

The Inadequacy of the Existing International Maritime Transport Regimes for Modern Container Transport

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Abstract

This article intends to focus on and proves the inadequacy of the provisions that relate to containerization, mainly under the Rotterdam Rules, and partly under the Hague-Visby and Hamburg Rules since these later Rules have dealt with containerization incidentally. The Rotterdam Rules aim to establish a uniform legal regime which takes into account modern transport practices, including containerization. Such aim only seems to be partially achieved. The Rules has a partial door-to-door scope and do not provide a multimodal scope. Although the Rules have given great attention to the effect of containers in transport, most of the provisions relating to container carriage are not necessary or confusing.

Keywords: hague rules, hague-visby rules, hamburg rules, rotterdam rules, container transport, containerization

1. Introduction

Nowadays, carriage of goods by sea is subject to the existing international maritime transport regimes, namely the Hague Rules 1924, Hague-Visby Rules 1968, Hamburg Rules 1978, and Rotterdam Rules 2008 (Derrington, 2005; Mahafzah, 2010; Chan, 2009), in addition to the fact that some states apply their own national laws. Most of today's bills of lading are subject to the application of the Hague-Visby Rules, while a fairly large percentage of bills of lading are subject only to the application of the Hague Rules, and only a small percentage of bills of lading are subject to the application of the Hamburg Rules. The Rotterdam Rules, however, are not yet in force, where they will enter into force one year after ratification by at least twenty states (UNCITRAL, 2008). Thus, their application is still unknown, whether in their insertion in bills of lading or in their application through various states.

Containers appeared just over fifty years ago, where the rapid increase in the volume of container transport and its modern use significantly changed the face of the maritime transport industry; containers have not only effected the operation and relocation of ports but also the entire transportation industry (Bernhofen, El-Sahli, & Kneller, 2013). Container transport has made it conceivable to move goods rapidly, cheaply and productively from their place of assembling to their last destination (The Global Enabling Trade Report, 2012):

There is no specific fixed value for the contents of a container, because contents vary. But a crude approximation of average content value can be derived by dividing the global seaborne container trade of US\$5.6 trillion by 140 million containers: this gives an average content value of US\$42,000. A container can be shipped from the Far East to Europe for US\$1,000, which means that the cost of shipping is roughly 2.4 percent of the value of the contents.

This implies that containers are intended for multimodal transport, where they can be transshipped starting with one method for transport then onto the next (ships, trucks, trains) without unloading their substance, they have had a tremendous effect in reducing carriage expenses of goods while increasing speed, volume and proficiency (Sturley, 2009; Schmeltzer & Peavy, 1970; Selna, 1969). This frequently requires multimodal transport to take into consideration door-to-door movement of goods (Alcántara, 2002). Yet, the period of the carrier's liability under the Hague, Hague-Visby, and Hamburg Rules cannot accommodate such movements. The Hague and Hague-Visby Rules are limited in their scope of application to tackle-to-tackle movement of goods, where this means that the carrier is responsible from the moment the goods are put on board till the moment they leave the ship (Article (1/e) of the Hague Rules, and Article (1/e) of the Hague-Visby Rules), whereas the Hamburg Rules are limited in its

scope of application to port-to-port movement of goods, where this means that the carrier is responsible from the moment that the carrier is in charge of the goods at the port of loading until the port of discharge (Article (4/1) of the Hamburg Rules). Accordingly, although container transport is one of the very important features of the modern transport industry, it is not taken into account by the Hague Rules since containerization existed only in the 1960s, and as a fact we shall realize that the Hague Rules did not deal in its provisions with such issue at all. In consequence, this paper focuses only on the Hague-Visby, Hamburg, and Rotterdam Rules (Nikaki, 2010; International Chamber of Shipping). The unforeseen development in containerized trade created liability challenges that could not be solved by the Hague, Hague-Visby, and Hamburg Rules. (Berlingieri, 2009) argues that:

... none of the existing instruments applies to the whole contract period when the carrier undertakes to take the goods in charge at the door of the shipper and to deliver them at the door of the consignee, as gradually has become more and more frequent with the advent of containers.

The Rotterdam Rules, on the other hand, may replace the Hague, Hague-Visby, and Hamburg Rules, as these conventions have become outdated (Heezen). The Rotterdam Rules expanded its scope of application to door-to-door transport, which may to some extent fulfill the needs of modern container transport since these Rules do not create a full multimodal transport. The Rotterdam Rules, in its preamble and annex provides that (United Nations, General Assembly, 2009):

Concerned that the current legal regime governing the international carriage of goods by sea lacks uniformity and fails to adequately take into account modern transport practices, including containerization...

In consequence, the question that shall arise in this context is: Do the Rotterdam Rules offer a distinguished addition as expressed in its preamble and annex? This paper intends to focus on and proves the inadequacy of the provisions that relate to containerization, mainly under the Rotterdam Rules, and partly on the Hague-Visby and Hamburg Rules since the later two Rules have dealt with containerization incidentally, in addition to the Hague Rules that can be referred to in certain occasions.

This article does not intend to suggest a solution for such inadequacy, but rather to prove that the Rotterdam Rules has a partial door-to-door scope. This will be dealt with in section (2) below. Section (3), on the other hand, will deal with other inadequate provisions concerning containerization under the international maritime transport regimes. Section (3) is divided to four subsections as to cover all provisions concerning containerization; Obligations of the shipper to the carrier in carrying containers, containerworthiness, on deck carriage of containers, and limitation of liability of the carrier for containers.

2. Door-to-Door Carriage of Goods under the International Maritime Transport Regimes

One of the most important changes made by the Rotterdam Rules is the extension of its scope of application to incorporate, to some extent, door-to-door transport (Article 5(1) of the Rotterdam Rules). As noted above, the Hague and Hague-Visby Rules apply only tackle-to-tackle transport, while the Hamburg Rules, obviously, cover port-to-port transport.

In spite of the fact that it is regularly mentioned that the Rotterdam Rules adopt the door-to-door transport (Pallarés, 2011; Neels, 2011; Conrado, 2011; Eftestol-Wilhelmsson, 2010), it ought to be noticed that the carrier's period of liability relies on the terms of the contract of carriage of goods and that nothing in the Rotterdam Rules prohibit the parties of the contract from entering into a customary tackle-to-tackle or port-to-port contract of carriage. Article 12(3) of the Rotterdam Rules expressly permits the parties of the contract of carriage of goods to concede to the time and location of the receipt and delivery of the goods. The main limitation is the stipulation in Article 12(3) that the time of receipt of the goods cannot be after the beginning of their initial loading, and the time of delivery of the goods cannot be before the conclusion of their final discharge. Thus, it is highly probable for the parties, for example, to enter into a customary port-to-port contract of carriage in which the shipper delivers the goods to the container yard of the port of loading, and the carrier discharges the goods at the container yard of the port of discharge. In such a case, the carrier would only be liable for the carriage between the two container yards. As a result, the Rotterdam Rules, like the Hamburg Rules, cover both inbound and outbound shipments to or from a Contracting State, unlike the Hague and Hague-Visby Rules which cover only shipments outbound from a Contracting State.

Present day container transport, however, normally requires the utilization of door-to-door contracts of carriage, and it is rational that the underlying legal infrastructure should take into consideration the same scope of application. Under the door-to-door transport, the period of the carrier's liability extends from the time of receipt

of the goods by the carrier, regularly at an inland location in one State, until the delivery of the goods to the consignee at an inland location in another State. If the Rotterdam Rules apply to the contract of carriage, it is possible for the carrier and the shipper to agree in the contract of carriage only to a port-to-port transport as long as one leg of the carriage is sea, yet this is a choice that will be made by the contracting parties as indicated by their business needs.

In order to achieve certainty, predictability and uniformity in door-to-door transport, it is rational to ensure that a single international legal regime shall cover the entire performance of the contract of carriage, instead of the present international legal regimes in which each segment of the transport can be subject to a different contract of carriage and a different international legal regime governing that particular mode of transport, whether it be by road, rail or other inland transport including air or maritime transport. While current industry practice does provide for the contractual extension of the maritime regime inland, those contractual agreements do not at present have the underlying support of a uniform international legal regime.

The Rotterdam Rules do not establish a full multimodal or door-to-door transport system. In fact, the Rotterdam Rules was not initially meant to be a multimodal convention as the bracketing of the words ‘wholly or partly and by sea’ in earlier draft conventions indicate that the starting point was to make a new unimodal regime (Hoeks, 2008). Thus, the Rotterdam Rules establish what has been described as a ‘maritime plus’ approach (UNCITRAL, 2002; Mukherjee & Bokareva, 2010; Fujita, 2009; Mukherjee & Bal, 2009; Jasenko; Lannan) rather than a multimodal or door-to-door transport approach.

Door-to-door carriage of goods is governed by Article 1(1) of the Rotterdam Rules on the condition that the contract shall provide for carriage by other modes of transport in addition to the sea carriage. This means that the Rotterdam Rules are applicable only if one leg of the carriage is sea. Yet, even if one leg of the carriage is sea, Article (26) of the Rotterdam Rules provides that the period of the carriers’ liability before loading the goods on the ship and after discharging the goods from the ship shall fall within the scope of other conventions if applicable. This means that the Rotterdam Rules regulate the liability of the contracting carrier and the performing maritime carrier, but not the liability of the performing inland carrier (Ulfbeck, 2009). Thus, in taking a ‘maritime plus’ approach, the Rotterdam Rules recognize the possibility of conflicting with the existing unimodal inland conventions.

The Rotterdam Rules, under Article (26), ‘do not prevail’ if rules of another 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”. The term ‘prevail’ is vague. This term makes the provision sound like a provision dealing with the issues of possible conflicts with other conventions; the conflicts with other conventions are dealt with under Article (82) of the Rotterdam Rules. The wording “direct” contract between the shipper and the carrier is also vague. The contract between these parties cannot be indirect. The wording would have made more sense had it be the relation between the shipper and the performing carrier (Ulfbeck, 2009).

In an attempt to ensure clarity in respect of the interaction between the Rotterdam Rules and unimodal inland conventions, the Rotterdam Rules, under Article (82), prevent its application from affecting the application of unimodal inland conventions in respect of the carriage of goods by air, road, rail, or inland waterway that regulate the liability of the carrier for loss of or damage to the goods, and that could apply to a contract of carriage subject to the Rotterdam Rules. In this respect, Article (82) of the Rotterdam Rules takes into account only mandatory unimodal inland conventions that would have applied to that leg of the carriage, and not mandatory national law. In this respect, it is questionable whether the application of the Rotterdam Rules to a contracting inland carrier would be considered contrary to inland national law. In the United States, for example, the recent court rulings (**Spray-Tek, Inc. v. Robbins Motor Transp., Inc.**, 426 F. Supp. 2d 875, 882 (W.D. Wis. 2006); **See also**, 49 U.S.C. 14706, (2005)) require the application of the Carmack Amendment to any carrier with inland carrier status even if a maritime regime is applicable (Ulfbeck, 2009). This implies that non-American shippers may have problems in determining whether they could have a valid case against the subcontracting carrier under the Carmack Amendment if damage has happened during an inland transport in the United States.

Furthermore, under European law, there are currently two international instruments governing inland carriage: the Convention on the Contract for the International Carriage of Goods by Road (CMR) and the Convention Concerning International Carriage by Rail (COTIF/CIM) (United Nations Treaty Collection). Under the United States and Jordan (Jordan Carriage of Goods by Road Law, 2006) legislations, however, there are no such international instruments governing inland carriage. This means that the liability under the Rotterdam Rules will not be applicable to multimodal transport that includes inland transport portion in Europe since Article (82) of the

said Rules prevents its application from affecting the application of unimodal inland conventions such as the CMR Convention or the COTIF/CIM Convention. In other words, it will not be possible to extend the application of the Rotterdam Rules in Europe to the contracting carrier for damage that has occurred during the inland transport portion. The European countries will disagree with the application of the approach adopted in the English case, *Contra Quantum Corp. v. Plane Trucking, Ltd.*, 2 Lloyd's Rep. 25 (2002), which ruled that the multimodal contract is a contract '*sui generis*' subject to freedom of contract.

If, alternatively, the inland transport happens in the United States, the liability of the contracting carrier will be regulated by the Rotterdam Rules. This means that it will still be desirable to attempt to regulate the liability of the performing inland carrier by inserting a 'Himalaya Clause' (BIMCO, 2010) providing that the performing inland carrier can claim protection under the Rotterdam Rules. In consequence, when the inland transport happens in the United States, the Rotterdam Rules will apply to all the parties in the chain of contracts. In contrast, the United States contracting ocean carriers may find themselves subject to European conventions governing inland transport if damage occurred during an international inland transport in Europe. As a result, these are problems that are imported into the Rotterdam Rules as it stands today. The Rotterdam Rules, accordingly, do not govern multimodal or door-to-door transport wholly by modes other than sea (Tetley (Article), 2008; Karan, 2011).

3. Other Provisions Concerning Containerization under the International Maritime Transport Regimes

The Hague-Visby and Hamburg Rules deal with containerization incidentally by including one container clause in the limitation on carrier's liability. The Rotterdam Rules, however, do take greater note of the importance of containerization, by including reference to it in various provisions. Thus, the concept of containerization is integral to the Rotterdam Rules, where it is recognized throughout the text in various provisions. In consequence, this section shall study those provisions and shall be divided to the following subsections as to cover all provisions that deal with containerization:

3.1 Obligations of the Shipper to the Carrier in Carrying Containers

The Rotterdam Rules, under Article (27/3), created a special provision for the delivery of containers, while the Hague-Visby (Article (IV/1)) and Hamburg Rules (The Hamburg Rules have presumed fault regime without a list of exonerations) do not have such express provision. Article (27) of the Rotterdam Rules provides that:

1. Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.
2. ...
3. When a container is packed or a vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container or vehicle, and in such a way that they will not cause harm to persons or property.

Article (27/3) applies only if the shipper has packed the container. However, if the shipper does not pack the container, then a general duty shall be imposed on the shipper by applying Article (27/1). This means that whether the shipper has packed the container or not, there is a duty and obligation on the shipper as to containerized cargo. Yet, the wording of Article (27/3) differs from Article (27/1); if the shipper has packed the container, the shipper shall 'properly and carefully stow, lash and secure the contents in or on the container', while if the general duty applies, the shipper shall 'deliver the goods (Goods include containers under Article (1/24) of the Rotterdam Rules) in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading'.

There might be an overlap between the above two paragraphs since Article (27/1) uses the wording 'properly and carefully', while Article (27/3) uses the wording 'withstand the intended carriage'. However, the wording 'withstand the intended carriage' imposes more duties on the shipper since it does not only include 'properly and carefully' stow, lash, and secure the goods, but also load, handle, and unload the goods in addition to any other action that will keep the goods in a condition that will 'withstand the intended carriage'. In practice, this may lead to an awkward situation; the logical situation shall be that if the shipper has packed the container, the duties and obligations imposed on the shipper shall be much higher than the situation where he does not pack the container and leave it to the carrier, where the carrier usually imposes extra charges for such packing. The awkward situation is that the shipper pays extra charges for leaving the packing of the container to the carrier, and at the same time, the Rotterdam Rules impose more duties and obligations on the shipper in such situation. This means that the shipper shall always be advised to pack the container in order to impose less duties and obligations on him.

In conclusion, to avoid the above awkward situation, Article (27) shall be amended as to either delete paragraph (3) of Article (27) since containers are already included in paragraph (1) of Article (27), or to amend paragraph (3) so as to impose a balanced duty on the shipper as imposed under paragraph (1) of Article (27).

3.2 Containerworthiness

Article (13) of the Rotterdam Rules requires the carrier to exercise reasonable care during the whole period of responsibility. Article (14) of the same Rules, however, requires the carrier to guarantee the exercise of reasonable care during sea voyage including making and keeping ‘the ship seaworthy’, and making and keeping ‘the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.’ The provision of Article (14/c) requires that a seaworthy container has to be supplied by the carrier. If the container is supplied by the shipper, then the container will fall into the definition of the goods under Article (1/24) of the Rotterdam Rules. Article (14/c) also obliges that all containers supplied by the carrier are to be seaworthy in the same way as any hold or part of the vessel. Article (14/c) thereby requires the carrier to exercise due diligence to supply a seaworthy container (Tetley (Book), 2008; Margetson, 2008). This pertains to the approach of the Hague-Visby Rules (The United States case, *Houlden & Co v. The Red Jacket* [1977] AMC 1382 at pp. 1401-1402 (SDNY, 1977), [1978] 1 Lloyd's Rep. 300; and the Netherland case, *The NDS Provider* (SCN 1 February 2008) nr C06/082HR, RvdW 2008, 177). In other words, the carrier may be liable for not exercising due diligence in providing a cargoworthy container if it is found that the container was unfit or unsafe at the reception of, the carrying of and the preservation of the contemplated cargo. The un-cargoworthiness of the container may affect the whole fitness of the ship if it is found that such a container may endanger the safety of the entire ship and not merely the carrying of an unfit cargo.

Seaworthiness, according to Article (14/a) of the Rotterdam Rules, includes stowage of containers as to prevent damage to the ship or to other containers. Thus, the carrier needs to know the contents and weight of each container in order to make or control a stowage plan. The shipper, in consequence, shall give such information to the carrier according to Articles (29, 31, 32, and 36) of the Rotterdam Rules. Accordingly, the carrier may qualify information in the contract particulars according to Articles (36/1 and 40) of the Rotterdam Rules. Still, these Articles do not clarify to which extent must due diligence be exercised. Is it physical verification are we talking about? Or is it documents verification? Presumably the Rotterdam Rules require the minimum steps of verification, i.e. documents verification, but still it is unclear.

Article (14/b) of the Rotterdam Rules clarifies that the carrier is bound to ‘properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage’. Article (14/b) is nearly similar in its wording to Article (III.1) of the Hague-Visby Rules. The Hamburg Rules, on the other hand, do not provide any reference to the obligations of the carrier to make the ship seaworthy and to care for the cargo, since it has been deemed sufficient to provide in Article 5(1) that the carrier is liable unless he proves that he and his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. In consequence, the meaning of due diligence required under the Rotterdam Rules may to some extent be clarified by referring to the case law of the Hague-Visby Rules (The United Kingdom cases: *Project Asia Line Inc. and Another v. Shone, (The Pride of Donegal)*, [2002] 1 Lloyd's Rep. 659; *Demand Shipping Co. Ltd. v. Ministry of Food Government of the People's Republic of Bangladesh and Another, (The Lendoudis Evangelos II)*, [2001] 2 Lloyd's Rep. 304. F. C; *Transocean Liners Reederei G.m.b.H. v. Euxine Shipping Co. Ltd., (The Imvros)*, [1999] 1 Lloyd's Rep. 848, at p.851; *C.H.Z. "Rolimpex" v. Eftavrysses Compania Naviera S.A. (the Panaghia Tinnou)*, [1986] 2 Lloyd's Rep. 586, at .591; *Robin Hood Flour Mills, Ltd. v. N. M. Paterson & Sons, Ltd., (The Farrandoc)*, [1967] 2 Lloyd's Rep. 276, p.280). Nevertheless, Article (14/b) of the Rotterdam Rules adds two important issues that are not provided for under Article (III.1) of the Hague-Visby Rules, namely that the carrier is not only bound before and at the beginning of the voyage to exercise due diligence but also ‘during the voyage’, and that the carrier shall not only make the ship seaworthy but also ‘keep’ the ship seaworthy! In other words, the reference to the case law of the Hague-Visby Rules might be considered insufficient because of the difference in the wording of Article (14/b) and Article (III.1).

The following example might be beneficial. If a container becomes unfit or unsafe during sea voyage, the carrier might not be in breach of due diligence under the Rotterdam Rules if all reasonable steps are taken during the voyage and repair of container is not possible until the ship calls a port. If the carrier, however, should have been aware of the unfit or unsafe container before or at the beginning of the voyage and continued the voyage without effecting any possible repairs, then the carrier shall be in breach of due diligence under the Hague-Visby Rules. Under the Hague-Visby Rules, if the ship calls at an intermediate port and a container becomes unfit or unsafe, the carrier may not be liable, while if the same ship calls at initial port, i.e. at the beginning of the voyage, and a container becomes unfit or unsafe, the carrier may possibly be liable. Such inconsistency under the Hague-Visby

Rules is removed by the Rotterdam Rules, but the Rotterdam Rules does not clarify when the sea voyage is finished. This means that it is not clear when the duties under Article (14/a) of the Rotterdam Rules are no longer due. Two possibilities shall be considered to clarify when the sea voyage is finished, either when the ship enters the port of discharge; or when the discharge of the containers is finished.

It may be argued that the intention of the drafters of the Rotterdam Rules was that the duties end when the containers are totally discharged. It is also more coherent as 'at the beginning of the voyage' is interpreted as starting from the loading of the ship (Neels, 2011).

In conclusion, Berlingieri (2012) commented on Article (14) of the Rotterdam Rules by stating that:

[T]he degree of diligence must be assessed on the basis of the action that may reasonably be taken in the specific circumstances and such action may be, just to cite some examples, to repair the damage on board if that is feasible, to call at the nearest port if the ship may sail under its own power or to ask for assistance.

3.3 On Deck Carriage of Containers

Over (65%) of the container-carrying capacity of a ship is usually on deck (UNCITRAL Doc A/CN.9/525, 2002). Certain containers may require under deck carriage, such as refrigerated containers, while others on deck (UNCITRAL Doc A/CN.9/525, 2002). On deck carriage of containers brings with it greater risks such as containers sweep or slide overboard, moisture damage of the containers' contents, and trim of the ship because of the heavy deck loads of containers or the inappropriate containers' stowage plan, which in consequence affects the seaworthiness of the ship (Bissell, 1970-71). Particular rules for deck carriage of containers are, therefore, required to guarantee a safe carriage. The carrier shall maintain a certain liberty to determine where to stow the containers. The Rotterdam Rules regulate such matter, as explained below.

Article (25/1) of the Rotterdam Rules provides that:

1. Goods may be carried on the deck of a ship only if:

(a) Such carriage is required by law;

(b) They are carried in or on containers or vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or vehicles; or

(c) The carriage on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.

As stated above, the carrier needs discretion in deciding where to stow the container. The above Article considers such discretion clearly by providing that goods may be carried on deck only if one of the three conditions is met. However, it is not necessary to comply with Article (25/1) (b) if Article (25/1) (a) or (c) applies. This means that on deck carriage of goods must not be specially fitted to carry containers, since the Rotterdam Rules not only envisage container ships but also every ship used to transport containers. In consequence, the carrier shall comply with the duties imposed on him under Article (13/1) as to 'properly and carefully ... care ... for the goods', under Article (14/a) as to 'make and keep the ship seaworthy', and under Article (14/c) as to 'make and keep the holds and all other parts of the ship ... fit and safe'.

By applying Articles (13/1) and (14/a) in practice, it is customary to draw up a stowage plan for containers, where the contents and weight of each container shall be taken into account. In such a case, the carrier relies on the information, documents and instructions concerning the goods furnished by the shipper. Article (40) of the Rotterdam Rules regulates how 'the carrier shall qualify the information referred to in Article (36/1), to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper'. However, the Rotterdam Rules are silent to which extent due diligence is required to verify the information given by the shipper in other ways than those provided for in Article (36/1). Physical verification of the container's content may not be required but still the carrier shall presumably take minimum steps to control the information furnished by the shipper.

By applying Article (14/c) in practice, on the other hand, containers are considered as part of the ship when other containers are stowed above or alongside and thus support these containers. Modern containers' ships are deckless, so they are always stacked. However, under Article (14/b), the carrier is bound to exercise due diligence to properly equip the ship, where such duty has consequences on carriage of containers. For example, transport technologies such as the lashing of containers with a lashing bridge are a part of the equipment of the ship and have an influence on the ship's seaworthiness. The carrier also has an express duty, under Article (14/c), to supply fit and safe containers for reception, carriage and preservation. This is a vital issue since most containers are owned by or leased to the carrier.

3.4 Limitation of Liability of the Carrier for Containers

Article (59) concerning the limitation of liability to the carrier under the Rotterdam Rules is nearly similar to the provisions applicable under the Hague (Article 4(5)), Hague-Visby (Article (IV/4)), and Hamburg Rules (Article (6)). The main difference among those conventions is the limitation level of recoveries. The Hague Rules, however, does not deal with containerized cargo. The Hague Rules contain only a per package limitation (then £100 sterling), while the Hague-Visby Rules a per package limitation (666.67 SDRs) and a per kilogram limitation (2 SDRs) (Mandelbaum, 1996), applying whichever yields the higher amount. The Hamburg Rules increased those limitation amounts to (835 SDRs) per package and (2.5 SDRs) per kilogram, while the Rotterdam Rules contain a slight increase of the limitation levels on carrier liability in the amount of (875 SDRs) per package and (3 SDRs) per kilogram. Nonetheless, the economic purpose of the limitation of liability which is provided for under the provisions of the Hague, Hague-Visby, Hamburg, and Rotterdam Rules, is to enable the carrier, on the ground of knowing that its liability is limited to a figure, to offer standard freight rates for all shippers. Thus, there would be no delay and cost to the carrier and shippers, which may arise by valuating the shipment and by changing the freight rate accordingly (Diplock, 1969-1970). Although those provisions may create stability in offering standard freight rates in modern sea transport, they are awkward in their application as illustrated below.

Article (59/1) of the Rotterdam Rules provides for a per package or shipping unit limitation of the carrier's liability of 875 SDRs, and 3 SDRs per kilogram of the gross weight of the goods lost or damaged, whichever is the higher, except where the value of the goods has been declared by the shipper before shipment and included in the contract of carriage particulars, or when a higher amount than the 875 SDRs or the 3 SDRs per kilogram has been agreed upon between the carrier and the shipper. Article (59/2) of the same Rules, however, provides that packages or shipping units enumerated in the contract particulars as packed in or on a container are deemed packages or shipping units. If not so enumerated, the goods in or on a container are deemed one shipping unit.

The disadvantage of the limitation of liability of the carrier for containers that is provided for under the Rotterdam Rules is that it may lead to some extent to the same results or decisions as it used to be applicable in the United States. The United States is still applying the Carriage of Goods by Sea Act (COGSA) (Sturley, 1990), since the United States only became a signatory and did not yet ratify the Rotterdam Rules (UNCITRAL - The Rotterdam Rules). COGSA adopted the Hague Rules with certain alterations (Sturley, 1990). COGSA provisions are nearly similar to the Hague Rules provisions, and in consequence, COGSA does not provide any provision that deals with containers. Therefore, in the 1970s, the United States Circuit Courts developed various tests in dealing with containerized goods (*Leather's Best Inc. v. s.s. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971) (the intention of the parties test); *Royal Typewriter Co. v. M. V. Kulmerland*, 483 F.2d 645 (2d Cir. 1973) (the functional economics test); *The Complaint of the Norfolk Baltimore and Caroline Inc.*, Eastern District of Virginia, 478 F. Supp. 383 (1979) (each case to be taken on its merits test). The United States Circuit Courts did not regard those tests as mutually exclusive and frequently more than one test was invoked in one particular case. See, *Cameco Inc. v. American Legion*, 514 F.2d 1291 (1974)). In the 1980s and afterwards, however, the Circuit Courts examined and analyzed these tests and attempted to create some form of rationalization and to some extent followed what is applicable under the Hague-Visby and Hamburg Rules, but lead to inconsistent decisions (*Mitsui & Co. Ltd. v. American Export Lines*, 636 F.2d 807 (2d Cir. 1981); *Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdam*, 759 F.2d 1006 at 1013 (2d Cir. 1985); *Universal Leaf Tobacco v. Companhia De Navegacao*, 993 F.2d 414 at 417 (4th Cir. 1993); *Fishman & Tobin, Inc. v. Tropical Shipping & Construction Co., Ltd.*, 240 F.3d 956 (11th Cir. 2001)). Accordingly, the United States Circuit Courts were inconsistent in their decisions as to whether a container itself constitutes a 'package', or its contents constitute packages. Thus, what counts is whether the contents are enumerated in the transport document or not. In any event, the declaration of the contents of a container is always made, due to customs requirements, and it is hardly persuasive for a shipper to complain against this traditional rule by asserting that it could have enjoyed a better limitation amount if it had not forgotten to declare. The United States Circuit Courts also have interpreted the COGSA limitation of liability concerning the package definition as to include large pieces of machinery, as being non-containerized cargo, where the compensation for each large piece of machinery was \$500 as being one package (The United States case, *Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co.*, 254 F.3d 987, 997-99 (Uth Cir. 2001), holding that a 'fully mobile, preassembled, hydraulically operated staging unit' constitutes one COGSA package). In other cases, however, the limitation of liability has been interpreted to permit the carrier to limit its liability to \$500 for an entire shipment (The United States cases, *Craddock Int'l Inc; v. W.K.P. Wilson & Son*, 116 F.3d 1095, 1108-09 (5th Cir. 1997), upholding the district court's finding that a \$1.7 million fish meal processing plant shipped on a lump-sum basis was a 'customary freight unit' to which the \$500 limitation applied; *Ulrich Ammann Bldg. Equip. Ltd. V. M/V Monsun*, 609 F. Supp. 87, 90-91 (S.D.N.Y. 1985), treating thirty unpackaged Caterpillar tractors shipped on a lump-sum basis as a single

'customary freight unit' and limiting recovery for them to \$500). As a result of these interpretations, it is not difficult to find cases in which shippers have recovered only a few pennies of dollars at the point when their goods has been lost or damaged, and the best example is the United States' Supreme Court decision in *Norfolk Southern R. Co. v. James N. Kirby Pty, Ltd.* (543 US at 20 n.l. 21, pp. 437-8, 125 S. Ct. 385, 160 L.Ed. 2d., 2004 A.M.C. 2705 (Nov. 9, 2004)), where the shipper of goods worth \$1.5 million was recovered only \$5,000!

The above means that in applying the above COGSA decisions on the Rotterdam Rules this may lead to the same awkward result, where large pieces of machinery that worth thousands of dollars are going to be compensated as being one package, i.e. 875 SDRs compensation. In addition, the 875 SDRs can be applicable on a container with its contents as being considered as one shipping unit, where the contents of such container might also worth thousands of dollars. Unfortunately, and as stated above, this awkward provision concerning the limitation of liability of the carrier under the Rotterdam Rules (Force, 2012; Sturley, 2009; Tetley (Article), 2008) is similar to those provisions applicable under the Hague-Visby and Hamburg Rules. Nothing is changed under the Rotterdam Rules. Thus, the present situation concerning such limitation of liability is not as good and adequate for modern container transport as several scholars may think so (Bond, 2014; Karan, 2011; Pallarés, 2011; Lannan).

4. Conclusion

One of the aims of the Rotterdam Rules is to establish a uniform legal regime which takes into account modern transport practices, including containerization. Such aim only seems to be partially achieved.

The Rotterdam Rules has a partial door-to-door scope but they allow parties to agree to limit the scope to port-to-port or even tackle-to-tackle. Thus, the Rules do not provide a multimodal scope.

The Rotterdam Rules have given great attention to the effect of containers in transport in comparison with the Hague, Hague-Visby, and Hamburg Rules. However, most of the provisions of the Rotterdam Rules relating to container carriage are not necessary or confusing. On deck carriage of containers is an example. It is not clear why there is a different liability regime for the carriage of containers on deck in addition to deck carriage of goods, although goods include containers in their definition. Shippers, on the other hand, shall always be advised to pack the container in order to impose less duties and obligations on them. It is also not clear when the duties of the carrier to provide a seaworthy container are no longer due, in addition to the fact that the requirement imposed on the carrier to exercise due diligence to supply a seaworthy container is not clear. Moreover, the provision concerning the limitation of liability of the carrier under the Rotterdam Rules is similar to those awkward provisions applicable under the Hague-Visby and Hamburg Rules.

Should the Rotterdam Rules come into force, in general, the benefits will far outweigh the negatives, but they would slightly improve upon the limited scope of other existing international maritime transport regimes in regard to modern container transport. Although such slight improvement may increase disparity in the short run, the present situation of the application of the Hague, Hague-Visby, and Hamburg Rules is not sustainable or desirable. At present, the Rotterdam Rules are the only global alternative and are the solution that could bring much-needed uniformity and harmonization in carriage of goods by sea.

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