

## ASPECTS OF MULTIMODAL TRANSPORT IN THE ROTTERDAM RULES

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### **Abstract**

*The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (hereinafter – The Rotterdam Rules or Convention) signed on 23 September 2009 is taking a novel approach to international trade. It might be the reason why it has not received positive acknowledgement from the signatories, law experts and other interested parties. However, one might wonder whether the trade itself stayed novel-free during the past several decades. It should not come as a surprise that it has not. Tackle-to tackle approach is no longer applicable to a majority of contracts concluded that provide for delivery to the consignee's doorstep, as of 1970 container ships and container terminals dominate cargo handling in ports and onboard the ship, electronic communication and documentation is becoming a common feature in the current trade. Even if there are more developments to be named, the aforementioned three make the regime under the Hague 'Hague-Visby and Hamburg Rules appear outdated. So is the unfamiliar approach as envisioned by the Rotterdam Rules really such a big failure?*

**Key words:** multimodal transport, the Rotterdam Rules, shipping industry Hamburg Rules, the European Union

**JEL Classification:** K23

Multimodal transport, normally defined as a contract of carriage involving more than one mode of transport, has been on the international regulatory agenda for many years. To date there has been no success in achieving uniformity of law in its international regulation<sup>2</sup>. When the new maritime Convention on International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules)<sup>3</sup> breaks with unimodal tradition and includes "carriage by other modes of transport in addition to the sea carriage"<sup>4</sup>, it embodies a big step forward. However, it is clear that the main area of the Convention is still maritime carriage. The multimodal part is only an 'addition', a fact that has given the Rotterdam Rules the position of a 'maritime plus' convention. Nevertheless, if the Rotterdam Rules enter into force the global transport industry will be provided with a legal instrument harmonising the rules on carrier liability in 'wet' multimodal transport, or multimodal transport with a sea leg. The parties to the Rotterdam Rules could be both the European Member States as well as the European Union (EU) as such (see Rotterdam Rules Articles 88, 93). Up to October 2010 only the following Member States have signed the Convention: Denmark, Greece, France, Luxembourg, the Netherlands, Poland and Spain. We might see a split in the traditional Nordic transport law cooperation: Denmark and Norway have signed; Finland, Sweden and Iceland have not. From an international point of view it is interesting that the United States has signed but China has not.<sup>5</sup> So far, however, no state has ratified the Convention. If a sufficient number of states do ratify (under Article 94 of the Convention 20 ratifications are required) and the Rotterdam Rules become applicable in any of these countries, there will certainly be an impact on the EU.

Currently the European Commission is working towards a form of transport that is: . . . sustainable, energy-efficient and respectful of the environment. [The] . . . aim is to disconnect mobility from its adverse effects. This means, above all, promoting co-modality, i.e. optimally combining various modes of transport within the same transport chain, which is the solution for

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<sup>2</sup> Ralph de Wit Multimodal Transport Carrier Liability and Documentation (Lloyds of London Press 1995) p 1.

<sup>3</sup> M Hoeks Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods (Kluwer The Netherlands 2010) at 19±22.

<sup>4</sup> United Nations Convention on International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules) (formally adopted by UN General Assembly December 2008, annexed to General Assembly Resolution 63/122

<sup>5</sup> Rotterdam Rules art 1.1.

the future in the case of freight.<sup>6</sup> A regional legal instrument is considered to be a prerequisite for this, incorporating a transparent and predictable liability regime. The lack of legal clarity has been considered a 'transaction cost' or barrier, keeping the consignor from choosing the multimodal transport alternative which is seen as more environmentally friendly than, for example, road transport.<sup>7</sup>

Freedom of contract and discretion of the parties is the universal driver of commercial contracts. For that reason commercial parties are given a choice as to the content of their legal relationships. The Rotterdam Rules, as opposed to other conventions governing international trade (Hague, Hague-Visby, Hamburg Rules, CMR<sup>8</sup>, CIM-COTIF<sup>9</sup>, CMNI<sup>10</sup>, Montreal Convention<sup>11</sup>) which are acts governing carriage, is a contract act. Therefore, the defining factor is not the carriage itself, but the concluded contract. UNCITRAL Working Group on Transport Law saw a gap in the uniformity of the carriage of goods by sea and made the right step towards the implementation of a novel regime to fit the requirements of the fast developing international trade. Thus the door-to-door regime<sup>12</sup> is triggered if a green light is given by the contracting parties when entering into a contract that involves a sea leg as stipulated in article 1.1. of the Rotterdam Rules. Now why is that a bad thing? I do not see the flexibility of the Rotterdam Rules regime as a drawback and consider it the right approach given the diversification of carriage contracts. If the Rotterdam Rules came into force, parties that see their contractual relationship as a door-to-door contract (which is in majority of cases by default also multimodal) could avoid the confusing regime of the Hague, Hague-Visby and Hamburg Rules.

What should not be surprising is that uniformity is not easily achieved, especially in multimodal transport trade. Each mode of transport has its own participants, rules, risks, carriage principles, etc. Even if at the outset the Working Group on the Rotterdam Rules envisioned a multimodal regime draft encompassing air, rail travel and road haulage, the final version came out as a "maritime plus" Convention in a sense that it put the sea travel at the core. Professor William Tetley<sup>13</sup> considers such aspect of the Convention as misleading and unfulfilling when the Preamble states the Rotterdam Rules to be of universal and uniform variety. What we should not forget is the 31 year old Multimodal Convention of 1980<sup>14</sup> which has not as of yet come into force. It can be seen from that particular experience that compromise is not within easy reach when in realms of international multimodal trade. The Rotterdam Rules authors tried to find the middle ground and implement as much uniformity as possible so that it would be acceptable to a majority of actors concerned. Why should we then blame the newly drafted instrument for what it could regulate due to clear objective barriers? As, generally, complete uniformity cannot be achieved, the Rotterdam Rules introduced a network liability system which is set to solve contradictions with any other act governing carriage by a different mode of transport (other than by a vessel) in the sphere of issues of liability, limitations of liability and time for suit. Articles 26 and 82 lay down the afore mentioned network liability regime. One question is whether or not the modified network liability system of the Rotterdam Rules provides a sufficiently effective

<sup>6</sup> Twenty-two states have now signed. However, the Rotterdam Rules will only come into force one year after the Convention has been ratified by 20 contracting states, which still appears some time away

<sup>7</sup> The European Commission, [http://ec.europa.eu/transport/sustainable/index\\_en.htm](http://ec.europa.eu/transport/sustainable/index_en.htm).

<sup>8</sup> Convention on the Contract for the International Carriage of Goods by Road ("CMR"), 19 May 1956, 399 U.N.T.S. 189.

<sup>9</sup> Convention Concerning International Carriage by Rail, 9 May 1980, 1987 Gr. Brit. T.S. No. 1 (Cm. 41), which incorporates the Uniform Rules concerning the Contract for International Carriage of Goods by Rail.

<sup>10</sup> Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways ("CMNI"), 3 October 2000

<sup>11</sup> Convention for the Unification of Certain Rules for International Carriage by Air ("Montreal Convention"), 28 May 1999, S. Treaty Doc. No. 106-45, at 27-45 (2000).

<sup>12</sup> Rotterdam Rules, article 5.

<sup>13</sup> William Tetley, *Summary of General Criticisms of the UNCITRAL Convention (The Rotterdam Rules)*, December, 2008.

<sup>14</sup> United Nations Convention on International Multimodal Transport of Goods, 24 May 1980, Doc. TD/MT/CONF/16.

alternative to the European Commission's objective to see increased use of multimodal transport by providing transport users with a predictable liability system. Under a network liability system predictability is linked to the question of how complicated it is for service users to predict liability in case of lost, damaged or delayed goods. This again is linked to the question of what liability system to apply. In the Rotterdam Rules this question is dealt with mainly in Articles 26 and 82. Article 26 governs the applicability of the Rotterdam Rules on carriage preceding or subsequent to sea carriage and Article 82 governs the status of international conventions governing the carriage of goods by other modes of transport<sup>15</sup>. While the latter regulates the relationship between existing conventions at a time when the Rotterdam Rules enter into force, Article 26 also takes into account the possibility of a new convention, or international instrument, covering the same area. The challenge in multimodal carriage has been to decide which convention is to be used in which situations. There is, by definition, more than one mode of transport involved in a multimodal carriage and thus several possible legal regimes may apply. The problem has usually been solved by establishing under which means of transport the damage, loss or incident causing delay occurred and then applying the appropriate unimodal legal regime. This approach is based on an understanding of the multimodal contract as a 'mixed contract' which is subject to an accumulation of regulations. With regard to the applicable convention the contract is considered as the sum total of unimodal contracts. This implies the use of different unimodal conventions in solving legal disputes arising under a multimodal contract of carriage. Where carrier liability is concerned this is known as the 'network liability solution'.

However, the network liability solution does not provide a solution when the damage, loss or event causing delay cannot be located or when the location is not exact because the damage, loss or delay has occurred gradually during the carriage. Also, when arrival of the cargo is delayed it may well be difficult to locate exactly where in the transport chain the delay occurred. These problems are familiar, particularly in container transport where the problem of legal unpredictability is particularly acute. A network liability system with a fall-back solution for damage, loss or delay that is not located might, however, solve this problem. Such a system has been defined as the 'modified network liability system' and is the solution adopted in the Rotterdam Rules. A modified network liability system will apply if there is no other (unimodal) liability system applicable or if the damage is not localised. Efforts so far to draft a European regional liability regime on multimodal transport have been based on an understanding of the multimodal contract as *sui generis*, a contract with its own characteristics, different from unimodal contracts of transport. This point of view was taken by the legal experts assisting the European Commission in drafting the 2005 proposal for an EU regional multimodal regime. The proposal's provisions were accordingly based on an effective and predictable 'uniform system', meaning one liability under a multimodal contract, regardless of where in the transport chain the damage, loss or delay occurred. This approach was possible because at the time of the proposal there was no international regulation on multimodal transport. Nevertheless, the expert group recognised that a European regime on multimodal transport might conflict with existing unimodal conventions, such as the Convention on the Contract for the International Carriage of Goods by Road (CMR), although it is stated in the proposal: 'The intention behind the Regime, however, is that in all such cases it is the Regime and not CMR that should prevail'.<sup>1</sup> The Rotterdam Rules are going to change this picture. If they enter into force there will be an operable international multimodal regime, a fact that must be taken into consideration when discussing a regional multimodal legal regime for the EU. The *sui generis* approach will not solve the problem of a

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<sup>15</sup> Report of the 18th session of the Working Group, document A/CN.9/616, paragraph 232; Report of the 20th session, document A/CN.9/642, paragraphs 228-232.

'collision of conventions' if the EU decides on a regional solution for international European multimodal transport. On the contrary, there will be two competing international legal regimes. In this article the European debate on a regional solution to the problem of liability in international (European) multimodal transport will be presented in section 2. In section 3 the modified network solution of the Rotterdam Rules will be outlined, although the content of the liability system of the Rotterdam Rules or any of the other applicable liability systems will not be addressed. The question of whether or not the modified network liability system of the Rotterdam Rules might serve as an alternative for the EU will be discussed in section 4. It will be argued that, despite the incompleteness of the Rotterdam Rules on multimodal carrier liability, the European Commission should not try to navigate around them but rather accept the modified network liability system as a sufficient alternative. This would also avoid the question of EU competency and the conflict between Member States' obligations both to an international convention and to the Community.

### The View of the Critics

Now we all know different interests have a tendency not to succumb to compromise easily. A very good example is the aforementioned Multimodal Convention of 1980. As shippers and carriers have contradicting interests in the risk allocation and other procedures of the carriage contract it is very unlikely that any legal instrument meant to unify the multimodal carriage rules will suit their best needs.

The main flaw of the Rotterdam Rules as defined by William Tetley, Professor Svante O. Johanson, A. Barry Oland and others<sup>11</sup> as well as the majority of signatories is the volume contracts exemption. They state that it defeats the purpose of the Convention and see no sense in allowing the parties to opt-out of the Convention regime just because the contracting parties have agreed on a series of shipments in a certain period of time. However, it is accepted practice for shippers to require constant delivery of goods to various destinations and to enter into specific contracts in aim to receive discounts and reserved space on the vessels concerned. Rotterdam Rules article 80 stipulates for strict conditions upon which there can be derogation from the Convention regime. Firstly, the volume contract has to be individually and freely negotiated. Secondly, the shipper has to be given an opportunity to conclude the contract on Convention terms. Thirdly, the derogation fact has to be clearly expressed in the wording of the volume contract. Fourthly, the consignee can only be bound by the derogation if he personally accepts such undertaking in writing. Fifthly, derogations concerning safety of the ship or cargo are not allowed (*i.e.*, continuous seaworthiness, obligation to provide information). Derogations that fail to comply with the said requirements are considered to be invalid. Therefore, safeguard measures ensure the appropriate usage of volume contract exception while at the same time allow for parties to freely contract as to their specific commercial peculiarities. Other widespread criticism relates to unequal obligations as between the shipper and the carrier. What is striking is that the most "popular" topic entertained by the critics is the unlimited liability of the shippers. It seems bizarre to render such a provision of the Rotterdam Rules as being flawed when that is the current state under the "praised" regimes of Hague, Hague-Visby and Hamburg Rules. Additional obligations that are imposed on the shippers are not a deviation from the existing regulation or an unreasonable burden not found in the existing regime, but a reaction to the developments in the modern sea trade. The reason why the Hague, Hague-Visby Rules do not provide for such an extensive list of obligations to the shipper is that at the time of their enactment there was no need for such regulation. What is more, the obligations of the shipper have reasonable grounds and usually relate to the safety of the sea adventure which would otherwise be subject to mandatory national laws (tortious liability). Each and every report that criticizes the Rotterdam Rules mentions the complexity of the Convention as a barrier to application. I tend to think it is false

belief to expect the legal instrument unifying multimodal transport intricacies to be easily readable by all the concerned actors in the field. One might wonder if the present situation is even more complex and contradictory with different carriage acts and national laws applying to the same adventure. Should the structure of the instrument be given preference over the quality of regulation contained therein? Competing interpretations of various provisions are a common occurrence in the national as well as international regulation. If assumptions and unfounded fears of contradicting interpretations were given decisive influence, we would not be able to achieve unification at all.

### Conclusion

Is there a lesson to be learned here? Most probably the multimodal trade community is not yet ready to accept a unified regime and abandon their national laws governing carriage of goods. It seems rather idealistic to think that another legal instrument of the same kind is just around the corner. Given the example of the Hamburg Rules which were signed on 1978 and entered into force in 1992, it is not farfetched to think that a certain period of time will have to elapse in order to come to a conclusion that the Rotterdam Rules have been a failure. Many international organizations, such as the International Chamber of Commerce, the World Shipping Council, the European Community Shipowners' Associations, The Baltic and International Maritime Council have already recommended the governments to accept the Rotterdam Rules. While it can be acknowledged that the Rotterdam Rules establish an unfamiliar approach to regulation incorporating complex set of provisions, there is no better alternative for the modernized shipping industry and its aim to harmonize trade practices.

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