Book Reviews

A Modern Lex Mercatoria for Carriage of Goods by Sea
by Petar Kragić and Diana Jerolimov

This book is written by two authors who have significant knowledge of the law and practice of shipping and international trade, and consequently are well qualified to cast a critical eye over the Rotterdam Rules.

Their text revives discussion of the Rotterdam Rules the fate of which is increasingly depressing for their supporters. The theme itself is of course legitimate and the authors are justified in harbouring reservations about the merits of the Rotterdam Rules. They are also well informed insiders and perceptive of the legal difficulties.

The authors come to their subject following an historical review of the law and practice relating to the carriage of good by sea and criticise the Rules for their failure to meet the needs of contemporary maritime trade. The historical section is substantial and much more than a mere introduction. It is useful to attempt a summary of the lessons derived from history, which the authors do with a wide ranging text around the central theme that the Rotterdam Rules are deficient, with suggestions (often radical) made to improve the current international position. These reforms to represent the new Lex Mercatoria advocated.

In their analysis and proposals the authors are fearless and radical. They contend that cargo liabilities should be channelled solely to contractual carriers and that the rights of claimants should be protected by mandatory insurance and direct right of action. The position of the contractual carrier under the international conventions is clearly and concisely developed. This is accompanied by proposals in relation to jurisdiction and arbitration.

The section on jurisdiction and arbitration is very detailed. This is a very active area of the law with a consistent flow of authorities. The general effect of this is that choice of jurisdiction clauses are even more firmly recognised. In addition, the rules relating to the construction of contracts have continued to be refined. The proposal made with regard to liability and mandatory insurance will be judged ultimately, and probably predominantly, on economic considerations.

The arguments are forcefully made and stir a debate, which demands engagement. I suspect that every reader of this text will be aroused to some manner of retort. The issues raised merit serious consideration.

The text also benefits from the comparative methodology adopted. It is very different from what may be described as standard publications in the field, and none the worse for that.

I think the text is challenging and provocative, and suggests radical reforms which are worthy of sober consideration.

Professor Emeritus D. Rhidian Thomas

A Modern Lex Mercatoria for Carriage of Goods by Sea

The book is exceptionally important and valuable for a number of reasons. Firstly, it represents an essential contribution to the shipping law because it is written by two experienced practitioners, who participated in the preparatory works, discussions and processes of developing United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. Secondly, the major significance of this book lays in the fact that it elaborates concisely, transparently and critically the complex matter of liability of the carrier of goods by sea by offering original views on the matter. In addition to that, the book contains authors' proposals what should be done to improve some Convention's solutions, which gives to the book elements of innovativeness.

The book begins with a short review and analysis of the historical development of liability of the carrier of goods by sea from the Roman period through the middle ages to the contemporary times. In the second chapter the book gives comprehensive critical and comparative analysis of the question: "Who are liable persons on the part of the ship in the carriage of goods by sea?" The most important is the analysis of the question who is the carrier in the context of modern shipping and contemporary contracts of carriage of goods by sea. The authors precisely distinguish who is the liable person under The Hague Rules, The Hague – Visby Rules and The Hamburg Rules. Particularly important part of this chapter is in the depth analysis of the elements of the carrier under the Rotterdam Rules and valuable explanation of the concept of maritime performing party given together with a critical review of its liability. The third chapter is devoted to the compulsory insurance for cargo liability. The authors say that the conventions on carriage of goods by sea have ignored developments in the insurance, unlike the conventions that govern carriage of passengers by sea, liability for oil pollution and removal of wrecks. They try to explain in a witty way that thesis by referring to the story of Columbus egg claiming that here there is also a simple solution for that complex puzzle. That simple solution the authors see in the analogy with other compulsory insurance cases in shipping and propose introduction of that concept for the carriage of goods. That means they advocate compulsory insurance of the carrier's liability for cargo and direct action by claiming that such insurance cover is already *de iure* and *de facto* in place. *De iure* Directive 2009/20/EC of the European parliament and EU commission requires compulsory insurance for shipowner's liabilities for maritime claims listed in LLMC 1976 and its 1996 Protocol, and *de facto* in shipping commercial practice where the charterers regularly require proof of P&I cover of the ship. If direct action were introduced than the need to arrest the ship as security for the claim would diminish or even disappear. According to the authors, compulsory insurance would be particularly useful in case the carrier becomes insolvent. For the Rotterdam Rules they advocate channelling liability towards the carrier. In the Fourth Chapter of the book, the authors introduce readers into the relevant problems concerning jurisdiction and arbitration. They explain the doctrine of *forum non conveniens* accompanied by presentation and comments of the court cases in which courts were deciding on implementation of such principle, actually on a question whether in a particular case there was another jurisdiction that can try the case more conveniently, bearing

in mind interests of all parties involved in a dispute and obtainment of justice. In continuation of this Chapter, they write about the European regulation on jurisdiction and arbitration, articles of the Hamburg Rules and the Rotterdam Rules on jurisdiction and arbitration. They explain why the choice of court agreement is important and what the consequences of restricting choice of court agreements for resolving dispute against carriers are, which they consider as the main flaw of the Rotterdam Rules.

The authors suggest that the Rules have not succeed in getting sufficient number of ratifications due to their complexity and fear that their implementation would cause more uncertainty and litigation rather than contribute in resolving disputes. Further, the main reason why states are reluctant to ratify the Rotterdam Rules, apart from their complexity, is the fact that the Rotterdam Rules allow cargo interests to sue, in addition to carrier, maritime performing parties.

In the book the authors give specific proposals for improving the Rotterdam Rules. The new conceptual attitude suggested by the authors is simplification of damage recovery mechanism by way of channelling of liability towards the carrier and by introducing the compulsory insurance of ship owner's liability for cargo.

The second important change advocated by the authors is related to the Rotterdam Rules on jurisdiction and arbitration, specifically changes of the articles on prorogation of jurisdiction and introduction of the institutionalised convention arbitration that would use established arbitrators from the existing arbitrational centres.

The authors conclude that entering into force of the amended Rotterdam Rules would facilitate carrying out transactions related to the international carriage of goods by sea in a simple and easy way. In other words, modern *Lex mercatoria* is required for regulating modern contractual merchant relations regarding carriage of goods by sea and for resolving disputes resulting therefrom.

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