



IMMTA E-Newsletter

October 2009

The Rotterdam Rules special

Dear friends and IMMTA members,

After almost four years, it is time to change the format of our Newsletter. For four years our colleague from UNCTAD, Mr. Jan Hoffmann, has kindly taken the responsibility of editing the Newsletter for which I would like to express my sincere appreciation. We believe that more informal format of the Newsletter would permit us to reach you, hopefully more frequently, without having to wait publication of a formal issue of the Newsletter. This format will also allow you to respond and communicate more frequently – and this is what I hope our Association is about.

This issue of the Newsletter focuses on the new and widely debated UNCITRAL Convention on Contract for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules), which was adopted by the UN General Assembly in December 2008 and was opened for signature in September in the city of Rotterdam.

The Rotterdam Rules

The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as the *Rotterdam Rules*, was opened for signature in a signing ceremony in September 23 in Rotterdam, the Netherlands. 15 countries signed the Rotterdam Rules at the special signing ceremony, namely Congo, Denmark, Gabon, Ghana, Greece, Guinea, the Netherlands, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo and the US. France signed the Rotterdam Rules later on the same day and Madagascar on the 25 and Armenia and Cameroon on the 29 September.

It should, however, be noted that this signature is not a binding signature and only reflects an interest in the Convention. States will still need to decide whether or not to ratify the Rotterdam Rules. Given the contentious nature of the Convention, it is not surprising that there were so few signatures. Even though we know many countries do sign conventions without ratifying them later. It is also interesting to note that not many maritime nations signed the Convention.

The Rotterdam Rules - Central features

More detailed information regarding the Rotterdam Rules have been provided in the previous IMMTA Newsletters. Here are some central features of the Rotterdam Rules in brief.

The Rotterdam Rules:

- Application to contracts for the carriage of goods by sea and multimodal transport involving an international sea leg,
- Based on maritime concepts and existing maritime liability regimes, but with significant changes in structure, content and drafting,
- Cover issues not currently subject to international uniform law, such as delivery of goods, right of control, etc.
- Contain 96 articles in 18 chapters,
- No attempt is made to address particular issues and challenges of modern multimodal transport, but purely maritime liability regime is extended to cover door-to-door transportation,
- Many provisions are lengthy and highly complex,
- Carriers' liability is based on fault,
- Carriers' seaworthiness obligation is continuous throughout the voyage,
- Include long list of exceptions with some new exemptions e.g. sacrifice of goods notwithstanding seaworthiness obligation,
- Deletion of exemption for "nautical fault",
- Period of responsibility from receipt to delivery of goods but may be restricted to cover the period from *initial loading to final discharge* under the contract (art. 12(3)),
- Burden of proof rules (there are multiple causes of loss) changed favouring the carrier (art. 17(6)),
- Possibility to *deliver goods without presentation of negotiable transport document* under certain condition (art.47(2)),
- Limits of liability not only for loss or damage to cargo but for *any breach*: 3 SDR per kg. & 875 SDR per package (art. 59) (more than maritime conventions but much less than those of other transport modes),
- No liability for delay unless agreed,
- Time-bar: two years,
- Shippers' obligations and liability: more extensive and detailed than existing conventions,
- Shippers' liability is based on fault,
- Strict liability of shipper to provide accurate information for contract particulars and on dangerous goods
- "Documentary shipper" (e.g. FOB seller) is liable in addition to shipper,
- Shipper may be liable for some of carriers' functions e.g. loading, handling, stowing and unloading,

- Shippers' obligations and liability are *mandatory* and may not be contractually excluded or limited,
- No monetary limitation on shippers' liability,
- "Volume contracts" in liner trade are exempt from mandatory application of the Convention: highly controversial during negotiations
- "Volume contracts" = "Service contracts" in the US,
- Most provisions of the Convention may be contractually modified or contracted out under volume contracts,
- No sufficient protection for third parties or small shippers against abuse,
- Extensive use of volume contracts = *no international uniformity*,
- Chapters on jurisdiction and arbitration: *optional*,
- 20 Contracting Parties required for the Convention to enter into force,
- Ratifying States must denounce the existing maritime convention they are a party to at the same time.

The substantive provisions of the Rotterdam Rules seem more favourable to carriers, than any existing maritime conventions, which would explain their support for the Convention. The reality, however, is that the Convention is too complex to benefit any interest. It is likely that many costly litigations may be required in order to obtain clear understanding of many provisions of the Convention. As a commentator put it:

"The Rules are a formidably comprehensive and complex code, as the survey of the liability regime undertaken in this article amply confirms. Their vulnerability ultimately is not necessarily to be attributed to the legal principles and framework that is propounded but to their suffocating wordiness, careless use of language and persistent refusal to abide by the basic rules of elegant and effective drafting. When the time comes to put the drafting to the test [...] it is suspected that the rules may be found to be wanting and productive of more disputes than might be considered healthy for the shipping industry. (Professor Rhidian Thomas, Journal of International Maritime Law, 2008, 496)

Furthermore, the Rotterdam Rules would not in any way provide any improvement to the existing complex legal framework for multimodal transport. By extending purely maritime liability regime to multimodal transport contracts that include an international sea leg, they would result in further fragmentation and confusion regarding the law governing multimodal transport.

In view of the above, I would urge members to recommend their governments ***not to sign or ratify the Rotterdam Rules.***

Views of some Stakeholders on the Rotterdam Rules

The Rotterdam Rules have been subject of a lot of lobbying with different interest groups issuing statements and position papers. Below is a brief look at what has been coming out:

Carriers' interests, such as the ICS, ECSA, BIMCO, P&I Clubs, WSC, express their strong support for the Rotterdam Rules. They all have issued statements / position papers which are available at:

www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.htm
|

Shippers' interests on the other hand express serious objection. The position paper and press release by the European Shippers' Council can be accessed at:

www.europeanshippers.com/docs/esc-position-paper-rotterdam-rules-march09.doc

www.europeanshippers.com/docs/press/090629pr.jsp

Freight forwarders, e.g. FIATA, CLECAT, also express serious concerns. Freight forwarders, who do not operate any vessel but contract with shippers to transport the cargo from door-to-door, may be both carrier (vis-à-vis small shipper) and shipper (vis-à-vis a unimodal carrier such as a sea carrier).

Having looked at some of the shortcomings of the Rotterdam Rules, the "FIATA Working Group on Sea Transport recommends that the Association members should advise their governments *not to accept* the Rotterdam Rules."

Similarly CLECAT having highlighted some of the problems of the Rotterdam Rules urges "the EU institutions and the European governments **NOT** to ratify this Convention."

You can read the paper by the Working Group on Sea Transport of FIATA and the CLECAT position paper at:

www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.htm
|

The European Commission (EC) has also been expressing serious reservations regarding the suitability of the Rotterdam Rules to govern multimodal transport. A study commissioned by the EC has just been released and posted on their website, including proposals for an alternative regional regime for multimodal transport:

http://ec.europa.eu/transport/strategies/studies/strategies_en.htm

UNECE Working Party on Intermodal Transport and Logistics (WP. 24) (12-13 October 2009)

The UNECE Working Party on Intermodal Transport has been monitoring the development regarding the Rotterdam Rules for a number of years. The objective being the preparation of an appropriate liability system, to cover short sea shipping, in order to address the concerns of the European intermodal transport industry.

The Rotterdam Rules were discussed yesterday at the meeting of the UNECE Working Party, in which UNCITRAL and EC representatives also participated. The

WP heard divergent views of different industry stakeholders (shippers, freight forwarders, carriers, etc.) as well as the member states. A representative from the EC confirmed that their work for the preparation of a European convention on multimodal transport will continue, following an impact assessment. The UNECE documents can be accessed at:

<http://www.unece.org/trans/wp/24/welcome.html>

A number of former delegates who attended the UNCITRAL Working Group meetings have taken upon themselves to comment on the concerns expressed by some organizations / industry representatives including the UNECE, ESC, FIATA and CLECAT. The authors of the comments, who are legal academics and maritime lawyers, writing in their personal capacity, criticise the industry representatives who are expressing the views and concerns of the members. The comments, however, fail to address adequately the real problems raised the Convention. They also seem to suggest that the interpretation of provisions in the Rotterdam Rules allows for one clear view only. While in respect of any new statutory regime there is certainly scope for interpretation and it would remain to be seen which views would be adopted by courts. You could read these comments at the UNECE website:

<http://www.unece.org/trans/wp24/wp24-inf-doc/24infdocs.html>

A response to these comments is provided by another group of lawyers / industry representatives highlighting some of the problem areas of the Rotterdam Rules:

<http://www.pysdens.com/pdf/documents/Summationpdf.pdf>

4th Global Shipping Summit

The 4th Global Shipping will be held in Dalian, China from 23 to 24 October. It is one of largest shipping events in China which brings together a large number of shipping and transport interests from both China and overseas to discuss and explore current issues and problems impacting the industry. It is expected that around 700 – 800 people from all sectors of the industry will take part in this year's event. IMMTA has a special session on multimodal transport on the 24th October. Join us if you can at the GSS, 23-24 October in Dalian.

More information on the event is available at:

<http://gss2009.shippingchina.com/en>

Mahin Faghfour
President, IMMTA
president@immta.org