KLUWER LAW INTERNATIONAL

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Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

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Foreword by the Editors

The authors of this book, different in nationality and background, have one important thing in common – all of them contributed over the last decade to the completion of the *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, now called the *Rotterdam Rules*.

The project started many years ago by collecting ideas and principals to serve as the basis for a new convention on transport by sea. One of the Editors (Alexander von Ziegler) was at that time Secretary-General of the Comité Maritime International (CMI) and had the privilege to coordinate matters. A group experts (including, from the very beginning, Stefano Zunarelli and Johan Schelin) gathered around the table to bring the input for the creation of a comprehensive, internationally harmonized instrument regulating the carriage of goods by sea.

What an opportunity to meet outstanding experts and closely cooperate with them during the entire process! The task implied many weeks of interesting negotiations and challenging interchanges in Vienna at UNCITRAL and in New York at the United Nations Headquarters. Through their work and deliberations, the delegation members built an efficient working relationship and in many cases also long-lasting friendships.

This mixture of expertise and friendship gave us the idea, during one of the sessions, to gather a group of close friends with the aim to publish, soon after finalizing the Convention, a small commentary on the Rotterdam Rules. It would be directed to practitioners and other interested parties who would like to know how the new Convention operates and how the provisions are to be applied after the Convention has come into force.

We were amazed – and took it as a sign of the great friendship developed in the Working Group III of UNCITRAL – at the great number of experts who agreed spontaneously and without hesitation to contribute to this project. Working with every one of them during the preparation of this book was an immense pleasure.

Indeed, we all profit from their wisdom and expertise, a pool of knowledge that we hope to share with the readers of this book.

The editors, together with the authors, hope that the present commentary will be of help and assistance to all of those interested in international maritime transportation matters and thus contribute to a better understanding of the new Rotterdam Rules. Together with the authors, we hope that the Rotterdam Rules will become successful, not merely in a selected geographic area, but as the one and only Convention ruling worldwide contracts of carriage by sea. Only if such a global application of the new Convention is achieved, will the purpose of this impressive project be reached – a success that in our opinion the international trade and maritime community cannot afford to miss.

Zürich, Stockholm and Bologna in August 2009

Alexander von Ziegler *Johan Schelin* *Stefano Zunarelli*

Foreword

*By Jernej Sekolec**

The regime governing the carriage of goods by sea has been for a long time the subject of criticism, such as for being out of date, fragmented, uncoordinated with other related transport regimes, leading to unpredictable results, or posing obstacles to the development of modern contract practices. The Hamburg Rules, prepared in 1978 with a view to improving the situation, have in the meantime entered into force but fell short of expectations in that they have not become a basis for a universally accepted regime; the Rules have also increasingly been seen as not addressing issues crucial for modern sea carriage. It has also been realized that the existing regime, whether based on the Hague, Hague-Visby, or Hamburg Rules, does not properly accommodate modern trade practices, such as those treating the carriage of goods by sea as part of wider door-to-door commercial transport operations and those relying on electronic commerce. Nevertheless, such criticism and considerations were for a long time unable to coalesce into a realistic plan for improving the situation.

Among the reasons for the lack of progress seems to have been the fact that the legal regime governing the carriage of goods by sea is of concern to a variety of stakeholders and that their interests have not been easy to reconcile. Those most directly interested include, in addition to sea carriers contracted by shippers, also sea carriers subcontracted by the sea carriers to perform the whole, or part of, the sea carriage, as well as various parties performing specialized services within port areas, such as warehouses, transport terminals, and stevedoring companies. Also interested are various inland carriers contracted or subcontracted to perform

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* From February 2001 to July 2008, Secretary of UNCITRAL and Director of the International Trade Law Division of the United Nations Office of Legal Affaires.

transport services before or after the sea leg. In addition, the transport regime also significantly affects the risks and contract practices of the exporters and importers of goods and of the banks financing such transactions. It is sometimes assumed that the interests of freight forwarders, cargo insurers, and liability insurers overlap with or follow the interests of the parties whom they represent or with whom they deal. Nevertheless, in practice, these enterprises seem to have their own views of how the transport regime affects their respective market positions.

Governments have been aware of the unsatisfactory situation, but have found it difficult to rally around a common approach because of the complexity of the problem and the lack of consensus among the different actors about solutions to be adopted. Interestingly, as long as the liability regime was seen as the main problem, no agreement on the way forward seemed in sight. However, when issues other than liability came to be perceived as problematic, it appeared possible to commence a meaningful discussion about possible compromises and workable solutions.

It is no surprise that it was in UNCITRAL, the United Nations Commission on International Trade Law, a universal intergovernmental organization with an excellent track record of producing legislative texts in important and controversial areas of commercial law, where governments started a debate about doing something about these problems. The traditionally cooperative atmosphere in the Commission and its balanced working methods have been honed over the years to facilitate thorough and inclusive negotiations, which have been capable of satisfying the interests of developing and developed countries and have also proved well-suited to take due account of the disparate interests of the various sectors of industry. Those early debates in UNCITRAL took place in the context of discussions of electronic commerce.[1] It was realized in that context that the growing use of electronic means of communication in the carriage of goods by sea clashed with the disparate and outdated legal regime. In particular it became clear that existing national laws and treaties left gaps regarding, for example, the functioning of bills of lading and seaway bills, the relation of those transport documents to the rights and obligations between exporters and importers of goods, and the practices of entities that provided financing for the sales contracts that underlie contracts of carriage. Those gaps were justifiably seen as factors increasing the cost of transactions and as obstacles to the cross-border flow of goods.

The discussions did not immediately lead to an agreed plan on how to proceed. Some delegates had doubts, in particular because work on new legislation might mean reconsideration of the liability regime. However, those who wanted to see progress argued that the review of the liability regime should not be the main

1. Report of the United Nations Commission in International Trade Law on the work of its twenty-ninth session (New York, 28 May to 14 Jun. 1996), Official Records of the General Assembly, fifty-first session, suppl. no. 17 (A/51/17), paras 210–215. Those debates were based on the report of the Working Group on Electronic Data Interchange on the work of its thirtieth session (Vienna, 26 Feb. to 8 Mar. 1996) (The Group was later renamed 'Working Group on Electronic Commerce'), Doc. A/CN.9/421, paras 104–108.

objective of the suggested work; rather, they regarded the proposed work as necessary to provide more comprehensive and modern solutions to issues that were not adequately dealt with in the existing treaties. On that basis, no firm conclusions were reached, but instead UNCITRAL requested its Secretariat to gather information, ideas, and opinions as to the problems in practice and possible solutions to those problems. In line with the style of work in UNCITRAL, such information-gathering was broadly based and, in addition to governments, included international organizations representing the commercial sectors involved in the carriage of goods by sea. Pursuant to that mandate, a useful and productive cooperative effort developed between the UNCITRAL Secretariat and the *Comité Maritime International* (CMI) in soliciting views of the sectors involved in the international carriage of goods and in preparing an analysis of that information. Governments in UNCITRAL welcomed the exploratory work being undertaken by the CMI and the Secretariat and appreciated the willingness of the CMI to cooperate.[2]

In 1999, the CMI took the floor at the annual session of the Commission and reported that it had instructed a Working Group to prepare a study on a broad range of issues in international transport law with the aim of identifying the areas in which unification or harmonization was needed by the industries involved.[3] The creation of that CMI working group boded well for beginning to overcome the old impasse, because the industries involved were interested and ready to offer their technical and legal knowledge to assist in considering possible solutions. Based on the preliminary findings of the CMI Working Group, it appeared that further harmonization in the field of transport law would be possible. The Working Group identified issues that had not been covered by the current instruments – for example, the lack of harmonization in regard to electronic commerce was seen as quite significant. Against the background of these developments, an increasing number of Governments appeared ready to accept that it was no longer rational to exclude from the agenda a re-evaluation of principles of liability and a determination of their compatibility with possible new solutions.[4]

In 2000, the Commission discussed these topics again.[5] The CMI had, at that time, created an International Subcommittee with a view to further assessing the situation. The Subcommittee held several meetings, to which all members of the CMI were invited, as well as observers in addition to UNCITRAL, including organizations such as the International Chamber of Commerce (ICC), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber

2. Report of the United Nations Commission in International Trade Law on the work of its thirty-first session (New York, 1–12 Jun. 1998), Official Records of the General Assembly, fifty-third Session, suppl. no. 17 (A/53/17), paras 260–267.
3. Report of the United Nations Commission in International Trade Law on the work of its thirty-second session (Vienna, 17 May to 4 Jun. 1999), Official Records of the General Assembly, fifty-fourth session, suppl. no. 17 (A/54/17), paras 413–414.
4. *Ibid.*, paras 417–418.
5. Report of the Secretary-General on possible future work in transport law, Doc. A/CN.9/476, 31 Mar. 2000.

of Shipping (ICS), the Baltic and International Maritime Council (BIMCO), the International Union of Marine Insurance (IUMI), and the International Group of P&I Clubs. One significant element in those assessments was gaps between the mandatory regimes applicable to the various transport modes and opinions that if an internationally harmonized regime were to be prepared, it should also take into account activities that were integral to the carriage that took place before loading onto and after discharge from the ship. UNCITRAL was receptive to those ideas. Some governmental delegates acknowledged the increasing warehouse-to-warehouse nature of carriage of goods by sea and also recognized that a broad view of these issues would involve some re-examination of the rules governing the liability for loss of or damage to goods.[6]

A visible and significant event in the context of those considerations was a Colloquium organized by the UNCITRAL Secretariat in cooperation with the CMI in New York on 6 July 2000.[7] At that event, which took place during the thirty-third annual session of the Commission, Governments yielded one day of their conference time to allow representatives of the private sector to express their views regarding the perceived problems in the transport industry. A broad range of interested organizations and industry representatives of both carriers and shippers provided their views. A majority of speakers acknowledged significant gaps in national transport laws and international conventions. There appeared to be a general view that, with the changes wrought by the development of multi-modalism and the use of electronic commerce, the transport law regime was in need of reform to regulate all transport contracts, whether applying to one or more modes of transport and regardless of whether the contract was made electronically or in writing. Some also raised the need to formulate more exact rules and definitions on the roles, responsibilities, and rights of the parties involved; the delivery of the goods; the cases in which it was not clear on which leg of the carriage the cargo had been lost or damaged; the liability regime; and the financial limits of liability. It was also pointed out that the need to prevent cases of maritime fraud should be borne in mind in crafting solutions. The Commission welcomed the opportunity to hear those views and requested the Secretariat to prepare a report identifying issues in transport law in respect to which the Commission might undertake future work.

The Secretariat published such a report in May 2001, entitled 'Possible Future Work on Transport Law', in which it suggested to the Commission that the consultations it had been conducting indicated that the time had come when work could usefully be commenced toward an international instrument, possibly having the nature of an international treaty, which would modernize the law of carriage; take into account the latest developments in technology, including electronic commerce; and reduce legal difficulties in the international transport of goods by sea. The Secretariat also reported to the Commission that the considerations in the

6. Report of the United Nations Commission in International Trade Law on the work of its thirty-third session (New York, 12 Jun. to 7 Jul. 2000), Official Records of the General Assembly, fifty-fifth session, suppl. no. 17 (A/55/17), paras 420–425.
7. *Ibid.*, para. 426.

context of the CMI, in particular in its International Subcommittee, were making good progress and that there was an interesting preliminary text in the making in the Subcommittee that would contain drafts of possible solutions for a future legislative instrument, including alternatives and comments. The report also suggested that, if the Commission so decided, it would be possible, as soon as the following year, to commence intergovernmental consideration of the feasibility, scope, and content of a future legislative instrument.[8]

At that session in 2001, the Commission, despite some voices of caution, became convinced that it should devote part of its resources and time to the preparation of a legislative text that would take a fresh and broader look at the legal issues of carriage of goods by sea. It established an intergovernmental full-membership Working Group for that purpose. As to the scope of the work, the decision was that the negotiations should also include liability. In addition, the Commission decided that the considerations in the Working Group should initially cover port-to-port transport operations. However, it also added that the Working Group would be free to study the desirability and feasibility of dealing with door-to-door transport operations, or certain aspects of those operations, and, depending on the results of those studies, to recommend to the Commission an appropriate extension of the Working Group's mandate.[9]

Later, in 2002, the Commission considered the mandate of the Working Group again and approved the working assumption that the draft instrument should cover door-to-door transport operations. This decision was based on the view that received strong support by some delegations that harmonizing the legal regime governing door-to-door transport was a practical necessity, in view of the large and growing number of practical situations in which transport, in particular transport of containerized goods, was operated under door-to-door contracts.[10] In informal consultations after establishing the Working Group, the Spanish government declared itself ready to put forward for the chairmanship of the Group a prominent academic and practitioner, Professor Rafael Illescas Ortiz. He was elected Chairman by consensus at each session of the Working Group, and with his knowledge of the subject and diplomatic skills he served the Group very well until the last Working Group session early in 2008, when a draft Convention was formulated for presentation to UNCITRAL.[11] In the summer of 2008, when the draft Convention was scheduled for the final round of substantive negotiations at the plenary level of

8. Report of the Secretary-General on possible future work in transport law, Doc. A/CN.9/497, 2 May 2001, paras 54–55.
9. Report of the United Nations Commission in International Trade Law on the work of its thirty-fourth session (Vienna, 25 Jun. to 13 Jul. 2001), Official Records of the General Assembly, fifty-sixth session, suppl. no. 17 (A/56/17), paras 337–345.
10. Report of the United Nations Commission in International Trade Law on the work of its thirty-fifth session (New York, 17–28 Jun. 2002), Official Records of the General Assembly, fifty-seventh session, suppl. no. 17 (A/57/17), paras 223–224.
11. Report of Working Group III (Transport Law) on the work of its twenty-first session (Vienna, 14–25 Jan. 2008), Doc. A/CN.645; the draft Convention as approved by the Working Group is reproduced in the Annex to the report.

UNCITRAL, it so happened that it was the turn of the so called 'Western and Others Group' of States in the United Nations to put forward a candidate to chair the plenary UNCITRAL session. It was no surprise that Professor Illescas, as the delegate of Spain, was elected by consensus to chair that forty-first annual session of UNCITRAL. Vice-chairpersons were Amadou Kane Diallo of Senegal, Ricado Sandoval López of Chile, and Tomotaka Fujita of Japan; Anita Zikmane of Latvia was the rapporteur. At the session, complex issues had to be resolved in some 2 weeks of discussions earmarked for the transport project, leading to the approval of the draft Convention that was ready for submission to the United Nations General Assembly.[12]

The record of the thorough negotiations within UNCITRAL, the soundness of the solutions, and the carefully negotiated compromises reflected in the text were so convincing that the General Assembly approved the Convention by consensus on 11 December 2008 without reopening any issue. The General Assembly also authorized that the treaty be opened for signature in a ceremony in Rotterdam on 23 September 2009 and recommended that the rules embodied in the Convention be known as the 'Rotterdam Rules'.[13]

No doubt, the Rotterdam Rules will be closely scrutinized before their enactment, even if it is clear now more than ever that the current regime is ill-equipped to deal with modern transport practices. I am convinced that an objective, public policy-minded scrutiny of the text will lead to the conclusion that the treaty is a balanced text that offers many benefits, including that it encourages and accommodates good contract practices, assists parties in adopting rational working methods, promotes the proper allocation of risk regarding the common venture, and facilitates financing of the sales contract for goods that are carried by sea. Much will depend also on assessments by various parties engaged, or commercially interested, in the carriage of goods by sea. I think that their assessments should also result in a positive verdict. They will appreciate the balanced way in which their respective interests have been addressed, the greater legal certainty for their respective legal positions, the possibility of the parties to extend by contract the application of the Rules to the whole transport operation, a clear legal basis of the use of electronic transport records, and the flexibility with which the Rules have left room for evolving trade practices.

This book, which has been written by experts intimately familiar with the negotiations leading to the finalization of the Convention, will be indispensable to both practitioners and legislators in dealing with the new regime.

12. Report of the United Nations Commission in International Trade Law on the work of its forty-first session (New York, 16 Jun. to 3 Jul. 2008), Official Records of the General Assembly, sixty-third session, suppl. no. 17 (A/63/17); the draft Convention as approved by the Commission is reproduced in Annex I to the report.
13. General Assembly Resolution 63/122.

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