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Possible future work in the area of transport law: Commentary or explanatory notes on the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("Rotterdam Rules")

Note by the Secretariat*

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* The present document was submitted after the deadline established by the General Assembly so as to reflect comments received recently from Governments.

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I. Introduction

1. At its forty-first session, in 2008,[1] the Commission approved the text of what was then known as the draft United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("the Convention" or "the Rotterdam Rules") and the subsequent adoption of the Convention by the General Assembly on 11 December 2008.[2] The General Assembly authorized the Convention to be opened for signature at a signing ceremony in Rotterdam on 23 September 2009[3] and called upon all Governments to consider becoming a party to the Convention.[4]

2. During its deliberations on the draft text of the Convention from 2002 to 2008, Working Group III (Transport Law) considered whether certain aspects of the text should be further elaborated in a commentary or explanatory notes that could accompany the Convention upon its publication. For example, there are two such references in the last draft text of the Convention that was published with footnotes (A/CN.9/WG.III/WP.101). Footnote 6 to article 3 on "Form requirements", the possibility of including an explanatory note to the effect that any notices contemplated in the Convention that are not included in article 3 may be made by any means, including orally or by exchange of data messages that do not necessarily meet the definition of "electronic communications" in draft article 1 (18). In addition, footnote 20 to article 9, considered whether detail related to the term "readily ascertainable" should be specified in a note or a commentary accompanying publication of the Convention. No specific decision was made by the Working Group in those cases.

3. As the text of the Rotterdam Rules has now been adopted by the General Assembly, preparations should be made for its publication and dissemination. The Commission may therefore wish to consider whether the text of the Convention should be accompanied by explanatory notes or commentary, and what form those additional materials should take.

II. Possible models for commentary or explanatory notes on the Rotterdam Rules

4. Several models could be examined by the Commission in its consideration of what sort of commentary or note, if any, should accompany the publication of the Convention. Note that all three examples below are called "explanatory notes", and specifically state that they do not constitute an official commentary on the convention in issue.

5. The explanatory notes accompanying the Hamburg Rules consist of brief introductory and background paragraphs, followed by a summary of the "salient features" of the Hamburg Rules, concluding with a brief discussion on the

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[1] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17), para. 298.

[2] Resolution 63/122, para. 2.

[3] Ibid., para. 3.

[4] Ibid., para. 4.

uniformity of law relating to the carriage of goods by sea. The text of the note is written in a narrative style, and without specific references to the discussion of particular issues in the *travaux preparatoires*. For example, the paragraphs in respect of article 4 on the period of responsibility of the carrier are as follows:

> "2. Period of responsibility
>
> "14. The Hague Rules cover only the period from the time the goods are loaded onto the ship until the time they are discharged from it. They do not cover loss or damage occurring while the goods are in the custody of the carrier prior to loading or after discharge.
>
> "15. In modern shipping practice carriers often take and retain custody of goods in port before and after the actual sea carriage. It has been estimated that most loss and damage to goods occurs while the goods are in port. In order to ensure that such loss or damage is the responsibility of the party who is in control of the goods and thereby best able to guard against that loss or damage, the Hamburg Rules apply to the entire period the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge."

6. Another possible model that the Commission may wish to consider is that of the explanatory note accompanying the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. The notes contain a slightly more detailed introduction, followed by a summary of the main features and provisions of the Convention. The text is written in a slightly more detailed narrative style than that accompanying the Hamburg Rules, but again without specific references to the discussion of particular issues in the *travaux preparatoires*. For example, the note referring to article 3 on the independence of the undertaking states as follows:

> "D. Definition of 'independence'
>
> "17. While it is widely recognized that undertakings of the type covered by the Convention are 'independent', there has been a lack of uniformity internationally in the understanding and recognition of that essential characteristic. The Convention will promote such uniformity by providing a definition of 'independence' (article 3). That definition is phrased in terms of the undertaking not being dependent upon the existence or validity of the underlying transaction, or upon any other undertaking. The latter reference, to other undertakings, clarifies the independent nature of a counter-guarantee from the guarantee that it relates to and of a confirmation from the stand-by letter of credit or independent guarantee that it confirms.
>
> "18. In addition, to fall within the scope of the Convention, an undertaking must not be subject to any terms or conditions not appearing in the undertaking. It is specified that, to fall within the Convention, an undertaking should not be subject to any future, uncertain act or event, with the exception of presentation of a demand and other documents by the beneficiary or of any other such act or event that falls within the 'sphere of operations' of the guarantor/issuer. That is in line with the notion that the role of the guarantor/issuer in the case of independent undertakings is one of paymaster rather than investigator."

7. A third possible model that the Commission may wish to consider is the explanatory note accompanying the United Nations Convention on the Use of Electronic Communications in International Contracts. Although called an explanatory note, the text is much more detailed than the previous two examples, and is more along the lines of a guide to enactment. The note contains a brief introduction, followed by a discussion of the main features of the instrument, a summary of the preparatory work, and concluding with quite detailed remarks on an article-by-article basis, including specific references to the discussion of particular issues in the *travaux preparatoires*. For example, the note referring to article 3 on party autonomy, which consists of a single sentence, states as follows:

"Article 3. Party autonomy

"1. Extent of power to derogate

"84. In preparing the Electronic Communications Convention, UNCITRAL was mindful of the fact that, in practice, solutions to the legal difficulties raised by the use of modern means of communication were mostly sought within contracts. The Convention reflects the view of UNCITRAL that party autonomy is vital in contractual negotiations and should be broadly recognized by the Convention. [Footnote: Ibid., para. 33.]

"85. At the same time, it was generally accepted that party autonomy did not extend to setting aside statutory requirements that imposed, for instance, the use of specific methods of authentication in a particular context. This is particularly important in connection with article 9 of the Convention, which provides criteria under which electronic communications and their elements (e.g. signatures) may satisfy form requirements, which are normally of a mandatory nature since they reflect decisions of public policy. Party autonomy does not allow the parties to relax statutory requirements (for example, on signature) in favour of methods of authentication that provide a lesser degree of reliability than electronic signatures, which is the minimum standard recognized by the Convention (see A/CN.9/527, para. 108; see also A/CN.9/571, para. 76).

"86. Nevertheless, as provided in article 8, paragraph 2, the Convention does not require the parties to accept electronic communications if they do not want to. This also means, for instance, that the parties may choose not to accept electronic signatures (see A/CN.9/527, para. 108).

"87. Under the Convention, party autonomy applies only to provisions that create rights and obligations for the parties, and not to the provisions of the Convention that are directed to contracting States (see A/CN.9/571, para. 75).

"2. Form of derogation

"88. Article 3 is intended to apply not only in the context of relationships between originators and addressees of data messages but also in the context of relationships involving intermediaries. Thus, the provisions of the Electronic Communications Convention can be varied either by bilateral or multilateral agreements between the parties, or by system rules agreed to by them.

"89. It was the understanding of UNCITRAL that derogations from the Convention did not need to be explicitly made but could also be made

implicitly, for example by parties agreeing to contract terms at variance with the provisions of the Convention (see A/CN.9/548, para. 123). [Footnote: Ibid., para. 32.]

"References to preparatory work

"UNCITRAL, 38th session (Vienna, 4-15 July 2005)	A/60/17, paras. 31-34
"Working Group IV, 44th session (Vienna 11-22 October 2004)	A/CN.9/571, paras. 70-77
"Working Group IV, 43rd session (New York, 15-19 March 2004)	A/CN.9/548, paras. 119-124
"Working Group IV, 41st session (New York, 5-9 May 2003)	A/CN.9/528, paras. 70-75
"Working Group IV, 40th session (Vienna 14-18 October 2002)"	A/CN.9/527, paras. 105-110

8. Should the Commission decide that an explanatory note or commentary should be published, it may decide not to choose any one of the above illustrations as a model. Instead, an alternative or hybrid approach more tailored to the specific characteristics of the Rotterdam Rules might be considered more suitable. Specific considerations in that regard include:

(a) The fact that the Convention harmonizes three separate existing conventions on the carriage of goods by sea, plus several competing regional and domestic regimes, as well as conforming with current industry practice, complicates the drafting of a detailed note;

(b) The scope of the Rotterdam Rules is much broader than previous conventions in the area, since it goes beyond the simple regulation of liability issues;

(c) The Convention is much longer than the texts of the models discussed above, and its provisions are highly detailed; and

(d) The Working Group met for a total of 26 weeks, thus the *travaux preparatoires* is voluminous, and users of the Rotterdam Rules could benefit from materials that refer to the specific discussion of issues by the Working Group and the Commission throughout the period of discussion of the text.