

A BLUE PRINT FOR A WORLDWIDE MULTIMODAL REGIME

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Resumen: En el nº 2 de 2010 de CDT se publicó un manifiesto del llamado «Grupo de los 9» titulado «Particular concerns with regard to the Rotterdam Rules» en el que estos destacados profesores y juristas expresaban sus dudas acerca de este nuevo instrumento internacional. Este Grupo ofrece ahora un nuevo manifiesto que supone un paso adelante en el que se indica que a pesar de la innegable necesidad de poner al día las Reglas de La Haya-Visby, y de las aportaciones efectuadas en tal sentido por las Reglas de Róterdam, las perspectivas de éxito de estas últimas se ven ensombrecidas por su pretensión de extenderse más allá de lo que en puridad debía ser su objeto, el transporte marítimo, para convertirse en el texto de referencia para el transporte multimodal que cuente con una fase marítima. Lejos de contribuir a un verdadero y efectivo régimen unificado de la multimodalidad, plantea nuevas dudas a la hora de determinar qué régimen, de entre los existentes para cada tipo de transporte, debe ser de aplicación en cada caso. Mientras tanto, parece que para conseguir los objetivos referidos al transporte marítimo de las Reglas de Róterdam habría bastado con la introducción de Protocolos a las Reglas de La Haya-Visby, dejando que lo concerniente al transporte multimodal continuara por la senda establecida a tal efecto por el CMR, cuyo sistema quizás debiera traspasar las fronteras europeas con el impulso de las diferentes instituciones internacionales.

Palabras clave: Reglas de Rotterdam, transporte multimodal, transporte marítimo, Reglas de La Haya-Visby, CMR.

Abstract: In the issue n. 2 of 2010 of CDT it was published a manifesto of the so-called «Group of the 9» under the title of «Particular concerns with regard to the Rotterdam Rules» where these renowned scholars and attorneys expressed their doubts about this new international legal instrument. The Group offers now a new manifesto providing a step further whereby they indicate that notwithstanding the undeniable necessity to update the Hague-Visby Rules and the contributions carried out in this direction by the Rotterdam Rules, success expectations of the latter rules are hindered because of the aim to expand the scope of application beyond their object in strict sense, namely maritime transport, so as to become the text of reference as for every multimodal transport that includes a sea leg. Far from contributing to a real and effective multimodal unified regime, new doubts arise when determining which regime, of all those for each type of transport, shall apply in each case. In any event, it seems that in order to reach the objectives appointed to by the Rotterdam Rules, introducing Protocols to the Hague-Visby Rules would have been good enough, whereas all that related to multimodal transport continues by the CMR established paths, a system which should trespass European borders with the help of different international institutions.

Key words: Rotterdam Rules, multimodal transport, maritime transport, Hague-Visby Rules, CMR.

*It is with a sense of regret that we report that Professor SVANTE O. JOHANSSON, who has been a very valuable member of our group, has now left us due to his having been appointed Justice to the Supreme Court of Sweden by the Swedish Government. We have been honoured to have had his unstinting support and are proud that our friend and colleague has reached such a momentous milestone in his career. Whilst we are sad to lose him, we are also pleased to announce that we have been joined by Professor MILOS POHUNEK of Prague University, a highly respected law professor and practitioner from the Czech Republic, who will undoubtedly maintain the academic and practical cargo transport law experience of our group.

1. The UN Convention on Contracts for International Carriage wholly or partly by Sea known as «the Rotterdam Rules» bridges the gap between the Hague and the Hague/Visby Rules on the one hand and the Hamburg Rules on the other by removing the error in navigation defence available to the maritime carrier under the Hague and the Hague/Visby Rules and by increasing the monetary limits of liability to account for world inflation since the 1920s.

2. However, there may well be considerable difficulties in getting broad international consensus on the innovations contained in the Rules. One such controversial aspect concerns the expansion of the Convention to cover not only the maritime segment but also pre-carriage and on-carriage by other modes of transport (the so-called «maritime plus»),¹ making it difficult to determine whether the Convention or other potentially applicable legal régimes apply to the same transport (Art. 82 of the Rotterdam Rules). Further, the Convention as such does not actually cover transport additional to maritime transport, as it merely gives the maritime carrier the option to include such additional carriage in his contract (Art.1.1 of the Rotterdam Rules: «... may provide for carriage by other modes in addition to sea carriage»). In practice, it may well be difficult for the customers to determine whether or not the carrier has exercised that option. Furthermore, it is unhelpful to expand a unimodal transport convention to cover other modes as well, since nowadays the important factor for customers is not exactly how goods have been carried and which mode of transport has been used but rather the desire to get the goods in the right condition to the right place at the right time.

3. The Rotterdam Rules also expand beyond the contractual carrier to cover anyone acting as a «maritime performing party». The definition of such a party would include anyone performing or undertaking 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 but with the exception that an inland carrier will only be considered to be a maritime performing party to the extent that it performs or undertakes to perform its services exclusively within a port area.

4. The definition clearly includes stevedoring companies and cargo terminals in the seaport. This may cause some problem to multi-purpose cargo terminals in the seaports, as it would be difficult for them to determine to what extent the goods stored in the terminal are subjected to the maritime convention. Indeed, the failure of the 1991 Convention on Operators of Transport Terminals to come into force (four states have ratified so far while five are required for the convention to enter into force) presumably depends on the difficulties which would arise for cargo terminals being exposed to different systems of liability depending upon the contemplated modes of carriage.² If that convention does come into force, the situation would be further aggravated.

5. Generally, the Rotterdam Rules represent an imbalance between shippers and carriers. Although the carrier enjoys the privilege of a monetary limitation of liability for a breach of any of its obligations, the shipper would incur an unlimited liability, e.g. in case of incorrect information given to the carrier. Whilst it might be understandable that the maritime carrier would prefer to have a joint and several liability comprising everyone acting as shipper and consignee, it may be considered less acceptable that a party having had nothing to do with the contract of carriage as such should be liable under the Convention.

6. Nevertheless, the Convention contains a definition of «documentary shipper» and to qualify as such, it is sufficient to agree to be named as «shipper» in the transport document or electronic transport record. This might be particularly harmful for Ex Works and FOB sellers who without realising the

¹ See F. BERLINGIERI, *A New Convention on the Carriage of Goods by Sea: Port-to-Port or Door-to-Door?* (in Uniform Law Review 2003).

² See E. VINCENZINI (together with J. RAMBERG), *La convenzione sulla responsabilità degli operatori di transport terminals nel commercio international* (in *Diritto dei trasporti* 1990:2).

consequences may agree to be named as shippers in bills of lading. More importantly, the bill of lading is of vital importance in commodity trades where the goods are frequently sold in transit. Such sales are implemented by the transfer of original bills of lading which is possible due to the issuer's irrevocable undertaking only to deliver the goods to the holder of an original bill of lading. This requirement has been relaxed more recently, particularly by the container lines.

7. The situation became even worse when—at the last moment in the deliberations in the UNCITRAL Commission—the carrier became entitled to issue a negotiable bill of lading without a promise to deliver the goods solely against one original or its electronic equivalent. If such a document is tendered, a seller would under CPT, CIP, CFR and CIF Incoterms 2010 clause A 8, be unable to present a document which would «enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer», as no prospective buyer would be content to receive a document without an irrevocable promise by the carrier to tender the goods to him in return for an original of the negotiable bill of lading.

8. During the deliberations in the UNCITRAL Commission in June 2008 the African and Arab States, as well as Australia and Canada, took a firm stance against what they considered to be an improper imbalance between the interests of shippers and carriers in the draft instrument. The problems caused by the expansion of the Convention to deal with non-maritime transport (the «maritime plus») caused some States (Germany, Finland, Sweden) requesting a disconnection reservation with respect to the applicability of the Convention beyond the maritime segment and to permit regional legislation for integrated transport. Nevertheless, the disconnection reservation was rejected by the majority of States.

9. It does appear clear from the current status of the Convention which does not yet have the force of law that it may never gain that status. It also seems clear that numerous countries have serious reservations about the innovations in the Convention, not least the volume contract exemption. Apart from those countries that signed the Convention at the signing ceremony or shortly thereafter (20 being the number needed to ratify to bring it into force), very few have come forward to sign. Only one country has ratified and we are only three months away from the second anniversary of the signing ceremony.

10. Historically, many countries that sign Conventions do not go on to ratify the same. In comparison, practically all countries signed the Hamburg Rules but they have only been ratified or acceded by 33 States. Thus, the prospect of the Rotterdam Rules effectively replacing the present conventions is remote.

11. Those of us coming from EU-countries firmly think that it is time for the EU to take a stand. To date, it has not taken up a formal position on the Rules. In its transport policy document entitled «Rotterdam Rules – European parliament Resolution on the Strategic Goals and Recommendations for the EU's Maritime Transport Policy until 2018 as adopted 23 March 2010» it encouraged member states to sign the Rules yet at the same time emphasized that such signing should be a matter for consultation in and subject to the views of member states. Therefore that position is non binding. Recently the Head of Unit Logistics and Co Modality in the EU, Pavel Stelmaszyk, confirmed that it will be considering an EU regime whether the Rotterdam Rules come into force or not. Surely it would be more appropriate for the EU to take a lead and recommend against the EU member states signing or ratifying the Rules, given the clear reticence in take up of the same worldwide?

12. At the same time it appears to us that Uncitral/CMI should be invited to start a redraft process on the following lines as a matter of urgency. The reason that urgency exists is due to the fact that the implementation of the much needed section of the Rotterdam Rules on electronic documentation is being delayed by being part of a more controversial and much wider document. It should be noted by CMI that CMR and CIM-Cotif may be worthwhile as being considered as potentially appropriate for use worldwide, given their success on a Europe wide basis.

13. Of course the Hague-Visby Rules have been adopted by the European nations rather than the Hamburg Rules and much of the initial work on the Rotterdam Rules consisted of a very detailed comparison of these two Conventions with a view to cherry picking the best of both. There is no reason why the fruits of this exercise should not be preserved by protocols to existing conventions and be adapted to provide an updated Hague-Visby Convention removing the error in navigation defence, adopting the Hamburg limitation clauses and including delivery terms. Further, the contemporary interaction between the uni modal Conventions when a carriage involves more than one mode of transport from the place of collection to the place of delivery does not present any serious problems in practice as evidenced by the 1991 UNCTAD/ICC Rules for Multimodal Transport Documents (ICC publ. 481).

14. Further, the CMR Convention for carriage of goods by road provides, in Article 2.1, an example of how this interaction could be handled where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air. As long as the goods are not unloaded from the vehicle then this Convention applies throughout the whole of the carriage. However, if the loss, damage or delay in delivery is proved to have been caused by some event which could only have occurred in the course of and by reason of the other means of carriage, the liability of the road carrier shall not be governed by the CMR Convention but by the other law that would mandatorily apply to the carrier of the other means of transport.

15. It is further provided that if the road carrier is also a carrier by other means, which may not be unusual in terms of the larger logistics providers such as Maersk, Article 2.1 shall apply to such a carrier as if they were two separate parties. Therefore as long as the goods remain on wheels and are not unloaded, even though the vehicle may be shipped on board a vessel for a sea crossing the CMR Convention will continue to apply unless the loss damage or delay is attributable to the other means of carriage in which case the liability of the other Convention applicable to that carriage will apply.

16. It is unlikely that any of the other modes of transport could deal with the change from one mode to another in the same way as CMR as a plane, ship/barge or train would not be loaded onboard another mode of transport when loaded with goods. The goods would have to be unloaded from these modes onto another mode and the difficulty is the hiatus between removing from the vessel, plane or train to the other mode of transport as the transshipment does not occur seamlessly from one mode to another.

17. Perhaps the simplest way to deal with this period between unloading and loading would be to have protocols to the relevant Conventions to provide that the delivering party shall be responsible for the goods to the point of loading onto the other mode of transport and shall be responsible pursuant to the Convention governing that carrier. It would be unwise to have a similar caveat to that appearing in the CMR Convention should the loss, damage or delay be more apposite to the other mode of transport as it is a period in between modes rather than involving two modes at once which is what is envisaged in the CMR caveat. The reality is that in a seamless transport you cannot have gaps and someone has to take responsibility for the interim period between unloading and loading and it may as well be the party passing the goods to the other modal operator.

18. This would appear to cause some difficulty with the CMR Convention as the actual party causing the damage would not be a successive carrier but more likely an independent third party such as a dock operator or stevedore but this problem would not materialize as the proposed protocol would deem the road carrier responsible as far as cargo is concerned to when the goods pass over the ship's rail and the carrier would have a cause of action in negligence against the dock operator or stevedore for contribution or indemnity outside the Convention. In this way whilst carriers under the four main Conventions would need to take responsibility for intermediate parties, they would have a cause of action against the party responsible for the loss under local law.

19. This would leave inland waterways to cover as a means of transport that is perhaps considered as being outside one of the four main transport Conventions applicable across the EU. The UN ECE pro-

duced the Budapest Convention for the carriage of goods by inland waterways in 2001 which required 5 ratifications in order to gain the force of law. That occurred on 1 April 2005 and since then another 10 countries have ratified this Convention. Whilst it is a fairly new Convention, it has relatively wide acceptance in the EU in countries where inland waterway carriage is widely used and there is no reason why the EU should not commend the same to countries outside the EU.

20. If Uncitral/CMI is not in a position to deal with effecting such a redraft promptly or indeed is not authorised to proceed by Uncitral, it may be appropriate for the EU to take the initiative as the EU has three tried and tested Conventions to offer for worldwide adoption (CMR, CMI – Cotif and Budapest Conventions) and participates in two widely adopted worldwide Conventions (Hague – Visby and Montreal Conventions) covering all modes of transport. Accordingly, the EU is well placed to offer a viable alternative to the Rotterdam Rules which is only partially multimodal. However, the EU should only take the initiative if Uncitral/CMI is unable to deal with this as it would be preferable to have a body that has been involved in the drafting of a worldwide convention in order to encourage worldwide consensus—a purely European initiative may unfortunately have the adverse effect. In any event, an initiative of some sort, in our view, has to be taken up rather than pressing ahead with a convention that is clearly not gaining any momentum—in fact it is gaining quite the reverse.

21. It has to be said that for those common law countries who have built up a valuable body of case law on transport Conventions adopted into their law, it would be far simpler to keep the existing Conventions in place with any necessary updates by way of protocols rather than to scrap the Hague Visby Rules in favour of the Rotterdam Rules which will introduce new concepts and is overly long and complicated and which would need years to create a suitable body of case law to cover the same at great expense to the industry – would this be a sane move in these difficult financial times?

22. There is no doubt that the Hague Visby Rules need updating but they do not need to be replaced with a convention that attempts to be multimodal without quite achieving this objective particularly when there are other conventions covering other modes of transport that give proper consideration to the particular idiosyncrasies of those modes. The Rotterdam Rules contains over 90 articles and a number of innovations. Compare that with Hague-Visby Rules at 10; CMR Convention at 41; Montreal Convention at 35; CIM-Cotif Convention at 66 and Budapest Convention at 32, most of which have maintained longstanding concepts in transport law.

23. What the trading world needs is transparency, certainty and predictability. Traders do not engage in reading contract terms and should be guarded against the risk of being caught by «fine print modifications». Also, insurers need a firm basis for setting appropriate premiums and for a smooth claims handling procedure.

24. Last but not least, we need a regime that covers all modes fully rather than taking one mode and partially extending it and the proposals above may hopefully be adopted by Uncitral/CMI and used as a starting point for a global regulation. Even if efforts to achieve such a regime fail, the present situation is far better than adding yet another convention to those already in force, thereby jeopardising the present relative unification of transport law. If it took a strong stance against the Rotterdam Rules, the EU could prevent this from happening.

25. We call on the EU to propose its members should not sign or ratify the Rules and should either support an initiative by Uncitral/CMI to draft suitable amendments and protocols to the current conventions in place and give the trading world a more than credible alternative to what is a flawed proposal that clearly numerous countries are uncomfortable with, if not have entirely rejected the same, or take up the initiative itself if Uncitral/CMI do not proceed with some degree of urgency.