

MONTEVIDEO DECLARATION

THE FACTS

(The text of the “Montevideo Declaration”(MD) appears inside the boxes below, while the italicized text that follows each box addresses each concern raised. Note that the English translation of the MD found inside the boxes below is the one provided by the drafters of the MD, except for the first sentence of paragraph 14, which had been omitted in the translation provided by the drafters, and for reference to the Spanish terms in paragraph 6, the inclusion of which appears to be fundamental to understanding the concern expressed.)

A group of citizens and experts in Maritime Law, who are against their respective countries ratifying and becoming parties to the so-called “Rotterdam Rules” (“Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea”, which was opened for signature on 23rd September 2009 in Rotterdam), have agreed to issue the following Declaration:

1. The aforementioned Convention is seriously detrimental to import and export firms in Latin American countries, almost all of which are dependent on international carriage by sea.

If the Rotterdam Rules were “inappropriate” for shippers and consignees in Latin America, they ought to be similarly “inappropriate” for shippers and consignees in other continents, but it would appear that this is not the case for North America (or at least for the United States) or for Africa, while in Europe the views of shippers are divided. In any event, the reasons for this opinion ought to be stated in subsequent points so that they could be addressed, but no reasons for the view expressed have been given in this paragraph.

2. Not only does it fail to provide equity and reciprocal benefits in international trade but in itself the Convention constitutes a highly complex juridical instrument with a regulatory approach which is full of references from one provision to another and contains definitions that are tautological. Furthermore, it introduces a maritime neo-language that invalidates a great amount of international case law created since 1924 and which, due to its deficient legislative technique, gives rise to very different interpretations.

a) The Rotterdam Rules are “highly complex”: *There is no doubt that the Convention is more complex than the Hague-Visby Rules and the Hamburg Rules, even though it may also be stated that the Hamburg Rules are more complex than the Hague-Visby Rules. But this is due, on the one hand, to the fact that the Rotterdam Rules attempt to ensure uniformity in areas of transport law not covered by the previous conventions (e.g. electronic equivalents to paper documents, right of control during carriage, delivery) and, on the other hand, to the fact that the Rotterdam Rules try to better regulate areas already regulated in the previous conventions (e.g. the obligations and liability of the shipper).*

One should also keep in mind that the complexity of a convention should not be assessed by simply counting the number of articles or the length of each provision. For instance, the provision of the contracts excluded from the scope of application of the Rotterdam Rules is much more “complex” compared with the Hague and the Hague-

Visby Rules. However, is the situation improved if the article simply states, along the lines of the Hague and the Hague-Visby Rules, that “This Convention does not apply to charterparties”? Such a simplified text would leave much scope for national courts to decide whether or not to apply the Convention, which would in general lead to a much-reduced degree of harmonization. A balance must be struck between “lengthy or complex” and precision and predictability.

b) The Rotterdam Rules are ‘over-regulatory’: *The question must be asked whether it has really been a mistake to regulate additional areas of transport law. Is this approach really adversely affecting shippers and consignees?*

c) The Rotterdam Rules are full of cross-references between provisions: *Indeed, there are many cross references, but, with respect, that is an appropriate legislative technique widely adopted and accepted both at international and national levels.*

d) There are in the Rotterdam Rules “tautological definitions”: *The only tautological definitions appear to be those of “non-liner transportation”, “non-negotiable transport document” and “non-negotiable electronic transport record”. This approach was used to avoid creating uncertain empty areas between “liner transportation”, clearly defined, and transportation other than liner transportation (the same reasoning would apply to the other two definitions). In any event, the meaning of that definition is quite clear and should not cause confusion.*

e) The Rotterdam Rules introduce “a maritime neo-language that invalidates a great amount of international case law created since 1924 and which, due to its deficient legislative technique, gives rise to very different interpretations”: *It is not clear to which terms reference is being made; if reference is made to “right of control”, indeed it is new, but that is due to the fact that that right, which is exercised in practice, had not previously been the subject of legislative regulation and therefore it is obvious that the jurisprudence on the Hague-Visby Rules is of no avail. As to whether the legislative technique of the Rotterdam Rules is deficient, perhaps it should be explained in what matter it is seen to be deficient. Furthermore, a review of the travaux préparatoires indicates that the drafters intended that the Rotterdam Rules actually preserve a great deal of the terminology used in the Hague, Hague-Visby and Hamburg Rules so as to preserve as much of the existing case law and doctrine as possible.*

3. It represents a retrogressive step in the standards and practices prevailing in multi-modal carriage, since it excludes other means of transport whenever shipment by sea is not involved – for it only regulates the marine carriage leg and associated transport (maritime plus). Moreover, it is not *per se* a convention of universal and uniform scope, as it allows exemptions to its own provisions, for example, in the case of “volume contracts”. In addition, it leaves the door open for states not to ratify the rules on Jurisdiction and Arbitration (Chapters 14 and 15) which means these provisions are not compulsory for contracting parties.

a) Multimodal carriage: *The Rotterdam Rules do not intend to replace the United Nations Convention on International Multimodal Transport of Goods or UNCTAD/ICC Rules for Multimodal Transport Documents. Rather, they replace the Hague and Hague-Visby or the Hamburg Rules. It is not correct to see Rotterdam Rules as an “imperfect” multimodal transport law convention. It should be understood as an expanded maritime transport law convention (“maritime-plus”), and in this sense, they are clearly not “a step backwards”.*

b) Volume contracts: *The Rotterdam Rules allow a certain degree of flexibility for the parties in connection with “volume contracts”, which must be freely negotiated. The issue is not whether broader uniformity is desirable or not, but instead to what extent the mandatory rules of the carrier’s liability regime should govern all contracts of carriage, regardless of the level of sophistication and bargaining power of the contracting parties.*

c) Jurisdiction and Arbitration: *Each state has its own interests with respect to the preferred approach to jurisdiction and arbitration rules, and an acceptable compromise of those national interests is not easily found. If the Rotterdam Rules did not contain opt-in chapters on jurisdiction and arbitration, the likely number of ratifications would be substantially decreased. It should be noted that the rules on jurisdiction and arbitration differ considerably from state to state, and providing the opportunity for at least some level of harmonization in these important areas cannot be seen as “a step backwards”.*

4. It introduces expressions that in juridical terms bear little or no significance to transportation contracts, such as: volume contract, regular or non-regular liner transportation, performing party and maritime performing party. These terms change neither the concept nor the purpose of contracts of carriage.

Article 1 of the Rotterdam Rules introduces a great number of definitions which are, without exception, relevant in applying and understanding the Convention. The comments below are not comprehensive, but they are intended to demonstrate the need for definitions in general and the need for the definitions mentioned in paragraph 4 of the MD, in particular.

To the extent that any definition has to do with the “scope of the contract of carriage”, that definition is of great relevance.

First, in order to understand the scope of application of the Rotterdam Rules, the definition of “contract of carriage” in article 1(1) is of importance. That concept is then further specified in articles 5 and 6. The same is true concerning the definitions in Article 1(3) and 1(4) on “liner transportation” and “non-liner transportation”.

The aim of the Rotterdam Rules is to maintain at least the same scope of application as currently exists in the case of the Hague Rules and the Hague-Visby Rules, but to make these provisions even clearer than before. While the issuance of a bill of lading is the key underlying factor of the scope of application of the Hague and Hague-Visby Rules, in reality, other factors like the nature of the trade plus certain contractual and documentary aspects provide a more precise method of appropriately defining the scope of application of the Convention.

As such, the scope of application provisions of the Rotterdam Rules look different from the Hague and Hague-Visby Rules. But, in their application, there are no dramatic differences between the present major regimes and the Rotterdam Rules. In fact, cargo interests will have greater protection under the Rotterdam Rules than under the Hague or Hague-Visby Rules due to the fact that the application of the Rotterdam Rules is not tied to, and thus restricted by, the issuance of a particular type of document.

The definition of “volume contract” in article 1(2) is absolutely necessary. First, it clarifies that the volume contract is a contract of carriage and that the Rotterdam Rules

might or might not be applicable due to the separate scope of application provisions. Second, volume contracts have a special status within the Rotterdam Rules pursuant to article 80, which allows contracting parties, and in some cases, third parties, to deviate from the mandatory framework of the Rotterdam Rules under certain preconditions enumerated in that provision. Third, the definition of volume contract is relevant for choice of court agreements as specified in article 67.

As the Rotterdam Rules are of “maritime plus” nature, meaning that the Rules can be applied in pure sea carriage and also in sea carriage combined with another mode of transport, it was necessary to define the “performing party” in article 1(6). The liability of a non-maritime performing party, for example, a road haulier or road carrier, is not regulated in the Rotterdam Rules. However, it is necessary to define these parties, for example, to specify when the goods have been received for carriage and when they have been delivered at the destination. In this context, the performing party plays a role as found in article 12 of the Rotterdam Rules, which defines the period of responsibility of the carrier. Another example of the need for such a definition is that the vicarious liability of the carrier covers any performing party in accordance with article 18 of the Convention.

The status of the “maritime performing party”, a sub-category of the performing party and defined in article 1(7), is also necessarily regulated, but separately from the performing party. The maritime performing party carries a kind of independent liability as regulated in article 19. It is natural that the Rotterdam Rules might be applicable to such a maritime performing party, as it is a question of sea carriage or a sea carriage link as well. Further, jurisdiction issues that relate specifically to the maritime performing party are regulated in article 68 of the Convention.

5. It introduces the concept of the “documentary shipper”, which is different from the shipper, although the Convention itself admits that this person is not in fact the other party to the contract of carriage. It also removes the concept of the transit agent or cargo transit agent.

a) *Documentary shipper: The legal status of the person who appears in the transport document as the shipper but is not really a contracting party is not clear under the previous conventions or under applicable national laws. The Rotterdam Rules address this issue and provide a uniform solution for this situation. The “documentary shipper” is nothing more than a shorthand way of referring to such legal situations, and does not intend to bring any substantial change for the conceptual framework with respect to the contracting parties.*

b) *Freight forwarder and cargo forwarding agents: The Rotterdam Rules did not “remove” the concepts of freight forwarders (“transit agents”) or cargo forwarding agents (“cargo transit agent”). These concepts were not used in the Hague, Hague-Visby or Hamburg Rules and the Rotterdam Rules simply continue this tradition. The reason why the Rotterdam Rules do not use these concepts is that freight forwarders or cargo forwarding agents are involved in a contract of carriage in a different capacity depending on the particular situation. Because freight forwarders or cargo forwarding agents play different roles depending on the cases, the Rotterdam Rules regulate them based on the roles they play (carrier, shipper, maritime performing party, etc.).*

For instance, if a freight forwarder undertakes to carry the goods to its customer, it is a carrier under the Rotterdam Rules. If a freight forwarder enters into a contract with a

sub-carrier in its own name, it is a shipper under the Rotterdam Rules. If a freight forwarder enters into a contract with a carrier on behalf of a customer (as an agent), it is not the carrier or the shipper under the Rotterdam Rules and is not liable as such (nor is it usually a “maritime performing party”).

6. It removes the terms “consignatario”¹ and endorsee of the cargo² which are time-honoured expressions employed for almost two centuries in international legislation, case law and practice. These terms are replaced by others with no juridical significance such as transport document holder, “destinatario”, right of control and controlling party.

The importance of the definitions in the Rotterdam Rules has already been discussed, and all of the terms referred to in the last sentence of paragraph 6 of the MD have a definition in the Rotterdam Rules that clarifies their precise meaning. This simple fact disproves the suggestion that such terms are legally meaningless or have no juridical significance.

It is true that there are indeed some terms that are new in the Rotterdam Rules as compared with existing maritime carriage conventions, such as the “right of control” and the “controlling party”. However, these terms, as previously stated, are not only already known in international practice, they have been carefully defined and their implications clearly laid out in the Convention.

The rest of the terms referred to in paragraph 6 of the MD, are not only defined in the Rotterdam Rules (Article 1, pars. 10 and 11), they are by no means new in contract of carriage terminology. The term “destinatario” is already widely used in some national and international instruments, such as in the Agreement on International Multimodal Transport between the States Parties to the MERCOSUR, in Decision 399 of the Andean Community on Road Carriage, or in the Spanish version of the 1999 Convention for the Unification of Certain Rules for International Carriage by Air. “Destinatario” is considered clearer than “consignatario”, precisely because of the fact that this latter term is ambiguous and has created some confusion, for it can refer to persons other than the one entitled to claim delivery of the goods at destination under the contract of carriage (for instance, to the cargo agent authorized by the consignee to collect the goods from the carrier). Likewise, the term “holder” of the transport document is very widely employed in much national legislation and in the existing international rules on the contract of carriage by sea (e.g., in the Hamburg Rules). In such rules, and certainly in the Rotterdam Rules, the term comprises any endorsee of the bill of lading (and to that extent “endorsee of the cargo”).

For the foregoing reasons, it cannot be stated that the terminology and the concepts relied upon by the Rotterdam Rules will entail a dramatic change with respect to previously-used terms. Much to the contrary, they are intended to preserve terms and concepts already used, while increasing clarity, and introducing some new concepts that are thought to improve the law applicable to the contract of carriage.

¹ The English translation provided by the drafters of the MD translates this word as “cargo broker.”

² The English translation provided by the drafters of the MD translates this word as “cargo agent”.

7. It removes the term bill of lading, also a traditional concept used in all international legislation, case law and practice, to be replaced by vague expressions such as transport document or electronic transport document.

The Rotterdam Rules have a much wider scope of application than the Hague and Hague-Visby Rules. Thus, as noted above in response to paragraph 4 of the MD, the Rotterdam Rules apply irrespective of whether a bill of lading or some other transport document (or no transport document at all) has been issued. Consequently, they apply to both bills of lading and other types of transport documents, such as sea waybills. It was necessary, therefore, to use the generic term “transport document” rather than the narrower concept “bill of lading”. This is similar to the approach of the Hamburg Rules. The term is qualified and given a more precise content in both the definitions (articles 1(14)-(16)) and in the substantive rules, e.g. article 46, so that the substantive rule will depend upon which type of document is issued, e.g. a bill of lading, a sea waybill, etc. The regulation in the Rotterdam Rules of the electronic equivalent of paper documents in maritime transport is a novelty as compared with the existing conventions and a new term therefore had to be inserted. The term “electronic transport record” is in line with other conventions on e-commerce, and the introduction of this regulation is one of the most important aspects of the Rotterdam Rules.

8. It errs in stating that the replacement for the Bill of Lading (namely the transport document) is the contract of carriage when it is really nothing more than evidence of the existence thereof. Furthermore, its other functions such as a mate’s receipt for merchandise on board and credit note are ignored.

The assertion in paragraph 8 seems to be based on a misapprehension; the term “transport document” comprises more than the bill of lading, also including, for example, sea waybills. The term is defined in article 1(14), pursuant to which paragraph (b) stipulates that the transport document can either evidence or contain the contract of carriage. Further, under article 1(14)(a), the transport document must evidence the receipt of the goods. Moreover, a transport document may be negotiable as defined in article 1(15). Consequently, a negotiable bill of lading would be deemed a negotiable transport document under the RR and be subject to, inter alia, article 41(b)(i) on the evidentiary effect of the contract particulars, and article 47 on the delivery of the goods. The traditional functions of the bill of lading are, thus, maintained in the Rotterdam Rules.

9. It allows special clauses to be inserted into the transport document, thus altering the current one, which is only admissible in freely negotiated charter parties.

While it is not completely clear what this paragraph of the MD is complaining of, the issuance and content of the transport document is regulated in chapter 8 of the Rotterdam Rules. Any further clauses in the transport document will be void if they excluded or limited the carrier’s obligations or liability, or increased the shipper’s obligations or liability as set out in the Rotterdam Rules, cf. article 79. This situation is no different from that under the current conventions.

10. It accepts the validity of adhesion clauses incorporated into transport documents that attribute exclusive jurisdiction to the courts that the carrier may choose. In practice, this means that claimants will be bound always to bring suits in the courts where the carrier has its domicile, thus excluding the courts of States that are users of

transportation services. In particular, this will prevent a shipper claiming breach of contract from having recourse to the courts in the place of delivery.

First, it should be recognized that chapter 14 of the Rotterdam Rules is subject to “opt-in” by a Contracting State, and that article 67 applies only if a Contracting State makes a declaration to apply the provisions in chapter 14. If a State does not support the rule on exclusive jurisdiction clauses under Rotterdam Rules, it should simply ratify the Convention without additional action.

If a State does opt into the chapter on jurisdiction, article 67 allows an exclusive jurisdiction clause only in limited circumstances. First, an exclusive jurisdiction clause is allowed only in volume contracts (article 67(1)(a)). In all other cases, claimants always have the option to bring an action in the places listed in article 66. Second, even for the exclusive jurisdiction clause contained in a volume contract, article 67 requires several conditions for its validity. The requirements are even more stringent for the clause being valid vis-à-vis third parties (article 67(2)).

Therefore, it is not at all accurate to state that the Convention “accepts the validity of adhesion clauses incorporated into transport documents that attribute exclusive jurisdiction to the courts that the carrier may choose”.

11. It does not apply to transport documents or bills of lading issued under charter parties relating to the whole or part of a ship, which is a standard commercial procedure with many years of untroubled application behind it.

At the preparatory stage of the Rotterdam Rules, the States negotiating the text decided early on that the bill of lading should not play a prevalent role in the regime to the same extent as they do in the Hague and the Hague-Visby Rules. It was agreed there was no commercial need to emphasize the legal role of this particular document.

This approach does not mean, however, that the Rotterdam Rules have made bills of lading irrelevant; rather, the particular term “bill of lading” is simply not reproduced. When reading the definition of “negotiable transport document” in article 1(15) of the Rotterdam Rules, it is clear that the bill of lading is still regulated as a negotiable transport document. The electronic alternative is defined in article 1(19).

Importantly, the bill of lading or a negotiable transport document is not the decisive factor in determining the scope of application of the Convention,³ which is mainly regulated in articles 5 to 7.

The Rotterdam Rules are mandatory, unless otherwise mentioned in a particular provision, as further specified in article 79. This means that once the Rotterdam Rules apply to the contract of carriage, the mandatory protection in the regime operates to the benefit of the contracting parties and any third party who has a legal interest in the goods carried or to be carried.

If the contract of carriage is not covered by the Rotterdam Rules, the situation is different. For example, a voyage charter party used in non-liner trade does not fall

³ A transport document or an electronic transport record might be relevant in the exceptional situation regulated in paragraph 2 of article 6 of the Rotterdam Rules. This provision became necessary in order not to diminish the scope of application of the Rotterdam Rules as compared with the Hague and Hague-Visby Rules.

under the scope of application of the Rotterdam Rules. It is thus open to the contracting parties, the charterer and the owner, to agree upon terms, including liability in case the goods are lost or damaged. National law might have restrictions, but in this case the restrictions do not derive from the Rotterdam Rules. This is exactly the same principle as found in the Hague and Hague-Visby Rules.

Once the contract of carriage is outside the scope of application of the Rotterdam Rules, it means that the legal status of a third party that has an interest in the goods must be discussed and solved. The approach in the Hague and Hague-Visby Rules is that any bill of lading issued under a charter party that regulates the relations between the carrier and the holder makes the Hague or the Hague-Visby Rules applicable in this particular relationship, as further specified in article I (b) of the Hague and Hague-Visby Rules.

In UNCITRAL, States discussed whether the protection of the third party in such a situation should be combined with a particular transport document or whether the status of the third party would be decisive. The latter view prevailed. According to article 7 of the Rotterdam Rules, certain third parties are protected by the Rotterdam Rules even if the basic contract of carriage, such as a voyage charterparty in non-linear trade, is outside the scope of application of the Rotterdam Rules. These third parties are specifically mentioned and they are: the consignee, controlling party or holder (that is not an original party to the charterparty). All these third parties are defined in article 1 of the Rotterdam Rules, see article 1(10), 1(11) and 1(13) respectively. Looking at the definition of “holder”, it becomes clear that the holder of a bill of lading is covered even if this is not separately mentioned in the Rotterdam Rules. As a matter of fact, the protection of third parties is wider under the Rotterdam Rules as compared with the Hague and the Hague-Visby Rules. Possession of a bill of lading is no longer necessary as long as the third party has the status of any of those groups of persons specifically mentioned in article 7 of the Rotterdam Rules.

12. It leaves the carrier free to decide whether to take goods on board or destroy them if such merchandise may at any time during the course of shipment become dangerous. It also relieves the carrier of liability for any natural loss, whether of weight or volume, without laying down specific limits for each type of merchandise. Moreover, it permits carriers to deviate without losing rights of exemption or limitation of liability due to such deviation.

a) Freedom of the carrier to reject or destroy goods: *Article 15, which grants the carrier the right to decline to receive or to destroy or render harmless goods, merely confirms principles that exist in the present conventions: see article 4.6 of the Hague-Visby Rules and article 13(2)(b) of the Hamburg Rules.*

b) Exoneration of the carrier from liability for loss due to natural wastage: *Article 17(3)(j) reproduces article 4.2(m) of the Hague-Visby Rules but, as is the case with all other events listed in that paragraph, is not an exoneration: proof of such an event or circumstance merely results in a reversal of the burden of proof.*

c) Right of deviation: *Article 24 does not allow the carrier to deviate, but merely provides that when applicable law provides that deviation constitutes a breach of the carrier’s obligations, the provisions of the Convention continue to apply: the purpose is to exclude the possibility that the deviation “destroys the contract”, as some common law jurisprudence has held in the past.*

13. It modifies the clear rules that previously governed carriers' liability significantly by placing the burden of proof on the claimant (whether the shipper or the consignee) which substantially alters the current state of affairs. There is, however, no reason to abandon the traditional system whereby the person who suffers loss or prejudice only has to prove the existence of the contract of carriage and breach of its terms. To that extent, it is up to the carrier to demonstrate reliance on exemptions which may relieve it from liability.

In view of the number of exemptions provided for, it is unclear whether the carrier now commits itself to a result, and the obligation on the carrier to look after the goods it receives on board disappears. But, if the essence of the contract is the duty to produce a result, this gives rise to a basic obligation on the carrier, namely to safeguard the merchandise.

With regard to loading and stowage on board the fact that carriers are allowed to transfer the responsibility for such operations to the shipper or other third party or parties means that the carrier is freed of its obligations to supervise and/or be responsible for proper stowage of the goods which may cause seaworthiness to be compromised.

a) Burden of proof: *It is hard to understand why it is being asserted that the rules are clearer under previous conventions or the Rotterdam Rules increase the burden of proof on the claimant.*

The burden of proof is not clearly stated under the Hague-Visby Rules or even under the Hamburg Rules. Articles 17(1) and (2) of the Rotterdam Rules explicitly codify the burden of proof under these conventions which is accepted in most jurisdictions.

It should be noted that articles 17(1) and (2) do not change the traditional rule at all: (i) The claimant (shipper or consignee) must only prove the loss, damage or delay or whatever caused it occurred during the carrier's period of responsibility ("breach") and (ii) the carrier must prove "the external cause that may exonerate it from liability".

b) Standard of carrier's liability: *It is correct that there are some important differences between the Rotterdam Rules and the Hague-Visby Rules. However, the differences indicate that the Rotterdam Rules substantially strengthen the carrier's liability.*

The list of perils is less extensive under the Rotterdam Rules. The major differences with the list under the Hague and the Hague-Visby Rules are the following: Error in navigation and in management is no longer a valid defence under article 17(3). While the "fire defence" still exists, the carrier cannot rely on the defence if the person referred to in article 18 (any performing party, employees etc.) caused the fire. (article 17(4)(a)). This is the same rule as in the Hamburg Rules.

In short, although article 17 of Rotterdam Rules might look like the Hague-Visby Rules, it is much more similar to the basis of liability under Hamburg Rules.

c) "Obligation of result": *The Rotterdam Rules do not change the nature of carrier's obligation under the contract of carriage (which is described as "obligation of result" (as opposed to "obligation of means") under some jurisdictions). This is why the claimant only has to prove loss, damage or delay (or their cause) occurred during*

the period of responsibility under article 17 and does not have to prove the carrier did not exercise due care.

“Obligation of result” does not mean that the obligor has no excuse for the result. Although the carrier’s obligation under the contract of carriage was described as “obligation of result”, the carrier is subject to fault-based liability under the Hague-Visby or the Hamburg Rules. The list of exonerations under article 17(3) which is shorter than the Hague-Visby is not inconsistent with carrier’s obligation as “obligation of result”.

d) Seaworthiness obligation: *Although article 13(2) allows the parties to agree that the shipper performs the stowage of the goods, the obligation under article 14 is not affected. Whatever the contents of agreement under article 13(2) is or which task the shipper actually performs under the agreement, the carrier is required to exercise due diligence to make and keep the ship seaworthy and cargoworthy – obligations that are now continuing obligations for the carrier.*

14. It sets nominal limits of liability for loss or damage – 875 SDR per package and 3 SDR per kilogram of gross weight – that entail a radical decrease of the limits set out in The Hague-Visby Rules. Furthermore, as the unit of account is a monetary unit that is subject to inflation, the passage of time will tend to lead to a progressive increase in carriers’ irresponsibility. The limitation on liability for delay (two and a half times the value of the freight) seems insufficient too. In addition, the rules with respect to the amount of compensation due when the value of the goods has been declared are not clear either.

The limitation of liability only applies to the carrier but not to the shipper (Articles 17/24) whose liability is integral and unlimited. The carrier is therefore granted an unacceptable privilege.

a) Sufficiency of the limitation on liability for loss or damage: *If there are limits on liability, at least some cases will involve goods that are worth more than the limitation amounts. A limitation level that permits full recovery in every case is the same as no limitation whatsoever. The available empirical evidence suggests that the Hague-Visby Rules’ combination of weight and package limitations (2 SDRs per kilogram and 666.67 SDRs per package) provides for full recovery in over 90% of all shipments. The estimate for the Hamburg Rules’ limitation figures (2.5 SDRs per kilogram and 835 SDRs per package) is thought to be closer to 95% of all shipments. The Rotterdam Rules provide even higher limitation amounts (3 SDRs per kilogram and 875 SDRs per package). Thus all but the most valuable shipments will be entitled to full recovery under the new convention. To argue that even the most valuable shipments should also be entitled to full recovery is to implicitly reject the concept of limited liability. If there is limitation of liability, the Rotterdam Rules provide limitation amounts that are adequate for their purpose.*

b) Inflation: *Paragraph 14 of the MD also complains that the SDR is subject to inflation, but that complaint is meaningless. Every monetary unit is subject to inflation (or deflation, if the world’s economies move in that direction). The SDR minimizes the risks of inflation (or deflation) in any single currency because its value is based on a weighted average of the world’s most important currencies in international trade. In any event, inflation does not appear to be a significant concern in today’s world and it has not been a significant concern in this specific context for the last half-century. As a*

result of the container revolution, the average value of a package of goods carried by sea has actually decreased over the last fifty years. This is due in part to the lower shipping costs associated with the increased efficiency of the system, which has made it profitable to ship less valuable goods. It is also due in part to the fact that containerized goods are shipped in much smaller packages today than they were fifty years ago.

c) Sufficiency of the limitation on liability for delay: *The carrier's liability for delay is less often at issue. When speed is a factor, most shippers arrange for carriage by air or land. For carriage by sea, shippers sacrifice speed to obtain lower freight costs. When delivery time is essential, shippers generally make separate arrangements with carriers (including liability limits that meet the shippers' needs). In most cases, the Rotterdam Rules' limit on delay damages is two and one-half times the limit under the Hamburg Rules (which declare that liability for delay will "not exceed[]" the total freight payable under the contract of carriage," article 6(1)(b)).*

d) Compensation in cases of declared value: *The Rotterdam Rules' treatment of the compensation due when the value of the goods has been declared is exactly the same as in prior conventions. It has always been well understood that the declared value becomes the new limit on the carrier's liability. But the point is insignificant in practice because virtually every shipper prefers not to declare the value of the goods.*

e) Limitation on shipper's liability: *Finally, paragraph 14 complains that the shipper does not benefit from a limitation of liability. UNCITRAL spent many hours trying to formulate a limitation for the shipper's liability, but no one could devise a solution that was even arguably workable. In fact, no modern convention for the carriage of goods by any means of transport contains a limitation on the shipper's liability. The Montevideo Declaration similarly fails to propose a workable solution.*

15. The limitation of carriers' liability is prejudicial for transport users as it entails a transfer of costs in favour of ship-owners and affects the balance of payments of countries that are reliant on shipping services. It must be pointed out that limitation of liability is not admissible in the laws of many countries in this region of the world (for example, Brazil and Uruguay) and that the limits adopted by Argentina and other countries that have ratified the Hague Rules are significantly higher.

Paragraph 15 of the Montevideo Declaration rejects any limitation of the carrier's liability. That criticism misunderstands the nature of limitation and its relationship to freight rates. Before carriers pay compensation for damages they first collect the money in freight that covers all of their costs (including liability costs). If carriers were liable to pay more compensation for loss, damage, or delay, then freight rates would increase.

Without limitation of liability, every shipper would pay more in freight to cover the cost of the increased compensation for high-value cargo (which is the only cargo affected by limitation). Thus shippers of ordinary cargo would subsidize the carriage of high-value cargo. With limitation of liability, those few shippers who ship cargo that is more valuable than the limitation levels can decide for themselves whether to declare the full value (effectively buying extra insurance from the carrier) or buy insurance elsewhere, knowing that the carrier will not be liable above the limitation levels.

The logic of limited liability is so strong that every international transport law convention, regardless of the mode of transportation, has always provided for limited liability for the carrier. Eliminating limitation of liability would burden the entire system for the benefit of a few high-value shippers that can easily protect themselves through insurance.

16. With a view to achieving unanimity juridical principles and provisions have been incorporated into these new Rules both from those adopted by the Hague Rules of 1924 and from the Hamburg Rules.

To put it another way, a framework based on Common Law has been covered over with extracts from the Hamburg Rules which are founded on European codified civil law.

When it is said that the aim is to achieve uniformity in applicable law in order to facilitate international maritime trade, this ignores the incoherence of the mass of Rotterdam provisions designed to please everybody which, in fact, only leads to a legal Tower of Babel. This outcome is considerably more inappropriate than analysing the laws of other countries that have been built up to protect the rights of users, i.e. importers and exporters.

Modern information technology allows the world to have access to local laws and regulations along with the courts' and legal authorities' interpretations thereof. In other words it is not so difficult to find out about transoceanic rules and regulations.

a) *The first two sentences of this final paragraph, in which reference is made to the Hague-Visby Rules and the Hamburg Rules, seem to criticize the fact that the Rotterdam Rules incorporate, not without changes and adaptations to the present time, certain provisions of the Hague-Visby Rules and of the Hamburg Rules. The complaint seems to be that the Rotterdam Rules have adopted a common law "skeleton" and placed on it a vest (ropaje) of civil law. It is difficult to ascertain what is meant, but it appears that the Rotterdam Rules have not been read very carefully, nor has note been taken of the Convention's very significant changes as compared with the Hague-Visby Rules (e.g. abolition of the exonerations for fault in navigation and management of the ship, qualification of the excepted perils as reversals of the burden of proof), and the regulation ex novo of important areas of transport law, such as the electronic equivalents of transport documents, identity of the carrier, right of control and delivery.*

b) *The rest of the paragraph contains two equally surprising assertions.*

The first is that the Rotterdam Rules are an incoherent cumulus of articles and a real jurisprudential Tower of Babel: this is rather novel language for jurists, and it might be best not to comment.

The second is that nowadays uniformity of law is not necessary any more since modern computer technology puts at the disposal of the whole universe local laws along with doctrinal and judicial interpretations. Therefore, the MD's conclusion seems to be that the continuous efforts that are being made inter alia by the UN Organizations and by the European Union with a view to eliminating the barriers to international trade caused by a lack of uniformity in national laws and regulations are a waste of time.

To sum up, it is a mistake to proclaim that the Rotterdam Rules will put an end to the “worldwide confusion currently affecting this sector” as the promoters of the new regulations enthusiastically assert.

Conclusion: For all the above reasons we call on the governments and parliaments of our respective countries NOT to ratify or become party to the “Rotterdam Rules”.

Montevideo, 22nd of October 2010.

The view expressed in the closing paragraphs of the MD is clearly not shared by the many States and industry groups that participated in the drafting of the Rotterdam Rules, nor by the UN General Assembly that called upon Member States to consider becoming party to the Convention, nor by the European Parliament, which echoed that call.

The authors of this point-by-point refutation of the MD have responded to each of the issues raised in the MD in order to ensure that States are in a position to make an informed decision about whether or not to adopt the Rotterdam Rules. It is hoped that this decision is made only after a rigorous and honest examination and consideration of all facets of the new regime.

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