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## UNECE Working Party on Intermodal Transport and Logistics

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Item 9 of the provisional agenda

**Civil liability regimes in intermodal transport**

## **UNECE Expert Group on the Rotterdam Rules: The scope of application and the practical consequences of the Rotterdam Rules for pan-European land and intermodal transport operations**

### **Contribution by the UNCTAD secretariat**

The new *UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, known as the **Rotterdam Rules**, provides mandatory standards of liability for loss or damage arising from the international carriage of goods by sea and is intended to provide a modern successor to earlier international conventions in the field, namely the so-called Hague Rules 1924, the Hague-Visby Rules, 1968 and the Hamburg Rules 1978. In contrast to these conventions currently in force, however, the Rotterdam Rules also apply to multimodal transport involving an international sea-leg and deal with a range of issues not presently subject to mandatory international law.

The UNCTAD secretariat participated in the preparatory work that was carried out by the UNCITRAL Working Group III (Transport Law) as an observer and has, over the years, prepared a number of documents to provide technical legal analysis of the draft text for consideration by the Working Group.<sup>1</sup> To assist governments, in particular in developing countries, in their assessment of the merits of ratification, an analytical overview of key features of the Rotterdam Rules has been published as part of the Review of Maritime Transport 2009 (Chapter 6 A), with a brief update in the Review of Maritime Transport 2010.<sup>2</sup>

The analysis suggests that the Convention may be problematic in a number of respects - including in respect of (i) the particular complexity of its provisions; (ii)

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<sup>1</sup> See UNCTAD/SDTE/TLB/4 and UNCTAD/SDTE/TLB/2004/2), available in English on the UNCTAD website at [www.unctad.org/ttl/legal](http://www.unctad.org/ttl/legal). Also available, in all UN languages, on the UNCITRAL Working Group III website (documents A/CN.9/WG.III/WP.21, Annex I; A/CN.9/WG.III/WP.41; A/CN.9/WG.III/WP.46)

<sup>2</sup> Available in all UN languages on the UNCTAD website at [www.unctad.org/ttl](http://www.unctad.org/ttl).

its treatment of multimodal transportation and (iii) of transportation under so-called "volume contracts", as well as (iv) the substantive compromise between shipper and carrier interests inherent in the Convention. Brief comments relating to the application of the Rotterdam Rules in a multimodal transport context are set out below.

## **Rotterdam Rules and Multimodal Transport**

While at present there is no international convention in force to govern multimodal transportation,<sup>3</sup> the extension of the Convention's scope of coverage to multimodal transport involving a maritime leg was subject to considerable controversy throughout the negotiations, as was the text of the relevant provisions in the Rotterdam Rules.<sup>4</sup> This was due, in particular, to: (a) concerns about the potential for conflict with unimodal conventions in the field of road, rail, air and inland waterway carriage, which in many instances also apply to loss arising during a particular stage of a multimodal transport; (b) the desire by some states to ensure the continued application of existing national law on multimodal transportation; (c) concerns about further fragmentation of the law applicable to international multimodal transportation; and (d) the fact that the substantive content of the liability regime is based exclusively on considerations and principles applicable to sea carriage, rather than multimodal transportation.<sup>5</sup>

### **To which contracts would the Convention apply? - Contracts for the International Carriage of Goods Wholly or Partly by Sea**

The Rotterdam Rules apply to international contracts of carriage,<sup>6</sup> provided the contract involves an international sea leg and the contractual place of receipt, loading, discharge or delivery is located in a Contracting State (Article 5). Contract of carriage is defined, in Article 1(1), as a "*contract in which the carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage of goods by sea and may provide for carriage by other modes of transport in addition to sea carriage*". Thus, as is also apparent from the rather cumbersome title of the Convention, the Rotterdam Rules apply not only to contracts of carriage by sea from or to a Contracting State, but also to contracts involving other modes, as long as the contract 'provides for carriage of goods by sea'.

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<sup>3</sup> For relevant UNCTAD reports on implementation of multimodal transport rules and on the feasibility of an international multimodal legal instrument, see [www.unctad.org/ttl/legal](http://www.unctad.org/ttl/legal).

<sup>4</sup> The substantive scope of application and the provisions regulating the application of the Convention to multimodal transport remained controversial, even at the UNCITRAL Commission meeting at which the final text was agreed, with some States proposing to make the multimodal application of the new international regime optional, or proposing to provide for continued applicability of existing national law. Others expressed concern about the suitability of the substantive liability regime in the context of international multimodal transportation. See A/63/17 at paras. 23, 93–98 and 270–278.

<sup>5</sup> Ibid.

<sup>6</sup> Note that charterparties are expressly excluded, as are 'other contracts for the use of a ship or for any space thereon' and contracts of carriage in non-liner transportation, except where 'there is no charterparty or other contract for the use of a ship or of any space thereon and a transport document or an electronic transport record is issued' (Art. 6). Note also Art. 7.

What exactly this means will depend on the interpretation by national courts, which may vary. A distinguished English commentator has summarized some potentially surprising outcomes which may arise, depending on national courts' approach to interpretation:

*“Does the Convention apply if the contract required the goods to be carried by sea but there was in fact no sea carriage as the goods were carried by some other mode in breach of contract? Here the Convention would seem to apply. Does the Convention apply if the contract required the goods to be carried by air but they were in fact carried by sea in breach of contract? Here the Convention would seem not to apply. Does the Convention apply if the contract is not ‘mode specific’, or contains a liberty or contractual option to carry by sea and the goods are in fact carried in whole or in part by sea? Might it be said that, in this example, the contract does ‘provide for carriage by sea’ in that it sanctions carriage by sea? If so, why does the Convention not apply where the carrier has a contractual liberty to carry by sea but in fact the goods are not so carried? A logical answer in both cases might be that it is irrelevant whether or not the actual carriage was by sea and that an option to carry by sea is not sufficient to satisfy the requirement that ‘the contract shall provide for carriage by sea’. I suspect however that courts may be reluctant to construe the phrase so narrowly. It would not be surprising if it were held that, where the contract contained an option to carry by sea and that option was exercised so that part of the carriage was actually by sea, the contract is to be read as though the contract provided for that part of the carriage to be by sea “.”<sup>7</sup>*

Irrespective of the lack of precision in the definition of contract of carriage, illustrated above, what is clear, however, is that *there is no requirement that the carriage ‘by other modes’ must be ancillary to the sea carriage or must be shorter than the sea carriage*. Thus any multimodal contract involving an international sea leg may be covered by the Rotterdam Rules, irrespective of which mode of transport is dominant. As a result, a contract for the carriage of goods from Vladivostok to Hull, involving rail carriage with a short international sea-leg across the English Channel could be subject to the Rotterdam Rules.

#### **Which rules apply in relation to multimodal transport involving a sea leg?**

In relation to regulation of liability arising from multimodal transport involving an international sea leg, the new Convention adopts an approach which is complex and may give rise to difficulties in its practical application.

The issue of potential overlap/conflict with existing international conventions applicable to road, rail, air and inland waterway carriage has, to some extent, been addressed in a separate provision, Art. 82. The provision gives precedence to international conventions on road, rail, air and inland waterway carriage currently in force (and any future amendments thereto “*on carrier liability for loss of or damage to the goods*”), to the extent that they apply, according to their own provisions, beyond pure unimodal transportation by road, rail, air and inland waterway, respectively.<sup>8</sup>

<sup>7</sup> A. Diamond, *The Rotterdam Rules* [2009] LMCLQ, 445 (451-52).

<sup>8</sup> However, it has been argued that despite the intention, inherent in Art. 82, of avoiding

However, otherwise, substantive rules pertaining to other modes of transport come into play only (a) in relation to losses *arising solely before or after sea-carriage*, and (b) even then only in the form of *mandatory* provisions on the *carrier's liability, limitation of liability and time for suit* contained in any international convention that would have applied mandatorily to the stage of carriage where the loss occurs, *had a separate unimodal transport contract been made* (Art. 26).

These specific mandatory provisions - and only these - would, in a cargo claim, - or in a claim by the carrier against the shipper arising in connection with dangerous goods - have to be applied in context with the substantive remaining body of provisions in the Rotterdam Rules. This is clearly a difficult task for courts in different jurisdictions, which may be expected to result in internationally diverging judgments.

For instance, if a loss arose during the road leg (a matter to be established by the claimant) of a multimodal transport which, "hypothetically" would have been subject to the CMR, then 'carrier liability, limitation of liability and time for suit' would be determined by the CMR. In every other respect, however, the lengthy and complex provisions of the Rotterdam Rules (e.g. shipper liability, delivery, jurisdiction, documentation, rights of suit etc.) would remain relevant.

In all other cases, that is to say where no international unimodal convention would have been applicable (had a separate unimodal contract been made), or where a loss cannot be localized, the provisions of the Rotterdam Rules, i.e. of a substantively maritime liability regime, would apply to determine the parties' rights and the incidence and extent of any liability. In this context it should be noted that apart from the provisions in Articles 1, 82 and 26, none of the remaining 93 Articles in the Rotterdam Rules makes reference to carriage by other modes than sea-carriage; all of the substantive liability provisions are based exclusively on maritime law concepts and principles, without particular regard to the application of the Rotterdam Rules in a multimodal transport context. Existing national laws on multimodal transportation will play no role in relation to contracts falling within the scope of the new Convention.

More generally, the complexity and considerable scope for interpretation inherent in the Convention means that extensive litigation is likely to be required to gain a clear understanding of the new rules, with courts in different jurisdictions adopting potentially differing approaches to interpretation and application of the provisions. The likelihood of conflicting legal proceedings and, ultimately, conflicting judgments at international level is further compounded by the fact that chapters in the Convention setting out rules on jurisdiction and arbitration are optional for Contracting States and, as a result, contractual jurisdiction and arbitration clauses may be valid under the same conditions in only some, but not all Contracting States.

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conflict with existing unimodal transport conventions, the potential for such conflict remains, in particular in respect of the CMR. See Diamond, *op.cit.*, at p. 454-455 for a considered discussion.