1. Introduction

About 90% of world trade is carried by the international shipping industry. Without shipping, the import/export of affordable food and goods would not be possible – half the world would starve and the other half would freeze!¹

1. BACKGROUND

The epigraph to this chapter precisely demonstrates what shipping is all about and why we are in such great need of it. Imagine a situation in which shipping and ships no longer existed – the outcome would be disastrous. Why then does the title of this book refer to transport law instead of only shipping and maritime law? Shipping, being one of the oldest and the most international of all industries,² was transformed in the middle of the twentieth century after the introduction of the container. It was observed that ‘the transportation industry has been turned upside down by the container revolution’.³ However, it appears that the greatest transformation of the transport industry will come in the future. It is still too early to make any conclusive statements, but the changes brought about by blockchain technology, smart contracts and digitization could have a tremendous impact on shipping and trade.

The container revolution meant the old patterns of how goods are manufactured, consolidated and carried from the seller to the buyer changed dramatically. Other preconditions that have changed the practice of carriage of goods include increased global trade, globalization of markets and the emergence of transnational corporations.

Except for traditional sea carriage of bulk cargo,⁴ transportation of manufactured and semimanufactured goods is basically containerized and

¹ See www.ics-shipping.org/shipping-facts/shipping-facts.
⁴ Bulk cargo includes commodities and raw materials, such as grain, sugar, steel, coal, oil, and so on, and cannot be consolidated and packed.
carried by a combination of various modes of transport, where maritime transport plays a leading role. Containerization of goods held lucrative prospects for shipping and the transport industry, which over time came to link virtually all continents and different modes of transport. The time and space between manufacturers and final customers was substantially decreased. Even though the maritime segment is predominant in transport, it is preceded and followed by other modes of transport in the country of departure as well as the country of destination. To add to this verity, transport’s geography of distribution has changed as well. As noted by one commentator, ‘Today’s focus in international seaborne trade has moved to sources and destinations dispersed all over the world, but to a large extent located in the Pacific Rim. China is now the leading source of exports and the second largest destination of imports’.5

The advent of the container as a standardized storage unit has transformed the entire system in which goods are consolidated, loaded, transported and discharged. This technique is not only suitable for carriage by sea, but also allows the loading of a container onto a truck or railway wagon and further transporting it on land. In this way the goods are carried in one container all the way from the manufacturer to the final destination of the customer, and do not need to be unloaded or transshipped at intermediary points. Nowadays, carriage of goods does not solely involve transportation from one place to another, but constitutes an integral part of a complex distribution process where the ultimate goal is to meet customers’ demands and expectations and deliver goods in a timely manner without loss or damage. The majority of all produced goods contain numerous small parts and components, produced in different stages; the final product is then distributed and sold globally.6

Thus, cargo interests’ preferences have changed too. Delivery of goods in a timely and secure manner is more important than the mode or combination of modes by which they are carried. Therefore, transportation plays only one part in this complex distribution process. Instead of dealing with different carriers, the cargo owner is keen to deal with a single contracting party who will carry the goods or arrange transportation from one point to another.7 This tendency has prompted the

traditional shipping companies to reconsider their previous ‘port to port’ service and instead offer ‘door to door’ transportation and additional services on land or at intermediary points, thus leading to the practice of using a single contract of carriage for goods carried by different modes and creating the preconditions for the development of multimodal transport. Moreover, this has instigated the appearance of numerous intermediaries who perform a range of services within a global supply chain, such as freight forwarders and logistics operators. One author has suggested that whereas before there used to be a ‘seller’s market’, today there exists a ‘buyer’s market’. The modern customer has easy access, through the internet, to information about alternative suppliers, price comparison and delivery status at every stage.8

It has been noted that in addition to technical and economic problems, containers have raised legal problems that are not easy to resolve.9 The legal regime applicable to sea carriage was not entirely suitable for containerized goods and developed slowly, despite the fact that the need for an adequate international regime had already been recognized in the early days of the container revolution. It became evident that regimes at different levels might apply simultaneously to international carriage of goods. These include a mixture of international transport conventions governing their respective modes; regional instruments; and domestic legislation, all of which might in certain cases overlap or even conflict with each other. Additionally, the conflicting interests of various stakeholders demonstrated that there was no easy solution acceptable to all. It can be observed that the borders of maritime law have changed as well, converging with other legal and nonlegal disciplines. Whether the disparity in legal regimes creates impediments to achieving international uniformity in transport law warrants further examination and will be explored in this book.

2. AIM OF THE BOOK

The central theme of this book is uniformity in international transport law. However, the focus throughout the book will be placed on maritime transport and its regulation, since it is considered to be a major transport

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mode in intercontinental trade. More specifically, the book takes account of carriage of goods by sea, carriage by other transport modes and multimodal transport within the wider scope of logistics and supply chain.

Uniformity of law is not a new phrase or concept and dates back to earlier periods of our civilization. It has occupied the minds of lawyers and scholars throughout history and has existed in various forms within one state – such as *jus gentium* in the Roman Empire – and even within one region – such as *jus commune* in Europe. There was another type of uniformity that existed in those times which was not linked to one state or region, but connected commercial men across state borders: the *lex mercatoria* or merchant law, which also included the *lex maritima* or maritime law. Historical evidence demonstrates that these early types of uniformity existed long before international conventions took their place as a unifying tool in various fields. Even in ancient times, various sorts of codes and laws regulating shipping activity existed, including with regard to carriage of goods by sea. The merchant laws that developed in different countries demonstrate astounding similarity simply because they originated from the customs of trade and were not dictated by legislative bodies or courts.\(^{10}\) The most striking pattern of uniformity existed in commercial and maritime law, covering not only one country or region but many countries in which shipping and trade were practised. The reason is self-explanatory – trade and oceans connect people and countries, and therefore, regulation should be international in scope and familiar to all those involved.

In this book, a broad approach is taken by placing transport law within the wider framework of international, or rather ‘transnational’, commercial law. Therefore, it is more appropriate to analyse international transport law and its dynamics as a part of commercial law, rather than looking at separate transport conventions and discussing uniformity within each individual mode. The subject of uniformity in transport law is unique and cannot be compared with other areas of commercial law. This uniqueness is at the heart of shipping and transportation, as well as the existence of international transport conventions that regulate specific modes of transport, such as sea, road, rail, air and inland waterways. Therefore, any discussion on uniformity in a modern setting cannot avoid examining all these conventions and regimes, and especially those

provisions which might be in potential conflict with each other. As already mentioned, containers and multimodal transport successfully linked all modes and revolutionized world transport infrastructure within a very short space of time. The legal response to this challenge should be reflected in a practical and achievable solution to effectively reach uniformity, or perhaps harmonization, in the application of these laws worldwide.

A recent attempt to address this question can be seen in the adoption of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which aims to promote uniformity in this complex area by means of a modern and updated regime suitable for the international carriage of goods in containers. This convention was adopted on 11 December 2008 by the General Assembly. Its signing ceremony was held on 23 September 2009 in Rotterdam, and thus it is known as the ‘Rotterdam Rules’. The convention perhaps cannot be described with the same phrasing as the container revolution, since it builds on many existing concepts and several decades of jurisprudence. However, a number of new concepts were developed to reflect modern developments in carriage of goods and electronic communications. One of the major novelties of the convention, which is reflected in its title, is the concept of ‘maritime plus’, which explicitly extends the scope of application of a maritime convention to other modes of transport, subject to certain conditions. It intends to govern the entirety of any contract of carriage which has an international sea leg, including those segments that are to be performed by other transport modes.

One of the primary objectives of the Rotterdam Rules is to replace existing international sea carriage regimes with a modern, contemporary convention that takes account of recent trends in the growth of containerized multimodal transport on a door to door basis and the corresponding impact of the logistics industry on world trade. During the drafting process, it was demonstrated that the majority of manufactured goods nowadays are carried from door to door, or in other words, on a multimodal basis. However, this approach has met with criticism in various quarters. The controversies surrounding the ‘maritime plus’ regime of the Rotterdam Rules have provided impetus for the EU to

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11 At the ceremony 16 States signed the Convention: Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, the Netherlands, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo and the USA. Later Armenia, the Democratic Republic of Congo, Luxembourg, Madagascar, Mali, Niger, Guinea-Bissau, Cameroon and Sweden signed it. Four states have ratified it: Congo, Spain, Cameroon and Togo.
Universe of transport law through international regimes

instigate discussions regarding whether it needs to adopt its own legislation concerning multimodal transport and not just wait for an international solution. One of the major questions surrounding the Rotterdam Rules is whether this convention can contribute to universal uniformity on carriage of goods, in light of the carriage being ‘maritime plus’ instead of multimodal.

In this book, the Rotterdam Rules are seen as one of the solutions regarding uniformity in carriage of goods law. Therefore, it is important to discuss the issues of uniformity in transport law holistically instead of focusing only on the Rotterdam Rules, partially because the Rules are not in force as yet. Such an approach will provide a broad understanding of the current problems in transport law, but also consider specific solutions which, in the opinion of the author, can contribute to the debate on uniformity in transport law.

Moreover, the book addresses the problem of uniformity of transport law and the potential solutions at international and EU levels. Various tools and methods of achieving uniformity in commercial law, and whether they are applicable to transport law conventions, will be considered. The examination includes a review of existing conventions developed by international organizations, as well as other instruments widely used in practice, and their ability to achieve the desired uniformity and legal certainty for the parties at the global and EU levels. As already highlighted, the work is not limited to purely sea carriage conventions and uniformity in maritime law, but also examines other transport conventions and instruments.

The book is an attempt to comprehensively examine the necessity of uniformity in this field and the pattern of uniformity that would be acceptable to all those involved. One of the questions explored in this book is whether there is a strong need to achieve uniformity for uniformity’s sake, or whether it can serve practical needs and facilitate daily practice in the transportation chain as a whole. Having in mind that the results of uniformity should focus on participants who would benefit from having clear and simple rules, further exploration will consider whether uniformity is purely an academic concept and whether there are any viable alternatives.

The book provides a theoretical foundation underlying transport law and the convention regimes that govern different modes of transport. In addition, the book provides a new insight into the future of the Rotterdam Rules, the international regime on multimodal transport and uniformity in transport law. It examines how uniformity can be achieved through international conventions and explores some of the private law conventions and other instruments that have actually achieved acceptance and
success internationally. The methods used in all stages of preparation and application of these instruments are analysed in order to determine the pattern of successful drafting and application that can be used by analogy to other private law conventions aimed at uniformity. The importance of the choice of form of the instrument and of the drafting body will be highlighted.

Discussion on international uniformity in transport law is complemented by an examination of regional harmonization as one of the methods of achieving uniformity in the context of the EU lawmaking and jurisprudence in the field of international transport. This will complement and enrich the discussion on how different transport conventions apply to carriage of goods within the EU and how the legal regimes coexist or conflict with each other. With respect to the law on carriage of goods, it can be observed that the EU has taken a particular interest in shipping and multimodal transport. This is evident from the attempts to create legislation at the regional level pending the effectuation of the international regime. It also examines the relationships between different legal orders through the case law of the European national courts and the Court of Justice of the European Union (CJEU). Comparison of the interpretations given to some international transport conventions by the CJEU and other national courts will reveal the complexities in application and interpretation of certain transport conventions, which in themselves are highly detrimental to achieving uniformity. This discussion will demonstrate that the attitude of the CJEU and its methodology in interpreting the rules relating to maritime and transport conventions can be applied by analogy to other fields as well. This comparison enables the book to contribute to scholarship not only on transport law but also on EU law and interpretation of international conventions, and may be useful in the more general application of other transport conventions in the future.

England and Wales and the House of Lords (now replaced by the Supreme Court of the United Kingdom). Traditionally, most maritime cases were decided by the English courts, although decisions in other common law jurisdictions have also featured considerably in the development of case law jurisprudence in international law. Needless to say, the English common law exerts considerable influence on private maritime law at the international level, and continues to be a dominating force in this field. It is widely recognized that more decided cases involving carriage of goods by sea disputes emanate from the English courts than from any other jurisdiction.\footnote{K. Zweigert and H. Kötz, Introduction to Comparative Law, Oxford: Clarendon Press, 1998, p. 42.}

In this book, the decided cases relating to the Hague–Visby Rules are of particular importance, covering numerous aspects of the Convention. Other conventions considered by the English courts include the CMR, Warsaw and Montreal conventions.

With respect to other instruments, it is recalled that there is a longstanding practice of using standard terms and practices in commercial law that date back to the Middle Ages. At that time, when no legislation or conventions existed, the law governing relationships between merchants was the \textit{lex mercatoria}, which is now defined as a set of uniform rules serving uniform needs of international commerce.\footnote{See Rt. Hon. Lord Justice Mustill, ‘The New \textit{Lex Mercatoria}: The First Twenty-Five Years’ in M. Bos and J. Brownlie (eds), \textit{Liber Amicorum for The Rt. Hon. Lord Wilberforce}, Oxford: Clarendon Press, 1987, p. 151.}

3. STRUCTURE OF THE BOOK

Following this introductory chapter, Chapter 2 provides a historical overview of the law pertaining to carriage of goods unimodally and multimodally. Currently, carriage of goods by sea is subject to the mandatory application of the Hague Rules, Hague–Visby Rules or Hamburg Rules; the Rotterdam Rules may also apply in the future. Other transport modes are governed by their respective international conventions. Whether these conventions are sufficient and efficient to resolve legal disputes involving claims for loss of or damage to goods or delay in transit that occur in an era of modern technology and transport logistics will be illustrated.
Chapter 3 focuses on the commercial and legal background of modern transportation of consolidated goods, which includes multimodal transport and logistics. It includes descriptions of contracts, documents and parties involved in such transportation of goods.

Chapter 4 addresses the main theme of the book: uniformity in transport law. Uniformity in transport law will inevitably include all transport modes and not just sea carriage. Such an approach will increase appreciation of the developments aimed at uniformity in other fields of commercial law, such as sale of goods, letters of credit and others, and aid an understanding of why some conventions and other instruments gain international acceptance and some fail to achieve this goal. Various forms of uniformity and terminology are examined in this chapter. An important question raised is whether it is possible to achieve global uniformity in the law on carriage of goods. Several alternatives will be considered, in particular whether it is necessary to strive for uniformity in carriage of goods globally and whether this is achievable at all. The conceptual distinction between uniformity and harmonization will be discussed.

Chapters 5 and 6 address the salient features of the Rotterdam Rules, which include its scope of application and the notion of maritime plus and the liability regime. The network liability system under the Rules is addressed, together with the provision dealing with the conflict of conventions under Articles 26 and 82. There is a detailed consideration of the topical issues of Himalaya protection and carrier’s liability for delay. Finally, the question of how the Rotterdam Rules as a convention can contribute to universal uniformity on carriage of goods, in light of the carriage being ‘wholly or partly by sea’, is analysed in light of the fact that only four states have ratified it out of the 20 required. Chapter 6 deals specifically with shipper’s obligations and liabilities.

Chapter 7 focuses on regional harmonization in transport law in the context of the EU. The roles of the EU and the CJEU in lawmaking and jurisprudence in the field of international transport will be examined: the discussion includes some conspicuous examples with regard to the Montreal Convention, and how it was perceived and shaped by the CJEU. As part of this discussion, Regulation (EC) No 261/2004 related to carriage of passengers by air is provided as the only real illustration so far of how an international transport convention is applied and interpreted within the EU legal framework. Furthermore, an analogy can be made between its relationship with the Montreal Convention in the EU context and the potential relationship between the Rotterdam Rules and any future EU legal instrument pertaining to sea and multimodal transport. Comparisons between the two truly global regimes – air and sea
transport – provide a novel approach and a good example of how legal frameworks at different levels interact.

Chapter 8 concludes, highlighting the significant findings of the book. The book ends by offering several alternatives for the future of the law on carriage of goods. Of these, one involves examination of the virtues of international conventions (be it the Rotterdam Rules or some other convention adopted in the future); others include partial mandatory and nonmandatory approaches to uniformity, making an analogy with The Cape Town Convention on International Interests in Mobile Equipment, 2001. Some proposals are offered which may be accepted by the traditional maritime states as well as emerging maritime powers.