

Main concepts of the new Convention: Its aims, structure and essentials*

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I. Introduction

Just as I was preparing my presentation, our law firm decided to upgrade its IT system and introduced a fully upgraded Windows version, including the upgrade of all Microsoft Office applications. This occurred simultaneously with the introduction of our new branding, which included new formats and templates.

Now, you may wonder why I am complaining to you

about this: I was swearing, I hated it, I could not find anything, I was deprived of my known and familiar working plat-

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form and, instead, had to work in a new environment that had suddenly been imposed on me.

What can we learn from this? New structures will always upset us at first, and we will not see the new benefits, but will rather – and this is entirely natural – concentrate on the new obstacles. Until we find out that *we* are often the main obstacle, as we are not familiar with the new structure or environment and rebel against the special effort that such a new environment requires from us.

Now, at the risk of boring you, I'd like to share my memories from about 20 years ago: At that time I was responsible for our firm upgrading the IT system. And again the major challenge for me, a young attorney, was not the technicality of the change but the almost insurmountable objections of all the secretaries and all my colleagues to the changes. Why fix something if it is not broken? Why make our lives more complicated by introducing change?

Well, I don't feel so differently today: However, if I had not withstood all the pressure 20 years ago, we would still be working with our primitive DOS programs, and I would not be able to show off today with my nice PowerPoint presentation!

We lawyers tend to react in the same way when confronted with new legislation. This is not surprising, since we often need to work with new legislation that has been externally imposed on us, just as some partners have imposed on us the introduction of a new IT environment.

I have practiced now for many years, and have had to adapt to a great deal of new legislation, be it on a national, regional (EU) or international level. And it is already clear that we will have to adapt to a new environment for maritime transport, whether under the new Rotterdam Rules, or, if not, in whatever legal situation the dynamics created in the vacuum in the field of modern maritime transportation will generate: new national legislations abroad (e.g. new US COGSA) or at home, new regional legislations, e.g. by the EU, or even new and different international conventions.

All of this would not concern us so much, if it weren't for the fact that in the fields of maritime transportation and trade all changes on the national, regional or international level affect us directly back home, even if these developments were made many miles from here. Any further complex proliferation of the legal situation affects the way we operate, the way trade functions, and the way we need to solve the legal issues that maritime transportation and trade generate.

Change is the only constant: Even if we decide not to change, changes will happen. This could not be truer in the field of maritime environment.

What remains is a choice: Are we going to follow the proposed path, or are we going to wait for something else? Something possibly better?

II. The UNCITRAL project

The complex background of the Rotterdam Rules can best be understood if one understands the long path of evolution from the Hague to Rotterdam, via Hamburg. More than a century ago and under pressure from some national US legislation (Harter Act 1893), the international community rushed to put together a harmonizing instrument that would restore unification to the field of a maritime carriage and

transportation law. The form of that harmonization was first planned in the form of the 1921 Hague Rules, an entirely private document, which was thought to be introduced by the market in the form of a model bill of lading. As it became quite clear that only an international convention would be able to restore uniformity, the Brussels conference, in 1924, enacted the so-called Hague Rules, which soon became the general scheme for selected issues on carrier's liability in the field of maritime transportation, despite the fact that the legislative method of the Hague Rules was not perfect (the Rules were drafted in the form of a model bill of lading and not in the form of international legislation) and despite the fact that they were wrongly conceived to be a product of the shipping industry and their insurers. It is, however, a fact that all interested industries were part of the process, and that the Convention was one of the greatest success in the field of international maritime law.

The Hague Rules were the subject of a revision on selected issues in the form of the Hague Visby Rules of 1968. The 1986 revision was, however, not deemed by everyone to be a sufficient modernization of the Hague Rules, and ten years later the Hamburg Rules were established as a »counter-offer« for an international harmonization in this field. What followed was almost a trench war between the Hague Rules and the Hamburg Rules, between the »Haguers« and the »Hamburgers«. The result of this polarization was that governments became virtually stalled as they could not move in either direction without facing violent lobby groups. The positions between the two groups froze, as did the chances of any further positive development on an international level.

Unfortunately, the answer to this fiasco were national »solo runs« by national legislators and, in reaction to this, a forceful international opposition against such national or regional initiatives developed. By approximately 1990 it was realized (at the Comité Maritime International and also at UNCITRAL) that the strongly polarized positions had led to an impasse. As the subject of the carriers maritime liability still was in effect a political issue (despite the fact that I really cannot see much political relevance in such a subject) a »*deus ex machina*« was needed to reopen the discussion.

A new opportunity arose in the context of electronic commerce: When UNCITRAL's work on electronic data interchange (EDI) encountered particular problems in trying to translate the mechanisms of international trade on the basis of bills of lading into the electronic environment, some delegations had asked UNCITRAL to attempt to harmonize the way such transport documents function. This was because it was clear that no existing international maritime instrument was effectively dealing with the issues of transfer of rights and with the role of the bill of lading as a document of title. All of the existing international instruments were concentrating on the carrier's liability, but none would actually assist the international community in defining the exact mechanism that was needed to translate trade realities into an electronic environment. As the basic starting point of the architecture of the electronic environment was based on the »functional equivalent« principle, it became necessary to translate the mechanism on the functioning of the bills of lading and other transport documents in trade. But, thus far, there had been a lack of uniformity, since most of those issues had been left to national law. And indeed, many national laws would differ on important issues in this context.

When embarking on this new challenge it was soon clear that there was a need for a broader perspective. There was a case for a harmonizing process that would clarify how trade and transport operate (and interrelate) in an electronic environment; here was an opportunity to clarify this for the benefit of trade, whether in a traditional or in an electronic environment.

As UNCITRAL had realized that this was a highly practical issue that required close cooperation with the industry, it asked the Comité Maritime International (CMI) to coordinate, with a number of international organizations, a study on those issues and to come up with some proposals. In the course of this, CMI was asked to draft a possible instrument to cover those issues. The idea was not to prepare a revision of the Hague or Hamburg Rules, but rather to seek a comprehensive legislation, which would also include liability issues, and would be aimed at the regulation of the entire contract of carriage by sea and the mechanisms by which the documents generated by this contract would operate, not just for the purposes of transportation, but, more importantly, for the purposes of international overseas trade. In the first phase of this exercise, the liability issues were not at the forefront; from a political, practical, and also legal perspective it soon became clear that, when dealing with contractual aspects of transportation, this would automatically raise issues of the responsibility of the parties and subsequently also of their liability, if their responsibilities were not met.

During all the phases of the project the industries were closely integrated into the process. As always, in such projects, it is not easy to find volunteers from those industries to actively participate. However, on several levels, including the CMI level, and its national associations (for their national market) and during the UNCITRAL project, the representatives of several interest groups in national trade and maritime transport were able to represent their interests and introduce the particular issues that they wished to be covered in a future instrument. The CMI draft that was prepared by its Sub-Committee and submitted in December 2001 to UNCITRAL was therefore already a product of consultation between the industries and the national associations, members of CMI. It therefore already contained many compromises that were based on in-depth discussions between several Committees and Conferences of CMI. This working method allowed the subsequent discussion at UNCITRAL to be much more focused on trade realities, and pre-identified the main issues that needed further discussion and possible compromise.

While an enormous amount of work on many levels has gone into the Convention, as we will see today, all this effort could not, unfortunately, guarantee the product being perfect. Those of us that have been part of an international harmonizing process know that the goal of achieving a perfect international legislation is practically an utopian ideal as at all stages compromises need to be made that are not necessarily sensible or in line with a general structure or strategy of the product itself. This creates here and there the odd provision that can only be understood if one knows the background of the legislation process. However, having said that, it is my personal view that those issues which are not »perfect« have been kept to a minimum as the UNCITRAL Working Group III has over the years benefited from a very professional working spirit and was supported throughout by a number of excellent delegations, covering all regions of the globe.

III. Main features of the Rotterdam Rules

As was explained earlier, the starting point of the project was to place the contract of carriage into its proper context within trade transactions. The trade transactions are the »raison d'être« of the shipping industry. This seems to be so self-evident that one tends to forget the starting point. But it is at the same time the starting point for any definition of the scope and the nature of an international legislation covering contracts for the carriage of goods by sea. This is especially true since the maritime transportation and the movement of goods have become – in turn – the backbone of international trade. While trade is setting the need, maritime transport is actually delivering the tools to achieve the goals of trade: Global economical interaction and prosperity.

The basics for any international trade transaction are found in the underlying sales contract. The geographical distance between the places where the goods are located at the time of the sale, and the place to which the goods will have to be moved for the buyer, creates the necessity for the movement of the goods. The purpose – the »raison d'être« – of the shipping industry is to overcome this distance. Therefore, the prime purpose of the contract of carriage is to arrange for the safe moment of the goods as part of the performance of the sales contract. The sales contract will define whether it is the seller or the buyer who will enter into the contract of carriage with the carrier (seller-CIF/CIP or buyer-FOB/FCA).

In a perfect world, the seller would like to receive the purchase price once he has delivered the goods. As delivery of the goods in an overseas sale usually occurs at the time of loading the goods onto the ship (e.g. for CIF and for FOB shipments), the seller would expect to receive purchase price at this point. However, the buyer would like – again in a perfect world – to pay only if the goods are delivered in conformity with the sales contract and only after he has, himself, received the goods at destination. The gap between those two moments in times (and, in fact, also the gap between the interests of the two parties) is bridged by letter of credit facilities offered by the banks. The key moment for the delivery of the goods from the seller to the buyer is the delivery of the goods to the carrier for transportation (FOB/FCA/CIF/CIP, etc.).

The key document for this is, therefore, the transport document, not merely in its role in relation to the contract of carriage (receipt of the goods, etc), but, more importantly, as the key document for the contract of sale and the contract under which the letter of credit will be set up. Such a document proves (to the buyer) that the sold goods were indeed delivered as requested under the sales contract at loading port. The transport document therefore plays a key role in the sales contract. Thanks to the negotiability of the bill of lading, the trade partners can tender this key document to trade finance banks for the financing of the letter of credit facilities.

As the risk passes from the seller to the buyer at the beginning of transportation, and because the goods are only of value to the buyer if and when they have safely arrived at destination, marine cargo insurance is put into place to cover the risks inherent in the transportation and storage of goods during transit. The insured parties are, as a rule, the parties, »interested in the cargo«, i.e. the parties involved in the underlying trade transaction.

All industries involved in such a trade transaction (traders, carriers, freight forwarders, banks and insurers),

must, therefore, be interested in the framework under which transportation is carried out. Until recently, legislators focused mainly on those aspects which concern the safe transportation of the goods themselves (questions of responsibility and liability). However, the trading industry (and the legislators who have to safeguard its interests) must, likewise be interested in all aspects of carriage, affecting not only the trade contract, but also all the other contracts linked with it.

Those inter-disciplinary interactions and interfaces are reinforced, when, as is standard in the commodity trade, the trade transaction involves a number of sales transactions between several sellers and buyers. In such a string sale, the first seller might sell on F-terms to an F-terms buyer. This first buyer, in turn, will sell the goods (now that he has paid for the transportation) on C-terms to a new buyer, who, in turn, could sell the goods again on C-terms to any third party. Here, it is the very same contract of carriage, and the very same transport document (bill of lading), that serves a number of very different sales transactions. All the various sales contracts, often involving different terms and based on different laws, must rely on that single contract of carriage and on the same transport documents which this single contract of carriage (and its multiple trade participants) generated. This reliance on the different aspects of the contract of carriage is passed on to the banks, which establish a separate letter of credit loop for each sales contract.

While in a string sale there are a number of contracts of sale, each with their own letter of credit loop, there is just one single contract of carriage which serves all the various trade transactions. One single set of transport documents will be used throughout the string sale, and just one insurance certificate issued under the marine insurance policy covering this entire transaction during the entire time span will offer risk coverage for whoever is ultimately concerned.

As I have already mentioned, this might be pleonastic for lawyers involved in international trade and transportation. However, this »trade holistic« perspective sets a totally different level of expectation for a new international legislation on the contract of carriage: The law covering the contract of carriage must properly safeguard the smooth performance of this complicated and fragile transaction, not just once a day, but a thousand times a day, three hundred sixty five times a year, year after year, as a stand-alone transaction or in string sales!

This explains why the new Convention has chosen to take a contractual approach (as opposed to a documentary approach). The Convention must cover the entire contract of carriage and must therefore extend its scope from a liability convention to a convention on the contract of carriage. The legislation must recognize the particularities of the contract of carriage and the transport documents in the context of international trade and must be able to work in an electronic trade environment, as well as in a traditional document environment, as applied in international trade.

If one takes a contractual approach, bearing in mind the fact that a huge amount of world trade is conducted door to door (container transportation), it is only logical that the scope of a new Convention for the international contract of carriage of goods by sea should include door-to-door cover and should, therefore, be applicable not just to the maritime leg between »tackle and tackle« or between the two ports (as with the Hague and Hamburg Rules) but rather for the entire

duration of custody of the goods by the carrier. This door-to-door approach brings along an extension of the scope of application and might end up being in conflict with land transportation conventions such as the CMR and COTIF. However, the extension of the scope from a purely maritime one to an entire contract »time scope« is essential and reflects trade reality today. The UNCTAD/ICC Rules, as well as the widely used FIATA bills of lading, already reflect the commercial need (expressed by the shippers under their international sales contract) to issue door-to-door documentation. Thus, as an extension of the rules and private instruments attempting to artificially achieve such door-to-door cover, the new Rotterdam Rules can now also offer a harmonizing instrument giving reliability and security to documents issued in such a door-to-door environment.

IV. Structure of the Rotterdam Rules

It is often said that the Rotterdam Rules are complex. This is usually in reference to the number of articles and the length of the provisions in the Convention. Now that we know what the background of the Convention is, we can easily see that any argument just comparing the number of articles to those of other Conventions must fail and is inappropriate. By virtue of the fact that the Convention has widened its scope to door-to-door, and taken on board a contractual approach, and accepted the challenge of dealing with all the important interfaces between the contract of carriage to the trade transactions, it is clear that the product is comprehensive and, therefore, comparable to the very successful Vienna Sales Convention, both in terms of complexity and length.

The Rotterdam Rules are divided into eighteen chapters. One could – to gain a preliminary overview – divide the convention into three different parts (the numbers refer to the number of the chapter of the Rotterdam Rules):

First part: (General and overall principals applying to the entire contract of carriage):

1. General provisions
2. Scope of application
3. Electronic transport
14. Jurisdiction
15. Arbitration
16. Validity of contractual terms
17. Matters not governed by the contract
18. Final Clauses

Second part: (Liability Issues):

4. Obligation of carrier
5. Liability of carrier
6. Additional provisions
7. Obligation of shipper
12. Limits of Liability
13. Time for suit

Third part: (Trade-related issues):

8. Transport documents
9. Delivery of goods
10. Right of control
11. Transfer of rights

With this division in mind, one can easily find one's way through the Convention when looking for a particular group of issues.

V. The essentials: Main changes and innovations of the Rotterdam Rules

Much will be said, and in much greater detail, during the course of this event. My task here is to give an overview on the main changes and to highlight the innovations embodied in the new Rotterdam Rules. What follows is a selection of the highlights that I will only be able to touch on. In doing so, I might, however, refer to some discussions that hinge on those innovations or on some controversial provisions in order to embed the discussion in the overall system and structure of the Rotterdam Rules.

1. The scope of application

In line with the basic starting point of deciding to cover the entire period and scope of the contract of carriage rather than to limit the scope artificially to the purely maritime section or to the transportation phase, the scope of application is now triggered not merely by the »port triggers« as is the case in the Hague Rules and Hamburg Rules, but also by the places where the custody of the goods started (place of receipt) and where it ended (place of delivery).

Article 5 Rotterdam Rules therefore foresees four triggers, viz:

- (1) delivery of the goods from the shipper to the carrier for transportation (place of receipt),
- (2) loading onto a vessel (which necessarily means a port),
- (3) unloading the vessel (port of discharge)
- (4) and finally the place of delivery at the end of the transportation undertaken by the carrier (place of delivery).

If any of those places is located in a contracting state of the Rotterdam Rules, the Convention will apply. This extended scope reflects the door-to-door scope of the new instrument.

2. Liability regime: Basic obligations

When addressing on the issues of liability, which for many are the key provisions of the Convention (despite the fact that all the other issues seem to me much more important for the functioning of international trade), the drafters departed from the substance of the Hague Rules (as revised by the Visby Rules), but were inspired throughout the process by the relevant legislative solutions of the Hamburg Rules and other transport conventions. The major goal was to clarify what needed to be clarified, and to transform the model bill of lading structure of the Hague Rules into a modern transport legislation. The Convention thus follows the double dichotomy of the Hague Rules: First it separates the obligations from the responsibilities/liabilities: As with Article 3 and 4 HR, the Convention now provides for two separate chapters: Chapter 4 dealing with the obligations of the carrier, and Chapter 5 covering all aspects of the carrier's liability.

Then, within Chapter 4, the Rotterdam Rules further subdivide the obligations into

- the duty of care for the cargo
- the duty to exercise due diligence in providing a seaworthy vessel

as within Article 3 (1) and (2) of the Hague Rules. While the first obligation is applicable irrespective of the

mode of transport, the second, for obvious reasons, can only apply in the context of the maritime leg.

Three aspects deserve special attention:

- *Firstly*, there is now an explicit mention of a cardinal obligation for the carrier, so obvious that we tend to forget it (as it was forgotten in all other transport conventions): the duty of the carrier to deliver the cargo to the consignee at destination (Article 11 RR).

- Then, *secondly*, there is an adjustment made relating to the mandatory nature of the carrier's obligation in those cases where the shipper has negotiated an FIOS shipment in his sales contract. Traders do this for obvious reasons relating to the underlying chartering business or the technical realities at the ports of shipment or destination (terminals operated by the traders etc.). In such situations the shipper contracts for FIOS shipments with the carrier. The agreement is that the cargo interest (shipper and consignee) remain responsible for the loading and stowing and, at destination, for the discharging of the cargo. This agreement with the carrier is mirrored in the sales contract, as there – again – the seller and the buyer agree that the loading, stowing and discharging of the vessel will be for them to carry out and that each party is also responsible for demurrage that follows from any delay in those activities. For such situations Article 13 (1) RR adjusts the mandatory scope since otherwise the carrier would remain mandatorily responsible despite the fact that the parties have freely and on a commercially perfectly sound and sensible basis agreed otherwise. You might hear a criticism of this particular provision of the Rotterdam Rules, since some people fear that Article 13 (1) opens the door to carriers negotiating against reality a non-liability regime for their loading and discharging operations. From my brief explanations you can see that those fears are all without justification.

- *Thirdly*, the obligation of due diligence towards the seaworthiness of the vessel has now been made continuous: Whereas the Hague Rules limited the due diligence obligation to the beginning of the voyage (justified then by the inability of the carrier to effectively check matters on board of the vessel once it has left the port), the new Convention now specifies that this duty applies throughout the entire sea voyage, thereby putting an end to lengthy and confusing discussions on the »doctrine of stages« and other techniques used in the past to address unjustified loss of liability cover for shippers in a cargo case. From those adjustments alone you can see that throughout the revision process relating to the liability regime the drafters and the Working Group III maintained those aspects of the regime that fit with commercial reality as applied in day-to-day trade, and, sought to eliminate earlier privileges which now seem unjustified in a modern transportation environment.

3. Basis of liability and scheme of proof

Let's now briefly turn to the revised liability regime of the Rotterdam Rules, as specified in Chapter 5 of the new Convention. First of all, you will find most of the liability issues covered in Article 17 RR. That provision has sometimes been criticized for being too complicated and too lengthy. Well, it is long compared with Articles 4 (1) and (2) of the Hague Rules, and maybe also compared to Article 5 Hamburg Rules. The comparison, however, is irrelevant, as the approach of the Convention is different. The context of the carriers'

liability is a mandatory regime. Parties are not permitted to specify or adapt the rules, as they can under normal contract law. Therefore, any civil law legislation technique which only refers to general principles and leaves the details to the parties to agree on will fail. Furthermore, the character of the Hague Rules as a model bill of lading had to be adapted and translated into a proper legislation. Last but not least, it was decided to structure Article 17 in line with the established structure hinging on the burden of proof, giving the claims handlers and lawyers a structure via which they can »walk through« the cargo case efficiently.

Article 17 starts with the »*prima facie* case«, the first step in all cargo cases (Article 17 [1] RR). If this first step is successful, the *prima facie* case liability of the carrier is established, as is the case under the law established around the Hague Rules. Next, the general defense clause that was found at the tail end of the catalogue of Article 4 (2) Hague Rules – the so-called »q-clause« – was elevated to the basic test for the carriers' defense: the carrier must prove the lack of fault! As an alternative, but only as an alternative to a general proof of lack of fault, the carrier can rely on one of the special exceptions listed in Article 17 (3) RR. Stated more clearly than in Article 4 (2) of the Hague Rules, these exceptions only create the presumption that the carrier has thereby met its duty to prove lack of fault (exactly as applied under the Hague Rules in international courts). If Article 17 (3) RR is invoked, the cargo claimant can now prove, in turn, fault of the carrier (Article 17 [4] RR), or a probability of un-seaworthiness (Article 17 [5] RR) as the cause of the cargo loss or damage. This leaves the carrier with either the proof of due diligence (Article 17 [5] [b] RR) or, if all else fails for the carrier, with the burden of allocating responsibility in cases of an apportionment of the loss (into losses for which the carrier is responsible and those for which it is not) or in cases of concurrent causes or multiple causation pursuant to what maritime lawyers call the »Vallescura«-principle (Article 17 [6] RR). This is no more complicated than the current structure, the only difference being that a number of issues that were being treated differently in some courts or questioned by some authors or courts have now been clarified in a harmonized way.

While the main points of the liability structure of the Hague Rules have been maintained, a number of important changes have been made, two of which I will mention here:

- Deletion of the »*error in navigation*«: Much has been said and written on the importance, or lack of justification, of the exception for errors by master and crew. Be that as it may, and even though today very few courts would allow that exception to apply under the Hague Rules without questioning the crew under the obligation of seaworthiness, the deletion of that outdated exception is long overdue and, in my opinion, fully justified. It will definitely have economic consequences for the carriers and their P&I Clubs, but it is a change that needed to be made in a modern Convention that seeks to correctly allocate the risks: here, with the ship operation and, therefore, with the carrier.

- Liability for *delay*: We know that time flies. As I say, time *flies* – it does not travel by sea! Time, therefore, is not an essential element of sea transportation, be it port-to-port or door-to-door. When time is of essence, however, it is a matter for the parties to the contract of carriage to agree on an agreement that need not to be explicitly made: what is required is a consensus by the parties on exactly when the cargo must be delivered. Once there is such an agreement, the failure to de-

liver at the agreed time will trigger a liability under the Convention, a liability that was previously not covered by the Hague Rules. The liability is not strict but is subject to the same scheme of liability and burden of proof as any other cargo damage claim: delay is part of the Article 17 RR liability scheme. The liability for delay is, however, limited to two-and-a-half times the value of the freight, payable on the delayed cargo (Article 60 RR). As the general cargo loss limitation, the limitation of liability for delay does not apply in cases of »willful misconduct« following the traditional maritime formula for intentional and reckless behavior on the part of the carrier itself (Article 61 [2] RR).

4. Maritime performing party

The new Convention has expanded the possibilities for cargo claimants to sue not only the carrier with whom the shipper contracted the contract of carriage, but instead also all persons or parties that have undertaken to perform activities relating to the handling of the cargo under the contract of carriage during the maritime operations (Article 1 [7] and Article 19 RR). This concept is not new as such. It was first introduced in the context of passenger air transportation, where it is called »actual carrier«. Such a concept, however, is not translatable to sea transportation, as was tried with the Hamburg Rules, but needs to be adapted to the maritime context, where the ship is deployed through complex forms of different layers of charter parties, bareboat, time and voyage. Which of those parties would be an actual carrier, the registered owner, the bareboat charterer, the time charterer, the voyage charterer, the sub-charterer? The difficulty of establishing this is one of the reasons why the Convention now extends to all parties that have undertaken to perform parts of the cargo handling. As it was not deemed justifiable to expose land operators outside of traditional maritime or port operations to the standards of the new Convention, the scope of the parties that fall under the additional direct action is limited to the maritime parties, the »maritime performing parties«. What might look like a form of additional exposure for such parties is in fact often a welcome form of protection, since inclusion into the scope of the new Convention brings with it the protection and limitation that the Rotterdam Rules offer the contractual carrier.

The other side of the coin is that all other nonmaritime »performing parties« are not responsible under the Convention but may well, in turn, be sued for tort or any other similar principle of the applicable national law in any jurisdiction they are already currently exposed to. The Convention does not extend any protection to those third parties, as they are also not liable under the Convention. What remains to be seen is to what extent the so-called Himalaya clauses in the contract of carriage and transport document will still be able to effectively extend such a protection on a contractual basis, and to what extent such clauses will also be enforceable to third-party cargo claimants such as consignees or insurers.

5. Special maritime topics

Some typically maritime issues were separated from the general provisions and allocated to a special Chapter 6.

There are no big surprises in connection with the issues of *deck cargo* and *deviation*, as these issues were already well covered in previous conventions. Chapter 6 was, however, the

place to correct what had been developed under those headings in some jurisdictions, such as the United States of America. There, because of the terribly low figure of 500 USD/package (without any kilogram limitation alternative), the courts became creative in finding new concepts to allow those limits to be broken, i.e. the so-called »quasi deviation«. Now that these issues have been taken care for in other sections of the Convention, it is clear that those national concepts are to be overridden.

Last but not least, the Convention clarifies that nothing in the Convention is deemed to affect the way *general average* is intended to operate in the maritime context.

6. Liability for on-land damages

Chapter 6 also deals with the damages and losses that occur on land. Where loss or damages (or circumstances causing a delay) occur solely before loading the goods onto the ship or solely after their discharge from the ship, the Rotterdam Rules will not prevail over another International Instrument (e.g. the CMR), so long as such another convention would have applied to those land operations if the shipper had made a separate and direct contract and to the extent that such another convention provides for liability and a limitation in a mandatory manner. This limited network system goes further than many existing comparable system as here a fiction is introduced, namely that the regime applies as if the shipper had chosen a purely land-based form of transportation and not – as in reality – a single and uninterrupted door-to-door transport contract. The shipper thereby gains two advantages: firstly, contracting in his interest for a single transport contract and receiving a single transport document covering the entire transport chain, and then, at the same time, being able to rely on a possibly better liability system than if the shipper had contracted separate and different contracts (and received a number of different transport documents) for each leg – the »have your cake and eat it« idea.

I would like to dispute the assumption that such land conventions are automatically better than the Rotterdam Rules. The reference to the difference between 3 and 8,66 SDR for the calculation of the limitation level is much too simplistic, and is wrong for most of the typical door-to-door forms of transportation for which Article 26 RR will apply: For most, the limitation level under the Rotterdam Rules will be much higher than the CMR levels, just because of the application of the per package limitation and the container clause!

It is clear that, based on the general rules and principles of the distribution of the burden of proof, the application of Article 26 and that of any land convention will be on the party claiming that benefit, i.e. most of the time on the cargo claimant. However, as mentioned above, the privilege for shippers (fought for by shippers during the drafting of the Convention) may now favor carriers whenever the CMR kilogram limits are lower than the package limits of the Rotterdam Rules. Depending on the legal position relating to the application of the CMR in door-to-door operations this result is, however, inevitable due to the double mandatory nature of the CMR.

7. Limitation of liability

The issue of limitation was left to the very last moment, and was often referred to as being the last element of a package

deal that could solve the remaining issues that had not until then found an acceptable compromise. The limits are clearly set higher than Hague and higher than Hamburg: 3 SDR per kilogram and 875 SDR per package (Article 59 [1] RR).

The fact that the issue of limitation of the carriers liability was left to the final negotiation phase (and was therefore open to compromise) may explain why there is, in my view, not much logic in the level of the amount for limitation. The limitation issue seems to me particularly strange in relation to the overwhelming portion of maritime transportation that concerns items packed into a container. Due to the »per package limitation« and based on the so-called »container clause« the pure fact that such individual items are spelled out in the bill of lading, will often lead to a situation where the kilo limitation is greatly exceeded. The coexistence of per kilogram and per package limitations makes the whole issue odd, as there is no predictability for the industries and their insurers relating to the ultimate risk that they carry, or of the sums that they may ultimately recover. This is not new: the system already operates this way under the Hague-Visby Rules. The point I want to make here, is that the issue of limitation of liability is – based on the duality of the trigger (i.e. per kilogram and per package) and the coincidental nature of the calculation for each case – not a persuasive field for argumentation, on neither side of the scale of interest. Having said that, I know that this issue might remain an important one in the deliberation of the Rotterdam Rules: some carrier interests (and some countries that feel responsible for defending their interests) may complain about the high level, and some shippers (and the states that defend their interests) may complain that the level does not meet their expectations, which were at the higher CMR levels. The latter is definitely wrong: for those transports that are at all commercially comparable with CMR (i.e. door-to-door transportation), the additional package limitation commuted through the container clause will generate higher limits under the Rotterdam Rules than the kilo limits of CMR, and in many instances may even exceed the value of the cargo.

8. Notice period & time for suit

The practical value of the notice period is often overestimated. It states the time period in which the receiver of the cargo should notify the carrier of any *damage or loss*. As the failure to carry out this duty has no real legal consequences, all that happens is that the cargo claimant has a greater burden to prove that the damage or the loss had already occurred during the carrier's custody (Article 23 [2] RR). Any delay in notifying the carrier will make it – from a practical point of view – more difficult to prove that the damage could not equally well have happened after delivery. Thus, it does not shift any burden, nor does it legally worsen the position of the cargo claimant, whose task it is anyway to prove damage or loss during custody (»*prima facie* case«). Having said that, I recognize that to set a notification deadline has a certain practical effect, as timely notification may ease the cargo claimant's burden as to the damaged delivery due to the short time between delivery and notice.

The notice period has been established as either to immediate notification at the time of delivery, or, in cases of nonapparent loss or damage, at seven working days from the date of delivery (Article 23 [1] RR).

As the Convention provides for compensation in cases

of *delay* where delivery times were agreed upon, there is also a time within which notice of such damages due to delay must be given: this is 21 days after delivery. Here, any failure to notify the carrier in time will serve as a foreclosure of any rights to claim compensation (Article 23 [4] RR)!

The *time for suit* has now been extended to two years after delivery, or after the time the goods should have been delivered (Article 62 [1] and [2] RR). This longer period is definitely a correct choice, as under the particular court rules of some jurisdictions it is practically impossible to submit complete claims (and all the supporting documentation) within the one year period that was applicable under the Hague Rules.

9. Liability of the shipper

The Rotterdam Rules are a Convention on the contract of carriage. It is therefore only logical that they include rules on the obligations and liabilities of the shipper. It is, however, often forgotten that both the Hague and the Hamburg Rules also had strict rules for the liability of the shipper, and that much of today's excitement about this Chapter of the Rotterdam Rules overlooks the fact that most of these principles have existed since long before the Rotterdam Rules.

The most important clarification made by the Rotterdam Rules are the provisions that state that the cargo interests (shippers and consignees) are responsible for delivering the cargo fit for its intended transportation (Article 27 RR) and for later subsequently accepting receipt of the goods at destination (Article 43 RR), in line with the buyer's obligation to accept the goods sold to him pursuant to Article 53 CISG

Furthermore, as a consequence of the cargo interest's duty to provide the goods fit for shipment, the shipper must also provide all important information relating to the handling and transportation of the goods (Article 29 RR), as well as for the establishment of transport documents (Article 31 RR). If those responsibilities are not properly carried out, the shippers will be liable (Article 30 RR). For any breach of the shippers' obligation to provide contract particulars the shippers will have to indemnify the carriers against loss or damage resulting from such breach.

The most important responsibilities of the shipper relate to the shipment of dangerous cargoes: Here, the shipper must provide the necessary information on the dangerous nature of the cargo and must ensure its proper marking. Any breach of such responsibilities will result in a strict liability and an indemnity.

Of greater interest is the fact that the documentary shipper (e.g. the FOB-seller that requests that the bill of lading names him as shipper) will be treated as shipper for the purpose of this Chapter. Such an FOB-shipper will assume the same responsibilities as the contractual shipper (e.g. the FOB-buyer) (Article 33 RR).

10. Transport documents

Much will be said later about the aspects of documentation that the Rotterdam Rules cover. Those are the chapters that I referred to in my introduction as the »Trade Related Chapters«. I will restrict myself to listing for you the major types of document that the Convention will now deal with:

- **Negotiable Transport Documents (the traditional Bills of Lading):** These form the core of the provisions that

relate to transport documents, and also to the way they are used to control the goods in transit and to transfer rights.

- **Door to door Bills of Lading:** by the mere scope of application it is now clarified that such door-to-door B/L, very often used in the last 30 years in form of NVOCC-B/L, are proper bills of lading, eliminating any remaining doubts that may have existed regarding the legal nature of FIATA B/L or similar documents (while the goods were on land).

- **Straight Bill of Lading:** much uncertainty arose in the past around bills of lading that were issued in favor of a named consignee and were not marked »to order«. Their function and value were judged differently depending on the jurisdiction in which they were treated. Now, at least some aspects of such documents have been clarified.

- **Non-Negotiable Transport Documents/Sea Waybills:** Despite their treatment by the CMI Sea Waybill Rules, Sea Waybills are now part of the documentary and liability system of the Convention, as are the

- **Electronic »documents«,** that are generated within the scope of this Convention.

The innovation however, is not so much the broadening of the scope of the different documents, but more the clarifications introduced in relation to the documents, notably their role in the supervision and delivery of goods and their value to third parties relying on their content. From those clarifications that figure in the chapter on Transport Documents (Chapter 8), let me list just three here:

- **Identity of Carrier:** Until now, it was very unsatisfactory that a carrier could state in its transport document that it was acting merely as an agent, basically leaving it up to the cargo claimant to find a proper defendant for its cargo claim, within the current short limitation period of one year. Now it has been made clear that whenever it is not obvious from the transport document who the carrier is, then the cargo claimant may sue the registered owner, who in turn will have to work out, among the different layers of contracts and charter parties, who should be made internally responsible for that cargo. For the shipper and the consignee, this will no longer be their problem (Article 37 RR). In addition, the fact that liability is vested with the registered ship-owner may well facilitate an arrest of the vessel as security for the cargo claim.

- Of course there are rules on the **evidentiary value of transport documents** (Article 41 RR). Now that all types of transport document are used, the rules on their evidentiary value are adapted to each of those documents:

- B/L (conclusive evidence)
- Sea waybills (*prima facie* evidence)
- Straight B/L (conclusive evidence)

A minor issue that has been introduced is the clarification in the Rotterdam Rules that the effect of a »**Freight Prepaid**« Clause in a negotiable transport document is such that a third party may conclusively rely on the fact that the freight for the cargo has been fully paid (Article 42 RR).

11. Rights and Obligations of the parties at Destination

Again, we will hear much more about this new part of the legislation that – surprisingly – for the first time covers the rights and obligations of both cargo interest and carrier at destination. We might hear that this part is too complex, or should not have been included, or does not correspond to any given national law. Now, nobody should forget why this

Chapter was added and what purpose the new Convention aims to fulfil. In a piece of legislation that has to cover the contract and its performance, it is only logical that it should properly address the fulfilment of the contract at destination, and not only in a limited way, or limited to issues of liability, as are the existing transport conventions. This Chapter contains a number of very important principles, some of which mirror current trade practice, others of which attempt to solve some anomalies that the current trade practices have generated. These principles are based on trade usage, but of course may sometimes derive from principles of national law, or, in light of their position in trade, might require a solution that has not yet been offered by national legislation.

In light of my time restrictions and the basic task I have been given of covering the entire Convention, I can of course only superficially touch upon some of the issues:

- **Consignee's right to request delivery of the goods:**

The trade practice and the principle embodied in most national laws that one original copy of the bills of lading issued for the cargo must be produced and surrendered when requesting the delivery of goods is now stated in Article 47 (1) (c) RR. The negotiable transport document therefore enjoys its traditional role as the key to the cargo, a principle that is so important to trade and trade finance.

- **Carrier's right to request delivery by the consignee:**

A carrier whose vessel arrives at destination must anticipate that the cargo will be taken by the receivers and not just left in the custody of the carrier. Enormous costs are involved for a vessel while it waits for the consignees to collect their cargo, an attitude of receivers that most of the time has nothing to do with the carrier, but rather with issues of cargo quality under the sales contract, rejection of goods under the sales contract, lack or loss of transport documents. Very much like Article 53 CISG, which requires the buyer to accept the purchased goods, the Rotterdam Rules now require from the cargo interests to take over the cargo at destination (Article 42 RR). Not to do so is a breach of the contract, with all its consequences.

- **The rights of the carrier when the cargo cannot be delivered at destination:** Whenever the cargo cannot be duly delivered at destination, the carrier has a number of rights (but also responsibilities) to act and care for the cargo. Those rights are not new as such, as many national laws provide for them, but the pattern has now been harmonized internationally (Article 48 RR). Once the carrier has issued sufficient advanced notice, and where all other prerequisites have been met, the carrier may act to deal with the cargo, in extreme cases selling or destroying the goods pursuant to the law or regulations of the place where the goods are located at the time.

- **Delivery when Bills of Lading are not available:** Those of us who deal with shipping and trade recognize the issues associated with delivery of cargo without the production of bills of lading. We know that, again and again, the carrier is trapped in an uncomfortable situation for which he is not in the least responsible. In a situation where the trade chain has somehow blocked or stopped the transfer of the bill of lading in time to the receiver, as the B/L is still lying somewhere on a bank's desk for security of their deferred payment trade finance instrument under an L/C, the trade expects the carrier to deliver without the production of the B/L; at the same time, however, it requests the law to elevate the B/L's status to that of an almost holy document that cannot be touched. The carrier will be requested to deliver, in violation

of the law, and will in turn request the traders to issue a Letter of Indemnity (LoI) often signed by a bank. This is a situation that shows a common schizophrenic streak in trade: relying on the strict application of a set of rules, but very quickly, and with great creativity, overriding those very rules, whenever obstacles arise as a result of the rules it has itself created. Be that as it may, this is not a problem of the contract of carriage, but of trade and the way it is financed; it is not a problem the carrier should suffer for, but one that should eventually be solved by trade itself and its L/C banks. This is why the Rotterdam Rules, in their attempt to embody the contract of carriage into the trade transaction – but only as far as necessary – make it an option for the contracting parties, the carrier and the shipper, to expressly state in the negotiable transport document that it is not necessary for the document to be surrendered at destination (Article 48 [2] RR). If this option is chosen, the bill of lading has effectively lost its role as the key to the cargo, at least for the issue of delivery of the goods at destination. In such cases the complex and strange LoI practice could be eliminated. However, we all – I am sure – remain quite skeptical about whether the L/C banks would be happy to accept such documents. We will see. But, to be fair, the L/C banks currently already rely – and this for some time now – on something that is – at least for some commodity trades (e.g. the oil trade) – practically never used according to the original intention of the bill of lading as a key to the cargo, *but rather accepted as a solution based on LoIs*. As far as the Rotterdam Rules are concerned, at least the Convention has left this to the trade partners to decide and left them the possibility to choose a solution which does not involve the carrier.

- **Right of Retention:** The last issue I will cover might look insignificant, particularly when considering the provision of the Rotterdam Rules. This is the reference to rights of retention that the carrier has against the shippers and consignees for their outstanding freights and costs. Since the Rotterdam Rules have chosen to specify that the carrier has a mandatory duty to deliver at destination, the right of the carrier to refuse delivery so long as the outstanding freight debts have not been paid must be safeguarded. The Rotterdam Rules have opted not to spell out the extent and operation of such retention rights, but rather to refer to national laws that provide such rights, and they make it clear that nothing in the Convention shall affect such rights and their enforcement (Article 49 RR).

12. Right of control

One of the major issues for the drafting of the Rotterdam Rules was the introduction of provisions relating to the mechanisms as well as the rights and obligations of the parties to control the goods during transit. The background to this issue has several aspects, the most important one being the cargo interest's desire to hold onto the goods, as a matter of the sales contract, until the purchase price has been paid. As we know, there are many interested parties in international (maritime) trade, and these will change pursuant to their financing scheme through the channels of the respective L/C loops for each trading portion of the transaction. As the carrier is entirely outside this loop, it is of utmost importance, especially in the maritime trade, to clarify the issues that arise when cargo parties would like to enforce their rights under the trade contracts by controlling the goods and instructing

the carrier. Thus, the Rotterdam Rules must mirror the seller's right to control the goods in transit, a right under the Sales Contract that is often referred to as the »right of stoppage in transit«, a principle which nowadays is embodied in the Vienna Sales Convention in Article 71 (2) CISG.

It is clear that the mechanisms will to a large extent depend on the type of transport document chosen by the parties to represent the contract of carriage. While the situation is very simple if no document has been issued or if Sea Waybills or other types of non-negotiable documents have been used, the situation totally changes whenever the carriers have issued negotiable documents. Here, the carrier cannot simply rely on his contractual partner for instructions; once the bills of lading have been handed over to the first holder (usually to the contractual shipper or to the FOB shipper), the instructions and the concomitant control must depend on the production of the full set of bills of lading. This is necessary in order to ensure that the real »owner« of the control over the goods – and only the real holder – be it the unpaid shipper/seller, the L/C banks, the intermediary buyer/on-seller (i.e. trader) or the ultimate receiver wanting to adapt the shipment terms to its logistical needs etc., is entitled to control the goods.

The Rotterdam Rules have now provided for such a system, one that fully mirrors the existing trade usage: the person wishing to control the goods vis à vis the carrier while the goods are in transit must present the full set of negotiable documents. It is surprising that such a provision has only now been introduced into the harmonized maritime law, and not earlier, given the critical importance of this principle for the performance and for the financing of the sales and trade contract! Many Transport Conventions for land or air transport have had provisions on this issue for much longer, despite the fact that such issues are much less important there than in the context of maritime trade.

The Rotterdam Rules have now established the rules for identifying the party who will have the right of control; at the same time, the Rules differentiate between the rights of instruction that such a party has without the possibility of the carrier objecting, and others rights i.e. where the party is restricted to the right to negotiate different terms with the carrier.

The lacuna in my view is that the Convention limits its regulations to the negotiable documents and leaves the corresponding situation for non-negotiable documents up to national law; unfortunately, a compromise had to be made with the group representing delegations that wanted to keep the scope of the Convention as limited as possible and to leave many issues up to national law.

13. Transfer of rights

As we will all have the pleasure later of hearing a speech that focusses on the issues of transfer of rights, I will only briefly touch on this myself. Please remember that it is exactly this issue that was the starting point of the UNCITRAL Project. Article 57 RR sets out the principle, quite familiar from our own national laws, for the mechanisms for the transfer of rights for the different types of negotiable transport document. Here again, the provisions were initially planned to be much more specific and were also to be used for non-negotiable documents. The Rotterdam Rules, as they stand today, have undergone the same restriction as with other issues covered by the Convention, and leave many issues to national law.

A provision that was successfully preserved is the important clarification that any holder that is not the shipper and that does not exercise any rights under the contract of carriage will not assume any liability under the contract of carriage, solely by virtue of being a holder (Article 58 [1] RR).

14. Mandatory scope and other forms of contract

The importance of this issue is very often exaggerated. The point of departure for any legislation on issues of commercial law must be that the rules are nonmandatory in nature, and protection by means of mandatory rules should be justified only if compelling reasons are at stake. In the field of the law of contract of carriage there seems to be a paranoia, which dates back more than a century, that the omnipotent carrier will abuse his seemingly overwhelming commercial power to offer minimal services with minimal liabilities. Let's not forget the historical and political background of the Harter Act 1893 and the international reaction to it in the form of the Hague Rules 1921 and 1924: this was a political economical confrontation of national economies between states with particular economical interests in shippers (USA) and carriers (UK). After the war, CMR and COTIF, for different – again, political, reasons – went even further. Only the passenger aspects in the Air Transport Convention justify – in that section – such mandatory rules. I have been known as a forceful defender of the freedom of contract in the field of maritime transport, not because I would like to give carriers the freedom to suppress all shippers' interests, but because I have not yet been persuaded that there is a compelling reason to treat the shippers as consumers; it is a fact that the great majority of shippers today are sophisticated companies who are well used to negotiating and to finding their leverage when negotiating their deals.

Having said that, I am of course aware that the new Convention must at least mirror the existing scope of a mandatory sphere of the Hague Rules. Remember, this is limited today to a few liability provisions in cases where bills of lading are issued, the level of limitation and some documentary issues. With the extension of the scope of the Rotterdam Rules, the scope of the mandatory provisions has also been expanded, a fact that is often forgotten when people complain about an alleged expansion of the freedom of contract. What can be identified throughout the Rotterdam Rules is the protection of a *bona fide* receiver who is relying on information in the bill of lading; such protection is well justified in light of the importance such reliance plays in international trade.

The discussion on »freedom of contract« mainly concentrates on a new »animal«, the institution of the »volume contract«. Since the US delegation introduced a special treatment of the Ocean Liner Service Agreements (OLSA), the Working Group has allowed some scope for a limited freedom of contract for contracts that provide for the carriage of specified quantity of goods in a series of shipments during an agreed period of time (see the definition under Article 1 [2] RR).

This type of contract is a sort of frame agreement, a type of agreement that I, as an attorney back home, have been asked to draft on behalf of shippers many times in the recent past. The initiative came – in all cases, without exception – from shippers, all sophisticated, but not necessarily big companies. Their interest is not on the level of liability, since the issue of cargo loss is delegated to one part to their cargo insurance scheme, their focus is rather on a totally different

level of responsibility that is established around key performance indicators, where a departure from a certain defined level of loss and damage performance ratio is penalized through contractually foreseen financial penalties for carriers, far broader than the liability scheme of any Transport Convention. Mandatory principles are a hindrance that need to be overcome when drafting such contracts, they have, with all due respect, no commercial, and therefore no legal, justification.

Of course, the Rotterdam Rules have to ensure that carriers cannot abuse this avenue offered in the form of the »volume contracts«. Therefore, they state that a contract must contain a prominent statement to the effect that it derogates from the provisions of the Rotterdam Rules (Article 80 [2] [a] RR) and must furthermore indicate prominently the sections of the volume contract containing the derogations (Article 80 [2] [b] RR). These formal requirements are, in my view, quite unnecessary complications for the drafting of such agreements involving costs that, in my experience, the shipper will have to bear, resulting in a rise of costs for the party for whom the protection was sought.

Almost self-evident is the prerequisite that the volume contract must be individually negotiated (Article 80 [2] [b] RR). As a consequence of that, the Convention has introduced a concept that we maritime lawyers recognize from the US doctrine of »fair opportunity« (used there for the declaration of values for limitation purposes): A prerequisite for the freedom of contract effect for volume contracts is that the shipper be given a fair opportunity to insist on the mandatory provisions of the Rotterdam Rules (Article 80 [2] [c] RR). Furthermore, the derogations may not be effected simply by reference to another document (such as general conditions) or included in a contract of adhesion. This is an understandable provision in light of the fears of many interests, but, given the number of commercial contracts that the same shipper enters into on an almost daily basis, with much greater financial and economical importance than the concluding of a contract of carriage (e.g. Insurance Contracts, Financing and Leasing Contracts), it is still rather surprising.

The area where I have some understanding of protection relates to the protection of the rights of third parties, even though I think that such protection should rather be given by the seller to the buyer by means of the sales contract. If the seller sells »shipped« (as for a CIF sale), it is the shipper who must respond to the buyer (the third party in the contract of carriage) for any surprises the shipper had agreed with the carrier in the contract of carriage. Why should the carrier have to carry that burden? Why should the carrier give any extended protection to a third party, a carrier who has only given a contractual promise to the shipper for the benefit of a third party (Vertrag zugunsten Dritter) on terms he had agreed with the principal, the shipper? Be that as it may, the Rotterdam Rules have given an additional protection to third parties: now all the contractual terms that were drafted under the freedom of contract will be enforceable against a third party who is relying on that contract if that party received the clearly stated information that the volume contract derogates from the Rotterdam Rules and if that party gave its express consent to be bound.

This shows that the interest group that defended the mandatory scope has to the greatest extent possible received all levels of protection, a level of protection that is often not explainable other than by referring to the historical and now cultural paranoia against the carriers' ways of obtaining

advantages in negotiating a contract of carriage with the shipper. Again, my personal view is that this regulation could also often work against the interests of shippers, who were given in Article 80 RR a useful tool to adapt their shipping needs without the obstacles of mandatory rules and complex drafting prerequisites which nowadays need to be observed, not only when drafting volume contracts, but also in the course of drafting sales contracts.

An interesting provision concludes the section on volume contracts, where it is stated that the party claiming the benefit of the derogation bears the burden of proof that the (previously-mentioned) conditions have been fulfilled (Article 80 [6] RR). In my view, this provision alone would have protected the parties enough, without adding formal requirements that – in the experience of many of you here, I imagine – might be seen as unnecessary and cumbersome in practice.

15. Jurisdiction and arbitration

The argument on the justification of mandatory rules on jurisdiction falls under a similar umbrella of competing interests. As most of us dealing with commercial law know, the best way to secure predictability and justice when dealing with disputes in connection with commercial contracts is to secure an exclusive jurisdiction by means of jurisdiction clauses in the contract. In the scope of the Hague Rules, this principle was observed and supported by – at times rather critical – US courts, most recently by the US Supreme Court in the »Sky Reefer« decision. And really, there seems to me (and to a majority of delegations at UNCITRAL) to be no compelling reason to fall into the consumer protection trap and introduce such mandatory jurisdiction provisions in a convention on trade issues such as the contract of carriage. Since some economically powerful states insisted on having such a jurisdiction provision (interestingly also the US delegation in order to overturn the effects created by the Sky Reefer for the US bar and other interests), an opt-in provision was created that would allow contracting states to opt into the Chapter 14 on Jurisdiction. Since the European Commission in its delegation have made it clear that they will follow the spirit of the EU Brussels and Lugano regulation that allows and encourages exclusive jurisdiction clauses, it is clear that the opt-in will not be something that will happen in Europe, at least as matters stand today.

A simple comparison with other transport conventions might be misleading: Due to the consumer protection angle for air passenger transport, such jurisdiction provisions have an appropriate place there, at least to the extent that they cover claims by passengers. For the corresponding provisions of land-based conventions, I am sure that almost all of the German lawyers here would agree that they do not operate adequately in practice, since they are abused by carriers in other jurisdictions. If the opt-in solution had not been included, the drafting group would have had to work in much more detail to avoid a provision that would backfire on trade: all predictability would have been lost in an issue that not only defines the place of jurisdiction but also the applicability of conflict-of-law rules and procedural issues that matter so much in international commercial law; and this is not limited to liability issues but for many other issues of the contract of carriage.

In my eyes, the provisions of the Rotterdam Rules on Arbitration (Chapter 15) are even worse as they disregard

the spirit and scope of commercial arbitration. How can an arbitration clause refer (as a matter of compulsory law) to a series of places of arbitration that could be chosen by a claimant? Such a provision is in the Rotterdam Rules today, but again only as an opt-in provision for a contracting state.

Therefore, as long as the contracting state does not opt in, matters basically stay as they are; not entirely, however: maritime lawyers will have to check the status of ratification and will be faced with foreign applications of the Rotterdam Rules for contracting states that have opted in to those Chapters, a situation that is not so different from one where national legislators or courts establish their own rules on jurisdiction as happens quite often even today.

VI. How will the Rotterdam Rules affect international trade?

May I conclude by asking to what extent the Rotterdam Rules will or might affect international trade? The question of course must be answered by the relevant industries and market players. This is one of the reasons why I heartily congratulate the German Transport Association for having organized this informative colloquium and for having invited so many industry players to comment on the proposed Convention.

I think that such a discussion must cover at least two angles: first, a proper industry view (what is in it for us, what is bad for us?), and, second, what is our role in the mechanics of international trade and how will we have to adapt in order to improve the way matters are organized in future?

For all of us, once the 20 contracting states requested by the Convention have ratified the Rotterdam Rules, a time of adaptation will commence. There will be an »initial learning curve« (as with any other major development in legislation) and, at least for a period, a time of initial »co-existence« with the Hague Rules, the Hague Visby Rules and the different and various national and regional legislations that exist today. From an economical perspective this is a period of investment.

It is at this point that the drafters of the Rotterdam

Rules will be tested. We will see then whether they have offered a workable and modernized liability system and have provided trade and its many different players with a system based on which the different commercial activities can be undertaken with greater international clarity and predictability. To achieve a better solution than the Rotterdam Rules within the next century is a utopian idea. No clever national or regional legislator is capable of producing something that will really solve the issues on an international level. Contrary to the situation with land transportation, where regional solutions are realistically imaginable, the maritime door-to-door phenomenon is inherently international and global, and is undermined by any regional or national stand-alone solution. And here is the key point of the Rotterdam Rules: not the deletion of error in navigation, not the volume contract and not the level of limitation, not the fact that the Rotterdam Rules could (or, in my view, must) replace the Hague Rules and its protocols, as well as the thousands of legislations existing today in this field, but rather that they successfully overcome the historical rivalry between Hague and Hamburg and prevent national interests or regional bodies from creating stand-alone solutions in the future. And believe me, nobody here, I am sure, would suggest that the process of such alternative national or regional legislation would guarantee a better legislation than the one created within the UN bodies in the form of the Rotterdam Rules.

To borrow from Shakespeare proverb, I would say that while it is true that the enemy of the good is the better, the situation today may look good for some, but the tendency towards national, regional or other alternative legislation will make the law deteriorate and atomize itself into different layers of competing and conflicting types of rules, legislation and court decision. Therefore, we need to accept the »good but not perfect« in order to not lose what is the most precious asset of international trade: international harmonization of the key issues, such as the contract of carriage with its vital functions in relation to the movement of goods and the production of vital documents that fuel the transaction and its financing. There is no alternative, it is not even a choice to remain passive: if we did, things would change anyway, arguably in directions none of us might take responsibility for.