COMITE MARITIME INTERNATIONAL

Standing Committee for Ratification of the Rotterdam Rules

Questionnaire to MLAs

Are you aware of:

1. any time stamped data collection or research that has been carried out as to the time or cost savings to the maritime industry in a paperless carriage by sea documentary world?

2. any issues that have arisen since 2000, (or earlier)in claims handling which were then resolved with or without recourse to litigation in one way or another, but which could have possibly been avoided thanks to provisions of the Rotterdam Rules, or which would have had a different outcome from what would have happened in a Rotterdam Rules environment.

3. any reported disputes or cases in which the Rotterdam Rules would have provided a different result to the outcome (including resolving the issue involved in the case.)

Examples in relation to the second and third questions might include where the issue or case related to the right of control of the goods, electronic commerce, delivery of the goods (including deliveries without presentation of negotiable document), deck cargo, deviation, undelivered goods, concealed damage in multimodal carriage, status and nature of a maritime + B/L where the carriers were on land, nature and status of Sea waybills, jurisdiction/forum shopping ,arbitration, nautical fault, seaworthiness during the voyage, package limitation, time limitation, delays in giving notice under the Hague or Hague Visby regimes, fire, delay, identify of carrier, lack of information in relation to cargo and burden of proof.

It will be sufficient to identify any case anonymously. Please just indicate the scope of the dispute and the issues that fall within the scope of the above Questionnaire. If there is a published record of the matter, please attach a copy.

A possible response could be as simple as:

> Swiss Courts / Swiss Law - pending: dispute on delivery of cargo without surrendering B/L; nature of B/L once on land (FIATA B/L with short on-carriage); value of B/L transferred to third parties after delivery of the goods; time bar applicable for cargo claim; role and liability of the freight forwarder acting as carrier's agent at destination.

Please send your responses to:

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and

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FIRMADO

MINISTRY
OF TRANSPORT
AND SUSTAINABLE
MOBILITY

The State Secretary for
Transport
and Sustainable
Mobility

Madrid, 15 July 2024

Fotini Ioannidou
Director - Maritime and Inland Waterway
Transport Directorate-General for Mobility and
Transport EUROPEAN COMMISSION

Dear Ms. Fotini:

I am writing to you on behalf of the Spanish Ministry of Transport and Sustainable Mobility, with the request that, once again, you drive for the ratification by the Member States of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.

Both the Member States and the European Commission actively participated in the negotiation of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, adopted on 11 December 2008, also known as the Rotterdam Rules. Even the European Parliament Resolution of 5 May 2010 on strategic objectives and recommendations for the EU's maritime transport policy until 2018 (2009/2095(INI)) was adopted, which urged, in point 11, the Member States to ratify the Rotterdam Rules. However, only Spain deposited the instrument of ratification of this convention on 19 January 2011.

The passage of time has highlighted the lack of a uniform regime to respond to the new technological and commercial challenges of international maritime transport. This is notably the case with the growth of containerised transport and the desirability of grouping door-to-door transport or the emergence of electronic transport documents into a single contract.

None of these issues are regulated in the Hague-Visby Rules of 1924 or the Hamburg Rules of 1978. The Rotterdam Rules, on the other hand, do address these issues and constitute a much more advanced and balanced convention than those mentioned above. This same position has also been expressed recently by both the Comité Maritime International and the Spanish Maritime Law Association, which urge that the gaps and shortcomings of the current international maritime transport regime be overcome.

The Ministry of Transport and Sustainable Mobility of the Kingdom of Spain shares this point of view. We believe that the Rotterdam Rules would enable all the member countries of the European Union to have a uniform, modern and attractive regulation for maritime transport players.

That is why we want to urge the ratification by the Member States of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules).

Yours sincerely

José Antonio Santano Clavero

Main Features of the Rotterdam Rules ("RR")

1. **Introduction**: the RR are a 2008 UN Convention that addresses the rights and obligations of the parties involved in the contract for maritime carriage of goods: shipper, carrier, consignee and 3rd party holder of a negotiable maritime transport document. It is meant to replace an old convention, the 1924 Hague Rules ("HR"), which convention is substantially based on even older legislation: the US Harter Act 1893 and to bring the law relating to maritime carriage up-to-date again.

2. **Hague Rules are outdated which has led to disuniformity of maritime law:** in the final decades of the 19th century still more sailing ships existed than steamers and maritime carriage was a risky venture. Consequently, the Hague Rules include primarily provisions relating the carriers' liabilities, including exceptions thereto. Most other legal rules on the maritime contract were left to the applicable contract law and/or maritime trade customs and practices.
   Meantime, over the past century many developments took place in the field of type and size of ships, shape of cargo (the container), trade patterns and –customs including e-commerce and multimodality, communication techniques including digitalization, safety and environment, et cetera, which together make the old convention fully obsolete. The result has been that a lot of countries tried to solve the issues at hand in their own way, which has led to a disuniformity of maritime contract law, while uniformity is required for several reasons.

3. **Uniformity of maritime law required:** first, because in transport always a third party is involved, often the consignee, who doesn't conclude the contract, but is effectively bound to it. Also other parties, such as cargo insurers and trade financing banks, necessarily rely on the terms of the contract of carriage.
   A second reason is the international character of the maritime trade: if the relevant law in the various countries involved is uniform, it will provide certainty of law. This will have a cost decreasing effect, levels the playing field of the parties involved, increases predictability and prevents

litigation to a minimum.
A further relevant matter is that, particularly in the (container)liner trade, contracts of maritime carriage are contracts of adherence and/or are referring to general conditions which are not seldom more favorable to carriers than to the other parties involved in the carriage.
In the paragraphs 4 -22 hereunder follow the main features of the RR, viewed from a shipper's perspective.

4. **Functional scope:** the HR apply to bills of lading only, the RR apply in the liner trade to all maritime transport contracts (except charterparties), irrespective whether a transport document is issued and the type of document. In the bulk trade the RR apply to the relationship between the carrier and the consignee and/or the party in control of the goods other than the shipper.

5. **Geographical scope (1):** the HR apply to carriage from port to port only. Under the RR parties are free to include also inland parts of the carriage under the contract. In other words: the RR may cover door-to-door transport, provided there is a maritime part.

6. **Geographical scope (2):** the HR apply to carriage *from* a port in a ratifying state (so, is related to export goods only). The RR apply to carriage *both to and from* a port or place in a ratifying state (so, is related to both import and export goods).

7. **Not always mandatory law:** the RR provide for commercial freedom where possible (such as when charterparties or volumecontracts are used where parties are deemed to have equal negotiating power) and provide for mandatory law where needed to protect certain parties (such as consignees or parties in control of the goods that did not conclude the contract of carriage, or where contracts of adhesion are commonly used, such as in the liner trade).
The carrier's obligations and liabilities are, in principle, 'one-sided' mandatory in the sense that any deviation therefrom is only allowed when it is in favor of the shipper/consignee. The shipper's obligations and

liabilities are mandatory and may not be deviated from either in favor of the carrier or of the shipper/consignee.

8. **Carrier's obligations and liabilities are modernized:** under the HR the carrier has to exercise due diligence *prior to the actual carriage* to provide a seaworthy ship that is fit and safe for the carriage of goods. Under the RR this obligation is extended to (i) the whole period of the voyage of the goods, and (ii) to carrier provided containers. Further, under the RR a carrier is no longer allowed to escape liability if damage to the goods is caused by its own fault or shortcoming.
   Also the HR ambiguities on the matter of division of proof no longer exist under the RR due to its clear language on this subject. In principle, the burden of proof is on the carrier that it is not at fault.
   Further, if a carrier farms out all or part of its obligations to another party, such party has under the RR a similar liability as the carrier itself.
   If the damage solely occurs during an inland part of the carriage and an inland liability convention is in force for such part, the carriers' liability is governed by that inland convention.

9. **Cargo on deck:** under the HR a carrier may deny all liability for carriage of cargo on deck. The RR provide clear rules that restrict this freedom in an appropriate way.

10. **Limitation of carrier's liability**: under the HR the carrier's liability in relation to the goods, is limited to certain amounts expressed in (the gold value of) pounds sterling. The RR retain the possibility of limitation and extend it to any damages sustained by a claimant (also those not specifically related to the goods such as those resulting from the issuance of an antedated transport document). However, the amounts are substantially increased and expressed in IMF Special Drawing Rights.

11. **Shipper's obligations and liabilities:** under the HR the obligations of a shipper are limited to a guarantee of the accuracy of the furnished marks, number, quantity and weight of the goods. Further it is stated in the HR that a shipper has no liabilities without fault. Because since 1924 the nature of the goods and their handling processes in maritime carriage

have changed a lot, the RR pay much more attention to the position of the shipper.

Under the RR a shipper must, unless agreed otherwise, deliver the goods to a carrier ready for carriage. If the shipper loads the container, it must do so properly. The goods may not cause harm to persons or property. The shipper must provide to the carrier all the necessary information on the goods, and more specifically when these are of a dangerous nature. When the shipper fails to do so, it will be strictly liable. Otherwise, the RR retain the fault liability of the shipper. The onus of proof that a shipper is at fault is on the claimant.

These shipper's obligations and liabilities (save the above mentioned exception) are mandatory law. It may be noted, however, that these obligations and liabilities of a shipper aren't new because they are usually already included in a carrier's contract conditions and/or in the various applicable national laws.

12. **Claim handling:** when a shipper/consignee suffers damage to the goods the HR provide for a notice period of 3 days. The RR extend this period to 7 days and state also expressly that the parties must be given access the relevant records and documents.

    Under the HR the time for suit *against* the carrier is 1 year, thereafter a carrier may not be liable anymore. The RR extend the period to two years and applies its scope to any breach of an obligation under the RR, which may include also claims *from* the carrier *against* the shipper/consignee. After the expiration of the two years period the claim still exists for defence and set-off purposes.

    It may be concluded that the RR claim handling provisions are better balanced between the carrier and the shipper/consignee and have become more favorable to the cargo side.

13. **Facilitation of digitalization:** the RR facilitate the digitalization in various ways. First, any communication under the RR for which a form requirement exists, may be made electronically. Second, parties may agree that transport documents are in a digital form. For such case the RR provide that the issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or

transfer of a transport document. In addition, throughout the entire RR each provision that refers to a transport document substantially equalizes the equivalent electronic transport record. This means that the general codification of the rights and obligations of the carrier and the shipper/consignee as included in the RR, also apply under a digital transport document.

14. **Delivery to the consignee:** the HR don't pay attention to this main obligation the carrier. Because this is a growing problem, the RR address this issue as follows: Parties are free to agree on the time and location of delivery of the goods, provided it is not prior to their final unloading. Subsequently, the deliverability of the goods is the responsibility of the shipper, while the carrier is responsible for the actual delivery to the consignee. When a negotiable transport document has been issued that doesn't expressly state that the goods may be delivered without presentation of that document, a carrier is obliged to deliver the goods to the holder of such document only. Further, a consignee is free to refuse delivery of the goods, but after it has claimed them, a consignee is obliged to accept their delivery. If the goods are not deliverable at destination, the carrier must first seek instructions from a person responsible for their delivery. If these instructions aren't forthcoming or the goods are otherwise undeliverable, the carrier's responsibilities under the contract of carriage have ended. In this situation, the carrier has a wide discretion what to do with the goods and its liabilities are much lesser than under the contract of carriage.
    It may be expected that these rules also have an anti-congestion effect in ports.

15. **Control of the goods during the carriage:** The HR don't address this subject either. The RR specify that the right of control includes not only the right of giving the carrier instructions that do not constitute a variation of the contract of carriage, but this right also relates to obtaining delivery of the goods in a scheduled port of call and to a replacement of the consignee by any other person including the controlling party itself. The right of control is a transferable right and may be exercised during the entire period that the carrier is contractually responsible for the goods.

In principle, the controlling party may unilaterally exercise the right of control. There are, however, operational restrictions: it must be reasonably possible for a carrier to execute the instructions and they may not interfere with the carrier's normal operations. And if (additional) expenses are incurred by the carrier, these must be reimbursed.

16. **Effects of the two previously mentioned rights:** The importance of their codification in an international instrument is difficult to overstate because these two rights are fundamental to world maritime trade. The contractual (indirect) control of the goods during their carriage and the contractual (direct) control of them at the end of the voyage may, under the applicable national law, be key conditions for buyers or financiers of the goods to become their owner or security holder.
In addition, the RR don't link these two rights exclusively to possession of a transport document. In principle, any shipper is entitled to the right of control and any consignee is entitled to delivery. This means that, within the settlement of an international sale, these rights may in many cases be transferred without the use of a negotiable transport document. And when the applicable national law allows a transfer of rights by digital means, an (expensive) electronic transport record may not be needed anymore either. Generally, the possibility of getting rid of transport documents (paper and electronic ones) will simplify digitalization in maritime trade.

17. **Increase of evidentiary value of transport documents:** when under the HR a negotiable document is issued and the document is in the hands of a person that is not original shipper, proof to the contrary is not allowed as to the description of the goods. The RR extend this conclusive evidence rule to *all* information as stated in the negotiable document.
The HR don't address non-negotiable documents like sea waybills. Under applicable national law it is often allowed to deliver evidence contrary to the information as stated in a non-negotiable document. The RR, however, provide that, when a consignee has acted in reliance of carrier provided information in a non-negotiable document, the carrier is not allowed to give proof to the contrary.

18. **Clarification of standard terms:** The RR clarify the effects within the scope of a contract of maritime carriage of a number of widely used standard terms ('freight prepaid', 'fob', 'fio(s)' and 'contents/weight unknown') on which much misunderstanding exists.

19. **Identity of the carrier:** this may currently be an ambiguous matter. The RR provide clear rules on this with the result that the identity of the carrier is more easily to find.

20. **Choice of court:** the RR include a chapter on choice of court provisions. A claimant may institute a claim on the carrier, amongst others, at a court of the place of delivery of the goods, unless the contract of carriage includes a clause which refers claims exclusively to another specific court. This RR chapter is optional in the sense that contracting states must expressly declare that they will be bound by it.

21. **Volume contracts:** during the UNCITRAL negotiations shippers expressed the view that volume contracts could be used by carriers to put shippers under pressure to accept more risks against a lower tariff. Apart from the fact that a carrier's liability insurance premium are normally only a tiny part of the carrier's cost price of a carriage, the RR try to minimize this risk by providing the following safeguards:
(a) the volume contract must contain a 'prominent' statement that it derogates from the RR terms;
(b) the volume contract must be either (i) individually negotiated, or (ii) prominently specify the sections containing the derogations;
(c) a volume contract may never be the only option for a shipper, because the shipper must be given an opportunity, and notice of the opportunity, to conclude a contract of carriage on terms and conditions that comply with the RR without any derogation;
(d) any derogation may not be (i) incorporated by reference from another document, or (ii) included in a contract of adhesion that is not subject to negotiation;
(e) a couple of key provisions with a certain public interest may not be derogated from, such as (i) the carrier's duty to make and keep the ship seaworthy, (ii) the shipper's obligation to provide certain information, and

(iii) the parties may not avoid or limit their liability for the consequences of any intentional or reckless acts or omissions.
(d) Even if the volume contract satisfies all the conditions (a) to (e) above, which apply cumulatively, a third party/consignee is not bound to a derogation unless:
(d) (i) it received information that prominently states that the volume contract derogates from the RR, and
(d) (ii) the third party/consignee gave its express consent to be bound by the derogation, and, consequently,
(d) (iii) the consent is not set forth solely in the carrier's public schedule of prices and services, the transport document or the electronic transport record.
Taking into account all the above safeguards, it may be reasonable to conclude that shippers and third parties/consignees are under the RR better protected against possibly unfair volume contracts than under existing law.

22. **Detailed explanation of the RR:** it is standing practice at UNCITRAL that its secretariat doesn't add an explanatory memorandum to a convention that is made under its auspices. Instead, the secretariat may invite a trusted third party that is familiar with the subject, to write a piece setting out the background and intended meaning of the provisions of the convention. For the RR this has become the book: STURLEY et al., *The Rotterdam Rules: the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea,* (2nd ed., Sweet & Maxwell, 2020).

Rotterdam, November 13, 2024
Prof. Gertjan van der Ziel (CMI)