The new Rotterdam Rules:
An overview on the main differences with the international regulations in force on carriage of goods by sea*

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1. INTRODUCTION

The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea is the new Convention adopted by the General Assembly of the United Nations on 11 December 2008 and will be opened to the signature of States in Rotterdam the 23th of september 2009.

This new instrument, that will enter into force once it has been ratified by at least twenty States, deals with the international carriage of goods and is closely connected with the international trade.

International transport law is currently regulated by two main international Conventions, the Hague Rules and the Hamburg Rules.

Many countries have adopted the Hague Rules as amended by two Protocols, respectively adopted in Brussels on 1968 (the Hague Visby Rules – 30 contracting States) and on 1979 (the Special Drawing Rights Protocol – 25 contracting States).

Some other Countries apply a sort of mix system between these Conventions.

As we can see, actually the field of maritime transport law is not at all internationally unified, eventhough the Hague and the Hague-Visby Rules are, at this stage, the more common rules applied by the shipowners of the Western countries.

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These Rules are in fact also largely enacted on the basis of their voluntarily application by the parties, with the Paramount clauses on the bills of lading.

For that reason I'll compare the new Rules basically with the Hague and Hague-Visby Rules.

2. SCOPE OF APPLICATION

2.1. GENERAL SCOPE OF APPLICATION

My first remark is that the new Convention is much longer than the others international Conventions on carriage of goods by sea we usually deal with. The approach in very practical and is quite unusual from a civil law perspective, as it was also in the Hague Rules. Anyway, here the regulation in all aspects of the subject is very detailed and deeply analysed from all possible cases.

From the point of view of the scope of application, as it has already been underlined by Professor Van Der Ziel in his speech before mine, this new international Convention aims to regulate the phenomenon of the "*door to door transportation*" which means that new rules will operate also with regard to the multimodal transport operations, but only in case of a sea leg transportation too. From this point of view, we have to note that the new rules are applicable only if, in a multimodal transport operation, there is also a sea transport leg between ports of two different States, which is substantially the same international element required for the application of the Hague and Hague-Visby Rules. So the internationality of the sea leg transportation is essential for the application of the Convention. Maritime transport leg remains the predominant part of the operation subject to this Convention, so that many regulations are typical of this transport law field.

The new Rules move from the Hague-Visby Rules (and from the Hamburg Rules too) which both these regulations refer to, for the determination of the scope of their application, also to *the place of issuance of the bill of lading* in a contracting State and to *the choice of the parties*. Article 5 of the Rotterdam Rules provides for the application of the Convention to an international contract of carriage, where a sea leg is between two different States, and 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*.

No reference is made to the place of issuance of the bill of lading, nor to any choice of the parties.

According to the Hague Rules the period of responsibility of the carrier starts with the operations of loading of the cargo on the ship and ends with the unloading (or discharge of the cargo). Under the new rules, art. 12 provides that the period of responsibility begins *when the carrier or a performing party receives the goods for carriage and ends when the goods are de-*

livered. This is because of the road transport leg, which could be agreed between the parties and could be part of the transport operation subject to the application of the Convention.

2.2. A "LIMITED NETWORK SYSTEM"

An important limitation of the scope of application of the new Rules is the so called "*Limited Network System*".

As provided in article 26, if the delay, loss or damage to the goods occurs before the loading or after the discharge from the ship, the provisions of the new Convention do not prevail on those provisions of another international Convention governing the liability, the limitation of liability and the time to sue, which would compulsory apply if the shipper made a separate and direct contract with the carrier for the particular stage of carriage where the event causing the delay, loss or damage occurred.

2.3. SPECIAL RULES FOR EXCEPTIONAL DEROGATIONS

Regulation is binding and mandatory, but in some cases parties are allowed to derogate them.

2.3.1. VOLUME CONTRACTS.

As said, the Convention reflects the new commercial practices with regard to the *volume contracts*, which usually are agreed in the liner transportation field.

Art. 80 specifies the conditions upon which the parties are allowed to depart from the application of the binding rules of the Convention. One important requirement is that the shipper should be informed of the opportunity to conclude a contract of carriage on terms and conditions that comply with the Convention, and that the derogation cannot be incorporated by referring to another document, nor it can be embedded in a contract of adhesion which is not negotiated. No derogation is allowed to the safety measures, as those required to insure the seaworthiness of the ship, the protection of the carrier against dangerous goods (art. 32), and the information the shipper has to give to the carrier under art 29. Furthermore no derogation is allowed to the rule which does not allow the parties to benefit of the limitation of liability in case the damages are caused with the intent to provoke the loss or recklessly and with knowledge that such loss would probably result. (*faute inexcusable*).

In case these derogations have to be enforced against a third party, paragraph 5 of art. 80 provides that this party has to expressly consent to them in writing, as specified in art 3, about the form requirements.

2.3.2. LIVE ANIMALS AND SPECIAL AGREEMENTS

Transport of live animals was excluded from the application of the Hague and Hague Visby Rules.

The new Convention specifies that the parties may exclude or limit the obligations or the liability if the goods are live animals, except if art 61 applies.

Similarly to the Hague and Hague Visby Rules, the new Convention provides for the possibility that it is not applied in case of *special agreements*, provided that the relevant contract of carriage does not relate to the ordinary commercial shipments made in the ordinary course of trade and that no negotiable transport document or electronic transport record has been issued.

2.4. BILLS OF LADING AND TRANSPORT DOCUMENTS

The Hague and Hague-Visby Rules apply to the contracts of carriage covered by a bill of lading or a similar document of title.

Under the provision of art. 1 letter B), in fact, the Rules apply to contracts «*covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same*».

The new Rules provide for their application either in case a negotiable document of title has been issued, and when a non-negotiable document of transport (as a straight bill of lading, a sea waybill, or a delivery order etc.) has been issued or when no document of transport has been issued.

The scope of application of the international binding regulation on maritime transport law was historically, since the Hague Rules, adopted in 1921 by the CMI, limited to the sector of the liner transportation, where a bill of lading was issued. The application of the international rules of transport (Hague Rules) was excluded for the non liner transportations, or *tramps*, where the contract was agreed between the parties on the basis of a charter party. In this latter case, since the shipper was deemed to have the same negotiating power that the ship-owner had, the charter party was the only regulation of their operation, and the protection of the international binding regulation was afforded only to the third party holder of the bill of lading acting in good faith.

The new rules reflect the modern commercial and maritime practices, where there is no longer a clear distinction between liner transportation with bill of lading and non liner transportation with charter parties. In this connection, the Rotterdam Rules have taken into account the situations where a charter party is issued in a liner transportation and the

opposite situation where no charter party, but just a transport document is issued in a non-liner transportation.

In the first case, although we are in the field of the *liner transportation,* the Convention doesn't apply. In the second case the Convention applies, even though we are in the field of the *non liner transportation* and even though no negotiable bill of lading has been issued (as required for the application of the Hague Visby Rules).

This is reflected also into the following provision of the art. 7, regarding the "*application to certain parties*", and which defines the "third party" as party which was not an original party to the contract of carriage in a transport operation excluded from the application of the Convention.

This article is not limited to the holder of a negotiable document of title (as in the Hague-Visby rules) but applies to the consignee and the controlling party.

3. RIGHT OF CONTROL

The new Convention provides for a specific regulation concerning the *right of control* on the goods shipped during the time the cargo is in the custody of the carrier.

The scope of this right is defined in art. 50 as «a) the right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage; b) the right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place in route; and c) the right to replace the consignee by any other person including the controlling party».

No provision of this kind was ever included in any other international convention on carriage of goods by sea and the right to instruct the carrier during transit is now allowed by customary rules and national laws just to the holder of the full set of negotiable documents of title (bills of lading).

From a practical point of view, this is a problem where no bill of lading has been issued and the carrier needs to know with whom it could negotiate different terms and conditions or from whom it is required to take instructions in exceptional circumstances.

Under the Rotterdam Rules, the controlling party is the shipper, unless it designates into the contract of carriage the consignee, the documentary shipper or another person as the *controlling party.*

But if a bill of lading has been issued, the new regulation provide anyway that the controlling party is the holder of the bill of lading or, if more than one original of the negotiable bill of lading has been issued, the holder of the full set of originals.

The same right is allowed by the new regulations to the holder of a negotiable electronic transport record.

The "right of control" under the new regulation can be transferred to another person and the transfer becomes effective with respect to the carrier upon it is notification of the transfer by the transferee.

If a negotiable bill of lading or a negotiable electronic transport record has been issued, the right of control can be the transferred by transferring the negotiable transport document or the negotiable electronic transport record.

For the first time in our field, art. 57 of the new Convention specifies how the rights incorporated into the negotiable transport documents (or into a negotiable electronic transport record) can be transferred from one to another person.

The new Rules specify that the holder that is not the shipper and does not exercise any right arising from the contract of carriage does not assume any liability under the contract of carriage solely by reason of being an holder (art. 58).

Moreover, the new Rules specify that if the holder that is not the shipper exercises any of the rights under the contract of carriage, he assumes the only liabilities arising from the contract that are incorporated in or ascertainable from the negotiable transport documents (or into a negotiable electronic transport record).

There is no other provision in the new Convention for the transfer of the contractual rights from the shipper to a third party who wasn't part to the original contract of carriage.

Since no uniform regulation was adopted on the right to sue the carrier, the issue of identifying the party entitled to bring an action against the carrier for loss or damage to the cargo is left to the national law of the single judge called to solve every dispute.

In France, the contract of carriage is usually qualified as a *contract between three subjects*, the shipper, the carrier and the consignee, and the latter assumes only the obligations concerning the normal "economy of the contract", through the exercise of the rights arising from the contract of carriage, when the delivery of the goods is requested.

In Italy, judges usually qualify the contract of carriage as a *contract for the benefit of a third party*, the consignee.

Under English law, for the *privity of contract doctrine*, it was impossible to transfer rights and obligations arising under a contract of carriage to a third party without the endorsement of a bill of lading, as provided by the statutory form of assignment of the sect. 1 of the Bill of lading Act 1855. By this statutory solution, the transfer of rights and obligations under the contract of carriage was anyway linked to the property of the goods.

Only after the Carriage of goods by sea Act 1992 has been adopted, English law provided that a third party – who wasn't party to the original agreement (between shipper and carrier) – is entitled to sue under a

contract of carriage, without the link with the property of the goods, and without the need of the issuance of a negotiable bill of lading.

This regulations provides for a transfer of the rights to the third party (sect. 2.1), independently from the transfer of the liabilities under the contract of carriage, which are transferred only if the third party : a) *takes or demands delivery from the carrier of any of the goods to which the documents relates b) makes a claim under the contract of carriage against the carrier in respect of any of those goods, or c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods.*

In conclusion, the new Convention has extended the scope of his application from the contracts of carriage covered by a bill of lading or any similar document of title, as it was in the Hague and Hague-Visby Rules, to those covered by any other non-negotiable transport document too, but has failed to unify the different national systems the consignee or any other third party acquires rights arising from the contract of carriage negotiated between shipper and carrier.

5. LIABILITIES OF SHIPPER AND CARRIER

New regulations in the field of maritime transport are also those referring to the obligations of the shipper, which are clearly set out for the first time in a separate chapter (number 7), and the specific provision on the basis of his liability against the carrier (art. 30).

From the point of view of the liability of the carrier, the new rules extend the liability under the contract also to the *Maritime performing parties*, which become jointly and severally liable with the carrier.

The basis of their liability lays in art. 17, which provides a solution similar to the one of art. 4 of the Hague Rules, but with a very useful solution for the burden of proof between the claimant and the carrier. The excepted perils are reproduced under §3, except those under §2 of art. 4 of the Hague Rules (nautical fault and fire) which were qualified as causes of exclusion of liability of the carrier.

The limitation of liability is available for the carrier and also for maritime performing parties, but also for servants, agents, master and crew etc. (art. 4).

Responsibility is excluded for master, crew and employees of the carrier and of the maritime performing party by art. 19.4.

Finally, new limits have been established for the liability of the carrier, as here compared with the previous international regulations in force:

	Hague Visby Rules	Hamburg Rules	Rotterdam Rules
Per Kilo	DSP 2 (€ 2,325)	DSP 2,5 (€ 2,791)	DSP 3 (€ 3,448)
Per pakage	DSP 666,67 (€ 775,58)	DSP 835 (€ 932,058)	DSP 875 (€ 1.017,44)

6. FINAL CLAUSES

As we pointed out in our works on the unification of maritime law[1], important problems arise from the fact that many countries are contracting parties of different international instruments in the same field of law and all in force internationally.

From the maritime law unification perspective, a very useful provision is contained in art. 89 of the final clauses of the Rotterdam Rules, which imposes to the States who want to ratify the new Convention to denounce the Hague Rules, or the Hague-Visby Rules, or the Hamburg Convention, whichever is the international Convention they are bound to at the time of the ratification.

Furthermore, no reservation is possible to this Convention, so the regulation will be the same for all contracting States (except for the part about the jurisdiction, for which a procedure of opting-in is adopted).

Finally, another important rule from the point of view of the international unification of the law in the filed of the carriage of goods is set out in art. 2, which is intended to facilitate the uniform interpretation of the Convention, as it was in a similar rule settled in the Hamburg Convention.

1 M. Rimaboschi, *L'unification du droit maritime – Contribution à la construction d'un ordre juridique maritime*, Marseille, PUAM, 2006 – Préface P. Bonassies; M. Rimaboschi, *Unification du droit maritime et interprétation uniforme*, Trieste, EUT, 2005, préface G. Righetti.