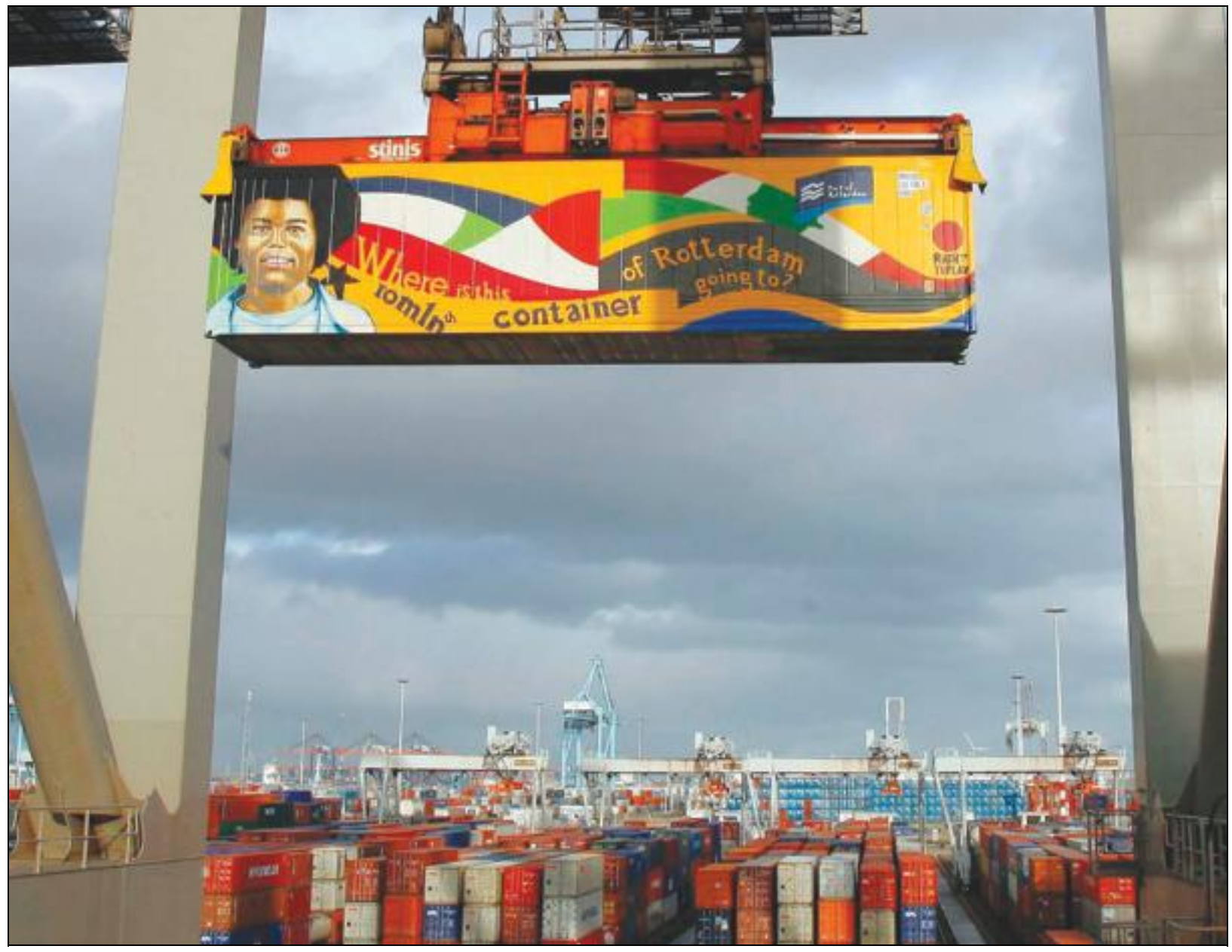
International law on the carriage of cargo is finally entering the global, digital, containerised age with the Rotterdam Rules. But there are bound to be one or two unresolved issues along the supply chain, writes Roger Hailey



Questions of balance in the Rotterdam Rules

HAMBURG, Hague and Visby — sounding like a fusty maritime law practice — are to be overtaken by an untried set of 96 articles intended to reshape the carriage of goods liability regime for two generations. Welcome, then, to the Rotterdam Rules.

Much has been written, and will be in the decades to come, about the Rotterdam Rules, which still labour under the ponderous title of the Convention for the International Carriage of Goods Wholly or Partly by Sea.

They have been carefully nurtured over 15 years by the United Nations Commission on International Trade Law, whose mandate is "the progressive harmonisation and unification of the law of international trade".

The Rotterdam Rules are designed for a door-to-door, globalised, digitised trading environment where maritime transport no longer stands alone, port to port, but is part of a multimodal supply chain.

On September 23, in a fanfare event at the Dutch port, the book containing the eponymous rules will be signed by an estimated 15 nations, including the US. More than a decade after a much narrower convention was initally conceived as a response to e-commerce, the expanded Rotterdam Rules are inching towards full ratification and thus the maritime law hall of fame.

But why do we need the Rotterdam Rules, and why are European shippers and freight forwarders so viscerally opposed to a convention that strives to meet the legal challenges of door-to-door cargo transported in this internet age?

Gertjan van der Ziel, a maritime lawyer formerly with Nedlloyd, led the Dutch delegation during the lengthy negotiations to draft the Rotterdam Rules. He explains why they are necessary: "The current laws are outdated, with the most relevant being the Hague Rules, supplemented by the Visby amendments. The Hague Rules date from 1924 and are based on shipping practices when there were still sailing ships on the high seas."

The days of the clipper are long gone; containerisation, multimodalism, electronic communication, e-commerce and globalisation have followed in its wake.

"We had to update maritime law," says Mr Van der Ziel. "There was simply no alternative but to pursue a genuine modernisation.

"When a convention is outdated, judges and arbitrators try to fill the gaps, adjusting the old law to the new environment. A process of crumbling starts because the judges and arbitrators are reinventing their own wheels within the legislation."

Another forceful proponent of the Rotterdam Rules is Michael Sturley, from the University of Texas Law School. He was part of the large US delegation at the Uncitral negotiations.

"There are two principal problems with the status quo. The first is Hague Visby. In the late 1930s, we had, essentially, international uniformity in maritime law covering the carriage of goods by sea. Pretty much the whole maritime world had adopted the Hague Rules at that point," Prof Sturley says.

"Now we have the Hague-Visby Rules, the Hamburg Rules and the unamended Hague Rules — there are two versions of the Hague-Visby Rules, with or without the special drawing rights protocol.

"In practice there are dozens of different versions of the Hague Rules, as national courts have interpreted their own versions somewhat differently. And you have Hague-Visby countries that are not fully Hague-Visby countries. The Scandinavians have their own code, which has got rid of a lot of the catalogue of defences, for example."

He adds: "China has its own maritime code which is a mixture of Hague, Hague-Visby, Hamburg and a number of unique Chinese elements.

"The US — roughly 25% of the world's trade — is a party to the Hague Rules but in many ways interprets them differently than other Hague Rules countries, let alone Hague-Visby and Hamburg countries."

In short, the legal regime for international liability in maritime trade is now a mess, and the "uniformity" of 70 years ago needs to be reintroduced.

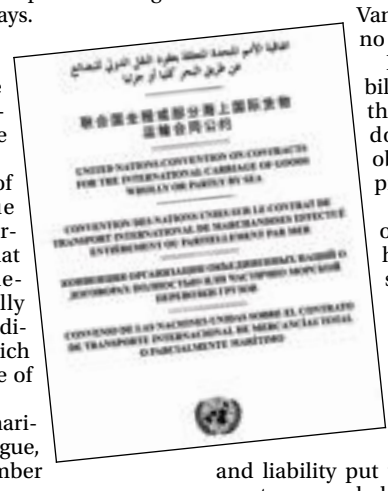
The critics of the Rotterdam Rules (their case will be presented in a later report) contend that the rules are weighted in favour of carriers and are biased against the cargo owners.

"That is blatant nonsense," Mr Van der Ziel says. "Within the Comité Maritime International all interests were represented: shippers, carriers, insurers and academics.

"If you look at the balance of liability, the balance has shifted in favour of the cargo side. This burden has certainly not shifted in favour of the carriers."

The rules' beginnings can be traced back to when the P&I Clubs and the CMI (the latter tasked with the unification of maritime law "in all its aspects") asked the Uncitral e-commerce group for help in framing a new convention that would deal with documents of title in an electronic format.

"But delegates said that if Uncitral was dealing with documents of title it should not forget one of the most important: the bill of lading," Mr Van der Ziel adds.



It sounds easy, but the difficulty with a bill of lading is that the tangible element — the bit of paper itself — plays an important role in that it identifies who is entitled to the cargo. In essence, possession of the bill of lading means ownership of the goods. "To replicate that function electronically is quite difficult," says Mr Van der Ziel. "And even today there are no techniques available to do that."

If you want to digitise the historic bill of lading, first you have to codify the legal environment around the document — the many rights and obligations that became custom and practice of the trade.

Uncitral decided to concentrate on that aspect but realised it did not have the expertise in the subject and so kicked the ball back to the CMI.

With help from freight forwarder representatives, shippers and others in the supply chain, a basic draft was written and then liability issues were added to the remit.

"That increased the workload considerably. The bill of lading and liability put together meant that a new instrument was needed to replace the old ones," Mr Van der Ziel says.

Pressure was applied by the US to speed things up and the result was what will shortly become the Rotterdam Rules. But are they too complicated, as has been stated by the critics?

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Gertjan van der Ziel, maritime lawyer

Yes and no, according to Mr Van der Ziel. "Compared with the previous conventions it is much more ambiguous, certainly," he says.

"But you can also say that the previous conventions were much too simple with liability issues. For instance, the position of the banks in trade finance was not dealt with at all. These are quite important commercial matters and quite typical of the customs and practices around a bill of lading that have to be codified."

He adds: "Essentially the Rotterdam Rules codify existing practices, and the existing practices are complicated. The rules are no more complicated than the practice of multimodal transport. They are catching up with more matters than the current Hamburg and Hague-Visby Rules.

"If a lawyer behind his desk says the Rotterdam Rules are complicated and he does not understand them, he does not understand the practices of modern transport. The convention is no more complicated than the practices."

Most maritime specialists agree that a new convention was needed. As Prof Sturley says: "Every human creation is flawed to some extent. I don't think we can be too harsh on the generation that gave us the Hague Rules for not anticipating containerisation and the things that grew out of containerisation, and e-commerce.

"One of the main problems we have today is that the current maritime regimes cover at most only port-to-port carriage. The Hamburg Rules are port to port, Hague and Hague Visby are tackle to tackle. Nobody contracts tackle to tackle.

"In the liner trades today the cargo is to the door, or some variation of that, and none of the existing maritime regimes is adequate to deal with that.

"It is very important to recognise that this is not a zero-sum game. The Rotterdam Rules are for the benefit of the industry as a whole — both shippers and carriers.

"We cannot guarantee that the Rotterdam Rules will provide uniformity, but they are the only chance we have to get uniformity in this generation."

So, what happens now?

On September 23, those countries that sign up to the rules are obliged (under the Vienna Convention on the Law of Treaties 1969, article 18) to refrain from acts that would defeat the object and purpose of the treaty, until the country in question has made its intention clear not to become a party.

A signature is the first step, ratification is the next. The rules need 20 states to ratify, and then one year later it will enter into force. Some countries, such as Japan, will accede rather than sign or ratify. It saves on paperwork.

Officials close to the organisation of the Rotterdam event — a reward for the hard work of Dutch delegation — expect the US to sign, alongside Denmark, the Netherlands, Spain, Italy, Poland, Norway, Belgium and Switzerland.

Germany will not sign, and there is uncertainty about the UK's position.

Uncitral sees signing as an enormously important political act and is hopeful that China will be there too, pen in hand. The necessary 20th ratification could take place by mid-2010, but that may be a little optimistic, say some observers.

But if the US and China are signatories, expect a flurry of signatures to follow in due course.

Realistically, it will take at least a decade or more of individual rulings in various jurisdictions before the Rotterdam Rules settle down as a tried and trusted regime for liability in the maritime supply chain.

The basis for the Rotterdam Rules is firmly rooted in the Hague, Hague-Visby and Hamburg rules. Prior experience with those regimes should inform future rulings. And there is no shortage of weighty tomes appearing on the bookshelves, acting as guides for the operators and maritime lawyers.

Meanwhile, the European Commission in Brussels, although it participated in the Uncitral negotiations, is preparing its own regional directive on liability that may include a derogation from parts of the Rotterdam Rules.

In time, rather like its predecessors, the Rotterdam Rules will be amended. Perhaps, one day we will see the Rotterdam-Antwerp Rules.

Tomorrow: The case against the Rotterdam Rules

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