

Evaluation of the new Convention from the perspective of freight forwarders

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1. Although freight forwarders, as carriers or logistics service providers, gain from the benefits accorded to carriers by the Rotterdam Rules - such as the right to limit liability not only for loss of or damage to cargo but for *any* breach (Art. 59.1) and no liability for delay unless agreed (Art. 21) – the Rotterdam Rules work to the disadvantage of freight forwarders when acting as shippers or when demanding compensation from the performing carriers. It is expected that the expansion of freedom of contract in case of volume contracts (Art. 1.2 and Art. 80) will lead to additional difficulties in getting compensation from the performing carriers.

2. As shippers, freight forwarders will be liable *without* any right to limit liability for incorrect information to the carriers (Art. 79.2[b]), although the carriers enjoy the right to limit *their* liability for incorrect information to the shippers (»any breach«).

3. Freight forwarders are frequently engaged in various capacities in the seaports. Such activities will expose them to liability as »maritime performing parties« (Art. 1.7 and Art. 19). At present, stevedores and warehousemen enjoy freedom of contract allowing them to escape liability, at least to the extent that their customers are or could be covered by insurance for loss or damage. In countries where stevedoring and warehousing enterprises are owned or controlled by governments or municipalities, any moves towards ratification of the Rotterdam Rules would for this reason presumably be strongly opposed in order to avoid escalation of liability insurance premiums. Multipurpose cargo terminals engaged as distribution centres in logistics operations would strongly oppose a sort of maritime law injection into their business, which presumably will be governed by more sophisticated liability régimes.

4. The administrative burden of freight forwarders will increase significantly with any entering into force of the Rotterdam Rules.

4.1 In general, the Convention is far too complicated. This leads to additional transaction costs and invites misunderstandings and misinterpretations. At worst, the Convention States may end up with different interpretations, so that the Rotterdam Rules will fail in reaching their main objective to unify the law of carriage of goods by sea.

4.2 FIATA has consistently opposed the so-called maritime plus (wholly or *partly* by Sea) and opted for a convention port-to-port. Although Article 26 permits the liability in some cases to be resolved by mandatory provisions of international instruments (not national law even if mandatory!) relating to non-maritime transport, this does not solve the problem where, at the time of the conclusion of the contract, the mode of transport to be used is not yet known (»unspecified transport«). Surely, it is unacceptable having to look into the after-events (i.e. the way in which the transport was actually performed) in order to decide which rules apply to the contract. Suffice it to mention the impossibility to apply such a methodology to liability for non-performance! How should one decide which of all the hypothetically applicable conven-

tions listed in Art. 82 apply in order to ensure that the correct transport document is issued? Also, it may well be inappropriate to apply the rather low limits of liability of the Rotterdam Rules to cases where it cannot be established where loss or damage occurred during a carriage which involves different modes of transport (so-called »concealed damage«).

An escape from the Rotterdam Rules may well be permitted for multimodal transports or contracts by logistics service providers, when the maritime transport segment is over-shadowed by other elements. But, again, the uncertainty created by the maritime plus of the Rotterdam Rules is disturbing. In the unlikely event that the Rotterdam Rules gain worldwide acceptance, which policy would FIATA prefer with respect to the FBL and the UNCTAD/ICC Rules for Multimodal Transport Documents? Should FIATA work under the hypothesis that multimodal transports, or logistics transport operations, are of their own kind and remain unaffected by the Rotterdam Rules? Or should FIATA use the perhaps more prudent alternative to wait and see if the UNCTAD/ICC Rules will be amended?

4.3 The introduction of a »joint and several liability for documentary shippers« (Art. 1.9 and Art. 33) and »real shippers« will call upon freight forwarders to exercise due diligence in avoiding mentioning exporters as »shippers« in the transport document when they have been selling on the delivery terms EXW, FCA or FOB. In these cases, sellers/shippers are *not* under a duty to contract for carriage. Needless to say, such sellers would like to avoid being trapped into a joint and several liability (Art. 33.1) with their buyers (the real shippers), particularly when they have protected themselves by getting paid upon shipment under a documentary credit. This is how they protect themselves against the risk of insolvency of their buyers and they certainly do not expect to incur that risk by a backlash from the carrier when his contracting party – the real shipper – becomes insolvent. Freight forwarders have to advise their customers on the risk to be liable as documentary shippers.

4.4 A most cumbersome – and indeed absolutely unacceptable – option has been accorded to carriers to issue *negotiable* transport documents or electronic equivalents and nevertheless retaining the right to deliver the goods without getting the *negotiable* transport document in return (Art. 47.2). So, the Rotterdam Rules accept that a document is called »negotiable« when in fact it is not! It goes without saying that, if the Rotterdam Rules come into force, freight forwarders must never issue such documents themselves. Also, they must ensure that such documents are *not* tendered to their customers by carriers. Indeed, such documents may well constitute important tools in maritime fraud, when a seller fraudulently sells the goods to a second buyer who could convince the carrier that he is entitled to get the goods, although he is unable to tender an original Bill of Lading, leaving the unfortunate first buyer with a right to get *limited* (cf. »any breach« above) compensation from the carrier. Freight forwarders must take care not to be associated with

such malpractice with the risk of being held liable through »guilt by association«.

5. There are benefits provided by the Rotterdam Rules compared with the Hague and the Hague/Visby Rules in the deletion of the defence of error in the navigation and management of the ship, the increase of the limits and the addition of rules on electronic procedures (the »electronic record«). But

such benefits could be provided in a much easier way, e.g. by amendments of or Protocols to the Hague Rules, the Hague/Visby Rules or the 1978 Hamburg Rules.

6. Summing up, the shortcomings of the Rotterdam Rules explained above may induce national freight forwarding associations to submit a negative response to the governments of their respective countries.