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Agenda Item 6. RECONCILITATION AND HARMONIZATION OF CIVIL LIABILITY REGIMES IN INTERMODAL TRANSPORT

Note: The secretariat has reproduced the communication below as received.

The Rotterdam Rules: An attempt to clarify certain concerns that have emerged

The authors of this paper have become aware of certain concerns that have been expressed by some organizations in respect of the Rotterdam Rules and their fitness to respond in a satisfactory and balanced manner to the requirement of modern trade and wish to reassure those Organisations that their concerns are not justified, as they hope to be able to clarify in this paper. The views they have expressed herein by the authors, who are all former delegates of Governments that have attended the sessions of the UNCITRAL Working Group on Transport Law, are personal views and do not bind in any manner the Governments they had the honour to represent during the sessions of the Working Group.

The reports and papers that will be considered are the following:

1. Report of the fifty-first session of the Working Party on Intermodal Transport and Logistics of the U.N. Economic and Social Council[1];

2. A document of the European Shipper's Council with an analysis of the Rotterdam Rules[2];

3. A paper of the Working Group on Sea Transport of FIATA being Annex two to FIATA's document MTJ/507 of 26 March 2009;

4. The Position Paper of the European Association for Forwarding Transport Logistic and Customs Services-CLECAT.

[1] ECE/TRANS/WP.24/123 of 6 May 2009. Hereafter "UNECE Report".

[2] View of the European Shippers' Council on the Convention on Contracts for the International Carrying of Goods Wholly or Partly be Sea also known as the "Rotterdam Rules", March 2009. Hereafter "ESC Paper".

1. *The Report of the Working Party on Intermodal Transport and Logistics (WP.24) of the U.N. Economic and Social Council*

1.1. *The Regional v. Worldwide Unification of Transport Law*

The Working Party, after having mentioned (in paragraphs 39-41) the Rotterdam Rules and having expressed generally their dissatisfaction about them, invites UNECE member States and professional organizations to examine how, under present circumstances, "an appropriate civil liability system, covering also short sea shipping, could be devised addressing the concerns of European intermodal transport operators and their clients".

Even without considering the great difficulties of identifying a satisfactory definition of "short sea shipping" for the purpose of the regulation of the rights, obligations and liabilities under the contract of carriage by sea, this is an opinion that is in conflict with the inherent international character of shipping and it would certainly not foster European international trade if a regime different from that in force in the rest of the world were to be adopted.

1.2. *Basis of liability of the carrier*

In paragraph 41 of the UNECE Report it is stated that the Rotterdam Rules do not "seem to be a step towards a simple, transparent, uniform and strict liability system of modern transport chains providing a level playing field among unimodal and intermodal transport operations". It has been possible to implement a strict liability system, accompanied by a compulsory insurance system in respect of pollution and a similar system in carriage of passengers by air as well as, to a limited extent, something near to that in respect of the carriage of passengers by sea when the 2002 Protocol to the Athens Convention will come into force. But that does not seem to be either possible or convenient in respect of carriage of goods. Some of the reasons are the ensuing greater cost of transportation and the dissatisfaction of shippers, who by far prefer to insure the goods themselves than rely on the carriers' liability insurance.

2. *The document of the European Shipper's Council with an analysis of the Rotterdam Rules*

2.1. *The support of a regional regime*

A view similar to that of the Working Group of UNECE is probably expressed by ESC that after having set out the reasons of its concerns about the Rotterdam Rules, proposes "the parallel development of a European multimodal convention which justifies a departure from the status quo of the Hague Rules and the Hague-Visby Rules for the majority of shippers who represent the preponderant trade interest of the majority of European States". It is not clear what such proposal consists of. "Parallel" to what? To the existing regimes or to the Rotterdam Rules? Has ESC in mind a separate intra European regime different from the world wide regime?

If what the ESC has in mind is an EU Regulation such as that proposed in the ISIC Study, that would mean that ESC suggests a system that grants full freedom of contract, including volume contracts and, therefore, a system that would allow by far more freedom than the Rotterdam Rules, without the protection granted to shippers and third parties by article 80 of the Rotterdam Rules.

The purely inter-European sea transport business is only a part of the overall maritime business that European shippers and carriers are involved in and does not have any relevant particularities that would justify any deviation from Rules and Conventions that operate world-wide. There is no explainable interest in such differentiation other than possibly weakening the scope of the Rotterdam Rules, but at the same time complicating the world map of regulations relating to an extent that certainly will not be in the interest of shippers, traders, carriers nor the insurers involved in the risks that such trade carries.

2.2. *The reasons indicated by the ESC for the recommendation to European member States "not to sign" the Rotterdam Rules*

The ESC has identified a number of key concerns, that will be considered hereafter with a view to establishing whether they have a real basis. The Authors of this paper have in fact noted that although the paper of the ESC contains a strong, albeit rather belated, attack against the Rotterdam Rules, from the subsequent Press Release of 24 April, it would appear that the ESC "maintains an open mind to the arguments and perspectives of others and is always happy to reconsider its own opinion on the light of strong and persuasive counter arguments".

In that context it is interesting that the opinion of the ESC is not generally shared by European shippers and that in all discussions undertaken in the decades that led to the conclusion of the Rotterdam Rules there was a general support of those rules, a support that is still very much existent today as evidenced by strong statements of support in course of local or regional consultation in light of the upcoming signature of the Rotterdam Rules.

First, a clarification seems to be needed. The fact that, in its conclusions under (h), the ESC refers to "the 20 signatories needed to make it (the Rotterdam Rules) pass as an international convention" and that in its Press Release of 24 April it is stated that the Rotterdam Rules "are likely to enter into force within months" suggests the that there may be a confusion between signature of an international convention and its entry into force. Signature of a convention, unless followed by ratification, acceptance or approval by the signatory States, is not binding on the States (article 88(2) of the Rotterdam Rules). The Rotterdam Rules enter into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of *ratification, acceptance, approval or accession*[3] (article 94(1)) (emphasis added). Twenty signatories alone do not satisfy the requirement for the Rules' entry into force.

2.2.1. *Conflict with other conventions*

With a view to avoiding conflicts with other conventions applicable to the carriage of goods (in Europe, the CMR and COTIF-CIM), a provision has been adopted in article 26 of the Rotterdam Rules pursuant to which, in respect of loss or damage or delay occurring solely before loading onto the ship or after discharging from a ship, the provisions of the Rotterdam Rules do not prevail over those of another international convention that would have compulsorily applied if a separate direct contract had been made between the shipper and the carrier in respect to a particular stage of carriage.

[3] "Accession" is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. The Rotterdam Rules are open for accession for all States that are not signatory States as from the date they are open for signature (Article 88(3)).

The following criticisms have been made of this provision: a) that the claimant in order to obtain the application of a different convention has the burden of proving that the event has occurred before or after carriage by sea, b) that the system adopted is a limited network system, because only provisions of other conventions relating to the liability of the carrier, the limit of such liability and the time to sue would prevail, c) that "the more favourable terms and conditions of CMR and CIM, as examples, would not extend to short sea shipping" and, d) that "Shippers concerned with intra-European shipments may choose against the use of short-sea services because of the increased obligations and liabilities of the Rotterdam Rules compared to other conventions".

As regards the criticism under a), the identification of the time when the occurrence causing the loss, damage or delay has taken place is obviously necessary in order to identify the regime applicable. Therefore one of the parties – carrier or claimant – must have the burden of proof. Since the Rotterdam Rules require the internationality of the sea leg, it is usually longer than the land leg (because of the emphasis on the sea leg under Rotterdam Rules, they are frequently referred to as a "maritime plus" convention) and it is reasonable that the burden of proof rests on the claimant. The same burden of proof has been adopted in the UNCTAD/ICC Rules as well as in the standard forms of door-to-door bills of lading. As the proof of the place of damage is intended to bring a benefit to the claimant, it is only in line with general principles of the burden of proof that such proof shall be carried by the party that benefits from the success of such proof. This is in line with all existing network systems consistently used in trade and created in cooperation with UNCTAD and ICC (UNCTAD/ICC Rules) and promulgated by FIATA (FIATA Bill of Lading). The burden goes along with the benefit of shippers (and actually their request of the logistics industry) that they can now rely on one single contract of carriage and one single document and will, therefore, not have to segment their transport and at the same time have to prove the condition of their cargo for each of the segments of a door-to-door transport. It is difficult to see what has generated this criticism, when it is established, that the same principle has existed for many decades without any problem or complaint from shippers.

As regards the criticism under b), attention must be drawn to the fact that certain provisions should not differ according to the stage of a global contract of carriage. This is the case, amongst others: i) for the provisions relating to the transport documents to be issued by the carrier on demand of the shipper, because the shipper requires a document that enables the holder to collect the goods at their final destination; ii) for the provisions on the rights and obligations of the parties in respect of delivery of the goods at their final destination and, iii) for the provisions on the right of control during transport. The regulation contained in the Rotterdam Rules with respect to the above mentioned matters is, in fact, far more comprehensive and clear than the one contained in the existing unimodal international conventions.

As regards that under c), it must be pointed out that it is not correct, since article 82 of the Rotterdam Rules provides expressly that, where CMR and CIM apply to maritime carriage, these Conventions prevail.

Nor is the assertion under d) correct because the shippers' obligations under the other conventions do not substantially differ from those under the Rotterdam Rules (see 2.2.6 below).

2.2.2. *Unequal obligations and liabilities between shippers and carriers*

The scope of the contract of carriage cannot be set out mandatorily in a convention. If the parties wish to conclude a port-to-port contract they must be able to do so. Even though door-to-door contracts have become much more frequent, there are still a great many port-to-port contracts . The provision in article 13(2), pursuant to which the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper or consignee, is merely an enactment of the FIO clause which is a clause frequently adopted, in particular in the non liner trade (to which the Rotterdam Rules may apply pursuant to article 6(2)). The enactment of such a provision does not bring about unequal obligations and liabilities. This should be understood by shippers that engage in commodity trades as they often agree in their own sales contracts that the shipment obligations under the F- or respectively the C- Clauses INCOTERMS shall be on FIOS basis and that it will be the shipper that has to load and stow, and the buyer to unload the cargo from the vessel. To request the carrier to be mandatorily responsible for a phase of the cargo handling for which the shipper had expressly (and due to reasons that it has set itself) agreed to be responsible, is not appropriate.

2.2.3. *Dangerous risk that carriers may reduce significantly their own limits of liability and obligations under volume contracts*

It is normal practice today for shippers that have a consistent volume of goods to be carried to various destinations to negotiate ad hoc contracts with carriers with a view to obtaining special freight rates and guaranteed availability of space on board ships at a specific time. A quid pro quo is often required for a reduction of the freight rates and, therefore, in order not to adversely affect international trade, it has appeared appropriate in such cases to grant the parties a limited freedom of contract. This could theoretically have been done by requiring a minimum volume of goods for the operation of the freedom of contract or by ensuring protection for shippers, who may have a relatively reduced negotiating power, and to consignees. The first alternative has proven impossible, because the minimum volume may vary according to the nature of the goods, the type of packing and the trade. However, as it appears from the definition in article 1(2), in order that a contract of carriage might be qualified a volume contract it is required that the subject matter of the carriage be a specified quantity of goods to be carried in a series of shipments: if, therefore a shipper is not interested in entering into such contract, the shipper is free to enter into separate contracts of carriage in respect of each shipment. If the shipper chooses to enter into a volume contract, that means that it has an interest in doing so.

The ESC fears that the acceptance of increased liability and reduced carrier’s reliability would represent a serious risk to shippers that were not completely aware of the implications.

However protection of the shipper and of the consignee has been ensured first by providing generally that a derogation is not allowed in respect of provisions the breach of which may affect safety (viz. those relating to the obligations of the carrier in respect of the seaworthiness of the ship, and to the obligations of the shipper in respect of the provision of information and documents for the proper handling of the goods and of the compliance with laws and regulations as well as in respect of dangerous goods), and secondly, by ensuring that the contract of carriage is freely negotiated. This result has been obtained first by excluding the validity of derogations for contracts of adhesion not subject to negotiation, and secondly, by making the derogation subject to a series of conditions,

including evidence that the shipper has been given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with the Convention (article 80(2)(c)) and, if the shipper finds it convenient to enter into a volume contract, the carrier is required to include in the contract (that, as noted above, must be freely negotiated), a prominent statement that it derogates from the Convention.

As regards persons other than the shipper, i.e. the holder of a negotiable transport document and the consignee, the protection is much greater, for not only it is required that such person receives information that the volume contract derogates from the Convention but, also that such person gives its express consent to be bound by such derogations. Such consent, pursuant to article 3, must be in writing.

It is thought, therefore, that the provisions of article 80(2) are such as to ensure that any shipper is made aware of the effect of any derogation from the provisions of the Rotterdam Rules and that any court of any State party to the Rotterdam Rules will therefore be able to establish whether or not the derogations are valid and binding. Furthermore, although in the ESC's paper reference is always made to the shipper, in reality the person normally concerned would be the consignee, for the risk on the goods is normally transferred to the buyer on delivery of the goods to the carrier. And, as previously pointed out, any derogation from the provisions of the Rotterdam Rules is not binding on the consignee unless expressly accepted in writing by him.

It remains to be said that the fears expressed by the ESC do not represent the current market situation: Today it is the shippers that request from their transportation partners (freight forwarders and carriers) entry into complex frame agreements that could very often be qualified as volume contracts, forcing the carrier to agree on strict terms relating to its responsibilities that very often go much further than the transportation laws that would otherwise apply. Often it is today the shippers that design a different scheme for the sharing of cargo risks, liabilities and responsibilities, leaving the risk for cargo loss to their own cargo insurance scheme, but rather sanctioning occurrences leading to cargo losses through other financial means. And, quite often, there are not just major shippers involved but more and more smaller companies that arrange similar arrangements with their logistical partners.

2.2.4. *Proving fault becomes harder for the shipper*

The Rotterdam Rules have brought no significant changes to the existing scheme for the burden of proof existing under the Hague Rules and the Hague Visby Rules that today constitute the prevailing legal regime. The novelty in Article 17 is that – contrary to the older Instruments – the Convention now spells out each of the aspects allowing the practitioners to follow the scheme without having to refer to case law or other authorities.

The statement that if the carrier avails himself of the alternative of invoking an excepted peril the shipper must prove that the loss was or was probably caused or contributed to by the unseaworthiness of the ship is probably due to a hastened reading of article 17. The careful reading of that article shows that the claimant has not the burden of proving the fault of the carrier, but quite to the contrary, it is the carrier who has the burden of proving the absence of fault. The allocation of the burden of proof is the following:

a) pursuant to paragraph 1, the claimant must prove the loss, damage or delay and its occurrence during the period of the carrier's responsibility, and such proof entails a presumption of liability of the carrier: this provision, therefore, codifies a general principle on the allocation of the burden of proof in contractual obligations; although such principle does not appear clearly in the text, it is the almost universal interpretation of the Hague Rules and the Hague-Visby Rules. The same principle was adopted under the Hamburg Rules (article 5(1));

b) pursuant to paragraphs 2 and 3, the carrier, in order to defeat the presumption of fault, has two alternatives:

(i) to prove the absence of fault, or

(ii) to prove that the loss, damage or delay was caused or contributed to by one of the events enumerated in paragraph 3 (the excepted perils of the Hague Rules and the Hague-Visby Rules, as amended).

c) While the proof of absence of fault relieves the carrier from liability, the proof under (ii) above only creates a presumption of absence of fault (similarly as under article 18(2) of CMR) that the claimant may defeat by proving:

(i) that the fault of the carrier caused or contributed to the excepted peril relied on by the carrier,

(ii) that an event other than an excepted peril, caused or contributed to the loss, damage or delay, or

(iii) that the loss, damage or delay was caused or probably caused by unseaworthiness of the ship or improper crewing, equipping and supplying the ship.

Therefore the claimant may rebut the presumption of absence of fault of the carrier in anyone of the above manners and this is again a codification of what the best jurisprudence has established under the Hague Rules and the Hague-Visby Rules. The seaworthiness and cargo worthiness of the ship come into play as they do under article 4(1) of the Hague Rules and the Hague-Visby Rules, but the allocation of the burden of proof is more clearly allocated. If the claimant chooses to rebut the presumption by invoking unseaworthiness (in a wide sense) its burden of proof is mitigated because the claimant must only prove that on the balance of probabilities that was the cause of the loss, damage or delay: this is what is meant by the words "*probably caused*". The claimant has not the burden of proving the fault of the carrier, but rather a fact: the unseaworthiness. It is the carrier that, in order to avoid its liability, must prove the exercise of due diligence (see paragraph 4.1(a)).

The conclusion is that the claimant has never the burden of proving the fault of the carrier and, it is submitted, that article 17 regulates in a complete and clear manner the system of allocation of the burden of proof that exists at present; it clarifies some aspects that are unclear under the Hague Rules and the Hague-Visby Rules system, one of which is that the excepted perils, except those enumerated under article 4(2)(a) and (b), are not exonerations from liability but only cases of reversal of the burden of proof.

The two real cases of exoneration under the Hague Rules and the Hague-Visby Rules (fault in navigation and management of the ship and fire) have been suppressed (a fact that is just mentioned in passing by the ESC as if it were of almost no importance): the first one has in fact been deleted and the second one has become a simple case of reversal of the burden of proof, so that the carrier would be responsible for a fire caused by the negligence of the crew.

2.2.5. *The Rotterdam Rules would make it increasingly difficult for shippers to successfully make a claim for damages*

There are various misunderstandings in the views expressed in this paragraph.

a) The fact that the limit per package can only be invoked if the packages are enumerated in the transport document is no novelty: an identical provision in fact exists in article 4(5)(c) of the Hague-Visby Rules and in article 6(2)(a) of the Hamburg Rules and it is hardly believable that a shipper, who is a professional, ignores that. At present, mention of the content of a container is always made, also for Customs requirements.

b) If it is uncommon to specify a delivery time, that means that up to now shippers have not perceived any special interest in the fact that delivery takes place by a certain date: the shipper's interest is normally that the transport document is issued by a certain date, in order to be able to negotiate the document in time when a letter of credit has been issued by the buyer. It must also be noted that the solution adopted in the Hamburg Rules, according to which delay in delivery occurs, when the time is not set out in the transport document, when delivery does not take place within the time which would be reasonable to require of a diligent carrier, would give room to litigation.

c) The fact that only the personal behaviour of the carrier causes the loss of the right to limit is no novelty, for this is also the case for the Hague-Visby Rules, wherein reference is made to the act or omission of the carrier and reference to the carrier does not include the master or the carrier's servants, as it appears clearly from article 4(2)(a). The same applies to the Hamburg Rules article 8(1). The need for the action to be a personal action of the person liable is now a common feature of all maritime conventions.

d) The "presumption" of delivery of the goods in accordance with their description in the transport document if no timely notice of loss, damage or delay is given, is a common feature of all transport conventions and, as stated in article 23(2) does not affect the allocation of the burden of proof under article 17, pursuant to which, in accordance to general principles, the consignee has the burden of proving that the goods were, at the time of delivery, missing or damaged.

e) The whole chapter on jurisdiction applies only if opted in. This solution was adopted in agreement with the representatives of the European Commission also, it is thought, in consideration of article 23 of Council Regulation (EC) No. 44/2001. The provision of article 67(2) covering arbitration clauses in volume contracts, that of course applies only if the chapter on arbitration is opted into, clarifies the conditions required for the jurisdiction clause to be operative vis-à-vis a person who is not a party to the volume contract (i.e. the consignee), and requires that (i) the court chosen be in one of the places designated in article 66, that that person be given timely and adequate notice of the court where action shall be brought and that

the jurisdiction of that court is exclusive and, (ii) that the court seized recognizes that that person may be bound by the exclusive jurisdiction clause: therefore the consignee (who normally will be the claimant) is given protection that he has not at present.

Furthermore, the ESC overlooks the fact that it has become much easier for shippers to successfully claim compensation under the Rotterdam Rules than under the Hague Rules and the Hague Visby Rules that today constitute the prevailing legal regime because:

- the notice period has been extended from 3 to 7 days,

- the time bar is extended from 1 year to 2 years,

- very importantly, because of the joint and several liability of the maritime performing party and the carrier, a shipper can always claim (in addition) against the shipowner or terminal operator, as the case may be. In other words: for the claimant there is always at least one debtor with assets. He can arrest the vessel (or threaten to do so) in order to obtain a P&I guarantee without the risk of having to pay compensation due to unlawful arrest. This may also be accomplished in the case where the bill of lading does not sufficiently identify the carrier: the Convention provides for a fiction that operates in favour of cargo claimants, that in such case the registered owner shall be deemed to be the carrier. Again a novelty in favour of shippers,

- the evidentiary value of transport documents has been reinforced (the conclusive evidence rule for negotiable documents has been extended to all particulars in the document instead of only the particulars relating to the goods, as under the Hague Rules and the Hague Visby Rules; in respect of non-negotiable documents the conclusive evidence rule has been instituted for certain particulars for which, under the Hague Rules and the Hague Visby Rules, the prima facie rule applies), and

- the shipper has access to the carrier's internal records and documents (such as temperature sheets of reefer containers), refer art 23 (6).

Further, the fact that a time-barred claim may be used as a defence or a set off is to the advantage of the shipper!

2.2.6. *Shipper's obligations are far more onerous than in previous conventions (paragraph 6 of the ESC document)*

Introduction. The Rotterdam Rules and existing law: the basis of liability, etc.

The fact that the Rotterdam Rules include more provisions on shipper's obligations and liabilities than previous conventions does not mean that they impose more obligations and liabilities than such conventions. It should be noted that the shipper has not been free from obligations and liabilities under the previous conventions. Rather, the shipper has been responsible under applicable national law. Therefore, one should examine whether and to what extent the shipper's obligations and liabilities under the Rotterdam Rules are onerous compared with those under applicable national law. In addition, the usual bill of lading terms also play a role here. All shippers' obligations can be

found in one form or another (such as in the form of an exclusion of liability of the carrier or an indemnity to the carrier) in the standard bill of lading of most carriers.

For instance, one of the most (and in fact, the only) important additional obligations under the Rotterdam Rules is that the goods in the container or trailer must be properly stowed, which means that they should be able to withstand the circumstances at sea when the container is packed or the trailer is loaded by the shipper (article 27(3)). However, this obligation already exists even under the present regime. First, although the Hague Rules and the Hague Visby Rules do not explicitly impose the same obligations (they are outdated on this point), the shipper might be liable under applicable national law (in tort etc.) when improper stowage of the goods caused damage. Second, standard terms and conditions of most short sea operators impose the same obligation. It should also be emphasized that this is an important safety matter and the promotion of safety at sea is a public policy matter as well.

Therefore the Rotterdam Rules do not substantially increase the shipper's obligations. Rather, they *explicitly* regulate the shipper's obligations which already exist under the applicable national law or under contract terms.

Article 30 provides a fault based liability for the shipper. Unlike the carrier's liability under article 17, the carrier should prove shipper's breach of obligation under the Convention. This requirement, in effect, would probably impose quite a similar, if not identical, burden of proof as in an action in torts under applicable national law. To that extent, the shipper's liability is not much enhanced.

It should also be noted that the Rotterdam Rules provide for protection for the shippers in that they prohibit the contract from imposing more liability than the Rules do (article 79(2)). The Rotterdam Rules provide for certainty for the shipper in that they also prohibit Contracting States from imposing more liability than the Rules by their national legislation.

a) *Obligation to deliver the goods in such condition that they will withstand carriage*

The complaint is that the carrier should also have some responsibility in this respect. Attention is drawn to article 28 of the Rotterdam Rules, pursuant to which the carrier and the shipper shall respond to request from each other to provide information and instructions required for the proper handling and carriage of the goods. It appears, therefore, that the complaint is not justified.

The assertion under (ii) that there is no right of a shipper to a statement that the goods are carried on deck is misleading. Such a rule is simply not possible because, in the container trade, at the moment of issue of the bill of lading it is often not known whether a container will be carried on deck or not. What the Rotterdam Rules do is to a large extent take away any negative consequence of the absence of such a rule by:

(i) limiting the possibilities for the carrier to load goods on deck to cases where it is normal to do so and which every professional shipper ought to know of;

(ii) providing for the rule that when the goods are loaded on deck without this being stated in a negotiable bill of lading, a third party holder of such bill of lading may treat the goods as if they were carried under deck; and

(iii) to deny a carrier the right to limit its liability when it has agreed that goods would be carried under deck and in fact they were carried on deck, and due to this fact damage had occurred to the goods.

To put it more generally, the provisions of the Rotterdam Rules on deck cargo should be viewed as great improvements from the viewpoint of the cargo side compared with the current practice, which allows the exclusion of the liability of the carrier for damage occurring to goods loaded (other than containers or trailers) on deck.

b) *Obligation of the shipper to provide information, instructions and documents*

In (i) the ESC states it has developed with the liner shipper industry association (ELAA) and the European freight forwarders association a framework of joint responsibility. This may be well be the case, but an international convention cannot be based on specific local agreements, even if attention had been drawn to them (and this has not been the case). But again, the ESC seems to have overlooked article 28 of the Rotterdam Rules.

In (ii) ESC states that the fact that the carrier does not need to qualify information in the transport documents if it is commercially unreasonable to check the information, removes a duty from the carriers "which ESC believes is unreasonable". This complaint is difficult to understand. The existing conventions only regulate the limits of the power of the carrier to qualify the information provided by the shipper but do not in any way provide the opposite, i.e. the obligation of the carrier to qualify the information when needed. The Rotterdam Rules, for the first time, have considered the need for the protection of the consignee from the shipper and have provided that, in certain cases, the carrier must qualify the information supplied by the shipper. It is rather surprising that the ESC, instead of appreciating this novelty, complains of the fact that the obligation has certain (quite reasonable) limits.

c) *Obligation of the consignee to accept delivery and power of the carrier to deliver the goods under a negotiable transport document without surrender of the document.*

As regards the obligation of the consignee to accept delivery, the ESC has obviously overlooked the fact that that obligation arises only, pursuant to article 43, after the consignee has demanded delivery. It seems quite obvious that after he has done so, he is obliged to accept delivery.

As regards the power of the carrier to deliver the goods without surrender of the negotiable transport document, a fact that in the opinion of the ESC could cause problems in relation to letters of credit, probably the ESC has not considered the circumstances in which this power may be exercised. Article 47(2), that regulates such power of the carrier, applies only when the transport document "expressly states that the goods may be delivered without surrender of the document". Therefore the holder of the document is aware that, if one of the situations mentioned in that provision occurs, the goods may be delivered on the basis of instructions of the shipper, in case the carrier is unable to obtain instructions from the consignee.

d) *Liability of the shipper without limitation*

This is the situation at present, under both the Hague Rules and the Hague-Visby Rules and the Hamburg Rules. During the sessions of the UNCITRAL Working Group, the issue of the limitation

of liability of the shipper was raised in connection with the suggested regulation of its liability for delay. The representatives of the shippers were in fact concerned that such liability might be of an unpredictable level, for example, in the case of the sailing of the carrying ship being delayed for many days, and suggested that in respect of liability for delay a limit would be appropriate. In view of the difficulty of finding an appropriate basis for such a limit, it was decided to exclude from the scope of the Convention the shipper's liability for delay that, therefore, is governed by the applicable law.

In this paragraph under (i), reference is also made to the fact that the liability of the shipper in respect of incorrect information for the compilation of the transport document is strict. This is the case at present under the Hague Rules and the Hague-Visby Rules (article 3(5)), and under the Hamburg Rules (article 17(1)), and it is quite correct, because the carrier is liable vis-à-vis the consignee if it does not qualify the information.

Still in this paragraph under (ii), the ESC calls attention to the fact that whilst in other cases the shipper is relieved of all or part of its liability if the cause, or one of the causes, of the loss is not attributable to its fault, this is not so in respect of dangerous goods. But article 32 clearly states both under (a) and (b) that the shipper is liable to the carrier for loss or damage resulting from its failure to inform or mark the goods.

Another complaint seems to be that although the liability of the shipper may be modified under a volume contract, this is not the case in relation to the shipper's obligation to provide information, instructions and documents (article 29) or obligations and liabilities in connection with dangerous goods (article 32). As respects dangerous goods, the reason is that, similarly to the obligation to make **and keep** (another relevant change adopted in the Rotterdam Rules, that the ESC seems to have overlooked) the ship seaworthy, the breach of such obligations affects safety. As respects the shipper's obligation to provide information etc., the reason is that (i) the failure to provide proper information, etc. by the shipper could entail the liability of the carrier vis-à-vis the consignee of such goods, as well as the consignees of other goods that may be damaged, or (ii) it could make the carrier responsible, often on a strict liability basis, for non-compliance in respect of the law and regulations applicable to the intended carriage.

e) *Liability of the shipper for the actions of those employed to perform its obligations.*

The attention of the ESC is drawn to the fact that this is also the case for the carrier: see article 18.

f) *Liability without limitation of the controlling party in respect of the instructions given to the carrier*

The chapter on the rights of the controlling party constitutes a novelty that gives normally to the shipper rights he, at present, does not have. The rights granted in article 50(1)(b) and (c) constitute variations to the contract and if such variations entail costs and liabilities, limitation of the controlling party's liability would be wholly unjustified. Why should the carrier bear part of the costs arising out of the request of the controlling party to vary the terms of the contract?

g) *Application of the Rotterdam Rules also when no transport document issued.*

It is not clear whether the ESC considers this to be wrong or not. If it does, we would be interested to know the reasons. It should noted that the Hamburg Rules also apply without regard to the issuance of transport documents.

3. *The paper of the Working Group on Sea Transport of FIATA being Annex II to FIATA's document MTJ/507 of 26 March 2009*

In its circular letter of 25th March 2009, FIATA states that "considering the diverse nature of the legal regimes under which each of our members operate it is virtually impossible for FIATA to render an official position for or against ratification of this Convention (the Rotterdam Rules)".

To that letter there are attached various papers, in which different views are expressed. Since one of such papers (Annex II) is a report of FIATA Working Group-Sea Transport, and the conclusion consists in a recommendation to advise Governments "not to accept the Rotterdam Rules", even though such conclusion has not been adopted by FIATA it seems worthwhile to consider the reasons on which it was based.

Such reasons are set out in six paragraphs that will be considered hereafter.

3.1. *The Rotterdam Rules are far too complicated*

In the opinion of the FIATA Working Group a) the Convention "will lead to additional transaction costs and invites misunderstandings and misinterpretations", b) "at worst the Convention States may end up with different interpretations"; c) for such reason, the Rotterdam Rules "will fail in reaching their main objective to unify the law of carriage of goods by sea".

a) Although no explanation is given of the alleged complications of the Rotterdam Rules, it is likely that that judgment is based on the extended scope of their provisions as respects the Hague Rules, the Hague-Visby Rules and the Hamburg Rules.

This being said, "complication" is a word wholly inappropriate, because certain of the areas on which there will be uniformity, when the Rotterdam Rules will enter into force, are areas additional to those covered by the present conventions, and in which at present there is no uniformity. That does not mean there are no rules applicable, but rather that national rules, as opposite to uniform rules, at present apply. One could, therefore, question whether the "complication" already exists at present, rather than in the future, when uniform rules will apply.

b) Different interpretations are possible even in national laws, and certainly cannot be excluded in a uniform regime. But this does not by itself constitute a good reason not to attempt to ensure international uniformity in areas which by their very nature are international.

c) If the danger of different interpretation of uniform rules constitutes a failure of attempts to substantive uniformity, all attempts to such uniformity have been – and will be in the future – a failure.

3.2. *Freight forwarders will benefit from the Rotterdam Rules when acting as carriers but will be adversely affected by them when acting as shippers.*

That means, in the view of the FIATA Working Group, that the Rotterdam Rules protect carriers and not shippers. Shippers (and consignees) significantly benefit from the obligation to exercise due diligence in respect of seaworthiness of the ship having become continuous, and from the abolition of the exonerations of the carrier from liability for fault in navigation and maintenance of the ship, as well from the significant increase in the limits of liability.

Furthermore, the carrier's due diligence obligation is extended to containers, and the exclusion of liability for deck cargo is no longer possible.

As regards the freedom of contract in respect of volume contracts, reference is made to the comments in paragraph 2.2.3 above. It is clear that a freight forwarder would be in a good position to negotiate with the ocean carriers a volume contract in which the freight forwarder would receive adequate benefits from the fact that he is tendering a global amount of shipments to the ocean carrier. In doing so, the freight forwarder can decide for itself to what extent it is interested – for its own benefit – to trade some aspects of liability against much better freight arrangements.

3.3. *The unlimited liability of freight forwarders as shippers*

It is pointed out that freight forwarders, as shippers, will be liable under article 79 (2)(b) without any right to limit liability for incorrect information to the carriers, although carriers enjoy the right to limit under article 59.

There is however a significant difference between the obligations of the carrier in respect of which it will benefit from the limitation and those of the shipper. Whilst, in fact, the obligations of the shipper set out in articles 27 and 29 are of primary importance and, in particular, those under article 27 may affect safety, the reciprocal obligations set out in article 28 exist only if a request for information is made and arise only if the relevant information or instruction is within the requested party's reasonable ability to provide and is not otherwise reasonably available to the requesting party. In practice, that difference will hardly become material.

3.4. *Freight forwarders are adversely affected by the liability regime applicable to maritime performing parties*

Three complaints are made in this paragraph: a) freight forwarders who act as stevedores and warehousemen enjoy freedom of contract while under the Rotterdam Rules will become performing parties and be subject to the liability regime of carriers; b) in countries where stevedoring and warehousing enterprises are owned or controlled by governments any movement towards ratification will presumably be opposed; c) multipurpose cargo terminals engaged as distribution centers in logistics operations would strongly oppose a sort of maritime law injection.

a) In considering whether the provisions of the Rotterdam Rules on freedom of contract are applicable to forwarders, one should be careful which relationship one focuses on, and freedom of contract with whom. As regards the contractual relationship between the forwarders (acting as stevedores) and the carrier, the freedom of contract is unaffected by the Rotterdam Rules because they do not apply to the contract between the carrier and the maritime performing party, unless it satisfies the definition of contract of carriage (article 1(1)) (this is apparently not the case here). As regards the forwarder's relationship with the shipper or consignee, the Rotterdam Rules simply make the carrier and the maritime performing party jointly liable towards the shipper and consignee.

In that respect, the fact that the freight forwarder, acting as a maritime performing party, is subject to the Rotterdam Rules may constitute an advantage, for it would benefit from the right of limitation of its liability while at present, irrespective of the contractual terms, in case it may be sued in tort, it would be liable without limitation. One cannot at the same time complain because the Rotterdam Rules afford carriers greater protection and complain because freight forwarders, being subject to the same liability rules as carriers, are adversely affected by the application of the Rotterdam Rules. The same comment applies in respect of the "multimodal cargo terminals engaged as distribution centers". Thus, we cannot agree that the inclusion of the "maritime performing party" will effectively lead to a substantial increase of exposure for freight forwarders. It also must be taken into consideration that they will be exposed in their place in respect of tort claims anyway, claims that are unlimited in nature and possibly lacking the context that the Convention offers in relation to the contractual carrier and possibly other maritime performing parties that are involved in the occurrence and the claims.

b) It can hardly be believed that any Government would decide not become a party to the Rotterdam Rules because it operates a stevedoring or warehousing enterprise.

c) No attention is paid, here as in the two preceding comments, to the need for a unification of the regime applicable throughout the period of responsibility of the carrier, and to the need for the protection of shippers and consignees.

3.5. In paragraph 5 of the FIATA Working Group Report, there are listed the reasons in support of the contention that the Rotterdam Rules will cause a significant increase of the administrative burden for freight forwarders. Some of such reasons will be considered here.

3.5.1. It is pointed out in the FIATA Working Group Report that when the mode of transport is not known at the time the contract is entered into, the door-to-door (or maritime plus) scope of application of the Rotterdam Rules will cause considerable uncertainty because it will not be possible to know which of the Conventions listed in article 82 will apply. But, besides the fact that the parties are free to choose between a port-to-port or a door-to-door contract, the problem raised already exists at present, when a door-to-door contract is adopted on the basis of the network system. This is, in particular, already so for all freight forwarders that have decided to enter into the NVOCC business and offer FIATA bills of lading that work in a quite similar way. In any event, it would appear that in the great majority of cases the transport modes that will be used are known to the freight forwarder and, in any event, the possible alternatives are few. The problem raised seems, therefore, to be a false problem.

In connection with concealed damage, it is suggested that the limits of the Rotterdam Rules are rather low. However, because of the package limitation, which for the multimodal carriage of containers is usually the relevant limitation, the Rotterdam Rules limitation figures are often higher. Compared with the CMR, the Rotterdam Rules are more favourable for the cargo claimant as long as the package does not weigh more than 109 kg. And, in addition, the shipper may cause the factor "per package" to multiply just by adding the content of the container into the transport document.

3.5.2. The complaint that, in case of shippers having sold their goods on EXW, FCA or FOB terms, freight forwarders will have to exercise due diligence in avoiding mentioning exporters as shippers is difficult to understand. First of all, it is conceivable that the same situation already exist under applicable national laws, where shippers are named in the bill of lading that are not actual

contractual parties to the contract of carriage. The Rotterdam Rules now clarify the matter to the benefit of all parties involved. Furthermore, the problem arises from a practical need that is created by the mechanisms of international trade: in most cases, the EXW, FCA or FOB exporter needs to be mentioned as shipper in the bill of lading. Without being named as shipper in the bill of lading, the exporter is not a holder and cannot exercise rights under the bill of lading, which the exporter needs to do when the buyer becomes insolvent. Neither can the exporter endorse the bill of lading, such endorsement being required when the bill of lading is presented to the bank in order to obtain the purchase price of the goods.

3.5.3. The complaint that, pursuant to article 47(2), the carrier may issue a negotiable document that actually is not negotiable is not justified and is probably due to the failure to understand the purpose of this provision.

It must first be pointed out that article 47(2) must be read in conjunction with article 35, pursuant to which the shipper is entitled, unless it is the custom, usage or practice of the trade not to use one, to obtain from the carrier a negotiable transport document (or a negotiable electronic record). In view of this, there does not appear to be any doubt that the shipper would be entitled to refuse a negotiable transport document that contains the statement indicated in article 47(2), unless it is the shipper itself that requests such statement precisely in order to ensure the possibility of delivery without presentation of the negotiable transport document.

In this context, one must be reminded that the issue that article 47(2) addresses is not arising due to a particular practice of some ship-owners/carriers that would like to circumvent their basic obligation to request surrender of one original bill of lading for delivery of the cargo to a consignee. The practice stems alone from trade reality created by the trading parties (traders and banks) that use the bill of lading as a tool for extended trade finance credits, but at the same time request the cargo to be delivered without production of the bill of lading. In this dilemma it is the carrier, that is not involved in any way in the trade and finance transactions, that has to bear the risk, a risk that is only artificially covered by the use of letters of indemnity. The Rotterdam Rules attempt to redress this situation and offer to the parties that know from the outset that the bill of lading will not be used in its intended ways, to relieve the carrier from the obligation of requesting surrender of the bill of lading. It will be the parties to the sales contract (and their banks) that will in future have the opportunity to agree on such a 47(2) document. All other functions of a bill of lading will continue to exist, e.g. in the context of the right of control and the transfer of rights.

Therefore, article 47(2) just addresses the issue of non-presentation and tries to provide an alternative for the letter of indemnity system. Currently, the legal validity of a bill of lading that is still in circulation after delivery is unclear. Such a bill of lading cannot pass property anymore (at least not in civil law countries). It still represents a claim against the carrier for delivery in many cases, but not always. For instance, in the *Delfini*[4] and the *Future Express*[5] cases, it was decided that the bill of lading holder had no claim on the carrier anymore. This uncertainty has been clarified under paragraphs (b) to (e) of article 47(2), which must be considered a great improvement in the Rotterdam Rules. It is a false accusation that article 47(2) devaluates the value of the bill of lading system and that, therefore, the article 47(2) bill of lading is not a genuine bill of lading. The devaluation of the bill of lading system is caused by the fact that it has become more or less normal

[4] *The Delfini* [1990] 1 Lloyd's Rep 252.
[5] *The Future Express* [1993] 2 Lloyd's Rep 542.

in certain trades not to present the bill of lading anymore. Article 47(2) just tries to provide a solution therefore, which is both practically and legally sound. The bona fide holder that is already protected under paragraph (e) of article 47(2) only receives additional protection by the statement referred to the chapeau of article 47(2). This statement however, does not legally make the article 47(2) bill of lading a different type of bill of lading.

In addition, the current letter of indemnity system that article 47(2) tries to address is much more prone to fraud than the alternative system of article 47(2).

3.6. The revision of the uniform regimes presently in force goes much beyond the abolition of certain exonerations of the carrier's liability`, as the FIATA Working Group has alleged. The Rotterdam Rules represent a global, well balanced revision and it would have been a great mistake indeed to limit the revision to such abolition, which, apparently, is the only part of the Rotterdam Rules the FIATA Working Group Report considers favourably. The approach they have adopted seems to be very one sided.

4. *The Position Paper of the European Association for Forwarding Transport Logistic and Customs Services-(CLECAT)*

CLECAT states that it has taken a strong interest "in the UNCITRAL process". It is a pity that it has waited until after the adoption of the Rotterdam Rules by the General Assembly of the United Nations on 11th December 2008 in order to express its views in its paper of 11th May 2009. Such views are divided in three parts: 1) General observations, 2) Specific concerns and, 3) Concluding remarks.

4.1. *General observations*

a) The first observation, in the fourth paragraph of page 1, is that many of the new features, if compared with the existing liability schemes, "seem to provide hardly any additional benefit." CLECAT seems, therefore, to be of the view that the extended scope of application of the Rotterdam Rules, the continuous obligation in respect of seaworthiness, the abolition of the exoneration from nautical fault and maintenance of the ship, the inclusion of a right to sue against other parties involved in the performance of the contract of carriage, the higher limitation amounts, the clearer and more complete rules on transport documents and their evidentiary value, the rules on electronic transport records, those on delivery and right of control, amongst others, do not yield any improvement as respects the Hague Rules, the Hague-Visby Rules and the Hamburg Rules. Contrary to CLECAT's view, the Authors of this paper suggest that the above changes are indeed of considerable importance.

b) The second observation, in the same paragraph, is that the development of "an extremely complex legal instrument ought to find precise and measurable trade-offs, which are unclear and uncertain". Again, contrary to that CLECAT view, the Authors of this paper suggest that the innovations mentioned under (a) above, and others that will be considered more carefully, ought to satisfy this requirement.

c) The third observation, still in the same paragraph, is that the evolution of modern logistics "would have been better served by a convention that focussed on the intermodal nature of containerisation." But this has been precisely what the Rotterdam Rules have done, by providing

door-to-door application if the parties choose to do so. CLECAT recognizes this feature when, a few lines below, it complains because the network principle has only partly been incorporated. The network principle has actually been adopted in the Rotterdam Rules to the extent necessary, in order, on the one hand, to avoid or reduce to the very minimum a potential conflict of conventions, and, on the other hand, to ensure the application to the maximum extent possible of a uniform regime, in order to avoid or greatly reduce litigation. In this connection, CLECAT suggests that the attempt made by the Rotterdam Rules is "complex and, to some extent, unmanageable". No explanation is given by CLECAT of the above views and, therefore, it is difficult to consider whether they are in all or in part justified. It may only be observed that if the intention was to refer to article 26, its provisions seem to be simple and clear.

d) CLECAT's fourth observation, in the last paragraph of page 1, is that implementing the Rotterdam Rules "is a step into a very extended grey area of uncertainty, both in legal and judicial terms".

It is certainly possible that in different jurisdictions the interpretation of the Rotterdam Rules, when they come in to force, may differ. But this happens with any convention that contains uniform substantive rules and it is not a good reason to keep in force a system which is obsolete.

e) The fifth observation of CLECAT, in the first paragraph of page 2, is that while several benefits are provided for carriers, the Rotterdam Rules do not work "in a similar advantageous way for shippers or freight forwarders" (freight forwarders are involved only if they are shippers or documentary shippers: see article 1(9)), and that the provisions on freedom of contract in respect of volume contracts do not sufficiently "protect the interest of the customer". Attention is, however, drawn to the increased area of liability of the carrier, reference to which has been made under (a) above. As regards the complaint in respect of the insufficient protection of the customer in respect of the freedom of contract, that is granted for volume contracts, reference is made to the comments in paragraph 2.2.3.

4.2. *Specific concerns*

The eight specific concerns mentioned by CLECAT in pages 2 and 3 are considered by the Authors of this paper below in the order in which CLECAT has set them out.

(i) *Complexity of the Rotterdam Rules.* The Rotterdam Rules are not too complex, but cover areas that are not covered either by the Hague Rules and the Hague-Visby Rules or by the Hamburg Rules, such as the very helpful definitions in article 1 of chapter 1, the provisions on electronic transport records in chapter 3, those on delivery in chapter 9, those on the rights of the controlling party in chapter 10, those on transfer of rights in chapter 11 and (as respects the Hague Rules and the Hague-Visby Rules) those on jurisdiction and arbitration in chapters 14 and 15. It is suggested that the complexity and difficulty of application of a Convention should not be assessed by counting the number of articles. As regards the cost of (cargo) insurance, it is suggested that the views of insurers should be sought and that the abolition of the exonerations of the carrier from liability in respect of fault in navigation and management and fire should probably increase the percentage of success of recourse actions by insurers and reduce the relative administrative costs.

(ii) *No limitation of liability for shippers.* In respect of the lack of any limitation of liability for the shippers, reference is made to the comments under paragraph 2.2.6(e) above. In addition, one

should note that neither the Hague Rules and the Hague-Visby Rules nor the Hamburg Rules provide for limitation of liability for the shippers. The shipper's liability under existing conventions and under the applicable national law of most jurisdictions has been unlimited. It seems quite odd to argue as if the lack of limitation for the shipper is a unique defect of the Rotterdam Rules.

(iii) *Freight forwarders as a maritime performing party.* As regards the position of freight forwarders "who simply turn up at the port to collect a container and leave" attention is called to the definition of "performing party" in article 1(6) and "maritime performing party" in article 1(7). First, it should be noted that a freight forwarder who picks up a container is not a "performing party" if it is acting for or on behalf of the shipper, and therefore is not responsible as a "maritime performing party". Second, even if a freight forwarder is a performing party, an inland carrier is a maritime performing party only if it performs or undertakes to perform its services **exclusively** within the port area. Non-maritime performing parties are not subject to the Rotterdam Rules. The concerns of CLECAT do not seem, therefore, to have any basis.

(iv) *Multipurpose cargo terminals.* It is thought by the Authors of this paper that in this respect, the view of terminal operators that are based within the port areas should be sought. They might, quite to the contrary of CLECAT's suggestion, consider it advantageous to be subject to the Rotterdam Rules regime which, for instance, provides for limitation of liability which they do not enjoy without an explicit Himalaya clause. The great advantage to have a unique regime applicable from the arrival of the goods to the port area to their departure from the port area of the place of destination is that shippers and consignees will know which regime is applicable and will not chose whom to sue on the basis of a the regime likely to be applicable to the defendant. It is suggested that this will reduce, rather than increase, litigation and make it less expensive.

(v) *Stevedore and warehousing enterprise owned by the states*. It is rather unlikely that, as suggested by CLECAT, a State will decide not to ratify the Rotterdam Rules only because it owns a stevedoring or warehousing enterprise.

(vi) *"Limited network system"*. A "full network system"`, as espoused by CLECAT, is far too unsatisfactory in the light of the purpose of Rotterdam Rules to offer a coherent liability regime as broadly as possible. An example referred to by CLECAT in footnote 3 is not persuasive. The "off wheels" section from Calais to a UK port is a pure international carriage of goods by sea and it is simply unthinkable that the Rotterdam Rules should concede to "private contractual rules" for such period. The situation is the same even under the existing conventions. Any "private contractual rules" are invalid in so far as a mandatory maritime transport convention (e.g., the Hague-Visby Rules) applies.

(vii) *Unavailability of freedom of contract for forwarding agent*. It appears that CLECAT meant to refer to the situation where the forwarding agent acts as carrier (or logistics provider), issues its own transport document and enters into a transport contract with the performing carrier but, while it has no sufficient negotiating power to obtain the agreement of the shipper on a derogation, the performing carrier does have such power and, therefore, there will be situations in which the forwarding agent is liable to the shipper but has no recourse action against the performing carrier. If this is the problem, it is thought that it exists independently from the adoption of the Rotterdam Rules, and the only solution seems to be that the forwarding agent negotiates in advance general transport conditions with both its customers and the performing carrier(s) it intends use.

(viii) *Delivery without surrender of a negotiable transport document.* It is incorrect to state, as CLECAT has, that carriers retain the right to deliver the goods without obtaining the negotiable transport document in return. Pursuant to article 47(2), reference to which is made, if the goods are not deliverable the carrier may request instructions from the shipper in respect of delivery and, irrespective of the shipper still being the holder of the transport document or not, is discharged from any liability if it complies with such instructions. This, however, does not affect the value of a negotiable transport document vis-à-vis its holder in good faith, because article 47(2) applies only "if the negotiable transport document or the negotiable transport record expressly states that the goods may be delivered without surrender of the transport document or the electronic transport record". Therefore the holder of the document or electronic record is put on notice that, if the conditions set out in that provision materialize, the carrier may deliver the goods pursuant to instructions of the shipper or documentary shipper. And such conditions are that (i) the holder has not claimed delivery after the arrival of the goods at destination, or the carrier has refused delivery because the person claiming delivery has not properly identified itself and, (ii) the carrier has, after reasonable efforts, been unable to locate the holder in order to request delivery instructions.

However it is not certain that the situation that has been envisaged is that which was really CLECAT's concern, since it is also stated in their comments that "they (the forwarders) are sued much more frequently than the ship owner, because it has contracted out of the liability regime". Besides the fact that if this happens now, the problem is not arising out of the Rotterdam Rules, it appears that at present if the forwarder enters into a separate contract of transport with the performing carrier, the shipper has no contractual relationship with the performing carrier and it can only bring an action in contract against the forwarder.

4.3. *Concluding remarks*

CLECAT's first contention is that the entry into force of the Rotterdam Rules "would make the supply chain more complex and unwieldy and contribute to foster protectionism instead of free trade". No reason is given for this very vague statement. It is the view of the Authors of this paper that a modern transport convention, that would replace the variety of regimes at present in existence, would foster international trade and reduce litigation.

The second (implied) contention is that there is no advantage in substituting the existing rules with the Rotterdam Rules. That means that CLECAT believes that the existing disuniformity resulting from the application in certain countries of the Hague Rules, in others of the Hague-Visby Rules, in others of the Hague-Visby Rules as amended by the SDR Protocol, in others of the Hamburg Rules, and still in others a national regime consisting of a cocktail between the Hague-Visby Rules and the Hamburg Rules, is preferable to a definitely more modern regime that hopefully will replace all those presently in force. Furthermore, and even more importantly, the tendency shown before embarking on the UNCITRAL project that some national or regional legislators were preparing their own legislation in relation to international carriage of goods by sea derogating from the existing international Conventions would obviously come back to life, and the same circles complaining today of the complexity of one single regime (Rotterdam Rules) will be faced soon with the even greater complexity of battles of Conventions, rules and laws in a very unpredictable way, and left with complex questions of conflicts of laws relating to all issues that the existing Conventions had left to national laws.

The third conclusion of CLECAT is that people should learn the lesson taught by the alleged failure of the efforts made in the last ten years, resulting in the adoption of the Rotterdam Rules, and produce in the future a new instrument that should meet the following requirements indicated by CLECAT pursuant to which "an acceptable transport convention should be":

"- *as simple and universal as possible,*

- *with few and carefully weighed exceptions,*

- *serving all parties in contract without interfering with third parties, and*

- *last but not least, be realistic in terms of liabilities and limitations that must be mirroring other parties.*"

Is it conceivable that the United Nations will in the near future start drafting a new convention? In order to establish that, as CLECAT suggests, the Rotterdam Rules have been a failure at least fifteen years should elapse (the Hamburg Rules have entered into force in 1992, fourteen years after their adoption) and then not less than ten years would be required for the adoption of the regime CLECAT is suggesting: the consequence would be that the present situation would continue (and worsen by national or regional attempts to cope with the growing lack of satisfaction relating to the existing Conventions) for not less than twenty five years.

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