

Chapter 2

General Principles of Transport Law and the Rotterdam Rules

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Abstract Now that the United Nations has adopted the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, popularly known as the Rotterdam Rules, and over twenty nations have signed the Convention, the ratification process is well underway.

Several important principles are reflected in the Rotterdam Rules. Foremost among these is the desire to achieve broad uniformity in the law governing the international carriage of goods. The importance of uniformity is well recognized, but the current status is unsatisfactory. The Rotterdam Rules now offer the only realistic possibility for an internationally uniform regime in the foreseeable future.

To encourage international uniformity, the Rotterdam Rules were drafted to achieve a broad consensus – both among nations and among commercial interests. Achieving a broad consensus generally required compromise solutions to difficult problems, but when compromise was impossible it was sometimes necessary to omit topics from the Convention.

The Rotterdam Rules are also designed to meet the industry's practical needs. Shippers, carriers, insurers, transportation intermediaries, and others involved in the

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industry actively participated in the negotiation and drafting of the Convention to ensure that it met their needs.

Perhaps the most pressing practical need was to update and modernize the law. Existing regimes are out-of-date and fail to cover essential subjects. For example, the new Convention addresses serious gaps in existing law by facilitating electronic commerce and recognizing modern developments in commercial practice.

In the final analysis, the Rotterdam Rules make a number of important changes in the law, but they are still evolutionary not revolutionary. The new Convention is directly based on existing models and years of practice under the existing regimes.

2.1 Introduction

It has been a real pleasure to participate in this outstanding conference on the Rotterdam Rules. I thank Koç University, its Faculty of Law, and the Dr Nüsret-Semahat Arsel International Business Law Implementation and Research Centre for organizing such a successful event. Not only were the substantive portions of the conference of great interest but all the logistical details were executed without a single glitch. The speakers all enjoyed superb hospitality and we are all grateful for such gracious hosts.

I also thank those who attended the conference. Distinguished academics, prominent practitioners, and dedicated students were all well-represented in the audience, and they engaged in the discussion at a very high level. The conference offered a learning opportunity for all who participated – speaker and audience alike.

2.2 Background

The long-awaited and much-anticipated “United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea”,¹ which will be known as the “Rotterdam Rules”,² was formally adopted by the U.N. General Assembly on 11th December 2008.³ It has been open for signature since

¹The final text of the Convention [hereinafter Convention or Rotterdam Rules] is annexed to General Assembly Resolution 63/122, U.N. Doc. A/RES/63/122 (11 Dec. 2008). It was also annexed to *Report of the United Nations Commission on International Trade Law*, 41st Session, U.N. GAOR, 63rd Sess., Supp. No. 17, Annex I, U.N. Doc. A/63/17 (2008) [hereinafter *Commission Report*].

²See General Assembly Resolution 63/122, *supra* note 1, § 3.

³See *id.* § 2.

23rd September 2009 (when the first sixteen nations⁴ signed the Convention at the formal signing ceremony in Rotterdam).⁵

This new convention represents the culmination of 8 years of intensive work by the U.N. Commission on International Trade Law (UNCITRAL) and its Working Group III on Transport Law,⁶ which followed almost 4 years of preparatory work by the Comité Maritime International (CMI).⁷ It will enter into force after twenty countries have ratified it.⁸ Several countries are already well advanced in the ratification process, including the United States. As this paper goes to press, however, it appears that Spain is the closest to ratifying the new convention. The Spanish government transmitted the convention to parliament on 6th May 2010.⁹

The Rotterdam Rules were created to govern the legal relationship between carrier interests and cargo interests¹⁰ in the context of international shipments that travel at least in part by sea. If they succeed, the new Rules will supersede not only the prior multilateral conventions – the Hague Rules,¹¹ the Hague-Visby Rules,¹²

⁴The sixteen countries to sign on the opening day were Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, the Netherlands, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo, and the United States.

⁵Now that the formal signing ceremony is complete, the Convention remains open for signature at U.N. headquarters in New York. See Rotterdam Rules art. 88(1). The first five countries to sign in New York were Armenia, Cameroon, Madagascar, Mali, and Niger. Other countries have made statements suggesting that they plan to sign the Convention soon.

⁶The primary source material for the UNCITRAL Transport Law project can be found on the UNCITRAL web site (www.uncitral.org), which contains – in the six official U.N. languages – not only the final text of the Rotterdam Rules but also each preliminary draft of the Convention as it was negotiated, the reports of each meeting of Working Group III, the reports of the full Commission meetings, the formal proposals made by each delegation, and all of the other documents that were filed with UNCITRAL.

⁷See generally Sturley (2003), pp. 65, 68–75 (discussing the background to the UNCITRAL Transport Law project, including the CMI's preparatory work) [hereinafter Sturley, *Interim View*]. The CMI is a non-governmental organization founded in the late nineteenth century that was the primary force in developing uniform international approaches to maritime law problems for most of the twentieth century. Cf. Sturley (1991), pp. 1, 9–10 [hereinafter Sturley, *History*].

⁸See Rotterdam Rules art. 94(1).

⁹By coincidence, 6th May 2010 is the very day that this paper was presented at the Koç University conference.

¹⁰In the simplest case, the Rotterdam Rules regulate the relationship between the carrier and the shipper. Other carrier interests include the “performing parties” that fulfill some of the carrier's obligations under the contract of carriage. Other cargo interests include those who succeed to the shipper's rights under the contract of carriage. Cf. *infra* part VI-C.

¹¹International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 120 L.N.T.S. 155 [hereinafter Hague Rules].

¹²The phrase “Hague-Visby Rules” describes the Hague Rules, *supra* note 11, as amended by the 1968 Visby Amendments, Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1977 Gr. Brit. T.S. No. 83 (Cmd. 6944) (entered into force June 23, 1977). In many countries, the 1968 Hague-Visby Rules have been further amended by the 1979 Special Drawing Right (SDR) Protocol. Protocol Amending the

and the Hamburg Rules¹³ – but also national¹⁴ and regional¹⁵ alternatives that supplement or partially replace those international regimes in some parts of the world.

The Rotterdam Rules contain no formal “Statement of Principles”,¹⁶ but it is still possible to discern a number of important principles motivating the Convention. Many of these principles have been evident throughout international transport law regimes dating back to the Hague Rules. Others are more recent innovations, or have been applied less regularly over the years. To help understand the Rotterdam Rules, in this paper I will note a few of these principles, and discuss their impact on the creation of the new Convention.

2.3 Uniformity

Like its predecessors,¹⁷ the Rotterdam Rules were motivated in large part by the desire to achieve broad uniformity in the law governing the international carriage of goods. The need for uniformity was implicit or explicit throughout the negotiations, and this importance is reflected both in the opening clauses of the resolution that formally adopted the Convention¹⁸ and in article 2 of the text. The first opening clause recalls the General Assembly’s resolution establishing UNCITRAL “with a mandate to further the progressive harmonization and unification of the law of

International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, 1984 Gr. Brit. T.S. No. 28 (Cmnd. 9197) (entered into force Feb. 14, 1984).

¹³United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3 [hereinafter Hamburg Rules].

¹⁴China, for example, adopted a Maritime Code, which came into force in 1993, that draws from both the Hague-Visby and Hamburg Rules, along with uniquely Chinese solutions to certain problems. See generally Li (1993). Although China is a particularly prominent example, it is not the only nation to have made significant modifications to the uniform international texts.

¹⁵For example, the four Nordic countries – Denmark, Finland, Norway, and Sweden – revised their maritime codes to incorporate major elements from the Hamburg Rules into their pre-existing Hague-Visby systems. See generally, e.g., Ramberg (1994).

¹⁶Perhaps the closest analogue would be the opening clauses of the resolution that formally adopted the Convention. See General Assembly Resolution 63/122, *supra* note 1. These opening clauses are mentioned from time to time in this paper. See, e.g., *infra* text following note 18. Article 2 may also be seen as representing a statement of general principle. It directs those interpreting the Convention to have “regard . . . to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.” Rotterdam Rules art. 2. See *infra* notes 19–21 and accompanying text.

¹⁷The value of having uniform international rules to allocate liability for the risk of the loss of or damage to goods carried by sea has been recognized at least since the nineteenth century. The International Law Association (the sponsor of the conference at which the original Hague Rules were adopted) first tackled the subject in 1882. See Sturley, *History*, *supra* note 7, at pp. 6–8 (discussing nineteenth century efforts to achieve uniformity).

¹⁸See *supra* note 16 (discussing the opening clauses).

international trade”; the next clause expresses concern over the current lack of uniformity; and the fourth and fifth clauses explain why the General Assembly is convinced that greater uniformity would be beneficial.

Article 2 of the text explicitly directs a court or arbitration panel interpreting the Convention to have “regard . . . to its international character and to the need to promote uniformity in its application . . .”¹⁹ Many factors have contributed to the breakdown in uniformity under prior conventions (such as the Hague and Hague-Visby Rules). One contributing factor has undoubtedly been the tendency of national courts to construe those conventions with less concern for achieving international uniformity in the application of the regime and more concern for preserving consistency with other aspects of national law.²⁰ Article 2, following the example of a very similar provision in the Hamburg Rules,²¹ is intended to counter that trend.

2.3.1 *The Importance of Uniformity*

The goal of achieving greater international uniformity is so well-known,²² not only for maritime law but for any international private law convention, that it does not require extended discussion here.²³ As the US Supreme Court recognized in its last case construing The Hague Rules, “conflicts in the interpretation of the Hague Rules not only destroy aesthetic symmetry in the international legal order but impose real costs on the commercial system the Rules govern.”²⁴

¹⁹Rotterdam Rules art. 2.

²⁰See generally Sturley (1987).

²¹Hamburg Rules art. 3. While the Hamburg Rules expressly refer to the regime’s “international character” and “the need to promote uniformity” – concepts that article 2 of the Rotterdam Rules addresses in very similar terms – the Rotterdam Rules also stress “the observance of good faith in international trade.” Rotterdam Rules art. 2.

²²The importance of international uniformity in the law governing the international carriage of goods has been widely recognized. See, e.g., *Riverstone Meat Co. v. Lancashire Shipping Co. (The Muncaster Castle)*, 1961 A.C. 807, 840 (“I think it is very important in commercial interests that there should be [international] uniformity of construction . . .”) (quoting *R.F. Brown & Co. v. Harrison*, 137 L.T. 549, 556, 43 L.T.R. 633 (C.A. 1927) (Atkin, L.J.)); Boyd et al. (2008). Indeed, both UNCITRAL and the CMI exist to promote uniformity. See General Assembly Resolution 2205 (XXI) (establishing UNCITRAL with the mandate to further the progressive harmonization and unification of the law of international trade); CMI Constitution art. 1 (declaring CMI’s “object . . . is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects”).

²³For a summary of the arguments and evidence supporting the need for greater uniformity in this field, see, e.g., Sturley (1995), pp. 553, 556–559 [hereinafter Sturley, *Uniformity*].

²⁴*Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537, 1995 AMC 1817, 1824 (1995).

Some portion of the cargo transported in international trade will inevitably be lost or damaged *en route*. The role of the legal system in this context is to allocate financial responsibility for those losses. In the process, it influences the actions of shippers, carriers, and other participants in a transaction. A carrier's decision concerning its appropriate level of care²⁵ during carriage will be based at least in part on its potential liability. Shippers will be similarly influenced in deciding how carefully goods should be prepared for shipment and the extent to which they will insure goods. Insurers must decide the terms on which coverage will be offered, potential buyers of the cargo must determine the protection that they require, and bankers financing a transaction must know the extent to which they can depend on a security interest in the goods. And all these decisions will be based in part on the liability regime that allocates the risk of loss.

If the law is uniform, all participants will know that their liability (or recovery) will be the same wherever a dispute is resolved. Results will be more predictable, litigation will thus be less necessary, and the parties will be able to make their underlying business decisions in confidence, knowing what law will be applied if loss or damage occurs. The chairman of the International Chamber of Commerce (ICC) Bill of Lading Committee clearly expressed the commercial interest in uniformity when he was advocating for the adoption of the Hague Rules in the 1920s. In testimony favoring the United States' ratification of the Hague Rules, he explained:

[I]n the view of the [ICC,] uniformity is the one important thing. It does not matter so much precisely where you draw the line dividing the responsibilities of the shipper and his underwriter from the responsibility of the carrier and his underwriter. The all-important question is that you draw the line somewhere and that that line be drawn in the same place for all countries and for all importers.²⁶

The practical factors motivating the ICC's desire for uniformity over 80 years ago are just as strong today. With uniformity and predictability, the law more efficiently allocates the risks of cargo loss or damage. At the very least, greater uniformity tends to keep the law from interfering with the flow of trade.

²⁵An unsophisticated observer might think that more care is always better than less care, but that is not true at least in this context. To take an obvious example, a carrier would be foolish to spend £1000 in extra precautions to ensure that a package worth only £500 arrived safely at its destination. The legal system should encourage participants to exercise an appropriate level of care, but that will rarely be the maximum care possible.

²⁶*International Convention for the Unification of Certain Rules in Regard to Bills of Lading for the Carriage of Goods by Sea: Hearing on Executive E Before a Subcommittee of the Senate Committee on Foreign Relations*, 70th Cong., 1st Sess. 3 (1927) (statement of Charles S. Haight), reprinted in 3 *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* 327 (Michael F. Sturley ed. 1990).

2.3.2 *The Current Status of Uniformity*

The current situation is widely regarded as unsatisfactory. The Hague-Visby Rules provide the dominant international legal regime today, but some major commercial nations are not parties to that regime. The United States (the nation with the single largest share of world trade) may be the most prominent example, but it is hardly alone.²⁷ China (with about a quarter of the world's population and a growing proportion of its trade) operates under a Maritime Code that combines selected elements from the Hague-Visby and Hamburg Rules with unique Chinese provisions.²⁸ Recognizing the problems, individual nations have already begun to develop their own, non-uniform, solutions.²⁹

The Hamburg Rules entered into force (for the countries that had ratified them) in 1992. Although over thirty countries are now parties to the Hamburg Rules,³⁰ they represent in the aggregate only a very small proportion of world trade. None of the major commercial or maritime powers has ratified them. Indeed, a third of the parties to the Hamburg Rules are land-locked. More significantly, it does not appear that any major commercial or maritime power is likely to become a party to the Hamburg Rules at this late date. Despite the vocal advocates who continue to press for the Hamburg Rules, they simply do not offer any realistic prospect of becoming the uniform regime that the world needs.

If the Rotterdam Rules are not widely adopted, it is likely to be at least a generation before the international community would be prepared to again undertake the effort to reform the law governing sea carriage. In the meantime, national and regional alternatives³¹ would be likely to supply the pressing need to update and modernize the law.³² It is self-evident that these non-uniform responses could not provide the needed uniformity. Moreover, they could well make the effort to achieve uniformity more difficult the next time the international community did attempt the task.

2.4 Achieving a Broad Consensus

As noted above,³³ the primary goal of the Convention is to harmonize the governing law when possible. For the Rotterdam Rules to succeed in this respect, nations that currently adhere to one of the old regimes (such as the Hague, Hague-Visby, or

²⁷See generally Sturley, *Uniformity*, *supra* note 23, at pp. 561–564.

²⁸See generally Li, *supra* note 14, at pp. 209–211; Sturley, *Uniformity*, *supra* note 23, at pp. 561–562.

²⁹See, e.g., Sturley, *Uniformity*, *supra* note 23, at pp. 560–570.

³⁰For a list of the countries that are parties to the Hamburg Rules, see, e.g., 2009 CMI Yearbook 546.

³¹Cf. *supra* notes 14–15, 29 and accompanying text.

³²Cf. *infra* notes 92–126 and accompanying text.

³³See *supra* notes 17–21 and accompanying text.

Hamburg Rules) – or to a unique national variation of one of the old regimes – will need to replace their existing laws with the single new regime. Uniformity, by its very nature, is more valuable the more broadly it is achieved. The Convention seeks to facilitate this process by proposing compromise solutions that can be accepted by most nations. The results were occasionally complex³⁴ or inelegant,³⁵ but that was often the price that needed to be paid to achieve the more important goal.

Achieving a broad consensus sometimes required a delicately balanced compromise on a complex legal issue. Several examples could illustrate this point well, but I will mention only two. The UNCITRAL Working Group was deeply divided on the proper approach to take in defining the Convention's scope of application.³⁶ Some delegates preferred the familiar "documentary" approach that had been adopted in the Hague Rules and continued in the Hague-Visby Rules.³⁷ Others favored the "contractual" approach that the Hamburg Rules had introduced to maritime law.³⁸ And a third group supported a proposed new "trade" approach.³⁹ Chapter 2 of the Convention⁴⁰ adopted a delicate compromise that drew on the strengths of each of the three approaches, thus proving acceptable to all three groups.⁴¹

The Working Group was even more deeply divided on a host of separate questions that relate to the broad issue of defining the basis of the carrier's liability.⁴² To detail just one aspect of the debate, many were convinced that the traditional list of carrier defenses should be treated as exonerations from liability while many others were equally convinced that the carrier defenses should be nothing more than rebuttable presumptions of non-liability.⁴³ Similarly deep

³⁴Sometimes it was necessary to adopt a complex solution because the demands of a complex industry required such a solution. Cf. *infra* notes 72–91 and accompanying text.

³⁵Cf. *infra* note 86 and accompanying text.

³⁶For a more detailed discussion of the issues and the Working Group's resolution of those issues, see Sturley (2005). Prof. Dr. Samim Ünan is addressing "Scope of Application of Rotterdam Rules" as part of the present conference.

³⁷See, e.g., *Report of Working Group III (Transport Law) on the Work of Its Fourteenth Session*, § 84, U.N. Doc. A/CN.9/572 (2004) [hereinafter *Fourteenth Session Report*].

³⁸See, e.g., *id.* § 85.

³⁹See, e.g., *id.* § 86.

⁴⁰Rotterdam Rules arts. 5–7.

⁴¹See, e.g., *Fourteenth Session Report*, *supra* note 37, § 89.

⁴²Prof. Dr. Fehmi Ülgener is addressing "Obligations and Liability of Carrier" as part of the present conference.

⁴³See, e.g., *Report of the Working Group on Transport Law on the Work of Its Ninth Session*, § 45, U.N. Doc. A/CN.9/510 (2002) [hereinafter *Ninth Session Report*]; *Report of Working Group III (Transport Law) on the Work of Its Tenth Session*, U.N. Doc. A/CN.9/525, § 41 (2002) [hereinafter *Tenth Session Report*]; *Report of Working Group III (Transport Law) on the Work of Its Twelfth Session*, U.N. Doc. A/CN.9/544, § 87, 90, 92, 97, 102, 106, 119, 129 (2003) [hereinafter *Twelfth Session Report*]; see generally Sturley, *Interim View*, *supra* note 7, at p. 96.

divisions concerned such issues as the burdens of proof,⁴⁴ the limits of particular defenses,⁴⁵ and even whether the traditional “catalogue” of defenses should be retained at all.⁴⁶ In the end, article 17 resolved the exoneration-presumption debate by focusing on the functional effect of each defense without regard to the label attached to it. That approach became one element of a larger – and again delicately balanced – compromise that was acceptable to the entire Working Group.⁴⁷

At other times, the legal analysis was entirely straight-forward but the Working Group needed to agree on a compromise about how to implement it. For example, every delegation agreed that the carrier’s liability would be subject to a package or weight-based limitation,⁴⁸ that claimants would have a limited period in which to bring their actions,⁴⁹ and that a time limit would apply to the receiver’s obligation to give the carrier notice of non-apparent damage.⁵⁰ But what would those limits be? The package and weight-based limitation amounts were particularly difficult to negotiate,⁵¹ but they were ultimately resolved when the Working Group accepted figures that were much higher than some delegates thought justifiable and much lower than other delegates had advocated. These figures, in turn, were part of a larger compromise proposal that thirty-three delegations jointly introduced at the end of the Working Group’s final session.⁵² It covered not only the limitation amounts but also a proposed “expedited amendment” procedure,⁵³ a proposal to treat “non-localized” loss or damage as if it had occurred on the leg with the highest limitation amount,⁵⁴ a proposal to include mandatory national law (along with

⁴⁴See, e.g., *Tenth Session Report*, *supra* note 43, § 46–56; *Fourteenth Session Report*, *supra* note 37, § 23–25, 29–33, 71–73; *Report of Working Group III (Transport Law) on the Work of Its Nineteenth Session*, § 73, U.N. Doc. A/CN.9/621 (2007) [hereinafter *Nineteenth Session Report*].

⁴⁵See, e.g., *Report of Working Group III (Transport Law) on the Work of Its Thirteenth Session*, U.N. Doc. A/CN.9/552, § 94–98 (2004) [hereinafter *Thirteenth Session Report*]; *Fourteenth Session Report*, *supra* note 37, § 36–66; *Nineteenth Session Report*, *supra* note 44, § 69–70; *Report of Working Group III (Transport Law) on the Work of Its Twenty-first Session*, U.N. Doc. A/CN.9/645, § 54 (2008) [hereinafter *Twenty-first Session Report*].

⁴⁶*Cf. infra* note 134.

⁴⁷See, e.g., *Fourteenth Session Report*, *supra* note 37, § 10–80.

⁴⁸See Rotterdam Rules art. 59(1).

⁴⁹See *id.* art. 62(1).

⁵⁰See *id.* art. 23(1).

⁵¹For a detailed “interim report” on this negotiation, see Sturley (2007).

⁵²See *Twenty-first Session Report*, *supra* note 45, § 197.

⁵³See *Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]*, U.N. Doc. A/CN.9/WG.3/WP.101, art. 99 (2007) [hereinafter *Draft Convention WP.101*]; *Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]*, U.N. Doc. A/CN.9/WG.3/WP.81, art. 99 (2007) [hereinafter *Draft Convention WP.81*]. *Cf.* Hamburg Rules art. 33.

⁵⁴See *Draft Convention WP.101*, *supra* note 53, art. 62(2); *Draft Convention WP.81*, *supra* note 53, art. 62(2).

international instruments) within the network provision,⁵⁵ and the “volume contract” definition.⁵⁶ Even after the Working Group accepted this compromise package,⁵⁷ some delegations were still unhappy with the limitation amounts.⁵⁸ But the Working Group had achieved the broadest consensus possible.

On some issues it proved impossible to reach a compromise solution that would attract sufficient support. When that happened, the contentious subject was generally dropped from the agenda. The Working Group usually concluded that it was more important to complete the project and address the core issues than to attempt more than could be accomplished at the risk of becoming so bogged down that the entire project failed. The early drafts considered by the Working Group, for example, had an entire chapter addressing freight.⁵⁹ During the second reading, however, the Working Group agreed to delete most of that chapter.⁶⁰ Other subjects were similarly considered and deleted.⁶¹ Indeed, the process of deleting contentious proposals continued to the very end of the negotiations. At the 2008 Commission meeting, when UNCITRAL approved what ultimately became the final draft of the Convention, it proved sufficiently difficult to reach a consensus on two

⁵⁵At the 2007 spring session in New York, there had been strong support in the Working Group for a compromise proposal to extend the network provision by allowing a country to declare when ratifying the Convention that it would treat its own mandatory national law in the same way as another international instrument when applying the provision that ultimately became article 26 of the Rotterdam Rules. See *Nineteenth Session Report*, *supra* note 44, § 189–190. At the 2007 fall session in Vienna, however, the Working Group “reverse[d] its decision.” *Report of Working Group III (Transport Law) on the Work of Its Twentieth Session*, § 163(e), U.N. Doc. A/CN.9/642 (2007); see also *id.* § 166.

⁵⁶See Rotterdam Rules art. 1(2). The “volume contract” definition had been highly controversial during the Working Group’s negotiations. See *Report of Working Group III (Transport Law) on the Work of Its Seventeenth Session*, § 154–170, U.N. Doc. A/CN.9/594 (2006); *Nineteenth Session Report*, *supra* note 44, § 161–172.

⁵⁷See *Twenty-first Session Report*, *supra* note 45, § 196–203.

⁵⁸Two delegations complained that the limitation amounts were too high. See *id.* § 199. Two others argued that they were still too low, and that other aspects of the compromise unduly favored carriers. See *id.* § 200–201.

⁵⁹See *Preliminary Draft Instrument on the Carriage of Goods by Sea*, U.N. Doc. A/CN.9/WG.III/WP.21, ch. 9 (arts. 9.1–9.5) (2002) [hereinafter *Preliminary Draft Instrument*]; *Draft Instrument on the Carriage of Goods by Sea*, U.N. Doc. A/CN.9/WG.3/WP.32, ch. 9 (arts. 41–45) (2003) [hereinafter *Draft Instrument WP.32*].

⁶⁰See *Thirteenth Session Report*, *supra* note 45, § 164. The only provision that survived to the final text became article 42 of the Convention, which addresses “freight prepaid” clauses. Cf. *Draft Instrument WP.32*, *supra* note 59, art. 44 (addressing “freight prepaid” clauses). A provision addressing “cesser” clauses, which had originally been in the freight chapter, see *id.* art. 43(2), survived almost until the end, but it was finally deleted by the Commission. See *infra* note 62 and accompanying text.

⁶¹See, e.g., *Report of Working Group III (Transport Law) on the Work of Its Fifteenth Session*, § 154–155, U.N. Doc. A/CN.9/576 (2005) [hereinafter *Fifteenth Session Report*] (deciding to delete *Draft Instrument WP.32*, *supra* note 59, art. 75, which addressed *lis pendens*, because “a rule on *lis pendens* would be extremely difficult to agree upon, given the complexity of the subject matter and the existence of diverse approaches . . . in the various jurisdictions”).

relatively minor articles that the Commission decided to delete them entirely rather than take the risk that the controversy on either one of them might undermine the Convention.⁶²

It proved impossible to reach a broadly acceptable compromise on the closely related issues of jurisdiction and arbitration⁶³ because a number of countries held very strong but conflicting views on the proper resolution of the subject. At one extreme, nations and industry groups sympathetic to carrier interests, along with nations that are commonly named in choice-of-court and arbitration agreements, argued that the Convention should include no provision on jurisdiction or arbitration (except, perhaps, one that routinely enforced choice-of-court and arbitration agreements). Not surprisingly, the United Kingdom was a prominent member of this coalition.⁶⁴ At the other extreme, nations and industry groups sympathetic to cargo interests, along with nations that regulate jurisdiction and arbitration domestically or as parties to the Hamburg Rules,⁶⁵ insisted that the Convention should follow the example of the Hamburg Rules to protect a cargo claimant's ability to seek recovery in a reasonable forum of its choice (notwithstanding a choice-of-court or arbitration agreement).⁶⁶ Between those two extremes, a number of nations sought a more balanced compromise between cargo and carrier interests.⁶⁷

Although a broadly acceptable compromise was impossible, jurisdiction and arbitration were too important to be completely omitted from the Convention.⁶⁸ The solution was not only to harmonize the law to the extent possible in independent

⁶²See *Commission Report*, *supra* note 1, § 45–53 (deciding to delete *Draft Convention WP.101*, *supra* note 53, art. 13, which addressed transport beyond the scope of the contract of carriage); *id.* § 109–110 (deciding to delete *Draft Convention WP.101*, *supra* note 53, art. 36, which addressed cesser clauses).

⁶³Asst Prof. Dr. Zeynep Derya Tarman is addressing “Jurisdiction and Arbitration” as part of the present conference.

⁶⁴See, e.g., *Comments by the United Kingdom of Great Britain and Northern Ireland Regarding Arbitration*, U.N. doc. no. A/CN.9/WG.III/WP.59 (2005).

⁶⁵See Hamburg Rules arts. 21–22.

⁶⁶Some of the discussion in favor of a Hamburg-style approach in the jurisdiction context is summarized at *Ninth Session Report*, *supra* note 43, § 61; *Fourteenth Session Report*, *supra* note 37, § 132; *Fifteenth Session Report*, *supra* note 61, § 158; *Report of Working Group III (Transport Law) on the Work of Its Eighteenth Session*, § 254, U.N. Doc. A/CN.9/616 (2006) [hereinafter *Eighteenth Session Report*]. For the arbitration context, see, e.g., *Fourteenth Session Report*, *supra* note 37, § 155; *Report of Working Group III (Transport Law) on the Work of Its Sixteenth Session*, § 89, U.N. Doc. A/CN.9/591 (2006) [hereinafter *Sixteenth Session Report*].

⁶⁷Some of the discussion in favor of a compromise approach in the jurisdiction context is summarized at *Fourteenth Session Report*, *supra* note 37, § 135; *Fifteenth Session Report*, *supra* note 61, § 157; *Sixteenth Session Report*, *supra* note 66, § 21. For the arbitration context, see, e.g., *Fourteenth Session Report*, *supra* note 37, § 156; *Sixteenth Session Report*, *supra* note 66, § 85, 90.

⁶⁸One might also say that the Working Group could not even agree to omit jurisdiction and arbitration from the Convention because some delegations believed so strongly that it needed to be included.

chapters on jurisdiction⁶⁹ and arbitration,⁷⁰ but to accommodate those nations that were not prepared to accept any compromise. Thus the final article in each chapter permits each nation ratifying (or otherwise becoming a party to) the Convention to decide for itself whether it will be bound by that chapter.⁷¹ The “opt in” solution proved to be the only acceptable compromise among the three entirely different positions. The solution met the needs of those countries that firmly believed that jurisdiction and arbitration needed to be covered, it harmonized the law to the maximum extent that nations were willing to accept harmonization, and it nevertheless preserved the status quo for those nations that were unwilling to accept any change. Most importantly, it ensured that the inclusion or omission of these subjects would not interfere with any nation’s ability to accept the remainder of the Rotterdam Rules.

2.5 Meeting Industry’s Commercial Needs⁷²

Many have criticized the Hamburg Rules as the product of a political process in which a majority of those negotiating that convention were more concerned about achieving political goals than meeting commercial needs.⁷³ Although political considerations inevitably play a role whenever governments are involved in making important decisions, and political considerations can manifest themselves in many forms, the negotiation and drafting of the Rotterdam Rules were particularly attuned to practical and commercial needs. Indeed the preeminence given to the industry’s commercial needs when the Rules were negotiated forcefully demonstrated that UNCITRAL had learned from the Hamburg experience. By recognizing the importance of meeting industry’s commercial needs, it harkened back to the era of the Hague Rules (and before), largely abandoning the less pragmatic attitude that had arisen more recently.

From the beginning, UNCITRAL made a point of reaching out to commercial interests. Indeed, when the Commission first considered the Transport Law project it directed the Secretariat to consult with organizations that act on behalf of various segments of the industry, including the CMI, the ICC, the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS), and the

⁶⁹Rotterdam Rules arts. 66–74.

⁷⁰*Id.* arts. 75–78.

⁷¹See *id.* art. 74 (jurisdiction); art. 78 (arbitration).

⁷²The second opening clause of the General Assembly resolution that formally adopted the Convention, see *supra* note 16, implicitly recognized the importance of meeting industry’s commercial needs when it expressed concern “that the current legal regime . . . fails to adequately take into account modern transport practices”.

⁷³See generally Frederick (1991), p. 81.

International Association of Ports and Harbours (IAPH).⁷⁴ Thereafter, representatives from relevant international organizations attended every meeting of the CMI's International Sub-Committee,⁷⁵ and commercial observers were active participants at every session of the UNCITRAL Working Group.

Commercial interests not only had a seat at the table so that their views could be heard, but the Working Group listened to those views and took them seriously. Most of the national delegations that were active in the negotiations either included expert industry representatives as members of the delegation⁷⁶ or consulted regularly with industry representatives between sessions.⁷⁷ When those experts with practical experience expressed strong views, therefore, the Working Group heard their message and responded accordingly.

Among other things, this meant that proposals that might have made perfect sense on a theoretical or logical level were abandoned when it became clear that the affected industries opposed them. Two examples illustrate that influence particularly well. Under article 19, "maritime performing parties" are liable on the Convention's terms for their own faults on the same basis as carriers (and receive the same benefits as carriers).⁷⁸ Early in the process, the draft text proposed that inland carriers (non-maritime performing parties) should be subject to the same rule.⁷⁹ But that proposal was abandoned⁸⁰ – and the text was amended to clarify that inland carriers do *not* qualify as maritime performing parties⁸¹ – when railroads and road carriers opposed it.⁸²

⁷⁴See *Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-Ninth Session*, U.N. GAOR, 51st Sess., Supp. No. 17, § 215, U.N. Doc. A/51/17 (1996) [hereinafter *UNCITRAL Twenty-Ninth Session Report*], reprinted in 1996 CMI Yearbook 355.

⁷⁵See, e.g., Sturley, *Interim View*, *supra* note 7, at pp. 69–72 (describing the work of the CMI's International Sub-Committee on Issues of Transport Law). Reports of individual meetings of that Sub-Committee are reprinted in the CMI Yearbook. See, e.g., *Report of the First Meeting of the International Sub-Committee on Issues of Transport Law*, 2000 CMI yearbook 176.

⁷⁶Over the course of the negotiations, the two largest delegations in the Working Group were those from China and the United States. Each of these countries had a large delegation precisely because it included industry experts to advise the government representatives. Even some of the smaller delegations also included industry experts that attended the meetings. Denmark, for example, regularly sent two delegates to the Working Group – one a government representative and one from industry.

⁷⁷Although China and the United States included industry experts on their delegations, see *supra* note 76, each country also prepared for Working Group sessions by meeting with an even broader range of industry experts. Most other countries that were particularly active in the negotiations also consulted regularly with industry experts at home.

⁷⁸See Rotterdam Rules art. 19(1).

⁷⁹See, e.g., *Preliminary Draft Instrument*, *supra* note 59, art. 6.3.1(a); *Draft Instrument WP.32*, *supra* note 59, art. 15(1).

⁸⁰See *Twelfth Session Report*, *supra* note 43, § 23, 161.

⁸¹See Rotterdam Rules art. 1(7).

⁸²See, e.g., *Proposals by the International Road Transport Union (IRU)*, U.N. Doc. A/CN.9/WG. III/WP.90, at § 1 (2007); *Drawing up of a New Convention on the Carriage of Goods by Sea and Extending This Convention to Door-to-Door Transport Operations (Comments on Behalf of*

Under article 80, “volume contracts” are subject to the Convention as a default rule but the parties have the freedom of contract to opt out of most of that coverage if they so choose.⁸³ At a “Round Table” discussion in London (attended by a number of delegates),⁸⁴ it was informally suggested that the text would be more logical if charterparties were subject to the same rule. That suggestion was also quickly abandoned when several non-governmental organizations representing carrier interests expressed their strong opposition.⁸⁵

As a result of the pragmatic process and the focus on pragmatic goals, the Rotterdam Rules are very much a pragmatic convention. Some academic observers have criticized them for being inelegant or complex,⁸⁶ and that may be a fair comment (although not fair criticism). The goal was never to achieve elegance and simplicity. The guiding principle was to improve the law so that it can better do the job that it is supposed to do – facilitate maritime commerce.

When considering the industry’s commercial needs, it is important not to take too narrow a view. Advocates for a particular commercial interest might first consider whether the Convention will help or hurt a party in litigation once a loss has occurred. Thus a lawyer who regularly represents P&I clubs defending cargo claims might evaluate whether a carrier’s liability is likely to be higher or lower in a typical case, just as a lawyer who regularly represents cargo insurers in subrogation actions might evaluate whether recoveries are likely to be higher or lower in typical cases.⁸⁷

The underlying business interests, however, should recognize that reforming the cargo liability regime is not a zero-sum game in which winners must be balanced against losers. Shippers and carriers alike will benefit from a more modern Convention that provides answers to the questions arising in practice, just as shippers and carriers alike will benefit from greater uniformity. That point was made particularly well by Knud Pontoppidan when he discussed the final text of the Rotterdam Rules at the CMI’s most recent conference in October 2008.⁸⁸

the IRU) in *Compilation of Replies to a Questionnaire on Door-to-Door Transport and Additional Comments by States and International Organizations on the Scope of the Draft Instrument*, U.N. Doc. A/CN.9/WG.III/WP.28, at p. 43 (2003); *Comments on Behalf of the Association of American Railroads (AAR) Relating to the Preliminary Draft Instrument on the Carriage of Goods by Sea in Compilation of Replies*, *supra*, at p. 32. For a good illustration of the influence on this issue that the railroads exerted over an individual delegation, see *Proposal of the United States of America on the Definition of “Maritime Performing Party,”* U.N. Doc. A/CN.9/WG.III/WP.84, § 1–2 (2007).

⁸³See Rotterdam Rules art. 80(1).

⁸⁴See generally Sturley (2008a) 461, 473 & nn.133–134 (describing the London Round Table) [hereinafter Sturley, *Transport Law for the Twenty-First Century*].

⁸⁵The traditional charterparty exclusion was accordingly retained. See Rotterdam Rules art. 6.

⁸⁶See, e.g., Tetley (2008), p. 625, 626.

⁸⁷Alternatively, some lawyers on both sides are likely to consider the impact that the new Convention will have on their own practices, with less regard for their clients’ best interests.

⁸⁸See Pontoppidan (2009), p. 282. Mr. Pontoppidan is the Executive Vice-President of AP Moller-Maersk AS.

He expressly acknowledged some of the many ways in which the Rotterdam Rules impose greater responsibility on carriers (as compared to the Hague-Visby regime),⁸⁹ including the loss of the navigational fault exception⁹⁰ and the large increase in the package and weight limitation amounts.⁹¹ But he nevertheless strongly supported the prompt ratification of the new Convention because the benefits to carriers of greater uniformity under a modern regime outweigh the greater burdens that the Rotterdam Rules place on carriers such as Maersk.

2.6 Updating and Modernizing the Law⁹²

One primary purpose of the Rotterdam Rules is to update and modernize the existing legal regimes that govern the carriage of goods (which includes filling in some of the gaps that have been identified in practice over the years). One of the ways in which the Rotterdam Rules update and modernize the law is to expand the range of issues addressed by the Convention. Even with this broader coverage, however, it is important to recognize that the Rotterdam Rules are still limited in their scope.

2.6.1 *Updating the Outdated Regimes*

As many observers have recognized, all the existing regimes are significantly in need of modernization. The Visby Protocol, which is over 40 years old, is seriously dated.⁹³ It was negotiated in the early days of the container revolution⁹⁴ when contracts for door-to-door multimodal transport were not yet the norm. Moreover, it did not overhaul the Hague Rules (which were then already over 40 years old), but instead amended them in limited respects.⁹⁵ The core of the Hague-Visby regime is not the 1968 Visby Protocol but the 1924 Hague Rules, which were not particularly

⁸⁹See 2009 CMI Yearbook at pp. 287–288.

⁹⁰Compare Rotterdam Rules art. 17 with Hague-Visby Rules art. 4(2)(a).

⁹¹Compare Rotterdam Rules art. 59(1) with Hague-Visby Rules art. 4(5).

⁹²The second and fourth opening clauses of the General Assembly resolution that formally adopted the Convention, *see supra* note 16, recognized the goal of updating and modernizing transport law, including filling the gaps that exist under current law.

⁹³See, e.g., van der Ziel (2002), p. 265.

⁹⁴See generally Levinson (2006) (discussing the impact of the container revolution); Cudahy (2006) (same).

⁹⁵See generally Sturley, *Transport Law for the Twenty-First Century*, *supra* note 84, at pp. 466–467 (discussing the negotiation of the Hague-Visby Rules).

“modern” even in the 1920s.⁹⁶ The Hamburg Rules are only 10 years younger, and in any event they did very little to update the Hague-Visby Rules.⁹⁷

The Hamburg Rules admittedly introduced some innovations that proved influential in the latest negotiations. The most obvious may have been the elimination of the navigational fault exception found in article 4(2)(a) of the Hague and Hague-Visby Rules.⁹⁸ More significant innovations were expanding the scope to cover inbound and outbound shipments,⁹⁹ and introducing special rules for jurisdiction and arbitration that sought to guarantee a cargo claimant’s right to have claims resolved in a convenient forum.¹⁰⁰ On a more technical level, the Hamburg Rules distinguished between the “carrier” (i.e., the person that undertakes to transport the goods) and a person that actually performs the carriage,¹⁰¹ covered contracts of carriage in which no bill of lading had been issued,¹⁰² recognized paperless transactions,¹⁰³ and expressly addressed liability for delay.¹⁰⁴

Unfortunately, the Hamburg Rules were also noteworthy for what they failed to do. More than two decades into the container revolution (and the accompanying growth of door-to-door multimodal transport), for example, the Hamburg Rules expanded the Hague and Hague-Visby tackle-to-tackle scope only to port-to-port coverage.¹⁰⁵ Although ships increasingly carried dangerous goods that were not even contemplated when the Hague Rules were negotiated, the Hamburg Rules’

⁹⁶The Hague Rules were substantially based on a 1910 Canadian statute that was modeled on the 1893 Harter Act, which was passed to address problems that began to arise at the beginning of the steam era. See generally Sturley, *History*, *supra* note 7, at pp. 4–17 (discussing situation in the nineteenth and early twentieth centuries).

⁹⁷On the two critical issues of facilitating e-commerce and addressing the needs of multimodal transport, the Hamburg Rules did nothing and next to nothing. See generally Sturley, *Transport Law for the Twenty-First Century*, *supra* note 84, at pp. 468–469 (discussing some of the limitations of the Hamburg Rules). The Hamburg Rules’ response to the container revolution was little different than Hague-Visby’s. See *id.* at 468 & nn.80–82 (comparing the Hague-Visby and Hamburg Rules).

⁹⁸See Hamburg Rules art. 5(1).

⁹⁹See Hamburg Rules art. 2(1). Although the CMI’s draft of the Visby Protocol called for expanding the scope to cover inbound and outbound shipments, the diplomatic conference rejected this proposal. See generally Sturley, *Transport Law for the Twenty-First Century*, *supra* note 84, at pp. 466–467 (discussing the negotiation of the Hague-Visby Rules).

¹⁰⁰See Hamburg Rules arts. 21–22.

¹⁰¹Hamburg Rules art. 1(2) recognizes the “actual carrier.” See also *id.* art. 10. The concept is expanded in the Rotterdam Rules as the “performing party.” See Rotterdam Rules art. 1(6). Assoc. Prof. Dr. Kerim Atamer is addressing “Identity of Carrier and Performing Party” as part of the present conference.

¹⁰²See Hamburg Rules art. 1(6); see also *id.* art. 18.

¹⁰³The Hamburg Rules did not anticipate e-commerce, of course, but they did recognize that telegrams and telexes should be recognized as “writings.” See *id.* art. 1(8).

¹⁰⁴See *id.* art. 5(1)–(2).

¹⁰⁵See *id.* art. 4; see also *id.* art. 1(6) (effectively excluding inland portion of multimodal contracts from coverage).

treatment of shippers' liability is not substantially different from the Hague treatment.¹⁰⁶

The Rotterdam Rules address the prior conventions' failure to keep pace with modern business practices in a number of specific ways. While none of the existing regimes facilitate electronic commerce, for example, the Rotterdam Rules address this modern trend not only with a separate chapter devoted to the subject¹⁰⁷ but throughout the text.¹⁰⁸ While none of the existing maritime regimes address the rights and responsibilities of the person with the right to control the goods, the Rotterdam Rules include a separate chapter to fill this gap.¹⁰⁹ While the existing regimes govern on a tackle-to-tackle¹¹⁰ or port-to-port¹¹¹ basis, failing to address the modern needs of multimodal contracts, the Rotterdam Rules instead apply on a door-to-door basis if the parties' contract runs that far.¹¹²

Updating and modernizing the law was not simply a guiding principle for UNCITRAL's Transport Law project, the entire project grew out of the perceived need to update and modernize. The initial seeds were planted in the context of UNCITRAL's Electronic Data Interchange (EDI) project. In June 1996, as part of the EDI project, the Commission discussed a proposal to

review . . . current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules in the areas where no such rules existed and with a view to achieving greater uniformity of laws than has so far been achieved.¹¹³

In conjunction with this discussion, the Commission noted:

[E]xisting national laws and international conventions left significant gaps regarding issues such as the functioning of the bills of lading and seaway bills, the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and to the legal position of the entities that provided financing to a party to the contract of carriage.¹¹⁴

¹⁰⁶See *id.* arts. 12–13.

¹⁰⁷See Rotterdam Rules arts. 8–10 (chapter 3).

¹⁰⁸See generally, e.g., Alba (2009) (discussing provisions of the Convention that facilitate electronic commerce).

¹⁰⁹See generally, e.g., van der Ziel (2009) (discussing the Convention's treatment of the right of control and the controlling party). Prof. Dr. van der Ziel is addressing "Right of Control and Controlling Party" as part of the present conference.

¹¹⁰See Hague-Visby Rules art. 1(e).

¹¹¹See Hamburg Rules art. 4; see also *id.* art. 1(6) (effectively excluding inland portion of multimodal contracts from coverage).

¹¹²See generally, e.g., Fujita (2009), p. 349 (discussing the Convention's comprehensive treatment of multimodal contracts).

¹¹³UNCITRAL *Twenty-Ninth Session Report*, *supra* note 74, § 210, reprinted in 1996 CMI Yearbook 354.

¹¹⁴*Id.*

The Commission accordingly authorized the UNCITRAL Secretariat to start gathering information on these matters with a view to deciding “on the nature and scope of any future work that might usefully be undertaken by [UNCITRAL].”¹¹⁵ With this mandate, the Secretariat invited the CMI to begin the preparatory work for a new convention and the project was underway.

2.6.2 *Expanding the Range of Issues*

Adequately updating transport law requires a much broader convention than the Hague, Hague-Visby, or Hamburg Rules. Many provisions in the final text of the Rotterdam Rules illustrate the extensive need to update current law. Chapters 3,¹¹⁶ 9,¹¹⁷ 10,¹¹⁸ and 11¹¹⁹ address issues that have been entirely omitted from prior maritime conventions. Chapter 8 resolves issues concerning transport documents and electronic transport records that have created real problems in practice but that prior conventions did not include.¹²⁰ Even on liability issues, the Rotterdam Rules cover a broader range of issues. Chapter 7 resolves issues of shipper liability more fully than prior maritime conventions,¹²¹ and chapter 5 addresses not only the carrier’s liability but also the liability of maritime performing parties.¹²²

The need to update the law to facilitate electronic commerce explains a large share of the new subjects covered by the Rotterdam Rules. Industry is moving in the direction of greater e-commerce, but current law impedes that progress to the extent that the law fails to furnish a framework that provides an adequate basis for e-commerce (however it may develop). Chapter 3 takes an important step by permitting the use of electronic transport records if the parties wish to use them, but that

¹¹⁵*Id.* § 215, reprinted in 1996 CMI Yearbook 355.

¹¹⁶Chapter 3, which consists of articles 8–10, addresses electronic transport records, a subject that was not even contemplated when the prior maritime conventions were negotiated. Assoc. Prof. Dr. Hakan Karan is addressing “Transport Documents and Electronic Transport Records” as part of the present conference.

¹¹⁷Chapter 9, which consists of articles 43–49, addresses delivery, a key concept that prior maritime conventions left undefined. Article 4(2) of the Hamburg Rules comes closest to providing any useful guidance.

¹¹⁸Chapter 10, which consists of articles 50–56, addresses the rights of the controlling party, a concept that prior maritime conventions did not recognize. Prof. Dr. van der Ziel is addressing “Right of Control and Controlling Party” as part of the present conference.

¹¹⁹Chapter 11, which consists of articles 57–58, addresses the transfer of rights, a subject beyond the scope of prior maritime conventions that has generally been governed by national law.

¹²⁰*Compare* Rotterdam Rules arts. 35–42 with Hague Rules arts. 3(3)-(5), 3(7); Hague-Visby Rules arts. 3(3)-(5), 3(7); Hamburg Rules arts. 14–18.

¹²¹*Compare* Rotterdam Rules arts. 27–34 with Hague Rules arts. 4(3), 4(6); Hague-Visby Rules arts. 4(3), 4(6); Hamburg Rules arts. 12–13. Prof. Tomotaka Fujita is addressing “Obligations and Liability of Shipper” as part of the present conference.

¹²²See Rotterdam Rules arts. 1(7), pp. 19–20.

solves only part of the problem. Before commercial parties will make the investment necessary to rely on e-commerce substitutes for bills of lading, they will need to know that the law provides predictable answers to such issues as the rights of the controlling party and transfer of rights – issues that Chaps. 10 and 11 now address.¹²³

The Rotterdam Rules' wider period of carrier responsibility – full door-to-door coverage (rather than tackle-to-tackle coverage under the Hague and Hague-Visby Rules or port-to-port coverage under the Hamburg Rules) when the contract of carriage extends that far¹²⁴ – is similarly a pragmatic innovation that is necessary to modernize the law. Separate legal regimes for each leg of a multimodal journey may have made sense in the days when each leg was performed under a different contract, but the commercial world has long since moved past that business model. It is time for the legal community to catch up with commercial reality. As the Supreme Court of the United States recently observed in the context of a multimodal bill of lading, “[c]onfusion and inefficiency will inevitably result if more than one body of law governs a given contract’s meaning.”¹²⁵ Thus the Rotterdam Rules provides that its legal regime will govern the relationship between the shipper and the carrier (the two contracting parties) throughout the entire performance of a multimodal contract that includes appropriate carriage by sea.¹²⁶

2.6.3 *Limitations on the Scope of the Rotterdam Rules*

Although the Rotterdam Rules are much broader than prior maritime conventions, it is nevertheless important to recognize that the Convention is still limited. Most obviously, the scope is limited to the transportation issues that arise out of the shipper-carrier relationship. The Convention does not address issues of property law, for example. Chapter 10 identifies the party that has the power to give instructions to the carrier,¹²⁷ but it does not address who has a property interest in the goods. Similarly, the Convention does not address issues of agency law. Article 19

¹²³Many of the other new provisions in the Rotterdam Rules were also necessary to update the law. Article 80's treatment of volume contracts was controversial because of the policy choices that UNCITRAL made, but *some* treatment of volume contracts (and other contractual forms that did not previously exist in common practice) was necessary to bring the law into the twenty-first century. We no longer live in an era when bills of lading and charterparties are the sole contracts of carriage in everyday use. Cf. Rotterdam Rules arts. 1(1) (providing a “contract of carriage” definition that is not limited to bills of lading and similar documents of title), 6(1)(b) (providing for contracts other than charterparties that provide for the use of a ship or any space thereon).

¹²⁴*Compare* Rotterdam Rules art. 12 *with* Hague Rules art. 1(e); Hague-Visby Rules art. 1(e); Hamburg Rules art. 4(1).

¹²⁵*Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 29, 2004 AMC 2705, 2715 (2004).

¹²⁶Of course, the contract must otherwise satisfy the scope-of-application requirements. See Rotterdam Rules arts. 5–7.

¹²⁷See *supra* note 118 and accompanying text.

establishes a cargo claimant's right to recover from a maritime performing party,¹²⁸ but nothing in the Convention addresses the relationship between the carrier and its performing parties (except to the extent that their relationship is established by a contract of carriage that itself satisfies the requirements of chapter 2¹²⁹).

Indeed, it would be illogical for the Rotterdam Rules to address issues such as property and agency. The Convention is intended to govern the contractual relationship between carriers (along with some related parties, such as maritime performing parties) and shippers (along with parties that derive their rights from shippers, such as consignees and controlling parties). Like its predecessors, it does not govern relationships between cargo interests, such as the relationship between two shippers or the relationship between a shipper and a consignee. Nor does it govern relationships between two carrier interests. Property issues generally arise in the context of the relationship between a seller (often the shipper in the transport contract) and a buyer (often the consignee) or lender (often the holder of a negotiable transport document). Agency issues generally arise in the context of the relationship between the principal parties and their subcontractors.

Although the Rotterdam Rules are strictly limited in their scope to the shipper-carrier relationship, they do not govern every aspect of even that relationship. Most obviously, the Convention does not govern the shipper's obligation to pay freight, which is one of the core obligations under the contract. Even for subjects that are within the Convention's ambit, a great many specific issues are left to national law. For example, article 17 addresses burdens of proof but it does not address the standard of proof. Thus it is left to otherwise applicable law to determine whether a party must carry its burden with a preponderance of the evidence, clear and convincing evidence, proof beyond a reasonable doubt, or some other standard. Similarly, the application of the Convention turns on the existence of a contract for carriage, but issues of contractual validity are left to otherwise applicable law. In any action to recover damages under the Convention, central issues may include causation, foreseeability, and the plaintiff's right to sue, but once again the Convention does not address those issues.

2.7 Evolutionary Development of the Law

If we pay attention to the big picture, the changes to existing law are not (and were not intended to be) earth-shaking. The Rotterdam Rules are deliberately evolutionary, not revolutionary. The focus is on updating and modernizing the existing legal

¹²⁸ Assoc. Prof. Dr. Kerim Atamer is addressing "Identity of Carrier and Performing Party" as part of the present conference.

¹²⁹ It is very common for an NVOCC to contract with a shipper for a multimodal carriage with a sea leg and then sub-contract with an ocean carrier to perform that sea leg. To the extent that the other requirements of chapter 2 are satisfied, both the multimodal contract (in which the NVOCC is the carrier) and the sub-contract for the sea leg (in which the NVOCC is the shipper) are subject to the Convention.

regimes that govern the carriage of goods,¹³⁰ filling in some of the gaps that have been identified in practice over the years,¹³¹ and harmonizing the governing law when possible.¹³² Indeed, the Working Group rejected proposals to address more revolutionary subjects (or at least more controversial subjects on which harmonization would have been difficult).¹³³

The Rotterdam Rules were not negotiated and drafted in a vacuum. Many provisions in the Convention were included either to preserve the jurisprudence that has developed during decades of experience with the Hague and Hague-Visby Rules¹³⁴ or to avoid any implication that changes may have been intended by the deletion of a well-known provision.¹³⁵ Even the entirely new provisions were written with an eye on the years of practice under the existing regimes.¹³⁶

To be sure, particular aspects of the Convention will involve more significant changes for some countries than for others. To the extent that generalization is possible, the Rotterdam Rules draw largely on the Hague-Visby and Hamburg Rules, incorporating significant elements from each. Those countries that have already adopted a national law incorporating major Hague-Visby and Hamburg elements are therefore less likely to see significant changes in their legal systems under the new regime (although from the very nature of a compromise, every country can expect some significant changes to be made). On the other hand,

¹³⁰See *supra* notes 92–126 and accompanying text.

¹³¹See *supra* text after note 92.

¹³²See *supra* notes 17–21 and accompanying text.

¹³³See *supra* notes 59–62 and accompanying text.

¹³⁴Article 17(3), for example, preserves most of the familiar catalogue of defenses that was originally included in article 4(2) of the Hague Rules – despite frequent debates over whether such a list is necessary. See, e.g., *Tenth Session Report*, *supra* note 43, § 39; *Twelfth Session Report*, *supra* note 43, § 117–118; *Fourteenth Session Report*, *supra* note 37, § 35; *Nineteenth Session Report*, *supra* note 44, § 68. The Nordic countries have gone so far as to eliminate most of the catalogue from their domestic Hague-Visby legislation on the ground that it is unnecessary. See generally, e.g., Ramberg, *supra* note 15, at 1223 (explaining that the elimination was not a substantive change because the general fault provision would preserve the omitted defenses in any event). But UNCITRAL for the most part retained the catalogue on the grounds that it did no harm in countries in which it was unnecessary and provided a real benefit in those countries that had a well-developed jurisprudence under the catalogue. See, e.g., *Tenth Session Report*, *supra* note 43, § 39; *Twelfth Session Report*, *supra* note 43, § 118; *Fourteenth Session Report*, *supra* note 37, § 35.

¹³⁵Article 79(1)(c), for example, preserves the ban on benefit-of-insurance clauses that was originally included in article 3(8) of the Hague Rules. See also, e.g., Hamburg Rules art. 23(1). Benefit-of-insurance clauses have not been a problem in practice for over ninety years. See Sturley (2008b), § 165, at pp. 16–28 & n.2 (7th rev. ed.). But UNCITRAL did not wish to risk resurrecting the problem by repealing the well-established prohibition.

¹³⁶Article 24, for example, largely abrogates the common-law deviation doctrine. Although no similar provision appears in prior maritime conventions, that article is a direct response to the practice that has developed in some countries under prior law. See, e.g., *Thirteenth Session Report*, *supra* note 45, § 100–102.

those countries that still adhere to the Hague Rules are likely to see greater changes.

Because the Rotterdam Rules are built on existing foundations, very little about them is completely new. One of the most visible reforms – elimination of the heavily criticized “navigational fault” exception¹³⁷ – is not even a change in law for those countries that have adopted the Hamburg Rules¹³⁸ (and it will not represent much of a change in practice in those countries whose courts rarely uphold the defense¹³⁹). Perhaps the most significant change in the new Convention is extending the period of responsibility (in appropriate cases) to full door-to-door coverage.¹⁴⁰ Although that innovation is not currently in force in other transport law conventions, it is still not particularly remarkable. Courts have for decades been upholding contractual clauses that extend the maritime regime inland.¹⁴¹ The Rotterdam Rules simply take this common commercial choice and give effect to it with the force of the Convention. Even the volume contract provision,¹⁴² which was long controversial within the Working Group, grows out of the recognition in the Hague, Hague-Visby, and Hamburg Rules that some contracts in which the parties are more likely to have equal bargaining power (i.e., charterparties) need not be subject to the regime on a mandatory basis.¹⁴³

Even with respect to those issues that have been entirely omitted from prior maritime conventions,¹⁴⁴ the Rotterdam Rules were not written on a clean slate. Although no international uniform law governed those issues, they are still subject to legal regimes (generally under domestic law). That patchwork of conflicting laws does a poor job of providing international traders with uniform and predictable laws that can govern their transactions consistently, wherever they do business, but it at least gave the UNCITRAL Working Group some functioning models on which the delegates could base new proposals.

¹³⁷See *Tenth Session Report*, *supra* note 43, § 35–36; see also Sturley, *Interim View*, *supra* note 7, at p. 95 (discussing the Working Group’s early decision to eliminate the navigational fault defense).

¹³⁸See Sturley, *Interim View*, *supra* note 7, at p. 95 (noting the Hamburg Rules’ elimination of the navigational fault defense).

¹³⁹See, e.g., Sturley, *Uniformity*, *supra* note 23, at p. 577 (noting that “the navigational fault defense is rarely, if ever, successful in the United States”).

¹⁴⁰*Compare* Rotterdam Rules art. 12(1) (providing for door-to-door coverage) *with* Hague-Visby Rules art. 1(e) (establishing tackle-to-tackle coverage); Hamburg Rules art. 4(1) (establishing port-to-port coverage). See generally, e.g., Sturley, *Interim View*, *supra* note 7, at pp. 76–79 (discussing the Working Group’s early discussion of the choice between port-to-port and door-to-door coverage).

¹⁴¹See, e.g., *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 2004 AMC 2705 (2004) (upholding inland extension of U.S. COGSA to govern liability for train derailment on basis of clause paramount in multimodal bill of lading).

¹⁴²Rotterdam Rules art. 80.

¹⁴³See Hague Rules art. 5; Hague-Visby Rules art. 5; Hamburg Rules art. 2(3).

¹⁴⁴See *supra* notes 116–122 and accompanying text.

2.8 Conclusion

Looking back at the long process required for the preparation of the Rotterdam Rules and considering the principles that motivate them, it is tempting to view ourselves as being at the conclusion of the story. In truth, however, we have witnessed only the prologue. UNCITRAL has finished drafting the new regime, the United Nations has adopted the formal Convention, and more than twenty nations have formally signed it. The next step is for the world's governments to decide that their countries should become parties to the Convention. When twenty nations have done so, the Rotterdam Rules finally enter into force. Then it will be possible to start witnessing the principles discussed here in the pragmatic real world in which the Rotterdam Rules were designed to operate.

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