By: Peter M. Jones

The New Rotterdam Rules: Concerns for the Forwarding Sector

After approximately 8 years of meetings by its Working Group III, the United National Commission on Trade Law (UNCITRAL) has adopted the text of an international convention applicable to contracts for the international carriage of goods wholly or partly by sea. As proposed by the Government of Netherlands, UNCITRAL has named this text the Rotterdam Rules. Although at a recent signing ceremony the Rotterdam Rules collected 20 signatories, they will not come into force until these countries (or others) ratify the Rules. Given the wide support for these Rules in developing countries (10 of the now 20 signings are by developing countries); it is likely that the Rules will come into effect in the relatively near future.

The new Rules have not been well received by the forwarding industry. FIATA is neutral and has left ratification issues to its national Members. CLECLAT, an alliance of European Forwarding Associations, does not support the Rules. BIFA, the UK Association, rejected them. Only the Transport Intermediaries Association, the FIATA member in the United States, has strongly endorsed ratification.

What are the concerns that have created such a lukewarm response? This subject was discussed by the FIATA Advisory Body on Legal Matters (ABLM) at its September meeting in Geneva.

(a) **Volume Contracts**

For several decades ocean carriers have used volume contracts as their underlying contractual document with regular shippers, including most non-vessel-operating common carriers (NVOCCs). It is estimated that nearly 90% of container shipments involve a volume contract with one of the parties in the supply chain. Volume contracts typically contain provisions by which a shipper obtains reduced rates in return for a guaranteed volume of cargo over a specified period of time. These contracts also frequently contain special terms for allocating cargo loss and damage, although under most existing conventions applicable to sea carriage these terms cannot reduce a carrier's liability below the convention limits.

Article 80 of the Rotterdam Rules establishes special rules applicable to Volume Contracts that sanction continued use of this form of contract, but with a new feature: a volume contract may "derogate" from the Rules by lessening the rights, obligations and liabilities imposed by the Rules on ocean carriers or shippers. The Articles not subject to derogation are Article 14, which requires an ocean carrier to make and keep its ship seaworthy etc., Article 29, which covers a shipper's duty to provide information to the carrier, Article 32, which applies to shipments of dangerous goods, and Article 63, which

denies a carrier whose reckless conduct has caused a loss the right to limit liability as provided by the Rules.

A free hand for ocean carriers to derogate from the Rules would effectively destroy the balance between the interests of shippers and carriers that the Rules attempt to preserve. So use of Volume Contracts is hedged by conditions that go a long way to insuring that such contracts are “freely negotiated”.

If they succeed in reducing their liability under Volume Contracts as the standard way of doing business, ocean carriers could transfer greater cargo liabilities to shippers and their cargo insurers.

Another possibility is a transfer of these liabilities to insurers of contractual carriers if that carrier does not succeed in adopting Volume Contracts into its standard business practices with their shipper customers. These carriers, particularly smaller or medium-sized NVOCC’s, may be tempted to accept a reduction in the levels of an ocean carrier’s liability in exchange for lower freight rates. They may even agree to indemnify ocean carriers against liabilities to other parties with an interest in the goods (who are not parties to the volume contract) for amounts determined by the limits in the Rotterdam Rules. Although cargo interests point out that they are still less than in other International Transport Conventions, the Rotterdam limits are substantially higher than the limits under the Hague Visby Rules.

A liability insurer for an NVOCC would then have to absorb the claim, as it would be unable to subrogate against the underlying carrier as its insured would have contracted away those rights when it entered into a Volume Contract.

(b) **Conflict of Conventions**

The drafters of the Convention worked hard to minimize conflict between the multimodal Articles in the Rules and international conventions on land transport that apply to the movement of cargo to or from the port of loading or discharge. Still there is a possibility of conflict between the Rules and an existing international convention, such as the CMR that governs road transport in European countries. This conflict may undermine the protection that the Rules provide NVOCCs against claims arising from damage that occurs during the land segment of the transport.

In other countries where the national law applicable to land transport is not based on an international convention, the carrier will be subject to the Rules for land transport in responding to shipper claims, but its recourse against the land carriers for indemnification will be subject to the national law applicable to those carriers. The difference in limitation amounts could be significant.

(c) **Lack of Limitations on Shipper Liability**

Recent cases have held shippers liable to ocean carriers for significant damages, particularly in the case of dangerous goods that cause harm. These onerous shipper

obligations are not subject to any limitation of liability. For this reason shipper interests claim that the Rules are one-sided.

(d) **Loading and Unloading**

A new Article expressly allows a carrier and a shipper to agree to exclude a carrier's liability for loading and unloading. This Article has its origin in non-liner shipments, particularly the shipments of bulk cargos. In those trades, the responsibility for loading or discharge is allocated by "Free In-Out" clauses. The Rules allow carriers to propose that shippers or receivers assume responsibility for these activities, whatever effect the transfer of this responsibility might have on others interested in the cargo.

Under present international conventions, carriers who did not stuff cargo into a container are not liable to either the shipper or the consignee for damage caused by a failure to properly secure the cargo in the container. Courts categorize damages resulted from this failure as caused by an act or omission of the shipper, or insufficiency of packaging, both of which are defences available to the carrier under the Rotterdam Rules.

As for the loading and unloading of containers from the carrying vessel, ocean carriers arrange for and accept liability for those functions. As shippers have no role in arranging for these services, the Rotterdam Rules will not lead to changes.

The Forwarding industry is most frequently involved with Container shipments; so its concerns over this provision are not substantial.

(e) Burden of Proof

It has been suggested that the Article as to Burden of Proof will in practice increase the difficulty establishing liability against the ocean carrier. Conversely, the ability of ocean carriers to defend cargo claims has been improved, at least to some degree.

(f) **Port Area**

The definition of maritime services may subject parties to the Rules where their operations take place within a port area. Land based parties who perform their services within the port area would include terminals and stevedores. These are the parties who now frequently handle goods only on the basis that the carrier who retains their services will indemnify them against liabilities in excess of what they have agreed to assume under the services agreement.

(g) **Complexity**

The complexity of the Rules may defeat the objective of the drafters to assure greater uniformity and predictability on cargo claims. In part the complexity arises because of the multimodal scope of the Rules and the diversity of the underlying transportation services subject to the Rules. In fairness to those who support the Convention, the decision to embrace multimodal transport preceding or following a sea voyage was

deliberate and reflected current practices in container transport. Further, every new international convention requires a period where the courts resolve the complexities of the language by judicial decision. See the previous paragraph on Conflict of Conventions.

(h) **Forum Shopping**

The failure of certain countries to ratify the Convention may result in increased court proceedings directed to jurisdiction, and to “forum shopping” for the law most favourable to a given claim.

(i) **General**

As Professor Jan Ramberg pointed out at the beginning of UNCITRAL’s efforts to produce a new Convention; the worst possible result will be a partial success, with many countries ratifying the Rules, while many others do not.

Is it not in the interests of international trade to avoid this outcome? Does this possibility suggest that all countries should be prepared to ratify the Rules whatever objections they may have?

Or, to paraphrase the remarks of a former Canadian prime minister: should they hold their nose and ratify?

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