

CONVENTIONS

Following on from January's Convention Supplement, we turn to two new Conventions – one still on the slipway (with an uncertain future) and the other coming into force in the same month as this Supplement is published.

'The Rotterdam Rules in a Nutshell' article has been written by Johanna Hjalmarsson and Melis Özdel. Johanna Hjalmarsson is Informa Research Fellow in Maritime and Commercial Law, University of Southampton School of Law. Melis Özdel is a Postgraduate researcher and from September 2010 she will be a Lecturer in Maritime and Commercial Law at the University of Southampton School of Law.

The article is complemented by an article in *Britannia News* by Craig Neame of Holman Fenwick Willan LLP, which assesses the potential impact of the Rules for shipowners, charterers, their agents and insurers.

The 'SUA Conventions' article has been written by Johanna Hjalmarsson and Alexandros XM Ntovas, Informa Research Fellow in Maritime and Commercial Law, University of Southampton School of Law, LL.M (Hons); MSc; AHEA; Doctorate Grantee in Public International Law, University of Southampton School of Law.

This text explains the SUA Convention and Protocol of 1988 and the amendments to those two treaties made by two new Protocols adopted in 2005, in force from 28 July 2010.

Unlike the Rotterdam Rules, the SUA Protocols of 2005 are little known. But, with terrorism high on everyone's agenda, shipowners need to be aware of the issues raised, in particular, questions relating to stowaways and the rights of owners where their ship is stopped, boarded and searched.

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THE ROTTERDAM RULES IN A NUTSHELL

What are the Rotterdam Rules?

The formal name of the Rotterdam Rules is the *United Nations Convention for the International Carriage of Goods Wholly or Partly by Sea, 2008*. The Rules were initially drafted by the *Comité Maritime International*, then by *Uncitral*. The current status of the Rules is that the text has been completed in final form and will not now be modified again. Once a convention has reached that stage, it can usually be modified only by the states parties agreeing a new Protocol (Art 95).

The Rotterdam Rules are similar to the Hague Rules, the Hague-Visby Rules and the Hamburg Rules in that they aim to fulfil roughly the same function: to secure uniformity by way of predictable content in contracts for the carriage of goods by sea, while providing a threshold level of protection to the parties to the contract of carriage. To help secure uniformity, reservations to the Rules are excluded by Article 90 and the scope for declarations is very limited (Art 91).

When will the Rotterdam Rules enter into force?

The answer for now is that it is too soon to tell. The signing ceremony took place on 23 September 2009. However, a signing ceremony is at best an early indication of the level of political support for a convention. Until the convention enters into force, it will not be legally binding on states who have signed it. The conditions for entry into force are specified by the Rotterdam Rules (Art 94): 20 states must adopt it. They can do so by binding signature, signature plus ratification or by accession. The 20th state to give binding acquiescence will start the process so that when one year has passed thereafter, the convention becomes binding on all states parties.

The Hague Rules, Hague-Visby Rules and Hamburg Rules must be denounced by a state which signs up to the Rotterdam Rules, so that in principle any one state will apply only one set of rules at any given time.

Even if the Convention does enter into force, will it achieve its aim of providing uniformity in contracts for the carriage of goods by sea? For that to happen, a majority of states needs to sign up to the Convention. The 34 (as of 23 June 2009) states that have signed up to the Hamburg Rules, for example, constitute at best a minority. The Rotterdam Rules are unlikely ever to receive the support of all nations: some trading nations will consider it a competitive advantage to opt for a minority regime in order to appear more carrier-friendly or more cargo-friendly than the majority.

To which contracts will the Rotterdam Rules apply?

Once the Rotterdam Rules are in force, they are binding on states parties. States who have not signed up will not be bound. It will therefore be of the utmost importance to know which states are parties to the convention at a given time, because the Rotterdam Rules apply where, according to the contract of carriage, either the place of

receipt and/or the port of loading and/or the place of delivery *and/or* the port of discharge is in a contracting state (Art 5).

The Rotterdam Rules themselves specify that they apply to 'contracts of carriage' as defined by Article 1. This is a deceptively simple description – and there are a number of important limitations (for example, Art 6) which are discussed below.

The Rotterdam Rules apply to contracts for carriage of goods by sea, including those where the sea leg is only a minor part of the carriage as a whole. The Rules apply to the land legs of carriage and to a wide range of other activities before and after the sea leg of carriage of goods and would replace not only the Hague-Visby Rules but also the Multi-Modal Convention 1980. The familiar tackle-to-tackle rule of the Hague Rules is abandoned by the Rotterdam Rules whose scope is better described as 'door-to-door' (Art 13). The duty of the carrier begins when the carrier receives the goods for carriage and ends when the goods are delivered (Art 13).

Limits of application

The scope of application of the Rotterdam Rules overlaps with several other conventions.



Some conflicts are foreseen and catered for: Article 82 gives precedence to other conventions applicable to carriage by air, road, rail or inland waterways which came into force before the Rotterdam Rules. The Rules will therefore apply to a finite list of conventions in force on the day before the entry into force of the Rotterdam Rules. Furthermore, the Rotterdam Rules will not apply before loading and after discharge where there is another international convention that applies to those phases of the carriage (Art 26). This can be any transport convention, whether it is in force at the time the Rotterdam Rules enter into force or is an entirely subsequent product. Article 26 applies only where no part of the loss, damage or delay is attributable to the sea leg and on three conditions, which must all be present. The other convention:

- i) must be *mandatory in the sense that it cannot be departed from by contract*;
- ii) must specifically provide for the carrier's liability, limitation of liability and time bar; and
- iii) must be capable of regulating the loss, damage or delay in question.

There cannot be any conflict between Articles 82 and 26: they will by definition apply to different conventions. Article 26 will apply to any convention that does not fall under Article 82, which is a finite and defined number settled on the date before entry into force of the Rotterdam Rules.

The Rotterdam Rules do not apply to charterparties or to slot charters in liner transportation (Art 6(1)), contracts for the carriage of passengers and their luggage (Art 85), and do not affect tonnage limitation (Art 83) under, say, the 1976 Limitation Convention and its 1996 Protocol, general average (Art 84) or nuclear incidents (Art 86). In non-liner transportation, they apply to the contract of carriage only when a transport

document (i.e. a bill of lading) has been issued *and* there is no charterparty or slot charter between the parties to the contract of carriage (Art 6(2)).

Special regimes with a generally increased freedom of contract apply to deck cargo (Art 25), live animals (Art 81(a)), special cargoes (Art 81(b)) and volume contracts (Art 80). Article 80 allows for contracting out of the Rotterdam Rules between the carrier and the shipper in volume contracts, providing it is done 'prominently' and the alternative terms are individually negotiated. However, this exception will only apply to a party other than the contracting carrier and shipper where the conditions in Article 80(5) are fulfilled. Those conditions are aimed at ensuring that the other party knew of and consented to the derogating terms.

No contracting out

According to Article 79, any term in a contract of carriage is void to the extent that it conflicts with the Rotterdam Rules. The parties cannot contract out of the Rules, either in favour of the shipper, or in favour of the carrier.

DUTIES OF THE CARRIER

Who is the carrier?

A carrier is defined simply as 'a person who enters into a contract of carriage with a shipper'; and a shipper is 'a person who enters into a contract of carriage with a carrier' (Art 1(5) and (8)).

When the contract of carriage does not name a carrier, there is a presumption that the registered owner is the carrier and, if he is sued within the time bar, the claimant may thereafter modify the law suit by adding further parties; see under 'Time bars' below. Given that this is an exception to the time bar of two years, registered owners of ships would be wise to encourage their bareboat

charterers systematically to name themselves (or some other party) as carriers in the contract of carriage. This presumption is otherwise practically an invitation to make the registered owner the first defendant to law suits filed near the two-year time bar, to counter the risk that the claimant's information about the identity of the carrier turns out to be incomplete. A claimant may also do so in order to force the carrier to supply information about the identity of other potential carriers.

There are however other parties who may come to shoulder some of the liability of the carrier and for whose faults the carrier may be liable.

The carrier and other performing parties

The carrier's liability extends to breaches of its obligations under the Rotterdam Rules (further below) caused by the acts or omissions of performing parties, master and crew, employees and employees of a performing party as well as 'any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control' (Art 18(d)).

It is necessary to address briefly the Rotterdam Rules' concepts of 'performing parties' and 'maritime performing parties'. Performing parties (defined in Art 1(6)) are essentially the carrier's subcontractors of any kind: they are persons other than the carrier who perform or undertake to perform any of the carrier's obligations in relation to the goods, directly or indirectly at the carrier's request or under the carrier's supervision or control – a definition capable of encompassing a fairly large circle of individuals.



These 'performing parties' do not become directly liable under the Rotterdam Rules, but they may naturally incur liabilities under some other legal framework. If a performing party is liable under some such other legal framework, the carrier is *not* vicariously liable by virtue of the Rotterdam Rules; the liability of the carrier is based on the Rotterdam Rules and for breaches that result from the acts or omissions of these third parties.

'Maritime performing parties' are 'performing parties' that carry out any of the carrier's obligations in relation to the goods, from the point in time of the arrival of the goods at the port of loading until their departure from the port of discharge (Art 1(7)). By way of example, stevedores would obviously qualify as a maritime performing party, unless retained by the shipper. A freight forwarder who carries the goods on a land leg would qualify, if it also handles the goods within the port area. Unlike 'performing parties,' a 'maritime performing party' is liable on the same terms as the contractual carrier, with the same defences and limits. They are subject to more or less the same liabilities as the carrier: provided some part of their performance was carried out in a contracting state and the damage to the cargo is related to their part of the performance of the carriage contract (Art 19).

Where the carrier and a maritime performing party are both liable under the convention, liability is joint and several (Art 20).

Duty to issue a transport document

There is a general duty on the carrier to issue a transport document (Art 35). However, there is no duty to issue a transport document where the parties have agreed not to use a transport document or it is the practice of the trade not to use one.

The Rotterdam Rules are generally rather formalistic in relation to documents. Article 3 provides that notices, confirmation, consent, agreement, declarations and other communications under the convention must be in writing (including electronic writing). Other articles list the precise contents of a particular document. For instance, Article 36 provides a detailed list of information that the transport document must contain.

What is a transport document?

What type of document is the carrier obliged to issue under the Rules? The Rotterdam Rules completely avoid the use of the well-known categorisation into bills of lading, sea waybills and so forth in favour of their own terminology. There are two main groups of transport documents: the negotiable transport document and the non-negotiable transport document (and the electronic transport record – more on that below).

At first glance it would seem that the abandonment of familiar categories such as bill of lading and sea waybill is a recipe for confusion – however it is also reasonable to imagine that by the time the Rules enter into force, new forms for transport documents will have been developed that state unambiguously to which of the Rotterdam Rules categories they belong and, perhaps, even which articles of the Rules are intended to apply.

The concept of 'transport documents' is based on the familiar notions of the 'contract of carriage function' and the 'receipt function'. Thus far the logic is clear and the division into negotiable and non-negotiable transport documents is fairly logical. However the provisions dealing with delivery are very complex; more on that below (under 'Delivery without production').

Electronic transport documents

Electronic transport records are defined in Article 1(18) as 'information in one or more messages issued by electronic communication under a contract of carriage by a carrier' that 'evidences the carrier's or a performing party's receipt of goods under a contract of carriage and evidences or contains a contract of carriage'.

While currently existing regimes are essentially focused on the liability regime, the Rotterdam Rules have wider ambitions. They are a forward-looking product in that they also cover electronic data interchange, provide detailed regulation of the use of electronic transport documents (negotiable and non-negotiable) and attempt to provide a workable, harmonised framework in support of a future of paperless trading.

Duties in relation to the goods

The carrier's duties in relation to the goods are not radically different from those under regimes such as the Hamburg Rules and the Hague-Visby Rules. The way liability arises and is proven by the parties is set out in Article 17 in a complex but logical structure. The starting point is that the carrier is liable for any loss, damage or delay arising during the period of its responsibility (Art 17(1)). The period of responsibility is defined as from receipt to delivery (Art 13).

Once the claimant has proven that the loss, damage or delay occurred during that period, the carrier may avoid liability either by proving that the cause of the loss, damage or delay was not attributable to its fault (Art 17(2)), or by proving that the cause of the loss was one of those listed in Article 17(3). That list is more or less that found in Article IV r 2 of the Hague-Visby Rules, starting with Act of God.



If the carrier succeeds in proving that one of those listed events was the cause of the loss, the ball is once again in the claimant's court. The claimant then has three options:

i) it may prove (Art 17(4)) that the carrier was at fault in relation to the exclusion that it has proven under Article 17(3); or
 ii) it may prove that there is another contributing cause not listed in Article 17(3) and, if so, it is once again the carrier's turn to prove that it was not at fault in relation to that contributing cause; or
 iii) the claimant may prove that the loss, damage or delay was due to unseaworthiness (Art 17(5)). If the claimant succeeds in proving a lack of seaworthiness, the carrier's last option is to prove that the lack of seaworthiness did not cause the loss, or else that it exercised due diligence.

It should be noted that, if there is more than one cause of loss, damage or delay, and the carrier is liable only for one of them, liability is to be apportioned accordingly (Art 17(6)).

Some main differences compared to existing liability regimes are discussed below.

Duty of care of the goods

In keeping with the expansion of the ambit of the Rotterdam Rules beyond the tackle-to-tackle period, the carrier is also responsible under the Rules for delivery, which has been included in the list of the carrier's obligations to 'properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver' the goods, Article 13(1).

On the other hand, there is specific provision for the possibility of the carrier and the shipper to agree that the shipper, the documentary shipper or the consignee is to perform the loading, handling, stowing and unloading of the goods, Article 13(2).

Delay

The carrier is liable not just for loss or damage but also for delay. As seen, that liability is set out together with the other liabilities in relation to the goods in Article 17 and follows the same rules and exceptions. However, there is also a definition of delay in Article 21 which is interesting in that it makes the Rotterdam Rules regime for delay potentially quite favourable to the carrier. Delay occurs only when the shipper and the carrier have *agreed*, expressly or by implication, that delivery is to take place by a certain date. It is therefore reasonable to assume that carriers will adopt the precaution of expressly negating any implied commitment to a particular delivery date in the contract of carriage. If there is no agreed delivery date, liability for delay will not arise.

Crucially, the receiver of the goods must give notice to the carrier of loss caused by delay within 21 days or will lose the right to compensation (Art 23(4)).

Exclusions

The list of exclusions in Article 17(3) is similar to the long list established by case law over the centuries, starting with Act of God. The main novelties are the elimination of the errors in 'navigation' or 'management of the ship' defences. The absence of the navigation defence could have a significant effect in increasing carrier liabilities – especially in the context of collision claims.

Seaworthiness

As usual, the carrier is under a duty to exercise due diligence to make the ship seaworthy and cargoworthy. The duty is more extensive than existing regimes in that, under the Rotterdam Rules, it is a continuing obligation. Under Article 14, the carrier's duty to make the ship seaworthy arises not only at the start

of the voyage but throughout; although, unlike many other aspects of the carrier's duties, it applies only to the sea voyage.

Carrier's liability for the fault of 'performing parties'

The carrier is liable for breach of these duties when they result from the act or omission of a performing party, the employees of the carrier itself or of a performing party, the master or crew of the ship or indeed 'any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage' when that person acts on the request of the carrier or under the carrier's supervision or control (Art 34).

DUTIES OF THE SHIPPER

Who is the shipper?

The liabilities and duties of the shipper are gathered in Chapter 7 of the Rotterdam Rules. The duties of the shipper apply, apart from to the person who enters into the contract of carriage with the carrier, also to a character called the 'documentary shipper', defined as 'a person, other than the shipper, that accepts to be named as shipper in the transport document' (Art 1(9)). The duties, liabilities and defences of the documentary shipper are those of the shipper (Art 33). The shipper is also liable for losses arising from the actions of employees, subcontractors and others (Art 34).

Oddly, the definition of documentary shipper refers not simply to 'a person named' but to 'a person that *accepts to be named*'. The unnecessary, italicised words could feasibly cause interpretation problems if a person 'named' as documentary shipper later plausibly denies having 'accepted' to be named, because he is seeking to distance himself from liability in relation to the shipment and the business relationships in question.



The documentary shipper is subject to the same duties as the shipper in relation for example to dangerous goods, and if he can credibly argue that he has not 'agreed' to be named, he could possibly avoid liability, for instance where something has gone wrong with dangerous goods. In sum, if a documentary shipper plausibly denies having accepted to be named, the carrier must revert back to the actual shipper.

What are the shipper's duties?

Some of the shipper's duties give rise to a strict liability, others to fault-based liability. If the duty fits under Articles 31 or 32, liability is strict, otherwise it is fault-based.

Duties in relation to the cargo

The duties of the shipper in relation to the cargo are to deliver the cargo ready for carriage and to perform any FIOS duties it may have undertaken to perform (Art 27). In relation to dangerous cargo, including legally dangerous cargo, the shipper must notify the carrier of its dangerous nature and furnish it with appropriate marks. If the shipper fails to do so, the liability is strict. The duties under Article 27 give rise only to fault-based liability.

Information duties

The shipper is under several different information duties under Articles 28, 29 and 31. The duty under Article 28 is to *exchange* information and instructions with the carrier (a bilateral duty), whereas Article 29 imposes a duty on the shipper to *provide* information, instructions and documents to the carrier. These duties give rise to a fault-based liability according to Article 30. By contrast, the shipper is also under a strict duty to provide information in relation to contract particulars (Art 31). This duty is a weighty one: not only is liability strict, but by providing the information, the shipper *guarantees* its accuracy. The carrier is thus entitled to rely on the information provided by the shipper.

DELIVERY WITHOUT PRODUCTION

Letters of indemnity are not covered by the Rotterdam Rules and indeed would not fit into the definition of contracts of carriage. Nevertheless, there are provisions which may affect their use. A framework of provisions regulates the situation when the receiver does not have the transport document at its disposal.

The provisions on delivery are largely familiar, with some exceptions. An important provision for the carrier is Article 47(2), which applies to negotiable transport documents and which expressly states that delivery without production may take place. According to this provision the carrier is, in some circumstances, discharged from the obligation of delivering the goods to the holder of the negotiable transport document; namely, when no verifiable holder presents itself and the carrier fails to obtain instructions from the holder of the negotiable transport document. The carrier may then deliver in accordance with instructions from the shipper or the documentary shipper, who must indemnify the carrier for loss arising from that delivery and provide security if required.

This is only a brief summary of this intricate provision which is potentially of great importance to the carrier because it provides, essentially, for a feasible cut-off point for the carrier's responsibility for the goods.

In addition, the Rotterdam Rules (Chapter 10) designate a 'controlling party' and stipulate that that party may give delivery instructions to the carrier. When the carrier delivers according to those instructions, even if delivery is not then in accordance with the transport document, the carrier is absolved of liability (Arts 50 to 56). The controlling party, who may or may not be a party to the contract of carriage itself, is entitled to give instructions in respect of the care and

handling of the goods, as long as they do not constitute a variation of the contract of carriage. The Rotterdam Rules do not clarify what constitutes a 'variation' of the contract of carriage. Different jurisdictions may well have different ideas in this respect, and it is therefore especially important to remember that the Rotterdam Rules, like any international convention, must be uniformly interpreted from country to country.

The controlling party is also entitled to obtain delivery at a scheduled port of call or anywhere en route in respect of a land voyage. This delivery provision means that if the container has been loaded for discharge at one named port, the controlling party is entitled to take delivery at any other port where the vessel is scheduled to call, before or after that port. The main rule is that the shipper is the controlling party, but there are exceptions in relation to non-negotiable transport documents requiring presentation for delivery and negotiable transport documents. In any case, the right of control may be transferred as per the Rules in Articles 51 and 52.

MEASURE OF LOSS

The carrier and the shipper may agree between them in the contract of carriage on a manner of calculating compensation for loss of or damage to the goods (Art 22). Such agreement will also affect the right to limit liability (Art 59(1)).

If they do not agree on compensation, Article 22(2) provides for a limit to what compensation the carrier may be liable to pay: the carrier is to pay compensation for loss of or damage to the goods calculated on the commodity exchange price, or if none is available the market price, or if there is no market price, the normal value of goods of the same type and quality at the agreed place of delivery at the intended time of delivery.



TIME BARS, NOTICE OBLIGATIONS AND LIMITS

Time bars

According to Article 62, any action will be time barred after two years from delivery or when delivery should have taken place. The time bar is not subject to the suspensions or interruptions of national law, meaning that it is unaffected by for instance insolvency events, but it may be interrupted by declaration by the defendant to the claimant. The time bar applies both to claims by the carrier against the shipper, and to claims by the shipper against the carrier. Time barred claims may still be used for set off. Set off is potentially possible against any claims so this is potentially a useful instrument.

As mentioned above, the registered owner is vulnerable to lawsuits when there is no indication in the contract of carriage of the identity of the carrier. An action against the bareboat charterer or other person identified as the carrier may be instituted within whichever is the later of two deadlines: 90 days after the rebuttal of the registered owner or bareboat charterer of the presumption that he is the carrier, or the carrier has otherwise been identified; or within the time allowed by national law in the jurisdiction of the proceedings.

The consignee's duty under a non-negotiable transport document to notify the carrier of any loss due to delay within 21 days has been mentioned above.

Limitation of liability

Limitation is package limitation. The carrier may limit its liability for loss caused by breaches of the carrier's obligations under the Rotterdam Rules, meaning any of the carrier's obligations – this is a new formula intended to be clearer than those used in the past (Art 59). The system bears most similarity to the Hamburg Rules but the number of

Special Drawing Rights (SDR) has been increased to 875. The shipper and the carrier may agree between them on a higher compensation than that provided for by the Rotterdam Rules. What constitutes a 'unit', for the purpose of calculating the package limit, is given greater clarity in the Rotterdam Rules (see Art 59(2)).

There is also a special provision on limitation for loss or damage caused by delay, calculated separately in a slightly different manner (Art 60). While compensation for damage to or loss of the goods resulting from delay follows the usual rule, liability for economic loss is separately limited to 2½ times the freight payable on the goods delayed. This is cumulative with the normal compensation, but there is also an outside limit: the sum of the liability for loss of or damage to the goods due to delay and the liability due to other causes may not exceed the limit for total loss of the goods (Art 60).

The carrier may, as ever, lose the right to limit liability, both for loss and for loss due to delay, if the loss was attributable to (or in the case of loss due to delay, resulted from) the personal act or omission of the person seeking to limit, done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result (Art 61).

Arrest

The Rotterdam Rules are mainly concerned with the obligations of the parties and their substantive liabilities and do not affect enforcement practice, which will remain a matter for national law as per Article 70. Arrest cannot found jurisdiction.

JURISDICTION AND ARBITRATION

Unlike the Hague and Hague-Visby Rules, the Rotterdam Rules contain jurisdiction

provisions. Unlike the Hamburg Rules, the parties' freedom in selecting their forum under contracts of carriage is not totally eliminated, although their enforcement by the parties is restricted.

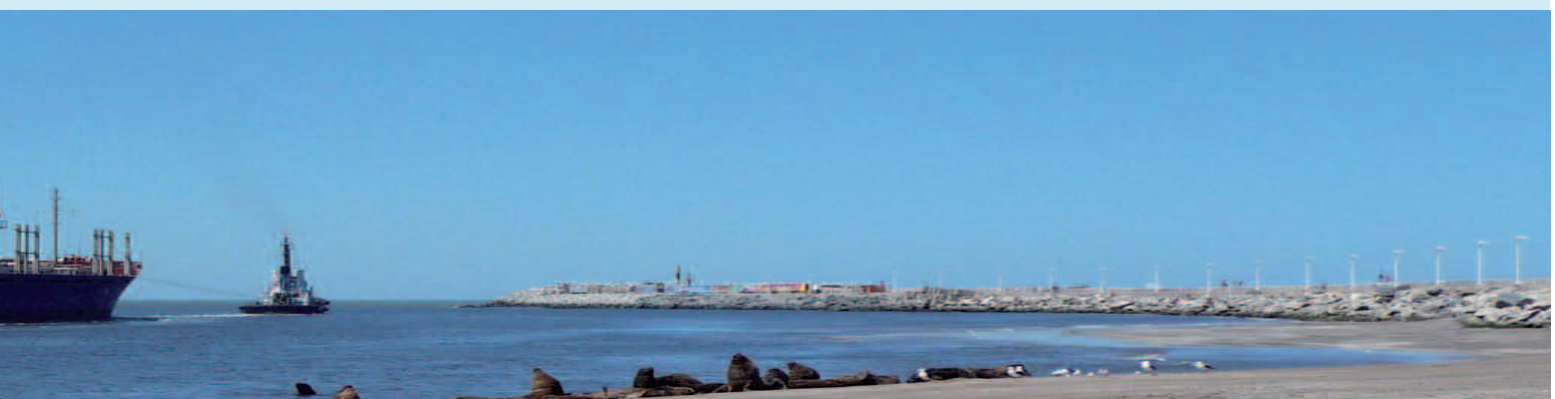
It is important to note that mere ratification by a state of the Rotterdam Rules does not result in its being bound by the provisions on jurisdiction (Chapter 14) and arbitration (Chapter 15). Rather, the provisions bind only those contracting states that make a declaration to that effect (Arts 74 and 78). Because of this so-called 'opt in' system, parties to a contract of carriage are advised to investigate not only whether the country in which the dispute is brought to a court is a party to the Rules, but also whether it has made such declarations.

Choice of court and place of arbitration

When the Convention's provisions on arbitration and jurisdiction are operative, the party seeking to pursue litigation or arbitration is entitled to arbitrate or to refer the dispute to the courts in the following places:

- i) the domicile of the carrier;
- ii) the place of receipt; or
- iii) delivery of the goods stipulated under the contract of carriage; or
- iv) the port where the goods are initially loaded on a ship or finally discharged from a ship (Art 66(a) and 75(2)(b)).

Where there is a choice of court agreement or an arbitration clause, the claimant will also have the right to initiate litigation or arbitration proceedings in the place designated therein (Art 66(b) and 75(2)(a)). Once a dispute has arisen, the parties are at liberty to override the jurisdiction and arbitration provisions of the Rules by agreeing on a court or place of arbitration (Arts 72 and 77).



Volume contracts

In volume contracts, jurisdiction clauses may be exclusive, but only if the parties so agree. The agreement must fulfil certain minimum requirements as to form and the exclusivity must be individually negotiated or prominently stated. It must also clearly designate the court or courts in question (Art 67(1)).

In addition, under the Rotterdam Rules, there is room for binding persons who are not parties to the volume contract with exclusive forum selection clauses. Such a person is bound by the agreement therein, but only in cases where the designated court or seat of arbitration is in one of the places identified in Articles 66(a) and 75(2)(b) (above); the agreement is contained in the transport document; the third party has timely and adequate notice of the exclusive choice of forum agreement; and applicable law permits that the third party may be bound by the exclusive choice of forum agreement (Art 67(2) and 75(4)).

Maritime performing parties

The Rotterdam Rules also stipulate in which court the plaintiff can pursue litigation against a 'maritime performing party'. The competent courts are those having jurisdiction over the domicile of the maritime performing party and the port where the goods are received or delivered by the maritime performing party, or the port in which the maritime performing party carries out its activities with regard to the goods (Art. 68). Actions against the carrier and the maritime performing party together must take place in a court that has jurisdiction over both the carrier and the maritime performing party.

Declarations of non-liability

Articles 66 and 68 determine in what courts an action may be commenced against the carrier or a maritime performing party and Article 69 prohibits any other choice of court except where the parties agree after a dispute has arisen. But what happens when a carrier or maritime performing party requests a declaration of non-liability from a court other than that provided by Article 66? It follows from Article 71(2) that the carrier or maritime performing party must withdraw the action at the request of their defendant if that defendant wishes to exercise its right to choice under Articles 66 or 68. Where there is an exclusive jurisdiction clause (Art 67) or arbitration clause (Art 72) this provision does not apply.

Recognition and enforcement

A contracting state must recognise and enforce judgments given by the court of another contracting state which has jurisdiction pursuant to the Rotterdam Rules, where both states have opted into the provisions on jurisdiction (Art 73). The courts of the contracting states will have the right to refuse recognition and enforcement of judgments in accordance with the legal grounds under its own laws.

Article 73 also provides an escape clause designed for the European Union's Brussels Regulation 44/2001, which notably deals with the enforcement of judgments: the Regulation and any future successors or related rules will continue to govern the enforcement of judgments as between Member States (Art 73(3)).

Further reading

'Rotterdam Rules', *United Nations Convention for the International Carriage of Goods Wholly or Partly by Sea, 2008*

Preparatory works to the *United Nations Convention for the International Carriage of Goods Wholly or Partly by Sea, 2008*, available at <http://www.uncitral.org>

Baatz, Y et al, *The Rotterdam Rules – a Practical Annotation* (London: Informa, 2009)

Beare, S, *Liability regimes: where we are, how we got there, and where we are going* [2002] LMCLQ pp 306-335

Diamond, A, *The next sea carriage convention?* [2008] LMCLQ pp 135-187

Sturley, M (ed), *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (London: Sweet& Maxwell, 2009)

Thomas, RD (ed), *Special issue of Journal of International Maritime Law on the Rotterdam Rules* (2008) 14 JIML pp 459-628



SUA CONVENTIONS

The Conventions

The full title of the original convention is *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988*. It was supplemented from the outset by the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988*. The two new Protocols amend the 1988 Convention and the 1988 Protocol respectively.

Origins

The political context surrounding the conception of the conventions is important to understanding them. The original Convention and Protocol from 1988 were the reaction of the international community to the appalling hijacking of the cruise ship *Achille Lauro* in 1985 which resulted in the murder of one of its passengers, and a way to show unity after the diplomatic crisis that followed. The 2005 revision is the reaction to the enhanced sensitivity to terrorist threats following the destruction of the World Trade Center in New York. It was soon realised that a ship could be used in a terrorist attack just as easily as an aircraft, and with potentially much greater effect. The original texts have also been an important tool in seeking to curb piracy and have been cited in a succession of UN Security Council Resolutions addressing the situation in Somalia.

The revised treaties address a rather different political situation: namely where a ship is found to carry nuclear, biological or chemical weapons; or substances that may become such weapons; or where a ship is found to be carrying terrorists. The revised treaties thus represent a tectonic shift compared to the original treaties, which addressed the situation when the ship itself was hijacked or destroyed in some way; that is, where the ship was at the receiving end of the violent act rather than the vehicle used to perpetrate it.

Under both the 1988 and the 2005 treaties, the states parties will be obliged to cooperate to bring the responsible person to justice and the treaties as a whole aim to eliminate any gaps in jurisdiction or competency that might arise in their absence.

The provisions of both Conventions and Protocols apply to fixed platforms on the continental shelf.

The 2005 treaties do not automatically supersede the 1988 treaties: the latter remain in force between any states parties. The 2005

treaties will apply only between states that have ratified the new treaties. A state that is a party to the 1988 treaties and decides to become a party to the 2005 treaties must also decide whether to denounce the 1988 treaties. If it does not, the 1988 treaties remain in force between that state and all other parties to the 1988 treaties. The treaties are separate, in that states that are parties only to the 2005 treaties have no obligations to parties to the 1988 treaties and vice versa.

Since there is no conflict between the 1988 and the 2005 treaties, there is no reason why a state should not be a party to both sets of treaties.

Scope

The treaties are intended to apply to extraordinary and criminal events only and not to address criminality arising in the ordinary course of shipping, or questions of discipline and order on board ship.

The 2005 SUA Convention applies to ships navigating waters beyond the outer limit of the territorial sea of a party state, or to ships that are scheduled to navigate into, through or from such waters (Article 4). The territorial sea is a maritime zone extending up to a limit not exceeding 12 nautical miles from the coast's baselines, wherein states exert sovereignty (United Nations Convention on the Law of the Sea, 1982, Part II). Incidents occurring within that narrow sea belt fall within the exclusive jurisdiction of the respective coastal state alone, regardless of whether that state is a party to the Convention. Where SUA offences are carried out in such area, the Convention remains applicable under the proviso that the offenders, or the alleged offenders, are subsequently found in the territory of a state party thereto (see below regarding the concept of territory and the extraterritorial application of the SUA Convention).

The Convention defines a ship as a vessel of any type whatsoever not permanently attached to the seabed, including

dynamically supported craft, submersibles, or any other floating craft. Warships and ships owned or operated by a state when being used as a naval auxiliary or for customs or police purposes are excluded.

Offences

The method of the treaties is to prescribe that each state party must ensure that certain acts will be considered criminal offences by courts within its own jurisdiction (Article 5). States must criminalise the acts mentioned in the preceding sections by the time the Convention enters into force in that state and the severity of the penalties must 'take into account the grave nature of those offences'. This is customary in international treaties dealing with criminal matters: the level of penalties is never specified but it is up to each state to assess how the offence should be punished under its national law. This conveniently avoids any need to discuss controversial issues such as the death penalty at drafting conferences.

Offences in the 1988 Convention and Protocol

States parties must make it an offence to seize or exercise control of a ship by force or intimidation. Parties must also criminalise the following acts where they endanger the safety of the ship:

- acts of violence on the ship;
- destruction of a ship;
- placing a dangerous device or substance on board a ship;
- damaging maritime or navigational facilities; and
- communicating false information.

Attempting or aiding and, in some cases, threatening these acts are also criminalised.

New offences under the 2005 Convention and Protocol

The offences under the 1988 treaties are maintained in the 2005 revision, and further offences are added. The main offences are those of:

- 1) transporting certain substances; and

2) committing certain acts in order to intimidate a population, organisation or government or to compel them to undertake or abstain from doing something. All of these acts must be committed 'unlawfully and intentionally'.

1) Transporting – what does it mean?

To 'transport' means to 'initiate, arrange or exercise effective control, including decision-making authority, over the movement of a person or item' (Article 1).

The 'items' that cannot be transported according to article 3bis are:

- a) explosive or radioactive materials, for the purpose of the intimidation or compulsion of a government or population;
- b) biological, chemical and nuclear weapons (for any purpose);
- c) special fissionable materials as defined by the Statute of the International Atomic Energy Agency with the knowledge that those materials are going to be used for any purpose not safeguarded by the IAEA; and
- d) 'equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose'.

For transport of BCN weapons and special fissionable materials to be illicit, it is not necessary that the *intent* of the transporter should be that they be used for terrorist purposes; it is enough that the transporter *knows* that they will be used for such purposes. A certain amount of vigilance is therefore required from the legitimate transport sector in relation to transports of such materials – turning a blind eye might well be construed as knowledge.

However, at a time when there is frequent worry about criminalisation of seafarers, it deserves to be pointed out that both the Convention itself and the translating national legislation require some form of criminal intent, so that a person who unknowingly or innocently transports dangerous goods or persons ought generally not to find themselves at the blunt end of this Convention.

The 2005 Convention in Article 2bis also clarifies that any obligations the states parties may have in relation to disarmament are unaffected. It is not an offence under the convention to transport nuclear materials where this is part of decommissioning activities.

2) Intimidation and pressuring

The Convention and Protocol require the criminalisation of a series of acts when undertaken for the purpose of intimidating a government, population or organisation; or when they are undertaken in order to compel a government, population or organisation to do or abstain from doing something.

It will therefore be an offence to use a ship in a manner that causes death or serious injury or damage, or to threaten to use a ship in such a manner.

It will also be an offence to use against or on a ship, or discharge from a ship any explosive, radioactive material or BCN weapon; and to discharge from a ship oil, liquefied natural gas, or other hazardous or noxious substances. These are criminalised when they are likely to cause death or serious injury or damage. It is also an offence to threaten to commit either of these acts.

3) Aiding, abetting and protecting persons

States must make it a criminal offence to transport a person who has committed an offence under the treaties, in order to help them evade prosecution (Article 3ter). Aiding and abetting the commission of the offences under the Convention must also be criminalised (Article 3quater). Equally, it is an offence to transport a person who has committed an offence under one of the so-called terrorism conventions, which are listed in an Annex to the Convention. Knowledge that the person has committed the offence and intent to help them evade prosecution are required. Shipowners should therefore not fear the possibility of incurring liabilities as a result of stowaways getting on board who turn out to be terrorists. However, issues may arise under the original 1988 Convention and these are discussed in more detail below.

4) Corporate responsibility

The Convention now also provides for corporate responsibility. Article 5bis prescribes that states should introduce sanctions against any legal entities that commit the offences in the convention. The liability introduced by the state party can be either civil, criminal or administrative.

5) Serious injury or damage

The definition of 'serious injury or damage' in Article 1 demonstrates that the Convention is designed only to protect the interests of the body public. The concept encompasses

serious bodily injury; extensive destruction of a place of public use, state or government facility, infrastructure facility, or public transportation system, resulting in major economic loss; and substantial damage to the environment, including air, soil, water, fauna, or flora. The Convention was not designed to protect private interests such as shipowners, cargo interests or insurers of hijacked ships; or, say, the interests of a shipowner whose ship has unwittingly been subchartered to a group of terrorists who has sunk it in a plot to destroy access routes to an oil refinery.

Stowaways

Notwithstanding that the SUA Convention does not make any reference to the issue of stowaways by name, situations involving such persons can practically give rise to its application in certain circumstances.

Stowaway situations can easily deteriorate – especially if it has not been possible to discharge the stowaways, as planned, at a convenient port, or they have been held in inappropriate conditions. Occasionally, their frustration has led to disorder and riot.

Such situations could feasibly result in the commission of some of the first generation of SUA offences (that is, under the 1988 Convention). The reason is that these are offences committed against the ship itself. Articles 3 and 3quater refer to situations where persons: act with violence against a person on board if that act is likely to endanger the safe navigation of that ship; cause damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; destroy or seriously damage maritime navigational facilities or seriously interfere with their operation, if any such act is likely to endanger the safe navigation of a ship; or injure or kill any person, in connection with the commission or the attempted commission of any of the above mentioned offences. Riotous situations arising on board a ship after the discovery of stowaways clearly meet the SUA criteria and it is possible that the master of the ship and the managing entity might feasibly bear some responsibility.

A 'stowaway' is defined as a person who is secreted on a ship, or in cargo which is subsequently loaded on the ship, without the consent of the shipowner or the master or any other responsible person and who is detected on board after the ship has

departed from a port, and is reported as a stowaway by the master to the appropriate authorities (IMO *Guidelines* paragraph 2, a quite similar definition is provided in the *FAL Convention*). However, it should be borne in mind that under the ISPS Code, if there are 'clear grounds' that a ship is not in compliance with the Code, the authorities are likely to apply security control measures to ensure compliance. Finding a stowaway on board is 'clear grounds' of non-compliance. From the above, it follows that even though SUA offences cannot be intended by stowaways, the master of the ship and the managing entity can be found co-liable on grounds relating to non-compliance with other international security standards. Legal instruments like the SUA Convention, SOLAS, ISPS etc do not operate in vacuum; on the contrary they aim to create a *complexus* of rights and obligations.

Jurisdiction

Article 6 of the Convention allocates jurisdiction to state parties on the basis of four legal principles which are briefly delineated below, namely:

- a) territoriality;
- b) nationality;
- c) passive personality; and
- d) protective principle.

Territoriality echoes the standard principle of territorial application, regarding offences that take place within the state's territory – or their perpetrator is to be found physically therein (i.e. either on the territorial sea including inland waters and port facilities, or beyond territorial waters but on board ships flying its flag and as such amounting *de iure* to that state's territory).

The remaining three principles are applied extraterritorially in the sense that the state's jurisdiction is founded respectively upon the basis of nationality of the perpetrator, the nationality of the targeted entity (crew or ship etc) and the potential effects of the offence itself to the state asserting jurisdiction.

Captain's exercisable jurisdiction in SUA situations

In principle, the master of a ship at sea is vested under the domestic public maritime law of the flag state and various other applicable codes (such as the ISPS Code and SOLAS Chapter XI-2, etc) with extensive quasi-enforcement jurisdiction.

The SUA Convention (Article 8) builds on this by making the master of a ship flying the flag of a state party responsible for delivering to the authorities of any other state party (the receiving state) any person who is reasonably believed of having committed a SUA offence. More specifically, when a ship carrying on board any person whom its master intends to deliver, the latter is personally obliged, whenever practicable, and if possible before entering the territorial sea of the receiving state, to give notification to the authorities of the receiving state of his intention to deliver such person together with the reasons.

In addition, the flag state must ensure that the master of its ship furnishes the receiving state with all the evidence in his possession that pertains to the alleged offence.

Detention and investigation of ships

The most innovative aspect of the 2005 SUA Convention, although not deviating substantively from the underlying traditional principles, lies in the development of specific boarding and inspection procedures with regards to a ship being suspected of SUA offences or having become embroiled (even innocently) in the commission of such acts.

First, any state party wishing to stop, board and search a ship must first obtain the authorisation of the relevant flag state. Once obtained, the state party may stop, board and search the ship, its cargo and persons on board. Furthermore, it may question the master, crew and any other persons on board in order to determine whether an SUA offence has been, is being or is about to be committed.

When evidence of SUA offences is found as the result of the boarding and inspection procedures, the flag state may authorise the requesting party to detain the ship, cargo and persons on board pending receipt of disposition instructions from the flag state. In any event the requesting party must promptly inform the flag state of the results of a boarding, search, and eventual detention. For all boardings and inspections the flag state retains the right to exercise jurisdiction over a detained ship, cargo or other items and persons on board, including seizure, forfeiture, arrest and prosecution.

Given that ships run high risks at sea from pirates and other hijackers, the Master of the ship shall be aware that any measure taken

pursuant to SUA Convention must be carried out by law enforcement or other authorised officials from warships or military aircraft, or from other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect. For the purposes of the SUA procedures 'law enforcement or other authorised officials' means uniformed or otherwise clearly identifiable members of law enforcement or other government authorities duly authorised by their government. Furthermore, law enforcement or other authorised officials must provide appropriate government-issued identification documents for examination by the master of the ship upon boarding.

Safeguards against abusive boarding and inspection procedures

The 2005 SUA boarding and inspection procedures have been followed by a number of safeguards aiming to guarantee the rights of the various private entities (crew, offenders and company interests). In accordance with Article 8*bis* paragraph 10a, the requesting state must:

- 1) take due account of the need not to endanger the safety of life at sea;
- 2) ensure that all persons on board are treated in a manner which preserves their basic human dignity;
- 3) ensure that a boarding and search is conducted in accordance with applicable international law;
- 4) take due account of the safety and security of the ship and its cargo;
- 5) take due account of the need not to prejudice the commercial or legal interests of the flag state;
- 6) ensure, within available means, that any measure taken with regard to the ship or its cargo is environmentally sound under the circumstances;
- 7) ensure that persons on board against whom proceedings may be commenced in connection with any of the SUA offences are afforded fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided for such proceedings by the law of the state in the territory of which he is present;
- 8) ensure that the master of a ship is advised of its intention to board, and is, or has been, afforded the opportunity to contact the ship's owner and the flag state at the earliest opportunity; and
- 9) take reasonable efforts to avoid a ship being unduly detained or delayed.



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Liabilities arising from boarding and inspection procedures

Out of consideration for the substantial economic interests involved, the SUA Convention notably provides that states Parties shall be held liable for any damage, harm or loss attributable to them arising from measures taken pursuant to the SUA Convention when: (a) the grounds for such measures prove to be unfounded, provided that the ship has not committed any act justifying the measures taken; or (b) such measures are unlawful or exceed those reasonably required in light of available information to implement the provisions of this article. States parties must provide effective recourse in respect of such damage, harm or loss.

Interpretation of the treaties

The treaties are not long or complicated, but the revision has been achieved by deleting paragraphs or articles from the old text and by introducing paragraphs and articles to the new Convention. As a result, the consolidated 2005 Convention and Protocol are a patchwork of provisions from the 1988 and 2005 treaties. The result is in parts puzzling from a technical perspective and because this could result in difficulties in interpretation in practice, the issues should be discussed briefly here.

The 2005 Protocols do not give clear guidance as to what precisely is the content of the revised Convention. Thus, Article 15 of the 2005 Protocol provides that the consolidated version should consist of Articles 1-16 of the Convention as amended together with articles 17-24 of the 2005 Protocol. However, there is also an article 16*bis* in the 2005 Protocol which appears not to be included in the consolidated 2005 Convention.

Further, the consolidated 2005 Protocol contains articles numbered 1-4*bis* and 8 onwards, with a gap in between where there ought to be articles numbered 5, 6 or 7. This does not lead to any problems of interpretation but it would have been fairly straightforward to ensure that the numbering was consecutive.

Finally, it is not clear which Preamble should apply to each consolidated document: the original 1988 preamble or the revised 2005 preamble. Indeed, the IMO consolidated version dispenses with the Preambles altogether. The text of the 2005 treaties is structured as amendments and insertions to the 1988 treaties. One would therefore logically think that it is the original preamble that applies. However, it is the Preamble to the amending Protocols that explains the

new purpose and intent of the revisions. Without the revised Preamble, an important tool is missing that helps states understand the context and purposes of the treaties in case of interpretation.

By way of example of an interpretation issue that could arise, the Preamble to the original treaty clarifies that offences of a type that falls under the disciplinary regime of the ship itself are not subject to the Convention: '*acts of the crew which are subject to normal shipboard discipline are outside the purview of this Convention*' (paragraph 11). This is not repeated in the Preamble to the revising Protocol, so that from a technical legal perspective, there could be said to be doubt whether minor offences subject to shipboard discipline might also be considered as within the purview of the Convention. This particular issue is by way of illustration only as one would imagine that a pragmatic stance would be taken on such occasions.

Fact box: the conventions in the new Annex to the Convention

- 1) Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.
- 2) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.
- 3) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.
- 4) International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.
- 5) Convention on the Physical Protection of Nuclear Material, done at Vienna on 26 October 1979.

- 6) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988.
- 7) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988.
- 8) International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.
- 9) International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999.

Sources and further reading

Aust, A, *Handbook on International Law* (Cambridge: Cambridge University Press, 2010 – 2nd edition)

Freestone, D, 'The 1988 International Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation', *International Journal of Estuarine and Coastal Law*, Volume 3 No 4 1988.

Hjalmarsson, J, *A princess transmogrified*, *Shipping & Trade Law*, (2005) Vol 5 Issue 5, STL 1-3

IMO, *Piracy and Armed Robbery at Sea* (London: Maritime Knowledge Centre: April 2010)

IMO, *SUA Convention – 2006 Edition* (IMO Publication: Sales number IA4623)

Wolfrum R, 'Fighting Terrorism at Sea: Options and Limitations under International Law', *The 28th Doherty Law Lecture given by the President of the International Tribunal for the Law of the Sea on the 13 April 2006.*