels Protocol of 1968 – the Hague-Visby Rules – are attached as a Schedule. COGSA increased the limits of liability, which were in turn increased in 1997 by the Shipping General Amendment Act.[157]

COGSA is still used to regulate South African shipping today. COGSA contains eight sections with which the Hague-Visby Rules must be read. Four of these sections contain formalities: are sections 3A–6, which merely state that the Act applies to Prince Edward Islands,[158] that the state is bound by the Act,[159] that sections 307–311 of the Merchant

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[142] Act 57 of 1951.
[143] Act 5 of 1996.
[144] Act 2 of 1981.
[145] Act 58 of 1998.
[146] Act 1 of 1986.
[147] Act 65 of 2000.
[148] Act 9 of 1989.
[149] Act 12 of 2005.
[150] Act 21 of 1935.
[151] Act 15 of 1994.
[152] Act 105 of 1983.
[153] Act 1 of 1986.
[154] Act 65 of 2000.
[155] Chapter VIII of the Merchant Shipping Act 57 of 1951.
[156] Act 1 of 1986.
[157] Act 23 of 1997.
[158] Carriage of Goods by Sea Act 1 of 1986 s 3A.
[159] Carriage of Goods by Sea Act 1 of 1986 s 4.

Shipping Act[160] are repealed by COGSA[161] and, lastly, give the short title and commencement date of the Act.[162]

The question that must be asked is whether the rules, if signed and ratified by South Africa, can merely replace the Hague-Visby Rules as a schedule to the Carriage of Goods by Sea Act[163] or if the matters addressed in COGSA are covered by the rules and whether, under present circumstances, South Africa will then need to implement a new Act.

The rules will not seriously affect COGSA in that it applies to the Prince Edward Islands, that the state is bound by them; nor will it affect the short title of the Act or the units of account and conversions contained in COGSA.

However, the rules do extend to deck cargo[164] and special rules for the carriage of live animals are included;[165] thus, section 1(1)(*d*) of COGSA would become superfluous. In addition, the rules include a number of other documents which are acceptable as transport documents in a number of articles than the Hague-Visby Rules accept, and so COGSA section 1(1)(*c*) will also become unnecessary. In addition, as the Rotterdam Rules govern multimodal transport, South Africa may choose to limit their application to carriage by sea only, and thus section 1(1)(*a*) of COGSA will require redrafting in order to incorporate this. Specific obligations, including "unseaworthiness",[166] are also contained in the rules in a very similar manner as in the Hague-Visby Rules and so section 2 of COGSA may remain unchanged. The rules also include extensive provisions relating to "jurisdiction"[167] which South Africa may opt into if it wishes to or; alternatively, section 3 of COGSA may stand as is.

Thus, signing the rules will affect national legislation and the potential implications – that is, whether existing legislation will become obsolete or superfluous – must be considered by states which are contemplating signing and ratifying the rules.

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[160] Act 57 of 1951.
[161] Carriage of Goods by Sea Act 1 of 1986 s 5.
[162] Section 6.
[163] Act 1 of 1986.
[164] Article 24.
[165] Article 81.
[166] Articles 14 and 17.
[167] Chapter 14.

The Sea Transport Documents Act[168] was enacted in South Africa in 2000 as a supplement to the Hague-Visby Rules, which South Africa uses to regulate carriage of goods by sea. Should South Africa become a signatory to the rules and ratify them, the Sea Transport Documents Act may no longer be a necessary part of South African Maritime Law. This section aims to identify whether all of the aspects which are regulated in the Sea Transport Documents Act are also regulated in the rules.

The Sea Transport Documents Act[169] in section 1 defines a "sea transport document" as:

(*a*) a bill of lading;

(*b*) a through bill of lading;

(*c*) a combined transport bill of lading;

(*d*) a sea way bill, or

(*e*) any consignment note, combined transport document or other similar document, relating to the carriage of goods either wholly or partly by sea, irrespective of whether it is transferable or negotiable.

The rules in comparison include definitions for a "transport document" a "negotiable transport document" a "non-negotiable transport document" as well as an "electronic transport record" a "non-negotiable electronic record", and a "negotiable electronic transport record",[170] which may all be used for sea carriage. It is quite clear that the rules encompass the meaning of "sea transport document" as envisaged by the Sea Transport Documents Act as well as making provision for electronic communications that the Sea Transport Documents Act does not include but which are becoming increasingly more important and common in international trade.

Unlike the Hague-Visby Rules, which cover only outbound carriage,[171] the Sea Transport Documents Act provides that any goods delivered or landed and discharged in South Africa are covered by the Act.[172] Should South Africa ratify the rules, the rules explicitly state that

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[168] Act 65 of 2000.
[169] Act 65 of 2000.
[170] Article 1.
[171] Article 10.
[172] Section 2(1)(*b*).

they apply to inbound or outbound carriage from a contracting state,[173] and so will incorporate this provision in the Sea Transport Documents Act.

The Sea Transport Documents Act also states that the Act applies to any proceedings instituted in the Republic in any court or before any arbitration tribunal in respect of sea transport documents or goods which are delivered or discharged in South Africa. The Act further applies to documents issued in South Africa.[174]

If South Africa signs and ratifies the rules, they could elect to "opt in" to chapters regulating jurisdiction[175] and arbitration.[176] Generally, under the chapter on "jurisdiction" in the rules a court has jurisdiction based on the domicile of the carrier, the place of delivery or agreed receipt as contained in the contract of carriage, or the port where goods are initially loaded or finally discharged.[177] Other states which have "opted in" to provisions on jurisdiction will most probably recognise and enforce the decision in these cases.[178] The provisions on "arbitration" are very similar to those dealing with jurisdiction in the rules[179] and should South Africa elect to opt in to these provisions then jurisdiction and arbitration proceedings will be regulated as provided for by the rules.

Section 3 of the Sea Transport Documents Act regulates the transfer of sea transport documents, basically stating that such a document may be transferred by the holder if delivered and endorsed as needed, and may be delivered through electronic communication methods. Further a "holder" is a person in possession of the original document, or the document is held on their behalf, or that person is the individual to whom the document was issued, or who is named as the consignee in the document or is the individual to whom the document has been transferred.[180] In addition, a person is considered to be a holder of an original sea transport document if the original has been lost or cannot be produced and that person or their agent would be entitled to possession of the document if the original could be produced.

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[173] Article 2.
[174] Article 2.
[175] Chapter 14.
[176] Chapter 15.
[177] Article 66.
[178] Articles 73 and 74.
[179] Chapter 15.
[180] Article 3(1) and (2).

"Holders" are dealt with extensively in the rules. Under these rules a holder is defined as a person in possession of a negotiable transport document; or if the person is identified as a shipper or consignee of an order document; or is the individual to whom the document has been endorsed; or that person is the bearer of a blank endorsed document or bearer document; or is the person to whom a negotiable electronic transport document has been issued or transferred in accordance with the rules.[181] The transfer of documents is also comprehensively regulated under the provisions relating to electronic transport records,[182] and under the evidentiary effect of contract particulars.[183] Thus the rules encompass the provisions of section 3 of the Sea Transport Documents Act.

Section 4 of the Sea Transport Documents Act regulates the transfer of rights and obligations under a sea transport document. It states that the holder of such a document has the same obligations and rights as the original holder, and is the cessionary of all rights of action for loss or damage to the goods referred to in the document. A holder who transfers the document is regarded as having ceded all of his rights and delegated all of his obligations under the document to the new holder except in so far as they arise from a *delectus personae* relating to the original holder.[184] Section 5 deals with saving of rights and states that any right or obligation under a contract of carriage evidenced by or contained in a sea transport document or liability of the consignee or holder in consequence of that person being a consignee or holder, or that person's receipt of goods or the transfer of the document to that person has full force and effect.

Chapter 10 of the rules deals with the rights of the controlling party and Chapter 11 regulates the transfer of rights under any sort of transport document. Article 57 controls the transferring of negotiable transport documents, while article 58 sets out provisions regulating the liability of a holder to whom a document has been transferred. Article 51 gives the controlling party the right to transfer the right of control to another person, who will become the holder of the document. In addition, article 33 allows for the assumption of a shipper's rights and obligations by a documentary shipper, stating that the documentary shipper is subject to obligations and liabilities imposed on a shipper, and is simultaneously entitled to all of the

[181] Article 1(10).
[182] Chapter 3.
[183] Article 41.
[184] Article 4(2).

shipper's rights and defences as provided for under the convention. Consequently, the rules make provision for the same terms as the Sea Transport Documents Act in this regard.

Section 6 of the Sea Transport Documents Act deals with a sea transport document as being evidence of shipment, and is *prima facie* evidence in favour of the holder of the document if that holder is the shipper or the individual to whom the document was issued, or conclusive proof for a subsequent holder of the shipment of the goods or of their receipt for shipment, as necessary.

Article 41 of the rules sets out provisions regulating the evidentiary proof of contractual particulars. Article 41(*a*) states that a transport document or electronic transport record is *prima facie* evidence of the carrier's receipt of the goods as described in the contract of carriage. In addition, this is conclusive proof for a consignee who has acted in good faith.[185]

Section 7 of the Sea Transport Documents Act sets out the provisions necessary for the regulation of the delivery of the goods. It states that a carrier is discharged from the obligation to deliver if he delivers the goods to a person entitled to receive them. Further, it states that a person who presents a sea transport document is entitled to delivery of the goods to which the document relates in accordance with the contract, and subject to any obligations to which delivery may be subject.[186] This article also requires that a carrier may request anyone presenting a sea transport document to establish a right to delivery.[187] An individual who must establish his right to delivery may do so through an application to court or through any other acceptable manner. However, if the carrier does not insist on a court application as proof of the right to delivery, he bears the risk that that person has no right to delivery.[188]

The rules regulate delivery comprehensively under Chapter 9, in articles 43–49. The rules cover a consignee's obligation to accept delivery;[189] the consignee's obligation to acknowledge receipt of the goods;[190] delivery when no negotiable transport document or negotiable electronic transport record has been issued[191] – or when such has been issued;[192]

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[185] Article 41(*b*)(ii) and (*c*).
[186] Article 7(2).
[187] Article 7(2).
[188] Article 7(3).
[189] Article 43.
[190] Article 44.
[191] Article 45.

delivery when a non-negotiable transport document that requires surrender has been issued[193] and further gives the carrier options for what action to take when goods remain undelivered.[194] This Chapter allows the carrier or performing party to retain goods in order to secure payment which is due.[195] Thus it is quite evident that the rules are far broader in scope than the Sea Transport Documents Act, and further include regulations for important commercial activities – such as making allowances for delivery under different types of document which the Sea Transport Documents Act does not. Further, given that the rules include provisions for when no documents at all are issued (as is becoming more frequent in maritime freight), the Sea Transport Documents Act is clearly deficient in this regard.

Section 8 of the Sea Transport Documents Act contains provisions relating to persons acting in bad faith. It states that any person who makes delivery of goods or comes into possession of a sea transport document is liable if when delivery is made or possession acquired, he had reasonable grounds for believing that the goods were not shipped or received for shipment, or the document which the person claims to be a holder of could not be transferred, or in the case of delivery the person had reasonable grounds for believing that the person claiming delivery had no right to receive the goods.

Articles 45 and 46 of the rules give the carrier the right to refuse to deliver the goods to a consignee if the consignee does not properly identify himself. The carrier may also refuse to deliver goods under a negotiable transport document if the holder cannot properly identify himself, or if he cannot demonstrate he is the holder; the carrier may also refuse delivery if a consignee will not acknowledge receipt of the goods.[196] In addition, the rules contain detailed provisions relating to the basis of liability of the carrier, and if the claimant is able to show that the loss of or damage to the goods occurred while the carrier was responsible for them, then he will be liable for damages.[197] The same is the case for performing parties[198] and maritime performing parties.[199]

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[192] Article 47.
[193] Article 46.
[194] Article 48.
[195] Article 49.
[196] Article 44.
[197] Article 17
[198] Article 18.
[199] Article 19.

It is thus quite apparent that the rules regulate, in far greater detail, all aspects of maritime trade that the Sea Transport Documents Act currently regulates in South Africa. Should South Africa elect to sign and ratify the rules, the Sea Transport Documents Act will become obsolete, and so should be repealed once the rules are ratified.

7.6 The Environmental Implications of the Rotterdam Rules

The rules contain no provisions relating to loss or damage to the environment which may arise from shipping activities. Globalisation, the increased flow of trade and issues such as global warming make it imperative that states have adequate measures in place to protect their environment from damage due to maritime trade. The rules affirm that one of their purposes is to increase the efficiency of the international carriage of goods and facilitate new access opportunities for previously remote markets and parties.[200] As the efficiency levels of international carriage increase, there will be more cargoes and journeys across the oceans and, as stated by the rules, previously remote areas may experience increased maritime traffic. An increase in maritime traffic in turn will mean an increase in traffic nationally, in that more vehicles and trains will be needed to move cargo, which may be harmful to the environment by causing higher levels of air and water pollution. Consequently, the rules may very well have an indirect effect on pollution levels internationally. This could be particularly harmful to states that have inadequate measures in place against environmental damage, from deficient legal to infrastructure processes.

James Boyd comments that marine vessels, terminals and harbour operations are capable of creating a number of legal damages, such as liability for cleanup costs, damages to private property and damage to public natural resources such as water quality, beach and coastal recreational resources, coral reefs, commercial and recreational fisheries, sea grass beds and bird and animal habitats.[201] These goods are in the public domain, so are neither owned or traded, and yet are economically and socially valuable.[202]

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[200] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Annex.

[201] J Boyd "Lost Ecosystem Goods and Services as a Measure of Marine Oil Pollution Damages" (2010) Available: http://www.rff.org/documents/RFF-DP-10-31.pdf (accessed 10 October 2010).

[202] J Boyd "How Do You Put a Price on Marine Oil Pollution Damages" Available: http://www.rff.org/RFF/Documents/Resources-175_MarineDamages.pdf (Accessed 10 October 2010).

Shipping pollution is generally caused by the release of oil and chemicals through accidental spills and operational discharges, the transfer of invasive alien species through ballast water and those carried on ship's hulls, the release of biocides from toxic chemicals used in ship paint, and the dumping of garbage and sewerage from the vessels.[203] Air pollution is caused through the emission of sulphur dioxide, nitrogen oxides and carbon dioxide, physical and other damage is also caused by ships through the dropping of anchors, noise and wave disturbances and the accidental striking of whales and other marine mammals.[204] The most recent major shipping incident was on 20 April 2011; the explosion of the *Deepwater Horizon* oil rig in the Gulf of Mexico, and the resulting massive oil spill, damages for which have not yet even been calculated.[205] It is evident that shipping may be a threat to the natural environment and as traffic increases so this threat grows.

South Africa has a 4 800 kilometre coastline, around which a large proportion of the world's tanker tonnage passes in order to reach world markets.[206] The waters around the Cape are frequently lashed by violent storms and gales, and large winter weather systems and currents along the coastline give rise to abnormal waves on the south-east coast.[207] South Africa has suffered from oil pollution because of this major traffic around its coasts,[208] and has been victim to some of the largest oil spills, such as that from the 267 000 ton *Castillo De Bellver.*[209]

At present, the legislation which regulates pollution from ships, tankers and offshore installations is the Marine Pollution Act (MPA).[210] The MPA provides for strict liability for the discharge of any type of oil, spirits produced from oil, as well as mixtures of oil and any other substance, from a ship, tanker or offshore installation within a prohibited area.[211] Van der Merwe comments that a "prohibited area" includes the internal waters, territorial waters, the exclusive economic zone and, for offshore installations, the sea within the limits of the continental shelf.[212]

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[203] World Wildlife Fund (WWF) "Shipping is a Significant Contributor to Marine Pollution" Available: http://wwf.panda.org/about_our_earth/blue_planet/problems/shipping/ (accessed 10 October 2010).
[204] WWF "Shipping is a Significant Contributor to Marine Pollution".
[205] Boyd "Lost Ecosystem Goods and Services as a Measure of Marine Oil Pollution Damages".
[206] Q van der Merwe "The Danger Grows while the Bureaucrats Snooze" (2006) 6(11) *Without Prejudice* 40.
[207] Ibid.
[208] AC Brown "Marine Pollution and Health in South Africa" (1987) 71 *SAMJ* 244 at 245.
[209] Van der Merwe (2006) 6(11) *Without Prejudice* 40.
[210] Act 6 of 1981.
[211] Van der Merwe (2006) 6(11) *Without Prejudice* 40.
[212] Ibid.

The MPA allows three exceptions for the strict liability for discharge of oil, these are if the discharge was necessary for safety reasons; the oil escaped from the ship, tanker or offshore installation as a consequence of damage occurring to the vessel and all reasonable steps were taken to stop or reduce the escape of oil, or if the oil escape was due to leakage and not as a result of any lack of reasonable care, and as soon as such was discovered all reasonable steps were used to halt or reduce the escape of the oil.[213]

Van der Merwe states that the limits of liability under the MPA are low enough to cause concern.[214] Under South African legislation, the owner's liability is limited to 133 SDRs per ton or 14 million SDRs, whichever is the lesser.[215] This means that the maximum amount the state can claim for an oil spill will be US$21 000 000, depending on the value of SDR at that time.[216] It is evident that should the spill be a large one, US$21 million will be hopelessly inadequate to preserve the environment or even conduct decent clean-up activities. This issue was identified in 2004, and while the South African government prepared draft legislation to remedy this in 2009 – the Merchant Shipping (International Oil Pollution Compensation Fund) Bill – no Bill has yet been enacted and, consequently, South Africa remains exposed to a major oil pollution risk. As the rate of shipping increases, South Africa's environment will be exposed to a greater risk as more shippers travel her coasts. Countries such as South Africa need to implement modern, higher-liability legislation concerning maritime pollution, then at least if a major spill which would result in damage to significant portions of the coastline and ecosystem cannot be prevented, the State would be able to fund the rehabilitation.

The rules have the potential to affect a state's political decisions, its economy, the social welfare of its people, the technology it must use, the existing law as well as the natural environment. It is quite evident why states are embarking on extensive discussions on whether or not to sign and ratify the rules. For well-developed and wealthy countries without excessive poverty and disease problems (such as the United States) the potential benefits of the rules will outweigh potential issues. However, for developing nations where poverty and disease are rife and whose people are very sensitive to price increases, states will have to

[213] Ibid.
[214] Ibid.
[215] Ibid.
[216] Ibid.

consider carefully whether signing and ratifying the rules will be good for the state as a whole, or whether the costs will be prohibitive.

8

Conclusion: Should South Africa Sign and Ratify the Rotterdam Rules?

Prior to 2000, the South African Maritime Law Association (SAMLA) submitted a position paper to the Comité Maritime International (CMI) calling for a revision of the Hague-Visby Rules so as to update and include provisions dealing with electronic documentation, stricter standards of seaworthiness, as well as clearer identification of the carrier, among other concerns.[1] In addition, at the CMI Assembly in New York in 2000, South Africa was one of the nations that called loudly for a new draft instrument to be worked on and presented for discussion.[2] John Hare comments that the Rotterdam Rules appear to be in line with SAMLA's "wish list" as given in their position paper mentioned above.[3]

Should South Africa sign and ratify the rules, it would undoubtedly be in the country's best interests to "opt-out" of the provisions relating to jurisdiction, as article 73 of the rules allows a vessel to be arrested, but the claim cannot be heard in the arresting jurisdiction unless it is made in terms of an international convention in the state. As South Africa is, at present, one of the countries in the world in which it is relatively easy to effect an arrest and have a "maritime claim" heard[4] and such is regulated by an effective Act,[5] it would not be in South Africa's best interests to "opt-in" to this chapter of the rules. However, ratification of the rules will mean that South Africa will have to renounce the Hague-Visby Rules, which will take effect if the Rotterdam Rules come into force.[6] John Hare comments that it would be a "positive step for South Africa to accede to or ratify the [Rotterdam] Rules".[7]

The Rotterdam Rules contain a number of positive aspects. Most notably in their favour is the extensive input into their formation from diverse industry stakeholders and government groups.[8] Consultations with industry groups, organisations and key stakeholders ensured that the needs of the maritime industry were identified at the time of the drafting of the

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[1] J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) 632
[2] Ibid.
[3] Hare *Shipping Law* 638.
[4] Section 2, Admiralty Jurisdiction and Regulation Act 105 of 1983.
[5] Admiralty Jurisdiction and Regulation Act 105 of 1983.
[6] Hare *Shipping Law* 639.
[7] Ibid.
[8] K Lannan "The Launch of the Rotterdam Rules" (2009) Available: http://www.shhsfy.gov.cn/hsinfoplat/platformData/infoplat/pub/hsfyenglish_42/docs/200911/20.doc (accessed 14 June 2010).

instrument.[9] The draft text of the rules was circulated for comment among all National Maritime Law Associations and a number of international maritime and business organisations in 2001.[10] The instrument was then subject to intergovernmental discussions and negotiations through the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (Transport Law).[11] The Working Group aimed to provide rules which reflected the "best possible consensus solution" in addressing input from government groups and industry stakeholders.[12] The Working Group strove to provide, in the rules, sufficient balance between the interests of carriers and shippers.[13] These rules are thus the product of more than ten years of industry canvassing, negotiations and compromises among varied interested groups. The rules do appear to provide answers to many of the issues in maritime transport that have been identified as requiring addressing. It is also most probable that the swift ratification of these rules will limit regionalisation of the law governing the carriage of goods by sea. It is unlikely at best that a 'flawless" instrument can ever be produced, or that a "better" solution to meeting current industry requirements than the Rotterdam Rules could be fashioned now or at any time in the near future. This is possibly the best argument in favour of the ratification of the rules.

The Rotterdam Rules have been described as "wide ranging and ambitious".[14] Five chapters have been included which cover areas that are not currently governed by an international convention, but which have been identified by governments and industry stakeholders as areas which would benefit from greater uniformity internationally.[15] Many provisions of the rules are, in this writer's opinion, positive – such as those incorporating multimodal contracts of carriage,[16] allowing the rules to cover both inbound and outbound cargoes from states applying the rules;[17] those allowing electronic documents finally to be considered as "on a par" with paper bills of lading and sea transport documents;[18] the extensive liability

[9] Lannan "The Launch of the Rotterdam Rules".
[10] Lannan "The Launch of the Rotterdam Rules".
[11] Lannan "The Launch of the Rotterdam Rules".
[12] UNCITRAL Working Group III "Report of Working Group III (Transport Law) on the Work of its Twenty-first Session" (Vienna, 14–25 January 2008) (2008) Available: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V08/507/44/PDF/UNCITRAL WORKING GROUP III "TWENTY FIRST SESSION".pdf?OpenElement (accessed 28 July 2010).
[13] UNCITRAL Working Group III "Twenty-first Session".
[14] S Beare "Liability Regimes: Where We Are, How We got There and Where We are Going." (2002) 3 *LMCLQ* 306 at 309.
[15] Ibid.
[16] Article 11.
[17] Article 5.
[18] Article 5.

provisions;[19] updated "exceptions" which do not allow the carrier to not be liable for nautical fault;[20] increased liability limits and liability for delay;[21] recognition of the joint-and-several liability of the carrier and his maritime performing parties.[22] Carriers' and shippers' obligations are given clearly and extensively in this instrument[23] and the introduction of who may be a "controlling party" and what his rights are[24] will all arguably benefit those engaging in international trade that includes an international leg.

However, it must be noted that while many criticisms of the Rotterdam Rules are not justified and have been answered convincingly by the UNCITRAL Working Group on Transport Law,[25] it is this writer's opinion that some of the concerns which have been raised are valid and are very likely to be the subject of litigation.

Whereas the rules aim to standardise international trade and shipping legislation, the sheer size of the rules – that is, 96 articles – means that they are unlikely to be consistently applied across various jurisdictions. If the rules do not garner wide international acceptance, this will mean that a fourth, and quite complex, body of rules will simply be added to what is already a fragmented sphere of law.

While it is commendable that the rules recognise liability for delay, article 21 states simply that delay occurs when goods are not delivered at the time agreed in the contract of carriage. While carriers are not known for including a specific date of delivery in their contracts, given the unpredictability of sea conditions, it would in fact be quite ridiculous for them to give a certain date for delivery; however, if a carrier does, he may end up in serious trouble. If one container carrying many shippers' goods is delayed, then a rash of small claims may be brought separately against the shipper, possibly in various jurisdictions. Many countries have special courts dealing with maritime matters; for example, in South Africa maritime claims are heard by the "Admiralty Court" which is a High Court "with a hat on". Should the high court – a court that deals with serious matters, now have to hear "small" maritime claims? That will merely clog up the court system. However, it is uncertain whether a lower court

[19] Articles 14 and 15,
[20] Article 18.2.
[21] Articles 4 and 20.
[22] Article 21.
[23] Articles 28–36, 41, 42.
[24] Chapter 10.
[25] Chapter 4.

may be competent to hear what may be complex maritime matters. This is a very real eventuality which may be brought about by the rules.

The liability limits[26] in the Rotterdam Rules are higher than in any other maritime instrument. Carriers may therefore need to pay more insurance in order to protect themselves against claims. This may have the "knock-on effect" of requiring shippers to pay higher freight rates, which will ultimately have the effect of consumers' paying more for the same goods than they have previously.

Many organisations have expressed their apprehension regarding volume contracts.[27] Most notably, the term "specific quantity" of goods which must be shipped over a time for a volume contract to be used by the parties is vague in that, as the critics contest, a "volume contract" could be used to ship three containers over a year-long period. The UNCITRAL Working Group, in its deliberations, states that including specific numbers in the definition of a volume contract could lead to uncertainty,[28] which is why such was not incorporated. However, it must be questioned whether this omission from the rules will lead to abuse by carriers, or even by shippers. While there are safeguards in the rules to "protect" the shipper who enters into a volume contract, it may be argued that if a shipper is shipping only three containers in a year, then he may be unfamiliar with shipping law, and should a wily carrier convince him to enter into a volume contract, then the shipper may be at a disadvantage. These circumstances have the potential to increase litigation and claims in which the shipper will probably not succeed as he would have signed a contract in the first place.

The limits contained in the Rotterdam Rules may also present a predicament for some states. The limits in the rules are higher than those in any other maritime instrument, which is not in itself an issue; but difficulties may arise if a state signs and ratifies the rules, and they are not a signatory to an international convention regulating carriage by land. This is because the rules state that if goods are damaged, lost or delayed while they are the carrier's responsibility but before or after they are loaded onto or discharged from a ship, then the rules will not prevail over provisions of another international instrument.[29] Consequently, the rules do prevail over national law regulating the carriage of goods by land. In these cases

[26] Article 59.
[27] Chapter 4.
[28] Chapter 4.
[29] Article 26.

when claims are made, the rules, and consequently their limits, will apply. If a state has a national instrument in place which regulates "land" liability, it will probably be overridden by the provisions of the rules. This may be troublesome where the national instruments contain limits for liability which are significantly lower than those contained in the rules. It is unlikely that the carriers' performing parties, which may be trucking companies and rail-carriage owners, will be pleased at having to pay higher amounts in damages because of a "maritime instrument" which they will probably perceive as not being connected to them in any way.

Another issue which was not anticpitated by the UNCITRAL Working Group concerning "volume contract" provisions in the Rotterdam Rules is suggested by the Canadian International Freight Forwarders' Association (CIFFA): the possibility of volume contracts' containing circular indemnity clauses.[30] If a shipper signs a volume contract with a circular indemnity clause, he will be unable to claim for loss, damage or delay as allowed by the rules, from any other party involved in the transaction, which will obviously be detrimental to the shipper and may create a number of court actions, the results of which may differ across states. This will not help to make international trade law more consistent.

It is apparent that there are both negative and positive aspects to the rules themselves. The most important factor states must take into account when choosing whether to sign and ratify the rules is the effect that they will have on that state individually. Consequently, states must carefully consider the potential economic, political, technological, social, legal and environmental implications of the rules.

There is a broad range of these types of implication which states should take into account in their deliberations. These include their own political agenda, trade policies and the opinion of domestic industry participants, as well as the economic climate, the geographical importance of their ports, foreign and export policies, the condition of maritime and transport infrastructure in their country and the benefits the rules could bring to them regarding trade. It

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[30] Canadian International Freight Forwarders Association "CIFFA Submission to Transport Canada: Commentary on the Rotterdam Rules" (2009) Available: http://www.ciffa.com/downloads/2009/03/30/CIFFA%20Submission%20to%20Transport%20Canada%20on%20the%20Rotterdam%20Rules%20March%202009.pdf (accessed 30 May 2010) 7.

is vital for states to also bear in mind the potential impact the rules could have on their environment and on the social welfare of their people.

As has been discussed, the Rotterdam Rules may make shipping more expensive because they increase the limits of liability. This, coupled with predicted high food prices in the medium term,[31] means that foodstuffs will become more expensive for consumers. Consequently, the social impact of rising food prices in countries with an elevated unemployment level, a large proportion of poor people, and a high level of HIV/Aids infection, may be ruinous on people who are disadvantaged. This impact will not be felt by all people, but rather those people who need protecting the most: the poor, the children and the sickly. This is a particularly contentious issue for African countries, as they are the main net importers of food.[32]

Environmental issues should also not be ignored. As the rules aim to "make remote areas more accessible",[33] this implies that shipping traffic will increase. Whether or not states choose to sign and ratify the rules, they should be taking legal steps to ensure that their environments will be protected against higher pollution levels. This is an area in which South Africa is sadly lacking, being regulated by Acts from the 1980s[34] which contain low penalties for pollution of South African waters.

The reality of the situation is that many states will decide whether to sign and ratify the rules based solely on political considerations. Germany and a number of other European countries have indicated that they will not sign the rules until such time as the United States and China – the two largest manufacturing and maritime nations in the world – make their positions on the rules clear.[35] The United States has subsequently given its full support to the rules, and

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[31] Human Development Network (HDN), Poverty Reduction and Economic Management (PREM) Network and the World Bank "Rising Food and Fuel Prices: Addressing the Risks to Future Generations" (2008) Available: http://siteresources.worldbank.org/DEVCOMMEXT/Resources/Food-Fuel.pdf (accessed 13 September 2010) 3.

[32] Food and Agricultural Organisation of the United Nations (FAO), International Fund for Agricultural Development (IFAD) and the United Nations World Food Programme (WFP) "High Food Prices: Impact and Recommendations for Action" (2008) Available: http://www.uneca.org/nepad/RCM9/High-food-prices.pdf (accessed 15 September 2010) 3.

[33] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Annex.

[34] The Marine Pollution (Control and Civil Liability) Act 6 of 1981; Marine Pollution (Intervention) Act 64 of 1987 and the Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986.

[35] Lloyds List "Germany Set to Delay Signing Rotterdam Rules" (2009) Available: http://www.rotterdamrules.com/pdf/Germany-set-to-delay-signing-Rotterdam-Rules-Lloyds-List-21-07-2009.pdf (accessed 15 August 2010); R Hailey "Questions of Balance in the Rotterdam Rules" (2009)

has signed them,[36] whereas China is still reportedly involved in domestic discussions.[37] It is almost inevitable that should China sign the rules, many other countries will follow suit.

South Africa has strong diplomatic ties with both the United States and China. As the "gateway to Africa", South Africa will benefit from increased trade, whether or not the government elects to sign and ratify the rules. Given that South Africa's ports are characterised as inefficient and overpriced,[38] that Transnet's rail network is inadequate to meet demand[39] and that the excessive use of road transport means that harbours are congested with slow-moving traffic[40] delays in delivery are unavoidable; however, South Africa is in the fortunate position that, as the "gateway to Africa", South Africa's ports will undoubtably continue to be used by countries shipping goods to Africa.

A serious concern for South Africa should be that the rules may make goods more expensive. As half of South Africans live below the poverty line, the unemployment rate is 29 per cent and more than 5.7 million people are living with HIV/Aids,[41] many citizens simply cannot afford to pay more for the same goods. "Goods" in these cases are not luxury items; they are vital foodstuffs. However, if South Africa signs and ratifies the rules they may benefit from trade agreements with other countries which do the same and see South Africa as taking a progressive step towards the unification of international law, which should help to combat rising food prices.

The Rotterdam Rules have been available for signature since September 2009, and they have already been signed by 24 states, with Spain being the first to ratify the convention earlier in 2011. Consequently, the drafters of the rules may be cautiously optimistic of their finding favour with the international community. It is also apparent that if China and other emerging

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Available: http://www.rotterdamrules.com/pdf/Questions-of-balance-in-the-Rotterdam-Rules-Lloyd's-List-27-08-2009.pdf (accessed 14 February 2010).

[36] WJ Marwedel, JR Tarpley and GP Hendrix "American Bar Association, Maritime Law Association of the United States, Tort Trial and Insurance Practice Section, Section of International Law: Report to the House of Delegates: Recommendation" (2010) Available: http://www.proctorinadmiralty.com/files/aba-rottedam-rules---resolution-2-8-2010.pdf (accessed 10 April 2010) 2.

[37] Inchcape Shipping Services "Brussels Urges Speedy Ratification of the Rotterdam Rules" (2010) Available: http://www.iss-shipping.com/NewsDetails. aspx?newsid=4609 (accessed 1 August 2010)

[38] S Thomas "Ports: Pay Up and Wait" *Financial Mail* (20 August 2010) 45.

[39] Ibid.

[40] Ibid.

[41] Mail&Guardian online "South Africa's GDP 'will get worse before it gets better'" (17 March 2009 –online edition).

trade-centric nations sign and ratify the rules, then it will be in South Africa's interests to do so, so as to promote international trade and their standing in the international community as well as to enjoy many of the benefits offered by the rules, as has been discussed in this paper.

References

South African Law

Admiralty Jurisdiction Regulation Act 105 of 1983

Carriage of Goods by Sea Act 1 of 1986

Electronic Communications and Transactions Act 25 of 2002

Marine Pollution (Control and Civil Liability) Act 6 of 1981

Marine Pollution (Intervention) Act 64 of 1987

Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986

The Sea-Transport Documents Act 65 of 2000

International Law

1980 Convention Concerning International Carriage by Rail (COTIF) agreement, with its annexes CIV (for passengers and luggage) and CIM (for freight)

Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2000

Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as amended by the Protocol signed at The Hague on 28 September 1955 and by the Protocol 4 signed at Montreal on 25 September 1975

Convention on the Contract for International Carriage of Goods by Road, 1956 (CMR)

The Hague Rules, as amended by the Visby Amendments, the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Brussels, 1968) ("The Hague-Visby Rules")

The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading – Brussels Convention 1924 ("The Hague Rules")

The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("The Rotterdam Rules")

The United Nations Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978) ("The Hamburg Rules")

Table of Cases

South Africa

MV Sea Joy: Owners of the Cargo Lately Laden On Board the MV Sea Joy v The MV Sea Joy 1998 (1) SA 487 (C).

MV Recife: Control Chemicals (Pty) Ltd v Safbank Line Ltd SCA 2000 (3) SA 357 (SCA).

International

Brown Jenkinson v Percy Dalton [1957] 2 Lloyd's Rep 161.

Daewoo Heavy Industries LTD. and Another v. Klipriver Shipping LTD. and Another (**The "Kapitan Petko Voivoda"**) [2003] EWCA Civ. 451 Lloyd's Law Reports , [2003] 2 Lloyd's Rep. 1.

Hollandia, The (Sub nom **The "Morviken"**), (H.L.) [1983] 1 Lloyd's Rep. 1; [1983] 1 A.C. 565.

J. I. Macwilliam Co. INC v. Mediterranean Shipping Co. S.A. (**The "Rafaela S"**) [2002] EWCA Civ 556 Lloyd's Law Reports , [2003] 2 Lloyd's Rep. 113.

J. I. Macwilliam Co. INC v. Mediterranean Shipping Co. S.A. (**The "Rafaela S"**) Lloyd's Law Reports , [2005] 1 Lloyd's Rep. 347.

Leather's Best INC. v. The "Mormaclynx", Moore-McCormack Lines INC., Tidewater Terminal INC. and Universal Terminal and Stevedoring Corporation (**The "Mormaclynx"**) Lloyd's Law Reports , [1971] 2 Lloyd's Rep. 476.

Norfolk Southern Ry Co v James N Kirby, Pty Ltd 543 US 14, 29, 2004 AMC 2705, 2715 (2004).

Riverstone Meat Company, PTY., LTD. v. Lancashire Shipping Company, LTD. (**The "Muncaster Castle"**) Lloyd's Law Reports , [1961] 1 Lloyd's Rep. 57.

Royal Typewriter Co., Divison Litton Business Systems INC. v. M.V. "Kulmerland" and Hamburgamerika Linie (**The "Kulmerland"**) Lloyd's Law Reports , [1973] 2 Lloyd's Rep. 428.

Other Sources

American Bar Association "About the ABA" (2011) Available: http://www.americanbar.org/utility/about_the_aba.html (accessed 9 December 2011)

Africa Review "South Africa country profile" (2009) Available: http://www.africareview.com/Country%20Profiles/-/979196/983060/-/d6c78az/-/index.html (accessed 22 October 2010)

African Union "NEPAD Planning and Coordinating Agency" (2010) Available: http://www.nepad.org/ (accessed 22 October 2010)

AGOA "Summary of African Growth and Opportunity Act" (2010) Available: http://www.agoa.gov/agoalegislation/index.asp (accessed 22 October 2010)

DR Appleyard, AJ Field and SL Cobb *International Economics* 6 ed (2008) Mcgraw-Hill Irwin: New York

Arab Academy for Science, Technology and Maritime Transport "Press Release: Alexandria Declaration 2010: Released on Recommendations of the Arab League Countries to jointly sign United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("The Rotterdam Rules 2008") (2010) Available: http://www.uncitral.org/pdf/english/news/ArabPressReleaseRR.pdf (accessed 4 June 2010)

Arabic German Consulting "The Arab League – The League of Arab States" (1999) Available: http://www.arab.de/arabinfo/league.htm (accessed 12 December 2011)

Australian Delegation "Australian Comments on the UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea" (2008) 22 *Australian & New Zealand Maritime Law Journal* 123

Australian Transport News "Australia must back Rotterdam Rules" (2009) Available: http://www.fullyloaded.com.au/industry-news/articleid/60944.aspx (accessed 15 August 2010)

AVERT "South Africa HIV & AIDS statistics" Available: http://www.avert.org/safricastats.htm (accessed 22 October 2010)

M Avery 'Moving SA, Again' (2006) 6(7) *Without Prejudice* 50

Australian Government "Benchmark Report 2011" (2011) Available: http://www.austrade.gov.au/Invest/Opportunities-by-Sector/Financial-Services/Data-and-Charts/default.aspx (accessed 9 December 2009)

Australian Government "Transport" (2011) Available: http://www.austrade.gov.au/Buy/Australian-IndustryCapability/Transport/default.aspx (accessed 9 December 2011)

I Barr "Cause of Concern" (2011) 25 *Maritime Risk International* 1

S Beare "Liability Regimes: Where We Are, How We got There and Where We are Going" (2002) 3 *LMCLQ* 306

Belgian Maritime Law Association) "The Belgian Position on the new UNCITRAL Convention: Position paper by the Belgian Maritime Law Association regarding the UNCITRAL Draft Convention on the Carriage of Goods Wholly or Partly by Sea" (2008Available: www.mcgill.ca/files/maritimelaw/Belgian_Position_Paper.pdf (accessed 20 May 2010)

F Berlingieri, P Delebecque, T Fujita, R Illescas, M Sturley, G van der Ziel, A Von Ziegler and S Zunarelli "The Rotterdam Rules: An attempt to clarify certain concerns that have emerged" (2009) Available: http://www.comitemaritime.org/draft/pdf/5RRULES.pdf (accessed 20 December 2009)

F Berlingieri "A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules" (2009) Available: http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20F.%20Berlingieri%2013%20OKT29.pdf (accessed 20 June 2010)

BIFA) "So what are the Rotterdam Rules" (2009 Available: http://www.bifa.org/_attachments/Resources/1003_S4.pdf (accessed 14 June 2010)

P Black, E Calitz and T Steenkamp *Public Economics* 4 ed (2008) Oxford University Press: Cape Town

DM Bovio "Ocean Carrier's Duty of Care to Cargo in Port: The Rotterdam Rules of 2009" (2009) 32 *Fordham Int'l LJ* 4 at 1172

J Boyd "Lost Ecosystem Goods and Services as a Measure of Marine Oil Pollution Damages" (2010) Available: http://www.rff.org/documents/RFF-DP-10-31.pdf (accessed 10 October 2010)

J Boyd "How Do You Put a Price on Marine Oil Pollution Damages?" Available: http://www.rff.org/RFF/Documents/Resources-175_MarineDamages.pdf (accessed 10 October 2010)

Brand South Africa "South Africa's Financial Sector" (2010) Available: http://www.southafrica.info/business/economy/sectors/financial.htm (accessed 22 October 2010)

AC Brown "Marine Pollution and Health in South Africa" (1987) 71 *SAMJ* 244

M Burns "Leaving no Stone Unturned" (2011) 22 *Maritime Risk International* 1

S Bursanesque "Reform of the Carriage of Goods by Sea Act in the United States: between COGSA 99 and UNCITRAL's Draft Convention on the Carriage of Goods [wholly or partly] [by sea]" (LLM research project, McGill Faculty of law, 2007) Available: http://www.mcgill.ca/files/maritimelaw/Silviu_Bursanescu-MastersResearch Project.pdf (accessed 5 January 2010)

Canadian International Freight Forwarders Association (CIFFA) "CIFFA submission to Transport Canada: Commentary on the Rotterdam Rules" (2009) Available: http://www.ciffa.com/downloads/2009/03/30/CIFFA%20Submission%20to%20Transport%20Canada%20on%20the%20Rotterdam%20Rules%20March%202009.pdf (accessed 30 May 2010)

D Chard "Rotterdam Rules: Why We Should Support Early Ratification" (2009) Available: http://www.britishshipping.org/News/hot_off_the_press/rotterdam_rules_why_we_should_support_early_ratification/ (accessed 5 January 2010)

M Chasomeris "South Africa's Maritime Policy and Transformation of the Shipping Industry" (2005) Available: http://www.essa.org.za/download/2005Conference/Chasomeris.pdf (accessed 1 October 2010)

D Chong Gek Sian "The Hague-Visby Rules Revisited" (1994) 6 *SAcLJ* 25

CLECAT "CLECAT European Association for Forwarding, Transport, Logistic and Customs Services" (2011) Available: http://www.clecat.org/index.php?option=com_content&task=view&id=41&Itemid=8 (accessed 9 December 2011)

CLECAT "Position Paper: RE: 2008 – United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea – the "Rotterdam Rules" (2009) Available: http://www.comitemaritime.org/draft/pdf/4CLECAT.pdf (accessed 7 January 2010)

J Clift "Rotterdam Rules Gain Momentum as 20th State Signs" (2009) Available: http://www.unis.unvienna.org/unis/pressrels/2009/unisl133.html (accessed 10 January 2010)

M Cohen "SACU Members Gather to Iron Out Differences" (2010) Available: http://www.busrep.co.za/index.php?fSectionId=561&fArticleId=5557307 (accessed 22 October 2010)

Comité Maritime International "Resolution adopted by the 39th CMI Conference on the UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea in Athens 17 October 2008" (2008) Available: http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/CMI_endorsement_17October2008.pdf (accessed 4 June 2010)

Comité Maritime International (2011) "Welcome to CMI" (2008) Available: http://www.comitemaritime.org/Home/0,271,1132,00.html (accessed 9 December 2011)

Crowell & Moring "New Rotterdam Rules for Maritime Shipping" (2009) Available: http://www.crowell.com/NewsEvents/Newsletter.aspx?id=1310 (accessed 5 January 2010)

J de Haan "A Test Case for the Rotterdam Rules" (2011) 25 *Maritime Risk International* 7

Economic and Social Council Working Party on Intermodal Transport and Logistics "Report of the Working Party on Intermodal Transport and Logistics at its Fifty-first Session" (2009) Available: http://www.comitemaritime.org/draft/pdf/1UNECE.pdf (accessed 5 January 2010)

ECSA "European Community Shipowners Associations" (2011) Available: http://www.ecsa.be/ (accessed 9 December 2011)

Minister C Eurlings "Rotterdam Rules" (2009) Available: http://www.verkeerenwaterstaat.nl/actueel/toespraken/rotterdamrules.aspx (accessed 20 February 2010)

European Shippers Council "View of the European Shippers' Council on Convention on Contracts for the International Carrying of Goods Wholly or Partly by Sea also known as the 'Rotterdam Rules'" (2009) Available: http://www.comitemaritime.org/draft/pdf/2ESC.pdf (accessed 3 January 2010)

European Shippers Council "Position Paper on the Draft Maritime Instrument of the United Nations Commission on International Trade Law" (2007) Available: http://www.europeanshippers.com/docs/esc_analysis_paperfin.pdf (accessed 15 January 2010)

European Union "EU-South Africa Summit (Brussels, 28 September 2010)" (2010) Available: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/116717.pdf (accessed 22 October 2010)

FIATA "FIATA the Global Voice of Freight Logistics" (2010) Available: http://www.fiata.com/index.php?id=30 (accessed 9 December 2011)

FIATA Working Group Sea Transport "FIATA Position on the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules")" (2009) Available: http://www.comitemaritime.org/draft/pdf/3FIATA.pdf (accessed 10 January 2010)

B Floor *Report of the Committee of Enquiry into a National Maritime Policy for the Republic of South Africa (Floor Report)* Annexure C: Clause 2.7, (1993) Republic of South Africa.

Food and Agricultural Organization of the United Nations (FAO) "Briefing Paper: Hunger on the Rise" (2008) Available: http://www.fao.org/newsroom/common/ecg/ 1000923/en /hungerfigs.pdf (accessed 20 September 2010)

Food and Agricultural Organisation of the United Nations (FAO), International Fund for Agricultural Development (IFAD) and the United Nations World Food Programme (WFP) "High Food Prices: Impact and Recommendations for Action" (2008) Available: http://www.uneca.org/nepad/RCM9/High-food-prices.pdf (accessed 15 September 2010)

T Fujita "The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implications" (2009) 44 *Texas Int'l LJ* 349

S Gallacher "The Economic and Social Impacts of Globalisation: New Zealand's Place in a Multilateral Rules-based Trading System" Available: http://www.minterellison.co.nz/New%20Zealand%20International%20Review.pdf (accessed 15 September 2010)

Gasbuddy "Find Local Gas Prices" (2010) Available: http://gasbuddy.com (accessed 22 October 2010)

S Gillespie "Food Prices and the Aids Response: How They are Linked and What can be Done" (2008) Available: http://programs.ifpri.org/renewal/pdf/RFbrief01.pdf (accessed 25 September 2010)

S Girvin "Carriage by Sea: The Sea Transport Documents Act 2000 in Historical and Comparative Perspective" (2002) 119 *SALJ* 317

D Glass "Meddling in the Multimodal Muddle? A Network of Conflict in the UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly] [by sea]" (2006) 3 *LMCLQ* 307

A Goulandris "Electronic Bills of Lading have Come of Age" (2011) 25 *Maritime Risk International* 3

R Hailey "Questions of Balance in the Rotterdam Rules" (2009) Available: http://www.rotterdamrules.com/pdf/Questions-of-balance-in-the-Rotterdam-Rules-Lloyd's-List-27-08-2009.pdf (accessed 14 February 2010)

W Han "China: China Update – New Regulations on the Prevention and Control of Marine Pollution from Ships in China" (2010) Available: http://www.mondaq.com/article.asp?articleid=98072 (accessed 10 September 2010)

J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) Juta: Cape Town

Hill Dickinson "Cargo Conventions: Comparing the Hague, Hague-Visby, Hamburg and Rotterdam Rules" (2009) Available: http://www.hilldickinson.com/pdf/Shipping %20Guide%201%20-%20Cargo%20conventions.pdf (accessed 10 January 2010)

H Honka "United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: Scope of Application and Freedom of Contract" (2009) Available: http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20Hannu%20Honka.pdf (accessed 1 August 2010)

J Honnold "The United Nations Commission on International Trade Law: Mission and Methods" (1979) 27 *American Journal of Comparative Law* 201

D Hughes "ECSA backs Rotterdam Rules" (2009) Available: http://www.mgn.com/news/dailystorydetails.cfm?storyid=10023 (accessed 4 June 2010)

Human Development Network (HDN), Poverty Reduction and Economic Management (PREM) Network and the World Bank "Rising Food and Fuel Prices: Addressing the Risks to Future Generations" (2008) Available: http://siteresources.worldbank.org/DEVCOMMEXT/Resources/Food-Fuel.pdf (accessed 13 September 2010)

Inchcape Shipping Services "Brussels Urges Speedy Ratification of the Rotterdam Rules" (2010) Available: http://www.iss-shipping.com/NewsDetails.aspx?newsid=4609 (accessed 1 August 2010)

Infomare "International Conventions Membership List" (2010) Available: http://www.informare.it/dbase/convuk.htm (accessed 10 March 2010)

International Chamber of Commerce "Comments on the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the"Rotterdam_Rules")" (2009) Available: http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/ICC_statement_27May2009.pdf (accessed 4 June 2010)

International Chamber of Shipping "Position Paper: The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea" (2009) Available: http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/ICS_PositionPaper.pdf (accessed 5 January 2010)

International Chamber of Shipping "The Voice of International Shipping" (2011) Available: http://www.marisec.org/ (accessed 9 December 2011)

M Jannson "The Consequences of a deletion of nautical fault" (LLM Thesis, Göteborg University) (2007) Available: http://gupea.ub.gu.se/bitstream/2077/7337/1/Nautical_Fault_Madeleine_Jansson.pdf (accessed 1 August 2010)

TR Jefferies "COGSA or Hague-Visby: Cargo Damages in International Shipments" (1995–1996) 18 *Houston Journal of International Law* 767

S Johansson, A Oland, K Pysden, J Ramberg, W Tetley and D Schmitt "A Response to the Attempt to Clarify Certain Concerns over the Rotterdam Rules" (2009)

Available: http://www.mcgill.ca/files/maritimelaw/Summationpdf.pdf (accessed 3 January 2010)

A Jung "The Box that Makes the World go Round" (2005) Available: http://www.spiegel.de/international/spiegel/0,1518,386799,00.html (accessed 20 February 2010)

KUEHNE+NAGEL "Kuehne + Hagel Belgium" (2011) Available: http://www.kn-portal.com/locations/europe/belgium/ (accessed 9 December 2011)

K Lannan "The Launch of the Rotterdam Rules" (2009) Available: http://www.shhsfy.gov.cn/hsinfoplat/platformData/infoplat/pub/hsfyenglish_42/docs/200911/20.doc (accessed 14 June 2010).

Lloyds List "Rotterdam Rules: Clubs in Support of Ratification" (2009) Available: http://www.rotterdamrules.com/pdf/Rotterdam-rules-clubs-in-support-of-ratification-Lloyds-List-01-09-2009.pdf (accessed 4 June 2010)

Lloyds List "Germany Set to Delay Signing Rotterdam Rules" (2009) Available: http://www.rotterdamrules.com/pdf/Germany-set-to-delay-signing-Rotterdam-Rules-Lloyds-List-21-07-2009.pdf (accessed 15 August 2010)

L Louw and P Venter *Strategic Management: Winning in the Southern African Workplace* (2006) Oxford University Press: Cape Town

F MacDonald and J Midgley "Introduction: Globalization, Social Justice and Social Welfare" (2007) Available: http://findarticles.com/p/articles/mi_m0CYZ/is_2_34/ai_n27265531/ (accessed 22 October 2010)

Mail&Guardian online "South Africa's GDP 'will get worse before it gets better'" (17 March 2009 – online edition) Available: http://www.mg.co.za/article/2009-03-17-south-africas-gdp-will-get-worse-before-it-gets-better (accessed 22 October 2010)

FA Mann "The Interpretation of Uniform Statutes" (1946) 62 *Law Quarterly Review* 278

P Marlow "Ships, Flags and Taxes" in C Th Grammenos (ed) *The Handbook of Maritime Economics and Business*) (2002) Lloyds of London Press: London, 512–529

WJ Marwedel, JR Tarpley and GP Hendrix "American Bar Association, Maritime Law Association of the United States, Tort Trial and Insurance Practice Section, Section of International Law: Report to the House of Delegates: Recommendation" (2010) Available:

http://www.proctorinadmiralty.com/files/aba-rottedam-rules---resolution-2-8-2010.pdf (accessed 10 April 2010)

McGill "Questions and Answers Why the MLA Needs an Open Debate Concerning the "Volume Contracts" Exception to the Proposed Rotterdam Rules" (2009) Available: http:// www.mcgill.ca/files/.../Questions_and_Answers_USMLA.pdf (accessed 10 January 2010)

Mc Gill University "Professor William Tetley, CM, QC, LLL" (2011) Available: http://www.123people.ca/ext/frm?ti=personensuche%20telefonbuch&search_term=william%20tetley&search_country=CA&st=suche%20nach%20personen&target_url=http%3A%2F%2Fwww.mcgill.ca%2Fmaritimelaw%2Ftetley%2F&section=bing&wrt_id=430 (accessed 9 December 2011)

F Mishkin *The Economics of Money, Banking, and Financial Markets* 8 ed (2007) Pearson, Addison Wesley: United States

PK Mukherjee and AB Bal "A Legal and Economic Analysis of the Volume Contract Concept under the Rotterdam Rules: Selected Issues in Perspective." (2009) Available: http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20Abhinayan%20Basu%20Bal%20-%20Volume%20Contract%20Final.pdf (accessed 15 August 2010)

National Industrial Transportation League "Response of the National Industrial Transportation League to the European Shippers' Council Position Paper on the Rotterdam Rules" (2009) Available: http://www.nitl.org/NITLRESPONSEPAPER.pdf (accessed 4 June 2010)

JC Nkomo "Crude Oil Price Movements and their Impact on South Africa" (2006) 17(4) *Journal of Energy in Southern Africa (JESA)* 25

P Page "Rotterdam Rules" *The Journal of Commerce Magazine* (6 July 2009) Available: http://www.joc.com/node/412276 (accessed 10 January 2010)

T Pedreira "Arbitration" (2010) Available: http://research.lawyers.com/Arbitration-and-Mediation.html (accessed 24 March 2010)

Press Digest "United Kingdom: The Arrival of the Rotterdam Rules" (2010) Available: http://en.portnews.ru/digest/1790/ Information Agency: Port News (accessed 10 September 2010)

Port of Montreal "Gateway to North America" (2011) Available: http://www.port-montreal.com/site/1_0/1_1.jsp?lang=en (accessed 9 December 2011)

Port of Montreal "Intermodal hub" (2011) Available: http://www.port-montreal.com/site/1_0/1_4.jsp?lang=en (accessed 9 December 2011)

Radio Netherlands Worldwide (RNW) "China becomes South Africa's Biggest Trading Partner" (2009) Available: http://www.rnw.nl/africa/article/china-becomes-south-africas-biggest-trading-partner (accessed: 5 September 2010)

F Reynolds "The Hague Rules, the Hague-Visby Rules and the Hamburg Rules" (1990) 7 *MLAANZ Journal* 16

D Rhidian Thomas "And then there were the Rotterdam Rules" (2008) 14 *JIML* 189

A Robinson "Letters of Credit & Sea Transport Documents: A South African Perspective" (2002) Available: http://www.deneysreitz.co.za/index.php/news/letters_of_credit_sea_transport_documents_a_south_african_perspective/ (accessed 20 January 2010)

SAinfo "South Africa's Energy Supply" (2010) Available: http://www.southafrica.info/business/economy/infrastructure/energy.htm (accessed 22 October 2010)

SAinfo "JSE Unveils Listing, BEE Plans" (2010) Available: http://www.southafrica.info/business/investing/opportunities/jse-listing.htm (accessed 22 October 2010)

SAinfo "South Africa's Telecommunications" (2010) Available: http://www.southafrica.info/business/economy/infrastructure/telecoms.htm (accessed 22 October 2010)

SAMSA "Custodians of South Africa's Maritime Legacy" *Sawubona* – South African Airways In-flight Magazine (September 2010) 80

J Simpson "SA Consumer Research Reveals Recessionary Buying Patterns" (2009) Available: http://www.bizcommunity.com/Article/196/168/35914.html (accessed 25 September 2010)

South Africa, Department of Transport "Draft South African Maritime Transport Policy 2008" (2008) Available: http://www.info.gov.za/view/DownloadFileAction?id=88424 (accessed 10 October 2010)

South African Consulate General "South Africa: Open for Business" (2010) Available: http://www.southafrica-newyork.net/consulate/openforbusiness.htm (accessed 22 October 2010)

T Sowell "Something for Nothing: Living Wage and Unemployment" (2006) Available: http://www.capitalismmagazine.com/markets/business/4591-Something-for-Nothing-Living-Wage-and-Unemployment.html (accessed 22 October 2010)

Steamship Mutual "What are P&I Clubs" (2010) Available: http://www.simsl.com/what-are-pi-clubs.html (accessed 4 June 2010)

G. Steyn "Perils of Protectionism" (2010) Available: http://www.fin24.com/Columnists/Greta-Steyn/Perils-of-protectionism-20101019 (accessed 22 October 2010)

MF Sturley "Sea Carriage Goes Ashore: The Relationship Between Multimodal Conventions and Domestic Unimodal Rules" (2007) Available: http://www.uncitral.org/pdf/english/congress/Sturley.pdf (accessed 10 January 2010)

MF Sturley "Scope of Coverage under the UNCITRAL Draft Instrument" (2004) 10 *JIML* 2 at 141

MF Sturley "Modernizing and Reforming US Maritime Law" (2009) 44 *Tex Int'l LJ* 427

MF Sturley "Jurisdiction under the Rotterdam Rules" Available: http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20Michael%20Sturley%2023%20OKT29.pdf (accessed 15 August 2010)

Swansea University "Professor D Rhidian Thomas" (2011) Available: http://www.swan.ac.uk/law/istl/members/professorrhidianthomas/ (accessed 9 December 2011)

W Tetley "Interpretation and Construction of the Hague, Hague-Visby and Hamburg Rules" (2004) 10 *JIML* 30

W Tetley *Marine Cargo Claims* Volume 1 4 ed (2008) Les Éditions Yvon Blais Inc: Canada

W Tetley *Marine Cargo Claims* Volume 2 4 ed (2008) Les Éditions Yvon Blais Inc: Canada

W Tetley "Summary of Some General Criticisms of the UNICTRAL Convention (The Rotterdam Rules)" (2008) Available: http://www.mcgill.ca/files/maritimelaw/Tetley_Criticism_of_Rotterdam_Rules.pdf (accessed 28 December 2009)

The West of England Ship Owners Mutual Insurance Association (Luxembourg) "Rotterdam Rules Review" (2010) Available: www.westpandi.com/Documents/News/ROTTERDAMRULESReview.pdf (accessed 10 February 2010)

S Thomas "Ports: Pay Up and Wait" *Financial Mail* (20 August 2010) 45

UNCITRAL Note by the Secretariat, Document A/CN.9/WG.III/WP.29 para 25

UNCITRAL Working Group III "The UNCITRAL Draft Instrument on the Carriage of Goods by Sea and other Transport Conventions" (2003) Available: http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V02/607/91/PDF/V0260791.pdf?OpenElement (accessed 15 August 2010)

UNCITRAL Working Group III "Report of Working Group III (Transport Law) on the Work of its Eleventh Session (New York, 24 March–4 April 2003)" Available: http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V03/808/18/ PDF/ V0380818.pdf?OpenElement (accessed 15 August 2010)

UNCITRAL Working Group III "Report of Working Group III (Transport Law) on the Work of its Twelfth Session (Vienna, 6–17 October 2003)" (2003) Available: http://daccessddsny.un.org/doc/UNDOC/GEN/V03/906/87/PDF/V0390687.pdf?OpenElement (accessed 28 July 2010)

UNCITRAL Working Group III "Report of Working Group III (Transport Law) on the Work of its Fifteenth Session (New York 18–28 April 2005" (2005) Available: http://daccessddsny.un.org/doc/UNDOC/GEN/V05/843/75/PDF/V0584375.pdf?OpenElement (accessed 28 July 2010)

UNCITRAL Working Group III "Report of Working Group III (Transport Law) on the Work of its Sixteenth Session (Vienna, 28 November–9 December 2005)" (2005) Available: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V06/500/31/ PDF/ V0650031.pdf?OpenElement (accessed 28 July 2010)

UNCITRAL Working Group III "Report of Working Group III (Transport Law) on the Work of its Eighteenth Session (Vienna, 6–17 November 2006)" (2006) Available: http://daccessddsny.un.org/doc/UNDOC/GEN/V06/586/90/PDF/V0658690.pdf?OpenElement (accessed 28 July 2010)

UNCITRAL Working Group III "Report of Working Group III (Transport Law) on the Work of its Nineteenth Session (New York, 16–27 April 2007)" (2007)

Available: http://daccessddsny.un.org/doc/UNDOC/GEN/V07/837/76/PDF/V0783776.pdf?OpenElement (accessed 28 July 2010)

UNCITRAL Working Group III "Report of Working Group III (Transport Law) on the Work of its Twentieth Session (Vienna, 15–25 October 2007)" (2007) Available: http://daccessddsny.un.org/doc/UNDOC/GEN/V07/879/10/PDF/V0787910.pdf?OpenElement (accessed 28 July 2010)

UNCITRAL Working Group III "Report of Working Group III (Transport Law) on the Work of its Twenty-first Session" (Vienna, 14–25 January 2008) (2008) Available: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V08/507/44/PDF/UNCITRAL WORKING GROUP III "TWENTY FIRST SESSION".pdf?OpenElement (accessed 28 July 2010)

United Nations "Transport and Communications" (2010) Available: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-8&chapter=11&lang=en (accessed 30 September 2010)

United Nations "Review of Maritime Transport, 2001: Chapter VII)" (2001) Available: http://www.unctad.org/en/docs/rmt2001ch7_en.pdf (accessed 15 August 2010)

United Nations Commission on International Trade Law "Origin, Mandate and Composition of UNCITRAL" (2010) Available: http://www.uncitral.org/uncitral/en/about/origin.html (accessed 10 October 2010)

United Nations Commission on International Trade Law "UNCITRAL Yearbook Volume XXXIVB: 2003" (2003) Available: http://www.uncitral.org/pdf/english/yearbooks/YB2003_B_E.pdf (accessed 15 August 2010)

United Nations Environment Programme "Southern Africa and Land Resources" (2008) Available: http://www.eoearth.org/article/Southern_Africa_and_land_resources (accessed 22 October 2010)

United Nations Statistics Division/ Department of Economic and Social Affairs "Total Imports and Exports for countries in US Dollars (Table A)" *2008 International Trade Statistics Yearbook* Volume 1 (2008) Available: http://comtrade.un.org/pb/WorldTables.aspx?y=2008 (accessed 20 January 2010)

United Nations Trade and Development Secretariat "Review of Maritime Transport 2009" (2009) Available: http://unctad.org/en/docs/rmt2009_en.pdf (accessed 10 September 2010)

United States Department of State "Background Note: South Africa" (2010) Available: http://www.state.gov/r/pa/ei/bgn/2898.htm (accessed 10 October 2010)

University of Cape Town "CMI" (2010) Available: http://web.uct.ac.za/depts/shiplaw/cmi/cmi.htm (accessed 21 August 2010)

Q van der Merwe "The Danger Grows While the Bureaucrats Snooze" (2006) 6(11) *Without Prejudice* 40

A Wanigasekera "Comparison of Hague-Visby and Hamburg Rules" Available: http://www.juliusandcreasy.com/inpages/publications/pdf/comparison_of_hague_and_hamburg-AW.pdf (accessed 14 February 2010)

World Shipping Council (WSC), Baltic and International Maritime Council (BIMCO), International Chamber of Shipping (ICS) and European Community Shipowners' Association (ECSA) "ICS/ECSA/BIMCO/WSC Press Release: The Rotterdam Rules – Wide Support by States at Signing Ceremony in Rotterdam" (2009) Available: http://www.uncitral.org/pdf/english/news/ICS_ECSA_BIMCO_WSC_press_release.pdf (accessed 4 June 2010)

World Shipping Council Partners in Trade "Top 50 World Container Ports" (2011) Available: http://www.worldshipping.org/about-the-industry/global-trade/top-50-world-container-ports (accessed 9 December 2011)

World Shipping Council "Trade Statistics" (2011) Available: http://www.worldshipping.org/about-the-industry/global-trade/trade-statistics (Accessed 9 December 2011)

World Trade Organization "WTO sees 9% Global Trade Decline in 2009 as Recession Strikes." (2009) Available: http://www.wto.org/english/news_e/pres09_e/ pr554_e.htm#appendix3 (accessed 15 August 2010)

World Wildlife Fund "Shipping is a Significant Contributor to Marine Pollution" Available: http://wwf.panda.org/about_our_earth/blue_planet/problems/shipping/ (accessed 10 October 2010)