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Olena Bokareva – Multi-modal Transportation under the Rotterdam Rules: Legal Implications for European Carriage of Goods and the Quest for Uniformity

Book Review¹

Should we split the Rotterdam Rules into a binding “Maritime” part and a “soft law” part for the remaining multi-modal aspects?

Marc A. Huybrechts *

After a lengthy, solid and detailed analysis of actual and modern transport law, Olena Bokareva comes to the – if not daring, at least surprising – conclusion that maybe one ought to split the Rotterdam Rules because obviously so many nations are hesitant to sign and ratify the Convention. Such a split might overcome these hesitations. Indeed, she states: “Assuming that the Rotterdam Rules, and its maritime plus regime, may not achieve universal acceptance, one option may be to pursue the partial mandatory approach...”.

It is quite likely that the Convention would get enough support if it was just a sea carriage convention, representing a refinement and a streamlining of the existing Hague, Hague-Visby and Hamburg Rules. The proposal to split the Convention into two parts may achieve a better outcome. The mandatory provisions will cover port-to-port transportation, which will also include maritime performing parties and all those operating in the port areas. The optional protocol will provide for a further possibility to enter into a door-to-door contract. The multi-modal transportation provisions would be

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¹ More information available at: Lund University portal, https://lup.lub.lu.se/search/publication/34fad33bb3ae08-4df4-a09f-b157d345e7d8 (accessed on 1st June 2016).
put into a separate instrument such as a protocol, and it would only be mandatory for those states that accepted it.

The fundamental research by Olena Bokareva resulted in a PhD thesis of 374 pages, which she brilliantly defended during her public examination at the Lund University in April 2015. After a lengthy and intense public defense, the jury unanimously granted her a well merited PhD degree.

Olena Bokareva is a Ukrainian scholar who left her country to continue her studies in Sweden at the Lund University but she also was a grante of the Max Plant Institute in Hamburg and she spent also considerable time at the Erasmus University in Rotterdam, working under the guidance of Professor Frank Smeele, Professor Krijn Haak and Professor Gert-Jan van der Ziel. Her PhD thesis at the Lund University was supervised by Professor Proshanto K. Mukherjee and Professor Lars-Göran from the University of Goteborg. Olena Bokareva is also well known for her authorship of the monograph on Ukrainian transport law, published in the International Encyclopedia of Laws as well as a number of articles published in international legal journals such as the International Journal of Maritime Law.

In engaging in this research project, Olena Bokareva started from the many various diverse transport treaties that are applicable and which govern shipping and transportation in our present commercial world. Against the above background, the principal purpose of her thesis is to examine the legal regime of multi-modal transportation at international and regional levels in the light of the emergence of the Rotterdam Rules.

Her starting point goes back to a factual observation. The decline of manufacturing activity in major developed countries coupled with rising economies in the Asian continent contributed to the globalization of markets. In her introduction, the author is of the opinion that in this particular context globalization refers to the increasing geographical scale of economic, social and political interactions, which include international trade and related import and export of goods. Globalization of markets has had a profound effect on the world economy over the past decades, and in particular on the exchange of goods. This has resulted in the increasing interconnectivity of national economies and the growing number of international contracts and, undoubtedly the above mentioned circumstances have had significant implications for the carriage of
goods globally. She reminds us of an old truth: the scale of growth and shipping is evidenced by the fact that around 90% of the world trade continues to be sea-born. Shipping is known as the most international of all industries and maritime transport is considered to be the largest service provider in international trade. And she, continues: global trade requires fast and cheap transportation and a wide range of auxiliary services.

Modern carriage of goods does not solely involve transportation from one place to another. Rather, it is an integral part of a complex distribution process where the ultimate goal is to meet customers’ demands and expectations, and deliver goods in time without loss or damage. Her observations are quite to the point: the preferences of the cargo interests have changed as well. What matters most is not how the goods are carried, but how timely and securely they are delivered. She observes: “the tendency has prompted shipping companies to reconsider their traditional services from port-to-port and offer transportation and additional services on land or at intermediary points from door-to-door.”

The advent of the container as a standardized storage unit has transformed the whole system of how goods can be loaded, transported and discharged. In this way the goods are carried in one container all the way from the manufacturer to the final destination to a customer. This has led to the practice of using a single contract of carriage for goods carried by different modes for the sake of predictability and legal certainty. Multi-modal transport is a contemporary reality in intercontinental trade. The use of containers has caused three kinds of problems: technical, economic and legal.

As far as legal problems are concerned, Olena Bokareva is of the opinion that the legal problems are numerous and delicate and many of them still remain unresolved, despite global concerted efforts. Her starting point is to revisit and critically examine the current state of all international legal regimes on the subject matter. Her journey will take us from the Hague Rules up to the Rotterdam Rules – the future law – if ever these rules obtain a sufficient number of ratifications. It is a fact that the present day transport conventions are not able to resolve adequately the legal disputes involving claims for loss or of damage to goods or delay in transit that occur in an area of modern technology and transport logistic. She observes that most of the conventions dealing with carriage of goods cover only one specific mode of transport while an applicable carriage convention which deals with multi-modal transportation is still lacking.
That brings her to the United Nations Conventions on Contracts for the International Carriage of Goods wholly or partly by Sea signed in Rotterdam on the 23rd of September 2009. One of the primary objectives of the Rotterdam Rules is to effectuate the collapse of the existing international sea carriage regimes as well as a significant number of national hybrid regimes, and replace all of them with a modern contemporary convention that takes account of recent trends in the growth of containerized multi-modal transport on a door-to-door basis and corresponding impact of the logistics industry on world trade. The Rotterdam Rules are intended to govern the whole contract of carriage, which comprises a sea-leg but also including those segments that are to be performed by road, rail, air or inland waterways and accordingly the Rotterdam Rules have introduced the new concept of a maritime “plus” convention.

Considering that at present there are different levels of policy making such as international, supranational and national decision makers, achieving uniformity in the applications and interpretations of international conventions is not an easy matter. And one such international actor is the European Union, which is becoming increasingly powerful and which has created its own legal regime. The internal market of the European Union is constantly growing and that demands more trade and movements of goods among its Member States and neighboring countries, and so the author comes to the conclusion that it can be inferred from this that the European Union will continue to develop its transport infrastructure, focusing on modal split by reducing the friction costs and making transport operation more environmentally friendly.

This is her starting point and field of reference. She announces that she will concentrate on two main targets: (a) to critically examine and evaluate the advantages and disadvantages of the multi-modal regime under the Rotterdam Rules, and, (b) to analyze the maritime plus regime of the Rotterdam Rules in terms of the potential impact of any European Union transportation regime on European State parties to the Rotterdam Rules.

Her analysis will concentrate on the following subjects: 1. The conflict of conventions dimension on the multi-modal regime of the Rotterdam Rules in the European context; 2. The new concept of the maritime performing party and provisions for the “Himalaya protection”; 3. Liability for delay in delivery in multi-modal transportation; 4. Shippers’ liability; 5. Attainment of uniformity or harmonization globally and within the European context; and, 6. Interpretation of international transport conventions by the Courts of
Justice of the European Union with the main focus on the Montreal Convention. To be sure this a truly ambitious project which the author brilliantly covers in her thesis.

The quest for uniformity is a recurrent issue and the late professor William Tetley Q.C. has repeatedly complained about the lack of uniformity and made suggestions for further harmonization.\(^2\) Professor Tetley’s point was: “The lack of uniformity is due to the lack of adoption of major International Maritime Law Conventions... The lack of uniformity in respect of International Maritime Law is disheartening for those who believe in uniformity, particularly in comparison with Air Law, which started far behind but has now gone far ahead of Maritime Law.” The thesis of Olena Bokareva substantially promotes uniformity in Maritime Law.

Will her fundamental research and the conclusions of her thesis convince the sovereign nations and non-believers that the Rotterdam Rules are the right step forward? It is certainly to be hoped as at present only Spain, Congo and Togo have ratified the rules. Maybe a slight progress is in sight as the maritime law associations of Denmark and Norway have recommended their governments to ratify. Also the United States State Department has completed its ratification package for the Rotterdam Rules (see the website of CMI under Rotterdam Rules / recent developments).

Olena Bokareva informs us that her research will apply a combination of research methods such as the dogmatic method, the comparative method and the qualitative research method. With the qualitative research methodology, she wants to inform the reader that she will limit herself to certain topics in the vast field of transport law. She will consider the existing law and the future law (\textit{de lege lata} and \textit{de lege ferenda}). Her comparative law method has to be understood in a specific or restrictive meaning. She is not comparing the legal systems of various countries but the comparison is situated at comparing the various transport treaties. She will be concerned with European legislation whereas regarding domestic law, her thesis is mostly concerned with English Law, particularly the judgments of the Court of Appeal of England and Wales and the House of Lords, now replaced by the Supreme Court of the United Kingdom. On occasions there will

\(^2\) William Tetley, “Uniformity of International Private Maritime Law, the pro’s, con’s and alternatives to international conventions – How to adopt an international convention”, \textit{Tulane Maritime Law Review} volume 24, L.J. (2000): 775-856.
be a reference to a court case in the United States or if needs be, she refers to a German case but French Case Law is completely ignored.

This thesis is not only a challenging research project on the emergence, the content and the future application of the Rotterdam Rules, but also has resulted in a very informative textbook on transport law in general. Olena Bokareva has spared no effort to give a full account of the law on carriage of goods by sea, over the early developments from the U.S. Harter Act of 1893, the Hague Rules of 1924, the Visby Protocol of 1968, the SDR Protocol of 1979 and the Hamburg Rules of 1978. She deals separately with the carriage over land, by rail, by road and air carriage and she describes the evolution of regimes for multi-modal transportation, starting from the early initiatives to the failed Multi-Modal Convention of 1980 and the soft law that resulted ever since, such as the UNCTAD/ICC rules, 1992. Olena Bokareva comes to the overall picture, based on her examination, that in the various existing transport treaties there are only limited provisions in relation to multi-modal aspects. At the same time, she perceives the inability to achieve the desired uniformity and legal certainty at a global level and at a European level.

In chapter 3 the candidate examined the various legal aspects of multi-modal transportation by analyzing the two opposing liability regimes, namely the uniform liability system of the failed United Nations Convention of 1980 and the network liability system, which obviously enjoys the preference of the transport market and which is also the retained solution in the Rotterdam Rules.

Part II of the thesis contains the chapters 4 through 6 dealing with the Rotterdam Rules. The author examines the coming into being of the rules and their legislative history with a gestation period of some 10 years in the background of numerous meetings between New York and Vienna and with thousands and thousands of documents to go through. The author discusses the carriers’ obligations and liabilities in the maritime plus context and especially the liability of the carrier for other parties involved in the carriage contract with the special novelty of the “maritime performing party”. This analysis is also coupled with the discussion of the “Himalaya protection” afforded to the maritime performing parties. Evidently also the limitation of liability per package is discussed as well as the liability for delay.

In chapter 6 she deals with the obligation of the shipper and his liability in which the reader is informed about the "documentary shipper", which is also a novel concept in the
Rotterdam Rules. In fact, this section on the liability of the shipper is a novelty in itself, whereas it strikes that the liability of the shipper is unlimited. It is hard to understand that the carrier and the maritime performing parties can invoke the benefit of liability in case of damage whereas the shipper cannot. This chapter finishes with a discussion of the volume contract concept, which is also to be seen as a major breakthrough or even a breakthrough with revolutionary aspects. One could raise the question whether the concept of the volume contract, allowing greater freedom of contract, is not the introduction of the Trojan horse into modern Transport Law?

Part III of the thesis discusses international uniformity and harmonization. This is an exceedingly interesting discussion about uniformity as differentiated from harmonization. The author discusses the various methods of the unification process either through binding treaty law, or through the creation of soft law. Her massive discussion, well documented by the relevant footnotes on "soft law" is in itself a remarkable piece of legal analysis.

This discussion is a good step up for the last chapter of part 3, namely the regional harmonization of carriage of goods within the European framework. The thesis offers us a good refresher course on European Law to start with. The thesis discusses two highly controversial cases by the European Court of Justice, namely the “Mox plant” case, involving Ireland and its proceedings before the International Court of Justice and the “formidable” “Intertanko” decision – formidable on account of its one-sided reasoning by the European Court of Justice. In that case, the Court refused to check the compliance of the European Directive 2005/35 with the MARPOL Convention Rules, MARPOL being part of public international law, to which all European Member States are a party, but not the European Union as such. The examination of jurisprudence of the European Court continues with a number of European Court cases which stands in a very strained relation with the Montreal Air Law Convention.

In chapter 9 Olena Bokareva comments on how to integrate and accommodate the Rotterdam Rules in the framework of multi-modal transportation.

Part IV of the thesis offers us a summary and conclusions. Here the author will move from the “lege lata” to the “lege ferenda”. The claim of the author is that the Rotterdam Rules were possibly a little bit overly optimistic and ambitious in trying to solve too many adverse problems, with too many parties and stakeholders getting involved with various
conflicting views, making the Rotterdam Rules at best a rather complex compromise. The author rightly perceives some serious hesitation if not resistance by a good number of sovereign states, which makes it doubtful whether sufficient ratifications will be obtained in a very near future. In order to save the rules, the author then makes a suggestion to split the rules into a binding maritime part and a second part which will only have the status of a protocol and considered to be soft law.

With due respect, but that suggestion, although it is the result of deep and detailed examination and reflection, may pose more problems than it solves and could also contribute to a further fragmentation of Transport Law with some states who would have ratified the Rotterdam Rules in its entirety, whereas other states would only have ratified in part! It raises also a question of public international law as states can only either ratify a convention or reject it. They could opt out of certain clauses if the convention itself allows such an opting out, as this is for instance the case with the LLMC Convention, but no such a provision is at hand in the Rotterdam rules; it is all or nothing. In other words, if we want to achieve that possibility of splitting the Rotterdam rules, it would imply first an entirely new negotiation round with all the participating UNCITRAL member states.

These technical difficulties and this comment however should not be a negative reflection or cause prejudice to the overall merits of the thesis. It is a most impressive scholarly and informative study which offers us a lot of challenging insides in multi-modal transportation, past, present and future and the thesis deserves a lot of credit and appreciation.