

I Magklasi ‘Can PECL help with vexing issues of maritime law? Critical reflections from the example of the Rotterdam Rules’ in Wouter Verheyen, Frank G.M. Smeele and Marian A.I.H. Hoeks (eds.) *Common Core, PECL and DCFR: could they change shipping and transport law?* (2015) *Ius Commune Europaeum Intersentia Metro*, pp. 27-39.

I. Introduction

1. This paper studies the trajectory, background and objectives of PECL¹ and identifies the link between contract law and maritime laws (namely carriage of goods by sea and international sale of goods). The author will present the intricacies of these laws, in an attempt to justify why, despite extensive codification and standardisation, maritime law is still in need of legal certainty and occasionally of fairer application of the law to the disputes not only by national courts, but also in the wider European context. After determining the principles of PECL and maritime law, the author reflects upon the benefit that certain provisions of PECL could have on the better integration of the latest harmonising convention in the area of carriage of goods by sea, namely of the Rotterdam Rules², by providing interpretational help to volume contracts with derogations in a way that promotes both PECL and maritime law’s objectives.

1.1 Introduction to PECL

2. DCFR and PECL have come to harmonise European substantive contract law³ and they are believed to prove handy in the application interpretation or creation of laws within Europe.⁴ They originated from the Commission on European Contract Law, which was a circle of distinguished lawyers from across the European Union. They have both been the product of laborious work and cooperation of European lawyers,⁵ experts on private law, comparative law and EU law. They are soft law provisions, and they do not have a normative character, which means that they were not drafted in order to be automatically legally binding.⁶ Thus, they take into account the particular contract law principles of European countries, as they could best foster inter-European Trade.⁷
3. PECL are the product of distilling common principles of contract law among jurisdictions of the Member states of the EU.⁸ Through PECL, the Lando Commission has set the plausible goal of achieving a greater uniformity in areas of contract law based on the understanding, which is also a

¹ Principles of European Contract Law.

² UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. Hereafter referred to as “The Rotterdam Rules” or “RR”.

³ Roy Goode, *Transnational Commercial Law: Texts, cases and materials* (OUP 2007), para 14.02.

⁴ *ibid*, para 14.12.

⁵ Ole Lando, ‘Salient features of the Principles of European Contract Law: A comparison with the UCC’ (2001) 13 *Pace International Law Review* 339-340.

⁶ Roy Goode, H Kronke, E McKendrick, *Transnational Commercial Law* (OUP 2007) 509.

⁷ Ole Lando, ‘European Contract Law’, in Petar Carcevic (ed) *International Contracts and Conflicts of Laws: A collection of Essays* (Graham & Trotman, London 1990) 1, 5.

⁸ Ole Lando, ‘Salient features of the Principles of European Contract Law: A comparison with the UCC’ (2001) 13 *Pace International Law Review* 339, 340.

true fact, that the legal systems of European countries have the same historical, philosophical and conceptual underpinnings.⁹ Contrary to the UNIDROIT Principles which were the product of another important uniformity project applicable only to international commercial contracts,¹⁰ PECL are designed to apply to inter-European contracts or to a contract governed by the law of one of the EU Member-States.¹¹

4. Since they are soft law in nature, one of the primary benefits of PECL is that they will be available to courts and arbitrators for the interpretation of the law, and they may apply by analogy.¹² Parties can expressly incorporate them into their contract. According to article 1(101)(3a) of PECL if parties say that their contract should be governed by principles of international law or *lex mercatoria*, then PECL may apply.¹³ But PECL is more flexible than that, as the Principles can be applied if any European Court believes their application is more suitable, either supplementing or deviating from the rules of a certain national law.¹⁴

1.2 Benefits and objectives of PECL

5. The formulation of PECL aspires to amalgamate the core principles of European contract law.¹⁵ The principles have been pronounced to lift barriers from the cross-border business between European countries.¹⁶ Intra-european trade will gradually be fostered through the familiarisation with the principles, which also have the advantage of not necessarily reflecting a certain legal system.¹⁷ Additionally, PECL help towards the materialisation of the objectives behind the European Union, which are to have a common approach towards regulation in order to enforce the single European market.¹⁸ Clearly, PECL can constitute the model upon which community laws may be based, and take the effort of harmonisation even further.¹⁹ Most importantly, and this is where this paper will elaborate on, PECL stands as a tank of provisions, guidelines and principles for national courts and arbitrators and also for legislators and policy makers.²⁰ This means that PECL embrace both the consolidation and codification elements underpinning the concept of legal

⁹ On this see: Nils Jansen, Reinhard Zimmermann, 'A European civil code in all but name: discussing the nature and purposes of the draft common frame of reference' (2010) CLJ 98, 103; Ole Lando, 'Some features of the law of contract in the third millennium' (2000) *Scandinavian studies in law*.

¹⁰ Roy Goode, H Kronke, E McKendrick *Transnational Commercial Law* (OUP 2007), para 14.16.

¹¹ Roy Goode, 'International Restatements of Contract and English contract law' (1997) II *Unif L Rev* 231, 235-6.

¹² *ibid.*

¹³ J Morrissey, J Graves, *International sales law and arbitration: Problems, cases and commentary* (Kluwer Law International 2008) pp. 28-29

¹⁴ Ole Lando, 'Salient Features of the Principles of European Contract Law: A comparison with the UCC' (2001) 13 *Pace International Law Review*, 339.

¹⁵ Ole Lando and H Beale(eds.), *Principles of European Contract Law, Part I, Performance and Non-performance and Remedies* (Martinus Nijhoff 1998), p. xv.

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ *ibid.*, p. xvi.

²⁰ *ibid.*

codified regulation. They stand for the consolidation of the law as it exists, but they are enriched in provisions to address issues that currently national laws are either silent on or regulate insufficiently.²¹ Moreover, the Principles of European Law will be beneficial in bringing civil and common law together, especially by filling the gaps created by the varied terminology, structure and legal reasoning, policy considerations and diverse approaches on other important legal concepts.²²

6. The purposes of the Principles speak for themselves: They provide a platform for the evolution of European legislation. PECL can serve as a mechanism for the better orientation or coordination of the regulations of the organs of the European Union. Parties could readily incorporate PECL in their contracts, as they form refined, and thus, more suitable solutions offered by European legal systems. The PECL and the DCFR represent not just the collection of common principles of contract law observed from the different individual European jurisdictions, but an evolutionary pronouncement of legal principles, from a legal doctrinal perspective, as they contain *de lege ferenda* provisions.²³ Progressively, through their incorporation into contracts and application by judges and arbitrators, they can develop a self-contained European *lex mercatoria*.²⁴ It has to be underlined that PECL will assist courts in better addressing certain ambiguous or not well-regulated issues, and they will empower the judges to apply a solution /remedy that is either in line with the common core of Europe or an evolutionary step from the common core into a better legal principle.²⁵ It is clear that PECL apply to commercial and not only transactions, and the court, should it so assess, may apply them on its own.²⁶ It is this latter element, the fact that PECL can be of assistance without being specifically referred to by the parties, in order to assist justice in proffering a judgment which addresses parties' interests and rights in the optimal way.

7. It has been submitted by Ole Lando that the principle of freedom of contract may be curved on the occasion of a contract where one of the parties is weaker, or evidently in consumer contracts.²⁷ Therefore, currently PECL are a soft law instrument²⁸ without the authority of national, anational or supranational law,²⁹ but at the same time are aspired to be the 'stem-cell' of the

²¹ *ibid.*

²² *ibid.*, pp. xvi and xvii. The classic example of difference is the principle of good faith which is primordial in most European jurisdictions, and which can be found sporadically in English law, through specific cases and application to very concrete circumstances.

²³ Roy Goode, *Transnational Commercial Law*, para 14.41.

²⁴ *ibid.*, xviii.

²⁵ *ibid.*

²⁶ Article 1(101).4 of PECL.

²⁷ Ole Lando, 'European Contract Law', in Petar Carcevic (ed) *International Contracts and Conflicts of Laws: A collection of Essays* (Graham & Trotman, London, 1990) 1, 5.

²⁸ Ole Lando, 'Salient Features of the Principles of European Contract Law: A comparison with the UCC', above 341.

²⁹ Ole Lando and Beale (eds.), *Principles of European Contract Law*, Part I, p. 40.

European Civil Code³⁰ and will help in the coordination of the existing and also stimulation and upcoming EU legislation in several areas of law. The next question to be addressed is how this fits in the area of maritime law. Therefore, the author will proceed to investigate how they can be first relevant and then applicable to maritime law in a fruitful and harmonised way.

II. From contract law to maritime law

8. This relationship is worth exploring in order to understand the important crossovers between contract, commercial and maritime law. Commercial law constitutes the *sui generis* ‘meeting point’ of contract law and maritime law. Several definitions have been provided for commercial law.³¹ According to Roy Goode, commercial law is the “the totality of the law’s response to mercantile disputes. It encompasses all those principles, rules and statutory provisions, of whatever kind and from whatever source, which bear on the private law rights and obligations of parties to commercial transactions, whether between themselves or in their relationship with others.”³² Therefore, it is not just implied, but it has also been asserted that commercial law covers transactions for the international sale of goods.³³ These are the branches of commercial law that the author will focus on in this paper: namely the law of the international sale of goods and the law of international carriage of goods by sea.
9. As aforementioned, PECL are principles of contract law. Before we see whether PECL can offer solutions to maritime law, in the context set above, it is crucial to look at the idiosyncracies of regulating maritime (trade) law. As we shall see, this on the one hand, has regard to the different forms of regulating this law and the disparate sources available. Unification and harmonisation in these areas of laws is usually attempted through different ways of regulation and by bodies with different composition and policy considerations.³⁴ As implied above, two streams of harmonisation have been observed internationally: through international conventions and model laws³⁵ and through standardisation.³⁶ Throughout this paper the author will be referring to either commercial or maritime law taken from the broad definition that Roy Goode and several other legal scholars have advocated.

³⁰ Ole Lando, ‘Salient Features of the Principles of European Contract Law’, 340.

³¹ See ‘The Nature of Commercial Law’ in LS Sealy and RJA Hooley, *Commercial Law, Text, cases and materials* (4th edn, OUP 2009), pp. 3- 8: HC Gutteridge, ‘Contract and Commercial Law’ (1935) 51 LQR 117 defined commercial law as “the object of commerce that is to deal in merchandise, [...] commercial law can be defined as the special rules which apply to contracts for the sale of goods and to such contracts are ancillary thereto, namely contracts for the carriage and insurance of goods and contracts the main purpose of which is to finance the carrying out of contracts of sale”.

³² LS Sealy and RJA Hooley, *Commercial Law, Text, cases and materials* (4th edn, OUP 2009), p.4 citing this abstract from Roy Goode’s speech in the 1997 Hamlyn Lectures.

³³ *ibid*, p.4.

³⁴ See in detail, Charles Debattista, ‘Legislative techniques in international trade: madness or method?’ [2002] JBL 626.

³⁵ LS Sealy and RJA Hooley, *Commercial Law, Text, cases and materials* (4th edn, OUP 2009), p. 28

³⁶ *ibid*.

2.1 Forms of harmonisation of maritime and trade laws

10. Harmonisation of commercial laws has been the great goal justifying the rule-setting work in the area of international commerce. CMI, UNCITRAL, UNIDROIT are international organisations which have undertaken the task of codification of rules in this field, through drafting of international conventions. There are also rules originating from business self-regulation, such as from the ICC, GAFTA, and FOSFA. Sale contracts of commodities represent the majority of international commercial sales.³⁷ In these contracts, it is *locus classicus* to have English law as the governing law of the contract,³⁸ without the country of shipment or destination being necessarily the UK, and regardless of whether payment is to be made outside the UK, or in a currency other than the English pound.³⁹ The choice of English law as the governing law as well as the preference for English jurisdiction are also justified by the profound expertise of English courts in commercial law matters.

11. When dealing with international commerce, English statutory as well as common law become incredibly relevant. Big commodity organisations use English law in their contracts.⁴⁰

2.1.1 Sets of standard trade terms

12. Incorporation of standard trade terms is another feature of international commercial contracts on shipping terms. If a certain answer to a trade question cannot be provided by a look at trade statutes and case law or carriage statutes, conventions and case law, then the study of other sales terms voluntarily incorporated may provide the answer.⁴¹ Some of the most popular sets are the Incoterms and the UCP 600 which are drafted by the International Chamber of Commerce (ICC). The Incoterms were published for the first time by the ICC in 1936.⁴² "Incoterms" provide a set of official rules for the interpretation of trade terms used in international trade.⁴³ They are drafted and revised by experts from several nationalities chosen for their outstanding contribution to

³⁷ F. Lorenzon, Y. Baatz and Lynne Skajaa, *CIF and FOB Contracts* (Sweet & Maxwell 2012), para 1.001.

³⁸ M. Bridge, *The International Sale of Goods* (3rd edn, Oxford University Press 2013), para 1.39; F Lorenzon, 'When is a CIF seller's carriage contract unreasonable? - Section 32(2) of the Sale of Goods Act 1979' (2007) 13 (4) JIML 241, 242; M .Bridge, 'Uniformity and Diversity in international sale contracts' (2003)15 Pace Int'l L. Rev. 55, 57.

³⁹ *ibid.*

⁴⁰ M. Bridge, *The International Sale of Goods* (3rd edn, Oxford University Press 2013), para 1.39.

⁴¹ See in detail, Charles Debattista, 'Legislative techniques in international trade: madness or method?' [2002] JBL 626.

⁴² M. Bridge, *The International Sale of Goods* (3rd edn, Oxford University Press 2013), para 10.62.

⁴³ For a considerable analysis of the distinctive characteristics of major ways of arranging payment for sale of goods overseas see M. Goldby, *Electronic documents in maritime trade: law and practice* (OUP 2013), paras 3.09-3.17.

international commercial law and to the International Chamber of Commerce over the years.⁴⁴ They are written in a very simple language for lay people lacking the specific knowledge of lawyers.⁴⁵ They are legal but non-binding instruments, widely used by practitioners and voluntarily incorporated into contracts.⁴⁶ Their importance has been acknowledged by the Court of Justice of the European Union.⁴⁷ Designed for use with the contract of sale, Incoterms have been adopted universally as a safeguard against misunderstandings and disputes between buyers and sellers.

13. Since they are business-oriented, Incoterms are more pragmatic. The ICC Commission on Commercial Law and Practice (CLP), which revises the Incoterms on the one hand and UNCITRAL on the other work in completely adverse ways: CLP, on the one hand, starts from the individual experts coming from companies, then works actively with intergovernmental organisations and, only ultimately, collaborates with national organisations for the production of effective regulatory systems.⁴⁸ UNCITRAL,⁴⁹ on the other hand, and the mechanisms behind the creation of international conventions have a governmental, rather than an industry starting point.⁵⁰ The drives behind international conventions, the Rotterdam Rules included, are harmonisation,⁵¹ whereas the rules created by private organisations/committees/bodies such as the ICC, are oriented to bring predictability in practice.⁵²

14. UNCITRAL can be said to have the following aims:⁵³ first, harmonisation, in order to minimise disparity of laws and other obstacles among jurisdictions,⁵⁴ specialisation, in order to meet current needs of international transactions and disputes,⁵⁵ modernisation, in order to take on board changes in values, technology and commercial practices,⁵⁶ codification for the elimination of obstacles paving the way for methods of communication, commerce and finance,⁵⁷ and the overall

⁴⁴History of the Incoterms: From 1936 to today: the Incoterms® rules' online <http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/history-of-the-incoterms-rules/> accessed 25 March 2014.

⁴⁵ M. Bridge, *The International Sale of Goods* (3rd edn, Oxford University Press 2013), para 1.19.

⁴⁶ Laurence Ravillon, 'Chronicle of informal sources on Business Law' [2012] 5 IBLJ 519, 542.

⁴⁷ *European Court of Justice (Case C-87/10) (Third Chamber) of 9 June 2011, Electrosteel Europe SA vs Edil Centro SpA*; 'Supply of goods in a distance selling contract: the Judicial competence and the role of the Incoterms' at <<http://www.piccozzimorigi.cn/main/reports.php?id=82>> accessed 23 November 2013; Melis Ozdel, 'Multimodal Transport Documents in international sale of goods' (2012) 23(7) I.C.C.L.R. 238.

⁴⁸ 'What do we do?: Commission on Commercial Law and Practice' online <http://www.iccwbo.org/about-icc/policy-commissions/commercial-law-and-practice/what-do-we-do/> accessed 20 March 2014.

⁴⁹ On the roles of UNCITRAL see in general G Herrmann, 'The role of UNCITRAL', in I Fletcher, L Mistelis and M Cremona (eds.), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell 2001).

⁵⁰ Charles Debattista, 'Legislative techniques in international trade: Madness or method?', 637. This however does not mean that the UNCITRAL and ICC have a competitive relation. Quite the opposite, there is cooperation as shown by the recent endorsement of Incoterms 2010 by UNCITRAL. See Report of the Commission on the work of its 45th session (Doc A/67/17), 2012, paras. 141-144.

⁵¹ Charles Debattista, 'Legislative techniques in international trade: Madness or method?', p. 636.

⁵² *ibid.*

⁵³ As listed by G Herrmann, 'The role of UNCITRAL' above.

⁵⁴ *ibid.*, paras 2-010-2-012.

⁵⁵ *ibid.*, paras 2-013-2-014.

⁵⁶ *ibid.*, paras 2-015-2-016.

⁵⁷ *ibid.*, paras 2-017-2-020. This is the so-called "preventive unification".

enhancement of legal certainty and confidence of traders on the provisions. These lead to the following observations.

III. Fusion of legal sources

15. The above categories of carriage and trade legal terms seem to be almost always relevant to a legal advisor. This is because they add segments to the desired legal advice on an international commercial dispute, where goods are to be carried by sea. However they may bear controversies or prove of controversial application. This is first because they are drawn up by rival market sectors⁵⁸ and in a “sector-specific”⁵⁹ manner. Carriage representatives support carriage interests whereas trade private bodies push for more commercial, rather than detailed shipping solutions. One should also be expecting synergies between all these sources, based on the fact that conventions have their own intricacies. Self-regulatory terms and conventions are drafted under different legislative techniques and as pointed out above, by organisations with different aims.⁶⁰

16. All this international rule-setting agencies as well as the Lando Commission had certain objectives in common. They all aim to further uniformity of the application of the law,⁶¹ to be sufficiently flexible in order to be timeless and embrace possible future developments⁶², and as far as PECL are concerned, to sometimes serve as an ideal solution to a contract law problem, where the application of national laws would be insufficient.

3.1 Main underpinnings of international commercial law

17. On the one hand the business community is interested in the flexibility, which is preserved by commercial freedom and party autonomy.⁶³ But this should not counter the national and international interest for certainty and predictability in the definition of rights and obligations as well as in the outcome of a dispute.⁶⁴ This can be prevented by fairly clear and comprehensive principles which affect the judicial decision-making.⁶⁵ Clearly, this is an area where PECL are not only welcome but also needed to assist.

18. Therefore it is in the interest of commercial law and of the business community to open the legal system to new practices and customs, without this minimising the ultimate interest in fairness

⁵⁸ Charles Debattista, ‘Legislative techniques in international trade: Madness or Method?’, p. 632.

⁵⁹ *ibid* p. 634.

⁶⁰ *ibid* p. 635.

⁶¹ On PECL see O Lando and H Beale (eds.), *Principles of European Contract Law Parts I and II* (Kluwer Law International 2000), p xxvi.

⁶² On PECL see, *ibid*. xxvii.

⁶³ E McKendrick(ed.), *Goode on Commercial Law* (4th edn, Penguin 2010), p. 1348.

⁶⁴ *ibid*.

⁶⁵ *ibid*.

and justice.⁶⁶ Flexibility can be very much achieved by the structure of English law and the use of standard contracts as a form of commercial harmonisation, but fairness can be ensured through the outline of principles permeated by a doctrinal approach that takes onboard the regulation that promotes justice to all parties.⁶⁷ The benefit of codification is that it simplifies and discerns the law, but it also offers the chance to assess it and optimise it.⁶⁸

So far, international codification through conventions has been an important platform of harmonisation, but we have also moved towards other methods:⁶⁹ model laws, principles (see PECL), and best practice guides.⁷⁰

19. Maritime law is permeated by the use of standard contracts and especially in the area of carriage of goods by sea, we have had international harmonisation attempts through Conventions. Traditionally, these conventions, and particularly carriage of goods conventions were intended to introduce a fair balance of risk allocation between carriers and cargo interests. The Rotterdam Rules represent the most recent convention in the area of carriage of goods by sea, which encapsulates freedom of contract through provisions for customized agreements that may derogate from most of the mandatory provisions of the Rotterdam Rules, if certain conditions are met. These customised agreements are the so-called volume contracts. Derogations from the Rotterdam Rules were initially aimed to apply to parties of equal bargaining power; however, this is not properly reflected in the text or the heading of the article. There is a specific section which is specifically devoted to the protection of third parties, but which is so broadly drafted that it is will almost certainly be variably applied and interpreted by different national courts when the Rotterdam Rules come into force.

20. In the opinion of the author this is an area where PECL can have a supplementary, if not salutary effect. In the following heading the author will discuss the application of PECL to a volume contract: resort to PECL for the sake of interpretational help is justified by the fact that the volume contract provisions have raised eyebrows with regards to the potential that article 80 of the RR leaves for the abuse of traders with little bargaining power.

IV. Can PECL promote the smooth application and efficient integration of the Rotterdam Rules in Europe?

21. This question is important but also relevant to the topic of the eighth European colloquium on maritime law. Better integration of European laws is anyway among the objectives of PECL. The

⁶⁶ *ibid*, pp. 1348, 1349.

⁶⁷ *ibid*.

⁶⁸ *ibid*. p.1352.

⁶⁹ Herbert Kronke, 'The future of harmonisation and formulating agencies: The role of UNIDROIT' in Ian Fletcher, Loukas Mistelis, Marise Cremona (eds.), *Foundations and Perspectives of International Trade Law*, above para 5-018.

⁷⁰ See also Loukas Mistelis 'Is Harmonisation a necessary evil? The future of harmonisation and new sources of international trade law' in I Fletcher, L Mistelis and M Cremona (eds.), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell 2001), para 1.029-1.030.

Rotterdam Rules constitute the latest attempt of harmonisation in the area of maritime trade law, which has received criticism in certain aspects. Therefore, studying how a convention in carriage of goods can optimise its harmonisation effects and foster trade in Europe, through PECL is at the crux of this conference's debate. The place is also significant, as Rotterdam was at the centre of the world in September of 2009 for the signature of the Rules, and also this year with the most distinguished legal scholars of European maritime law gathered to discuss PECL, DCFR and the common law and the contribution they can make to maritime law. Therefore both the time and place are pertinent for the discussion the author wants to make.

22. First, the RR, like PECL constitute a legal piece of harmonisation,⁷¹ but in the field of maritime law. The RR were drafted to update and harmonise carriage of goods wholly or partly by sea laws and finally set aside the fragmented regimes which have been in existence so far.⁷² The Rotterdam Rules recognise freedom of contract and want to secure the ability of shippers and carriers to tailor-make their agreements. Thus, they allow derogations from the mandatory provisions of the Rotterdam Rules, under certain circumstances.⁷³ Volume contracts are defined as contracts for the carriage of a specified quantity of goods in a series of shipments over a given period of time.⁷⁴ Given, that the definition of a volume contract is vague in certain respects, and because oppositions have been made during the preparatory works, the draftsmen of the Convention have decided to set forth a list of formal conditions that the volume contract should satisfy so that the derogations prove to be consensual and valid.⁷⁵

23. Article 80(2) of the RR reads:

A derogation pursuant to paragraph 1 of this article is binding only when:

- (a) The volume contract contains a prominent statement that it derogates from this Convention;
- (b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;
- (c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and
- (d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation

⁷¹ On the aims of the RR see the preamble to the Convention available at: http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/Rotterdam-Rules-E.pdf accessed 9 September 2014.

⁷² Namely the Hague, Hague-Visby and Hamburg Rules.

⁷³ See the proposal of the US on the need and benefits to allow this contractual freedom in the preparatory works of the RR.

⁷⁴ See article 1(2) of the RR.

⁷⁵ See article 80(2) of the RR.

24. This prominence of the derogations along with the need of an express consent to such terms are specifically requested for the protection of a third party (usually assignee, subsequent holder of the transport document), since such parties will not have negotiated the contract.⁷⁶

The major criticism that the framework around derogations from the RR has received is that it affords carriers with a potentially extensive possibility to derogate from the RR.⁷⁷ This, in turn may empower them to impose this derogation standard in the market, “forcing” shippers to conclude contracts where the carrier undertakes little liability against usually a low freight rate, and thus expose especially parties without much bargaining power or experience to undesirable liability exclusions. It is especially small or medium sized shippers that need this protection and this naturally takes us to similar provisions of PECL that could be of help.

25. One such is Article 2:104: Terms Not Individually Negotiated. The article reads as follows:

(1) Contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded.

(2) Terms are not brought appropriately to a party's attention by a mere reference to them in a contract document, even if that party signs the document.

26. Coming back to volume contracts, in the opinion of the author, the requirements for an opportunity and notice of the opportunity to contract in non-derogatory terms are impractical and perhaps confusing, especially in terms of evidence. A notice can be in writing, but the same cannot apply separately to the opportunity; the opportunity to contract on regular Rotterdam rules terms *per se* cannot be evidenced through writing if there are no more specific indicators.⁷⁸

Surprisingly, the rationale behind subsection 80 (2) of the RR, instead of over-emphasising the need of protection of parties in an unprivileged bargaining position, focuses on the conclusion of contracts in a way which is compatible with commercial practice;⁷⁹ the fears of having small shippers exposed to volume contracts, almost on a standard basis, with the negotiations perhaps focusing on freight, was understood during the preparatory works.⁸⁰ It has to be clarified that a mere

⁷⁶ Article 80(5) of the RR.

⁷⁷ See among others Asariotis, Regina Asariotis, ‘Reflections on the Rotterdam Rules’, in M.A. Clarke (ed.), *Maritime Law Evolving: Thirty Years at Southampton* (Hart Publishing 2013); Regina Asariotis ‘UNCITRAL Draft Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea: Mandatory Rules and Freedom of contract’ Antapassis, Athanassiou and Rosaeg (eds.), *Competition and Regulation in Shipping and Shipping Related Industries*, (Martinus Nijhoff, 2009), pp. 358 and 361-363.

⁷⁸ See preparatory works of the Rotterdam Rules, 15th session Report, A/CN.9/576, para 83, where there was an official suggestion for inserting indicators specifying the individuality of the negotiations, e.g., the bargaining power of the parties.

⁷⁹ See, 15th session Report, A/CN.9/576, para 82, where “a need to maintain a measure of commercial pragmatism” was acknowledged. The draftsmen were cautious not to insert precautions that would be too onerous and thus commercially impracticable.

⁸⁰ See preparatory works of the Rotterdam Rules, 15th session Report, A/CN.9/576, para 83.

written indication that the contract has been individually negotiated does not necessarily mean that this has actually been the case, or more importantly that a more vulnerable party (for example a smaller shipper) has been reasonably directed to all or some of the derogations.

27. Parties may sign a volume contract with a coversheet saying “*On date x, Y and Z have entered into individual negotiations and concluded a volume contract that derogates from the RR. Some terms are agreed outside the mandatory scope of the Rotterdam Rules. For details of the clauses see Annex attached*”. What is remarkable in the above scenario is that article 80 may be technically satisfied, without the original drafting aims being properly solidified, hence, article 80 of the RR has been hotly debated by practitioners and academics.

28. Evidently, such a contract *prima facie* satisfies the formality of an individually negotiated contract, whereas this may not be the actual case. Besides, there is only an indication of derogations, without exact knowledge of the different provisions. This obstacle can be avoided in two ways: either by way of interpretation, if it is inferred that the requirement for the opportunity is satisfied through the tender of a written notice of the opportunity; or by a specific provision in the volume contract with a simpler wording. For clarity, the parties can stipulate in their contract that the shipper was offered an opportunity to contract on standard terms and conditions subject to the RR, and he has rejected.

However, even in that case, there does not seem to be a way to prove whether the intention of the carrier to enter into a non-volume carriage contract has actually occurred. If the terms of the volume contract are a lot more attractive (low freight rates for instance), there is nothing to prevent the shipper from being induced by the carrier-or left without a viable alternative choice- because of the commercial pressure exercised or the standardisation of the freight market.⁸¹ The reason why this is said is because article 80(2) of the RR seems to insert steps showing that there is adequate consideration before the volume contract is concluded.

29. In the opinion of the author, individual negotiations needed to be a separate and independent precondition to assure that there is abundant clarification of the sections that will be derogated. The word “sections” used in Art. 80(2)(b)(ii) mostly refers to the numbers of the derogations,⁸² so, one could say that they are used figuratively. In the author’s view, the logical and imperative order of steps which have to be proven in writing should have been: the opportunity to contract on conventional terms, individual negotiations about the content of the intended derogations and lastly, prominent statement of the content of the derogations on the contract itself. Eventually, even if a volume contract is entered into and satisfies these preconditions, it is difficult to know the particular preceding bargaining matrix, whether the party signed accepting or knowing all of the derogations

⁸¹ This has been admitted by several commentators, but it was foreseen during the deliberations of the RR, as seen above.

⁸² See Y Baatz and others, *The Rotterdam Rules: A Practical Annotation* (Informa 2009), para 80.04.

and their substance, or whether the contract was offered on an actual take it or leave it basis, thus making it a contract of adhesion.⁸³

30. It is the author's contention that the above formalities could be of practical help if they were read not only in light of the underlying principles of the RR, but essentially if they were read through the underlying principle of article 2.104 of PECL.⁸⁴ A European court could read the RR also in light of PECL, and go beyond the technicalities of article 80 of the RR, giving justice to the parties and interpretational help to the RR, that are a bit abstract on the matter. The fact that the principles represent the common core of European contract law would mean that an interpretation of article 80 of the RR in light of PECL could be, and in fact should be followed by any European court. At same time, this would increase trust of the trade community in the way disputes are resolved within the European jurisdiction and would indeed materialise PECL's objective to foster inter-European trade. At the same time, this would increase reliability of the trade community to resolving disputes within the European jurisdiction and would indeed materialise PECL's objective to foster inter-European trade. Essentially, reading article 80 of the RR under the light of articles such as the aforementioned of PECL, would safeguard the laborious work of all the states, agencies and organisations towards the RR and the intensive need of the international trade community for one carriage regime, which is modern, all-embrative and leaves behind the jurisdictional chaos of the present, with multiple regimes applicable and the national courts still judging also through the lenses of the law proffered by their own jurisdiction.

V. Suggestions and Final Recommendations

31. In this article, the author has embarked on a considerable analysis of the possible value of PECL, examining their hypothetical contribution to the application of justice under a vexing issue of maritime law. This concerned volume contracts not individually negotiated, as regulated under the Rotterdam Rules. Before that, the author illustrated the principles underlying PECL and described the main characteristics of maritime and commercial law, focusing on the fusion of legal sources by rule-setting agencies with different composition and objectives.

32. Opinions on PECL are usually polarised: the principles are either completely distrusted or appreciated from the prism of wishful thinking. The author has conceived a way of considering PECL and the RR as not just two fairly recent legal pieces which may never be of practical use or

⁸³ The volume contract which derogated should not be in the form of a contract of adhesion according to article 80(2)(d) of the RR.

⁸⁴ Articles 4.109 and 4:110 of PECL are also in the same vein. Article 4:110 para 1, reads:

“A party may avoid a term which has not been individually negotiated, if contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded”.

application, but as a way of seeing if and how they could prove useful in the modern maritime law context.

33. At the moment, there are concerns about the possible application of both PECL and the Rotterdam Rules. The idea of the author is to use PECL in an attempt to provide interpretational help to an international contract (volume contract with derogations) which may give rise to a dispute that may have to be resolved within Europe. Thus, the author explained how the articles of PECL on terms not individually negotiated may protect an unsophisticated commercial party which has entered into a volume contract under commercial pressure, with article 80 of the RR being only seemingly complied with.

One should not look at the suggestions of the author as an attempt to add layers of checks and principles, but as an indicative illustration of how PECL, which are at the disposal of European courts and arbitrators for the achievement of legal certainty, may actually contribute to a fair and homogeneous resolution of maritime disputes within Europe.