BOOK REVIEW

Sturley, M, Fujita, T, van der Ziel, J, *The Rotterdam Rules, The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Sweet & Maxwell, London, 2010). liv + 444 pp, HB. ISBN: 9781847037343, £235.

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The maritime law world waited expectantly for UNCTRAL's new 2008 Convention on the Carriage of Goods by Sea, designed as a replacement for the Hague Rules 1924, Hague/Visby Rules 1968 and Hamburg Rules 1978. The new 'Rotterdam Rules' (snappily and appropriately named after one of the world's greatest ports) were finalised in 2008 with the aim of providing a uniform international carriage regime adapted to the needs of e-commerce. The Rules have the potential to have an equal, or greater, international importance for world trade as, eg, the Vienna Convention on International Sales.

In maritime law, generally, uniformity has always been an important goal, but in the case of the carriage of goods by sea there is currently a terrible mess internationally. Apart from the three sets of Rules dating back to 1924, there are still States which are party to none of the international regimes. All this causes great uncertainty. In the present international climate, the world is particularly looking to the USA and China to see if they will take the lead; if both of these States adopt the Rotterdam Rules it seems inevitable that the rest of the world may have to follow.[1] To some extent the EU will also be important but, despite the underlying desire of the EU Commission to take a controlling role, there are still many differing voices among the EU States. The greater fear is that, in the absence of a quick degree of international acceptance of the Rotterdam Rules, the Commission will take the opportunity to introduce regional legislation. That would be bad, not only because it would undermine attempts to achieve international uniformity, but also because there is little confidence in the Commission's knowledge of maritime law or its ability to draft commercially realistic solutions.

Debates about the intrinsic merits of a new carriage Convention can be passionate. The reviewer well remembers the many discussions and conferences from the late 1970s about whether to adopt the Hamburg Rules, and the particularly forceful views of some in the shipping and insurance industries who warned against changing an existing system that 'worked' (albeit after a fashion). To believe some of the critics at the time, world trade might almost come to an end if the 1978 Rules were adopted. Thirty-five years later most of these arguments seem unrealistic and the entry into force of the Hamburg Rules has caused hardly a flutter. So, while the same arguments about the destabilising effect of change may be made against the Rotterdam Rules, what is true is that the shipping and commercial world does not want yet another *competing* regime.

At the time of writing only Spain and Togo have ratified the 2008 Convention incorporating the new Rules, but those Rules have already been the subject of many learned articles and edited books, not to mention countless PhD theses (many held in abeyance during the protracted negotiations). A new Convention in a central area of international trade is bound to attract such close attention. Calculations of commercial self-interest have already thrown up strong advocates for and against the new Rules; there are still fierce critics of any change to an existing model; a new Convention that does not provide perfect or different solutions is a problem for other critics (some of them peeved that they were not invited to be among the new generation of drafters); there will be academics keen to generate research publications and organise big conferences; and there will be the (sometimes partisan) voices of those who were directly involved in the drafting and who want to explain what was really intended.

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[1] This is not simply a political issue; the Rotterdam Rules have wide scope of application provisions that mean that those trading with Rotterdam Rules' States may find that the Rules 'trump' national provisions. The choice of law of a Rotterdam State may also be significant to allow full application of transferable 'electronic transport records', ie 'electronic' bills of lading.

The authors of this book might seem to fall into the last category. All three currently hold academic posts (in the US, Japan and the Netherlands) and act as legal practitioners, although Van der Ziel also had considerable experience in the container trade with Nedlloyd. They were all members of the UNCITRAL Working Group which produced the Convention text and whose collective effort is properly acknowledged in the Preface. But the influence of Sturley and Van der Ziel, in particular, goes back much before the start of UNCITRAL's involvement.

The genesis of the Rules is a matter of some interest, and perspectives differ. Chapter I of the book provides the historical background from the 19th Century onwards and the creation of the 1924, 1968 and 1978 Rules. Special emphasis is laid on the involvement of UNCITRAL in the new Rotterdam Rules, although there is little by way of explanation of the politics involved in their production. For instance, why it was UNCITRAL and not UNCTAD that took the lead within the UN family, and how a simple mandate to introduce e-commerce updating of the current regime was used as, in effect, a Trojan horse to produce a new code of carriage by sea. What were the tensions between the negotiating parties, and the influences of particular delegations or individuals? What were the different drivers for the new Rules?

There were those in the CMI who wanted substantive modernisation of the Hague-Visby Rules (recognising the continued political unacceptable of the Hamburg Rules to many developed States); there was also the need to take account of e-commerce. But the other main driver for *international* action was the fear that the US, led by the US Maritime Law Association (of which Sturley was an influential member), would produce its own national updating of its (Hague Rules based) Carriage of Goods by Sea Act 1936. While the general influence of unilateral US action in the Harter Act 1893 can now be seen as being a beneficial catalyst for international reform, non-US readers of the various 1990s drafts of a US Carriage of Goods by Sea Bill were somewhat horrified by the parochial nature of the language and solutions being proposed. It was the fear of the international effect of such unilateral action that was one of the drivers that persuaded many outside the US to urge that coordinated international action was to be preferred.

Understandably, perhaps, this 'US' factor has not been widely or openly discussed and is not mentioned in the book; nor is the controversial 'deal' done by the US at the last stages of negotiation to offer higher limits of liability to African States in exchange for support on the broader package (including volume contracts).[2] This deal may well have served the purpose of obtaining a package that would satisfy, inter alia, the various 'pork barrel' interests in the US, but the process of obtaining it and the higher limits involved caused some upset among some key States, and this will not assist an early adoption of the Rules. This wider political background of diplomatic wrangling is therefore largely unexamined in the book, with the authors concentrating instead on an analysis of the text of the final product.

So there is a flavour in some ways that this book is an 'authorised version', indeed with an Introduction by the Secretary of UNCITRAL itself. There is very little by way of negative criticism of the drafting process, or of the final product. To some extent, this is inevitable. The production of any law with such a long gestation period (over 10 years) inevitably means that those involved in the drafting have an intellectual commitment to the outcome. It is no secret that UNCITRAL has organised a number of conferences around the world as it seeks to persuade States to ratify, and there is obviously a perception that the drafters will feel the need to proselytise. There is also a fairly short window of immediate opportunity when national delegations are still fresh with enthusiasm at the product of so much work, and while the relevant civil servants have the matter on the national agenda; the longer the gap between the production of the Convention and entry into force, the greater the risk that its value will be less appreciated.

On this basis it is entirely appropriate for there to be a major publication which puts forward a positive and authoritative explanation of what was intended by the drafters. There will be plenty of opportunity for others to pick holes in the drafting, or to respond to such criticism.[3] These others can also comment critically on some of

[2] The authors do rather coyly note about this that 'a small group of nations finally brokered a compromise…' (167).
[3] For the most penetrating analyses, see the admirable debate between two highly respected maritime lawyers, Anthony Diamond and Francesco Berlingieri in [2009] LMCLQ 445 and [2010] LMCLQ 583. Diamond had already written extremely clear and incisive appraisals

the sensitive political realities in the drafting background not addressed in the book. If and when[4] the Rotterdam Rules enter into force, a future edition of this book might be more forthcoming about the drafting tensions and the role of personalities.[5] It would be fascinating to know about all this before memories fade. There are interesting stories to be told of how at least two of the authors started with a blank piece of paper as part of the transition from a unilateral US draft to that which might appeal to the broader membership of the CMI.

Still, I think it is unlikely that the present authors will provide such a personalised approach, even in future editions of this book. The book is very much written *ex cathedra*, without much (if any) expression of doubt about proper interpretation of provisions. This is partly because the authors write with authority, conviction and logic, but also because the underlying tone has the confidence of those producing a definitive account — almost with the certainty of a court of final appeal. In this respect the style of the writing is sometimes more akin to that of a Civil Law judgement than of the personalised approach of the Common Law judges (who may be given to doubts and some introspection). Two out of the three authors are Civil lawyers, so this melding of styles is appropriate and effective.

So the readers of this book will not have identified for them any failings or omissions in the Rotterdam Rules which are *not* capable of a reasonable solution as offered by the authors.[6] There was no doubt a fear that if the very architects of the Rotterdam Rules identify problems with the drafting process, or substantive outcomes, then this might deter some States from adopting the new Rules.[7] When the Rotterdam Rules are widely in force this will be less of a concern for the authors and UNCITRAL, so there may be more scope in future editions for these authors to be rather more frank about any drawbacks in the Rules. At this stage, it is quite understandable for them to be cautious and to present the features of the Rules as they are intended to work, and to point to alternatives which may have produced less satisfactory solutions.[8] Where there was controversy in negotiations, the arguments of each side are generally presented fairly, eg on volume contracts (375-383). Difficulties are identified, eg as to delivery without presentation of a transport document,[9] but not in a way that advertises some fundamental defect which would prevent States adopting the Rules. Thus, the authors are at pains to counter complaints that the new Rules are unfriendly to shippers and address this issue specifically (200-201). Their conclusion is perhaps more significant for what it omits to acknowledge ('…it is implausible to suggest that the shipper's obligations and liabilities are *substantially* increased under the Rotterdam Rules…').[10] Here perhaps we come closer to a recognition that the Rules do imply some value judgments and it is significant that a pro-carrier view is offered of *The Giannis NK*[11] decision on dangerous goods ('an *unreasonably* broad interpretation').[12]

I do not want to give the impression that this is a superficial textbook, lacking critical intellectual content. On the contrary, it is an extremely authoritative and expert analysis (with inside knowledge) of complex and interlocking provisions. The changes introduced by the Rotterdam Rules are always set in the context of the existing systems (Hague/Visby, and Hamburg). What the authors present is a handbook, very much influenced by the style of the Restatements of the American Law Institute, where there is a statement of a rule, then a

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of the Hague-Visby and Hamburg Rules (as well as the ill-fated Multimodal Convention 1980); Berlingieri was a guiding force in the CMI's reconsideration of the Hague-Visby Rules. Although Berlingieri had the advantage of the last word in the exchange on the Rotterdam Rules, it must be said that his responses are generally more convincing in their freshness and, typically, penetrating logic.

[4] It is hard to believe that the Rotterdam Rules will not at some stage receive the necessary 20 ratifications or accessions. Even the Hamburg Rules entered into force some 14 years after production.

[5] In the reviewers' experience, the drafting of international maritime law conventions is still highly influenced by leading personalities, and see Gaskell, N, 'Decision Making and the Legal Committee of the IMO' (2003) 18 IJMCL 155.

[6] Rather, the authors are more likely to provide explanations, e.g. for apparent superfluity; see eg the exclusion of 'charterparties' in Art 6(1)(a) and (b) (40-41); and the continued reference to nationality (44-45). These are generally convincing.

[7] Thus, there is no particular value judgment made about contractual liberties given to the carrier to restrict responsibilities after unloading (Art 12(2)(b), derived from the Hamburg Rules), or to rely on FIO clauses under Art 13(2): see generally 88-92.

[8] Drafting compromises can be presented as being an elegant combination of strengths rather than an admission of weakness (see eg scope of application Chapter II, 23, 30), or a decision to leave outstanding issues to national law (delay liability under Art 21, see 123). Apparent omissions can be justified eg on the basis of present and expected trade practice (50 and the electronic equivalent of a type of straight bill of lading), or as not presenting a 'major' problem (50 and the law governing the electronic transfer of rights).

[9] The controversy over Art 47(2) is very fairly described at 265-267.

[10] At 201, my emphasis.

[11] [1998] 1 Lloyd's Rep 337.

[12] At 193, my emphasis.

commentary, and often one or more illustrations. This book does not have an Article by Article set of annotations, though, and the text of the Rules is only found in the Appendix, rather than being inserted rule by rule before the appropriate piece of commentary. This means that the authors have imposed their own theoretical structure on the subject matter in the appropriate manner for a monograph. Nevertheless, that structure largely mirrors the Chapter headings in the Rules themselves. Thus, eg, Chapter II of the book mirrors Chapter 2 of the Rules in dealing with 'Scope of Application', and Chapter XIII on 'Validity of Contractual Terms' has the same title as Chapter 16 of the Rules; most of the other Chapters of the book reflect equivalent Chapters of the Rules. This makes it very easy to match the authors' discussion with the text of the Rules themselves and is more a reflection of the coherent ordering of the Rules themselves than of lack of imagination by the authors.

It is interesting that the only book chapter which does not really have a direct counterpart in the Rules is Chapter IV on 'Multimodal Aspects'. One of the criticisms of the Rotterdam Rules has been of the treatment of multimodalism, with its limited 'maritime plus' solution. For some, this does not provide a complete solution to door to door transportation, while for others it intrudes too much on existing intermodal regimes. The text of Chapter IV is rather defensive about the solutions adopted, and this is one of the places where the authors do come near to making, by implication, a criticism of the final outcome. They are anxious to set out the essentially political (rather than ideal drafting) choices that were available, but explain in a clear and comprehensive manner why decisions were made and how they will operate in practice. It is here that it is extremely useful to have the use of boxes containing illustrations of how the particular Rules will work in practice. This is not a book that dodges hard issues, eg as to whether the Rotterdam Rules or the CMR apply in a complicated multimodal shipment between different States. It is invaluable for the reader to have drafters explaining how they saw the complex provisions working together; others may disagree with the clear answers given, but they will have to confront some very strong arguments.

These illustrations, and others throughout the book, are really useful in giving a practical flavour which will be of use to advisers. In this respect, the book manages to merge the intellectual rigour of the Civil Law with the pragmatism of the Common Law (with its concern to address the real problems faced by the shipping industry in practice). The awareness of industry practice is wide and invaluable, and one can see how the book benefits from the shipping experience of van der Ziel. One of the criticisms of the Rules is that they are too long[13] and try to cover too many issues. No doubt a drafter such as van der Ziel, with experience of the day to day problems of the shipping industry[14] was bound to try to answer many questions to which the previous Rules provided no answer. My own feeling is that this was a worthwhile task, and the Rotterdam Rules can hardly be criticised for providing some solution where before there was uncertainty. To some extent the book is able to answer criticisms of the breadth of coverage of the Rules, as here we have some of the main authors explaining what it was that they intended, with practical examples. Of course, there is always a danger with that, as drafters of contracts or statutes may not always be the best to judge what objectively their words can be taken to mean. In this book, though, we have clear and concise explanations with examples of the intentions. It will be up to others to unpick the authors' analyses if they dare.

The maritime law world is fortunate that three of the drafters of the Rotterdam Rules have collaborated to produce such a clearly written book. I could not find tortuous, or over-complex, explanations.[15] Indeed, this is a book that is accessible to lawyers and non-lawyers alike.[16] Unlike many government participants in the gruelling drafting work for international Conventions, these authors have not sat back to let others try to sort out what was meant by particular provisions — or, more importantly, how the whole fits together. Indeed, the more complex

[13] The Hague Rules have 16 Articles and 3268 words; the Hague-Visby Rules (ie the Protocol) have 17 Articles and 2068 words the Hamburg Rules have 34 Articles and 8216 words. The Rotterdam Rules have 96 Articles and 17,053 words. This may be seen as an unnecessary increase, but the simple fact is that modern Conventions are more comprehensively drafted and the Vienna Convention on Sales, for instance, has 101 Articles and 10, 147 words. The latter is perhaps a more realistic comparison, but still shows the Rotterdam Rules as rather wordy.

[14] Eg, how to effect delivery of cargo where the bills of lading have not arrived at the disport.

[15] The only typo I could find was an incorrect reference to the *Vita Foods* case in the case index, where para '2.044' should have been para '2.041' (see n 56). This was trivial in the context of an otherwise excellently produced book.

[16] I did struggle at first with Illustration 2-18, as it seemed on first reading that carrier had agreed to deliver cargo 72 hours before a ship actually arrived in port (!) but, on re-reading, the time requirement referred to the time of directions to be given by a shipper.

(or long) the instrument, the greater the need to be aware of the subtle interplays of definitions and other provisions (eg on carriers' liability and multimodal transport).

There is little doubt in my mind that this book must be treated as the most authoritative academic analysis of the Rules. It will be the first place of reference for judges and lawyers seeking to interpret the Rules — all other books will have to be judged by reference to its magisterial approach. I fully expect that it will undergo further editions, and I hope that in it these authors will be able to identify some of the few technical drafting problems in the Rules,[17] and how best they can be approached. It will also give them the opportunity to respond to some interpretations given by other writers. At this stage, the authors are justified in holding their return fire;[18] and I shall also refrain from the temptation to raise technical issues of possible controversy within their book. For, what they have given us is a clear basis on which to assess the Rotterdam Rules as a working coherent whole.

[17] A very minor one has been identified by the reviewer, eg the inappropriate reference in the chapeau to Art 47(2) to 'surrender' of an electronic transport record: see Gaskell, N, 'Bills of Lading in an Electronic Age' [2010] LMCLQ 233, 281. The authors do not seem to identify a problem in 'surrendering' an electronic record (see p. 267), but they may be aware of similar issues that, at this stage, they may not particularly wish to advertise.

[18] In the main, footnote references are to the UNCITRAL or CMI drafting documentation, rather than academic commentaries (even those made during the drafting stages). Only five cases (all English) are referred to in the book, which shows that it is forward looking. The only real criticism made of a decision is of that in the pro-shipper *The Giannis NK* (see above n 11). After entry into force of the Rules the style of the book will be able to accommodate case law decisions from around the world.