Multimodal perspectives of the carriage of goods by sea

Towards a uniform system of international transport law via the Rotterdam Rules

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Content

Abstract

This paper focuses on the evolution of the regulation of the international transport of goods by sea with particular reference to the issues connected to multimodal transport.

In the current economic context, international maritime transport is frequently only a phase of a complex multimodal transport operation, but which is not specifically regulated by any international convention currently in force. Furthermore, the analysis of the relevant comparative case law demonstrates that national courts are uncertain as to which liability regime to apply on the multimodal transport operator. Of course, uncertainty it is depending from the parties, as to which law is applicable depending on which is the competent court.

Although the new Rotterdam Rules are not revolutionary, for the first time they provide a liability regime for the sea carrier which specifically takes into consideration the development of sea transport from a «multimodal perspective», and it fills in the gaps left by the international conventions that are currently in force. From this perspective the author would like the Rotterdam Rules to be promptly ratified by the major maritime States so as to (at least partially) resolve the situation of uncertainty that characterises the subject of multimodal transport.

Key words

Hague-Visby Rules, Hamburg Rules, liability of the carrier, multimodal transport, Rotterdam Rules.

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1 From Brussels to Rotterdam via Hamburg

The International Convention for the unification of certain rules of law relating to bills of lading (Brussels, 25 August 1924, hereinafter the 1924 Brussels Convention) ([1]) was conceived in order to compromise the interests of maritime carriers with those of shippers with the aim being to limit the abuse of freedom of contract ([2]). This conception clearly also marked the 1968 Visby Protocol ([3]) and the 1979 Brussels Protocol ([4]), both amending the 1924 Brussels Convention (hereinafter the Hague-Visby Rules) with the sole intent of clarifying certain matters already regulated by such Convention ([5]).

The United Nations Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978, hereinafter the Hamburg Rules) had the aim of defending cargo interests in a stronger way than provided for by the 1924 Brussels Convention and its amendments. But, despite their pro-

1 () Entered into force on 2 June 1931.

2 () G. Treitel, F.M.B. Reynolds, Carver on Bill of Lading, London, 2001, 9-062; H. Karan, The carrier's liability under international maritime conventions: the Hague, Hague-Visby, and Hamburg rules, Lewiston-Queenston-Lampeter, 2004, 21 ss.; S.M. Carbone, Contratto di trasporto marittimo di cose, 2nd ed. (in cooperation with A. La Mattina), Milano, 2010, 251 ss. The preparatory works of the Hague-Visby system were edited by F. Berlingieri, The Travaux Préparatoires of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924, the Hague Rules, and of the Protocols of 23 February 1968 and 21 December 1979, the Hague-Visby Rules, Antwerp, 1997, and by M. Sturley, The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoiries of the Hague Rules, Littleton-Colorado, 1990.

3 () Protocol to amend the International Convention for the unification of certain rules of law relating to bills of lading (Brussels, 23 February 1968), entered into force on 23 June 1977.

4 () Protocol to amend the International Convention for the unification of certain rules relating to bills of lading as modified by the Amending Protocol of 23 February 1968 (Brussels, 21 December 1979), entered into force on 14 February 1984.

5 () Uniformity of discipline of carriage of goods by sea is now compromised because not all the contracting States of the original 1924 Brussels Convention have adopted the 1968 Visby Protocol and the 1979 Brussels Protocol. At this respect, please, see the "Status of Ratification of Maritime Conventions" schedule provided for by the Comité Maritime International website (http://comitemaritime.org/Uploads/Publications/CMI_YBK_Part_III.pdf).

moters' intention, the Hamburg Rules – their drafting style apart ([6]) – have been largely acknowledged as being along the same line of continuity of the Hague-Visby Rules: indeed, carriers' liability has not been significantly enhanced ([7]).

With regard to the maritime leg of the transport, also the new discipline adopted in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam, 23 September 2009, hereinafter the Rotterdam Rules) ([8]) is substantially consistent with the above-mentioned uniform maritime transportation law currently in force, even if it better defines some of its aspects ([9]). The drafters of the Rotterdam Rules have taken into account the reasons why the Hamburg Rules have failed to reach sufficient international consensus ([10]), and have come back to a carrier liability scheme similar to that

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6 () H. Karan, The carrier's liability under international maritime conventions: the Hague, Hague-Visby, and Hamburg rules, cit., 47. See also R. Asariotis, Contracts for the Carriage of Goods by Sea and Conflict of Laws, in Jour. Mar. Law and Comm., 1995, 293 ff.

7 () R. Asariotis, Allocation of liability and burden of proof in the Draft Instrument on Transport Law, in Lloyd's Mar. Comm. Law Quart., 2002, 388; W. Tetley 2008, Marine Cargo Claims, 4th ed., Cowansville, 2008, 936-937; M. Lopez de Gonzalo, Operatività e limiti delle regole di diritto uniforme relative al trasporto marittimo, in Jornadas de Lisboa de Direito Marìtimo – O contrato de transporte marìtimo de mercadorias, Coimbra, 2008, 80-81, S.M. Carbone, Contratto di trasporto marittimo di cose, loc. cit. For a comment on the first decisions applying the Hamburg Rules see A. La Mattina, Le prime applicazioni delle Regole di Amburgo tra autonomia privata, diritto internazionale privato e diritto uniforme dei trasporti, in Riv. dir. int. priv. e proc., 2004, 597 ss.

8 () UN Resolution 63/122. The Rotterdam Rules has not yet entered into force. In order to check the ratification status of the Rotterdam Rules see the UNCITRAL website (www.uncitral.org).

9 () In general, on the evolution of the preparatory works of the Rotterdam Rules see, inter alia, F. Berlingieri, S. Zunarelli, Il Draft Instrument on Transport Law del CMI, in Dir. maritt., 2002, 3 ss.; H. Honka, The Legislative Future of Carriage of Goods by Sea: Could it not be the UNCITRAL Draft?, in Scandinavian Studies in Law, 46, 2004, 93 ss.; J. Schelin, The UNCITRAL Convention on Carriage of Goods by Sea: Harmonization or De-Harmonization?, in Texas Int'l L. J., 321 ss., 2008-2009, p. 321 ss.; M. Sturley, Transport Law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules, in R. Thomas (ed.), A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules, Oxon, 2009, 1 ss.

10 () The Hamburg Rules are in force between a limited number of States (at present 34).

adopted by the Hague-Visby Rules ([11]). In particular, the «presumed fault» of the carrier, established by Article 17.2, is based on some fundamental obligations with which the carrier must comply ([12]), coupled with a complex (and more precise) onus probandi scheme, which is modelled on an amended version of the traditional «excepted perils» system ([13]).

However, it would be a mistake to consider the Rotterdam Rules as a mere updating of the Hague-Visby Rules ([14]): as a matter of fact, the new 2009 Convention modifies the carrier liability regime currently in force, and takes into account both the technical evolution of sea transport and a full-fledged assessment of the duties which a modern carrier should fulfil ([15]).

No wonder, therefore, that nautical fault has been removed from the list of the «excepted perils» and the Rotterdam Rules provide not only the obligation of the carrier to «properly crew… the ship…during the voyage by sea» ([16]), but also the carrier's «vicarious liability» in relation to every fault of the shipowner's employees and/or agents during the execution of the carriage ([17]). Furthermore, the obligation to provide a seaworthy vessel is extended by Article 14.a throughout the entire dura-

In order to check the ratification status of the Hamburg Rules see the UNCITRAL website (www.uncitral.org).

11 () R. Asariotis, Allocation of liability and burden of proof in the Draft Instrument on Transport Law, 389 ss.; F. Berlingieri, S. Zunarelli, C. Alvisi, La nuova convenzione UNCITRAL sul trasporto internazionale di merci «wholly or partly by sea» (Regole di Rotterdam), in Dir. maritt., 2008, 1173 ss.; A. Diamond, The next sea carriage Convention?, in Lloyd's Mar. Comm. Law Quart., 2008, 149 ss.

12 () See Articles 11, 13 and 14.

13 () See Article 17.3. The complexity of the onus probandi scheme adopted by the Rotterdam Rules is highlighted by K. Mbiah, The Convention On Contracts For The International Carriage Of Goods Wholly Or Partly By Sea: The Liability and Limitation Of Liability Regime, in CMI Yearbook, 2007-2008, 289.

14 () A. Diamond, The next sea carriage Convention?, cit., 149.

15 () M. Sturley, The UNCITRAL Carriage of Goods Convention: Changes to Existing Law, in CMI Yearbook, 2007-2008, 255; K. Mbiah, The Convention On Contracts For The International Carriage Of Goods Wholly Or Partly By Sea: The Liability and Limitation Of Liability Regime, cit., 290; S.M. Carbone, Contratto di trasporto marittimo di cose, cit., 288 ss.

16 () See Article 14.

17 () See Article 18.

tion of the sea transport, and no longer exclusively at its beginning, as is the case under Article III.1.a of the Hague-Visby Rules. Finally, the fire exemption has been maintained with some important clarifications regarding its scope of application. In addition to that, specific obligations have been entrusted to the carrier in order to avoid a negative impact of the carriage on the environment: reference is made, in particular, to the obligations indicated in Articles 15, 17.3.n and 32 of the Rotterdam Rules ([18]).

The Rotterdam Rules have also taken into account some features of the liability regime contained in the Hamburg Rules derogating from that embodied in the Hague-Visby Rules. This is true, in particular, for the liability of the carrier for a delay, which has been envisaged in Article 21 of the Rotterdam Rules. However, such liability for a delay only arises if the goods are not delivered in a timely fashion at the place of destination indicated and the contract of carriage provides for a specific date for this purpose; therefore, if there is no special provision regarding the time of delivery, then no such carrier liability can be assessed. Hence, in this respect, Article 21 of the Rotterdam Rules differs not only from the Hague-Visby Rules, where no liability for a delay exists, but also from the Hamburg Rules, whose ambiguous Article 5.2 provides for the liability of the carrier if goods are not consigned at the time established in the transport contract, or «within the time which it would be reasonable to expect from a diligent carrier» ([19]).

In short, it can be assumed that the Rotterdam Rules continue along the path of the regime of the traditional carrier liability schemes, and yet provide important clarification, as well as innovations with respect to those parts of the Hague-Visby Rules that are no longer consistent with the evolution of the practical needs of maritime transport. In this sense, we do agree with the definitions of the Rotterdam Rules, which

[18] () F. Munari, A. La Mattina, The Rotterdam Rules and their implications for environmental protection, in J. Int. Mar. Law, 2010, 370 ss.

[19] () The debate regarding the opportunity to insert in the Rotterdam Rules a provision similar to article 5.2 of the Hamburg Rules has been recorded during the preparatory works (see UNCITRAL document A/CN.9/645, par. 64).

have been baptized as «evolutionary and not revolutionary» ([20]) as well as a fair compromise between «tradition and modernity» ([21]).

2 Uncertain rules for uncertain judges

Moreover, an important new element of the Rotterdam Rules is established in Article 26 where a specific regime has been introduced for multimodal transport in some particular cases. As a matter of fact, such provision extends - under certain conditions - the period of liability of the maritime carrier to non-sea legs of a certain multimodal maritime transport ([22]).

As is known, in the current economic context, international maritime transport appears with more frequency as a mere phase of a multimodal transport ([23]). But this kind of transport is not specifically regulated by any international convention, the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980, hereinafter the Geneva Convention) never having entered into effect. In this situation, Italian and foreign judges have attempted to determine the legal regime which is applicable to multimodal transport (especially to multimodal maritime transport), in some cases extending the international maritime transport rules currently in force to all (or to part) of the phases of such kind of transport ([24]). In particular, where the maritime segment of the carriage was the «prevailing route», the Hague-Visby

[20] () M. Sturley, The UNCITRAL Carriage of Goods Convention: Changes to Existing Law, in CMI Yearbook, p. 255.

[21] () P. Delebecque, The New Convention on International Contract of Carriage of Goods Wholly or Partly by Sea: a Civil Law Perspective, in CMI Yearbook, 2007-2008, 264.

[22] () S.M. Carbone, A. La Mattina, L'ambito di applicazione del diritto uniforme dei trasporti marittimi internazionali: dalla Convenzione di Bruxelles alla UNCITRAL Convention, in Riv. dir. int. priv. e proc., 2008, 981 ss.

[23] () UNCITRAL docs. A/CN.9/WG.III/WP.29, para. 12-26, and A/CN.9/510, para 26-32.

[24] () See the case law reported by A. La Mattina, Il trasporto multimodale nei leading cases italiani e stranieri, in Dir. maritt., 2007, 1010.

Rules have often been applied to the entire multimodal transport (and, therefore, even to the non-maritime phases of such multimodal transport) ([25]); on the contrary, in other cases the decision is based on the so-called «network liability system», thereby splitting the liability regime of the multimodal carrier and affirming that such a regime varies on the basis of the place where the damage to the goods occurs. In these cases, the Hague-Visby Rules have only been applied if the damage is caused during the maritime phase of a certain multimodal transport ([26]).

Both of these trends represent positivism and criticism.

On the one hand, the application of the Hague-Visby Rules to multimodal transport irrespective of the localization of the damage to the goods eliminates all doubts concerning the discipline of «non-localized» damages (meaning those damages that arise from an unknown route) ([27]), but it does not seem at all convincing, because (a) it represents a «strain» for the application of the Hague-Visby Rules, which does not

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[25] () Trib. Genova, 12 March 1992, in Dir. maritt., 2003, 430; Moore-McCormack Lines, Inc. v. International Terminal Operating Co., 619 F. Supp. 1406 (S.D.N.Y. 1983); Hoogovens Estel Verkoopantoor v. Ceres Terminals, Inc., 1984 AMC 1417; Marubeni-Iida, Inc. v. Nippon Yusen Kaisha, 1962 Amc 1082; Berkshire Fashions Inc. v. MV Hakusan II, 954 F.2d 874, 881 (3d Cir. 1992); Hartford Fire Ins. Co. v. Orient Overseas Container Lines, 230 F. 3d 549, 555-556 (CA2 2000); App. Aix-en-Provence, 10 July 1984, in Dr. mar. fr., 1987, 84.

[26] () App. Roma, 5 January 1948, in Foro it., 1948, I, 697; Trib. Genova, 15 April 1950, in Dir. maritt., 1950, 576; App. Milano, 7 November 1950, in Foro it., 1951, I, 76; Trib. Milano, 26 February 2004, in Dir. maritt., 2006, 1220; Cass., 6 June 2006, n. 13253, in Riv. dir. int. priv. e proc., 2007, 407; Reider v. Thompson, 339 US 113, 1951, AMC 38 (1950); Compagnie Française de Navigation a Vapeur v. Bonnasse, 19 F.2d 777, 779-780, 1927 AMC 1325, 1329 (2d Cir. 1927); HSBC Insurance Ltd. v. Scanwell Container Line Ltd, in Eur. Transp. Law, 2001, 358 ss.; App. Versailles, 25 May 2000, Merz Conteneurs v. Brambi Fruits et al., unpublished (but available on the website www.legifrance.gouv.fr); App. Rouen, 13 November 2001, Via Assurance c. Gefco, in Rev. dr. comm. (Scapel), 2002, 30; Mayhew Foods Ltd. v. Overseas Containers Ltd. [1984] 1 Lloyd's Rep. 317; Oberlandesgericht Hamburg, 19 August 2004, in TranspR, 2004, 403. Contra see Trib. Genova 11 January 2011, unpublished, where it was affirmed that multimodal transport is a sui generis kind of carriage to which the system of liability provided for by the regulation of each segment of the carriage is not applicable. On this matter see also E. Turco Bulgherini, Trasporto combinato delle merci, in Porti mare terr., 1979, 5, 90.

[27] () K. Diplock, A combined transport document. The Genoa Seminar on Combined Transport, in J. Bus. L., 1972, 273.

take into consideration routes which are different to the maritime one ([28]) and (b) it leaves sufficient room for many doubtful aspects with reference to the notion of «prevailing route».

On the other hand, recourse to the «network liability system» does not create compatibility problems with the application of the international «unimodal» conventions and, in particular, with the Hague-Visby Rules, but it does create uncertainty concerning the applicable regime of responsibility which is unpredictable before the damage occurs and which may not be determined at all in the case of «non-localized» damage. Such uncertainty may not only increase litigation, but may also result in increased insurance costs connected with multimodal transport.

In light of such uncertainties, the Supreme Court of the United States in the Kirby case ([29]) inaugurated what has been defined as a «conceptual

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[28] () F. Berlingieri, Le convenzioni internazionali di diritto marittimo e il codice della navigazione, Milano, 2009, 33.

[29] () Norfolk Southern Railway Co. v. James N. Kirby, Pty. Ltd. 543 U.S. 14 (2004) 300 F.3d 1300. This case regards a transport from Sydney (Australia) to Huntsville (Alabama, USA). James N. Kirby, Pty Ltd., an Australian manufacturer, hired International Cargo Control (ICC) to arrange for delivery of machinery from Australia to Huntsville by "through" transportation. The bill of lading that ICC issued to Kirby (ICC bill) designated Savannah as the discharge port and Huntsville as the ultimate destination, and set ICC's liability limitation lower than the cargo's true value, using the default liability rule in the Carriage of Goods by Sea Act (COGSA) ($500 per package) for the sea leg and a higher amount for the land leg. The bill also contained a "Himalaya Clause," which extends liability limitations to downstream parties, including, here, "any servant, agent, or other person (including any independent contractor)." Kirby separately insured the cargo for its true value with co-respondent, Allianz Australia Insurance Ltd. When ICC hired a German shipping company (Hamburg Süd) to transport the containers, Hamburg Süd issued its own bill of lading to ICC (Hamburg Süd bill), designating Savannah as the discharge port and Huntsville as the ultimate destination. That bill also adopted COGSA's default rule, extended it to any land damages, and extended it in a Himalaya Clause to "all agents … (including inland) carriers … and all independent contractors." Hamburg Süd hired petitioner Norfolk Southern Railway (Norfolk) to transport the machinery from Savannah to Huntsville. The train derailed, causing an alleged $1.5 million in damages. Allianz reimbursed Kirby for the loss and then joined Kirby in suing Norfolk in a Georgia Federal District Court, asserting diversity jurisdiction and alleging tort and contract claims. Norfolk responded that, among other things, Kirby's potential recovery could not exceed the liability limitations in the two bills of lading. The District Court granted Norfolk partial summary judgment, limiting Norfolk's liability to $500 per container, and certified the decision for interlocutory

approach» ([30]) affirming that a multimodal transport contract that includes a «substantial» maritime route and a «shorter», but not necessarily «incidental», land route has a maritime nature (unless it results in the different will of the parties to such a contract). Therefore - independently from the identification of the place where eventual damage to the goods occurs – such a multimodal transport contract has to be regulated by the US Carriage of Good by Sea Act (i.e. the Federal legislation on maritime transport where the 1924 Brussels Convention has been implemented). In the case in question the Supreme Court (i) completely overrides the «network liability system» (that - as was said by the Court - may cause «confusion and inefficiency»), as it is not relevant in determining where the damage to the goods occurred, and (ii) grants more certainty and predictability to the conclusions of the case-law trend indicated above, making it unnecessary to measure with «a ruler» which is the «prevailing» route of a certain multimodal maritime transport in order to determine its applicable legal regime and giving substantial enphasys to the relevant «surrounding circumstances» of the case ([31]).

In the same perspective, in the Kawasaki case, the Supreme Court has affirmed that a through bill of lading issued abroad by an ocean carrier can apply also to the domestic, inland portion of a multimodal transport (providing both for sea and rail carriages), with the consequence

review. In reversing, the Eleventh Circuit held that Norfolk could not claim protection under the ICC bill's Himalaya Clause because it had not been in privity with ICC when that bill was issued and because linguistic specificity was required to extend the clause's benefits to an inland carrier. It also held that Kirby was not bound by the Hamburg Süd bill's liability limitation because ICC was not acting as Kirby's agent when it received that bill.

30 () M. Sturley, An overview of the latest developments in cargo liability law at the United States Supreme Court, in Dir. maritt., 2005, 358.

31 () In this sense the Supreme Court has affirmed that "realistically each leg of the journey is essential to accomplishing the contract's purpose: so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce – an thus it is a maritime contract (...); its character as a maritime contract is not defeated simply because it also provides for some land carriage". But the Supreme Court has also affirmed that "[g]eography then is useful in a conceptual inquiry only in a limited sens: if a bill's sea components are insubstantial, the bill is not a maritime contract": Norfolk Southern Railway Co. v. James N. Kirby, Pty. Ltd., cit., 662.

that not only the ocean carriage but also the inland carriage will be governed by the 1936 US Carriage of Goods by Sea Act ([32]).

On the basis of what above we cannot ignore the situation of uncertainty that characterizes the rules which are applicable to multimodal transport due to the absence of an unequivocal case law. Only a specific regulatory intervention that is desired by most parties, and that has resulted in interest in the UNCITRAL, would solve the problem ([33]).

3 Multimodal transport and the Rotterdam Rules

In this perspective, the drafters of the Rotterdam Rules (and before them, the drafters of the CMI *Draft Instrument on Transport Law*, on which

[32] () Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 130 S. Ct. 2433 (2010). This case regards a transport from China to inland United States destinations. "K" Line issued to the shippers four through bills of lading (i.e., bills of lading covering both the ocean and inland portions of transport in a single document). The bills contain a "Himalaya Clause," which: (i) extends the bills' defenses and liability limitations to subcontractors; (ii) permit "K" Line to subcontract to complete the journey; (iii) provide that the entire journey is governed by the Carriage of Goods by Sea Act (COGSA), which regulates bills of lading issued by ocean carriers engaged in foreign trade; and (iv) designate a Tokyo court as the venue for any dispute. "K" Line arranged the journey, subcontracting with Union Pacific for rail shipment in the United States. The cargo was shipped in "K" Line vessels to California and then loaded onto a Union Pacific train. A derailment along the inland route allegedly destroyed the cargo. Ultimately, the Federal District Court granted the motion of Union Pacific and "K" Line to dismiss the cargo owners' suits against them based on the parties' Tokyo forum-selection clause. The Ninth Circuit reversed, concluding that that clause was trumped by the Carmack Amendment governing bills of lading issued by domestic rail carriers, which applied to the inland portion of the shipment. The Supreme Court has reversed such decision, affirming that because the Carmack Amendment does not apply to a shipment originating overseas under a single through bill of lading, the parties' agreement to litigate these cases in Tokyo is binding.

[33] () A. Furrer, M. Schürch, Cross-border Multimodal Transport - Problems and Limits of Finding an Appropriate Legal Regime, in K. Boele-Woelki, T. Einhorn, D. Girsberger, S. Symeonides (cur.), Convergence and divergence in Private International Law - Liber Amicorum Kurt Sier, The Netherlands, 2010, 402-403.

the Rotterdam Rules are based ([34])) have intended to specify the extension, in certain cases, of the application of such regulation to forms of multimodal transport (*door-to-door)* that include a maritime route. In an extreme synthesis, the new convention elaborated on behalf of the UNICITRAL does not have the aim of regulating multimodal transportation *tout court,* but - under certain conditions and in the presence of certain circumstances - only to extend its scope of application in relation to the land and/or air and/or internal waterways route (if any) and/or subsequent to maritime transport. Therefore, the Rotterdam Rules are a little *less* of a «true» multimodal convention (such as the 1980 Geneva Convention) but a little *more* of a convention on maritime transport: correctly, in fact, a «multimodal maritime approach» has been referred to ([35]).

In this sense, the Rotterdam Rules, firstly, extend the definition of a «contract of carriage» relevant to its proper scope of application and affirm in Art. 1.1 that such a contract shall provide for carriage by sea and may provide for carriage by other methods of transport in addition to the sea carriage; also the combined provisions of Art. 5 (entitled «General scope of application») and Art. 12 (entitled «Period of responsibility of the carrier») provide that the period of responsibility of the carrier includes the moment from the receipt of the goods until the moment of the delivery of the same goods to the consignee, and that the responsibility of the carrier is not necessarily limited to the phase when the goods are placed on the ship. Furthermore, from Art. 5 of the Rotterdam Rules it is clear that the places of the receipt/delivery of the goods may eventually not coincide with the ports of loading/unloading.

As has therefore been observed, the 1924 Brussels Convention, in its original formulation, was a «tackle-to-tackle» convention, the Hague-Visby Rules and the Hamburg Rules were «port-to-port» conventions, and, finally, the Rotterdam Rules will become a «door-to-door» conven-

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[34] () See UNCITRAL doc. A/CN.9/WG.III/WP.21.

[35] () M. Sturley, Scope of the coverage under the UNCITRAL Draft Instrument, in J. Int. Mar. Law, 2004, 146; E. Eftestøl-Wilhelmsson, The Rotterdam Rules in a European multimodal context, in J. Int. Mar. Law, 2010, 274.

tion, even if they merely concern «wet» multimodal transports (i.e. multimodal maritime transports) ([36]). In reality, as already observed above, the text in question is not really a «door to door» convention because the scope of application of the Rotterdam Rules is limited both under the «subjective» profile as well as the «objective» one.

The scope of application of the Rotterdam Rules is limited under the «subjective» profile because this new convention, once in force, will only be applied (a) to the «contractual» maritime carrier - and this (subject to the «objective» limits mentioned further on) with reference to the services he provides, directly or indirectly, on the maritime route as well as on the land or air or internal waterways route - and (b) to the so-called «maritime performing parties», meaning those individuals who are charged by the same contractual carrier to execute - «during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship» (Art. 17) - «any of the carrier obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods» (Art. 1.6.a). In other words, the Rotterdam Rules - as implicitly stated in Art. 4.1.a - may not be applied towards «non-maritime carriers», unless they operate «exclusively within a port area» (Art. 1.7). This limitation has been criticized by some US scholars, who have highlighted the fact that the Rotterdam Rules are not able to attain the results that were recently reached by the Supreme Court in the Kirby case, therefore obliging operators to utilize the Himalaya Clause in order to allow an extension of the regulation for maritime transport to land carriers ([37]).

The Rotterdam Rules are also limited under the «objective» profile as they do not provide a uniform regime for all the phases of a multimodal transport, - but, by adopting the so-called «network liability system»- only in the case of losses or damage to the goods that are verified exclusively

[36] () F. Berlingieri, Basis of liability and exclusions of liability, in Lloyd's Mar. Comm. Law Quart., 2002, 382.

[37] () M.E. Crowley, The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: the Multimodal Problem, in Tul. L. Rev., 2005, 1502-1503.

on one route. As a matter of fact, Art. 26 determines the application of the «international instrument» to such phases (not also the state legislation) ([38]) specifically shaped for the relevant non-maritime route if the interested party would have stipulated a separate transportation contract and if such an instrument imperatively stipulated («either at all or to the detriment of the shipper») the provisions that concern the responsibility of the carrier, the limitation of liability and a time bar. Hence, from an «objective» point of view, the Rotterdam Rules may only be applied with regard to non-maritime routes if: (a) damage to the goods occurs exclusively on a non-maritime route or the damage is not localized (meaning that the route of the transport where the damage occurs is unknown) and (b) there is no mandatory uniform regime of the non-maritime route concerning the responsibility of the carrier, the limitation of liability and a time bar, or, even though there may be such a regime, it does not clash with the corresponding provisions of the new Convention ([39]).

The rationale of this regulation resides in the will to avoid conflict between the Rotterdam Rules (in the part where it extends its proper scope of application to the non-maritime route) and the «unimodal» conventions which regulate land, train, air and internal waterway transportation.

Concerning this last proposal, moreover, some scholars have affirmed the superfluous nature of such a disposition considering the fact that there is no conflict amongst the multimodal provisions of the Rotterdam Rules and the scope of application of the «unimodal» conventions, in so far as these - with the exception of what we will state further on ([40]) - do not have as their objective the regulation of multimodal transport ([41]).

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38 () As was said during the preparatory works of the Rotterdam Rules, the word instrument was preferred to the term convention «in order to include the mandatory regulation of regional organizations»: see UNCITRAL doc. A/CN.9/WG.III/WP.81, note 88.

39 () See UNCITRAL doc. A/CN.9/WG.III/WP. 78, para. 18: «the limited network system only comes into play in situations where (…) there might be a conflict between the liability provisions of the draft convention and the liability provisions of the relevant unimodal transport conventions».

40 () See note 42 and the corresponding text.

41 () M. Riccomagno, The liability regime of th MTO under the UNCTAD/ICC Rules as

Furthermore, the fact that Art. 26 of the Rotterdam Rules provides for the application of another «international instrument» to non-maritime routes (but only with reference to the responsibility of the carrier, the limitation of liability and concerning the time bar) implies that for those routes two different responsibility regimes may be contemporaneously applicable: (i) the one that would have belonged to the route if a «unimodal» transport contract would have been executed for that route (i.e. the regime provided for by CMR, COTIF, CMNI or the Montreal Convention), but limited to the above-mentioned aspects of the responsibility of the carrier, the limitation of liability and the time bar, and (ii) that of the Rotterdam Rules, with reference to all the other aspects of the transport contract (amongst these, for example, are the obligations of the shipper, the transport documents, the delivery, the «right of control», the transfer of the rights that arise from the contract…). From this «an obscure patchwork of different regimes which were not designed to complement each other» would arise ([42]), that, in any case, would not resolve all the potential conflicts between the new Convention and the other applicable instruments with regard to non-maritime transport, thereby not solving the problem of an «overlap» with reference to that which is indicated under point ii above ([43]).

Lastly, with the aim of preventing possible conflicts with other «unimodal» conventions, Art. 82 - similar to Art. 25 of the Hamburg Rules, but with more specific wording - contains a safeguard clause concerning the scope of application of the multimodal transport regulations provided for by other «unimodal» conventions currently in force. Art. 82 therefore provides that the Rotterdam Rules do not affect the application of multimodal transport regulations provided for by other conventions to maritime routes ([44]).

influenced by International Conventions on the sea carriage, in Dir. trasp., 1998, 72.

42 () UNCTAD doc. A/CN.9/WG.III/WP.21/Add. 1, Annex II, para 44.

43 () D. Glass, Meddling in multimodal muddle? – a network of conflict in the UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly] [by sea], in Lloyd's Mar. Comm. Law Quart., 306, 2006, 333 ss.

44 () In particular, the Rotterdam Rules do not affect the application of the following provisions: (a) Art. 18.3 of the Warsaw Convention and Article 18.4 of the Montreal

4 The way to «utopia» or the «next-best solution»?

Rotterdam Rules do not regulate any kind of multimodal transport, but – subject to certain conditions - they extend their scope of application to non-maritime routes involving «wet» multimodal transport. In other words, the Rotterdam Rules do not provide a «uniform» regime of responsibility concerning the multimodal carrier, but – by applying a sort of «network liability system» - they try to fill the gaps left open by the «unimodal» conventions currently in force and, in particular, by the Hague-Visby Rules.

Of course, it would have been better to have a complete regulation of multimodal transport ([45]) and I hope that one day it would be possible to have a truly «uniform» system of international transport, common to all phases of carriage, based upon what has been called the "concept juridique d'amodalité" ([46]), and regulated by a sole convention in lieu of several «unimodal» instruments ([47]).

But at present that way is far to have concrete chances to be implemented as it has been demonstrated by the complete failure of the 1980 Geneva Convention on International Multimodal Transport of Goods.

Bearing in mind what above, although they are not revolutionary, the Rotterdam Rules should be looked as the first international instrument

Convention on air transport; (b) Art. 2 of the CMR Convention on road transport; (c) Art. 1.3 and Art. 1.4 of the CIM – COTIF Convention on railway transport; (d) Art. 2.2 of the CMNI Convention on internal waterways transport. On these topics, see E. Røsaeg, Conflicts of Conventions in the Rotterdam Rules, in J. Int. Mar. Law, 2009, 238 ss.; E. Eftestøl-Wilhelmsson, The Rotterdam Rules in a European multimodal context, cit., 284 ff.

45 () A. La Mattina, La responsabilità del vettore multimodale, in Dir. maritt., 2005, 71-72.

46 () C. Scapel, Le concept juridique d'amodalité, in Mer, terre, air… vers l'amodalité, Annales IMTM, Marseilles, 2012, 42 ff.

47 () S.M. Carbone, Il trasporto marittimo nel sistema dei trasporti internazionali, Milano, 1976, 119; G. Romanelli, Riflessioni sulla disciplina del contratto di trasporto e sul diritto dei trasporti, in Dir. trasp., 1993, 295 ss.; Id., Principi comuni nelle convenzioni internazionali in tema di trasporto, in Dir. mar., 1999, 197 ss.

which provides a regime concerning the liability of the sea carrier which specifically takes into consideration the development of the sea transport into a «multimodal perspective».

In conclusion, at present, it seems that the ratification of the Rotterdam Rules by the major maritime States, with a view to replacing all the international conventions on the transport of goods by sea currently in force, could be the first reasonable step in order to (partially) resolve the situation of uncertainty that characterizes the subject of multimodal transport ([48]), or - as it has also been said - the "next-best solution for international multimodal cases" ([49]).

[48] () E. Eftestøl-Wilhelmsson, The Rotterdam Rules in a European multimodal context, cit., 274.

[49] () K. Haak, Carriage Preceding or Subsequent to Sea Carriage under the Rotterdam Rules, in Eur. Jur. of Commercial Contract Law, 2010, 71.