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The Rotterdam Rules

A transport convention for the future?

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Contents

Summary

The Rotterdam Rules is a UN Convention with the name: United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. Behind this long title hides the latest attempt to reform and harmonise the law governing carriage of goods by sea. The Rotterdam Rules were signed by a number of countries in 2009 in Rotterdam and will enter into force if they receive acceptance, accession, approval or ratification from 20 countries. The Rules will in such a case replace the Hague, Hague-Visby and Hamburg regimes that are currently governing this area of law, an area which today is governed not only by these three different sets of rules but by different national and regional solutions as well. If the Rotterdam Rules become a success this diversification will end and the law will reach the same degree of uniformity that it once had. This thesis explores the background to the new Rules as well as their content and what the differences to the older regimes are.

The three international regimes that regulate the area today are all obsolete. The most widespread – the Hague-Visby Rules is based on the Hague Rules, which is almost ninety years old. A lot has happened in shipping during the course of the 20th century and there is therefore a large need for reform. Attempts to reform this area has been made before. The first attempt was the Visby protocol from the 1960s which although achieving a certain degree of success only addressed the most pressing needs for an update and has now become too old. The Visby protocol was followed by an additional protocol called the SDR protocol which addressed some issues in the Hague-Visby regime that concerned monetary limitation of liability amounts. The second attempt was the Hamburg Rules which for various reasons became a failure. The Hamburg Rules was short after its creation followed by the Multimodal Convention that aimed to govern multimodal transport, a convention which until this day has not received the required ratifications even though it was created in the 1980s. Since consensus around an international solution has not been reached many nations have decided to adopt national or regional solutions which have made the situation of non-uniformity worse. The Rotterdam Rules were created as a result of this background. The Rules are therefore drafted in order to receive support from states that for various reasons have not supported previous reform attempts, as well as from those that have. The Rules build on the old familiar conventions but have also introduced changes both by changing existing rules as well as by covering new areas. The new areas covered by the Rules are for example: multimodal transport and electronic transport documents. Among the most important changes introduced we find; removal of old carrier-friendly exceptions from liability, increased regulation of the shipper's obligations, higher limitation of liability amounts and the introduction of a limited freedom of contract for so called volume contracts.

Sammanfattning

Rotterdamreglerna är en FN konvention med namnet: Förenta Nationernas konvention om avtal om internationell transport av gods helt eller delvis till sjöss. Bakom denna långa titel döljer sig det senaste försöket att reformera och harmonisera lagstiftning som reglerar godsbefordran till sjöss. Rotterdamreglerna blev underskrivna av ett antal länder 2009 i Rotterdam och kommer träda ikraft ifall de erhåller ratifikationer etc. från 20 länder. Reglerna kommer i sådant fall att ersätta Haag, Haag-Visby och Hamburg reglerna som för tillfället är gällande rätt för många jurisdiktioner inom detta område, ett område som idag är reglerat inte bara genom dessa konventioner utan även av regional och nationell lagstiftning av varierande slag. Om Rotterdamreglerna lyckas kommer denna olikformighet att försvinna och lagen som reglerar detta område kommer återigen att bli enhetlig. Detta examensarbete undersöker bakgrunden till de nya reglerna såväl som deras innehåll samt vilka skillnaderna gentemot de gamla reglerna är.

De tre olika regelsystem som används inom området idag är alla obsoleta. Det mest använda – Haag-Visby-reglerna är baserat på Haag-reglerna, som är nästan nittio år gamla. Mycket har hänt inom sjöfarten under 1900-talet och det finns därför ett stort reformbehov. Olika reformförsök har gjorts tidigare. Det första försöket var Visbyprotokollet från 1960-talet som trots att det rönte viss framgång, ändå bara åtgärdade de mest akuta reformbehoven och nu har blivit omodernt. Visbyprotokollet följdes av SDR-protokollet som åtgärdade vissa frågor rörande ansvarsbegränsningsbelopp. Det andra försöket var Hamburgreglerna som av olika anledningar blev ett misslyckande. Hamburgreglerna blev bara kort tid efter deras skapelse följda av den Multimodala konventionen som var tänkt att reglera multimodal transport, en konvention som tills idag inte har erhållit tillräckligt stöd trots att den skapades på 1980-talet. Eftersom internationell konsensus har visat sig vara svårt att uppnå så har många nationer bestämt sig för att istället anta nationella eller regionala lösningar vilket har förvärrat situationen. Rotterdamreglerna är skapade mot denna bakgrund. Reglerna har därför utformats så att de ska kunna få stöd från stater som av olika anledningar inte har anslutit sig till tidigare reformförsök såväl som från de som har anslutit sig till tidigare försök. Reglerna bygger på de gamla konventionerna men har också introducerat ändringar som består av både ändringar i gamla välkända bestämmelser såväl som introduktion av regler som behandlar helt nya områden. De nya områdena som täcks av reglerna är t.ex. multimodala transporter och elektroniska transportdokument. Några av de viktigaste ändringarna i befintliga regler är t.ex. avlägsnande av gamla redarvänliga undantagsbestämmelser för transportörens transportansvar, mer omfattande reglering av lastägarens skyldigheter, högre ansvarsbegränsningsbelopp och introduktionen av en begränsad avtalsfrihet för s.k. volymkontrakt.

Abbreviations

BIMCO	The Baltic and International Maritime Council
BRICS	Brazil, Russia, India, China and South Africa
CIM	Uniform Rules Concerning the Contract for International Carriage of Goods by Rail
CMI	Comité Maritime International
CMNI	Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway
CMR	Convention on the Contract for the International Carriage of Goods by Road
COTIF	Convention concerning International Carriage by Rail
EU	European Union
FIATA	The International Federation of Freight Forwarders Associations
The Hague-Visby Rules	The Hague Rules as amended by the Visby Protocol
IAPH	International Association of Ports and Harbors
ICC	International Chamber of Commerce
IMMTA	International Multimodal Transport Association
INGO	International Non-Governmental Organisation
IRU	The International Road Transport Union
ISC	International Sub-Committee
The ISM Code	The International Safety Management Code
IUMI	International Union of Marine Insurance
The Montreal Convention	Convention for the Unification of Certain Rules for International Carriage by Air, 1999

NGO	Non-Governmental Organisation
OLSA	Ocean Liner Service Agreement
OTIF	Intergovernmental Organisation for International Carriage by Rail
P & I	Protection & Indemnity Insurance
The Rotterdam Rules	United Nations Convention On Contracts For The International Carriage of Goods Wholly or Partly by Sea
SOU	Statens Offentliga Utredningar
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Commission on Trade and Development
UNECE	United Nations Economic Commission for Europe
Warsaw Convention	Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929

1 Introduction

The law governing international carriage of goods by sea today is very fragmented and a multitude of different combinations of conventions together with various national and regional sets of rules exists. This fragmentation is the result of a development that has been going on for the last century that makes legal certainty difficult in this area of law. The Rotterdam Rules aim to update the law governing carriage of goods by sea and to introduce a modern regime that aims to replace the present regimes and to restore the uniformity that once existed.[1] The Rules were signed in September 2009 at a signature event in Rotterdam, The Netherlands, which was the result of a long process. The signature event however also marked the beginning of a new process of ratification, acceptance or approval, a process that will determine the future of the Rules. This thesis will give the reader a birds-eye perspective on the development of carriage of goods regimes and the Rotterdam Rules in particular and hopefully provide a good basis for an idea as to whether the Rotterdam Rules will govern this area of law in the future.

1.1 Subject and purpose

The thesis aims to display the background to the Rotterdam Rules, the present regulations and the differences between them and the changes that the Rotterdam Rules introduce compared to the preceding regimes. This display provides the basis for an analysis of whether the new Rules will succeed with their aims. The questions that need answers are:

- What is the historical background of the Rotterdam Rules?
- Why- and how were they developed?
- Is there a need for them?
- How are the Rules different from the older regimes?
- Who will gain from their eventual entry into force?
- Will the Rules be a success?

These questions will be answered and analysed throughout the thesis. The last part will provide a concluding analysis that will focus on the balance of the convention and the probability for the Rules eventual entry into force.

[1] The Rotterdam Rules can be found on the UNCITRAL webpage: http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/09-85608_Ebook.pdf

1.2 Material and method

The material used are the convention texts, books and articles written on the subject of carriage of goods by sea and the Rotterdam Rules, a few cases, and to some extent legislative history i.e. the *travaux préparatoires* for the Rotterdam Rules and Swedish government documents. The Rotterdam Rules are a newly drafted international convention and has not yet entered into force therefore there are naturally not any case law so far. There are of course old cases concerning the presently used Hague-Visby Rules that could be relevant since the wordings in some provisions of the Rotterdam Rules are the same as or very similar to their equivalents in the Hague-Visby Rules. A discussion about the old cases would however be out of place in this thesis since it would require a far more detailed overview and analysis of the different Rules. Case law has therefore not been given a large weight in the discussion. Since no case law based directly on the Rotterdam Rules exists and the discussions in academia often are biased in one direction or the other depending on the authors wishes for the future, it is hard to maintain a neutral position to the Rules. I have therefore been pending between positive and negative feelings towards this regime during my time with this thesis. I have nevertheless tried to maintain a neutral position and to show both sides of the different problems discussed. In my personal conclusion, I display more directly my own sentiments concerning the Rotterdam Rules.

The method used has largely been comparative. Since the thesis deals mainly with three different sets of Rules it is natural to have a comparative approach. The history and the present regimes give an indication for the future of the Rotterdam Rules and to be able to analyse them properly an overview of the present regimes and the working process towards the Rotterdam Rules is necessary. Thus, the history and the precedent (present) regimes have been given a considerable amount of space in the thesis.

1.3 Delimitations

The Rotterdam Rules consist of 96 Articles and is a very comprehensive regime that aims to regulate many different aspects of contracts on carriage of goods wholly or partly by sea. The aim of this thesis is not to analyse all of these aspects in detail, neither would it be possible within the space available. Certain delimitations have therefore been necessary. This thesis thus aims to display the core features of the Rotterdam Rules and the older regime. That is in short: the scope of application, the carriers' obligations and liability and limitation of liability. The thesis therefore treats these issues more in detail than other issues. Other issues have also been treated though because even if they are not of immediate relevance they are nevertheless important for the big picture. Such issues are for example: the obligations of the shipper, the treatment of transport documents under different regimes, jurisdiction and time limits. Those issues have been

collected under each overview under the name ‘other issues’. Some issues have been completely left out of the discussion like for example: 3rd parties rights and the chapter on right to control in the Rotterdam Rules. The thesis will hence not treat the issue of what happens if the goods are sold during the voyage. History and precedent regimes have been given a quite large weight since the Rotterdam Rules are often described as being an evolutionary set of rules and it therefore is essential to understand the precedent regimes to understand the Rotterdam Rules. Concerning the overview of the Rotterdam Rules, multimodal issues and volume contracts are treated in more detail than other issues. This is simply because these provisions are new compared to the older regimes and quite controversial.

2 Preceding Carriage Conventions

2.1 Historical background

A suitable starting point for a thesis about the Rotterdam rules and the need for them is to take a look at the historical background for rules dealing with carriage of goods by sea and the development that has led up to the creation of the Rotterdam rules. A historical outlook is particularly interesting in this case since the debate and power struggle between different interests has been going on for well over a century. The debate today is in many ways the same as that of the late 19th and early 20th century although the balance between different interests and the shipping industry, as well as the world itself, has changed a lot during the course of the 20th century. In this section this thesis will shed some light on the events that gave rise to liability regimes in the form of the Harter act and the Hague rules. It will then follow the development and the discussions that have been taking place during the course of the 20th century that ultimately led to the creation of the less successful regimes of the Hamburg rules and the Multimodal convention. The discussion of the past was like the contemporary discussion of today characterised by the struggle between the conflicting interests of cargo owners and shippers on one side and ship owners and carriers on the other.

During the 19th century, the industrialization of large parts of the world led to increased manufacturing, trade and transport together with technological and infrastructural development. This in turn led to a huge increase in maritime transport. For example during the years between 1850 and 1869, the total net tonnage of steamers increased with over 400 per cent.[2] A part of this development was that liner conferences were created during the second half of the 19th century to control price levels and act for uniform tariffs on shipping routes.[3] The organisation of carriers in liner conferences led to increased negotiating power that gave carriers a great advantage against shippers when negotiating transport terms.[4]

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[2] Faria, José Angelo Estrella, *Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules***,** Texas International Law Journal, vol.44, 2008-2009. p.279.

[3] Liner Conferences are price controlling cartels formed between liner carriers. The conferences have long been subject to exceptions from competition law in many jurisdictions but that is now changing. See for example: EU Press Releases, *Competition: Commission welcomes Council agreement to end exemption for liner shipping conferences,* Brussels, 25 September 2006, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1249&format=HTML&aged=0&language=EN&guiLanguage=en

[4] Faria, José Angelo Estrella, *Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules***,** pp.280-281.

The law regarding the carriage of goods by sea had in the early 19th century been made up by general maritime principles that were applied in both common and civil law countries. These traditional maritime principles held that a carrier was strict liable for cargo damage unless it could prove that its negligence had not contributed to the loss *and* that the damage had been caused by one of four excepted causes namely: act of God, act of public enemies, shipper's fault, or inherent vice of the goods.[5]

The conclusions that can be drawn from this are that in the early 19th century and before, the shippers were well protected and the carriers had a broad liability for cargo if the principles were followed.[6] However, the problem that came up during the course of the 19th century and culminated in the late 19th century was that the application and interpretation of these principles varied from country to country and that a schism between Great Britain and the US appeared. This schism concerned the interpretation of the maritime principles and soon spread, which made other countries follow either the American way or the British.[7]

British courts interpreted the principles considered above as a "default rule" which the parties could set aside by contract. Carriers could contract out of its obligations in jurisdictions that applied this interpretation method. Thus in British jurisdictions the carriers could contract out of nearly all of their obligations towards the shipper and limit their liability in a way that nearly removed it completely**.** Even clauses that stipulated that no liability would arise for damages caused by the carrier's own negligence were accepted.[8] British courts did nevertheless still regard the obligation of providing a seaworthy ship as a fundamental principle (although one that could be modified though not removed) the rest was considered as being under the freedom of contract.[9] Carriers of course used the possibilities given to them to exclude themselves from liability and since they had powerful positions as parts of price-controlling liner conferences and were supported by the generous attitude adopted by the British courts there were not much cargo owners could do about it.[10]

In the US, the courts however applied the general principles with a stronger restriction of the possibilities of contracting out. The courts tolerated limitation of liability in many cases but disapproved of clauses that removed carriers' responsibilities for their own negligence. As concerns seaworthiness the courts in the US regarded the obligation to provide a seaworthy ship as a fundamental obligation although open for

[5] Sturley, Michael F, *The History of COGSA and the Hague Rules*, Journal of Maritime Law and Commerce, vol.22, no.1, January, 1991, p.4.
[6] Hooper, Chester D, *Carriage of Goods and Charter Parties*, Tulane Law Review, vol.73, 1998-1999, p.1698.
[7] Sturley, Michael F, *The History of COGSA and the Hague Rules*, p.5.
[8] Ibid. p.5
[9] Faria, José Angelo Estrella, *Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules*, p.283.
[10] Sturley, Michael F, *The History of COGSA and the Hague Rules*, p.10.

modifications, just like their British colleagues did.[11] The American approach was shared by some countries like Japan and over time, more and more countries would start to reason in the American way.[12]

The differences described above led to attempts to unify the law concerning carriage of goods by sea by different means. For example, the International Law Association drafted a model bill of lading. These attempts were however not successful and the failure to achieve international uniformity led to the creation of new national laws in several countries.

In the US, cargo interests were unhappy about the lack of regulations concerning exoneration clauses in bills of ladings. There was also a large degree of discontent with choice of forum clauses that stipulated that cargo-claims were to be settled in forums with a positive attitude towards exculpatory clauses (i.e. British courts). Hence, there was an obvious conflict between American cargo-interests and European carriers.[13] This conflict led to the proposition of bills by the American congress in order to solve the problems that had come up and in 1892, the Harter Act was enacted.[14]

The Harter act was the first important step towards the Hague Rules and its provisions came to be the inspiration for later national laws. The Harter act strived to achieve a balance of interests between shipper and carrier. The act was in essence a codification of the earlier common law principles in the way they had been interpreted in the US. The Harter Act however introduced the obligation to exercise due diligence to provide a seaworthy ship (a carrier friendly element since this obligation previously had been absolute) as a trade-off for giving the shippers stronger legislative protection.[15] On the pro shipper side**,** the act made it illegal to in the bill of lading contract out of the traditional obligations for the carrier by exonerating the carrier from negligence in performing his duties. Any clauses lessening the carrier's responsibility for negligence in loading, stowage, care, delivery or custody of the goods were declared void according to the act. This was also the case for clauses lessening the obligation to exercise due diligence in providing a seaworthy ship. The Harter Act additionally introduced some new defences for the carrier provided that he had exercised due diligence in performing his duties. The act then gave the carrier possibilities of exoneration from damages caused by certain events such as for example: perils of the sea, deviation to save life or property at sea, but also for faults or error in navigation or in

[11] Faria, José Angelo Estrella, *Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules*, p.282.
[12] Sturley, Michael, *The History of COGSA and the Hague Rules*, pp.5-6.
[13] Faria, José Angelo Estrella, *Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules*, p.282.
[14] Sturley, Michael F, *The History of COGSA and the Hague Rules*, p.12.
[15] Sturley, Michael F, Fujita, Tomotaka & Ziel, Gertjan van der, *The Rotterdam rules: the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, Sweet & Maxwell, London, 2010, p.78

management of the vessel (so called nautical fault).[16]The Harter act was in essence a balanced effort to protect American cargo-interests from abusive clauses in bills of lading issued by powerful European carriers.[17]

Soon other countries followed the American example and introduced bills which rendered clauses that exempted the carrier from liability for negligence void and introduced catalogues with exemptions from liability if requirements of due diligence were fulfilled. New Zealand, Australia, Canada and French Morocco all followed the US example and passed bills that resembled the Harter act. In the early 1920s, many countries were about to introduce similar legislation. The law on carriage of goods had in this way become very non-uniform in an international perspective with large differences between different jurisdictions. The international community decided to act and this resulted in Hague conference of 1921.

2.2 The Hague Rules

The Hague Rules was the first successful attempt to unify the law on carriage of goods. All other attempts, both before and after, have failed to reach the same degree of success and today almost ninety years after their creation, the Hague Rules in their original form are still the only convention in force in some jurisdictions.

The Hague conference of 1921 was initiated because of the increasing problems caused by diversification of the law regarding carriage of goods by sea. Especially in the British Empire, this was a problem since there was a conflict between Great Britain and the semi-independent Dominions (like Canada) of the British Empire, which had enacted acts similar to the Harter act. Complaints started to come in from the Dominions because their legislation only applied to outward and domestic bills of lading. Importers could therefore be subject to abusive clauses in the bills of lading even though the law of the dominions for sea carriage within their own territory and for outbound carriages offered protection from such clauses. Pressure from parts of the Empire and from domestic cargo interests forced Great Britain to prepare for an enactment of a law similar to the Harter-act for the empire as a whole.[18] The change of attitude by Great Britain, which for a long time had favoured carrier interests and been against legislation protecting shippers, paved way for an effort to achieve an international solution on the subject. Even British carrier interests were positive to an international solution since they might as well act for uniform international law because domestic legislation was in any case under way in their home jurisdiction.[19] Under British leadership, the ILA took up their old project of making the law of carriage of goods uniform.

[16] Hooper, Chester D, *Carriage of Goods and Charter Parties*, pp.1699-1700.
[17] Sturley, Michael F, *The History of COGSA and the Hague Rules*, pp.13-14.
[18] Ibid. p.18.
[19] Ibid. p.19.

Their product, The Hague Rules, were developed during The Hague conference of 1921 and after additional debate and changes adopted in Brussels in 1924 during a conference attended by twenty-six nations. Great Britain was fast to adopt the rules and even enacted their new Hague-based COGSA before the conventions' signing ceremony. The US however reacted slower and it took until 1936[20] for them to adopt the rules but once the US had adopted most maritime nations in the world soon followed.[21]

2.3 The Visby Protocol

The Hague rules were a product of the early 20th century and of course adapted to the conditions of that time. The rapid changes in technology and politics during the course of the 20th century soon called for changes in the regulation of international carriage of goods by sea. Some of the factors that had made the Hague rules outdated were that monetary changes had made the liability limits in the Hague rules too low and that the technological changes in the shipping industry caused by the increasing use of containers (the so called container revolution) called for updates in the convention's definition of "package or unit".[22]

The Visby protocol, concluded in 1968, proposed a few necessary amendments to the Hague rules. The scope of application was widened, although not in a very significant way since it still only covered outward voyages.[23] The most important changes were instead that a container clause was inserted into the rules, the limitation limits were increased, a weight-based calculation alternative was inserted[24] and that the currency on which the calculation of liability amounts was based was changed into Poincaré francs (only to be replaced with SDR:s a few years later).[25]

The Visby protocol solved some of the most acute problems such as the definition of a container (if a container were to be considered a package or not) but many matters remained unsolved and more were to come since the modernisation of the shipping industry continued.

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[20] An important event which contributed to the US ratification of the Hague rules was the supreme court case of *The Isis (May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, 290 U.S. 333, (1933))* which made it more favorable for the American carriers to be subject to a COGSA based on the Hague rules than the Harter act. For a brief summary of *The Isis* case see Sturley, Michael, *The History of COGSA and the Hague Rules*, p.52.

[21] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, p.10.

[22] Sturley, Michael F, *Transport law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam rules*, Journal of International Maritime Law, vol. 14, 2008, p.467.

[23] Article 10 of the Hague-Visby Rules.

[24] See Article 4 (5)(a) of the Hague-Visby Rules.

[25] A Poincaré franc is based on the value of gold. A SDR (Special drawing right) is a unit of account created by IMF which is based on the average value of some major currencies. The SDR protocol was adopted in 1979 and changed the H/V limitations to 666.67 SDRs per package or 2 SDRs per kg whichever amount is the most favorable for the carrier as long as it does not exceed the maximum limitation limit.

2.4 Overview of the Hague-Visby Rules

The regime today that governs carriage of goods by sea in the majority of the states of the world is still almost ninety years after their creation the Hague rules. The majority of the important trading states which are parties to the Hague Rules have also signed and ratified the Visby protocol (and the SDR protocol of 1979) or in other ways implemented it in their national legislation, some exceptions exist though, a major one is the United States.[26]

The Visby protocol is nothing but an amendment to The Hague rules and not (like the Hamburg- or the Rotterdam Rules) an independent set of rules. Article 6 of the Visby protocol states that it should be read together with the Hague rules. This thesis will therefore treat the Hague Rules as amended by the Visby protocol if it is not explicitly mentioned that the discussion only concerns the Hague Rules in their original form.

2.4.1 Scope of application

Article 1 of the Hague-Visby Rules defines the scope of application through giving definitions of the terms that are used in the Rules:

> "In this convention the following words are employed, with the meanings set out below:
>
> (a) 'Carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.
>
> (b) 'Contract of carriage' applies only to contracts of carriage 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.
>
> (c) 'Goods' includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.
>
> (d) 'Ship' means any vessel used for the carriage of goods by sea.
>
> (e) 'Carriage of goods' covers the period from the time when the goods are loaded on to the time they are discharged from the ship."

Since the Rules, according to Article 2, are applicable to contracts of carriage, they are therefore because of the definition in Article 1 only applicable to contracts that are covered by a bill of lading and concern the carriage of goods by sea. The Rules are therefore not applicable to charter parties (except if agreed to by contract) or other modes of transport.[27] Since

[26] Tetley, William, *Marine cargo claims, vol. 2*, 4. ed., Thomson Carswell, 2008, Appendix A, p.2649.
[27] Tetley, William, *Marine cargo claims, vol. 1*, 4. ed., Thomson Carswell, 2008, pp.24-25.

a bill of lading is required in order for the rules to apply it is often said that the Rules use a "documentary approach" to define the scope of application.

Furthermore, the convention applies "tackle to tackle" and the period of coverage is according to Article 1(e) the period of time between the loading of goods onto the ship until the discharge at the port. This creates some uncertainty since there consequently are periods during which the carrier is in possession of the goods but the Hague-Visby rules do not apply. For example, when the carrier takes charge of the goods before the loading or delivers them to a warehouse at the port of discharge (often called the "before and after problem").[28] Finally, concerning the scope of the Rules it is also important to mention that Article 10 states that the rules are only applicable to outbound voyages from a member state and not to inbound.

2.4.2 Obligations and liability of the carrier under the Hague-Visby Rules

Article 3 of the Hague-Visby Rules regulates the obligations of the carrier. The Article is based upon the traditional common law obligations such as the duty to care for the cargo and to make the ship seaworthy.[29] Article 3(1) states as follows:

> Article 3
>
> 1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
>
> (a) Make the ship seaworthy;
>
> (b) Properly man, equip and supply the ship
>
> (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

The obligations of the carrier stated in Article 3(1)(a) to (c) are not absolute (i.e. not under strict liability) but nonetheless strong since there is a presumption for the carrier's fault if the cargo-owner claims that the damage was caused because of want of due diligence to make the ship seaworthy. The carrier needs to show that he exercised due diligence in order to be relieved from responsibility.[30] Regarding other causes of loss than from

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[28] Berlingieri, Francesco, *A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules,* Paper delivered at the General Assembly of the AMD, Marrakesh 5-6 November 2009, http://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf, p.5.

[29] Tetley gives the following general definition of seaworthiness in his book *Marine cargo claims:* "Seaworthiness may be defined as the state of a vessel in such a condition, with such equipment, and manned by such a master and crew, that normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage". Tetley, William, *Marine cargo claims, vol.1,* p.877

[30] Art 4(1) of the Hague-Visby Rules.

want of due diligence to carry out the obligations stated in Article 3(1) the burden of proof should normally lay on the shipper (claimant) under the Hague-Visby Rules, although it depends on the case and it is hard to do any generalisations.[31]

The requirement of due diligence from the carrier in exercising his duties is as stated in the previous section a change compared to the common law obligations which were absolute. Tetley mentions in his book *Marine cargo claims* that the requirement of due diligence regarding seaworthiness has been defined by the English Court of Appeal in the case *Kapitan Sakharov* as follows:

"…whether it had shown that it [the carrier], its servants, agents or independent contractor, had exercised all reasonable skill and care to ensure that the vessel was seaworthy at the commencement of its voyage, namely, reasonably fit to encounter the ordinary incidents of the voyage…"[32]

Furthermore concerning seaworthiness the Hague-Visby rules explicitly states that the obligation of seaworthiness is not a continuous obligation ("before and at the beginning of the voyage"). This means that the carrier only has an obligation to make the ship seaworthy in the beginning of the trip and not to keep it that way during the trip, which may seem a little strange and it is one of the features of the Hague Rules that has been changed in the newer regulations. Even though the obligation under the Hague-Visby Rules is not continuous, the provisions of the ISM code in practice provides for a continuous obligation of seaworthiness for the carrier. However, that is a question of public law and not of private, it does therefore not change anything as concerns the obligation of the Hague-Visby Rules, but the provisions of the ISM code could nevertheless come into play as concerns seaworthiness when deciding whether a carrier has acted with due diligence before and at the beginning of the voyage.[33]

Furthermore, even if the seaworthiness obligation is not continuous the duty 'to properly care for the cargo' is and can be used if there is cargo damage during the voyage. Since the duty to care for the cargo is a continuous obligation, any unseaworthiness caused by the want of due diligence by the carrier could make the carrier responsible for lack of care for the cargo even if it happened during an ongoing voyage.[34] The practical difference would be that the claimant is in a less favourable position with a claim based on lack of care than unseaworthiness since the exceptions in Article 4(2) of the

[31] Force, Robert, *A Comparison of the Hague, Hague-Visby and Hamburg Rules: Much ado about (?)*, Tulane Law Review, vol.70, 1995-1996, p.2086.
[32] *The Kapitan Sakharov [2000]* 2 Lloyd's Rep. 509, p.516. See also Tetley, William, *Marine Cargo Claims, vol.1*, pp.876-877.
[33] Nikaki, Theodora, *The carrier's duties under the Rotterdam Rules: Better the devil you know*?, Tulane Maritime Law Journal, vol.35, 2010, p.5.
[34] Tetley, William, *Marine cargo claims, vol.1*, p.936.

Hague-Visby Rules would be applicable as defences for the carrier which would not be the case as regards unseaworthiness.

Article 3(2) of the Hague-Visby rules contains the duties to properly and carefully load, handle, stow, carry, keep and discharge the goods, in short the duty to properly care for the cargo. The duties of Article 3(2) are subject to the exceptions listed in Article 4(2) such as nautical fault, fire, perils of the sea, act of god, act of war etc. The provisions of the list are quite uncontroversial except for the nautical fault exception, which has been removed in the succeeding regimes, and the fire exception that has been removed in the Rotterdam Rules. The catalogue is followed by a general clause that is meant to catch the cases that can fall out of range of the list (worth mentioning is that the Hamburg rules, as we will see later, have only one article of this kind that governs the liability of the carrier, which replaces the list of exceptions).[35] If the carrier can show that the occurred damage was attributable to any of the exceptions it will be exempted from liability.

2.4.3 Limitation of liability under the Hague-Visby Rules

If the carrier does not fulfil its obligations under the Hague-Visby Rules and no exception is applicable it gets liable to pay compensation to the cargo-owner. The liability is however subject to limitations. The limitation amounts have been subject for debate as concerns all regimes that regulate carriage of goods by sea. In the Hague-Visby rules the carrier's right to limit liability is regulated in Article 4(5)(a) – (g). The limitation amount and the method to calculate it was changed both by the Visby protocol and the SDR protocol which shows that limitation amounts is something that changes every time when changes are made to existing regimes or new carriage of goods by sea regimes are introduced. According to the Hague-Visby Rules the carrier has a maximum limit to his liability of 666,67 SDRs per package or unit or two SDRs per kilo in gross weight carried, whichever is the higher amount. This limitation amount is however not mandatory if the shipper declare the nature and value of the goods and include the declaration in the bill of lading. If such declaration is done, the shipper obtains full compensation unless the carrier disproves the valuation.[36] Finally, the carrier can lose the right to limit liability according to Article 4(5)(e) of the Hague-Visby Rules if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause damage or recklessly and with knowledge that damage would probably result.[37] Similar conduct

[35] Article 4(2)(q) of the Hague-Visby Rules, which also states that in order for the carrier to escape liability under this provision it must also show that its "agents or servants" were not at fault.
[36] Article 4(5) of the Hague-Visby Rules.
[37] Wilson, John F, *Carriage of Goods by Sea*, p.203.

of an employee or agent will result in the loss of the right to limit for him personally but not for the carrier.[38]

The Visby protocol solved the issue of whether a container should be considered as a package or unit or not, which arose because of the container revolution. The solution is to be found in Article 4(5)(c), according to which the number of packages stated in the bill of lading as packed in the container is the number that should be used while calculating limitation of liability. If description of the cargo in the container are made with use of the words "*one container said to contain x packages"* it does probably not make the container a package, the units listed in the bill of lading will still decide.[39]

Servants or agents of the carrier are entitled to the same defences and limits of liability as the carrier according to Article 4*bis*(1) of the Hague-Visby rules, this provision was inserted into the rules by the Visby protocol.

2.4.4 Some other issues regulated by the Hague-Visby Rules

Time for suit is regulated by Article 3(6)(4), which state that suit has to be brought before the elapse of one year although the period may be extended if the parties agree. Article 3(6)*bis* additionally states that an action for indemnity against a third person may be brought even after the elapse of one year.

Obligations of the shipper are not regulated clearly and extensively by the Hague-Visby rules although there are certain passages that state some elementary obligations of the shipper. The rules do not provide a clear definition of the shipper but the shipper can be said to be defined in Article 1(a) where carrier is defined.[40] The carrier enters into a contract with a shipper; the shipper is therefore by consequence the carrier's counterpart. The obligations of the shipper which exist in the Hague-Visby rules are as follows: strict liability for shipping dangerous cargo (Article 4(6)), implied duties in the different exclusions of Article 4(2) such as to pack and mark goods sufficiently and not to do damage to the goods by act or omission, a general duty to care for the goods impliedly stated in 4(3) and finally the obligation to state accurate information in the bill of lading 3(5). The shipper also has a right to demand that a bill of lading is issued to him by the carrier.

Finally, as concerns freedom of contract Article 3(8) of the Hague-Visby Rules states that any changes to the rules by contract are null and void if they affect the shipper's rights under the Rules in a negative way. Article

[38] Ibid.p.204.
[39] Ibid. pp.197 and 200.
[40] Thomas, Rhidian, *The position of Shippers under the Rotterdam Rules*, European Journal of Commercial Contract Law 2010-1/2, p.22.

3(8) does not prohibit contracts which enhance the position of the shipper. Freedom of contract therefore only exists if it gives the shipper a better position than the one already provided for by the Rules.

2.4.5 Remarks on issues unregulated by the Hague-Visby Rules

Many areas were left unregulated by the Hague-Visby rules, which is a reason for why the regime grew to be outdated during the 20th century. For example, The Hague-Visby rules do not contain any provisions on jurisdiction, do not cover liability for delay, only applies “tackle to tackle” so that what happens before and after loading more or less remains unregulated, do not contain any provisions on the carriage of cargo on deck and live animals (other than 1(c) which exclude this kind of carriages from the scope of application), lack a more extensive regulation of the shippers rights and obligations and do not (because of its age) regulate electronic alternatives to the traditional bill of lading. A big difference compared to the Rotterdam rules is also that the Hague-Visby rules only applies to sea-carriage whereas the Rotterdam rules can cover carriage by other modes of transport as well. The fact that these issues are not regulated and other factors such as discontent with too low limitation limits and the general problems with the Hague-Visby regimes limited scope of application, old age and lack of connection to the modern transport industry are some of the reasons behind the creation of the Hamburg and Rotterdam regimes.

2.5 The Hamburg Rules

2.5.1 Background

The Hamburg Rules of 1978 was a product of a process in the UN initiated by third world countries that felt subsided and disadvantaged by the Hague Rules and the Visby protocol. These countries were just starting to build up independent economies and shipping was an important factor for them. An important reason for the initiation of work towards a new carriage convention was therefore, in addition to the shortcomings of the Hague-Visby Rules, that many newly independent countries saw it as a chance to display their power in the UN and to create a new convention which would be more beneficial towards their interests.[41]

The need for modernisation of the regime governing carriage of goods by sea had been the reason for the creation of the Visby protocol, which solved some issues, but problems remained. According to the developing nations without national shipping capacities, the Visby protocol was not enough. They wanted a new regime, one that favoured their interests and not those of the traditional maritime nations. UNCTAD started to work towards a new convention in 1968 and later on UNCITRAL took up the work and completed it.[42] Contrary to the processes of creating the Hague Rules and the Visby protocol, which were to a large extent CMI products, and most recently the Rotterdam rules which is a product of cooperation between UNCITRAL and the CMI[43], commercial interests and the CMI were not very involved in the creation of the Hamburg Rules.[44]

The Hamburg Rules is a more shipper friendly regime than the Hague-Visby Rules. The developing countries were unhappy with many of the provisions in the Hague-Visby Rules, which according to them were more favourable to the carrier and therefore demanded a better balance between shipper and carrier interests. The criticism against the Hague-Visby Rules concerned amongst other things: the exemption for nautical fault and some of the other exceptions in the catalogue in Article 4 of the Hague-Visby Rules, the levels of limitation of carrier liability, lack of jurisdictional regulations that make for the shipper unfavourable forum clauses possible in bills of lading, the period of responsibility and the lack of regulations concerning carriage of cargo on deck and live animals.[45]

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[41] Fredrick, David C, *Political participation and legal reform in the international maritime rulemaking process: from the Hague rules to the Hamburg rules*, Journal of Maritime Law and Commerce, vol.22, no.1 1991, pp.81, 100-103.
[42] Faria, José Angelo Estrella, *Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules***,** pp.297-298.
[43] Sturley, Michael F, *Transport law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam rules* p.469.
[44] Fredrick, David C, *Political participation and legal reform in the international maritime rulemaking process: from the Hague rules to the Hamburg rules*, pp.101-102.
[45] SOU 1990:13 p.92.

The Hamburg Rules contain, as we will see, changes in the criticized areas of the Hague-Visby Rules, as well as provisions that deal with areas previously unregulated by international maritime conventions. The Hamburg Rules have however not turned out to be a successful attempt to modernise and unify the law concerning carriage of goods by sea. Even though the Hamburg Rules have been ratified by 34 countries[46], up until now there is not a single large economy or important maritime nation among them. The reasons behind the lack of success will be considered below after a brief overview of the Rules and the differences between the Hamburg- and Hague-Visby regimes.

2.5.2 Overview of the Hamburg Rules with focus on the new elements compared to the Hague-Visby Rules

2.5.2.1 Definitions and scope of application

The definitions of some of the terms used in connection to carriage of goods by sea and the scope of application are wider in the Hamburg Rules than in the Hague-Visby Rules.

First, the definition of carrier is more comprehensive.[47] The definition includes a person who has negotiated the contract with the shipper but has no intention of carrying the goods himself. A distinction is made between such a person and the "real" carrier by naming the carrier who actually carries the goods 'actual carrier'.[48] It is also stated that the carrier who has delegated performance of the contract to an 'actual carrier' remains responsible for acts or omissions committed by the actual carrier and his servants and agents. The responsibilities of the actual carrier are however also regulated by the convention and if there is an overlap the liability between actual and contractual carrier is joint and several. The effect of these provisions is that if the Hamburg Rules apply it is easier for a shipper to find a responsible carrier than compared to the Hague-Visby Rules, which only recognise the contractual carrier.[49]

Second, the definition of contract of carriage by sea is no longer documentary like in the Hague-Visby Rules where a bill of lading is required in order for those rules to be applicable, but contractual.[50] Hence,

[46] http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html
[47] Article 1 of the Hamburg Rules defines carrier as "Any person by whom or in whose name a contract of carriage of goods has been concluded with a shipper". while carrier is defined in Article 1 (1) of the Hague-Visby Rules as the owner or the charterer who enters into a contract of carriage with a shipper.
[48] Article 1 of the Hamburg Rules see also, Wilson, John F, *Carriage of goods by sea*, pp.225-226.
[49] Wilson, John F, *Carriage of goods by sea*, p.225.
[50] Article 1(6) of the Hamburg Rules

the Hamburg Rules are not restricted only to contracts covered by a bill of lading but can also be applied on contracts of carriage by sea governed by straight bills of ladings and electronic documents.[51] Concerning charter parties there are however no difference between the regimes, neither the Hamburg- nor the Hague-Visby Rules are applicable to charter parties.

Concerning the geographical scope of application, it is also somewhat wider since it covers both inward and outward journeys. Article 2 states that the Hamburg rules is applicable when the port of loading or port of discharge is located in a contracting state. It also allows parties to decide by contract that the Rules should apply even in jurisdictions that are not parties to the Rules.

Furthermore, the carrier's period of responsibility has been widened. The convention does not apply only "tackle to tackle" like the Hague-Visby Rules but covers the whole 'period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge'.[52] In short this widening of the period of responsibility is for the purpose of solving the "before and after problem" which existed in the Hague-Visby Rules by making the carrier liable even though the goods are not physically on the ship.[53]

2.5.2.2 Obligations and liability of the carrier

Other important changes are those which relates to the carrier's obligations, liability and the limitation of liability. The provisions of carrier liability and the cases in which the carrier are exempted from liability are different compared to the Hague rules. The obligations of the carrier and thus the basis of the carrier's liability are found in Article 5. The carrier is, according to Article 5(1) of the Hamburg rules, liable if the damage occurred during his period of responsibility unless he can show that he or his servants etc. took all measures that could reasonably be required to avoid the occurrence and its consequences. In short, the claimant has an initial burden to show that the damage happened during the carrier's period of responsibility, then the burden of proof switches to the carrier who has to show that the damage was not caused by his fault or negligence.[54] Thus concerning the burden of proof the Hamburg rules are simplified compared to the Hague-Visby rules since there is a uniform rule for all cases except for fire (regulated in 5(4)) and deviation to save life or property at sea (5(6)). The largest differences between the regimes lies in that the carrier's obligations has been compiled in Article 5(1) and that the grounds for exceptions has changed. The "catalogue" of Article 4 in the Hague-Visby rules is gone and replaced with the general fault based responsibility of 5(1), this does not constitute any major changes since a majority of the exceptions in the Hague-Visby Rules were such as they were not dependent on the carrier's fault (act of god, war

[51] Force, Robert, *A Comparison of the Hague, Hague-Visby and Hamburg Rules: Much ado about (?)*, p.2057.
[52] Article 4(1) of the Hamburg Rules
[53] Wilson, John F, *Carriage of goods by sea*, p.216.
[54] Tetley, William, *Marine cargo claims, vol.1*, 4.ed., Thomson Carswell, 2008, p.936.

etc.).[55] However, the exception of nautical fault (fault in the navigation or management of the ship)[56] that can be invoked even if there is fault on the carrier's side has been removed. This exception has been (and is) a source of disagreement between carrier and cargo interests.[57] The removal of the nautical fault exception was therefore subject to much debate in the negotiations that preceded the Hamburg rules.[58]

The obligation to provide a seaworthy ship is seen as included in Article 5(1) which makes the obligation continuous (as opposed to the Hague-Visby Rules). However, the practical importance of this difference is not huge since the duty to care for the cargo is continuous in the Hague-Visby Rules and the ISM-code provides for a continuous obligation to keep the ship seaworthy.[59]

Another change as concerns the carrier's obligations is that liability for delay in delivery of the goods was added to the Hamburg Rules and is included in Article 5(1).[60] Concerning physical damage caused by delay, such loss falls under the general duty to care for the cargo under the Hague-Visby Rules. The position under those rules is however unclear with regard to economic loss. The regulation in the Hamburg Rules is therefore an improvement and an adaption to the conventions that regulates carriage of goods by other modes of transport.[61]

At last concerning the carrier's obligations, it is also important to mention that carriage of live animals was excluded from the application of the Hague-Visby Rules but is included in the Hamburg Rules. The Hamburg Rules provide for a special rule for the carrier's obligations in the case of carriage of live animals, which states that the carrier is not liable if the loss is caused by any special risks related to the kind of carriage.[62] The Hamburg Rules also include provisions dealing with deck cargo in Article 9 of the rules whereas that type of cargo is excluded from the scope of application of the Hague-Visby Rules.

2.5.2.3 Limitation of liability

A large deal of debate on the subject of limitation of carrier liability and whether to keep it or not proceeded the Hamburg Rules. Limitation of liability was kept because it was deemed to be of benefit to both shippers and carriers (and their insurers) since it makes carriers able to calculate their

[55] Force, Robert, *A Comparison of the Hague, Hague-Visby and Hamburg Rules: Much ado about (?),* pp.2065-2066.
[56] Article 4(2)(a) of the Hague-Visby Rules
[57] Wilson, John F, *Carriage of goods by sea*, p.217.
[58] Fredrick, David C, *Political participation and legal reform in the international maritime rulemaking process: from the Hague rules to the Hamburg rules*, pp.110-112.
[59] Tetley, William, *Marine cargo claims, vol.1*, pp.936-937. See also p. 15 above.
[60] For a definition of delay see Article 5(2) of the Hamburg Rules.
[61] Wilson, John F, *Carriage of goods by sea*, p.220.
[62] Force, Robert, *A Comparison of the Hague, Hague-Visby and Hamburg Rules: Much ado about (?),* p.2071.

risk in advance and establish uniform and cheaper freight rates.[63] The arguments from the carrier interests were that the removal of the principle of limitation of liability would raise insurance cost and therefore freight costs as well.

The levels of limitation were raised in order to reflect the actual value of the goods shipped since the limitation levels in the Hague rules were deemed to be too low (from the views of the shippers at least). Wilson names two important factors that were considered when the levels were set and that needs to be respected when setting limitation levels generally:

"Any agreed limits must […] be fixed at a sufficiently high level to encourage the carrier to look after the cargo and, so far as possible, they should be inflation proof."[64]

The levels of limitation in the Hamburg Rules are 835 SDRs per shipping unit or package or 2.5 SDRs per kilo.[65] The conditions for the carrier's loss of the right to limit its liability are almost exactly the same as those in the Hague-Visby regime.[66] Regarding limitation of liability for delay, it is not the same as for ordinary cargo damage; the maximum amount which the carrier is liable for concerning damages because of delay is 2.5 times the freight payable for the goods delayed, provided that it does not exceed the total freight payable under the contract of carriage.[67] Whether a container is to be considered as a single unit or package or not is judged in the same way as in the Hague-Visby Rules (i.e. the transport document decides).[68] The carrier and the shipper are, just as in the Hague-Visby Rules, free to agree on higher limitation levels than those provided by the convention.

2.5.2.4 Some other issues regulated by the Hamburg Rules

The obligations and liability of the shipper which were not regulated in much detail by the Hague-Visby Rules and were found in different articles that mainly concerned the carrier, has received their own chapter in the Hamburg Rules. A clear definition of shipper is set out in Article 1(3)[69]and part III of the Hamburg Rules, consisting of two articles, regulates the

[63] Wilson, John F, *Carriage of goods by sea*, p.220.
[64] Ibid.
[65] Article 6(1)(a) of the Hamburg Rules.
[66] See Berlingieri, Francesco, *A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules*, p.33 and Article 8 of the Hamburg rules.
[67] Article 6(1)(b) of the Hamburg Rules.
[68] Article 6(2)(a) of the Hamburg Rules.
[69] As is not the case in the Hague-Visby Rules where the definition of shipper can be deducted from the definition of carrier, see previous section dealing with the Hague-Visby Rules in this thesis. The shipper is defined in the Article 1(3) of the Hamburg Rules as follows. "'Shipper' means any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea."

liability of the shipper.[70] However, even though the obligations and liability of the shipper are clearly regulated in one place and the term shipper is clearly defined, the differences compared to the Hague-Visby Rules cannot be seen as very large. Article 12 corresponds to Article 4(3) in the Hague-Visby Rules and defines the shipper's liability. Article 13 sets out the shippers obligations regarding dangerous cargo and has its equivalent in Article 4(6) of the Hague-Visby Rules that also deals with dangerous cargo. Article 13 of the Hamburg Rules differs in the way that it establishes two express duties, first to mark and label dangerous goods in a suitable way, second to disclose to the carrier the nature of the goods when the carrier does not know that it is dangerous. The shipper is subject to strict liability if it has breached the duties set out in Article 13.[71] A part of the shipper's liability is additionally regulated elsewhere than under part III of the Rules, that is, the liability for incorrect description of the goods, which is found in Article 17 of the Hamburg Rules.[72] The right to limit liability is just like in the Hague-Visby Rules restricted to carriers.

New provisions dealing with jurisdiction and arbitration were added to the Hamburg Rules. These issues are not dealt with by the Hague-Visby Rules.[73] Article 21 and 22 deals with jurisdictional issues and their aim is essentially to guard against the risk that carriers put unfavourable choice of forum clauses in the contract that makes it hard for claimants to pursue their claims.[74] The matter is particularly complicated in the EU because provisions on jurisdiction comes under exclusive EU competence.[75] These provisions are therefore not discussed further and treated only briefly in the following chapter about the Rotterdam rules.

Freedom of contract is governed by Article 23, which states that derogations are null and void unless they increase the responsibilities and obligations of the carrier.

Finally, another change in the Hamburg rules compared to the Hague-Visby Rules is that some new time limits have been introduced. For example delay, which was not regulated before, has to be reported to the carrier within 60 consecutive days after the days when the goods were handed over to the consignee. The general time limit to bring an action related to the carriage of goods under the rules has also been made longer compared to the

[70] Article 12 and 13 of the Hamburg Rules.
[71] Thomas, Rhidian, *The position of shippers under the Rotterdam rules*, p.23.
[72] For the equivalent provision in the Hague-Visby Rules see Article 3(5) of those rules. Berlingieri, Francesco, *A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules*, p.18.
[73] Although in some cases Article 3(8) of the Hague-Visby Rules has been held to ban choice of court clauses when they have been considered as unfavorable to the claimant in such a way as to breach the article. See p.325 in Sturley, Michael F, Fujita, Tomotaka & Ziel, Gertjan van der, *The Rotterdam Rules*.
[74] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, p.326.
[75] Berlingieri, Francesco, *A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules*, p.46.

Hague-Visby Rules and is under the Hamburg Rules 2 years instead of 1 year as it was before. The time limits for claims and actions are found in Article 19 and 20 of the Hamburg Rules.

2.5.3 Why the lack of success?

The Hamburg Rules have not received any widespread acceptance. As mentioned before only 38 states have ratified the convention among which no state belongs to the major maritime nations. There are many reasons behind the reluctance of more important maritime nations to ratify the Hamburg Rules.

The criticism from the carrier interests are concentrated on the levels of liability that are placed on the carriers and the changes in the burden of proof which they see as unreasonable and in their opinion will lead to increased freight rates. Additionally from this side criticism has also been directed against the removal of the exception of nautical fault (which they argue will increase freight rates) and the changes to the fire exception that will make it harder to use. An interesting observation is that most of these changes, as will be shown further down, have been kept in the Rotterdam Rules. The difference as concerns the new regime is just that the removal of these carrier friendly elements have been balanced by the introduction of other provisions that supposedly are beneficial for carriers.

Regarding the limitation levels, the arguments are the same as those that were brought forward against the Hague Rules and later against The Visby protocol and that are now being used again against the Rotterdam rules, i.e. higher insurance costs. However, no one really seems to know what the implications will be of raised liability levels and arguments has been put forward from actors which are in favour of new regimes instead of the Hague or Hague-Visby Rules that the insurance industry will find ways to adapt to higher limitation levels without them having an impact on the freight rates.[76]

Concerning the fears that an increased carrier liability will have negative consequences, arguments have been made that the liability of the Hamburg rules is close to being a strict liability. However this criticism has been met with the arguments that the Hamburg rules explicitly provides for a liability under "presumed fault" which is already often the case under the Hague-Visby Rules (for example regarding seaworthiness) and the removal of the catalogue of exceptions does further on not mean that the carrier cannot use them since they are still covered by Article 5 of the Hamburg Rules. These fears can therefore surely be considered as exaggerated.[77]

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[76] Force, Robert, *A Comparison of the Hague, Hague-Visby and Hamburg Rules: Much ado about (?)*, pp.2087-2088.

[77] José Angelo Estrella Faria, *Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules*, p.300.

Additionally a fear of increasing costs of litigation to establish the definitive meaning of the new rules has made carrier interests negative towards the convention. Especially since the presumed fault burden of proof on the carrier could make shippers more willingly to test their cases in court. Carrier interests have argued that the Hague Rules were well tested and that litigation therefore could be avoided in many cases because the outcome is foreseeable. In any case, uncertainty is impossible to escape with any new convention and to argue against the Hamburg rules on this ground is to argue against any new conventions and attempts to modernise and bring uniformity to the rules of carriage whatsoever.[78]

Personally, I think that the answer is to be found elsewhere than in the actual provisions of the Hamburg rules, which do not by themselves constitute that much of a radical change compared to the Hague-Visby regime (which on the other hand by itself can be a good reason for not adopting a convention). The political process that led up to the rules was a process characterized by confrontation instead of common understanding and compromise.[79] Important commercial actors were in the beginning left out from the negotiations (the same actors which had been the driving force behind the Hague rules and the Visby protocol and which can be seen to represent the interests of major maritime countries). Further, the whole process of creating the Hamburg rules were in a way a method of displaying power for the newly independent nations in the third world. The old western powers were probably not so keen on letting the developing nations set the agenda and that might be an additional explanation to the lack of ratifications from those nations.

The unwillingness of the traditional major trade and maritime nations to ratify has also stopped smaller nations from ratifying, since many countries adopt a so called "wait and see approach"[80] to whether they should ratify or not, and since there have been no ratifications from large economies most nations have been stuck in the waiting stage without taking the step to ratify themselves. It is in my opinion possible to draw a parallel to the Hague rules which became popular only after the US ratification in 1936, just that in the case of the Hamburg rules there has not been any releasing factor[81] that

[78] Force, Robert, *A Comparison of the Hague, Hague-Visby and Hamburg Rules: Much ado about (?),* p.2088.
[79] José Angelo Estrella Faria, *Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules*, p.300.
[80] For example this was the reasoning of Sweden. In a preparatory document to the new Sea Code of 1993, SOU 1990:13 p.199 it is written (my translation): In order to in the largest possible extent avoid negative cost and competition effects an entry into the Hamburg rules should be effected first after the convention has received a somewhat wide acceptance among the most important trading partners of Sweden. The countries concerned are, except from the Nordic countries, the EC countries and the USA. The investigation expects that the Government is following the development in the concerned countries and initiates an entry to the convention as soon as above-mentioned conditions are met.
[81] Like the Supreme Court case of *The Isis* preceding the US ratification which eliminated the opposition of the US carriers towards the Hague Rules. See Sturley, Michael F, *The history of COGSA and the Hague Rules*, p.52 and the previous section about the background to the Hague rules in this essay on p.10.

would have provoked ratification from any important maritime nations. The failure of the Hamburg rules is as far as I can see a result of lack of political will from the western countries to join the convention because of a combination of the reasons treated above.

The absence of ratifications and the flaws that do exist together with the fact that some issues that now need to be regulated because of later technological developments are unregulated (i.e. such as electronic bills of lading) has made the convention aged and regarded as a failure. It is therefore quite sure that the Hamburg Rules will not be the convention that provides the solution for regulation of carriage of goods in the future.

The Hamburg Rules have however despite of the lack of widespread ratifications had a considerable impact anyway since quite a lot of nations (some of them important shipping nations) have implemented parts of the rules in their national carriage of goods by sea legislations. These so called hybrid regimes have played an important role in the developments that has led up to the Rotterdam rules.

2.6 National hybrid regimes

Many nations that have not joined and ratified the Hamburg Rules (or the Visby protocol) have anyhow experienced a need for modernising their carriage of goods regimes. The solution for these nations has been that instead of waiting for a new international solution take steps by themselves or together with countries belonging to the same region to modernise and update their national laws governing carriage of goods by sea (that were based on either the Hague Rules or the Hague-Visby Rules). These measures have of course not contributed to international uniformity but have instead made the situation worse especially since some of the codes apply both inwards and outwards and therefore creates problems with conflict of law issues.[82] This group of national laws is often named “hybrid regimes” in academia. Among the countries that have adopted such laws are large economies and countries that are either or both important “carrier” and “cargo” countries i.e. China, Japan, the Nordic countries, Australia and Canada. A draft to a new COGSA was also prepared in the US but has been put on hold in order to take the outcome of the Rotterdam Rules into account.[83]

The majority of the new regimes only take up parts of the Hamburg Rules that do not conflict with the Hague-Visby Rules, for example the maritime codes of the Nordic countries (Denmark, Finland, Norway and Sweden) which have introduced liability for delay and other new provisions from the

[82] Basu Bal, Abhinayan, *An Evaluation of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) through Critical Analysis*, Malmö, Sweden, WMU Publications, p. 2.
[83] Wilson, John F, *Carriage of goods by sea*, p. 288.

Hamburg Rules but kept the exception for nautical fault and the old fire exception.[84] The Chinese maritime code is however an example of more aggressive legislation that contains many unique elements[85] and in this way contributes more to the disharmony of international law governing carriage of goods by sea. However, even though aggressive national and regional legislation in this area may contribute to increased fragmentation in the short run it can also be a factor that encourages states to work for uniformity and unification of the area because of the benefits such uniformity would create. One factor behind the decision to draft the Rotterdam rules was the increased international fragmentation and historically the same reasons were behind the creation of the Hague Rules and contributed to the many ratifications of that convention.[86] Perhaps the existing national hybrid-regimes will be an encouraging factor for ratifications of the Rotterdam Rules since international uniformity is preferable to national solutions in this area of law.

2.7 The Multimodal Convention

Since today transport often takes place with the use of more than one mode of transport by so-called multimodal transport[87], legal problems arise concerning which convention that is applicable in case of cargo damage since different sets of rules exist for different modes of transport.[88] A way of solving these problems is to use the combined transport document issued by the ICC.[89]

A description of contracts and rules for combined and multimodal transport is not possible to do in this thesis; it could be the sole topic for another essay. It is important to mention however that efforts have been made to

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[84] Sturley, Michael F, *Uniformity in the Law Governing the Carriage of Goods by Sea*, Journal of Maritime Law and Commerce, vol.26, no.4, 1995, p.562

[85] Ibid.

[86] As Sturley describes on p.10 in his article *'The History of COGSA and the Hague rules'*: "While the international community was accomplishing little toward the unification of the law, several countries unilaterally enacted domestic legislation governing exoneration clauses in bills of lading. This made the conflict among national laws (and among national interpretations of general maritime law) more serious in the short run, but in the long run actions subjecting the carriers to conflicting regulation increased their incentive to support an international resolution of the problem. The domestic legislation of the late nineteenth and early twentieth centuries, coupled with the threat of more extensive domestic regulation in the 1920's, therefore turned out to be a major factor in the eventual procurement of an international agreement." See also pp.3-4 of the same article.

[87] International Multimodal Transport is defined in the following way in Article 1(1) of the Multimodal Convention: "'International multimodal transport' means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country. […]".

[88] The conventions governing international transport by other modes of transport are as follows: For road: CMR, railroad: CIM, and for air: The Warsaw- and Montreal Conventions.

[89] Wilson, John F, *Carriage of goods by sea*, p.254.

create a convention to govern multimodal transports since these matters are addressed by the Rotterdam Rules as well.

The Multimodal convention of 1980 was intended to solve the issues of multimodal transport. In the convention, the party who undertakes to perform the multimodal transport is named as "the Multimodal Transport Operator". The basis of liability is similar to the Hamburg Rules, with a liability under presumed fault. The liability limits are however higher.[90]

The problems while creating a multimodal regime is whether to adopt a uniform or network solution to the multimodal operator's liability. Should liability be governed by a sole convention or should reference be made to the other conventions that govern the different transport modes? The Multimodal convention uses a solution that is something in between. If the place of damage cannot be identified the presumed fault liability of the Multimodal convention will be applicable as well as the limitation levels. If the place of damage can be located on a particular leg then the limitation level of the relevant unimodal convention will apply provided that it is higher than that of the Multimodal convention, but the multimodal convention still governs the liability as such.[91]

The Multimodal convention which (as well as the Hamburg Rules until UNCITRAL took over) were prepared by UNCTAD has not received the sufficient contracting parties for it to enter into force (only 13 of the 30 required states) and it will probably never do so either since over 30 years has passed since its creation.[92] Multimodal issues are however being addressed by the Rotterdam Rules when other modes of transport are being used in connection to an international transport by sea.

[90] 920 SDRs per package or 2.75 SDRs per kg whichever is the highest unless the loss, damage or delay occurred during an identifiable segment of transportation where another international treaty, convention, or law establish a higher liability amount.
[91] Wilson, John F, *Carriage of goods by sea*, p.260.
[92] José Angelo Estrella Faria, *Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules***,** p.303.

3 The Rotterdam Rules

3.1 The need for reform

It is clear from the chapters above that the present regimes are dated and that a lack of uniformity exists concerning the rules governing international carriage of goods by sea. The steps to start the work towards a solution to the problems that exists in this area were taken in the end of the 1990s because of the old age of the conventions presently in force and their lack of adaptation to the modern transportation industry. Signs of this lack of adaption are for example that electronic transport documents and multimodal transport are not regulated by the regimes currently in force and the lack of provisions that are adapted to containerised transport.[93] The Rotterdam Rules are therefore a product of different needs for reform.

The Rotterdam Rules aims to establish uniform rules to modernise and harmonise the rules that govern international carriage of goods by sea.[94] The goal of creating uniform rules was one of the most important reasons for the steps to reform this area of law since the situation with increasing differences between different jurisdictions in the law governing carriage of goods by sea was only getting worse and something had to be done in order to restore the uniformity that had once existed. The failure of the Hamburg Rules and the following increasing number of national hybrid regimes that aims to update the law on their own has contributed to the present problematic situation. Today three different sets of rules (all of them dated and in need of modernisation among which the ones most commonly used are the two oldest) that are interpreted in different ways by courts and arbitration panels all over the world together with several national hybrid-regimes which incorporate parts of the before-mentioned sets of rules are in force. The present situation with large variations in the law is not sustainable in the long run since there is so much to gain from having uniform laws governing this area. The benefits of uniformity are easy to see: if the law is uniform litigation will be less necessary and the costs for transport lower since the law will be predictable (i.e. it will be more easy to allocate the risks of cargo loss or damage), and all parties involved in a contract of carriage will be able to know that their liability will be the same wherever a dispute is resolved. Uniform law increases predictability and

[93] A legal vacuum does not exist concerning these areas; they are regulated in other ways as by standard forms, contract, national laws etc. but regulation by an international convention has been considered to promote harmony and uniformity in this field. For discussions of uniformity and its benefits, see Tetley, William, *Uniformity of International Private Maritime Law – The Pros, Cons, and Alternatives to International Conventions-How to Adopt an International Convention*, Tulane Maritime Law Journal, vol.24, 1999-2000, and Sturley, Michael F, *Uniformity in the Law Governing the Carriage of Goods by Sea*.
[94] United Nations resolution 63/122

legal certainty and from increased predictability and legal certainty comes such benefits as lower costs and smoother trade.[95]

The present regimes are also as mentioned before obsolete in many ways. Regarding electronic transport documents, problems exists because the Hague and Hague-Visby Rules requires a bill of lading or similar document of title in order to be applicable, a requirement that is something of an anachronism since sea way bills (and similar transport documents such as the straight bill of lading)[96] and electronic transport documents are frequently used today. Since transport is considerably faster today than in the days of the Hague Rules, goods may arrive at their destination before the bill of lading[97] which causes costs and delays, therefore sea way bills and electronic transport documents are often preferred before traditional bills of lading.[98] The Hamburg Rules are a bit more modern since they are applicable to other transport documents but electronic transport documents are not regulated in them either. Thus in a time when computers is used for everything it is a natural consequence that legislation regarding international transports needs to be adapted to the contemporary technological climate.

Another big issue is that the previous regimes are, as previously described, only applicable on a tackle-to-tackle (Hague-Visby) or port-to-port (Hamburg) basis. Since transports today often are multimodal because of the use of containers, a need for a regulation that reflects this fact has arisen. Multimodal transport is currently governed by a patchwork of different legal instruments and no multimodal convention is in force.[99]. Furthermore, at the time of The Hague Rules' creation containers were not even invented and steam ships were used to transport goods. In our time almost all transport takes place by the use of containers and there are ships that can carry well over 10000 containers, but carriage of goods by sea is still regulated to a large extent by a convention from the time of the steam ships.[100] The Visby protocol and the Hamburg Rules both have articles dealing with containers but not in a very extensive way and they are not applicable on a door to door

[95] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, pp.3-4.

[96] The difference between a sea waybill and a bill of lading is that a bill of lading is a document of title whereas the sea waybill is not. Both transport documents however acts as receipts and provides evidence of the contract of carriage. The problem with sea waybills is that if the owner wishes to sell the goods in transit a sea waybill is not suitable since it does not constitute a document of title. This kind of document is nonetheless frequently used and has been calculated that up to 85 % of the trans-Atlantic trade in containerized cargo could be carried under waybills. (See Wilson, John F, *Carriage of goods by sea*, pp.159-160). The lack of regulation of other transport documents than the bill of lading is one of the reasons behind the creation of the Rotterdam Rules.

[97] A bill of lading requires delivery of goods against presentation and therefore the document needs to have arrived before the goods (and that is sometimes not the case today because of fast transports and slow postal and banking services) see Wilson, John F, *Carriage of goods by sea*, p.157.

[98] José Angelo Estrella Faria, *Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules***,** p.309.

[99] Ibid. p.313

[100] Beare, Stuart, *The need for change and the preparatory work of the CMI*, Paper found on: http://www.comitemaritime.org/Rotterdam-Rules/0,2748,14832,00.html

basis and do not deal with multimodal issues. An update of the law in order to deal with modern transportation practices such as container- and multimodal transport has therefore been deemed necessary. Further since the previous attempt to create an international convention that governs multimodal transport has failed there is a clear need for a new convention that address these issues.

The answer to these different reasons behind the need for reform has been to create a new convention. The Rotterdam Rules has therefore been developed by the CMI and UNCITRAL in cooperation with other organizations to promote uniformity and to modernise and adapt the rules governing carriage of goods by sea to the conditions of the 21st century.

3.2 The working process

3.2.1 Work of the Comité Maritime International

The work of CMI and UNCITRAL has been parallel and UNCITRAL has cooperated with many more NGOs (and INGOs) than just CMI and the creation of the Rotterdam rules has involved a great range of different actors. However, CMI had a leading function in the preparatory work of the Rotterdam rules.[101]

The starting point of CMI's work towards the Rotterdam rules can actually be put so far back as 1988 when the CMI decided to investigate whether the question of uniformity of the law of the carriage of goods by sea should be placed on the agenda of the 1990 Paris conference of the CMI. The CMI was investigating this issue through the beginning of the 1990s and a working group was established in 1994 in order to further investigate the problems of the various regimes governing this legal area.[102]

The year 1996 was a very important year in the process towards the Rotterdam rules and can easily be considered as the "real" starting point. In this year, UNCITRAL decided to start to work with a review of the laws and practices in the area of carriage of goods by sea.[103] Representatives from the CMI and UNCITRAL met to discuss cooperation (since official draft conventions must be sponsored by the UN, CMI cannot create a convention

[101] Beare, Stuart, *Liability regimes: where we are, how we got there and where we are going*, Lloyd's Maritime and Commercial Law Quarterly, Part. 3, 2002, pp.306-307.
[102] *A brief history of the involvement of the CMI from the initial stages to the preparation of the UNCITRAL draft convention on the international carriage of goods wholly or partly by sea*, CMI Yearbook 2009, p.252.
[103] The UNCITRAL had previously been involved in a project on electronic commerce where the gaps between the functioning of bills of ladings and sea waybills were discussed, in this way UNCITRAL:s attention was turned to the carriage of goods by sea area and the possible future possibility of including rules on electronic commerce in rules dealing with carriage of goods by sea. See, Beare, Stuart, *Liability regimes: where we are, how we got there and where we are going*, p.306.

on their own initiative). As a result of this cooperation work started towards a draft that would be handed over to UNCITRAL for further work and a new working group and an ISC were established by the CMI.[104]

The CMI sent out questionnaires in May 1999 to be answered by their national associations, the answers that came in were then analysed and topics were prepared to be discussed by the ISC.[105] In this work liability issues had not been included from the start because those issues were being investigated by the ISC that had its origins in 1988. However, as the work proceeded it was clear that liability issues should be included in the work and that the issues of areas previously unregulated by the international liability regimes and core liability issues could not be separated. That is why issues of liability were included in the ICS:s terms of reference when it was established in November 1999 and UNCITRAL at its 34th session in 2001 decided that the working document that was about to be put forward by the secretariat should include issues of liability.[106]

The primary work of the CMI was finished in November 2001 and their draft to a new convention was approved in December 2001 to be handed over for further work and deliberations by the UNCITRAL. Thus a new phase in the work towards a new transport convention had started.[107]

3.2.2 United Nations Commission on International Trade Law (UNCITRAL)

The starting point for the work with the Rotterdam Rules for UNCITRAL is to be found in 1994 when their working group on electronic data interchange suggested to the commission that work should be undertaken on the issues of negotiability and transferability of rights in goods in a computer-based environment. That suggestion was accepted in 1995 by the commission and work concerning these issues was decided to be undertaken with particular emphasis on maritime transport documents. The work that had already been done by the CMI was to be taken into account.[108]

In 1996 at UNCITRAL:s 29th session it was decided to let the secretariat gather information in order to see if it was necessary to undertake a larger

[104] *A brief history of the involvement of the CMI from the initial stages to the preparation of the UNCITRAL draft convention on the international carriage of goods wholly or partly by sea*, CMI Yearbook 2009, p.253.
[105] The goal of the ISC was: ”To consider in what areas of transport law, not at present governed by international liability regimes, greater international uniformity may be achieved; to prepare the outline of an instrument designed to bring about uniformity of transport law; and thereafter to draft provisions to be incorporated in the proposed instrument including those relating to liability.
[106] Beare, Stuart, *Liability regimes: where we are, how we got there and where we are going*, pp.307-308.
[107] Ibid. pp.308-309.
[108] Lannan, Kate, *Overview of the Convention The UNCITRAL Perspective*, CMI Yearbook 2009, p.272.

review of the international carriage of goods by sea regimes because of the reform needs treated above. The secretariat should gather information from a wide range of actors such as governments, NGOs and IGOs and especially from the CMI.[109] A presentation of the work of the UNCITRAL secretariat for the UNCITRAL was decided to be made at a future session.

The collaboration between CMI and UNCITRAL started after that session in 1996 and continued the following years. For example, a colloquium was organised in 2000 jointly with the CMI. During this occasion, issues that needed further consideration were identified such as for example multimodal transport and electronic commerce. In 2001 the final draft of CMI was (as mentioned in the section above) handed over to UNCITRAL for further work and deliberations in the working group III of UNCITRAL. This was the start of the process to finalise the Rotterdam rules. After this UNCITRAL started its work towards the harmonisation of transport law through a new convention with the CMI draft convention as a starting point. The Working group of transport law (Working group III) held two two-week sessions per year to work on the text that would be the Rotterdam Rules.[110] In addition to the formal sessions, informal meetings were held and a large degree of communication and deliberation took place between the formal sessions among the different parties involved in the Working Group.[111]

Important issues for the UNCITRAL were that their work should take already existing conventions into account and seek to establish a balance between the interests of carriers and shippers.[112]

UNCITRAL involved a large range of actors in the working group's process of creating what would later become the Rotterdam Rules. Many different organisations representing different stakeholders were invited to participate in the working group sessions as well as the member states, which in their turn also had involved national stakeholders.[113] There was therefore a broad representation of different interests and both carrier-, shipper- and insurance interests have been involved in shaping the Rotterdam Rules as well as a variety of states with differentiated economies. Although actors with such different interests were involved the focus was on cooperation not confrontation (as was the case with the Hamburg Rules) and on the effort to create a balanced instrument.[114]

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[109] Ibid.
[110] Sturley, Michael F, *Transport law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam rules*, p.471
[111] Schelin, Johan, *The Uncitral Convention: Harmonization or De-Harmonization?*, Texas International Law Journal, vol.44, 2008-2009, p.323.
[112] Lannan, Kate, *Overview of the Convention The UNCITRAL Perspective*, p.274.
[113] Ibid. p.275, contains a list of organisations actively involved in the working group sessions. They are: CMI, UNCTAD, UNECE, ICC, IUMI, FIATA, ICS, BIMCO, International group of P & I clubs, IAPH, European Commission, Association of American Railroads, OTIF, European Shipper's Council, IRU, IMMTA, and World Maritime University.
[114] Ibid. p.275.

Interesting to note is the varying degree of activity between the different member-states and that the active delegations naturally have shaped the convention more than the ones with a lesser degree of activity. Among the nations with a large degree of activity were some of the world's largest economies like USA, China, Japan and Germany.[115]

The final session of the Working Group took place in January 2008 in Vienna. During this meeting some remaining issues were solved (to mention some, the limitation levels were set and the definition of volume contracts was decided to remain unaltered) and the draft was submitted to UNCITRAL.[116]

The UNCITRAL secretariat then circulated the final draft convention to the UN member states for review and later comments at a final commission session. Some written comments were submitted to UNCITRAL containing statements that sought to reopen issues. This kind of comments mostly came from governments that had not participated actively in the Working Group's sessions. The Commission rejected the wishes of some of these member-states to reopen negotiations concerning major issues since it had required a lot of time and effort to create the draft convention and it would create a risk that the project would be in vain if such issues were reopened at a Commission level.[117] The fact that there is discontent among some nations with important provisions in the convention might be an obstacle to the reception of enough ratifications for the convention to enter into force.

However even though large controversial issues were not reopened a few smaller issues actually were. For example, changes were made on a provision regarding "delivery of goods without the consignee's surrender of the negotiable transport document[118] or negotiable electronic transport record" that was subject to a large deal of debate whether it should exist in the convention at all. A compromise was struck, which meant that such a possibility could be inserted in the transport document. This solution provides a good example of compromise reaching during the creation of the Rotterdam Rules.

The Rotterdam Rules was adopted by the General Assembly of the UN by Resolution 63/122, which was passed on the 11th of December 2008. The

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[115] Basu Bal, Abhinayan, *An Evaluation of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) through Critical Analysis, p.12.*

[116] Sturley, Michael F, *Transport law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam rules,* p.475.

[117] Issues that were decided to not be reopened were for example: the basis of the carrier's liability, the limitation levels and the treatment of volume contracts. Sturley, Michael F, *Transport law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam rules,* p.476. See also, Schelin, Johan, *The Uncitral Convention: Harmonization or De-Harmonization?* p.323. On this page the author explains that controversial issues always run the risk of becoming more politicised at higher levels and that reopening in a worst case scenario might terminate the whole negotiation process".

[118] The equivalent of bill of lading in the Rotterdam Rules.

resolution contains statements about the content of the convention such as General Assembly concerns of the lack of uniformity and the lack of a modern international carriage of goods regulation adapted to containerisation etc. The resolution also states in general terms the importance of harmonisation and modernisation of the rules governing international carriage of goods by sea and authorises the signing ceremony that subsequently was held in Rotterdam in the Netherlands. Lastly, it recommends the name 'Rotterdam Rules' for the Convention.[119]

The signing ceremony was held in September 2009 in Rotterdam and so far 24 states have signed the Rules and one of these states has ratified them.[120] The future will tell if the required 20 will ratify the Rules states and make them enter into force.

3.3 Overview of the Rotterdam Rules – What has changed? What is old and what is new?

In this part, the Rotterdam rules are presented. The overview are not overly detailed since there is no space for a more detailed review of the rules in this thesis instead the aim is to display the core features of the Rotterdam Rules. The overview follows the pattern from the previous sections about the Hague-Visby and Hamburg regimes with focus on scope of application and definitions, obligations of the carrier, limitation of liability and other regulated issues such as the obligations and liability of the shipper. Issues that are new and/or controversial are treated in more detail than parts of the Rules that do not differ much from the previous regimes.

3.3.1 Definitions

Article 1 of the Rules contains a list with the definitions of the different concepts used in the convention. The definition provisions of the Rotterdam Rules are considerably more extensive and comprehensive (Article 1 takes up four and a half pages of the convention alone) than their equivalents in the older conventions. This is due to the fact that many new concepts have been introduced in the Rotterdam Rules and because the Rotterdam Rules have a wider scope of application. The definitions will not be dealt with in a specific part. Instead they will be introduced when the articles and concepts to which they are related are treated. The relevant definitions concerning the scope of application are found in Article 1(1) to 1(4) and will therefore be dealt with in the next section.

[119] United Nations Resolution 63/122
[120] http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html

3.3.2 Scope of application

As is clear from the previous chapter, the scope of application of the two preceding regimes varies between the two regimes. The Hague-Visby Rules use a documentary approach to the contract of carriage concept to which they are applicable while the Hamburg Rules mainly use a contractual approach. The Rotterdam Rules uses a concept that is a kind of hybrid between the approaches of the two preceding conventions. The purpose of this combination is to properly define the scope and to catch the contracts that should fall under the convention.

The problems and issues to bear in mind when defining the scope are described in a good way at p.30 in the book *the Rotterdam rules* written by *Sturley, Fujita and van der Ziel*:

"[….]which of the approaches would best accomplish the goal of clearly and predictably including the transactions that should be included and, just as important, excluding the transactions that should be excluded? Not only must the courts in a wide range of legal systems be able to recognise when the Convention applies, but commercial parties must be able to tell when they must conform their behaviour to the mandatory rules (and know when they have the freedom to contract on terms of their own choosing)."[121]

The way of solving this problem was to combine the previous approaches together with the adding of a third one. This solution is the so-called 'trade approach' of the Rotterdam Rules and it can be described as a hybrid created to properly catch all contracts that should be governed by the Rotterdam Rules.

The general scope of application is set out in Article 5 with limitations in Article 6-7 which contains exclusions from the scope of application.[122] The convention applies to contracts of carriage which provides for international carriage by sea (the contractual approach). The scope has been widened in relation to the Hague-Visby Rules in the sense that the Rules just like the Hamburg Rules applies both inward and outward and in relation to both the

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[121] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, p.30.

[122] Article 5 states: "Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:
(a) The place of receipt;
(b) The port of loading;
(c) The place of delivery; or
(d) The port of discharge .
2 . This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties"

Hamburg Rules and the Hague-Visby in the sense that the Rules may be applicable on door-to-door contracts that provides for multimodal transport.

Contract of carriage is defined in Article 1 of the Rules as: "A contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage." It is obvious from this definition that it is question about a convention with a different nature than the other two. In the definition of contract of carriage "ports" are not mentioned. The article instead use the term "places" and states that the contract *may* provide for other modes of transport in addition to transport by sea but that it *shall* provide for carriage by sea (which means that a sea-leg should be included in the voyage). By reading the article one notice two considerable changes: the convention may apply inland, and may provide for other modes of transport. The convention's new multimodal character (which has been named as maritime-plus because of the compulsory sea-part of the carriage) is hence obvious already from the start. The multimodal aspects of the rules will be dealt with in more detail below.

The definitions of transport document and liner/non-liner transportation can be said to limit the scope.[123] The transport document definitions define the scope using the "documentary approach" of the Hague-Visby rules. While the liner/non-liner uses the "trade approach. These definitions affect the implementation of Articles 6 and 7, the Articles which contain exceptions to the applicability of the convention. Charter parties are excluded from application just as in the other conventions, but the wording and structure of the exceptions is a bit more complicated. The reason for this is that the definition of which contracts that should be excluded is hard to draft since contract-types exists which are something in between charter parties and bills of lading. However, the important thing to bear in mind is why compulsory rules are necessary at all, namely to protect the party to the contract who has the weaker bargaining power. That is why charter parties are excluded from application because the parties to those kinds of freight-contracts normally are of equal or at least close to equal bargaining power. Hence, the definition needs to exclude those kinds of contracts that are made between contracting parties with a somewhat equal bargaining power. The aim of the exceptions is to limit the scope of application to those transactions that needs to be governed by a compulsory set of rules.[124]

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[123] *Transport document* is defined in Article 1(14) as follows: "Transport document" means a document issued under a contract of carriage by the carrier that: (a) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and (b) Evidences or contains a contract of carriage. Further *liner transportation* is defined in 1(3) in the following manner: ""Liner transportation" means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables or sailing dates. *Non-liner transportation* is negatively defined in Article 1(4) as: "[…]any transportation that is not liner transportation".

[124] Honka, Hannu, *Scope of application, freedom of contract*, CMI Yearbook 2009, pp.257-258.

Another effort to achieve this aim has been made by the introduction of the volume-contract exception which will be discussed further down.

Article 6 is therefore divided into two parts, one that concerns liner transportation, and one that concerns non-liner transportation.[125] This is the essence of the trade approach, the aim of the convention is to be applicable in liner transportation except when a charter party or similar contract is issued but not in non-liner transportation (like in the case of tramp shipping).[126] The reason for this is as previously mentioned to protect the weaker party to the contract, which was historically (see previous chapters) the whole reason for creating rules governing international carriage of goods by sea in the first place. However, only using the trade approach would be a too blunt instrument and therefore it is mixed with the documentary approach and it is here the "transport document" comes into play.

The documentary approach is used to further define the applicability and in some way create "exceptions to the exceptions" because normally a transport document (in it's strict sense) is not required for the Rotterdam Rules to be applicable (the contractual approach, just like in the Hamburg Rules) but when it is question about non-liner transportation, which the Rules in the normal case should not apply too, the contract is nonetheless covered if there is no charter party and a transport document has been issued.[127] The Hague and Hague-Visby Rules do not exclude carriage in non-liner trade for which no charter-party is issued and the drafters of the Rotterdam rules saw no reason for doing this by using a pure trade approach. The reason for this is for example contracts that may arise of so-called on-demand carriage, when goods, on the demand of a shipper, are carried on the outgoing leg of a voyage whose incoming leg was liner-based. There is no reason for why such a contract, if a transport document/bill of lading is issued, should not be covered by the Rotterdam Rules and a strict implementation of a trade approach would consequently exclude such contracts.[128]

Concerning the "by sea" requirement in Article 1(1) and 5(1) of the Rules the question that could be raised is what is by sea? Are only the worlds oceans covered? Or will international transport on inland seas be covered as well? Such questions have to be answered by courts in their interpretation of

[125] Article 6(1) of the Rotterdam Rules.
[126] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, pp.40-42.
[127] Art 6(2) of the Rotterdam Rules.
[128] Honka, Hannu, *Scope of application, freedom of contract*, CMI Yearbook 2009, pp. 256-258. Honka explains on p. 257 that: "….a pure trade approach was not the proper way to go. It would have two major problems. First, it would leave unclear specific transport arrangements within liner transportation where it would not be generally considered necessary to include those arrangements under the RR. Second, it was early on considered necessary not to decrease the scope of application of the RR compared with the Hague and the Hague-Visby Rules. As the latter two cover more than just liner transportation due to the requirement of a bill of lading or a similar document of title having been issued, as long as not based on charter parties, it was necessary to have a clarifying provision in the RR whereby the same result would be achieved."

the convention in the future.[129] Another question that can be raised concerning the sea-leg is for example what if the contract provides for sea-carriage but the goods are not in fact carried by sea? In such a case, the Rotterdam Rules will be applicable because it is the contract that determines the scope of application and not the actual carriage, and the contract provides for carriage by sea. Furthermore it should be mentioned that if the contract provides for other carriage than sea carriage no requirement is set out that the sea-leg in such a case should be longer than other legs of the voyage **or the like,** for the convention to be applicable.[130]

Regarding the internationality requirement, the reason for that wording was to guard against the risk of a shipment containing two domestic sea legs.[131] It should be noted that "between contracting states" are not used here, only "between different states".[132]This ought to be a consequence of the extended scope (because the Rules apply both inwards and outwards).In order to apply, at least one of the following four places must be located in a contracting state (which is defined in Article 92, although that article does not offer any surprises) namely, the place of receipt, the port of loading, the place of delivery, or the port of discharge.[133]

An important difference compared to the Hague-Visby- and Hamburg regimes is that the Rotterdam Rules do not apply just because the transport document is issued in a contracting state. This is because the adaption to electronical commerce makes the place of issuance of the transport document irrelevant.[134]

To conclude: The Rotterdam Rules are applicable to international carriage if a sea-leg is included. The Rules are mainly applicable to contracts of carriage in liner-transportation but in certain circumstances they may apply in non-liner transportation. Furthermore, the focus is less on the documentation but more on the contract as such. Just as the Hamburg Rules, the Rules apply to contracts of carriage by sea no matter the type of documentation used.[135] One of , if not *the*, largest difference compared to the two preceding set of rules is the multimodal scope of application of the Rules which includes provisions for solving situations of overlap and conflict with other transport-conventions. Another novelty is the limited freedom of contract that can apply provided that some specific conditions

[129] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, p.35.
[130] Mankovski, Peter, *The Rotterdam Rules – Scope of Application and Freedom of Contract*, European Journal of Commercial and Contract Law 2010-1/2. p.17.
[131] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, p.37.
[132] Baatz, Yvonne, Debattista, Charles, Lorenzon, Filippo, Serdy, Andrew, Staniland, Hilton, Tsimplis, Michael, *The Rotterdam rules: A Practical Annotation*, Informa, London, 2009, p.17.
[133] Ibid.
[134] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, p.39.
[135] Wilson, John F, *Carriage of goods by sea*, p.231.

are fulfilled. These two features of the Rules need a more detailed description and are therefore treated in the following sections.

3.3.3 Multimodal aspects

To maintain a 'tackle-to-tackle' or 'port-to-port' approach to transport today when most transports are on a 'door-to-door' basis would be to divide transport artificially into covered and excluded periods. Such division would not be in line with modern transport practices since a majority of transport today takes place on a door-to-door basis. There is additionally a large degree of dissatisfaction among industry interests with the legal status quo regarding multimodal transport (as has been mentioned before the outlook for the Multimodal convention is not exactly bright).[136]

The Rotterdam Rules thus provides for door-to-door coverage. During the creation process the CMI draft that was handed over to UNCITRAL had a door-to-door approach but in the deliberations by UNCITRAL there was debate whether this should be kept or not. UNCITRAL did nonetheless finally decide that the convention should be able to apply on a door-to-door basis and the decision to draft an instrument with a different character than it predecessors was therefore taken.[137] The debate did not end by that decision however and it continued even to the last session where a proposal to make the multimodal parts of the convention optional was put forward. This proposal was rejected and particularly the US was strongly opposed to allowing countries to opt out from the multimodal aspects of the Rules.[138] This illustrates well that the multimodal scope of the convention is controversial and a big step forward. Although in my opinion a natural one if one take into account the reasons for modernising the law in the first place. The multimodal scope is one of the most debated aspects of the Rules and it is subject to both criticism and praise.

Even though the convention may apply to other modes of transport; it is not a truly multimodal instrument but rather a 'maritime-plus' convention. Thus, the contract of carriage *must* provide for sea-carriage for the convention to be applicable.[139]

Because the Rotterdam Rules apply on a door-to-door basis, provisions have been inserted into the Rules or adjusted in order to tackle the conflict situations that could arise because of the wider multimodal scope of application. Firstly, it has to be remembered that as stated above the convention can only be applicable to such contracts of transport that include

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[136] Mankowski, Peter, *The Rotterdam Rules – Scope of Application and Freedom of Contract*. European Journal of Commercial Contract Law 2010-1/2. p.16.
[137] UNCITRAL, *Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March to 4 April 2003*) pp.58-66.
[138] Haak, Krijn, *Carriage Preceding or Subsequent to Sea Carriage under the Rotterdam Rules.* European Journal of Commercial Contract Law 2010-1/2, p.65.
[139] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, p. 61.

an international sea-leg. This formulation already excludes many contracts from the scope. Secondly, the situations that could be covered need special rules because of conflict situations that can arise with other transport conventions. Those provisions that govern multimodal transport are Article 26 and 82 of the Rules.

Article 26 set outs the situation when the convention could apply in a multimodal context i.e. when a damage occurs during the carrier's period of responsibility but before or after the loading onto or the discharge from the ship.

The carrier's period of responsibility is defined in Article 12 as starting when the carrier or a performing party receives the goods and ending at the time of delivery. The period of responsibility is naturally larger than the equivalent of the other regimes because of the new multimodal application.
An important feature of Article 12 is that it makes it possible for the period of responsibility to be decreased by contract. It can be said that Article 12(3) provides for a minimum period of responsibility equivalent to "tackle to tackle" but less is not acceptable since it prohibits shorter periods of responsibility. Thus Article 12(3) has the practical effect of allowing the parties to a contract to "contract out" of multimodal coverage if they so desire, by making separate contracts for the different stages of the carriage.[140] It should however be noted that this is only the case if there really is separate contracts. If the contract is multimodal and covers all stages of the journey or include other parts than just the sea-journey it is impossible to reduce the carrier's period of responsibility to "tackle-to-tackle".[141]

Since the Rotterdam Rules applies during other parts of the voyage than in the maritime leg during the carrier's period of responsibility, conflicts with other set of rules governing these other parts could arise. Article 26 therefore provides for a so called "limited network solution" to the problem of which convention that should apply in different stages of the voyage. The limited network solution means that Article 26 refers to other conventions if the damage occurred on a part of the voyage, which is covered by such other convention. The limited part of the network solution is that the other conventions or "international instruments" only apply to those areas and under those conditions listed in Article 26.[142] The limited network solution

[140] Ibid. p.62 The authors clarify: "When multimodal carriage is involved, the phrases "initial loading" and "final unloading" refer to loading and unloading *under the contract of carriage*. If the carriage is multimodal, but the contract is not, the initial loading is the loading on the seagoing vessel and the final unloading is the unloading from the seagoing vessel."
[141] *Q & A on the Rotterdam Rules by The CMI International Working Group on the Rotterdam Rules*, p.9
http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Questions%20and%20Answers%20on%20The%20Rotterdam%20Rules.pdf
[142] van der Ziel, Gertjan, *Multimodal Aspects of the Rotterdam Rules,* CMI Yearbook 2009, p.303-308.

thus differs from a pure uniform solution, which would provide for only one set of rules to govern the multimodal contract.[143]
Article 26 states:

"Article 26
Carriage preceding or subsequent to sea carriage

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(*a*) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(*b*) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and

(*c*) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument."

The Article speaks of damage that occurs during the carrier's period of responsibility but solely *before* the loading of the goods onto the ship or *after* their discharge from the ship. The Article is therefore applicable only if damage occurs on parts of the journeys which do not constitute sea-carriage, because if damage occurred during the sea-carriage the Rotterdam Rules will doubtlessly be applicable, provided of course that the carriage fulfils the other criteria to fall under the scope of the Rules. Article 26 is further on not applicable if it is unknown where the damage occurred since the Rotterdam Rules in such a case are applicable.[144] The essence of the Article is simply that if damage occurs outside the sea-leg and a unimodal convention is applicable to that part of the voyage and if the conditions (a), (b) and (c) in such a case are fulfilled the Rotterdam rules are subsidiary to that convention in respect of the issues pointed out in (b). In other situations and concerning other features of the transport at issue that is regulated in the Rotterdam Rules, the Rotterdam Rules apply.[145] Additionally Article 26(b) should be interpreted restrictively and therefore provisions of other conventions that only indirectly affect liability, such as for example notice of loss, should not be included under (b).[146] It should also be stressed that

[143] Baatz, Debattista, Lorenzon, Serdy, Staniland, Tsimplis, *The Rotterdam rules: A Practical Annotation*, p. 78.
[144] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, p.66.
[145] Ibid. p.69.
[146] Lind Rasmussen, Uffe, *Additional provisions relating to particular stages of carriage*, in Ziegler, Alexander von, Schelin, Johan & Zunarelli, Stefano (red.), *The Rotterdam Rules 2008: commentary to the United Nations Convention on Contracts for the International*

Article 26 only allows application of other international instruments (i.e. conventions) hence national law is outside the scope of Article 26.[147]

The limited network solution of Article 26 is in its turn further limited by special provisions in Article 82 regarding certain conflict issues with existing transport conventions. The reason for this is that the aim of Article 82 is to prevent against specific conflict situations already identified that could arise with other transport conventions. Article 82 therefore gives the existing transport conventions precedence if the specific requirements in the Article are fulfilled. Article 82 goes further than Article 26 in the way that it limits the application of the Rotterdam Rules also as regards issues that lay outside Article 26(b) and (c). Article 82 covers existing conventions and future amendments to them, it does however not include future conventions in its scope.[148]

The Article has four parts that deals with those specific conflict issues that could arise with the conventions governing carriage by air, road, rail and inland waterway:[149]

Article 82(a) deals with air transport. The combination sea/air transport under one contract is supposedly quite unusual.[150] However, UNCITRAL nonetheless considered it necessary to include a provision against specific conflict situations that had been identified with the Warsaw- or Montreal conventions. Article 82(a) simply states that the Rotterdam Rules shall not affect the application of any carriage by air convention that applies to any part of the voyage.[151] A conflict situation could arise if a contract for multimodal carriage includes both an international air leg and an international sea leg and the goods suffer damage during the sea leg and the cause behind that damage had occurred during the air carriage. In such a

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Carriage of Goods Wholly or Partly by Sea, Wolters Kluwer Law & Business, Austin, 2010, p.149.

[147] van der Ziel, Gertjan, *Multimodal Aspects of the Rotterdam Rules*, pp.303-304.

[148] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, pp. 71-72.

[149] Article 82 of the Rotterdam Rules:

Article 82 International conventions governing the carriage of goods by other modes of transport

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

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

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

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

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

[150] van Der Ziel, Gertjan, *Multimodal aspects of the Rotterdam Rules*, p.311.

[151] Berlingieri, Francesco, *A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules*, p.56.

case, Article 26 would not exclude the application of the Rotterdam Rules because the damage itself occurred during the sea-leg (it was the cause that occurred during the air carriage). The Rotterdam Rules would therefore be applicable. At the same time the Montreal Convention would apply since it is applicable if the "event which caused the damage so sustained took place during the carriage by air"[152]. Article 82(a) therefore comes into play and gives preference to the Montreal Convention in such a situation.[153]

Article 82(b) is most likely of greater importance than (a) since it is relevant for a situation that probably is quite common, namely during transportation with an international ferry crossing involved. If the damage occurs on an international ferry crossing when goods are transported on trucks under a single contract, the Rotterdam Rules would normally apply since the damage occurred during the sea-leg. At the same time, the CMR convention applies[154]. Article 82(b) solves the problem of conflict of conventions by giving precedence to the CMR in such situations.[155]

Article 82(c) deals with rail carriage and with situations similar to those of (b) but as regards rail transportation. Article 82(c) gives precedence to the CIM-COTIF when it "according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail".

Regarding carriage by inland waterway, Article 82(d) gives precedence to the convention governing such carriage (CMNI) when it is applicable i.e. when goods are carried without transhipment by both inland waterways and sea.

As we can see Article 26 and 82 restricts the application of the Rotterdam Rules in order to avoid conflict, and hereby lays the whole nature of the limited network system and the "maritime-plus" character of the Rotterdam Rules. This solution has been the subject of debate and it has been criticised by some authors like for example William Tetley, who prefers a truly multimodal instrument with a uniform solution instead of a network

[152] Article 18(1) of the Montreal Convention.
[153] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, pp. 72-73. See also Berlingieri, Francesco, *A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules*, p. 56. Berlingieri describes some relevant aspects regarding which convention that could apply. He points out the interesting differences between the Rotterdam Rules and the Montreal Convention concerning limitation levels, the Rotterdam Rules provides for higher limitation levels as concerns packages under 51,7 kg but the Montreal Convention in its turn is more generous for heavier packages since that convention only has a limitation per kg (17 SDRs/kg) as an option whereas the Rotterdam Rules has a per package limitation of 875sdr (alternatively a 3,75 SDRs/kg option). It is therefore less favorable to use the Montreal Convention as regards lighter packages, which supposedly is the most frequent kind of packages as concerns air carriage.
[154] Article 2(1) CMR.
[155] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, pp.73-74.

solution.[156] Others criticise the applicability of the Rotterdam Rules in the case of non-localised damage since Article 26 does not prevent the applicability of the Rotterdam Rules in such a case.[157] Interesting to note is that these views do not seem to be really compatible, one side criticise the Rotterdam Rules for not applying enough and the other is of the opinion that the applicability of the Rules is too large.

The multimodal aspects of the Rotterdam Rules are together with the 'volume contract' concept that grants a limited freedom of contract under certain circumstances, some of the most heavily debated features of the Rotterdam Rules and will definitely be an important factor for states when deciding on whether to join or not.

3.3.4 Freedom of contract and the concept of volume contracts

3.3.4.1 General restrictions

Article 79 of the Rotterdam Rules governs freedom of contract and just as its counter-parts in the Hague-Visby regime and in the Hamburg Rules it provides a possibility to increase the obligations and liabilities of the carrier but not to decrease them unless the Rules provide otherwise.[158] Article 79(1) is a bit more specific than its counterparts in the previous regimes and uses the term 'maritime performing party' to include subcontractors (the term will be explained further down) and makes reference to indirect exclusion or limitation of obligations to prevent circumvention of the Rotterdam Rules

[156] Tetley, William, *A Summary of General Criticisms of the UNCITRAL Convention (The Rotterdam Rules) by William Tetley*, December 20, 2008

[157] See, Røsaeg, Erik, *The Rotterdam Rules as a Model for Multimodal Transport Law*, European Journal of Commercial Contract Law 2010-1/2, pp. 94-95. In this article an example of the effects this could create is displayed: The author puts a transport from northern Sweden to Helsingör in Denmark as his example. If the goods are carried by truck to Denmark via ferry over Öresund under a single contract and a damage occurs on the way but it is not sure where, the Rotterdam Rules would in such a case apply to the whole voyage since an international sea-leg is a part of the transport and the damage is non-localised and Article 26 therefore does not apply. The author is of the opinion that Article 26 and 82 are exceptions to a general rule of applicability in the case of non-localised damage. Applicability of the Rotterdam Rules in a case such as the one, described in Røsaeg's article, could be unexpected to the parties involved since the ferry-trip is a very small part of the total voyage. The author mentions documentation as an example of problems that could arise. One can additionally imagine that the applicability of the Rotterdam Rules in such a case also could give rise to legal uncertainty concerning other aspects as well, such as limitation levels etc.

[158] "Unless otherwise provided in this Convention," is used in both Article 79(1) and (2). Exceptions to the mandatory application of the Rules can for example be found in Article 27, 56, 80 and 81. Article 80 will be discussed in more detail further down. Article 81 provides for derogation concerning carriage of live animals and goods of a special character, similar to the exceptions for the same categories in the Hague-Visby and Hamburg regimes, and will be treated briefly in the next section.

by certain contractual arrangements. However, seen as a whole there are no big differences compared to the older regimes as regards Article 79(1).[159]

The difference as concerns Article 79 instead lays in the second paragraph of the article. In Article 79(2) the group that can be named cargo interests (i.e. shipper, consignee, controlling party, holder or documentary shipper) are treated. Their obligations or liability can be neither increased nor decreased, instead they remain unchanged under Article 79 unless the Rules provide otherwise (a so called two-way mandatory restriction on the freedom of contract).[160] The Hague-Visby and Hamburg regimes mostly deal with the carriers' obligations and liability and are to a large extent silent on the shippers' and other cargo interests' obligations whereas under the Rotterdam Rules those parties' obligations and liabilities are included and subject to express provisions, hence the limitation on the freedom of contract regarding their obligations in Article 79(2).[161] The reason behind this two-way mandatory regulation of the cargo interests' obligations is protection of the shippers from an increase of their obligations, which in practice could equal a decrease of the carriers' obligations, and public policy reasoning on the banning of decrease since many of the cargo interests' obligations are related to safety concerns.[162]

As regards the difference between the Rotterdam Rules and the previous regimes concerning freedom of contract in general, the Hague-Visby Rules has as we have seen a much more narrow scope of application and the Hamburg Rules even though having a contractual scope of application does still not apply multimodal. Freedom of contract is therefore in some sense allowed under the previous regimes for situations that fall outside of their scope. Under the Hague-Visby regime, more specifically when the cause of damage arises before or after the sea transport or the transport is not subject to a bill of lading.[163] Since the Rotterdam Rules has a considerably wider scope than the previous regimes, the options to depart from them would indeed be very limited if only Article 79 governed freedom of contract. Article 80 of the Rotterdam Rules, which contains the famous (or infamous) volume contract exception, makes sure that this will not be the case since it contains possibilities to depart from the Rotterdam Rules that are quite far reaching.

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[159] Honka, Hannu, *Scope of application, freedom of contract,* CMI Yearbook 2009, pp. 260-261.
[160] Ibid. p.261.
[161] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, p.371.
[162] Ibid.
[163] See Articles 3(8), 6 and 7 of the Hague-Visby Rules and Berlingieri, Francesco, *A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules,* p.38.

3.3.4.2 Special rules for volume contracts

The origins of the volume contract exception can be found in a US proposal during the negotiating process.[164] In the US, special types of service contract agreements are used that are called OLSA (Ocean Liner Service Agreements).[165] These agreements are individually negotiated between shippers and carriers and can be classified as framework contracts concerning series of shipments.[166] Without going into too much detail as regards these types of contracts and the differences between them and the "volume contracts" as defined by the Rotterdam Rules it suffice to say that the OLSA is something similar to the volume contract under the Rotterdam Rules.[167] The US wanted this type of contracts to be included under the scope of the Rotterdam Rules (as opposed to the Hague and Hague-Visby regimes where such contracts would not be included since they are not governed by a bill of lading) but under the condition that the application of the Rules should be possible to derogate from in contracts concerning this type of agreements.[168]

It was decided by UNCITRAL that an exception granting limited freedom of contract for some individually negotiated contracts should be included. But it was however felt that an OLSA exception would be based too directly on specific legislation from one country and that the broader concept of "volume contracts" was more suitable for an international instrument.[169] The insertion of a volume contract exception into what was

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[164] UNCITRAL Document A/CN.9/WG.III/WP.34 pp.6-8.

[165] An "Ocean Liner Service Agreement" is defined in the American Carriage of Goods by Sea act as: "….a written contract other than a bill of lading or a receipt, between one or more shippers and an individual ocean common carrier or an agreement between or among ocean common carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed time period, and the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of non-performance on the part of any party". See, Thomas, Rhidian D, *The Enigma of Volume Contracts*, in *The Carriage of Goods by Sea under The Rotterdam Rules*, Lloyd's list, London, 2010, p.18.

[166] Honka, Hannu, *Scope of application, freedom of contract*, p.262.

[167] Mukherjee, Proshanto K. & Basu Bal, Abhinayan, *A Legal and Economic Analysis of the Volume Contract Concept under the Rotterdam Rules: Selected Issues in Perspective*, p. 11, http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20Abhinayan%20Basu%20Bal%20-%20Volume%20Contract%20Final.pdf

[168] UNCITRAL Document A/CN.9/WG.III/WP.34 p.6 para.18 "A key issue in the United States (and we believe in other parts of the world as well) is how the Instrument should treat certain specialized and customized agreements used for ocean liner services that are negotiated between shippers and carriers. As part of the overall package, the United States believes that this kind of agreement, which we refer to as an Ocean Liner Service Agreement ("OLSA"), should be covered by the Instrument, unless the OLSA parties expressly agree to derogate from all or part of the Instrument. A decision to derogate from the Instrument, however, would be binding only on the parties to the OLSA. There are differing views, both within the United States and internationally, on the option to derogate down from the Instrument's liability limits. Nevertheless, the U.S. view is that the parties to an OLSA should be able to depart from any of the Instrument's terms."

[169] Sturley, Michael F; Fujita, Tomotaka and van der Ziel, Gertjan, *The Rotterdam Rules*, p. 377.

about to become the Rotterdam Rules was important for the US and has been described as a "deal-breaker" for them.[170]

Article 80(1) of the Rotterdam Rules states that a volume contract between the carrier and shipper may provide for greater or lesser rights, obligations and liabilities than those imposed by the Rules. Article 80(2) sets out certain conditions that have to be fulfilled in order for the derogation to be binding. Further limitations of the right to derogate under a volume contract are then set out in paragraphs 3 to 6. The volume contract as such is defined in Article 1(2) as a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range. Thus, three criteria can be seen in order for a contract to fit into the definition:

i) A specified quantity of goods
ii) In a series of shipments
iii) During an agreed period of time

The criteria for defining volume contracts are far-reaching and quite vague and it could therefore be possible to fit a wide variety of contracts into this definition. The exception has thus been criticised for being too flexible and open for abuse.[171] However, the safeguards in Article 80(2) are designed to prevent abuse and furthermore Article 79 also ban indirect circumvention of the Rotterdam Rules. The Courts will surely not accept contracts that use Article 80 solely to circumvent the Rotterdam Rules and grant freedom of contract when it is not question of a "real" volume contract. As mentioned by Honka, it is also hard to believe that a carrier will make the effort to expand his freedom of contract for a very small contract because of the safeguards in Article 80.[172] This reasoning is convincing to me because it seems to make little commercial sense to negotiate a contract to get more favourable terms when it is question about a small shipper shipping a small shipment, it must be a lot easier to simply let the Rotterdam Rules govern the contract through a reference or standard contract, considering the time, costs and efforts required to negotiate a volume contract exception. Small shippers are therefore probably protected from abuse at least as regards shipments in smaller series. As regards contracts between larger actors concerning larger shipments, the exception will surely be used but in such circumstances the parties are more equal and since one of the aims of the Rules is to protect the party with weaker bargaining power and freedom of

[170] Carlson, Mary Helen, *U.S Participation in the International Unification of Private Law: The making of the UNCITRAL Draft Carriage of Goods by Sea Convention*, Tulane Maritime Law Journal, vol.31, 2006-2007, p.636.
[171] "[…]the provision lends itself to abuse under each one of the three elements mentioned above as there is no minimum quantity, period of time or frequency and the minimum number of shipments is clearly just two." Baatz, Debattista, Lorenzon, Serdy, Staniland, Tsimplis, *The Rotterdam rules: A Practical Annotation*, pp.247-248.
[172] Honka, Hannu, *Scope of application, freedom of contract*, p.265. Honka mentions further that a specification of a minimum quantity of containers in the definition of volume contracts would not be suitable since individual situations vary.

contract between stronger parties does not contradict this, the exception to the mandatory application of the Rules could in such cases be suitable.

This discussion calls for an explanation of the provisions in Article 80 that are designed to prevent abuse. The main paragraph with this function is Article 80(2) which puts up certain requirements that have to be fulfilled in order to use the exception. Paragraph (a) states that the contract has to contain a *prominent statement* that it derogates form the Rules. What this means in practice is that the reader's attention has to be attracted to the statement; it should simply be an effective warning of the derogation.[173] Paragraph (b) requires that the contract is either *individually negotiated* or *prominently specifies* the sections of the volume contract containing the derogations. The requirements of (b) are separated by an "or" and are therefore not cumulative, it is therefore enough that one of them are fulfilled. Paragraph (c) states that the shipper has to be given an opportunity to conclude a contract of carriage that complies with the Rules which does not include any derogation. This paragraph was introduced as an additional safe-guard to make sure that the shipper enters into the contract based on individual will and is given a real choice to decide whether he wants to derogate or not. In practice (c) will mean that the shipper is offered two freight rates, one based on the Rotterdam Rules and another based on derogations.[174] Paragraph (d) further enforces the element of individual will since it disallows reference and standard terms, hence the contract has to contain an element of individual negotiation (despite the "or" used in paragraph (b)).[175] Paragraph (3) is somehow complementary to the requirements in (2) in that it provides a negative list of what does not constitute volume contracts, it is therefore a further enforcement since the meaning can be seen as comprised in (a) and (d).[176] Together these provisions are somewhat overlapping but the essence is clear; they are introduced to make sure that shippers are protected from abusive terms and to guard against the risk of the exception being used by carriers to undermine the mandatory application of the Rotterdam Rules.[177] Taking into account the discussion above the safeguards could achieve this aim especially considering Article 79. However, it is possible that contracts derogating will be commercially more interesting and therefore Article 80 will be extensively used anyway, also in relation to small shippers which in some circumstances will be given "real choices" but choices which would provide for derogative offers so attractive that it would be commercially impossible to refuse them and instead opt for offers including the protection of the Rotterdam Rules.[178] This kind of situations can be imagined when it

[173] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, pp.379-380.
[174] Honka, Hannu, *Scope of application, freedom of contract*, p.266.
[175] Honka, Hannu, *Scope of application, freedom of contract*, p.267.
[176] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, p. 381.
[177] Thomas, Rhidian D, *The Enigma of Volume Contracts*, in *The Carriage of Goods by Sea under The Rotterdam Rules*, p.23.
[178] Baatz, Debattista, Lorenzon, Serdy, Staniland, Tsimplis, *The Rotterdam rules: A Practical Annotation*, p.249.

is question about strong carriers and the shipper has limited choices because competition and other alternatives are limited. The future will, provided that the Rotterdam Rules receive enough ratifications, show if the safe-guards put up are enough to guard against the unwanted side-effects of the volume contract exception.

Moreover, Article 80 provides for some additional conditions for its application and scope. Paragraph (4) states that some core provisions in the Rotterdam Rules cannot be derogated from. These so called "supermandatory" provisions are seaworthiness, the shipper's obligation to provide information, instructions and documents, the shipper's obligations as concerns dangerous goods, and the liability of the carrier that can arise from an act or omission causing the loss of the carrier's right to limit its liability.[179] An interesting aspect of this provision is that there are more references to obligations of the shipper than to the carrier, however these seem to be related to safety aspects.

Third parties are protected through paragraph (5) which puts up certain requirements for them to be bound. Information which prominently states that the volume contract derogates together with express consent that are not solely set forth in a carrier's public schedule of prices and services, transport document or similar or electronic transport document are required. This Article, like all of Article 80, has to be read in the light of Article 3 of the Rules which states the form requirements for communication, as for example the consent required in Article 80(5).[180]

Finally, Article 80(6) puts the burden of proof of showing that the conditions for derogation have been fulfilled on the party claiming the benefit of the derogation.

The volume contract exception is controversial and for good reasons. In my opinion, the exception on one hand somehow goes against the whole purpose of protecting weaker parties since it gives large possibilities of derogation, even with the taking into account of the safe-guards in Article 80.[181] On the other hand, it has to be discussed whether the protective arguments are as strong on the contemporary market as it was in the days of the Hague Rules and the Harter Act. Since the liner-shipping industry is becoming more deregulated and subject to competition with the break-up of liner conferences[182] one could pose the question why freedom of contract to a certain degree should not be allowed? It seems like today it is not always question about a strong carrier and a weak shipper, the opposite might also be the case. The old truth of strong carriers vs. weak shippers is therefore

[179] Articles 14(a) and (b), 29, 32 and 61 of the Rotterdam Rules
[180] Honka, Hannu, *Scope of application, freedom of contract,* pp.267-268.
[181] It can be compared with the situation before the Harter Act when the only obligation of the carrier which could not be set aside by contract was the obligation of providing a seaworthy ship.
[182] Faria, José Angelo Estrella, *Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules*, pp.316-317.

something of an anachronism today.[183] It should also not be forgotten that we are dealing with contracts between two commercial parties; a cargo interest is a commercial party and not a private consumer, so why is mandatory law necessary to protect a commercial party who supposedly can take informed decisions and protect its own rights? Moreover freedom of contract could probably benefit competition and in this way lower prices and consequently actually be of advantage to the weak shipper, who is supposed to need the protection of mandatory rules, in form of lower costs. A look at the opinions of the different scholars that have written on the subject shows that they (like so often is the case concerning the Rotterdam Rules) are divided and that both positive and negative forecasts exist.[184]

An example of a negative forecast is that the exception could mean further fragmentation of the rules concerning carriage of goods since large actors representing a significant part of the global container transportation, could use the exception to contract out of the Rules. If this happens a large part of international container transportation would consequently be governed by a distinct and separate liability regime.[185] Furthermore, we have the criticism discussed above that the exception might be disadvantageous to shippers. An important point against this criticism is that volume contracts are only covered under the Hague-Visby regime if a bill of lading is issued. Seen from that angle it could even be viewed as the shipper's position through the inclusion of volume contracts (in a liner context) under the scope of the Rotterdam Rules has been improved.[186]

In my opinion, the debate on this particular provision grasps the general problem with the Rotterdam Rules. The opinions on them depend on the perspective of the writer. The Rotterdam Rules are a compromise and what has to be decided on for the states that are about to decide whether to join or not is whether they are a sufficiently good compromise or not.

3.3.5 Obligations and liability of the carrier

In order to discuss the obligations of the carrier it is first needed to establish what a carrier is under the Rules. A carrier is defined in Article 1(5) as a person who enters into a contract of carriage with a shipper. This broad definition can be compared with the definition in the Hamburg Rules, which encompasses contractual carriers, ship owners and charterers as opposed to the more narrow definition in the Hague-Visby Rules, which only speaks of an owner or charterer who enters into a contract of carriage with a

[183] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, pp. 366-367.
[184] Mukherjee, Proshanto K. & Basu Bal, Abhinayan, *A Legal and Economic Analysis of the Volume Contract Concept under the Rotterdam Rules: Selected Issues in Perspective* pp.19-23.
[185] Thomas, Rhidian D, *The Enigma of Volume Contracts*, in *The Carriage of Goods by Sea under The Rotterdam Rules*, p.24.
[186] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, p. 384.

shipper.[187] A definition between contractual carrier and actual carrier as the one made in the Hamburg Rules is therefore necessary in the Rotterdam Rules as well. The separation between the carriers is taken further in the Rotterdam Rules because of their larger multimodal scope of application.[188] Hence, instead of using the term 'actual carrier' like in the Hamburg Rules the term 'performing party' has been introduced. Performing party is defined in Article 1(6) and becomes divided into two different types by Article 1(7) namely, maritime performing parties and non-maritime performing parties. Article 1(6) is a very broad provision aimed to include all possible parties on the carrier's side as performing parties.[189] A performing party means: "a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control''. Undertakes to perform means that it is enough with a promise to perform to count as a performance party and the reference to 'indirectly' means that it does not matter how far down the chain a performance party is, it will still be classified as such if it is ultimately under the control of the carrier.[190] From this broad category, a narrower category is then separated and defined as 'maritime performing parties' in Article 1(7). This categorisation fills a purpose as to distinguish between provisions that should only apply to performance parties active only on the sea-leg of the carriage and provisions that should apply to those active in other stages of the carriage as well as in the case of multimodal carriage. Maritime performing party is thus defined as a performing party to the extent that it performs any of the carrier's obligations on the stage of the voyage that is ''port to port'', which can be compared to the scope of application of the Hamburg Rules. A maritime performing party is as stated in Article 19 of the Rotterdam Rules then subject to obligations and liability similar to those of the carrier and it can also use the same defences and limits of liability.[191] To put it short it can be said that the Rules provide cargo interests with a possibility of direct action against 'maritime performing parties' but not against 'performing parties'. The reason for this division is that it is a way to prevent unexpected consequences for sub-contractors on the non-sea parts of the voyage and an additional way of preventing conflicts with other sets of rules.[192]

The possibility of direct action is an improvement compared to the Hague-Visby regime, which are silent on this matter and have left it to domestic

[187] See Article 1(1) of the Hague-Visby Rules and Art 1(1) of the Hamburg Rules.
[188] Thomas, Rhidian D, *An analysis of the liability regime of carriers and maritime performing parties,* in *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules*, p.56.
[189] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, p.132.
[190] Ibid. pp.133-135.
[191] Wilson, John F *Carriage of goods by sea*, p.235.
[192] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, p.70.

legislation to solve the issue.[193] In comparison with the Hamburg Rules it does in my opinion not seem to be much of a change though since their division between 'contractual' and 'actual' carrier is similar and they also make it possible with direct action against subcontractors as being 'actual' carriers.[194]

As concerns the basic obligations of the carrier, they are found in Chapter 4 of the Rotterdam Rules. Article 11 sets out the obligations to carry the goods to the place of destination and deliver them to the consignee. These are rather elementary obligations but obligations which were not expressly written out in the previous regimes, instead they were implicit. The obligations have before been covered by otherwise applicable national legislation. The introduction of them in the Rules can be of practical importance because when they are written out explicitly there can be no uncertainty as to whether a breach is a breach of the Rotterdam Rules or only of otherwise applicable law. This can be of importance in cases of "misdelivery" (i.e. delivery to the wrong person) because Article 11 makes misdelivery a clear violation of the Rotterdam Rules. Since most of the relevant provisions of the Rotterdam Rules (like for example limits of liability in Article 59(1) and time for suit in Article 62(1)) applies to breaches 'under this Convention' according to their language, they will doubtlessly be applicable in such cases.[195]

Article 12 which set out the carrier's period of responsibility has already been discussed in relation to the multimodal issues and it is therefore not necessary to discuss it further.[196]

The obligations set out in Article 13(1) are recognisable from the Hague-Visby Rules.[197] It is question about the duty to 'properly and carefully' receive, load, handle, stow, carry, keep, care for, unload and deliver the goods. To put it simple: the Article defines the general duty to care for the goods. The wording has been kept since the Hague-Visby Rules (except for some small modifications) in order to maintain the applicability of the jurisprudence related to those Rules. This is understandable since the carrier's obligations of course will vary depending on many factors such as type of goods and the risks involved etc.[198] Article 13(2) makes it possible to delegate some of the obligations (i.e. loading, handling, stowing and unloading) to the shipper or consignee.

Seaworthiness is then dealt with in Article 14. The obligation of seaworthiness as set out in Article 14 does not differ much from the Hague-

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[193] Smeele, Frank, *The Maritime Performing Party in the Rotterdam Rules 2009*, European Journal of Commercial Contract Law 2010-1/2. p.73.
[194] See p.20 above.
[195] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, pp.80-81.
[196] See p.42 above.
[197] Article 3(2) of the Hague-Visby Rules.
[198] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, p.82.

Visby regime since the wording is very similar.[199] Nor does the obligation differ much from the Hamburg Rules in practice since the obligation of seaworthiness is implied in those rules. The only large difference from the Hague-Visby regime (although not from the Hamburg Rules) is that the obligation has been made continuous in the Rotterdam Rules. The obligation is no longer only to exercise due diligence to make the ship seaworthy before the beginning of the voyage but also to keep it seaworthy *during* the voyage. This should not change much in practice since as mentioned above the obligation to care for the cargo is continuous under the Hague-Visby regime and the ISM code puts up continuous safety requirements.[200] These safety requirements and the technical developments in shipping since the time of the Hague Rules makes the extension of the seaworthiness obligation in essence nothing more than an adjustment to today's reality.[201]

The reason for keeping the obligation of seaworthiness in almost exactly the same wording as in the Hague-Visby rules is the same as for the duty to care for the cargo, namely to preserve the old jurisprudence.[202] The extension of seaworthiness to a continuous obligation has however raised doubts whether this will actually be the case.[203] The jurisprudence will surely be of relevance as concerns the obligation "before and at the beginning of the voyage". During the voyage, it is more unclear. Concerning that part of the voyage, the obligation of exercising due diligence will however probably be lighter than it will before the voyage.[204]

Finally, concerning the carrier's obligations, Article 15 states that the carrier may under certain conditions refuse to receive or destroy dangerous goods and Article 16 provides a similar right to sacrifice goods for safety reasons.[205]

The liability for cargo damage due to a breach of any of the obligations in chapter 4 is then regulated in chapter 5. The fundamental article in this chapter is Article 17, which sets out the basis for the carrier's liability and the burden of proof. The structure of this Article is familiar from the Hague-Visby regime thus the simplified approach of the Hamburg Rules has not been retained. The substance under all three sets of rules is more or less the same though. Despite the differences in content and method, the carrier's liability is based on the same principle under all three regimes, namely, a

[199] See Article 3(1) of the Hague-Visby Rules.
[200] Delebecque, Philippe, *Obligations and Liability Exemptions of the Carrier*, European Journal of Commercial Contract Law 2010–1/2, p.89.
[201] Nikaki, Theodora *The obligations of carriers to provide seaworthy ships and exercise care*, in *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules*, p.105.
[202] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, p.83.
[203] Baatz, Debattista, Lorenzon, Serdy, Staniland, Tsimplis, *The Rotterdam rules: A Practical Annotation*, p.40.
[204] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, p.85.
[205] Similar rights are found in Article 4(6) of the Hague-Visby Rules and Art 13 of the Hamburg Rules.

fault based liability subject to certain exceptions.[206] The inclusion of the list of exceptions may seem strange since in most cases the applicability of an exception actually equals absence of fault with the sole exceptions that do not require absence of fault being the fire exception and the now removed nautical fault exception as expressed in the Hague-Visby regime.[207] However, even though they may seem superfluous, the exceptions have been retained because of historical reasons and because the use of lists with exceptions is a frequent way of formulating rules in the common law tradition.[208] What differ in substance between the regimes are thus which exceptions that can be applied even if fault exists and the regulation of the burden of proof, which is clearly stated in the Rotterdam Rules as opposed to the previous regimes, especially concerning the way in which liability arising from different causes is divided between claimant and carrier.

In the Rotterdam Rules Article 17(1) establishes a *prima facie* presumption for the fault of the carrier if cargo damage occurred during its period of responsibility.[209] The claimant can therefore show that damage happened during the carrier's period of responsibility simply by showing that the goods were undamaged by the delivery to the carrier. This is how it works under the previous regimes as well as far as I can see, so this far nothing has changed.[210] Instead we find the change in the following more detailed regulation of the "ping-pong game" of burden of proof and in the treatment of damage arising from multiple causes. Article 17(2) states that the carrier is excepted from all or part of its liability if it shows that the cause or one of the causes of the loss, damage or delay was not due to its fault (or the fault of any person for whom it was responsible). This Article can be compared to the catch-all exception in Article 4(2)(q) of the Hague-Visby Rules. Alternative to the use of Article 17(2) the carrier can show that one of the exceptions in Article 17(3) caused or contributed to the loss etc. The most prominent differences in the list compared to the Hague-Visby are that the "nautical fault" exception has been removed and that the fire exception has been modified to only be applicable in the clear absence of fault by the carrier including persons for whom it is responsible. Some new exceptions have also been inserted into the list and some of the old familiar ones have been slightly modified.[211]

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[206] Berlingieri, Francesco, *A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules,* p.8.

[207] Wilson, John F, *Carriage of goods by sea*, p.194.

[208] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, pp.94-95.

[209] "The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4."

[210] von Ziegler, Alexander, *Compensation for damage the Rotterdam Rules appraised,* European Journal of Commercial Contract Law, 2010-1/2, p.52.

[211] Most of the exceptions have been modified in one way or another but the most significant change is the new fire exception in Article 17(3)(f) which makes the carrier liable for fires caused by fault of any of the persons under his responsibility (Article 18) as opposed to the situation under the Hague-Visby Rules when "actual fault or privity" was required of the carrier. The new exceptions are: 17(3)(o), (i) and (n).

The most important change in the list though is unquestionable the removal of the nautical fault exception, which is an important change compared to the Hague-Visby Rules and in practice puts harder demands on the carrier. However, this is perfectly in its order, today there is no reason for this rule since the carrier is able to keep contact with its crew during the whole voyage. The nautical fault is a remnant from older times and even if it is a remnant which is beneficial for carriers it is nonetheless a provision that cannot be justified in a modern carriage of goods regime. Particularly since the obligation of seaworthiness has been made continuous, it would be non-consistent to keep the nautical fault exception.

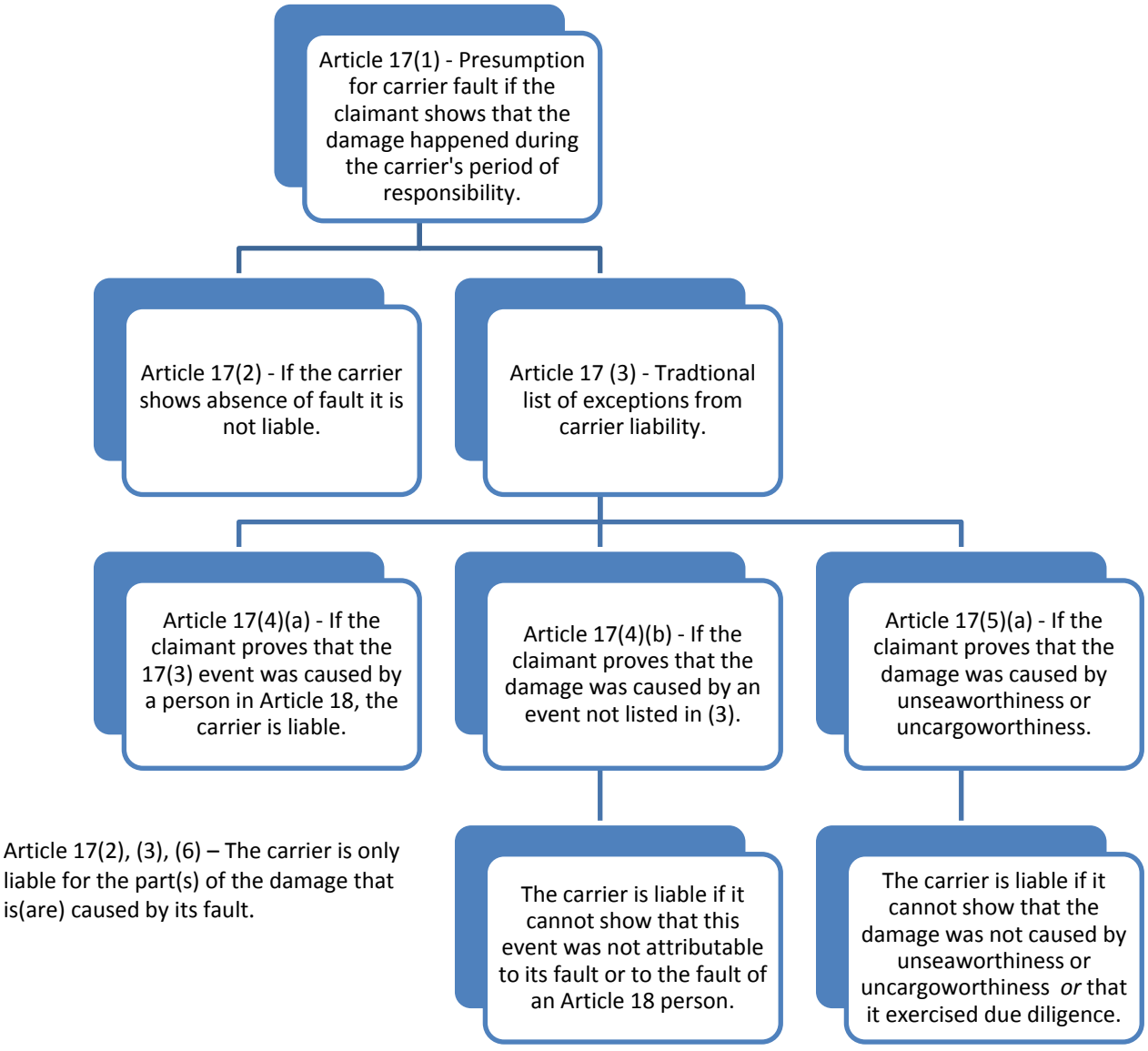
The ping-pong game continues after 17(3) and it is not over just because a 17(3) defence has been used by the carrier. If one of the exceptions in Article 17(3) has been used by the carrier the ping-pong ball of proof goes over to the claimant again according to 17(4) because even if the damage was caused by an event in 17(3) the carrier can still become liable if the claimant proves that either the carrier or a person for whom the carrier is responsible caused or contributed to the 17(3) event. The claimant can also prove that another event that is not listed in 17(3) contributed to the damage and if the carrier cannot prove otherwise then it is held liable. Article 17(5) finally state one further ground for holding the carrier liable for damage notwithstanding 17(3): If the claimant proves that the damage was, or was probably caused by unseaworthiness[212] or uncargoworthiness[213] and the carrier is unable to prove that it was not or that it exercised due diligence as required by Article 14, then it is also held liable.

An important thing to remember though is that when there are multiple causes Article 17(6) comes into play. Overall, it is constantly stressed in Article 17 that more than one cause of the loss may be involved since the words 'caused or contributed to' are used repeatedly.[214] If that is the case the Rules provide that the carrier may be liable for whole or only part of the loss depending on the circumstances. Article 17(6) states that when the carrier is relieved of part of its liability it is only liable for the part of the loss, damage or delay which is attributable to the event or circumstance for which it is liable under Article 17. In short, for the part of the damage that is attributable to the fault of the carrier. The effect of this provision together with the rest of Article 17 is the reversal of the so called *Vallescura* rule, which provided that when there were multiple causes to the damage, and fault from the carrier for at least one cause there was a presumption for it being liable for the whole loss which the carrier had to break.[215] Article

[212] Article 17(a) (i) and (ii).
[213] Article 17(a) (iii).
[214] Thomas, Rhidian D, *An analysis of the liability regime of carriers and maritime performing parties,* in *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules*, p.64.
[215] The Rule comes from the US Supreme Court case *Schnell v The Vallescura*, 293 US 296 306 and is applied in the US, Australia, Canada and England. It is included in Article 5 (7) of the Hamburg Rules. See Basu Bal, Abhinayan, *An Evaluation of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) through Critical Analysis*, p.25.

17(6) instead place the burden of showing to what extent the carrier's fault contributed to the damage on the claimant, the result of this is that the carrier only needs to show absence of fault/an applicable 17(3) exception and the burden to break this defence is placed on the claimant.[216]
This is therefore a carrier friendly element of Article 17, which in my opinion balances the removal of nautical fault and the extension of the seaworthiness obligation.

This scheme illustrates the structure of Article 17:



[216] Basu Bal, Abhinayan, *An Evaluation of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) through Critical Analysis*, p.25.

It is not possible to discuss all the problematic sides of Article 17 in detail in this thesis. However, a few things can be pointed out. Article 17(5) has for example been criticized by Australia from a cargo owner point of view for putting the burden on the claimant to show to what extent unseaworthiness or uncargoworthiness caused the damage, something that the claimant will supposedly have trouble knowing.[217]

Personally I think it can also be discussed whether Article 17(3) is necessary. In my opinion a simplified approach like in the Hamburg Rules would be more suitable since the issue of carrier liability already is enough complicated as it is, the exceptions would then be left to the court instead of clearly listed. Some exceptions would nonetheless need to be clearly stated like the ones related to salvage (which is the case in the Hamburg Rules) but exceptions clearly related to fault (such as *force majeure*) seems superfluous to me. Of course, there are also advantages with keeping the list structure, apart from pleasing common law countries; old jurisprudence will more clearly be conserved. Furthermore, since the Rotterdam Rules aims to only moderately change the liability regime the conservative drafting of Article 17 is in line with the whole philosophy behind the Convention. However, my conclusion regarding the list structure is nonetheless that it complicates Article 17 more than what is necessary, but perhaps this conclusion is due to the fact that I am looking at this issue through Swedish civil-law lenses.

Overall Article 17 can be characterised as unnecessary complex, just establishing a fault based liability with a *prima facie* presumption for the carrier's fault would probably have been enough (Article 17(1) and 17(2) would in such a case suffice). The details as regards burden of proof would in such a case be left to national legislation and courts. Article 17 seems overambitious in my opinion and it is strange that the burden of proof has been regulated in detail when the Article is not putting up any *standard of proof* as this will surely vary between different jurisdictions.[218]

Furthermore, as regards carrier liability a few more issues need to be discussed. Article 18 states which other persons the carrier is liable for, such as performing parties, employees of the carrier or of performing parties, or other persons under the carrier's control. Article 19 then sets out the liability of maritime performing parties, a particular group under the Rotterdam Rules. The essence of this Article is discussed above and is that maritime performing parties are subject to the same liability and defences as the carrier under certain conditions and the Rules therefore provide a right of direct action against this group. Article 20 gives the possibility of joint and several liability of the carrier and any performing party. The aggregate liability of these two categories cannot supersede the liability limits

[217] Basu Bal, Abhinayan, *An Evaluation of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) through Critical Analysis*, p.24.
[218] Thomas, Rhidian D, *An analysis of the liability regime of carriers and maritime performing parties,* in *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules*, p.61.

(provided that there is no breach which would prohibit limitation of liability). Liability for delay is furthermore defined in Article 21. Liability for delay is mentioned throughout Article 17 therefore Article 21 seems to be nothing more than an additional definition.[219] The liability for delay is new compared to the Hague-Visby regime but was also included in the Hamburg Rules.

Notice of loss is regulated in Article 23 and resembles its predecessors but with some changes. The Article states in essence that if notice of loss for apparent damages is not given before or at the time of delivery or for non-apparent damages not within seven working days from delivery (as opposed to three days under the Hague-Visby regime), there is a presumption that the goods were delivered in good condition. This presumption is however breakable but the effect of this provision is to give the carrier an evidentiary advantage in a claim when the claimant needs to establish that there has been damage.[220]

Finally, the Rotterdam Rules contains a few provisions that establish special liability rules. These provisions can be said to be separated from the general liability rule of Article 17.[221] The provisions are dealing with dangerous cargo, deck cargo, live animals and "special cargoes".[222] Deck cargo and live animals are news compared to the Hague-Visby regime but are included in the Hamburg Rules. As concerns "special cargoes" and dangerous cargo, rules regulating these categories can be found in all the regimes. The rules treating the latter category are however more related to the obligations of the shipper.

As a final point the most important issue as concerns the obligations and liabilities of the carrier is in my view how the Rules balance cargo owner and carrier interests. This issue can however not be discussed separately because in order to provide a good foundation for that discussion it is needed to look at the Rules as a whole and therefore limitation of liability and other issues such as the obligations of the shipper needs to be taken into account.

3.3.6 Limitation of liability

The carrier's liability can be limited just like in the previous regimes. The principle of limitation of liability is not something unique to the Rotterdam

[219] Article 21 states: "Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed".
[220] Sturley, Michael F, Fujita, Tomotaka & van der Ziel, Gertjan, *The Rotterdam Rules*, pp.152-156.
[221] Thomas, Rhidian D, *An analysis of the liability regime of carriers and maritime performing parties*, in *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules*, p.77.
[222] Article 25 contains rules about deck cargo, Article 32 regulates the shipper's obligations in relation to dangerous goods and Article 81 states special rules for live animals and certain other goods.

Rules but something that exists in almost all other transport conventions as well, which is apparent from the discussion about multimodal issues above. The provisions dealing with limitation of liability in the Rotterdam Rules are found in Chapter 12, which contains Articles 59-61. The provisions contain some differences when compared to the rules about limitation in the other regimes. The most apparent difference though is that the levels of liability have been raised; the limits are now 875 SDRs per package or other shipping unit or 3 SDRs per kilogram whichever amount is the highest. There are however three exceptions to those two amounts which makes higher sums possible if:

i) The value has been declared by the shipper or,
ii) A higher amount has been agreed by contract or,
iii) The right to limit liability is lost pursuant to Article 61

These possibilities of higher limits are all present in the previous conventions as well. As concerns Article 61 it states that the right to limit liability is lost if the loss resulting from the breach of the carrier's obligations is attributable to a personal act from the person claiming a right to limit, that was done with the intent to cause such loss or recklessly with the knowledge that such loss would probably result. Thus if the carrier actually wanted to cause the loss by a breach of its obligations it looses the right to limit. A "personal act" should mean that it is needed that the act was done at a high managerial level. This is in contrast to air law as governed by the Montreal Convention where the limit is unbreakable or road transport governed by the CMR convention where there are no personal restrictions and it therefore is easier to break the limits. An interesting side of these differences related to the multimodal scope of the Rotterdam Rules is that a claimant in a case concerning multimodal transport could want to make the argument that the damage occurred on the road leg. If this argument is successful Article 26 of the Rotterdam Rules makes the CMR applicable concerning limitation of liability and it would therefore in such a case be easier for the claimant to break the limits if its question about damage exceeding the limits in the Rotterdam Rules.[223]

Another difference as concerns these provisions of the Rules is that their scope has been widened.[224] Article 59 talks about 'carrier's liability for breaches of its obligations under this Convention' as opposed to the old formulations in the Hague-Visby and Hamburg Rules.[225] This difference of course depends on the fact that the obligations of the carrier are better defined in the Rotterdam Rules. What the implications in practice will be of

[223] von Ziegler, Alexander, *Compensation for Damage: The Rotterdam Rules appraised*, p.58.
[224] Girvin, Stephen, *The right of the carrier to exclude and limit liability* in *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules*, p.130.
[225] The Hague-Visby Rules use the wording 'any loss or damage to or in connection with the goods' and the Hamburg Rules use 'loss or damage to the goods'.

this change is that the carrier will now clearly have a right to limit his liability in claims based on such issues as misdelivery or misinformation.[226]

Concerning liability for delay it is as mentioned above new compared to the Hague-Visby Rules but not in relation to the Hamburg Rules. The limitation provision for liability for delay is similar to its equivalent in the Hamburg Rules. Article 60 states that the maximum liability for economic loss due to delay is 2,5 times the freight but not exceeding the limit that would be established pursuant to article 59 in respect of the total loss of the goods concerned. Economic loss due to delay will probably have to be further defined and clarified by the courts with regard to what kind of economic losses that are covered since it is a broad term.

Regarding the old question whether a container is a package or not, this is addressed in Article 59(2). The essence of this paragraph is the same as the solution first established by the Visby protocol. The shipping units as enumerated in the contract decide. If the contract is silent on how many units that are packed in a container (or now also on a vehicle) it will be deemed to be one shipping unit.

The most debated issue concerning limitation of liability during the working process was, not surprisingly, the amounts. Liability amounts were not decided until late in the working process because it was seen as a way of balancing the convention.[227] The result in short is a small increase compared to the Hamburg Rules, a slightly larger compared to the Hague-Visby and a gigantic increase compared to the Hague Rules. Thus for most countries the increase are not very large. The limits set in the Rotterdam Rules are a product of compromise and as such probably set at a sufficiently moderate level for not deterring countries with strong opinions either for or against high levels from joining the Rules.[228]

Interesting to note is that the concept of limitation of liability as such does not seem to have been questioned to a great extent.[229] Perhaps it is such a well-established principle of transport law that it is taken for granted. However, the whole idea of putting a legal upper limit to liability can be questioned from a policy perspective.[230] Why should carriers in some cases not be liable to repay the whole damage they have caused? The reasons for the principle seems to be that it is a way of estimating insurance and freight

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[226] Baatz, Debattista, Lorenzon, Serdy, Staniland, Tsimplis, *The Rotterdam rules: A Practical Annotation*, p.185.

[227] Girvin, Stephen, *The right of the carrier to exclude and limit liability* in *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules*, p.132.

[228] For a summary of the arguments during the negotiations for and against higher limitation levels than the current see: Basu Bal, Abhinayan, *An Evaluation of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) through Critical Analysis*, pp.39-43.

[229] Girvin, Stephen, *The right of the carrier to exclude and limit liability* in *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules*, p.129.

[230] Gauci, Gothard, *Limitation of Liability an Anachronism?*, Marine Policy, vol.19, no.1 1995, pp.65-74.

costs and of introducing some predictability in relation to these costs. These effects should thus lead to lower freight rates.[231] The principle is therefore used because of trade practice and not because it is a fair principle. The Rotterdam Rules make sure that the use of limitation will continue and it is therefore unlikely that it will disappear at least for the near future.

3.3.7 Some other issues regulated by the Rotterdam Rules

One of the new features of the Rotterdam rules compared to the previous regimes is that the obligations of the shipper are more extensively regulated. In the Hague-Visby Rules the shipper is, as we have seen, not mentioned much and even though the Hamburg Rules provides a chapter dedicated to the obligations and liability of the shipper the differences between the two older regimes are not large.[232] The term shipper is defined in the Rotterdam Rules as a person that enters into a contract of carriage with a carrier. The Rules also provides for a wider term: 'documentary shipper' who is a person other than the shipper that accepts to be named as 'shipper' in the transport document. The shipper's obligations and liability are regulated in Chapter 7 Articles 27-34 and are, as mentioned above, mandatory according to Article 79(2). The Rotterdam Rules explicitly states the liability that applies for breach of the shipper's obligations in Article 30. The shipper's obligations are either subject to a fault-based liability or to a strict liability depending on the obligation.[233] This division into fault-based or strict liability depending on the nature of the obligation is recognisable from the old regimes.[234]

The shipper's obligations under strict liability are in short: the obligations related to dangerous goods, namely to disclose the dangerous nature of the cargo and to mark or label dangerous goods in an appropriate manner[235] and the obligations related to the information stated in the transport document (the information should be accurate and the shipper should guarantee the accuracy and indemnify the carrier for loss resulting from any inaccuracy)[236].

The fault-based obligations can be summarized as follows: to deliver the goods ready for carriage[237], to properly, carefully and safely pack cargo in or on a container or vehicle[238], to perform the obligations to load etc.

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[231] Basu Bal, Abhinayan, *An Evaluation of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) through Critical Analysis*, p.36.
[232] Berlingieri, Francesco, *A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules*, p.18.
[233] Berlingieri, Francesco, *A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules*, p.19
[234] Ibid. p.18.
[235] Article 32 of the Rotterdam Rules
[236] Article 31
[237] Article 27 (1)
[238] Article 27 (3)

properly and carefully if the carrier has delegated performance of those obligations to the shipper under Art 13(2)[239], to cooperate with the carrier in providing information and instructions relating to the carriage of the goods[240], and to provide the carrier with information, instructions and documents relating to the goods and the proposed carriage[241].[242]

Article 30 does (apart from defining the basis of the shipper's liability) also state that the burden of proof to show breach of the shipper's obligations lays on the carrier.

The obligations of the shipper in the Rotterdam Rules have been criticised from a cargo-interest point of view for putting a heavier burden on the shipper without granting the compensation of limited liability in return.[243] Whether the burden is in fact heavier is open for discussion, and it seems that not even organisations representing cargo-interests have the same opinion. The European Shipper's Council is of the opinion that the burden is heavier than in present rules[244], while the American National Industrial Transportation League's view is that the obligations of the shipper in the Rotterdam Rules in large are a codification of current laws and trade practices.[245] What can be said within in the framework of this thesis is that the shipper's obligations indeed are more clearly defined and will get a stronger legal status with the Rotterdam Rules. This will probably be seen as something that benefits carrier-interests. However, clearly defined obligations will also contribute to predictability and legal certainty which both carrier- and cargo interests certainly will benefit from in the long run.

Another novelty of the Rotterdam Rules is that the Rules have provisions about 'electronic transport records'. This is a necessary adaption to the modern transport industry and the use of electronic bills of lading. The provisions regarding 'electronic transport records' are found in Chapter 3 and Chapter 8 of the Rotterdam Rules. The use of this kind of documents has to be on a voluntary basis and Article 8 states that consent is necessary for the use of electronic transport records, in order to avoid the imposition of an electronic transport record on a party that needs paper documents for

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[239] Article 27
[240] Article 28
[241] Article 29
[242] Thomas, Rhidian, *The position of Shippers under the Rotterdam Rules*, p.24.
[243] Basu Bal, Abhinayan, *An Evaluation of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) through Critical Analysis*, pp.28 and 30.
[244] European Shippers' Council, *View of the European Shippers' Council on the Convention on Contracts for the International Carrying of Goods Wholly or Partly by Sea also known as the 'Rotterdam Rules*, http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/ESC_PositionPaper_March2009.pdf, p.5.
[245] National Industrial Transportation League, *Response of the National Industrial Transportation League To The European Shippers' Council Position Paper on The Rotterdam Rules*, http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/NITL_ResponsePaper.pdf , pp.14-15.

legal reasons. [246] The article also states that an electronic transport record has the same legal effects as a "normal" transport document.

Provisions relating to jurisdiction and arbitration are news compared to the Hague-Visby regime but not in relation to the Hamburg Rules. Since individual member-states of the EU do not have competence to join international agreements regarding jurisdiction on their own, Article 74 states that the chapter on jurisdiction is only binding for those states that make a declaration that they want to be bound by the chapter ('opt-in').[247] Article 78 states the same in relation to the arbitration chapter. The aim of the jurisdiction chapter is the same as the equivalent provisions of the Hamburg Rules. Namely, to protect weaker parties from forum clauses that obliges them to pursue litigation in for them unfavourable forums (i.e. to prevent so called "forum-shopping"). Exceptions to the rules are made for volume contracts, which can contain exclusive choice of forum clauses that are not subject to the jurisdiction rules if the conditions in Art 67(1)(b) are fulfilled. The multitude of conditions in Article 66 and 67 renders exclusive choice of forum clauses near impossible; this is an interesting problem that touches upon many issues such as freedom of contract, legal certainty, and protection of the weaker party.[248] However, the limited scope and space of this thesis precludes a more detailed discussion of the jurisdiction and arbitration chapters. Moreover since the chapters are optional and not possible to enter into for individual member-states of the European Union they are for now not of large weight for the discussion. It remains to be seen whether other states than the EU member-states will declare to be bound by the chapters and if they will be of importance in the future.

Another important issue that should be mentioned is that the time for suit has been extended in the Rotterdam Rules as compared to the Hague-Visby Rules. It is now 2 years instead of 1 and the time limits in the Rotterdam Rules encompass *all* claims under the convention. The time is calculated from the delivery day or in case of no or partial delivery, from the day intended as the last delivery day. The effect of this is that a claimant has one more year to instigate proceedings and it is therefore a quite "cargo friendly" change.

At last the Rotterdam Rules contains a provision in the end that can be easy to forget but that nevertheless is very important in order to discuss the future of these Rules. Article 94(1) states that the Convention enters into force one year after the 20th ratification, acceptance, approval or accession of the Convention. The last part of this thesis will try to answer whether the

[246] Basu Bal, Abhinayan, *An Evaluation of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) through Critical Analysis*, pp.31-32.
[247] Berlingieri, Francesco, *A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules*, p.46.
[248] Olivier Cachard, *Jurisdictional Issues in the Rotterdam Rules: Balance of Interests or Legal Paternalism?*, European Journal of Commercial Contract Law 2010–1/2, pp. 1-8.

conditions of this Article will be fulfilled and whether the Rotterdam Rules will succeed with its aims and goals.

4 Analysis and Conclusions

4.1 Winners and losers?

The Rotterdam Rules when taken as a whole seems to be a quite balanced regime. Although there are sides of them that have positive or negative effects for one side or the other these effects seems to be balanced out in the end. If we look from the carrier perspective we see that the removal of nautical fault and the extension of the duty of seaworthiness to a continuous seem to be disadvantages for the carrier, but these changes are clearly in line with a modern approach to carriage of goods regulation and as such more or less inevitable. Other less beneficial changes for the carrier's side are moreover for example: the increased limitation amounts, the change of the fire exception and the introduction of liability for delay. Most of these changes for the carrier were also found in the Hamburg Rules, which as we know has not become a success partly because of its "shipper friendliness". However, the Rotterdam Rules does not take anything from a side without giving something in return. The carrier does not have to look far to see benefits as for example; the reversal of the *Vallescura* rule, the volume contract exception and the increased regulation of the shipper's obligations. When looked at from a birds-eye perspective the Rules do not seem to tip the balance in any particular direction. However, this does not change the fact that some provisions could turn out to be problematic in the future. When looked at closer the volume contract provisions are such provisions since they invite to abuse even despite the safeguards put up. The discussion around the volume contract provisions is fundamentally one of policy, unregulated market vs. regulated market. The exception could provide large actors, both shippers and carriers with the possibilities of putting up their own rules to a large extent something that ideally if combined with functioning competition could benefit both shipper and carrier interests. The down side to this reasoning though is that deregulation has been tried in other areas with a negative result. Today we see the effects of a deregulated financial market everyday on the world economy.[249] It remains to be seen what effects the volume contract exception could have and how it would be used. Much concerning this feature also depends on the future interpretation by different national courts.

In the discussion of balance, it should not be forgotten that the Rules do not only contain provisions that mean advantage to one party and disadvantage to another. There are some provisions that both sides ideally should gain from. These provisions are for example; the inclusion of all transport documents, adaption to electronic commerce and the new multimodal scope. All of those have the common characteristic of being adaptions to transport industry as it looks today and are therefore necessary modernisation

[249] Nilsson, Rolf P, *Kritik mot nya sjörättsregler*, Svensk sjöfartstidning, May 21 2010, p.20.

attempts. The question that can be asked concerning these changes are whether they are enough. The multimodal scope has for example been criticised for being a weak compromise and something of a paper tiger because of the network solution. On the other hand, it has been criticised for applying too easily to other modes of transport as well. One thing is sure though and that is that it is high time for multimodal transport to be governed by a global legal solution.

The global solution argument is finally something that is true for the Rules as a whole. Because the one thing that all parties, all interest groups and countries involved would gain from is the uniformity of laws around the world that a global solution would bring. Uniformity is the most important purpose of the Rules and something that only could be achieved for the time being through enough ratifications and acceptance of the Rotterdam Rules.

4.2 Success or failure?

The Rotterdam Rules as we know requires 20 ratifications in order to enter into force. The Rules has received a significant amount of signatures, signatures are however not a strong indicator for the probability of a conventions entry into force or success, of which the fates of the Multimodal Convention and the Hamburg Rules are good examples. Signatures merely signifies that the signatory states will consider the Rules and whether to ratify or not and that they will refrain from acts which would defeat the object- and purpose of the treaty until they have taken a decision on whether to accept it or not.[250] .

In order to see whether the Rotterdam Rules will receive enough ratifications and succeed in harmonising and updating the law regarding the carriage of goods by sea we have to look at other factors. An important factor is the support of important trading states, a support that the Hamburg Rules lacked. The Rotterdam Rules fares better in this respect, it seems like they have a large degree of support from the United States, which had a large impact on the creation of them. Factors that speak for US ratification is that they have a draft COGSA that is put on hold in order to see what becomes of the Rotterdam Rules, and that their rules today are based on the obsolete Hague Rules and thus in strong need of modernisation. Other important countries are the BRICS, what we can see here is as concerns two of these countries that India and China seem to have decided to "wait and see".[251] A US ratification could therefore probably trigger ratifications from these countries as well and then it would be possible with a development similar to that of the Hague Rules in their time with widespread ratifications as a consequence.

[250] Shaw, Malcolm N, *International Law*, 6th edition, Cambridge, 2008, p.911.
[251] Learned from personal e-mail exchange with Abhinayan Basu Bal.

As regards the EU, the members-states seem somewhat scattered for the moment. For example, Spain has ratified, but Germany seems hesitant.[252] Here the EU is a factor in itself; the European parliament has issued a recommendation to speedily ratify the Rotterdam Rules. [253] However, these recommendations are rarely given a large weight. The EU should be able to include the Rotterdam Rules within the framework of the common transport policy and sign the Rules although my guess is that this issue is far too politically sensitive for the EU and thus the competence will be left with the member-states.

In academia, the opinions concerning the Rules are divided as this thesis has showed. The Rules have been criticised on many grounds. Among which one of the most common grounds are simply because of their complexity. A critique that is easy to agree with, the Rules have 96 Articles and are considerably more extensive than the previous regimes. They are sometimes difficult to understand and concerning some parts, the reader risks getting a different impression for each time they are read. One can imagine that the Rules could become interpreted very differently in different jurisdictions because of this complexity. However, as regards this problem it might be so simple that complex issues require complex solutions**.** Perhaps it is therefore better to have *one* complex convention that covers most aspects related to contracts on carriage of goods by sea than having a multitude of Rules which taken together are much more complex than the Rotterdam Rules.

It has also been questioned whether the Rules are necessary at all since the changes are not large from the existing law and been suggested that one of the existing set of rules could have been amended instead of creating a new convention.[254] I think that this is a good point and open for discussion but the Rules are nonetheless in my opinion a fresh start in an area where all previous attempts to receive global solutions since the Hague Rules have failed. The Rules are an extensive set of rules and not a half-measure like the Visby protocol. Other similar attempts to amend the existing Rules with protocols would not have been a good solution since that would probably have increased the disparity of rules even more. The Rotterdam Rules represents a serious attempt to create a new convention where all voices have been listened too and taken into account in order to try to create rules that can be a success on a global scale. The changes in the Rotterdam Rules are not revolutionary. However, if they were it would probably have been an even harder task to find acceptance for them because a too bold convention would not succeed (on which the fate of the Hamburg Rules is a good

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[252] Boecker, Ekhard, ***Les Règles de Rotterdam vers un droit maritime uniforme?*, International Transport Journal, January 20, 2010, (in French),** http://www.transportjournal.com/index.php?id=489&no_cache=1&L=2&tx_ttnews%5Bpointer%5D=21&tx_ttnews%5Btt_news%5D=17057&tx_ttnews%5BbackPid%5D=441&cHash=518885c09cc06dc6598e32b12d1dfe13

[253] *European Parliament resolution of 5 May 2010 on strategic goals and recommendations for the EU's maritime transport policy until 2018*, 2009/2095(INI)

[254] Karan, Hakan, *Any need for a new international intrument on the carriage of goods by sea: The Rotterdam Rules?*, Journal of Maritime Law and Commerce, vol.42, July 2011, pp.441-448.

example). The Rules are thus evolutionary instead because there is a need to proceed carefully in areas where it is hard to find common ground.

Despite the criticism, most scholars (even many of the critical ones), express the need for uniform solutions and argues that now when the Rules actually exist, ratification is the better choice. What is important now is therefore not to look on the Rules from the side of only cargo- or carrier interests; it is too late to change them anyway, but rather to try to see the overall benefits that could be achieved from restoring uniformity. The success of the Rotterdam Rules depends on whether the world will view the Rules as a whole and the benefits of uniformity they could bring as outweighing their eventual drawbacks.

4.3 Conclusions

The Rotterdam Rules are created to reform the area of carriage of goods by sea, something that they in my opinion could succeed in doing. The Rules contain provisions that are new to this area and responds well to the needs that led to their creation. All sides and all countries will be able to find positive and negative features when analysing these rules in detail. However, the important thing is that all parties involved keep their eye on the price, namely, uniformity and harmonisation.

The Rules are the last shot for modernising carriage of goods regimes on a global scale and if they will fail, it will take a long time before any new attempt will be made. It is easy to find aspects to criticise with the Rotterdam Rules but it is probably harder to create a better solution for the time being. The Hague Rules were not regarded as a perfect solution in their time and yet they have worked now for almost a century. I believe that the Rotterdam Rules could achieve the same degree of success if they are given the opportunity.

It is therefore important that the Rules are considered with the alternatives in mind. Even though the Rules may increase disparity in the short run, the present situation is not sustainable and the alternatives are national and regional solutions, which do not seem desirable since carriage of goods is global. The Rotterdam Rules exist and are the only global alternative for the time being and if they are the solution that could bring uniformity to this legal area in the future, their existence is certainly a good thing.

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E-mail exchange with Abhinayan Basu Bal of Lund University, Faculty of Law and WMU