

THE MARITIME PERFORMING PARTY AND THE SCOPE OF THE ROTTERDAM RULES

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1 Introduction

The *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (hereinafter the 'Rotterdam Rules' or the 'Rules')¹ would, if adopted, significantly change the liability regime surrounding the international carriage of goods by sea.

The Rules seek to harmonise and modernise the law surrounding the international carriage of goods by sea.² For the first time in an international carriage convention, the Rules allow for modern developments such as volume contracts³ and electronic transport records.⁴ They establish detailed rules of liability, with a clearly shifting burden of proof.⁵ They modernise the permitted exemptions from liability.⁶ Significantly, the Rules may even apply inland.⁷ Arguably the most far-reaching development, however, relates to an even more fundamental issue: who will the Rules apply to?

Previous international maritime conventions, such as New Zealand's current liability regime (the 'Hague-Visby Rules'),⁸ have focused primarily on carriers. The Rotterdam Rules go further, by introducing the 'maritime performing party' ('MPP') concept. MPPs are parties which take on certain of the carrier's obligations during the port-to-port leg of the carriage. For example, a stevedore which undertakes the carrier's obligation to load or unload the vessel would be an MPP. Previous conventions have been silent on the liability of such parties. Under the Rules, these MPPs take on the carrier's liabilities.⁹ They also take on the carrier's defences and limits of liability.¹⁰

The Rules have been slow to gather the 20 ratifications required to enter into force (at present only Spain, Togo and the Republic of Congo have ratified).¹¹ The United States has, however, taken some steps towards ratification.¹² There is reason to believe that once the United States ratifies the Rules, other nations will follow.¹³ It is therefore worthwhile to examine the nature of the MPP concept, how it is intended to improve the scope of the Rules, and whether it succeeds.

2 Overview of the MPP Concept

The MPP under the Rotterdam Rules is a subcategory of 'performing party' ('PP'). Essentially, a PP is a person other than the contracting 'carrier' who undertakes components of the carrier's obligations under the carriage

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¹ *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Rotterdam Rules), opened for signature 23 September 2009, UN Doc A/RES/63/122 (not yet in force).

² Rotterdam Rules preamble.

³ Ibid art 80.

⁴ Ibid art 8.

⁵ Ibid art 17.

⁶ Ibid art 17(3). A notable casualty of the Rotterdam Rules is the 'nautical fault' exemption in art 4(2)(a) of the Hague Rules. See, eg, PA Myburgh, 'Charting the Limits of the Nautical Fault Exemption' [2008] *Lloyd's Maritime & Commercial Law Quarterly* 291, 294, who describes the nautical fault exemption as 'an unprincipled anachronism on the verge of extinction.'

⁷ Rotterdam Rules art 12(1).

⁸ *Maritime Transport Act 1994* (NZ) s 209, incorporating the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* (Hague Rules), 1924, 120 LNTS 155 as amended by the *Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25th August 1924* (Visby Protocol), 1968, 1412 UNTS 128 and the *Protocol Amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924, as amended by the Protocol of 23 February 1968* (SDR Protocol), 1979, 1412 UNTS 146.

⁹ Rotterdam Rules 19(1).

¹⁰ Ibid arts 4(1), 19(1).

¹¹ United Nations Treaty Collection, *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (27 November 2014) < https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XI-D-8&chapter=11&lang=en >.

¹² LeRoy Lambert, *Web Alert: Rotterdam Rules Clear Significant Hurdle on Way to Ratification by United States* (14 June 2013) The Standard < <http://www.standard-club.com/news-and-knowledge/news/2013/06/web-alert-rotterdam-rules-clear-significant-hurdle-on-way-to-ratification-by-the-united-states/> >.

¹³ Mary Helen Carlson, 'US Participation in Private International Law Negotiations: Why the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea Is Important to the United States' (2009) 44 *Texas International Law Journal* 269, 273.

contract.¹⁴ An MPP is a PP to the extent that it acts within the port-to-port segment ('maritime leg') of the carriage.¹⁵

This geographic distinction is significant because (as noted) the Rotterdam Rules may apply beyond the maritime leg.¹⁶ The Rules extend obligations to the carrier from the place of receipt to the place of delivery under the contract of carriage.¹⁷ Either receipt or delivery may be inland. The total contract of carriage may therefore cover several legs: an 'inland leg' from the place of receipt to the port of loading, a maritime leg from arrival at the port of loading to departure from the port of discharge, and a second inland leg from the port of discharge to the place of delivery. Where the carrier subcontracts any of its obligations on an inland leg, the party which undertakes them will be a PP but not an MPP. Only parties which undertake the carrier's obligations on the maritime leg will be MPPs.

For example, a freight forwarder (acting as a principal)¹⁸ might contract with a shipper to carry milk powder from Hawera to Shanghai. The freight forwarder arranges for KiwiRail to carry the goods from Hawera to Port Taranaki, and for a shipowner to carry the goods to Shanghai.

In this scenario the freight forwarder is the 'carrier', even though it does not physically perform any of the carriage itself. It entered into a contract of carriage with the shipper.¹⁹ KiwiRail is a PP, but not an MPP. It carries the goods from the place of receipt to the port, but takes no part in the maritime leg. The shipowner is an MPP. It carries the goods during the maritime leg. The stevedores and others involved in loading and handling the goods at Port Taranaki are also MPPs. They load and handle the goods during the maritime leg.

Whether a party is the carrier, a PP, or an MPP will determine the scope of its potential liability under the Rules. The carrier, under the Rules, is liable to the cargo interest over the entire carriage period for loss, damage or delay.²⁰ It is liable for breaches caused by PPs (including MPPs).²¹ If KiwiRail or the shipowner damaged the goods, the freight forwarder (as 'carrier') would be liable to the cargo interest.

The Rules also impose joint and several liability on MPPs.²² As it has received the goods in a Contracting State (New Zealand), the shipowner would be liable under the Rules for any damage, loss or delay caused in the maritime leg while it had custody of the goods or was performing an activity under the carriage contract.²³

PPs which are not MPPs have no liability under the Rules. KiwiRail would have no liability under the Rules for any damage, loss or delay that it caused. A cargo interest that wished to pursue KiwiRail would need to rely on another cause of action outside the Rules.²⁴

Liabilities and obligations are coupled with defences and limits to liability under the Rules. Carriers and MPPs may raise the defences contained in the Rules against any action, whether founded in contract, tort, or otherwise²⁵ whereas PPs may not.

¹⁴ Rotterdam Rules art 1(6):

- (a) "Performing party" means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, keeping, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.
- (b) 'Performing party' does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier."

Note that the text as originally passed omitted 'keeping' from the obligations listed in art 1(6)(a). This was apparently a drafting oversight, and was subsequently corrected in January 2013: see Michael F Sturley, 'Amending the Rotterdam Rules: technical corrections to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea' (2012) 18 *Journal of International Maritime Law* 423.

¹⁵ Rotterdam Rules art 1(7): "Maritime performing party" means a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations 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. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area."

¹⁶ Ibid art 1(1).

¹⁷ Ibid arts 5(1), 12(1).

¹⁸ See, eg. *Granville Oil & Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 570 (15 April 2003).

¹⁹ Rotterdam Rules art 1(5): "Carrier" means a person that enters into a contract of carriage with a shipper."

²⁰ Ibid art 17(1).

²¹ Ibid art 18(a).

²² Ibid art 20.

²³ Ibid art 19(1).

²⁴ In New Zealand any claim would need to be under the *Carriage of Goods Act 1979* (NZ) ('COGA'), as s 6 of that Act excludes liability under any other cause of action (eg. in tort or bailment). However, as an 'actual carrier', Kiwirail would have no direct liability to the cargo interest under COGA in most circumstances: see COGA s11(1).

²⁵ Rotterdam Rules art 4(1).

3 Background – The Scope of Existing Conventions

The MPP concept reflects the drafters' dissatisfaction with the scope of existing international maritime carriage conventions.²⁶ Those conventions have arguably struggled to keep up with developments in international carriage of goods since the introduction of the Hague Rules in 1924.

3.1 The Hague/Hague-Visby Rules

The Hague Rules envisage carriage as a transaction solely between two parties: the shipper and the carrier. The 'carrier' includes the shipowner or charterer who enters into a contract with a shipper.²⁷ The Hague Rules impose obligations on the carrier,²⁸ and provide defences for the carrier.²⁹ However, their scope does not extend to any other party which a carrier might engage to handle the goods. A stevedore subcontracted to unload the carrier's vessel, for instance, would have neither obligations nor defences under the Hague Rules.

The Hague Rules were amended by the Visby Protocol in 1968. Article 4 *bis* makes only a modest extension to the scope of the Hague Rules. It extends the defences and limitations of liability to a "servant or agent of the carrier". It does not, however, extend any of the obligations or liabilities of the carrier. Nor does it apply if the servant or agent in question is an 'independent contractor'. Consequently, as with the original Hague Rules, subcontractors fall outside this limited scope.

This is a significant omission. Subcontracting is an integral part of international shipping, especially in multimodal carriage contracts. Not only do carriers subcontract functions such as loading and unloading goods to independent stevedores, they frequently subcontract some (or all) of the carriage itself.³⁰ Restricting the scope of coverage to a notional single 'carrier' fails to reflect industry practice and can cause difficulties.

In *The Starsin*, for instance, much rested on whether the shipowner (which had physically carried the goods, but which was arguably not named as carrier in the bill of lading) was the 'carrier'.³¹ The House of Lords unanimously concluded that it was not. They considered that the (insolvent) charterer was the 'carrier'. The cargo owners therefore had no claim in contract against the shipowner under the Hague-Visby Rules.³² The MPP concept in the Rotterdam Rules is intended to account for such a situation. Under the Rotterdam Rules, even if the shipowner in the *Starsin* was not the contracting 'carrier', it would still have been an MPP. It was performing the carrier's obligations during the maritime leg and so would have been liable to the cargo owners.

The Hague and Hague-Visby Rules also physically limit their scope from 'tackle-to-tackle' (i.e. from when the goods are loaded aboard the ship until they are discharged).³³ Again, this fails to reflect the reality of modern carriage, in which the carrier or its subcontractors will take charge of the goods well before loading. Modern carriage, particularly container carriage, is frequently 'door-to-door' (i.e. from the consignor's place of business to the consignee's place of business).³⁴ Failing to account for this can cause problems.

In *Fletcher Panel Industries Ltd v Ports of Auckland Ltd*, for instance, the plaintiffs (whose goods should have been loaded aboard a ship but were instead left behind on the wharf) found their claim time-barred by New Zealand's domestic *Carriage of Goods Act 1979* (NZ) (COGA).³⁵ The Hague-Visby Rules did not apply because the goods had not yet reached the ship's hook.

²⁶ The drafting process behind the Rules was lengthy, beginning with preparatory work by the Comité Maritime International (CMI) before proceeding to the United Nations Commission on International Trade Law (UNCITRAL). For a detailed history of the drafting process, see Michael F Sturley, 'Transport Law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules' in D Rhidian Thomas (ed), *A New Convention for the Carriage of Goods by Sea: The Rotterdam Rules* (Lawtext, 2009) 1.

²⁷ Hague Rules art 1(a).

²⁸ Ibid art 3.

²⁹ Ibid art 4.

³⁰ Michael F Sturley, 'The Treatment of Performing Parties' in *CMI Yearbook 2003* (CMI, 2003) 230, 233.

³¹ *Homburg Houtimport BV v Agrosin Private Ltd ('The Starsin')* [2004] 1 AC 715.

³² Further claims based in tort turned on whether the shipowners' liability was excluded by a Himalaya clause, and on whether title over the goods had passed to the cargo owners at the time they were damaged. Neither of these issues would have been relevant to a claim made under the Hague-Visby Rules.

³³ Hague Rules art 1(e).

³⁴ UNCITRAL, *Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]: General remarks on the sphere of application of the draft instrument* UN Doc A/CN.9/WGIII/WP.29 (31 January 2003), [25] ('General Remarks'): 'Of the 60 million containers carried worldwide in the year 2000, container liner operators carried 50% of them on a multimodal basis.'

³⁵ [1992] 2 NZLR 231 (*Fletcher Panel*).

The Rotterdam Rules are intended to have a broader geographic scope. They apply to the carrier from the place of receipt to the place of delivery.³⁶ Consequently, in door-to-door multimodal transport, the Rules will apply door-to-door.³⁷ MPPs are covered from the arrival of the goods at the port of loading to their departure from the port of discharge (i.e. 'port-to-port'). In a scenario like *Fletcher Panel*, the defendant port terminal operator would be an MPP. The Rotterdam Rules would apply.

3.2 Himalaya Clauses

Maritime carriage contracts frequently seek to circumvent some of the limitations of the Hague/Hague-Visby Rules by means of a Himalaya clause, which extends the carrier's defences and limits of liability to its subcontractors.³⁸ Himalaya clauses sit uncomfortably with the doctrine of privity of contract. To give effect to them, the Courts have required the creation of a notional contract between the shipper and the subcontractor through the agency of the carrier.³⁹ While this approach is arguably artificial, Himalaya clauses have nevertheless been widely accepted as a 'deft' commercial response to the shortcomings of the Hague/Hague-Visby Rules.⁴⁰ They prevent cargo interests from sidestepping convention limits of liability within the Hague/Hague-Visby Rules by pursuing claims against parties other than the 'carrier'.

While it may be 'deft', this use of contractual terms to extend the Hague/Hague-Visby Rules to subcontractors creates a peculiar asymmetry. While carriers may extend their defences and limits of liabilities to their subcontractors, they do not extend their convention obligations. A cargo interest wishing to make a claim against a subcontractor must find another basis for its claim, such as tort⁴¹ or bailment.⁴²

Furthermore, Himalaya clauses are frequently coupled with extremely broad exclusions of subcontractors' liability,⁴³ and with 'circular indemnity clauses'. A circular indemnity clause provides that the cargo interest will not claim against the carrier's subcontractors, and that if they nevertheless do so, they will indemnify the carrier for the consequences.⁴⁴ For example, if a cargo interest were to successfully claim against a negligent stevedore, that stevedore might in turn be entitled to recover the judgment sum from the carrier. Were it to do so, the carrier would then be entitled under the circular indemnity clause to recover that sum from the cargo interest. In other words, the 'circular' effect is that the cargo interest might ultimately find itself required to meet its own claim.⁴⁵

Therefore, while Himalaya clauses plug a gap in the scope of the Hague/Hague-Visby Rules, they are an unbalanced solution. They do not put subcontractors on the same legal footing as the carrier. Instead, they are intended to discourage suit against subcontractors in almost all situations. This position clearly suits the

³⁶ Rotterdam Rules art 12(1).

³⁷ However, the parties may contract for a narrower scope, provided it is not less than tackle-to-tackle: Rotterdam Rules art 12(3).

³⁸ See, eg. cl 15(b) of the Conlinebill 2000: '...every exemption from liability, limitation, condition and liberty herein contained and every right, defence, and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled, shall also be available and shall extend to protect every such servant and agent of the Carrier acting as aforesaid.'

³⁹ The four-part test is laid out by Lord Reid in *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, 474 ('*Midland Silicones*'): first, the bill of lading must make it clear that the stevedore is intended to be protected by the provisions which limit liability; second, the bill of lading must make it clear that the carrier is contracting as the stevedore's agent with respect to applying those provisions to the stevedore; third, the carrier has authority from the stevedore to do so; fourth, any difficulties about consideration moving from the stevedore are overcome. While Lord Reid's test was not met in *Midland Silicones*, it was subsequently used to uphold a Himalaya clause in *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd* ('*The Eurymedon*') [1975] AC 154, where the majority found that consideration was satisfied by the stevedore performing its services to discharge the goods.

⁴⁰ *The Starsin* [2004] 1 AC 715, 744 [34] (Lord Bingham). See Frank Smeele, 'The Maritime Performing Party in the Rotterdam Rules 2009' [2010] *European Journal of Commercial Contract Law* 72, [17] fn 49 for a list of cases upholding Himalaya clauses in various common law and civil law jurisdictions. Interestingly, while Himalaya clauses are in theory valid under New Zealand law, they may be effectively defunct: COGA will apply to parties handling the goods before loading and after discharge. COGA s 8(7) requires that to substitute liability on 'declared terms' (i.e. the Hague-Visby Rules) for COGA's default 'limited risk' liability, a contract must be 'freely negotiated between the parties'. This will rarely be true of Himalaya clauses, which are usually standard-form. See: Paul Myburgh, 'National Summary New Zealand' in William Tetley, *Marine Cargo Claims* (International Shipping Publications, 4th ed, 2008) 2527, 2531. In any case, there will usually be little reason for a subcontractor to seek to have a Himalaya clause upheld: COGA's package-based limit of liability will generally be lower than the Hague-Visby Rules' per-kilo limit.

⁴¹ See, eg. *The Eurymedon* [1975] AC 154.

⁴² See, eg. *Southampton Cargo Handling PLC v Lotus Cars Ltd* ('*The Rigoletto*') [2000] 2 Lloyd's Rep 532.

⁴³ See, eg. cl 15(a) of the Conlinebill 2000: 'It is hereby expressly agreed that no servant or agent of the Carrier (which for the purpose of this Clause includes every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Merchant under this Contract of carriage for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment.'

⁴⁴ See, eg. cl 15(c) of the Conlinebill 2000: 'The Merchant undertakes that no claim shall be made against any servant or agent of the Carrier and, if any claim should nevertheless be made, to indemnify the Carrier against all consequences thereof.'

⁴⁵ William Tetley, 'The Himalaya Clause – Revisited' (2003) *Journal of International Maritime Law* 40.

interests of subcontractors very well. It may also benefit carriers (who may be able to negotiate a better rate with their subcontractors), but it reduces cargo interests' options. Consequently, the carrier's subcontractors take all the benefits of the Hague/Hague-Visby Rules but none of the burdens.

The Rotterdam Rules are intended to adopt a more balanced approach. MPPs are granted Himalaya-style protection: they receive the carrier's defences and limits of liability.⁴⁶ However, this protection comes at a cost: MPPs also take on the carrier's obligations and liabilities.⁴⁷ The result is that those parties who take the benefits of the Rules also take the burdens.

3.3 The Hamburg Rules

The 1978 *United Nations Convention on the Carriage of Goods by Sea* (the 'Hamburg Rules') provides an existing alternative to the Hague/Hague-Visby Rules.⁴⁸ The Convention has had limited uptake. Of New Zealand's top 30 export and import partners, only two (Egypt and Nigeria) have ratified the Hamburg Rules.⁴⁹ The Hamburg Rules expand upon the scope of the Hague/Hague-Visby Rules and address two of the key weaknesses of those earlier conventions.

Firstly, the Hamburg Rules bring subcontractors into the convention regime. The Hamburg Rules allow cargo interests to claim against both 'carriers' and 'actual carriers'. The 'carrier', as in the Rotterdam Rules, is the person who concludes a carriage contract with a shipper.⁵⁰ An 'actual carrier' is a person to whom the carrier entrusts 'the performance of the carriage of the goods, or part of the carriage.'⁵¹ It bears the responsibilities of the carrier for the part of the carriage which it performs.⁵² Under the Hamburg Rules, a shipowner in a *Starsin*-type scenario would be an actual carrier if it was not the carrier.

Secondly, the Hamburg Rules extend inland, albeit to a much more limited extent than the Rotterdam Rules. The carrier (or actual carrier) is responsible for the goods during the period in which it is in charge of the goods at the port of loading, during the carriage and at the port of discharge.⁵³ This port-to-port application is a significant improvement on the tackle-to-tackle boundaries of the Hague/Hague-Visby Rules, although it falls well short of the carrier's potential door-to-door liability in the Rotterdam Rules. It is essentially the same port-to-port scope as the MPP provisions in the Rotterdam Rules.

The MPP concept in the Rotterdam Rules is closely related to the 'actual carrier' in the Hamburg Rules.⁵⁴ Both refer to parties other than the carrier who perform the carrier's obligations during the maritime leg. However, the MPP is designed to be broader in application than the actual carrier. The drafters of the Rotterdam Rules disliked the terminology of the Hamburg Rules. They considered that the term 'actual carrier' suggests that the contracting carrier is not 'actually' a carrier.⁵⁵ Furthermore, it was thought to imply that only those parties who 'carry' the goods were included, as opposed to those who (for instance) store or handle the goods.⁵⁶

It is not entirely clear whether the actual carrier definition in the Hamburg Rules encompasses parties who handle the goods but do not 'carry' them. It refers only to those entrusted with 'carriage'. A broad reading might extend this to any obligation undertaken under a contract of carriage. However, it is uncertain whether this reading was intended by the Hamburg drafters.⁵⁷ The Rotterdam Rules are intended to address this problem by explicitly defining a PP (and therefore an MPP) as undertaking obligations with respect to receipt, loading, handling, care and so on. They are intended to clearly apply to activities other than 'carriage'.

The Rotterdam Rules are also intended to better accommodate modern door-to-door carriage. MPPs under the Rotterdam Rules will only be liable within the same port-to-port scope as the Hamburg actual carrier, but the

⁴⁶ Rotterdam Rules arts 4(1), 19(1).

⁴⁷ Ibid 19(1).

⁴⁸ *United Nations Convention on the Carriage of Goods by Sea* (Hamburg Rules), 1978, 1695 UNTS 3.

⁴⁹ Statistics New Zealand, *Global New Zealand – International trade, investment, and travel profile: Year ended December 2013* (2014), 13–14.

⁵⁰ Hamburg Rules art 1(1).

⁵¹ Ibid art 1(2).

⁵² Ibid art 10(2).

⁵³ Ibid art 4(1).

⁵⁴ Michael F Sturley, 'Scope of coverage under the UNCITRAL Draft Instrument' (2004) 10 *Journal of International Maritime Law* 138, 149 fn 82.

⁵⁵ CMI, 'Draft Outline Instrument' in *CMI Yearbook 2000* (CMI, 2000) 122, 123 ('*CMI October 2000 Draft*').

⁵⁶ CMI, 'Report of the Fifth Meeting of the International Sub-Committee on Issues of Transport Law' in *CMI Yearbook 2001* (CMI, 2001) 265, 302.

⁵⁷ Sturley, 'Scope of coverage', above n 54, 149 fn 80.

carrier's liability is wider. It will be liable for the entire duration of the carriage – potentially extending beyond the port-to-port liability of the Hamburg carrier.⁵⁸

3.4 The OTT Convention

The Hamburg Rules are not the only attempt to update the international maritime carriage liability regime prior to Rotterdam. One proposed convention that would cover many of the same parties as the MPP provisions in the Rotterdam Rules is the 1991 *United Nations Convention on the Liabilities of Operators of Transport Terminals in International Trade* (the 'OTT Convention').

That convention deals with 'operators of transport terminals' ('OTTs'). An OTT is a person who undertakes to take in charge goods involved in international carriage, in order to perform or procure transport-related services with respect to those goods in an area under his control or in which he has a right of access or use.⁵⁹ This definition might include parties engaged in loading, unloading, stowing or storing goods being transported. Unlike the Hague/Hague-Visby, Hamburg, or Rotterdam Rules, the OTT Convention applies even if the goods are not carried by sea.

The scope of the OTT Convention stands out from other carriage conventions. Unusually, it does not deal with carriers. It explicitly excludes them.⁶⁰ It deals exclusively with OTTs. The intention is to fill the gaps within existing carriage regimes, rather than to create a whole new carriage regime with a greater scope.⁶¹

This unique scope leads to an interesting result. Maritime carriage conventions have traditionally defined their scope by reference to a party's relationship to a single notional 'carrier'.⁶² This approach is arguably outdated, and ill-suited to dealing with the arrangements which may arise in multimodal transport. For instance, a shipper (perhaps acting through a freight forwarder) might arrange for goods to be carried by sea from Auckland to Sydney, stored in a warehouse, then carried by road to Canberra. The warehouse operator has no relationship with either the sea or road carrier. It has been engaged directly by the shipper. It would not be captured by a carrier-centric convention. It does, however, take the goods in charge. It would be captured by the OTT Convention.

The OTT Convention has proven to be a political failure. It has not gathered the five ratifications needed to enter into force. Its limited, 'gap-filling' scope is partly to blame. For a start, it may not fill all gaps. The OTT Convention's period of responsibility⁶³ will usually align comfortably with the similarly-worded provisions in the Hamburg Rules,⁶⁴ but it may continue to leave gaps between OTTs and carriers operating under the Hague/Hague-Visby Rules.⁶⁵

Furthermore, the OTT Convention's limited scope means that its limits of liability sit uneasily alongside the limits in the conventions it is intended to supplement. International maritime carriage conventions have historically provided for much lower limits of liability than road and rail conventions.⁶⁶ To accommodate this, the OTT Convention provides for a lower limit of liability if the goods have been handed to the OTT immediately after carriage by sea or inland waterway, or if the OTT hands the goods over for such carriage.⁶⁷ Nevertheless, this lower 'maritime' limit of liability of 2.75 SDR/kg exceeds not only the per-kg limit in the

⁵⁸ Rotterdam Rules art 12(1): 'The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.'

⁵⁹ *United Nations Convention on the Liability of Operators of Transport Terminals in International Trade* (OTT Convention), opened for signature 19 April 1991, UN Doc A/CONF/152/13 (not yet in force) art 1(a).

⁶⁰ Ibid art 1(a).

⁶¹ UNCITRAL, *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade* UN Doc A/CONF/152/13 (1994), [7].

⁶² The Hague-Visby Rules, for instance, grant defences to a 'servant or agent of the carrier'. An actual carrier in the Hamburg Rules is a person to whom performance 'has been entrusted by the carrier'.

⁶³ OTT Convention art 3.

⁶⁴ Hamburg Rules art 4.

⁶⁵ This was a key criticism from the United States: see UNCITRAL, *Liability of operators of transport terminals: compilation of comments by Governments and international organizations on the draft Convention on the Liability of Operators of Transport Terminals in International Trade: report of the Secretary General* UN Doc A/CN.9/319 (1990), 157 ('OTT Compilation of Comments'). This concern may be exaggerated, however. A gap should only arise in the (rare) case where a carrier loads or unloads the goods itself: see Roger Harris, 'Liability Equals Responsibility: Canadian Marine Transport Terminal Operators in the 1990s' (1993) 21 *Canadian Business Law Journal* 229, 248.

⁶⁶ Such as the *Convention on the Contract for the International Carriage of Goods by Road (CMR)*, 1956, 399 UNTS 189, and the *Convention Concerning International Carriage by Rail (CIM-COTIF)*, 1980, 1397 UNTS 2.

⁶⁷ OTT Convention art 6(1)(b). The 'maritime' limit of liability of SDR 2.75/kg compares to a limit of SDR 8.33/kg otherwise. 'SDR' is the Special Drawing Right as defined by the International Monetary Fund.

SDR protocol to the Hague-Visby Rules (2 SDR/kg), but also the Hamburg Rules' 2.5 SDR/kg limit.⁶⁸ Unsurprisingly, this provoked criticism that terminal operators should not be faced with higher limits of liability than maritime carriers.⁶⁹

The Rotterdam Rules, by contrast, provide for an even higher per-kg limit of liability than the OTT Convention (3 SDR/kg), but this limit applies equally to both carriers and MPPs. Unlike the OTT Convention, the Rules' broader scope provides a level playing field and ensures that all gaps are filled.

3.5 The Multimodal Convention

Another international carriage convention which has not gathered the support required to enter into force is the 1980 Multimodal Convention.⁷⁰ That convention would govern multimodal transport only.⁷¹ It imposes obligations and liabilities only upon 'multimodal transport operators' ('MTOs'), who have concluded a multimodal transport contract. Unimodal carriers (including subcontractors of an MTO) are left to be governed by existing unimodal regimes such as the Hague/Hague-Visby Rules.

This multimodal focus naturally leads to a broader geographic scope than is found in the unimodal Hague/Hague-Visby or Hamburg Rules. The Multimodal Convention is not limited to the maritime leg. It would cover the entire carriage (potentially door-to-door).⁷² It is designed as a 'uniform' regime which would govern the entire multimodal carriage even where another regime might also apply.

This door-to-door scope is generally beneficial for cargo interests, who will benefit from a single, predictable liability regime governing the entire contract of carriage.⁷³ However it raises the prospect of a conflict with the unimodal conventions which the Multimodal Convention is intended to supplement.⁷⁴ The MTO is especially vulnerable to discrepancies between conventions. An MTO subject to the Multimodal Convention's liability regime may be unable to pursue adequate recourse against a subcontractor subject to a lower limit of liability under a unimodal regime. This is among the reasons why the Multimodal Convention has received little support among major shipping nations.⁷⁵

The prospect of a conflict of conventions is reduced in the Rotterdam Rules. For a start, the Rules bring both the multimodal 'carrier' and its unimodal MPPs into the same convention during the maritime leg. Both will face the same limits of liability. Outside the maritime leg, the drafters of the Rules favoured a 'limited network' approach over the 'uniform' approach of the Multimodal Convention. Where another international convention applies, the Rules will give way.⁷⁶ This will go some way to ensuring that carriers' liabilities are aligned with those of their unimodal subcontractors.⁷⁷

A further quirk of the Multimodal Convention is that while it imposes obligations and liabilities only upon MTOs, it extends the MTO's defences and limits of liability to its subcontractors (as under a Himalaya clause).⁷⁸ This 'Himalaya' protection produces a windfall for the MTO's subcontractors. Many of these subcontractors will already fall within the scope of a unimodal convention. Passing on the defences of the Multimodal Convention to them does not put them on the same footing as the MTO. It merely allows them to pick and choose whichever liability regime minimises their burden in the instant case.⁷⁹

⁶⁸ *Hamburg Rules* art 6(1)(a).

⁶⁹ UNCITRAL, *OTT Compilation of Comments*, above n 65, at 153, 154, 156, 158, 164, 169.

⁷⁰ *United Nations Convention on International Multimodal Transport of Goods (Multimodal Convention)*, opened for signature 1 September 1980, UN Doc TD/MT/CONF/16 (not yet in force).

⁷¹ *Multimodal Convention* art 2.

⁷² *Multimodal Convention* art 14(1).

⁷³ Ralph De Wit, *Multimodal Transport: Carrier Liability and Documentation* (Lloyd's of London Press, 1995) [2.162].

⁷⁴ Anthony Diamond 'The United Nations Convention on International Multimodal Transport of Goods, 1980' in Diana Faber (ed), *Multimodal Transport: Avoiding Legal Problems* (Lloyd's of London Press, 1997) 51, 62.

⁷⁵ United Nations Conference on Trade and Development (UNCTAD), *Multimodal Transport: the Feasibility of an International Legal Instrument* UN Doc UNCTAD/SDTE/TLB/2003/1 (13 January 2003), [25].

⁷⁶ Rotterdam Rules art 26. Whether art 26 fully prevents the possibility of a conflict of conventions is debatable. See e.g. Michael Lake, 'Ships, Planes, Trains and Automobiles: How Far Inland Do the Rotterdam Rules Reach?' (2010) 16 *New Zealand Business Law Quarterly* 312; Theodora Nikaki and Barış Soyer, 'A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive AND Efficient, or Just Another One for the Shelves?' (2012) 30 *Berkeley Journal of International Law* 303, 316.

⁷⁷ Although carriers may still face a shortfall in recourse against subcontractors governed by a mandatory domestic regime such as COGA.

⁷⁸ *Multimodal Convention* art 20(2).

⁷⁹ Diamond, above n 74, 62.

3.6 The Rotterdam Rules: An Opportunity

The drafters of the Rotterdam Rules were well aware of the flaws in the scope of previous international maritime carriage conventions. The Rules were an opportunity to improve upon them. They were an opportunity to:

1. Take into account subcontractors and other parties involved in the carriage other than a single, notional ‘carrier’;
2. Take into account the reality of door-to-door, multimodal carriage;
3. Provide a clear and certain scope of application; and
4. Be sufficiently politically acceptable to achieve ratification by major shipping nations.⁸⁰

The mechanism which the drafters developed to achieve this is the MPP.

4 The Maritime Performing Party Concept

The MPP, as already noted, is a subcategory of PP. It is a PP to the extent that it acts within the maritime leg.

The drafters originally intended that the Rules should apply the carrier’s obligations to all PPs, irrespective of whether they acted within the maritime leg or not. The CMI’s final Draft Instrument on Transport Law (which became UNCITRAL’s Preliminary Draft Instrument on the Carriage of Goods by Sea) made no mention of MPPs. It dealt only with PPs, which bore the carrier’s responsibilities and liabilities (and enjoyed their rights and immunities) regardless of whether they performed their services within the maritime leg or not.⁸¹

The decision to restrict PP liability to the maritime leg arose from broader discussions as to the scope of the Rules. The original CMI drafts contemplated that the convention should apply door-to-door, in order to reflect practice in the container trade.⁸² However, a number of members of the UNCITRAL Working Group objected to door-to-door coverage. They preferred a port-to-port scope.⁸³

Those members argued that a port-to-port convention would be more politically acceptable.⁸⁴ Many delegates were reluctant to overturn domestic inland carriage regimes that favoured either the carrier or cargo interests.⁸⁵ Further pressure was applied by industry groups (notably the Association of American Railroads (AAR)), which lobbied heavily against overturning ‘existing and well-established’ systems of liability.⁸⁶

The port-to-port proponents also argued that a door-to-door convention might be difficult to reconcile with existing inland carriage regimes. Inland PPs would be subject to different regimes depending on whether or not door-to-door carriage involved a sea leg.⁸⁷ Some inland PPs might not even be aware that their carriage formed one leg of an international carriage contract governed by the Rules. They might find themselves subject to liabilities beyond what they were insured for.⁸⁸ In New Zealand, for instance, an inland PP which thought it was subject to the package limitation of COGA might be rudely surprised to discover it was subject to the weight limitation of the Rules.⁸⁹

⁸⁰ These themes were acknowledged by the drafters as intertwined: Sturley ‘The Treatment of Performing Parties’, above n 30, 230-232.

⁸¹ CMI, ‘CMI Draft Instrument on Transport Law’ in *CMI Yearbook 2001* (CMI, 2001) 532, art 6.3.1 (‘CMI Final Draft’).

⁸² CMI, ‘Door to Door Transport’ in *CMI Yearbook 2000* (CMI, 2000) 118, 118; UNCITRAL, *Report of Working Group III (Transport Law) on the work of its eleventh session* UN Doc A/CN.9/526 (9 May 2003), [225] (‘11th Session Report’).

⁸³ UNCITRAL, *Report of the Working Group on Transport Law on the work of its ninth session* UN Doc A/CN.9/510 (7 May 2002), [27] (‘9th Session Report’).

⁸⁴ Ibid [28]; UNCITRAL, *Preliminary draft instrument on the carriage of goods [by sea]: Proposal by Canada* UN Doc A/CN.9/WGIII/ WP23 (21 August 2002), [4].

⁸⁵ Gertjan van der Ziel, ‘Multimodal Aspects of the Rotterdam Rules’ in *CMI Yearbook 2009* (CMI, 2009) 301, 309.

⁸⁶ UNCITRAL, *Preparation of a draft instrument on the carriage of goods [by sea]: Compilation of replies to a questionnaire on door-to-door transport and additional comments by States and international organizations on the scope of the draft instrument* UN Doc A/CN.9/WGIII/ WP28 (31 January 2003), 32 (‘Compilation of Replies on Scope’). Sturley suggests that the AAR may have been concerned more with minimising the liability of its members than with promoting good public policy: its position sits uncomfortably with its criticism elsewhere of the lack of uniformity in the existing US liability regime: see Michael F Sturley, ‘Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo’ (2009) 40 *Journal of Maritime Law and Commerce* 1, 38–39.

⁸⁷ UNCITRAL, *9th Session Report*, above n 83, [29].

⁸⁸ van der Ziel, above n 85, 309.

⁸⁹ The COGA package limitation was recently increased from NZD 1500 to NZD 2000 by the *Carriage of Goods Amendment Act 2013* (NZ). The new COGA package limitation is actually higher than the package limitation in the Rules (SDR 875/unit = NZD 1578.80/unit as

In response, it was argued that a port-to-port convention was simply not ambitious enough to be worthwhile. It would do little to further harmonise transport law.⁹⁰ It would merely be ‘...a further convention of restricted application in an area of international law which is overburdened with competing legislation, creating further disharmony.’⁹¹ Such a convention, it was submitted, would be unlikely to gather much support.⁹²

The final solution was put forward by the United States as part of a package of proposals developed in consultation with affected industries.⁹³ This package was characterised as a necessary commercial compromise between competing interests.⁹⁴ The United States’ solution was to use the MPP concept to split the scope of the Rules. The Rules would provide a door-to-door liability regime between contracting parties (i.e. the carrier and the cargo interests).⁹⁵ They would also provide a substantive port-to-port liability regime for MPPs.⁹⁶ However, they would neither create new causes of action nor pre-empt existing causes of action against inland PPs. Nor would they interfere with inland PPs’ existing rights to rely on a Himalaya clause.⁹⁷

This is a practical solution. It neatly retains the desired door-to-door coverage, while addressing the problem of imposing maritime liability on unaware inland carriers. The contracting carrier and cargo interests are aware of the maritime element. They will be liable under the Rules for the entire carriage (except insofar as a competing international convention applies). They can insure themselves accordingly. Any other party involved in the carriage will only be liable under the Rules if they perform their activities in the maritime leg. This makes sense, as parties performing their activities in the maritime leg should expect to be governed by a maritime liability regime, and will not typically be subject to a competing inland liability regime.

4.1 Alternative Approaches

Could the drafters have done better? One alternative approach was suggested by Italy.⁹⁸ Like the United States’ approach, the Italian proposal would have applied the Rules door-to-door with respect to the carrier. Unlike the United States’ approach, the Rules would not have given way to other international regimes.⁹⁹ The Rules would effectively have operated as a uniform multimodal convention with respect to the carrier.

Under the Italian proposal, ‘performing parties’ would have been subject to the Rules, but would be distinguished from ‘performing carriers’ (i.e. parties engaged by the carrier to perform part of the carriage). Performing carriers would be subject to whatever law would otherwise apply to their contract with the carrier (be it an international convention or domestic law such as COGA).¹⁰⁰

This approach has the virtue of giving the cargo interest a more predictable cause of action against the carrier. The Rules will not be ousted by any other international convention. However, a uniform approach runs into the same difficulties that have stifled the adoption of the Multimodal Convention, such as the possibility of a shortfall in recourse for carriers. Furthermore the distinction between ‘performing parties’ and ‘performing carriers’ seems hard to justify. If an inland performing carrier should be subject to domestic law, why should an inland warehouse operator be subject to the Rules? The United States’ approach, based on the MPP, draws a more principled boundary.

Another possible approach – which the drafters did not consider – is suggested by the OTT Convention. The OTT Convention provides that to constitute ‘international carriage’ (and therefore to fall within the scope of the convention), the place of departure and place of destination must be identified as being in two different states

at August 2014). However, because the Rules also include a weight limitation (SDR 3/kg = NZD 5.41/kg as at January 2014), heavier cargoes may incur higher liability under the Rules than under COGA.

⁹⁰ UNCITRAL, *9th Session Report*, above n 83, [28].

⁹¹ UNCITRAL, *Compilation of Replies on Scope*, above n 86, 37.

⁹² Ibid; UNCITRAL, *9th Session Report*, above n 83, [28].

⁹³ UNCITRAL, *Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]: Proposal by the United States of America* UN Doc A/CN.9/WGIII/WP34 (7 August 2003) (‘USA Proposal’). Another significant part of the package was to provide different treatment for ‘Ocean Liner Service Agreements’ (‘OLSAs’), which later developed into the ‘volume contract’ provisions of the Rules.

⁹⁴ Ibid [2]–[4].

⁹⁵ Ibid [5].

⁹⁶ Ibid [6].

⁹⁷ Ibid [7].

⁹⁸ UNCITRAL, *Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]: Proposal by Italy* UN Doc A/CN.9/WGIII/WP25 (13 December 2002) (‘Italy Proposal’).

⁹⁹ Ibid [1]; UNCITRAL, *General Remarks*, above n 34, [154].

¹⁰⁰ UNCITRAL, *Italy Proposal*, above n 98, [1]; UNCITRAL, *General Remarks*, above n 34, [156]–[157].

when the goods are taken in charge by the terminal operator.¹⁰¹ If the international nature of the carriage is not identified, the OTT Convention will not apply.

This approach could have been adopted in the Rotterdam Rules. The drafters could have made inland PPs liable under the Rules provided the international maritime nature of the carriage was sufficiently identified to them. This would have allowed them to retain a door-to-door scope for PPs while avoiding the ‘unaware inland carrier’ problem. However, it would probably have created more problems than it solved, raising difficult questions of fact as to whether the international maritime nature of the carriage was evident. The United States’ approach avoids this by – in effect – assuming that MPPs will always be sufficiently aware of the nature of the carriage, and inland PPs unaware.

Sturley – almost apologetically – describes the philosophy of the Rules as ‘pragmatic’.¹⁰² He writes that proposals making ‘perfect sense on a theoretical or logical level’ were abandoned in the face of industry opposition.¹⁰³ He cites the failure to cover inland PPs as an example of this.

In fact, the drafters have nothing to apologise for. The split door-to-door/port-to-port scope is an effective solution to a genuine problem, and still provides for a more ambitious liability regime than ever before. MPPs are liable within the same port-to-port scope as the Hamburg Rules, but carriers are liable for the entire carriage. Furthermore, the Rules go beyond even the Multimodal Convention by imposing obligations – not just defences – on the carrier’s subcontractors.

5 The PP/MPP Definitions: ‘Performing Party’

In order to achieve the desired scope, the Rules include lengthy definitions for both the PP and MPP. These definitions indicate the drafters’ intention to achieve a very specific coverage, driven by their policy concerns. Each element of the definition is significant. Some aspects of the definitions were controversial. Others are potentially problematic. There remains uncertainty in their scope of application.

Article 1(6) of the Rotterdam Rules provides a definition of a ‘Performing party’:

(a) “Performing party” means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, keeping, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.

(b) “Performing party” does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.

5.1 ‘Performing party’ means a person other than the carrier...

A carrier in the Rules is a person who enters into a contract of carriage with a shipper.¹⁰⁴ A PP, by contrast, has no direct contractual relationship with the shipper.

The PP concept cuts across contractual niceties. It encompasses parties who play a role in performing the contract of carriage, even though they are not themselves a party to that contract. Like the ‘actual carrier’ definition in the Hamburg Rules, the PP concept is intended to embrace subcontractors of the contracting ‘carrier’. These parties have no direct contractual relationship with the shipper, who may not even be aware of their existence. Nevertheless, they are involved in performing the contract of carriage.

If a shipowner in a *Starsin*-type scenario carries (and damages) the goods, there is little utility in debating whether it did so as a contracting ‘carrier’ or not. The drafters were correct to recognise that a modern international maritime carriage convention must extend its reach to parties beyond the contracting ‘carrier’.

¹⁰¹ OTT Convention art 1(c). See also UNCITRAL, *Report of the Working Group on International Contract Practices on the work of its tenth session* UN Doc A/CN.9/287 (1987), [131]–[135].

¹⁰² Sturley, ‘Transport Law for the twenty-first century’, above n 26, 24.

¹⁰³ Ibid 25.

¹⁰⁴ Rotterdam Rules art 1(5).

5.2 ...that performs or undertakes to perform...

The reach of the PP definition extends to include not just parties who 'perform' the carrier's obligations, but also those who 'undertake to perform'. This ensures the coverage of parties who undertake to physically perform part of the carriage but who completely fail to do so, such as a stevedore who undertakes to load goods but in fact leaves them sitting on the wharf (as in *Fletcher Panel*).

It also extends to cover parties that never intended to physically perform any obligations themselves. Just as a carrier may subcontract to other parties, those parties may further subcontract some or all of the physical performance. By covering parties that 'undertake' to perform, the PP definition ensures that every party in the contractual chain remains a PP, even if they do not physically perform any of the carriage themselves.¹⁰⁵ The decision to cover such 'paper carriers' was the subject of considerable controversy.

The early CMI drafts defined the PP as a person who performs, undertakes to perform, or 'procures to be performed' the carrier's responsibilities.¹⁰⁶ This conveys even more clearly the intention to cover every party in the contractual chain. However, it was vigorously opposed by the International Federation of Freight Forwarders Associations (FIATA). FIATA argued that the cargo interest should have an action only against the carrier and the party which physically carries the goods. No action should lie against paper carriers.¹⁰⁷ The definition was accordingly narrowed to cover only those who 'physically perform or fail to perform'.¹⁰⁸

This decision was later reversed by the UNCITRAL Working Group. Proponents of the reversal argued that including those who undertake to perform would protect the interests of cargo claimants, by giving them a direct cause of action against every party in a contractual chain.¹⁰⁹ It would ensure that cargo claimants would be able to directly pursue whichever PP was at fault without requiring a multiplicity of actions to work through the contractual chain.¹¹⁰

In fact, the definition does more than that. Cargo claimants will not be limited to suing just those who are directly at fault. Article 19(3) provides that MPPs are liable for the acts and omissions of their subcontractors.¹¹¹ By including those who 'undertake' to perform in the PP (and therefore MPP) definition, the Rules allow cargo claimants to pursue a paper carrier anywhere in the contractual chain, even if it is not directly at fault. Opponents characterised this as creating causes of action against parties which were not the 'proper' defendants.¹¹²

This criticism can be rebutted. A paper carrier – even if it is not directly at fault – may still be a 'proper' defendant. Allowing the cargo interest to sue anyone in the contractual chain provides them with the broadest possible options for pursuing a remedy when the parties directly at fault are insolvent or cannot be identified. It provides a more satisfactory allocation of risk.

Suppose, for instance, that a paper carrier engages two subcontractors to perform the obligations it has undertaken: a stevedore to load goods, and a shipowner to carry them to a destination port. If the goods are damaged but it is unclear which subcontractor has damaged them (i.e. the damage is not 'localised'), the cargo interest will still have a remedy against the paper carrier. The paper carrier, not the cargo interest, will shoulder the liability for the subcontractors it has engaged.

A remedy against a paper carrier will often be unnecessary in such a case. The cargo interest will also have a remedy against the original contracting carrier (who is liable for the entire duration of the carriage). But where the original contracting carrier is insolvent or based in an inconvenient jurisdiction, the cargo interest may prefer a remedy against the paper carrier. They should have it. As Sturley, Fujita and van der Ziel put it: '[i]f a party

¹⁰⁵ Michael F Sturley, Tomotaka Fujita and Gertjan van der Ziel, *The Rotterdam Rules: the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Sweet & Maxwell, 2010), [5.147].

¹⁰⁶ See, eg. CMI, 'Draft Outline Instrument of 31 May 2001' in *CMI Yearbook 2001* (CMI 2001) 357, art 1.3 ('CMI May 2001 Draft').

¹⁰⁷ CMI, 'Draft Report of the Sixth Meeting of the International Sub-Committee on Issues of Transport Law' in *CMI Yearbook 2001* (CMI, 2001) 305, 342.

¹⁰⁸ CMI, *CMI Final Draft*, above n 81, art 1.17.

¹⁰⁹ UNCITRAL, *Report of Working Group III (Transport Law) on the work of its twelfth session* UN Doc A/CN.9/544 (16 December 2003), [32] ('12th Session Report').

¹¹⁰ *Ibid* [36].

¹¹¹ Rotterdam Rules art 19(3): 'A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage...'

¹¹² UNCITRAL, *12th Session Report*, above n 109, [37].

undertakes to perform any of the carrier's obligations, it should not escape its promise simply by passing the duty to another person.¹¹³

5.3 ...any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, keeping, carriage, care, unloading or delivery of the goods...

Only certain, specific, listed obligations are included in the PP definition. Receipt, loading, handling and so on are the obligations which are imposed on the carrier by Article 13(1) of the Rules. The drafters considered them to be the 'core' obligations of the carrier relating to the goods.¹¹⁴

While a carrier may undertake further non-core obligations under a contract of carriage, a subcontractor which performs only those additional obligations will not be a PP. For instance, as part of a contract of carriage, a carrier might undertake to obtain a phytosanitary certificate for a cargo of logs being carried from Tauranga to Tokyo. A subcontracted party whose only role was to obtain that certificate would not be a PP.

The list of specific obligations in the PP definition arguably provides for a clearer field of application than the Hamburg Rules' 'actual carrier' definition. However, there is still room for disagreement as to exactly what the listed obligations extend to.

The drafters appear to have had in mind a restrictive reading of the listed obligations. Parties they had in mind as PPs included ocean carriers, stevedores and terminal operators. Parties which they did not consider would be PPs included a security company guarding a container yard, an intermediary preparing documents for the carrier, or a ship yard which repairs a vessel.¹¹⁵ The underlying idea seems to be that a party will be a PP if it performs activities directly related to cargo-handling and carriage.¹¹⁶

There is room for the courts to apply a more liberal interpretation. Making a vessel seaworthy could arguably be considered one of the carrier's obligations with respect to 'carriage' or 'care' of the goods. Issuing a bill of lading or other documents might be considered one of the carrier's obligations with respect to 'receipt' of the goods. Guarding a container yard could be construed as 'care'.

It would be unfortunate if the courts were to overextend the scope of the listed obligations. It would be better to adopt a more restrained interpretation. PPs who are found to be MPPs will face direct liability under the Rules. Parties such as shipyards or security guards are only loosely connected to the contract of carriage. A shipyard may foresee that if it fails to make a ship seaworthy, its future cargo may be damaged. However, it has no way of knowing the nature of that cargo or its value. It would be very difficult to secure appropriate insurance. It is better that the risk lies with parties who can adequately insure against it: the carrier (up to the Rules' limit of liability), and the cargo interest (for any shortfall).

5.4 ...to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

A person is only a PP to the extent that they act (directly or indirectly) at the carrier's request or under the carrier's supervision or control.

This element of the definition is an improvement on previous maritime conventions. By including parties who act under the carrier's 'supervision and control' (even if they may not act at its 'request'), the definition reinforces that it is the functions which a party performs which are significant, not the underlying contractual arrangements. It avoids dwelling on contractual formalities, or whether the party is a 'servant or agent' of the carrier.¹¹⁷

This approach is admirable. It ensures that the Rules will provide a more reliable cause of action for cargo claimants. It furthers the Rules' objective of enhancing uniformity in cargo claims. However, it does not go as far as it could have. Not all parties which handle the goods during the course of carriage will be included. A

¹¹³ Sturley, Fujita, and van der Ziel, above n 105, [5.147].

¹¹⁴ UNCITRAL, *Preliminary Draft Instrument on the Carriage of Goods by Sea* UN Doc A/CN.9/WGIII/WP21 (8 January 2002), [17] ('UNCITRAL Preliminary Draft Instrument').

¹¹⁵ Ibid.

¹¹⁶ Smeele, above n 40, [38].

¹¹⁷ CMI, *CMI October 2000 Draft*, above n 55, 123.

customs authority would not be a PP, for instance: while it handles the goods, it acts neither at the carrier's request, nor under its supervision or control.¹¹⁸

This might lead to some awkward results: a cargo interest would have a claim under the Rules against a private warehouse operator who negligently allowed goods to be stolen, but would have no convention-based claim against a customs authority which made the same mistake. It would need to pursue its claim outside the Rules.

This result is necessary because the Rules impose vicarious liability on the carrier for the acts and omissions of PPs.¹¹⁹ It is reasonable to impose such liability on the carrier for those parties which it has requested perform the carriage or which it has some control over, but it would be unreasonable to impose liability against them for the acts or omissions of a party which they neither chose nor control.

Nevertheless, it is a missed opportunity. There would be value in giving cargo interests a direct convention-based claim against parties who handle the goods but who do not answer to the carrier. This could have been achieved by redrafting the PP definition to focus on a party's relationship to the goods (as in the OTT Convention). The vicarious liability provision could in turn have been redrafted to specify that the carrier was liable only for PPs acting at its request, or under its control or supervision.

5.5 "Performing party" does not include any person that is retained, directly or indirectly, by a shipper... instead of by the carrier.

Loading, handling, stowing and unloading the goods are usually the carrier's obligations.¹²⁰ However, the Rules expressly provide that these functions may instead be performed by the shipper (or by the 'documentary shipper',¹²¹ 'controlling party',¹²² or consignee), rather than the carrier.¹²³ This would be the case under a FIOST ('free in, out, stowed and trimmed') clause, for instance.

This element of the PP definition clarifies that in such cases, a subcontractor employed by the shipper is not a PP (and therefore cannot be an MPP). A result of this is that under the Rotterdam Rules, as with previous maritime carriage conventions, a stevedore who damages cargo while loading will enjoy the Rules' defences and limits of liability if he is retained by the carrier, but not if he is retained by the shipper.

This result is again a consequence of imposing vicarious liability on the carrier for the actions of PPs. It reflects the view that has developed in the English courts with respect to FIOST clauses under the Hague-Visby Rules.¹²⁴ A carrier should not be liable for the negligence of stevedores retained by the cargo owners. While it is reasonable that they be liable for the actions of those PPs they have themselves chosen, it is unreasonable that they be held liable for the actions of people selected by the shipper.¹²⁵

It would be an odd state of things if one were to hold that a shipowner who has no contract whatever with the stevedore, and who cannot say to the stevedore: 'You have broken your contract with me, and therefore I will not have you any longer in my vessel; and who has no control over what is to be paid to the stevedore, should be responsible for the failure of the stevedore to do his duty.

Excluding parties retained by the shipper from the PP definition avoids unfairly imposing vicarious liability on the carrier. But it is another missed opportunity. Bringing all parties retained by the shipper into a maritime carriage convention would have further unified the liability regime. It is not clear why a 'carrier' retained by the shipper should enjoy the defences and limits of liability granted by the Rules, while other parties retained by the shipper should not.

¹¹⁸ Sturley, Fujita and van der Ziel, above n 105, [5.150].

¹¹⁹ Rotterdam Rules art 18(a).

¹²⁰ Ibid 13(1).

¹²¹ Ibid 1(9): 'a person, other than the shipper, that accepts to be named as "shipper" in the transport document or electronic transport record.'

¹²² Ibid 1(13): 'the person that pursuant to article 51 is entitled to exercise the right of control.' Depending on the circumstances, this may be the shipper, consignee, documentary shipper or another designated person, or the holder of a negotiable transport document (electronic or otherwise).

¹²³ Ibid 13(2).

¹²⁴ See, eg., *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc ('The Jordan II')* [2005] 1 WLR 1363. The English approach is not shared universally. In the United States, for instance, the carrier's liability for negligence in loading and stowing cargo (under the *Carriage of Goods by Sea Act*) has been held to be non-delegable: see *Associated Metals & Minerals Corp* 978 F 2d 47 (2nd Cir, 1992), 51.

¹²⁵ *The Jordan II* [2005] 1 WLR 1363, 1183, quoting pre-Hague Rules case *Bryson & Gylsen v J & J Drysdale & Co* (1920) 4 Lloyd's Rep 24.

Again, an OTT-style definition of PP and a redrafted vicarious liability provision could have included parties retained by the shipper within the Rules, while ensuring that carriers were not unfairly held liable for their actions.

6 The PP/MPP Definitions: 'Maritime Performing Party'

The MPP is defined in Article 1(7) of the Rules:

'Maritime performing party' means a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations 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. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

6.1 'Maritime performing party' means a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations...

The MPP definition raises an immediate question. A PP will be an MPP to the extent that it performs or undertakes to perform 'any of the carrier's obligations' during the maritime leg. The question is which obligations are meant to be encompassed by this definition?

One possibility is that the drafters intended to limit the obligations to those listed in the PP definition (receipt, loading, handling and so on). An MPP is, after all, a subcategory of PP. On that reading, a PP which performs additional obligations other than those listed in the PP definition would be an MPP only while performing the listed obligations. It would not be an MPP (and would therefore not be subject to direct liability) while performing its additional obligations. An alternative reading is that the drafters meant 'any of the carrier's obligations' to be read literally, covering any obligation whether listed in the PP definition or not. An MPP which performs additional obligations will be an MPP for the whole of its work.

The two readings may lead to significantly different consequences. One notable obligation which the carrier undertakes, but which is not listed in the PP definition, is the obligation to exercise due diligence to make and keep the ship seaworthy.¹²⁶ Atamer points out that if the limited reading is correct, it would produce a 'surprising' result. Shipowners will frequently be MPPs, not carriers, under the Rules (where, for instance, a freight forwarder acts as the carrier). On the limited reading, such shipowners would not be MPPs (and would therefore bear no liability under the Rules) with respect to any failure to keep their ships seaworthy.¹²⁷

Atamer nevertheless considers that the drafting history of the rules indicates that the limited reading was intended.¹²⁸ Early drafts of the PP always referred only to the carrier's 'core' obligations. When the MPP concept was subsequently introduced, the drafters' concern was with altering the geographic scope (i.e. the maritime leg), not the functional scope. By choosing to define the MPP as "a PP", Atamer argues, the drafters made it clear that only those persons involved with the listed obligations would qualify as an MPP.

Atamer's conclusion can be questioned, however. He is correct to say that only parties who undertake the listed obligations can be PPs (and therefore MPPs), but it does not follow that parties who undertake those obligations will then cease to be MPPs while they are engaged in other activities. Quite the opposite is true: the drafting history indicates that they will continue to be MPPs. The MPP definition must be read in the context of the obligations and liabilities that the Rules impose upon the MPP.

While early drafts of the PP definition referred only to the 'core' obligations, the liability provisions did not limit the PP's liability to those obligations. If a party undertook a listed responsibility, it would be a PP.¹²⁹ But

¹²⁶ Rotterdam Rules art 14(a).

¹²⁷ Kerim Atamer, 'Construction Problems in the Rotterdam Rules regarding the Performing and Maritime Performing Parties' (2010) 41 *Journal of Maritime Law and Commerce* 469, 493. This is a case where the detailed drafting of the Rules has increased ambiguity rather than reduced it. Under the simpler drafting of the Hamburg Rules, there would be no doubt that an 'actual carrier' shipowner is responsible for the seaworthiness of its vessel. Article 1(2) designates it an 'actual carrier' because it has been entrusted with carriage, and art 10(2) therefore subjects it to all of the responsibilities of the carrier.

¹²⁸ *Ibid* 492–493.

¹²⁹ See, eg. UNCITRAL, *Draft instrument on the carriage of goods [wholly or partly] [by sea]* UN Doc A/CN.9/WGIII/WP32 (4 September 2003), art 1(e) ('*UNCITRAL 2003 Draft*'): 'Performing party' means a person other than the carrier that physically performs [or undertakes to perform] any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage. The term 'performing party' does not include any person who is retained by a shipper or consignee, or is an employee, agent, contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper or consignee.

by virtue of being a PP, it would be subject to all the responsibilities and liabilities of the carrier – not just the listed ‘core’ obligations.¹³⁰

The drafters subsequently introduced the MPP concept to place a geographical limit on which parties would bear the carrier’s obligations and liabilities. Parties outside the maritime leg would no longer bear any liability, but there is nothing to indicate that the drafters intended to change the position for parties operating within the maritime leg. Just as in the early drafts, parties who meet the MPP definition should be liable for whatever obligations they undertake. A literal reading of the MPP definition would achieve this.

On this interpretation, a shipyard which undertakes to make a vessel seaworthy is not an MPP. It has not met the threshold requirement that it be a PP, as it (probably) has not undertaken any of the obligations listed in the PP definition. By contrast, a shipowner which undertakes to make and keep its vessel seaworthy is an MPP. It has undertaken to ‘carry’ the goods, so it is a PP. It will therefore continue to be an MPP with respect to all the obligations it undertakes, including seaworthiness. This interpretation of the definition is supported by the drafting history, and avoids ‘surprising’ results. It is the interpretation that the courts should adopt.

6.2 ...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.

While the drafters were correct to limit the direct liability of MPPs to the maritime leg, this decision does cause some potential difficulties. The drafters considered that the maritime leg would be better defined using a ‘geographical’ approach rather than a ‘functional’ approach.¹³¹ A PP is an MPP not by virtue of the activities it performs, but by virtue of where it performs them: between arrival at the port of loading and departure from the port of discharge. Unfortunately this raises the awkward question of what constitutes a ‘port’. As in the Hamburg Rules, the drafters chose not to define ‘port’ in the Rules. Instead they left the matter to be determined under national law, due to differing views on what constituted a ‘port’ in different geographic conditions.¹³²

Leaving such questions to national law creates uncertainty in the Rules. Atamer notes that in the past there has been considerable litigation over when a ship has ‘arrived at the port’ in the context of laytime and demurrage under a voyage charterparty.¹³³ He predicts that the Rules may well see similar litigation arise in bill of lading cases as to where the ‘landside’ limits of the port are to be drawn.

The position in New Zealand remains to be determined. Is a port limited simply to the terminal immediately adjacent to the water? Could a nearby container yard or cargo consolidation area be included? What about an ‘inland port’ freight hub which delivers cargo directly to the seaside terminal, such as Port of Tauranga’s Metroport, or Port of Auckland’s Wiri freight terminal? What about public roads connecting two terminals of a single port, such as the Tauranga Harbour Bridge between Port of Tauranga’s Sulphur Point terminal and its Mount Maunganui terminal?

In New Zealand, s 2 of the *Maritime Transport Act 1994* (NZ) provides that for the purposes of that Act, “port”:¹³⁴

- (a) Means an area of land and water intended or designed to be used either wholly or partly for the berthing, departure, movement, and servicing of ships; and
- (b) includes any place in or at which ships can or do (i) load or unload goods: (ii) embark or disembark passengers; and
- (c) also includes a harbour

¹³⁰ See, eg. Ibid, art 15(1) (variant 1): A performing party is subject to the responsibilities and liabilities imposed on the carrier under this instrument, and entitled to the carrier’s rights and immunities provided by this instrument

(a) during the period in which it has custody of the goods; and

(b) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage.

¹³¹ UNCITRAL, *12th Session Report*, above n 109, [30].

¹³² Ibid; UNCITRAL, *Report of Working Group III (Transport Law) on the work of its nineteenth session (New York, 16-27 April 2007)* UN Doc A/CN.9/621 (17 May 2007), [148] (‘19th Session Report’).

¹³³ Atamer, above n 127, 483–484.

¹³⁴ The Act was recently amended by the *Maritime Transport Amendment Act 2013* (NZ). Prior to that amendment, s 2 provided simply that ‘port includes place and harbour’.

The New Zealand courts might well choose to apply that definition to the Rules in order to achieve consistency with other areas of maritime activity. However that definition was not drafted with cargo claims in mind, much less the Rules. It will not resolve all ambiguity. Inland areas such as Metroport are probably excluded. But the definition leaves room for doubt with respect to areas closer to the water.

The inclusion of a carefully drafted definition of ‘port’ would probably have improved the Rules. Domestic law will frequently be ambiguous on the point. It is to be regretted that fundamental disagreement has made such a definition politically impossible. The consequences may be significant, particularly with respect to the liability of ‘inland carriers’.

6.3 An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

While the MPP definition is primarily geographic, it contains a functional exception. The Rules generally provide that a PP will be an MPP to the extent that it performs its services in the maritime leg. A PP which performs some of the carrier’s obligations within the maritime leg and some outside it will be an MPP only with respect to its activities within the maritime leg. However, the position is different for “inland carriers”. An inland carrier will be an MPP only if it performs its services exclusively within a port area. This is intended to encompass parties such as forklift drivers whose only role is to carry goods from one wharf to another.¹³⁵ An inland carrier which performs any services outside the port area, by contrast, will not be an MPP even with respect to any services which it performs within the port area.

The goal of the provision is to ensure that inland carriers such as railroads and truckers will almost never fall within the MPP definition. During the drafting process both the AAR (through the United States delegation) and the International Road Transport Union (IRU) argued that their members should be excluded from the MPP definition altogether.¹³⁶ The AAR argued that its members’ role is virtually always to move goods into or out of a port rather than to move goods within the port.¹³⁷ Its activities within the port are merely incidental.

Excluding inland carriers from the MPP definition unless they perform their services exclusively within a port area makes sense. If the Rules do not apply to inland carriers door-to-door, then they should not apply at all. The overwhelming majority of most inland carriers’ service is non-maritime. It would unnecessarily complicate claims if an inland carrier was subject to different liability regimes depending on whether or not the goods were damaged in a port area.

In particular it would cause problems in cases where the damage cannot be localised. It might be apparent that goods were damaged by an inland carrier, but unclear exactly where that damage occurred. By ensuring that inland carriers who perform services outside the port area are not MPPs, the Rules ensure that a single (domestic) liability regime will apply to them, no matter where the damage occurs. This should simplify claims. There are, however, some downsides to excluding inland carriers from the MPP definition.

A particular problem is that ‘inland carrier’ is not defined in the Rules. It is clear that ‘carrier’ here is not being used in the sense used throughout the rest of the Rules (i.e. a person who contracts with a shipper). ‘Carrier’ here is a functional term describing the nature of the services being performed: an “inland carrier” is a person who physically carries goods inland. This functional language is used to distinguish these ‘inland carriers’ from other PPs located inland who the drafters considered should nevertheless be MPPs (such as stowage planners).¹³⁸

This distinction is not as clear as the drafters might have hoped. ‘Inland carrier’ obviously includes single-service carriers such as truckers and railroads. It obviously excludes single-service stowage planners and the

¹³⁵ UNCITRAL, *12th Session Report*, above n 109, [31]; UNCITRAL, *Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: Provisional redraft of the articles of the draft instrument considered in the Report of Working Group III on the work of its twelfth session (A/CN.9/544)* UN Doc A/CN.9/WGIII/WP36 (23 March 2004), [4] fn 9; UNCITRAL, *19th Session Report*, above n 132, [137].

¹³⁶ UNCITRAL, *Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: Proposal of the United States of America on the definition of “maritime performing party”* UN Doc A/CN.9/WGIII/WP84 (28 February 2007) (‘USA Proposal on “MPP”’); UNCITRAL *Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: Proposals by the International Road Transport Union (IRU) concerning articles 1(7), 26 and 90 of the draft convention* UN Doc A/CN.9/WGIII/WP90 (27 March 2007).

¹³⁷ UNCITRAL, *USA Proposal on “MPP”*, above n 136, [2].

¹³⁸ UNCITRAL, *19th Session Report*, above n 132, [145]. A stowage planner may perform its services in an office outside port, but it nevertheless undertakes an obligation of the carrier on the maritime leg.

like, but the drafters do not appear to have considered how the term might apply to multi-service logistics providers which provide both inland carriage services and other non-carriage services.

For instance, a company might provide stevedoring and marshalling services within a port area, plus warehousing outside the port area, and transport to that warehouse. Transportation to the warehouse would constitute ‘inland carriage’, and would not be exclusively within the port area. Would such a company be considered an ‘inland carrier’? If so, would it therefore be excluded from being an MPP with respect to its stevedoring operations? What about its marshalling services (i.e. intra-port carriage)?

What if that company did not undertake to arrange transport to its warehouse? It would ‘carry’ the goods exclusively intra-port, but its storage at the warehouse would constitute a ‘service’ not performed exclusively within the port area. Would it then be excluded from being an MPP?

On a broad reading of the provision, any PP that physically carried goods inland would be an ‘inland carrier’, irrespective of its other activities. If it performed any services outside the port area (carriage or otherwise), it would be excluded as an MPP with respect to all of its activities.

This interpretation conforms to the literal wording of the Rules, and would be certain, but it goes too far. It would certainly capture the kinds of single-service carriers that the drafters had in mind. However, it would also seem to extend the exception to parties for whom inland carriage is only an incidental part of their activities (e.g. transporting goods to a warehouse across the street from the port). The situation is the reverse of that raised by the AAR. Why should a party which performs almost all its activities in port have its liability (and its defences) under the Rules ousted by incidental carriage activities outside the port?

A more restricted reading might hold that an ‘inland carrier’ was a person that *solely* undertook to perform carriage services. A person which undertook any non-carriage services would be an MPP with respect to all its services in port (including carriage), even if it undertook to carry goods outside the port area.

This reading goes too far in the other direction. While it would limit the exception to the single-service rail and road carriers which the drafters had in mind, it would fail to capture all of them. Such providers might find themselves outside the exception should they perform incidental non-carriage activities (e.g. warehousing goods overnight at a freight hub). On this restricted reading, performing such extra duties would mean that they were no longer “inland carriers”, even though the vast bulk of their work was inland carriage. This is clearly not what the drafters intended.

A similar but more flexible interpretation might hold that an ‘inland carrier’ was a person who *preponderantly* undertook to perform carriage services. This would be a better interpretation. It gets closer to what the drafters intended. It would capture all single-service carriers, and exclude merely incidental carriers. But it would also leave a lot of uncertainty in between. It is simply not clear what proportion of carriage-to-non-carriage services would classify a party as an ‘inland carrier’.

The best interpretation, however, is a functional split. A PP which undertakes to perform inland carriage services is an ‘inland carrier’, (and therefore excluded as an MPP) only while performing its carriage services. They would not be an inland carrier (and so could still be an MPP) while performing non-carriage services.

This ‘split’ interpretation sits a little uncomfortably with the wording of the provision. The provision refers to ‘inland carriers’ rather than e.g. ‘parties who undertake to carry goods inland’. The chosen wording suggests that a party either is or is not an ‘inland carrier’, not that it may be an inland carrier at some times but not at others. Furthermore the provision refers to the “services” provided by an inland carrier, rather than e.g. the ‘carriage’. Again, this suggests that the drafters intended to capture all services provided by parties designated as ‘inland carriers’. They probably intended that railways and truckers would not be MPPs even if they provided non-carriage services in port. On this preferred interpretation, it is submitted that they would be.

Nevertheless, the split interpretation best resolves the problem raised by the multi-service logistics provider: a problem which the drafters failed to recognise. Those parties will be excluded from the Rules to the extent that they act like the single-service carriers the drafters intended to exclude. They will fall within the Rules to the extent that they act like the port-service providers which the drafters intended to include.

7 The Liability/Defence Provisions

Determining whether a party falls within the MPP definition is important because MPPs potentially face direct liability to cargo interests under the Rules. They may also be entitled to the carrier's defences and limits of liability. However, not all MPPs will necessarily fall within the scope of the liability and defence provisions.

The key MPP liability provision in the Rules is Article 19(1). Article 19(1) provides that an MPP shares the same obligations and liabilities as the carrier.¹³⁹ It also shares the carrier's defences and limits of liability. Like the actual carrier in the Hamburg Rules, the MPP takes 'the bitter with the sweet'.¹⁴⁰

Article 19(1) applies provided that:¹⁴¹

- (a) The MPP has received, delivered, or performed its activities with respect to the goods in a Contracting State; and
- (b) The loss was caused between the goods' arrival at the port of loading and their departure from the port of discharge, while the MPP either had custody of the goods or was performing an activity contemplated by the contract of carriage.

The second of these conditions does little to alter the scope of application. It largely just restates the MPP definition. The first condition, however, appears to be a more real restriction on which MPPs will receive the carrier's liabilities and defences. The carrier's obligations and liabilities will be imposed on an MPP only if it receives, delivers, or performs its activities in a Contracting State. Similarly, only MPPs who receive, deliver, or perform their activities in a Contracting State will be entitled to the carrier's defences and limits of liability. MPPs outside Contracting States will receive neither liabilities nor defences.

However, Article 19(1) is not the only provision in the Rules which deals with MPPs' defences. When looking at the Rules as a whole, the position on MPPs outside Contracting States is not so clear. Article 4(1) also extends the carrier's defences and limits of liability to MPPs. It specifies that these defences and limits apply to any proceedings 'whether founded in contract, in tort, or otherwise'.¹⁴² It does not specify that those defences and limits will be available only to MPPs who receive/deliver/perform their activities in a Contracting State.

What is the correct position here? Will an MPP which performs its services in a non-Contracting State be entitled to the carrier's defences and limits of liability, or not? If a stevedore in Australia, a non-Contracting State, negligently damaged goods while loading them on board a ship bound for New Zealand, a Contracting State, could that stevedore rely on the Rules' limits of liability if it was sued in tort?

One possibility is that Article 4(1) simply means what it says. All MPPs are entitled to the Rules' defences and limits of liability, irrespective of whether or not they act in a Contracting State. On that view, the extension of

¹³⁹ Article 19(1): 'A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this convention if:

- (a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and
- (b) The occurrence that caused the loss, damage or delay took place:
 - (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship and either
 - (ii) while the maritime performing party had custody of the goods or
 - (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.'

¹⁴⁰ Sturley, 'The Treatment of Performing Parties', above n 30, 235. This might be contrasted with the situation under the Hague and Hague-Visby Rules, where carriers pass only the "sweet" on to their subcontractors through Himalaya clauses.

¹⁴¹ The original text of art 19(1) contained an ambiguity which was subsequently corrected in January 2013. Article 19(1)(b) initially did not include the words 'and either' prior to requirement (ii). Without those words, the article could be interpreted as imposing the carrier's liabilities on an MPP for damage occurring anywhere in the port-to-port segment, even while it was not participating in the carriage and had no custody of the goods. For instance, a stevedore which had loaded goods in Auckland could arguably have been liable for damage caused by a stevedore unloading those goods in Hong Kong. See Sturley, 'Amending the Rotterdam Rules', above n 14, 427.

¹⁴² Rotterdam Rules art 4(1): 'Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:

- (a) The carrier or a maritime performing party;
- (b) The master, crew or any other person that performs services on board the ship; or
- (c) Employees of the carrier or a maritime performing party.'

defences and limits of liability by Article 19(1) is simply redundant.¹⁴³ This is plausible. It would not be the only redundancy in the Rules.¹⁴⁴

The alternative possibility is that Article 4(1) is impliedly limited by Article 19(1). Only MPPs in Contracting States will have the Rules' defences and limits of liability. On balance, I consider that the drafting history of the Rules better supports this interpretation.

Article 4(1) was included in the earliest drafts of the Rules, under the heading 'non-contractual claims'.¹⁴⁵ Its function was seen throughout the drafting process as to ensure that the convention was not circumvented by a party taking a non-contractual claim.¹⁴⁶ This purpose was seen as distinct from the provisions extending 'Himalaya' protection under Article 19.¹⁴⁷

By contrast, Article 19(1)(a) was a relatively late addition to the Rules. The drafters' intention was that the Rules should not apply to MPPs without a 'connecting factor' to a Contracting State.¹⁴⁸ An MPP which did not perform its duties in a Contracting State would not be subject to a direct cause of action under the Rules, but nor would it enjoy the same defences and limits of liability.¹⁴⁹

The drafters appear not to have noticed that by inserting this new condition they created an apparent inconsistency with Article 4. Their intention, however, had they turned their minds to it, would seem to be that the expansive language of Article 4 should be impliedly limited by the conditions in Article 19. MPPs in non-Contracting States who receive no liabilities should not receive defences. The bitter should be taken with the sweet.

There is a very real possibility that the courts might overlook this drafting history and extend the Rules' defences to all MPPs. Nikaki takes this approach, for instance. She writes:¹⁵⁰

Other maritime parties, namely those that perform the carrier's obligations in ports not located in a contracting state are afforded the protection of art.4.1 in any event, since, whilst they do not bear a carrier's liability under the Rotterdam Rules, they are open to actions in tort or any other legal basis that may be available to the cargo owners under the applicable national law.

It would be unfortunate if the courts were to adopt this approach. Nikaki correctly acknowledges that the defences and limits of liability in Article 19(1) 'counterbalance' the liabilities imposed under that section.¹⁵¹ However, her expansive interpretation of Article 4(1) upsets that balance. On her interpretation, MPPs in Contracting States would receive both liabilities and defences, while MPPs in non-Contracting States would receive the Rules' defences but no corresponding liabilities. This would be contrary to the policy of the Rules. The drafters considered it would be inappropriate to impose liabilities on parties with no connection to a Contracting State. It would be just as inappropriate to grant defences to them.

Of course, in many cases it will not matter which approach is taken. Even where the Rules themselves do not extend the carrier's defences and limits of liability, a carrier may do so by means of a Himalaya clause. Where such a clause is present, it may extend the scope of the Rules' defences to MPPs in non-Contracting States even if Article 4(1) does not.

¹⁴³ Theodora Nikaki, 'The statutory Himalaya-type protection under the Rotterdam Rules: capable of filling the gaps?' [2009] *Journal of Business Law* 403, 411.

¹⁴⁴ In fact, art 4(1)(b) and 4(1)(c) are themselves arguably redundant, as the 'master, crew or any other person that performs services on board the ship' and 'employees of the carrier or a maritime performing party' will almost invariably be MPPs, and therefore covered by art 4(1)(a). See Sturley, Fujita and van der Ziel, above n 105, [5.191].

¹⁴⁵ See, eg. *CMI October 2000 Draft*, above n 55, art 5.10; UNCITRAL, *UNCITRAL Preliminary Draft Instrument*, above n 114, art 6.

¹⁴⁶ UNCITRAL, *Report of Working Group III (Transport Law) on the work of its tenth session (Vienna, 16-20 September 2002)* UN Doc A/CN.9/525 (7 October 2002), [101] ('10th Session Report').

¹⁴⁷ UNCITRAL, *Report of Working Group III (Transport Law) on the work of its thirteenth session (New York, 3-14 May 2004)* UN Doc A/CN.9/552 (24 May 2004), [90] ('13th Session Report').

¹⁴⁸ UNCITRAL, *Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: Proposal by Finland on scope of application, freedom of contract and related provisions* UN Doc A/CN.9/WGIII/WP61 (27 January 2006), [44].

¹⁴⁹ UNCITRAL, *19th Session Report*, above n 132, [83].

¹⁵⁰ Nikaki, 'The statutory Himalaya-type protection', above n 143, 411.

¹⁵¹ *Ibid.*

8 Himalaya Clauses and the Rotterdam Rules

Articles 4 and 19 of the Rules have been described as extending a statutory ‘Himalaya’-type protection to MPPs,¹⁵² but this will not render Himalaya clauses redundant. They will continue to appear in carriage contracts. A comprehensively drafted Himalaya clause will extend the scope of the Rules’ defences to situations not covered by the Rules themselves.

For instance (as already noted) a Himalaya clause will extend the Rules’ defences and limits of liability to an MPP which performs its activities outside a Contracting State. While it may be inappropriate for an international convention to grant defences to parties with no connection to a Contracting State, there is nothing to prevent individual parties doing so as a matter of contract.

A Himalaya clause might also be used to protect PPs who are not MPPs (such as most inland carriers). Again, while the drafters considered that defences should flow with obligations, parties may choose to contract otherwise.

Furthermore, Articles 4 and 19 extend only Convention defences. A Himalaya clause could be used to extend any further contractual defences not provided for by the Rules.¹⁵³

8.1 Volume Contracts

There may also be scope to use a Himalaya clause to extend limits of liability under a volume contract. The ‘volume contract’ is an innovation in the Rotterdam Rules. It is a carriage contract ‘that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time.’¹⁵⁴ A major shipper such as Fonterra, for instance, might use a volume contract to cover multiple shipments of milk powder.

Article 80(1) provides that ‘as between the carrier and the shipper’ a volume contract may derogate from almost any of the rights, obligations and liabilities imposed by the Rules. A volume contract might set a lower limit of liability than the Rules, or conceivably even exclude liability altogether.

Such derogation would apply between the carrier and shipper. It would also apply between the carrier and ‘any person other than the shipper’ (e.g. a consignee) provided that person was adequately informed and gave its express consent.¹⁵⁵ However, nothing is said about the position as between the shipper and a person other than the carrier. Could a Himalaya clause be used to extend the carrier’s lower limit of liability to an MPP?

The drafters probably did not intend that it could. Article 80(1) refers only to the carrier, not the MPP. It may be contrasted with Article 81(a), which provides that a contract of carriage may exclude or limit the obligations or liability of ‘both the carrier and a maritime performing party’ if the goods are live animals. However, the wording of Article 80(1) still leaves some doubt. Whether a court is willing to apply a Himalaya clause in such circumstances may depend upon that court’s view of the legal basis for Himalaya protection generally.

At common law, the English courts’ view is that a valid Himalaya clause establishes a contract between a stevedore (for example) and the cargo interest, with the carrier acting as the stevedore’s agent.¹⁵⁶ This approach is acknowledged to be an ‘artificial’ but ‘deft’ method of complying with the doctrine of privity of contract.¹⁵⁷ In the context of the Rules, it is difficult to see how an artificial contract constructed between an MPP and a shipper could be said to operate “as between the carrier and the shipper”. Consequently Article 80(1) would not excuse derogation from the MPP’s liabilities under the Rules.

Courts in the United States, by contrast, take a less strict position on privity of contract. They see no need to construct an artificial contract between MPP and shipper. Himalaya protection is conferred directly under the contract between the carrier and the shipper, under the ‘third party beneficiary’ rule.¹⁵⁸ Under that rule, a

¹⁵² See, eg. Theodora Nikaki, ‘Himalaya clauses and the Rotterdam Rules’ (2011) 17 *Journal of International Maritime Law* 20, 20; Tomotaka Fujita, ‘Performing Parties and Himalaya Protection’ (Paper presented at Colloquium on the Rotterdam Rules, Rotterdam, September 21 2009).

¹⁵³ Smeele, above n 40, [21].

¹⁵⁴ Rotterdam Rules art 1(2).

¹⁵⁵ Rotterdam Rules art 80(5).

¹⁵⁶ Nikaki, ‘Himalaya Clauses and the Rotterdam Rules’, above n 152, 24–25.

¹⁵⁷ *The Starsin* [2004] 1 AC 715, [34].

¹⁵⁸ *Robert C Herd & Co v Krawill Machinery Corp*, 359 US 297, 308 (1959); *Norfolk Southern Railway Co v James N Kirby Pty Ltd* 543 US 14, 32 (2004). For a detailed discussion, see: Nikaki, ‘Himalaya Clauses and the Rotterdam Rules’, above n 152, 27.

contractual promise (such as a promise to extend defences to a third party) may create a duty to the 'intended beneficiary', which that intended beneficiary may enforce.¹⁵⁹ Civil law jurisdictions similarly understand the Himalaya clause as a stipulation for the benefit of a third party.¹⁶⁰

A United States court might conclude that the duty created by the Himalaya clause exists 'as between' the shipper and the MPP, and therefore that Article 80(1) does not apply. But they might alternatively conclude that that duty is created by a contract between the carrier and the shipper, and so operates 'as between' them. On the latter view, the Himalaya clause would be permitted to derogate from the Rules, granting an MPP lower limits of liability than the Rules provide.

The approach in New Zealand may turn on the construction of the specific clause. Under the *Contracts (Privity) Act 1982* (NZ), if a contract confers a benefit on a person who is not a party to it, that person may sue for the benefit as though they were a party.¹⁶¹ However, the person in question must be 'designated by name, description, or reference to a class'.¹⁶² If the Himalaya clause can satisfy this requirement, then the courts might consider that it operates 'as between' the carrier and shipper, being contained in their contract. If so, it could extend the benefits of a volume contract to an MPP.

9 Practical Consequences

The Rules give cargo interests a direct cause of action against MPPs, but it remains to be seen to what extent they will use it. Certainly there is some concern that the Rules will enable a flood of cargo claims to be brought against terminal operators and other MPPs.

Neame, for instance, suggests that terminal operators at present are ill-equipped to deal with a multitude of claims from a large number of individual cargo claimants.¹⁶³ Their systems and processes, he says, are designed for handling a small number of claims channelled through shipping lines. Similarly, Williams argues that 'channelling' claims in other areas of maritime activity has facilitated claims and minimised administration costs.¹⁶⁴ He implies that allowing direct claims against MPPs will achieve the opposite.

These concerns may be overstated. In fact, while the Rules allow direct claims against MPPs, their practical effect may well be to channel disputes to the carrier.¹⁶⁵ If recovery against MPPs is limited to the same levels as are imposed on the carrier, there will usually be little incentive to target them. The MPP's liability is limited to the period during which it participated in performance or had custody of the goods. Showing that the damage occurred during a particular MPP's period of responsibility will frequently be difficult without impractical, expensive inspection of the goods whenever the goods change hands.¹⁶⁶ The carrier, by contrast, is liable under Article 17 for the entire duration of the carriage. Claiming against the carrier therefore avoids the difficulty of showing exactly where the damage occurred.

Of course there will still be cases where an MPP may be the preferred target, particularly where the cause of the damage is clear (goods dropped from a crane, for instance). A cargo interest may prefer to claim against an MPP in the same jurisdiction over a carrier in a foreign jurisdiction, or against an MPP which is solvent over a carrier which is not. Allowing claims under the Rules against MPPs in these cases will not likely increase costs. If anything, it may reduce them. Parties may be spared expensive foreign litigation, and cargo interests will have a uniform cause of action whether they are suing the carrier or an MPP.

PPs who are not MPPs will remain outside the Rules' liability regime. It will often be more practical for a cargo interest to pursue a carrier under the Rules than to claim against a PP under e.g. tort or a domestic carriage

¹⁵⁹ American Law Institute, *Restatement (Second) of the Law of Contracts* (1981) §304.

¹⁶⁰ Smeele, above n 40, [17] n 51.

¹⁶¹ *Contracts (Privity) Act 1982* (NZ) ss 4, 8. The UK has passed similar legislation: the *Contracts (Rights of Third Parties) Act 1999* (UK) s 31.

¹⁶² *Contracts (Privity Act 1982* (NZ) s 4.

¹⁶³ Craig Neame, 'What impact will the Rotterdam Rules have on shipowners?' *Brittania News* (online), July 2010 <www.brittaniapandi.com>, 14.

¹⁶⁴ Richard Williams, 'The Rotterdam Rules: Winners and Losers' (2010) 16 *Journal of International Maritime Law* 191, 209. A notable example of channelling claims in maritime law is the *Convention on Limitation of Liability for Maritime Claims* (LLMC 1976), 1977, 1456 UNTS 221. Article 13(1) provides that where a shipowner constitutes a limitation fund in respect to a claim, a claimant is barred from exercising a right against any of the shipowner's other assets (e.g. arresting a 'sister' ship). This channels all claims to the limitation fund, preventing a multiplicity of proceedings against ships in different jurisdictions.

¹⁶⁵ Sturley, Fujita and van der Ziel, above n 105, [5.187].

¹⁶⁶ Smeele, above n 40, [53].

regime such as COGA. Direct claims against PPs are likely to arise in much the same circumstances as they will arise against MPPs.

10 Conclusion

International maritime carriage has come a long way since the advent of the Hague Rules. The Hague and Hague-Visby Rules remain the dominant international maritime carriage regimes worldwide,¹⁶⁷ but their limited scope is increasingly outdated.

In particular, the Hague/Hague-Visby Rules' concept of carriage performed by a single 'carrier' fits poorly with the modern reality of carriage performed by a multiplicity of subcontractors. Similarly, their tackle-to-tackle scope is inadequate for dealing with the multimodal door-to-door carriage arrangements which are commonplace in the container trade. Himalaya clauses provide a partial but inadequate solution. While they extend defences and limits of liability to subcontractors, they fail to extend obligations and liabilities.

Previous attempts to update the Hague/Hague-Visby Rules have had limited success. The Hamburg Rules' port-to-port to port scope improves upon the Hague/Hague-Visby Rules, but falls short of door-to-door coverage. The 'actual carrier' definition is of uncertain application to subcontractors who do not 'carry' the goods. The OTT Convention extends its scope by reference to the goods rather than a 'carrier', and the Multimodal Convention operates door-to-door, but neither fits comfortably with the conventions they are intended to supplement, and they have been political failures.

The Rotterdam Rules are a considerable step forward. They have the most ambitious scope of any maritime carriage convention to date. The split scope achieved through the MPP concept accounts for the modern realities of subcontracting and door-to-door transport. Cargo interests have the certainty of a door-to-door liability regime against the carrier, and the safety of a direct cause of action against MPPs in the maritime leg (provided they have a connection to a Contracting State). Limiting the MPP's liability to the maritime leg ably defuses concerns that the Rules might be unfairly applied to inland parties unaware that they were participating in international maritime carriage.

The drafters could have gone further. Whilst they succeeded in ensuring that 'paper carriers' fall within the regime, they could have further unified the liability regime by encompassing all parties who handle the goods, even if they were engaged by the shipper or operated outside the carrier's control. A simple redrafting of the vicarious liability provisions would have protected carriers from unfair exposure to liability arising from MPPs they had not chosen.

The drafting also leaves some ambiguities in the Rules' scope, with the potential to cause problems. What activities will constitute 'receipt, loading, handling' and so on? Will MPP shipowners be responsible for the seaworthiness of their vessels? What constitutes a 'port'? When and to what extent should a multi-service logistics provider be considered an 'inland carrier'? Will an MPP in a non-Contracting State be protected by the Rules' defences and limits of liability? Can a Himalaya clause extend the defences and limits of liability in a volume contract to MPPs? The drafting history and policy of the Rules may suggest some answers to these questions, but they all carry the potential for future litigation.

Despite these lingering questions, the core concept of the MPP is sound. It is a savvy political compromise which enables the Rules to combine door-to-door coverage with subcontractor liability. Should the Rotterdam Rules come into force, they would significantly improve upon the limited scope of existing international maritime carriage conventions, particularly in Hague/Hague-Visby nations such as New Zealand. I wish them luck.

¹⁶⁷ Nikaki and Soyer, above n 76, 304 n 3.