

Evaluation of the new Convention from the perspective of cargo interests

Philippe Bonnevie, Association des utilisateurs de transport de fret (AUTF), Paris

I do appreciate the opportunity that the Deutsche Gesellschaft für Transport Recht, its president, *Professor Doctor Rolf Herber and Doctor Beate Czerwenka of the Federal Ministry of Justice* have given me the opportunity to express the views of shippers on what may become some day the instrument that could govern our relationships with the maritime carriers.

Before accepting this invitation I have hesitated a bit before responding positively wondering whether I could speak on behalf of shippers, not because I could give a false or incomplete analysis of what shippers think the rules are about – actually I’m not an academic, only a former practical shipper – but I really wondered if I could be entitled to give the position of shippers on a text that probably 99% of them are still unaware.

So as a foreword I wish to question the level of shippers’ knowledge on the Rotterdam Rules and more generally on the rules governing the international maritime transport. An answer to this question helps to shape our perception of the Rotterdam Rules.

Once this point is clarified I’ll wonder what shippers were waiting for or should have waited for a new legal instrument in comparison to what they have obtained. I will mainly focus on 3 points:

1. Will the Rules permit a rebalancing of the juridical relationship between carrier and shippers and will it help clarifying the maritime law (at least for shippers)?
2. Will the Rules secure Carrier/shippers relationships – Are there any real innovations in this perspective – is the contractual freedom the solution to all our problems?
3. Will the Rules promote the development of short sea shipping and the motorways of the sea in Europe? More glob-

ally is this convention good for the European industrial world?

I. Foreword: Are shippers aware of the Rotterdam Rules and more generally of the maritime law?

Concerning the shippers’ level of awareness on the Rotterdam rules, I think I can say without any risk of mistake that the percentage of shippers (regardless of their sizes) with some knowledge of the existence of these rules is close to zero, as is close to zero their awareness of the key concepts of this Convention.

This ignorance is a reflection of a more general vast ignorance of shippers about the legal environment surrounding their freight negotiation of freight as well as the operational organisation of their maritime traffics. Since the mid 90ies we observe that the transport in general (not only maritime) is more and more seen as an element of cost, and thus entrusted to purchasing specialists rather than Maritime experts with exhaustive knowledge.

This ignorance and the lack of interest for the transport legal environment has also been observed at a broader level during the work of the UNCITRAL working group. European shippers were absent until the late 2005 and missed the first years of work.

Except the African shippers’ councils, which are quasi-public agencies, which came out progressively in the discussion by having the status of official delegations, only one American shippers’ association embedded into the official U.S. delegation, and deprived of their freedom of speech as such, has attended the works since the beginning. No Asian or South American shippers have appeared, and very few

shippers organisation have taken a positions vis-à-vis their government or national administration on this issue.

In contrast the maritime world was strongly represented either as advisers in the national delegations or in numerous NGO (WSC, BIMCO, CMI, ICS and the P&I clubs etc.).

This situation of chronic ignorance of the legal environment of the international maritime transport among shippers accounts for a large part with certain positions that I will take in my development, especially when I'll get onto the concept of freedom of contract proposed by the Rotterdam rules.

II. Main Issues.

I would now like to try to answer one of the main issue: What shippers were entitled to expect from these 6 years of a long process of law elaboration and what have they actually obtained.

1. Will the Rules permit a rebalancing of the juridical relationship between carrier and shippers and will it help clarifying the maritime law (at least for shippers)?

Better say it unequivocally: The answer is unfortunately: NO

Our starting point in Europe is a legal system founded in 1924 that progressively has become obsolete over the years, due to technological innovations and the evolution of business models.

The Hague – Visby rules have long been considered from the perspective of shippers as heavily lopsided in favour of the carriers, which may severely limit the scope of its liability and the amounts of compensation. Moreover, they only relate to the maritime phase of transport, while since the 60ies we have seen the development of containerization that has popularized the concept of a door to door transport and the development of the carriage by sea of road transport units.

This explains why shippers, at least some of them, have welcomed the idea of a new convention to simplify and modernize the maritime law and why they have been disappointed with the final outcome.

Despite some innovation such as the introduction of the electronic transport document or a few minor positive points on which I'll come back in part 2 of my lecture, the Rotterdam Rules don't meet the global shippers expectations.

Let's consider a few examples:

– As drafted, **Article 12 § 3** – Period of responsibility of the carrier- can easily lead to the definition of a minimum period of the carrier liability »under tackle/under tackle«

– I could as well comment **Article 13** on »Specific obligations«. Originally It was drafted to deal with the FIO terms but due to its too vague drafting it negatively impacts with what should be one of the carrier's most substantial obligation to »properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods«.

– Another example I'd like to dwell on is **Article 17** which deals with the principle of the carrier liability. This

article actually ingrains the »excepted cases« that we thought condemned once for all to modernize the maritime law. This is to be put in perspective with the no way out shipper's liability, itself unlimited while the carrier may, if he cannot escape its responsibility, to limit its compensation.

At the turn of the 21st century we can wonder about the reasons for such an imbalance of treatment. No logical answer appears but only the weight of history, the traditions, the economic weight of the maritime sector as well, and the fact that lawyers – a lot of them have greatly contributed to the works of the working group – always come back to what they know, the jurisprudence, ... the past.

As regards clarification and simplification of maritime law, we may wonder about a text of 90 articles, full of cross references, and riddled with negative definitions. This document, even for law experts, is heavy, poorly written, in a word indigestible.

Article 17 that I just mentioned is complex, outdated and incidentally very detrimental to shippers:

Complex: The almost 2 pages text begins with a principle: the carrier is responsible for loss damage or delay.

– Then we have in § 2 a first exception to the principle: the defence of disproving fault – a classic ...

– Then in § 3 we find the famous list of defence cases to neutralise the 1st principle

– Followed by § 4 and 5 that are the exception of the above § 3.

This cascade of principles, exceptions to the principle and exceptions to the exception themselves appears to be a bit complex for non specialists.

Obsolete:

– This obsolescence is symbolised by the reintroduction of the old defence of the »excepted cases« (except the nautical fault there are all back: fire, strike, act of god etc ...) their reintroduction 30 years later after the Hamburg rules is certainly not a symbol of modernisation of the maritime law, rather a kind of »revenge« on the Hamburg rules »wanted by »pro maritime interests«.

Unfavourable to shippers:

Notwithstanding the defence of the »excepted perils« we may also consider the § 4 and 5 that seems to be an exception to the previous exception to the carrier liability principle (§ 3), in favour of the shippers ... if one considers that the shift in the burden of proof can ever be favourable to shippers.

– § 4 puts clearly the burden of the proof on the shippers' shoulders.

– The a) of § 5 says «The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the un seaworthiness of the ship; (ii) the improper Crewing, equipping, and supplying of the ship; etc ...

One can wish good luck to the courageous shipper, using a regular liner, that will try to prove the elements constitutive of (i) and (ii).

Article 80 that institutes the freedom of contract is also a good example explaining our critics;

– This article appears to be quite confusing.

First It welcomes some elements of common law: The pre-eminence of the will of parties, or the long list of excepted perils rather than brief definition of the force majeure, or the op-out system etc.

But it also contains some elements of American domestic legislation;

The § 3 says »A carrier's public schedule of prices and services, (...) is not a volume contract pursuant paragraph 1 of this article (...).«

For those not familiar with the U.S. system of filing of tariffs against the FMC, the notion of »carrier public schedule of price and service« may puzzle as it could puzzled a judge in China (or in Senegal).

But there is also one element of French law (to represent the Latin tradition)

§ 2 (d) says »The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.«

Notwithstanding the point that a *contract of adhesion* is by nature rarely subject to negotiation, one can also wonder how the same Chinese judge will appreciate the concept of »contract of adhesion« as additional (negative) element of definition (same for a British judge).

I have insisted on these articles as they are very representative of what we do not like with this convention that is according us: Obsolete, unbalanced, complex and poorly drafted.

2. Will the Rules secure Carrier/shippers relationships? – Are there any real innovations in this perspective – is the contractual freedom the solution to all our problems?

Objectively a perusal of the final text shows a few positive innovations.

– The fact that the »error of navigation« is now dropped has been presented as a great step forward, and a great sacrifice on the part of the carriers.

This should be put in perspective with the generalisation the GPS and the navigation assisted by satellites and incidentally with a minimum social commitment that requests carriers to have an effective responsibility of their ships management vis-à-vis the society.

– The »Right of Control« has also been presented as a major innovation that should favours the shippers' adhesion to the rules.

In fact as it is drafted this set of provisions (art. 50 to 56) is of limited interest as it does not bring noticeable changes to what is presently done in practice.

The possibilities to modify the instructions are however very limited by the Art 52 »Carrier's execution of instructions«.

– Article 52 § 1, b & c) gives the carrier an uncontrollable limitation to the shippers right of control. Who knows if« *The instructions will not interfere with the normal operations of the carrier, including its delivery practices.*« Certainly not the shipper who can't control the carrier's allegations.

– § 2 creates a high potential risk for asking for a change of instruction.

This risk is so broad that it will appear totally dissuasive. The indemnity due to the carrier in relation to *any additional expense, loss or damage to the carrier or to any person interested in other goods carried on the same voyage* go beyond any measure of predictability that would normally regulate the conduct of the shipper.

In any case a security thru a letter of guaranty will have to be given by the shipper to the carrier to cover the reason-

ably expected expenses, loss or damage as it is already the practice presently.

– The increases of the carrier's limits of liability are positive.

Article 59 actually is an improvement: the limits are higher than in the Hague & Visby rules or in the Hamburg Rules, and § 2 is clearer than the Hague & Visby protocol and officialises certain elements of jurisprudence (compensation limits based on the quantity of packages in the container)

– Concerning the »indemnity for delay«, the concept has been welcome but it's implementation may be proved difficult:

The indirect prejudice is indemnified by 2,5 times the freight, (similar to the Hamburg Rules) but the point that remains is the narrow definition of the »delay« contained in article 21 that says:

»Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage *within the time agreed.*«

An intermediary version, closer to the Hamburg Rules said:

»(...), in the absence of such agreement, within the time it would be reasonable to expect of a diligent carrier, having regard to the terms of the contract, the customs, practices and usages of the trade, and the circumstances of the journey.

In practice the right of control may be of little effect if a specified delivery time is not agreed in the »contract«.

The solution may depend of the judge's interpretation: will he consider that the *official schedule* on the carrier's website or published in the Lloyd list constitutes an »agreed time«.

In fact we can not deny that shippers have effectively obtained the principle of the of a compensation for »delays, but in what shape compared to the Hamburg Rules!!

– Last but not the least there is one thing shippers can't consider as a positive innovation: »the contractual freedom« introduced by the Article 80: **Special rules for volume contracts:**

To clearly explain our opposition to the almost unlimited contractual freedom instituted by the Rotterdam Rules it is worth first of all to remind the definition of the volume contract.

»Volume contract« means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range ».

It's hard to find a more vague definition than this one. As it is, it covers 99% of the »contracts« under which goods are moved around the world.

= a specified quantity of goods: 2 containers are enough

= in a series of shipments: 2 shipments of one TC each are enough,

= during an agreed period of time; 1, 3, 6 or 12 months will make it

There is not even a minimum commitment of volume from the shipper side neither penalties in case it is not reached ... This definition which is the key to the contractual freedom is less constraining than a classical American service contract that provides almost no specific advantage except the confidentiality of freight rates! This extensive contractual freedom will be proposed to all types of shippers inclusive of

the most inexperienced ones, the most vulnerable ones. This is the main danger of this draft convention.

If we consider the basic of this complex obscure and poorly drafted article 80, our main critics are multiples:

= The possibility to contract out of nearly all the provisions in the Rules by means of a volume contract represents the greatest of shipper's concerns over the introduction of the Rotterdam Rules.

= The possibility to increase shipper liability and reduce carrier liability would represent a serious risk to shippers that were not completely aware of the implications.

= Signing up to a volume contract only to obtain a so called »good freight rate« could expose most shippers to a great risk. Actually it is generally assumed that volume contracts would offer lower rates to reflect any reduced liability by the carrier. This was clearly explained by the US delegation during the working sessions during which this concept was debated.

We underline that a volume contract entitles the carrier to escape nearly all the shipper-protective provisions usually contained in a maritime convention (they all have been envisaged in that perspective from the old Harter Act in 1893 to the Hamburg rules or the more recent land conventions).

What can be the consequences of such unlimited freedom of contract If we refer to the Rotterdam Rules:

1. The carrier must normally ship the goods to the place of destination and deliver them to the consignee, Its responsibility commences when the carrier or his agent receives the goods for carriage and ends when the goods are delivered. This so substantial obligation can be derogated from under a volume contract and reduced to a »tackle to tackle« minimum.

2. The carrier must normally properly and carefully receive, load, handle, stow, keep, care for, unload and deliver the goods. This also is not obligatory under a volume contract. The article 13 whose § 2 is so vaguely drafted that, thru a tricky volume contract, a carrier could put these substantial carriers obligations on shippers shoulders even in the scope of a groupage shipment.

3. The Carrier must normally make and keep the holds and any containers supplied fit and safe for the reception, carriage and preservation of the goods.

This again is not obligatory under a volume contract.

4. Incidentally thru the freedom of contract the carrier can easily escape to the provisions concerning the exercise of the right of control of the controlling party,

5. And at last the contractual freedom will facilitate the choice of the place of litigation the most favourable and we fear carriers will mainly benefit of this possibility.

Above all things the Freedom of contract permitted by article 80 gives an advantageous position to the carrier who may derogate to most of its substantial obligations. Virtually all the provisions of the Rules may be circumvented by this means except the seaworthiness and its limitation of liability in case of personal wilful misconduct.

On the shipper side no derogation to the main shippers obligation is possible; (In fact shippers did not ask for any derogation but this difference of treatment is symptomatic of a certain tropism).

We still find unacceptable that the carrier may derogate to its main obligation to such extend he could not be liable at all of damages, loss and delay. A situation that would send shippers back to the pre 1924 situation with the resurgence of non liability clauses in contracts.

Illusory safeguards:

All along the discussion of the draft text shippers have tempted to show how this almost unlimited freedom of contract was dangerous for small and mediums size shippers (and many big ones too). We may have been slightly persuasive on this risk as we must recognise that the final version has benefited of some redrafting which attempts to introduce some additional safeguards which are, according us, illusory:

The article 80 § 2 provides a list of conditions to make the contract effectively binding For example the contract must:

– contain a »prominent statement« that it derogates from the Rules

– be »individually negotiated« or »prominently displays« the sections containing derogations (»or« not »and« permits to escape to the prominent display) etc.

These pseudo safeguards will not change drastically the situation of (inexperienced) shippers.

In the contrary the question on to which extend these pseudo safeguards will have any effect remains to be seen in practice and such safeguards can be expected to be the subject of lots of litigations in order to establish interpretation of the wordings used in the Rules.

Further interpretation will also be required to establish what is meant by »subject to negotiation« in relation to such contracts. Will it be sufficient to show that the contract does not preclude a negotiation or will an actual attempt of negotiation have to be shown (like it may exist in a charter party negotiation)?

What will happen if the unbalanced bargaining position of the parties is such that the shipper has no perspective of gaining anything from the negotiation?

Is this kind of unbalanced bargaining situation is there still really a »negotiation« in terms of the Rules. A French judge, by tradition more protective of the »weakest«, will probably not appreciate the effectiveness of the negotiation than its British homologue will.

Another shippers' major reservation concerns the consequences of the freedom of contract on the position made to the consignee. Shippers consider the protection of the consignee is not secured. It is in danger since the provision – »*express consent*« –, which is supposed to ensure the consignee adherence in full lucidity to the derogations that have been negotiated between the seller/shipper and the carrier is illusory.

One can indeed question the ability of the consignee who is waiting urgently the goods it has probably already paid by a letter of credit; to refuse to adhere to the derogation in the hypothesis it has the necessary knowledge to understand the scope of that derogation. In the practice it is quite probable that the consignee will sign any document or arrival notification in order to get its goods as soon as possible, with or without a statement of derogation, whether pro-eminent or not.

In addition, and this is not the least negative consequences of the unlimited freedom of contract, the possibility for the carrier to derogate to the most important provisions of the convention, may lead to a disruption of the international trade by weakening the system of letters of credit. Banks may find themselves in a situation where when they'll get a set of transport documents, (a negotiable B/L) they will not know whether the provisions contained in the B/L overleaf, in particular the carrier liability provisions, have a real value or if a volume contract has emptied them of their substance.

3. Finally the last interrogation concerns the Short Sea Shipping, Will the ROTTERDAM rules clarify the Multimodal carriage with a sea leg, and promote the development of SSS and the motorways of the sea,

First of all I'd like to underline one point that concerns the classic issue of pre and post carriage of sea containers when the said carriage is performed by the maritime carrier (carrier haulage).

It concerns the Article 26 »*Carriage preceding or subsequent to sea carriage*«

According to our analysis only the *international conventions* will override the Rotterdam Rules. If this provision should not create a problem if the litigation takes place in Europe, we can wonder how a Chinese (or Australian or Chilean) judge will understand the word »International« when having to deal with CMR in competition with the maritime convention. We may fear that considering CMR/CIM is not international (only regional) they would apply the Rules instead. We have just seen how easy it will be for a carrier thru the contractual liberty to choose the place of litigation (or arbitration). This is another risk of a non homogeneous interpretation.

We underline that the previous references to *national law* applying to land carriage have been dropped, extending the range of situations where the Rules will apply by default.

This means that an average or a loss occurring during a carrier haulage pre carriage between Munchen and Hamburg would be settled by the Rules, The only way for the Bayerische shipper to be ascertained to have the benefit of a better level of indemnity than the one implemented by the Rules would be go to embark in Rotterdam or Antwerp to be governed by the CIM or CMR or the Budapest convention for river navigation.

Will the Rules promote intra European Short Sea Shipping?

Once again the Rules are not satisfactory!

First of all, we underline the danger of the insertion at the last moment in Article 25 – »shipment on deck« – of an assimilation of the (road or rail) vehicle to a sea container.

This assimilation is technically unintelligible. This leads to a situation where a sea carrier could load a road trailer on deck without having to seek the advice of the truck contractor or the multimodal operator who will be then in the position of a shipper, and, worth, to ask for the advise of the first real shipper who loaded his cargo into the vehicle.

A trailer placed on the upper deck is to bear the highest amplitudes of the forces sustained by the ship, increasing the risk of goods getting loose inside the trailer, especially if the lashing and blocking has not been done according to the maritime standards. In the case of damages to other goods, or to others vehicles or even to the vessel, it is the multimodal operator in the position of shipper who is, under Article 27 § 3 illimitably responsible.

Such a situation, once known by the truck hauliers and the multimodal operators will not encourage them to put their vehicles on board ships.

Finally, the Article 59 which deals with the limits of liability of the carrier under the dual system of calculation per packages or shipping units enumerated in the contract particulars, has been amended to obtain may be the support of shippers. Indeed according to § 2 of this article, when the goods are placed in containers or, now, in a trailer, or a rail car, the rule of limitation per package or shipping unit should apply. If the carrier will have the good idea to detail the contents of his trailer, we can wonder of such a rule which, when applied to bulk trailers, leads to calculate the basis of compensation in counting the trailer and its contents for a single package.

Concerning the applicable law to multimodal carriage with a sea leg, we still have some concerns.

It is obvious that due to our rather negative analysis of the Rules we are not favourable to their application to both the maritime and the inland parts as a unique regime and we prefer to remain when possible within the scope of international modal convention. In this respect, the Rules don't reassure us totally.

First we must admit that the provisions dealing with Regional/international land laws have been substantially improved in clarity compared to the previous versions.

CMR and CIM in particular should see their field of application preserved but only partially yet with a risk of interpretation.

If we understand correctly the final drafting of Article 82 on »**International conventions governing the carriage of goods by other modes of transport**« that primarily permits the application of any of the land international conventions that regulate the liability of the carrier for loss of or damage to the goods, the supremacy of these conventions seems to appear limited:

For example:

– Article 82 (d) precises that)« Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods *without trans-shipment* both by inland waterways and sea«. This restriction should lead to discriminate against both general cargo and multimodal loading units shipments by river barges.

– Article 82 (b) says that »Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of *goods that remain loaded on a road cargo vehicle carried on board a ship*«;

We fear any restriction which might lead to a discrimination against certain multimodal transport units such as »swap bodies«, »binnen – container«, or 45 »wide pallet« which constitute the largest potential market share of motorways of the sea (and some day the future UECI). These modules unknown in the Convention on Road Traffic of 1949 amended in 1968 are not included in the scope of the CMR Convention (cf. Article 4). Consequently these most modern multimodal transport units should be governed in any cases by the rules of the maritime convention.

Finally in the perspective of the intra European short sea shipping, the Rotterdam Rules tend to create a juridical uncertainty added to some operational potentially dangerous situation. This is not the proper way to promote the environmental friendly modes of transport.

III. CONCLUSIONS

The few shippers aware of the Rotterdam Rules and most of their representative associations in Europe therefore consider that the convention proposed to the ratification has missed an historic opportunity.

The Rules could have set the necessary provisions to balance shippers and carriers rights and obligations, actually they have not, thus preserving the historical advantages granted to the maritime industry.

The rules could also have modernized the maritime legislation in fully and clearly incorporating in the convention the consequences of 50 years of containerisation and the development of multimodal door to door transport by establishing a simple rule: Carriers are responsible for what they sell!

They have not either!

Instead of that, the Rules may constitute a serious peril for a vast majority of inexperienced shippers that could put

them in a worth position than before 1924. The unlimited freedom of contract puts in danger a large number of shippers and sacrifices the positions of the consignees.

Finally the Rotterdam rules could have been the tool to promote the development of multimodal short sea shipping that Europe drastically needs to develop. They have not! On the contrary the Rotterdam rules are only a mainly maritime instrument that does not meet the shippers expectations and their wishes to develop multimodal transport using a sea leg.

This failure makes more than necessary to work to the adoption of a (regional) European regulation to facilitate the emergence of intra-European short sea shipping.

Better having a supplementary regional legal system that works and helps to achieve this objective rather than implementing a may be someday harmonised global instrument that will be counterproductive.

Shippers' final conclusion is that the Rotterdam rules will not help the industry and do not deserve to be ratified.