CLECAT
european association for forwarding, transport, logistic and customs services

Position Paper

The European Voice of Freight Logistics and Customs Representatives

Brussels, 11th of May 2009

RE: 2008 - United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea - the "Rotterdam Rules"[1]

CLECAT represents European freight forwarders, logistics service providers and Customs agents. While neutral towards all transport modes, our Members are amongst the main users of maritime transport (or shipping) services, they would thus be directly affected by the possible entry into force of the above mentioned international conventions, which we will refer to as 'Rotterdam Rules' (RR) hereinafter.

CLECAT has been taking a strong interest in the UNCITRAL process in recent years, and has been regularly updated through FIATA, the international organisation representing freight forwarders, which devoted time and energy in monitoring the process on behalf of its Members.

Whereas the appreciation in other areas of the world may be aligned to the following observations only in parts, the message that came from the European interests represented in our sector was however clear and unmistakable: shadows prevail. For this reason CLECAT took the view to provide the public, EU institutions and European governments with the following observations. We hope these are helpful in the decision on whether to ratify this international legal instrument or not.

The first observations that our Members make is that many of the new features, if compared with the old liability schemes of the Hague rules, the Hague-Visby rules or the Hamburg rules seem to provide hardly any additional benefit. The fact that this convention developed into an extremely complex legal instrument ought to find precise and measurable trade-offs, which are unclear and uncertain. It is impossible to abstain from the observation that the evolution of modern logistics would have been better served by a convention that focussed on the intermodal nature of containerisation. At the same time a maritime convention would need to regulate the port to port leg of the intermodal chain and to interconnect with the other intermodal legs by a network principle, which has only partly been incorporated in this one. At the same time this attempt has made this convention so complex and, to some extent, unmanageable.

Implementing the RR is in our view a step into a very extended grey area of uncertainty, both in legal and judicial terms. The risk is that these uncertainties will end up adding a new liability regime side by side with existing ones, thus increasing confusion, rather than mitigating it. Our Members are also concerned that the extreme complication of these rules may lead to a number of local or regional interpretations, which is possible according to the terms laid out in the convention. This would certainly not lead to harmonisation or simplification.

[1] http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html

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Several benefits for maritime carriers are provided by the RR – such as the right to limit liability not only for loss of or damage to cargo but for any breach (Art. 59.1), and no liability for delay unless agreed (Art. 21) – but the RR do not work in a similarly advantageous way for shippers or freight forwarders, especially when acting as contractual carriers or when compensation from the performing carrier is to be sought. Whilst the principle of "freedom of contract" is normally welcome, it is with a split heart that one has to accept the idea of volume contracts (Art. 1.2 and Art. 80), which does not come with sufficient boundaries to protect the interest of the customer.

In addition to the above remarks of a general nature, some of our specific concerns are the following:

- The RR are far too complex (much longer and richer in exceptions than any other existing transport convention) to be readily understandable for users and third parties, including brokers and insurers. Our perception is that insurance and protection will become more expensive, if these rules are adopted;
- The limitations to liability seem to work in one direction only, without offering shippers or freight forwarders any mitigation;
- Freight forwarders are frequently engaged in various capacities in the seaports. The RR now introduce the new concept of the 'maritime performing party' (Art. 1.7 and Art. 19), which could apply to a forwarder who simply turns up at the port to collect a container and leave. From the time it enters the port area till the time it leaves, even though it has nothing to do with the maritime leg, it would become a maritime performing party, caught by the force of RR provisions, unless CMR[2] applies, i.e. the box comes over on wheels. This point alone is able to create an unprecedented number of litigations;
- Multipurpose cargo terminals engaged as distribution centres in logistics operations would strongly oppose a sort of maritime law injection into their business, which presumably will be governed by more sophisticated liability regimes that may be incompatible with the rules;
- We also expect that in those states, where stevedoring and warehousing enterprises are owned by the governments, the RR will not be ratified without exceptions, in order to avoid an escalation of liability insurance premiums;
- The Convention is only a partial network system whereas freight forwarders always sought a full network system. This means that only mandatory conventions override (such as CMR), but private conditions do not[3]. Private conditions are however very frequent and have served the industry without complaint for decades. Eventually the confusion created by conflicting conventions and/or private contractual rules may escalate into mind-fraying litigations in conflicting jurisdictions;
- The ship-owner can probably contract out under the volume contract exemption most of the time, whilst the forwarders are far less likely to be able to do so and could get into a situation, where they are sued much more frequently than the ship-owner, because it has contracted out of the liability regime. At best this would lead to higher liability premiums, but it might well lead to insurers being unable to accept the contract. This would leave both freight forwarders and their customers without protection, sometimes unwittingly.

[2] Convention on the Contract for the International Carriage of Goods by Road: http://www.unece.org/trans/conventn/cmr_e.pdf

[3] If for example goods were shipped on wheels from Germany to the UK, CMR would apply, but if the goods were in a box and shipped off wheels from Calais port to the UK, the RR would apply from Calais port edge to the UK and CMR from Germany to Calais port edge. What operators would do in this situation now is sub-contract on CMR privately, so CMR covers door to door, but the RR would override the off wheels section as it is not a mandatory applicable convention. The result is that operators would be prevented from actually achieving back to back cover.

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- The carriers have been burdened with the cumbersome requirement to issue negotiable transport documents (or electronic equivalents), nevertheless they retain the right to deliver the goods without obtaining the negotiable transport document in return (Art. 47.2). This is seemingly the most contradicting provision: the RR accept that a document is called "negotiable" when in fact it is not! This feature is bound to create conflict and complicated international litigations, it may also be a serious problem with regards to payments and letters of credit.

These are the main reasons for our Members to urge the EU institutions and the European governments **NOT** to ratify this convention.

The entry into force of this convention would make the supply chain more complex and unwieldy and contribute to foster protectionism instead of free trade. We do not see any advantage in substituting the existing rules with these ones. The trading community must have the courage to recognise that this convention is not likely to be of service to the international trade, despite the initial good intentions, all the work done and the commendable opportunity to reflect on modern logistics that this exercise has provided.

We believe that all this work would not be wasted, if one of the first lessons learnt for future work was that 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'.

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