Some suggestions
for the advancement of the Rotterdam Rules

Introduction

1. The Rotterdam Rules 2008 have attracted so far only five states (Benin, Cameroon, Congo, Spain, Togo) and have been on the shelf for over 16 years, receiving very little attention from the industry.

2. The questions are: Why there has been such low interest in, not to say stiff opposition to, bringing them into force? What should be done to raise interest in the Rules? How can they be made more attractive to the industry?

3. It must be taken into account that the initial motive for imposing a compulsory liability regime for the carriage of goods by sea (which goes back to the 1893 Harter Act, and has reverberated through the Hague, Hague-Visby, Hamburg, and Rotterdam Rules) has significantly lost its rationale, particularly in tramp shipping. In addition, the impact of a number of new developments (such as the EU Directive 2009 on the insurance of shipowners for maritime claims, the treatment of the jurisdiction clauses in charterparty bills of lading by the leading international courts, direct action against insurers in national laws, EU Regulations on jurisdiction[1] and related court cases) should be taken into consideration.

Forum shopping

4. In a 2009 paper,[2] a group of knowledgeable and distinguished shipping law experts concluded (under the heading *Jurisdiction and Arbitration (opting-in) – Rotterdam Rules*) that the system invited *forum shopping* because it might be expected that some states would choose not to opt-in.

5. However, the business practice developed worldwide through the application of the Hamburg Rules (whose jurisdiction / arbitration rules are copied by the Rotterdam Rules) demonstrates that in fact

[1] Section 3, Article 13 of Regulation (EU) No. 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

[2] A response to the attempt to clarify certain concerns over the Rotterdam Rules published on 5 August 2009 by Professor Svante O. Johansson; Barry Oland; Kay Pysden; Professor Jan Ramberg; Professor William Tetley C.M., Q.C.; Douglas G. Schmitt, endorsed by Jose Alcantara; Julio Vidal; Frazer Hunt.

the *opt-in* solution of the Rotterdam Rules, even if exercised by all state parties, would invite *forum shopping* as is the case with the Hamburg Rules.

6. An *opt-in* solution would provide cargo claimants with a wide range of forums, which would give them the opportunity to choose a biased court that would rule against the carrier by avoiding internationally recognised legal standards.

7. The fundamental problem of the Rotterdam Rules is not the basis of liability, but the options given to the cargo claimants to choose (shop for) the jurisdiction of sub-standard and/or biased courts that rule to the detriment of the carriers.

8. Rules on the carrier's liability unified by an international instrument (like the Rotterdam Rules) are not sufficient for harmonising international law / justice. Achieving such a goal requires the application of internationally acceptable standards that concern not only the rules on the carrier's liability, but the governing law that provides for legal concepts such as mitigation of damage, misrepresentation, good faith and the like (not regulated by a carriage of goods by sea convention – the Rotterdam Rules), and the interpretation of the submitted evidence. Of course, the expertise and integrity of judges, lawyers and court experts play a crucial role.

9. There is abundant evidence that in contemporary trade cargo interests, local importers in particular have the upper hand over carriers when it comes to disputes over loss or damage to cargo. Carriers have to settle claims on unfavourable terms, being aware that the local court would rule in favour of the claimant. It goes so far that in some countries the consignee requires security for cargo shortage even before the cargo has been discharged and weighed on shore. They know in advance that the shore scale will always show a shortage of about 500 MT, and that the local court will regularly accept the shore figures (regardless of the fact that the shore figures from the port of loading, the ship figures from the port of loading and port of discharge, the empty hold certificate upon discharge and the hatch sealing certificate, all confirmed or issued by a reputable international surveyor company, prove that there is no shortage at all).

10. It is evident that business people in shipping when they have free choice – like the parties to charterparties – contract for well-recognised international forums that guarantee impartiality and the application of internationally accepted legal standards. The leading shipping jurisdictions accept that those forum clauses, if certain conditions are met, bind the consignee. The Rotterdam Rules should recognise the jurisdiction clauses incorporated into the charterparty bills of ladings and should bind the bill of lading holders to such clauses. (The trader is in a position to check the jurisdiction clause in the transport documents before deciding on buying the goods or to put a condition on such clauses in the sales agreement for the goods to be shipped under a bill of lading).

11. There are a number of cases where the English courts ruled that the consignee was bound by the jurisdiction clause incorporated in the bill of lading, but nevertheless the claimant sued the carrier in the local court on the basis of the jurisdiction options offered to him by the Hamburg Rules. This causes a conflict of national jurisdictions.

12. Recognition of jurisdiction / arbitration clauses in the charterparty bills of lading would create a desirable *lex mercatoria* approach where commercial disputes are resolved by impartial forums with proper expertise, chosen by the merchants, rather than those imposed by governments. Such freedom of contract would improve the fairness of trade, as shipowners in tramp shipping today have no monopoly (and do not impose jurisdictions clauses unfavourable or unacceptable to the cargo interest).

13. In contrast to the tramp shipping situation, in the liner trade, small customers (citizens – non-businesses and small businesses that ship a package, one item of cargo or a single container) do not have a level play field with the carriers, which is reflected – perhaps most conspicuously – in the forum clauses included in the carrier's general terms and conditions of service, booking notes and bills of lading forms, calling for the exclusive jurisdiction of the courts of the carrier's place of business. Such small customers should have adequate protection. They should not be bound by the exclusive jurisdiction clauses imposed by the carriers and should be entitled to sue the carrier in the port of discharge.

14. Furthermore, the "expected" scenario in which some states would choose not to *opt-in*, and some to *opt-in*, would create further

disharmony in the international regime for carriage of goods by sea as it would additionally complicate the resolution of shipping disputes with international elements by creating a conflict of jurisdictions and difficulties with the recognition of foreign judgments.

Maritime performing party and complexity of the Rules

15. The industry sees the Rotterdam Rules as a very complex instrument which might cause more ambiguities and disputes than they would solve. The fear is that the result would be a state of uncertainty that will trigger a number of lengthy and expensive litigations. The main reason for the complexity of the Rotterdam Rules is the intention to secure shippers' cargo claims by allowing them to sue multiple parties involved in the transportation process.

16. In the past, the industry called for the simplification of the draft of the Rotterdam Rules, *inter alia*, by suggesting that the "*contracting carrier alone should be liable for any cargo loss or damage*". Such a simple solution in the view of the business community would reduce the unwelcome complexity of the instrument. The proposal was not accepted by the drafting committee with the explanation: "… *every regime that provides for the channelling of liability also includes mandatory insurance, which does not exist in this context*".

17. Now, the logical question arises: Why would mandatory insurance not be introduced in "the context" of the Rotterdam Rules, when in the real world: (i) every ship engaged in international trade has cargo liability insurance in place; (ii) EU law requires mandatory liability insurance for ships entering its ports; (iii) every charterer, as a rule of thumb, requires proof of P&I cover before fixing a ship? Apart from the habit of keeping things that function as they are unless there is a compelling need for change ("if it ain't broke, don't fix it"), the answer may lie in the objection to *direct action* against the P&I clubs. However, it might be worth considering modified direct action, renamed *enforcement action*, that would place the P&I Clubs in the same position as they find themselves in today when they put up a security to lift the arrest of an entered ship.

18. Simplification of the Rotterdam Rules could be achieved by removing the *performance party concept* and accommodating the request *for channelling liability towards the carrier and banning*

actions in tort. In exchange, mandatory insurance for cargo liability could be introduced (which all shipowners / charterers already have) together with *the enforcement action* (not direct action) that would put P&I Clubs in the same position in which they find themselves when an entered ship is arrested and an LOU is issued by her Club to lift the arrest. The P&I Clubs would be liable under the enforcement action if the final judgement of a competent court against the carrier is not paid (which is currently the case with the LOU). Consequently, the need to arrest the ship – in order to obtain a letter of undertaking, which very often causes delays – would substantially decrease.

19. It seems that the effort to bring the Rotterdam Rules into force should rely on a bottom-up initiative coming from the industry, rather than top-down action. In this sense, the current version of the Rotterdam Rules should be reviewed through a discussion with the industry.

20. More information on some of the views and suggestions on the Rotterdam Rules can be found at:

https://hdpp.hr/a-modern-lex-mercatoria-for-carriage-of-goods-by-sea/

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