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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
Response to the attempt to clarify certain concerns that have emerged as contained in Informal Document WP.24 No. 2 (2009)

A RESPONSE TO THE ATTEMPT TO CLARIFY CERTAIN CONCERNS OVER THE ROTTERDAM RULES PUBLISHED 5 AUGUST 2009

Introduction

Eight persons of very considerable reputation have given it as their opinion that the Rotterdam Rules should be signed on September 23, 2009 at Rotterdam and then adopted thereafter. The eight are: Francesco Berlingieri, Philippe Delebecque, Tomotaka Fujita, Rafael Illescas, Michael Sturley, Gertjan van der Ziel, Alexander von Ziegler, and Stefano Zunarelli, (the "Eight").

The "Eight" have considerable experience in maritime law and in the creation of the Rotterdam Rules and therefore they and their opinions merit attention and respect. The "Eight" have especially been involved in the drafting of the Rotterdam Rules over the years.

This does not mean, however, that the opinion of the "Eight" must be adopted or that there may not be a better solution than the signing and adopting of the Rotterdam Rules as the "Eight" propose. In particular a) various defects in the Rotterdam Rules, b) various defects in the preparation of the Rules and c) various defects in the adoption of the Rules are noted in this paper below.

The History of the Rules

Just as the Hague Rules were drafted by CMI over 80 years ago, so these rules emanated from groundwork done by CMI who issued the first draft for consideration by the UNCITRAL working Group on Transport Law. The CMI work began with consideration of the current international regimes in place to cover sea carriage and considering what regime would take the best from each to come up with a unified set of rules potentially acceptable to interests worldwide. The purpose of the work was to attempt to bring back uniformity to carriage of goods by sea law. What came next was a CMI working group to consider transport related issues i.e. issues of a transport nature related to the sea carriage. The primary consideration was that the Hague concept of tackle to tackle no longer reflected modern sea carriage involving containerised traffic so discussions considered actions beyond the ship's rail and into the port area. At this stage there was no consideration of this convention becoming multimodal in status as long as it had a sea leg, however limited, in relation to the transport movement as a whole.

The basic difficulty with this Convention is that its original draft was drafted by CMI which is essentially sea related in its interests and the drafting came out of a central core consideration of international sea carriage. To give credit to CMI its initial draft left the additional multimodal aspect in square brackets and gave precedence to a full network liability system including national law. This was presumably because much of what is part of an international movement is essentially domestic and the expectation of the

ability to widen the Convention to something beyond coverage of international sea carriage was limited. Had the original work done by CMI focussed on door to door movements rather than a sea core with other aspects tacked on in square brackets it is suggested that a very different draft would have emerged. Those who were responsible for creating this draft have a particular interest in international sea carriage whereas what has in fact emerged is something of a hybrid which has been termed Maritime Plus meaning that the parts additional to the sea carriage are effectively incidental and only partially covered. This has the unfortunate effect of interfering with a complex but perfectly working body of law that has grown up on a regional if not national basis to deal with multimodal transport.

It should not be forgotten that the Multimodal Convention 1980 never came into force having found insufficient support and that was a concerted effort from the outset to create a true international multimodal regime. One can understand why UNCITRAL wished to consider a door to door regime, but what may not be understood is why this was approached by considering international sea carriage at the core and widening this out into what may only be described as a less than full attempt to create a full multimodal regime which is necessary if one is to cover international multimodal movements on a door to door basis.

The true purpose of these rules at the outset was to end the fragmentation of carriage of goods by sea law and somewhere along the way, ambition to create a multimodal regime crept in which means the process was flawed from the outset as one finds that the initial work was sea based and the later work was done by those representing Governments and the Government departments managing the consideration of the Rules being essentially sea based and not multimodal based.

The Liability System

It may very well be that Art. 17 amounts to no more than

a) Deletion of the nautical fault defense
b) Converting the fire defense to a liability for proven negligence of the crew
c) A rebuttable presumption of non-liability in case of certain enumerated events.

The question of a list of enumerated events was extensively discussed when the UNCTAD/ICC Rules for Multimodal Transport Documents were elaborated. The Working Group was instructed to base the Rules on the Hague and Hague Visby Rules. Nevertheless, a simplification without any list was unanimously agreed by all stakeholders. As a consequence, only the real exonerations from liability (nautical fault and fire) are mentioned in Art. 5.4 of the UNCTAD/ICC Rules. Presumably, simplicity will be preferred by stakeholders also in the future. The alleged clarifications by the many words of Art. 17 may or may not assist courts of law but it cannot be assumed that any advantage for the settlement of claims is provided compared with a simple formula of liability for presumed fault or neglect in case of loss of or damage to the goods proven to have occurred during the carrier's period of responsibility.

Limited Scope of the Rotterdam Rules – universal & uniform?

Art. 1(1) of the Rotterdam Rules defines the contract of carriage as a "contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage." The Rotterdam Rules, therefore, only apply to multimodal transport contracts that include carriage by sea as one of the legs. The Rules for example will not apply to a multimodal carriage by air and road, but will apply to multimodal carriage by sea and road. This limited scope of the application of the Rotterdam Rules contradicts the very goal of creating a "binding universal regime to support the operation of contracts of maritime carriage involving various modes of transport" announced in the Preamble of the Rotterdam Rules. (Emphasis added).

See in the same Preamble the declaration concerning "the adoption of uniform rules ..." (emphasis added), which declaration is also contradicted by the limited scope of the Rotterdam Rules.

As a result, carriers and shippers in finding the scope of the Rotterdam Rules neither universal, nor uniform will be forced to look to other conventions and other legal regimes to govern the complete transport contracts of their goods. Thus, the Rotterdam Rules not only fail to create a universal or a uniform body of law for regulation of multimodal transport, but add to the complexity of existing multimodal transport regimes.

The Basis of Liability of the Carrier

Sea carriage does not have the same risks as air carriage which does not have the same risks as road carriage which does not have the same risks as rail carriage. All these different modes of carriage have something intrinsically different about them and to give precedence to one type of carriage was to approach the project from a flawed basis. This is not about possibility or convenience but about why an international movement by sea should be stretched beyond an international sea movement to include port movements and other land or air based movements so long as they are not covered by other transport regimes. The problem with that approach made in an effort not to interfere with other international conventions covering the **same mode of transport** is to fail to consider on what basis it is just or equitable or even appropriate for an international regime to impinge on an essentially domestic movement. CMR covers international road movements; CIM covers international rail movements and the Montreal convention covers international air movements.

These International Transport Conventions do not cover domestic movements by one mode of transport but the Rotterdam Rules do to a certain extent and the effect of this is to remove the ability of the carrier caught by the regime to subcontract domestically for

one mode of transport and obtain back to back liability cover. For example, a road carriage from Germany to France on wheels and over the channel off wheels and back on wheels in the UK to destination inland UK would be covered by the Rotterdam Rules which would then give precedence to CMR for the Germany to France part of the road carriage but the sea carriage and UK domestic road carriage would remain governed by the Rules. However, if the goods remained on wheels throughout the journey, again, the Rotterdam Rules would cover the contract door to door but would give precedence to CMR which would apply door to door as the goods do not come off wheels.

In the latter case, the primary carrier and the other carriers would be subject to the CMR Convention but in the former, the primary carrier and other carriers would be covered by CMR up to when the consignment came off wheels and then the primary carrier and other carriers from that point would be covered by the Rotterdam Rules so there would be no back to back cover among the carriers. Why is that appropriate when a CMR contract would be issued in either case door to door and head contractors subcontracting to those involved after the goods came off wheels would ensure CMR conditions apply by private contract?

Unequal Obligations and liabilities between shippers and carriers

The suggestion that port to port contracts must be possible even though door to door contracts have become much more frequent is not a justification for allowing the carrier to be free to agree with the shipper or consignee that loading, handling, stowing, or unloading is to be performed by the latter. The Rules started out as purely port to port. Then the view was to widen this to port related activities because ship's rail to ship's rail had become outdated. Why allow this element be outside of the Rules? Why is this inappropriate? These operations are part of the carriage of goods and should be the duty of the carrier.

Shipper's right to limit liability

Although shippers do not benefit from any limitation of liability under the present law, the situation becomes imbalanced with the extension of the carrier's right to limit liability for any breach of the contract or the convention. It is hardly acceptable to accord the right to limit liability only to one of the parties in the contractual relationship for the same type of breach, such as wrong or insufficient information.

The "maritime plus"

The network liability system of the Rotterdam Rules does not represent a novelty. Nevertheless, the extension of the Rotterdam Rules to permit the inclusion of non-maritime transport ("may include") aggravates the problem. In particular, it may be difficult to ascertain from time to time whether Rotterdam Rules carriers will make use of the option to include non-maritime transport. Further, the exclusion of mandatory

national law from the network is particularly harmful for States with mandatory regulation of domestic transport used in connection with maritime transport.

Maritime performing carriers

Those supporting the Rules appear to underestimate the difficulties for cargo terminals and, in particular, multipurpose cargo terminals and distribution centres in logistics operations when being exposed to different liability régimes. True, they may be exposed to tort claims and incur ultimate liability for such claims unless protected by indemnity provisions. However, this is not the point. Although, in some cases, cargo terminals may benefit from the shield available to maritime performing parties under the Rotterdam Rules, they would suffer from the loss of their right to develop their liability systems as they deem fit in the present modern era of transport logistics.

Limitation of Liability in the Rotterdam Rules

Under Chapter 12 of the Rotterdam Rules – "*Limits of Liability*", the carrier's liability for breaches of its obligations under the Rules is limited to 875 units of account per package, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is higher,[1] which for example in Canadian dollars is $1,620 or $5.50 respectively.[2] This limitation represents an increase of approximately 33% and 50% from the 666.67 S.D.R.[3] ($1,200) per package or 2 S.D.R. ($3.70) per kilogram limitations of liability under the Hague-Visby Rules currently applicable for example in Canada.[4]

The Rotterdam Rules apply "door-to-door"[5] – from the place of receipt to the place of delivery. The new limitations of liability under Rotterdam Rules will thus apply both to the sea and to the land leg of the carriage. The Hague-Visby Rules apply "tackle-to-tackle"[6] – on the sea, leaving the determination of limitations of liability for the damage caused on land to other applicable international conventions or to the national legislation. For example in Canada presently, under the network liability regime, the maximum liability for road transport is Canadian $4.41 per kilo under provincial laws,[7] regardless

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[1] Article 59 of the Rotterdam Rules.

[2] "Information Paper on the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea," Transport Canada Department of International Marine Policy, February 2009.

[3] Special Drawing Rights of the International Monetary Fund.

[4] Canadian International Freight Forwarders Association submission to Transport Canada Commentary on the Rotterdam Rules, March 21, 2009 (available on-line at: http://www.ciffa.com/downloads/2009/03/30/CIFFA%20Submission%20to%20Transport%20Canada%20on%20the%20Rotterdam%20Rules%20March%202009.pdf).

[5] Article 12.1 of the Rotterdam Rules provides that "[t]he period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered."

[6] According to Art. 2, art. 1(b) and art. 1(e) of the Hague-Visby Rules the Rules apply "from the time when the goods are loaded on to the time when they are discharged from the ship."

[7] See for example Quebec Regulation Respecting the Requirements for Bills of Lading, c. T-12, r.5.1 enacted by Order in Council No 1198-99, s. 1 of October 20, 1999, Schedule 1 "Model Bill of Lading" and Schedule 2, s. 10: "The amount of any loss or damage ... must not exceed 4,41 $ per kilogram, depending

of the number of packages.[8] If the limitation of liability of Rotterdam Rules will apply to damage caused during land carriage – the increase in the liability of carrier would be unreasonably high compared to the existing regime. Thus, if a container containing 1,000 packages weighing 10,000 kilos was lost during road carriage, the carrier's maximum liability will be Canadian $1,620,000 under the new Convention, as opposed to the present maximum of Canadian $44,100 under provincial highway transport liability regimes, since the provincial regime is national law and not international convention.[9]

In this illustration, the contracting carrier and his liability insurer will need to cover a liability shortfall of almost Canadian $1.6 million between what he is liable for and how much he could recover from the trucking company. The new Convention will dramatically alter the presently existing dynamics between the shipper, carrier, performing parties and insurers.[10]

The main flaw that is the volume contract exemption

The volume contract exemption from the rules is the single most inexplicable part of these Rules. From the most basic standpoint, if one seeks to bring back uniformity to carriage of goods by sea law why allow any such exemption? It is hardly unusual in terms of commercial trade that one should get some kind of a discount in price for volume whether one is trading in apples, electronics or carriage but that does not lead to a change in liability in respect of such contracts. The liability is related to the risks of the adventure, not the amount of business done. Therefore, this is a totally fallacious and unacceptable standpoint. Whilst it is accepted that charterparties are generally excluded from the mandatory rules being contracts of hire and that volume contracts may well take the form of consecutive voyage charterparties we are here concerned with the definition of volume contracts.

"Opting-outs" are one of the egregious defects of the Rotterdam Rules and "volume contracts" are perhaps the opting-out with the broadest effect. In addition, Article 80 of the Rotterdam Rules contains controversial minimum requirements that the carrier must meet in order to have a contract qualify as a "volume contract". The definition of a volume contract is found in Article 1 of the Rotterdam Rules as follows:

> "'Volume contract' means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum, or a certain range."

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on the total weight of the shipment, unless the shipper has declared a higher value on the front of the bill of lading."

[8] Canadian International Freight Forwarders Association submission to Transport Canada Commentary on the Rotterdam Rules, March 21, 2009.

[9] Ibid. at p. 2.

[10] Ibid. at p. 3.

In theory, the above requirements should give the shipper an opportunity to negotiate a higher freight rate for a higher liability under the Rotterdam Rules. In reality, creative carriers will use contractual forms that arguably comply with the Rotterdam Rules, but without real negotiation. Thus the opting-out is very likely and possible.

Are there grounds for European short sea movements being exempted from application of the Rules?

We disagree that inter European sea transport business has no viable reason for being treated differently, the reason being that it is usually a very limited part of a much more extensive door to door contract that is predominantly by road or rail. It is because the Rotterdam Rules have included multimodal contracts in a limited manner rather than implementing a full network liability system that the reason for the different treatment becomes clear. There is no reason for a predominantly sea orientated Convention affecting substantial numbers of door to door European contracts that are predominantly land based. It is quite odd that those supporting the Rules should question the wish to remove European short sea movements from being caught by the Convention where there is in fact a viable reason for such removal, particularly when the volume contract exemption has found its way into this Convention for which there is no apparently viable reason.

Jurisdiction and Arbitration (opting-ins) – Rotterdam Rules

The Rotterdam Rules, unlike for example the Hague-Visby Rules[11], contain chapters on jurisdiction (Chapter 14) and arbitration (Chapter 15). These provisions of the Rotterdam Rules, however, are not mandatory. The states that have ratified the Convention are given the choice of whether or not to opt-in to the provisions on jurisdiction and arbitration. Article 74 of Chapter 14 *Jurisdiction* of the Rotterdam Rules states that this chapter shall bind only Contracting States that declare that they will be bound by the Rules in accordance with Article 91. Article 78 of Chapter 15 *Arbitration* similarly provides that the provisions of this chapter shall bind only Contracting States that declare that they will be bound by them. Even when made in accordance with Article 91, such declaration may be withdrawn *at any time* by a formal notification in writing addressed to the depositary, and will take effect within 6 months after the date of the receipt of the notification.[12] As it may be expected that some States will choose not to opt-in ,the system invites forum shopping.

The documentary shipper

The introduction of the notion of documentary shipper in the Rotterdam Rules is a novelty compared with the present law. An exporter not involved in the contract of

[11] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels, August 25, 1924 and in June 2, 1931 ("Hague Rules 1924"), as amended by the "Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading", adopted at Brussels, February force 23, 1968 in force June 23, 1977 ("Visby Rules" 1968).
[12] Rotterdam Rules Art. 91(5).

carriage, such as an ex works seller, does not benefit from such a contract in order to protect himself against the buyer's insolvency. The exporter would have to rely on any right of stoppage in transit available under the applicable law. Possession of the bill of lading may facilitate for the seller to exercise such right but that does not mean that he becomes involved in the contract of carriage made by the buyer with the carrier. Thus, it is difficult to understand why he should be exposed to any liability to the carrier, not being the contracting party. In particular, when an ex works seller protects himself against the insolvency of the buyer under a documentary credit, he certainly does not expect to incur a claim by the buyer's carrier should the buyer fail to honour his commitments under the contract of carriage. Hence, freight forwarders would have to caution their customers and inform them of the risk of potential liability under the Rotterdam Rules following from their position as documentary shippers.

Delivery without the surrender of the negotiable bill of lading

Even if delivery of the goods without the surrender of the bill of lading requires an express statement in the document according to Art. 47(2), the bill of lading becomes misleading. One of the most important functions of the bill of lading is to enable the parties to transfer title to the goods in transit by the mere transfer of the bill of lading or its electronic equivalent. In turn, the ultimate consignee must have a guarantee that he, and nobody else, will actually receive the goods and not merely (limited) compensation upon the surrender of the bill of lading to the carrier. Therefore, Article 47(2) will create confusion in sales contracts. Is an Article 47(2) document a document controlling the disposition of the goods in the sense of Article 58 of the UN Convention on Contracts for the International Sale of Goods (CISG)? This question has been referred to the CISG Advisory Council by the ICC Commission on Commercial Law and Practice. The answer is expected to help deciding whether the document qualifies according to INCOTERMS 2000 CFR and CIF (the A 8 clauses) and under documentary credits. The current practice to tender goods to consignees against indemnities when they fail to present bills of lading is a bad practice. However, the cure of such bad practice by the legislative blessing in Article 47(2) is unacceptable and constitutes an erosion of the value of the bill of lading as the most important document used in international trade.

The Clecat Position Paper

It is an apparent fiction to state that Clecat has waited to express its views until after the adoption of the Rules. It was engaged in the entire process through FIATA representation. Clecat is always represented at FIATA meetings and the FIATA representation was for and on behalf of all FIATA attendees.

The position of Clecat is clearly an overview comparison and it is inappropriate to assume that positive features have been dismissed. They have to be counterbalanced by the negative features such as the volume contract exemption and the application of the limited network liability system. For the forwarding industry, these two issues alone comprise a double attack in that forwarders as customers of carriers are generally

entering into volume contracts and with their customers this is much less likely and as they are generally entering into door to door contracts they will be caught under the Rules as carrier by the shipper but will not be able to ensure back to back cover with sub contractors who are not solely maritime performing parties. There was no need to differentiate between maritime performing parties and performing parties. The inclusion of the latter rather than the former would have made the operation of the Rules far more equitable and there is no just reason why a substantial sector of business should be made capable of walking away from this attempt at uniform international regulation.

The suggestion that the removal of nautical fault is a huge benefit is somewhat concerning. Surely no one in current times can plausibly contend that this defence is viable when satellite navigation and GPS tracking technology exist. This removal ought not to be in any way a bargaining chip for a set of Rules that is designed to bring international law up to date.

It is the case that any new Convention will have different interpretations in different jurisdictions but Conventions that have been successful historically have generally followed a very simple rule. The rule is keep it short and simple. One has to ask if a 90 plus article instrument is worth bringing into force on that point alone. The likelihood due to the loose wording in a number of paragraphs will inevitably lead to a wide array of different interpretations. It is a fallacy to suggest that, in this respect, the Rules are no different from other Conventions. The Rules are very different from any Convention currently in force and have many clauses that appear on the face of it to make certain parties liable then allow them out under other clauses then bring in other Conventions then allow opting out of jurisdiction and arbitration clauses. The Rules have a far greater propensity to create different interpretations than any other Convention. Quite apart from that, one has to take account of the volume contract exemption and the effective performing party exemption apart from those that are purely maritime performing parties which all militates strongly against any real kind of uniformity which was the goal of this instrument when work first began on it in 1996.

It is true that the provisions on electronic transport documents are very helpful but these provisions could be utilised as an add on to any other current Convention by way of a protocol. Nautical fault should be consigned to history as a defence given technological advances and should be capable of removal without any trade off. We do not need a new convention to deal with these two issues.

The concern for forwarders is that they are often based within port areas and deal with clearing and release of containers from the container yard. Furthermore they are going to be caught as carriers under the NVOCC door to door contracts that they issue and cannot sub contract on equal terms as the domestic road carriers are going to be unwilling to agree to be bound by terms of a predominantly sea related convention by way of private contract.

It is quite wrong to suggest that perceived problems in the forwarding industry due to forwarders acting on the one hand as shippers and the other hand as non vessel owing

contracting carriers in relation to the operation of the Rules are independent from the issue of the adoption of the Rules. In fact the perceived problem is caused by the volume contract exemption which is unjustifiable when one is seeking to bring uniformity to carriage of goods by sea law and the limited network liability system which causes problems as identified above.

The authors of this paper do not agree that the Rotterdam Rules will foster international trade and reduce litigation. If anything due to the volume contract exemption and failure to commit to a full network liability system given that there are only 5 or 6 main shipping lines worldwide plying their trade, it will be more likely to lead to a few high powered corporations dominating the market at the expense of small and medium sized businesses and could well lead to a similar crisis worldwide as that recently witnessed in the financial sector in the event that these limited groups act inappropriately which could severely damage the effectiveness of the supply chain worldwide. This is widely accepted to have resulted from deregulation and a few large scale organisations causing the financial markets to collapse. It would be catastrophic for this to happen in the international transport industry when basic needs are often met through its use such as food, emergency supplies, pharmaceuticals and medical supplies being delivered worldwide every day.

The negative reactions by some stakeholders

It seems to be a recurring theme among those who support these Rules to question the lateness of such commentaries. One has to remember that if these Rules do become a Convention they will affect huge numbers of those involved in commercial contracts for sale of and carriage of goods. These Rules were formed by a working Group with a few hundred participants which is hardly representative and simply because concerns arise after adoption of the Rules does not make such concerns any less valid.

The objective of the Rotterdam Rules to provide a comprehensive regulation is certainly acceptable but the risk is obvious that some of the innovations compared with the present law will limit the willingness of States to ratify the convention. From this perspective, it might have been wiser restricting the revision work to a modernization of the liability system and the introduction of rules for electronic transmission so as to ensure a global acceptance of the Rotterdam Rules as a replacement of the old system. The aim to expand the Rotterdam Rules to cover much more has invited negative reactions by some important stakeholders to the effect that some additions are considered at best unnecessary and at worst contrary to their respective interests.

The Consequences of the "Opting-Outs" (including no opting-in)

The Rotterdam Rules contain multiple opting-outs, which will allow major shipping nations to "opt-out" of all or part of the Rules. The United Kingdom, for example, could support the signing of the Convention but could also be able to protect its important arbitration centre and arbitration business in London by opting-outs. And the world's shipping/carrier/oil producer nations such as Norway could adopt the Rotterdam Rules,

but the opting-outs could also allow them to avoid many provisions of the Rules, that do not favour them.

The United States of America and those nations, which like the United States of America have not adopted the Hague, or Hague/Visby or Hamburg Rules, will seemingly have progressed to some extent by the adoption of the Rotterdam Rules but is this "half loaf" better than a new try at adopting a uniform, binding, modern Multimodal Carriage of Goods by Sea Convention of the 21st Century?

Are not the Rotterdam Rules a step backwards for the vast majority of shipper/carrier nations of the world, who have already adopted a universal and uniform, and less complex carriage of goods by sea legislation with broader scope and fewer opting-outs, particularly for jurisdiction and arbitration and for volume contracts?

And are the Rotterdam Rules really universal and uniform as so declared in the Preamble to those Rules?

The Complexity of the Rotterdam Rules

The Rotterdam Rules provide a detailed set of rules for three types of transport documents: negotiable transport documents, non-negotiable transport documents, and straight bills of lading. These different types of transport documents entail different results when determining the evidentiary effect of the contract particulars (Article 41), delivery of the goods (Chapter 9), and rights of the controlling party (Chapter 10). Will the average shipper or carrier be able to distinguish between a negotiable and a non-negotiable transport document? This could lead to confusion and mistakes. Furthermore, a contract which is simply called a "bill of lading" is liable to be characterized as any one of the three legal characterizations, which again can only create confusion.[13]

The excessive detail of the Rotterdam Rules is liable to create uncertainty and hinder the goal of attaining legal certainty in multimodal transport regulation. The Rotterdam Rules seem fit only for a small select group of trained lawyers. A more pragmatic approach of introducing only two types of transport documents: a negotiable and a non-negotiable multimodal transport document as is found in the United Nations Convention on International Multimodal Transport of Goods (Multimodal Convention (1980)) would make the rules simpler and more understandable to merchants, shippers, consignees, carriers and even to lawyers and judges.

Drafting Deficiencies in the Rotterdam Rules

An example of a drafting deficiency can be found in Article 12, which deals with the 'period of responsibility' of the carrier. Article 12(1) states: "The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered." Article 12(2) (a) and (b) provide specific criteria to determine when the period of responsibility

[13] See Anthony Diamond, "The Next Sea Carriage Convention?" [2008] LMCLQ at p. 163.

begins and ends. At the same time, however, Article 12(3) allows the parties to determine this period themselves, subject to two exceptions. Article 12(1) and Article 12(3) therefore appear to be contradictory. It is suggested that Art. 12(1) should start with "Subject to paragraph 3..." The current wording of Article 12 may lead to mistakes and confusion. Careless readers might simply read the first paragraph and conclude that the period of responsibility can only conform to that stipulation. The reader may also wonder whether one paragraph trumps the other.

Article 51(1) states: "Except in the cases referred to in paragraphs 2, 3 and 4...", in other words, except when there is, respectively, a non-negotiable transport document, a negotiable transport document, and a negotiable electronic transport record. There are, however, three different types of transport documents: negotiable, non-negotiable, and straight bill of lading. Thus, given the exceptions, article 51(1) would seem to be dealing with non-negotiable electronic transport documents, as well as straight bills of lading. But there is doubt without a specific stipulation to that effect in law. Why should we have to guess? And perhaps paragraph 1 also contemplates all residual transport documents as well (i.e., those that are not readily able to be characterized under the Rotterdam Rules). Defining the purview of a given stipulation solely by stating its exceptions lends itself to ambiguity.

Conclusion

The "Eight" are respected and respectable maritime lawyers. They have, however, spent years creating and supporting a document which partially updates the United States of America Carriage of Goods by Sea law, but with many, many defects including opting-outs. The "Eight" and others have done their best, but have been hampered, particularly by the reluctance of carriers, shippers, and other parties in the U.S A to adopt a truly complete Multimodal Convention for the future.

Should the rest of the world accept Rules which put them behind the position they are presently in? The Rotterdam Rules are really only a partial advance for the United States of America and for nations which have not adopted the Hague, Hague-Visby or Hamburg Rules. Therefore the Rotterdam Rules should be neither signed nor ratified.

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