

Professor William Tetley Q.C. In Memoriam

Tribute by the Group opposed to the Rotterdam Rules

Our group was formed in 2009, between acceptance by the General Assembly of the Rotterdam Rules (the "Rules") on 11 December 2008 and the signing Ceremony in Rotterdam on 20-23 September 2009, as an alternative voice to those who wish to promote the Rules. Our group has grown since then, but has recently lost one of its initial, and indeed, most well-known and respected members, Professor William "Bill" Tetley Q.C., who passed away on 1 July 2014.

Bill and many of the group were members of the initial CMI working groups that drafted the Rules and presented them to Uncitral for consideration and further work. He was a popular member of working groups, always ready to listen and always polite in reply even if in disagreement. He, like us, was against the introduction of the volumetric exemption clauses from the outset and agreed that the loss of the network liability principle was unhelpful. Bill was also not a supporter of the inclusion of clauses to deal with the particular legal internal problems of certain countries as occurred with the introduction of jurisdiction and arbitration clauses. Whilst these clauses are optional, their inclusion in the Rules attacks the very principle of uniformity which these Rules were intended to promote.

These initial meetings took place in the late 90's and we have come a long way since the CMI's work on the Rules with the Uncitral working group adding

volume exemption clauses and jurisdiction/arbitration clauses and deleting clauses that promoted the network liability principle. It cannot be said that all is bad about the Rules, but there is much that does not endear these Rules to the wider global commercial community. They are too long. There are too many exemptions. The wording is not tight enough and will lead to disputes as to how they are to be interpreted. The Rules fail to deal properly with multimodal transport. They have introduced new and unnecessary concepts such as the maritime performing party. The list goes on, but what is good? The e-commerce sections and the removal of the navigational fault exemption in terms of carrier liability. It may be contended by some that the removal of the navigational fault exemption was premature as although GPS is extremely accurate, there was and indeed still is no effective plan B in the case of failure and it is relatively easy to block or disable such systems if one intends to do so. Several countries including Russia, Canada and the U.K. are developing similar back up plans that involve the use of radio waves; technology that was devised during the Second World War. The research project in the U.K. known as ELoran has proved locally effective but it is as yet unknown if the projects in the various countries will be able to work together as an effective global network to operate as back up in the event of GPS failure.

At the signing ceremony, 19 countries signed up which was one country short of the number that would eventually be required to ratify to give the Rules the force of law. Since then there have only been 6 further signatories, taking the number to 25. For a set of Rules intended to bring uniformity to carriage of goods by sea law, this must be considered hugely disappointing, particularly when one considers that historically many conventions have failed to gain the force of law, despite having more signatories than needed because signing often does not translate to eventual ratification.

Looking at the countries who have signed, there are notable absences. Not one South American country has signed, nor has any country from the Far East. Of the G7 countries, only two have signed (France and the U.S.) and only two of the G20 countries, (France and the U.S.) have signed. Notable absences include all four of the BRIC countries, Australasia, Canada, Germany, Italy, Japan and the U.K. What is it about the Rules that has made them so unwelcome? Why has there been no rush to sign up or ratify, despite the efforts of CMI and Uncitral to highlight the virtues of the Rules? So far, ratifications have been effected by Spain, Togo and Congo. Virtually all who have signed are from Western Europe or Africa along with the U.S., leaving large areas of the globe unrepresented.

Our group is of the view that the Rules will do little to bring uniformity to the carriage of goods by sea law and if anything, will simply further splinter an increasingly disparate set of rules used worldwide with most countries adhering to either the Hague, Hague-Visby or Hamburg Rules. Common law countries, where laws are built on precedent, are unlikely to want to replace settled law with a Convention of over 90 articles that will create a new body of law and owing to its alienation from the clauses of the established conventions, will not be able to draw on the precedent cases. Who will these Rules benefit? Lawyers? Insurers? Surely the Rules should benefit direct users and providers of international transport, but there is little in the Rules to endear them to these communities.

As some will be aware, our group has prepared three papers on the subject of the Rules and Bill Tetley drafted the summation to the first. It is worth repeating the text here as it was insightful:-

The negative reactions by some stakeholders

It seems to be a recurring theme among those who support these Rules to question the lateness of such commentaries. One has to remember that if these Rules do become a Convention they will affect huge numbers of those involved in commercial contracts for sale of and carriage of goods. These Rules were formed by a working Group with a few hundred participants which is hardly representative and simply because concerns arise after adoption of the

Rules does not make such concerns any less valid.

The objective of the Rotterdam Rules to provide a comprehensive regulation is certainly acceptable but the risk is obvious that some of the innovations compared with the present law will limit the willingness of States to ratify the convention. From this perspective, it might have been wiser restricting the revision work to a modernization of the liability system and the introduction of rules for electronic transmission so as to ensure a global acceptance of the Rotterdam Rules as a replacement of the old system. The aim to expand the Rotterdam Rules to cover much more has invited negative reactions by some important stakeholders to the effect that some additions are considered at best unnecessary and at worst contrary to their respective interests.

The Consequences of the “Opting-Outs” (including no opting-in)

The Rotterdam Rules contain multiple opting-outs, which will allow major shipping nations to “opt-out” of all or part of the Rules. The United Kingdom, for example, could support the signing of the Convention but could also be able to protect its important arbitration centre and arbitration business in London by opting-outs. And the world’s shipping/carrier/oil producer nations such as Norway could adopt the Rotterdam Rules, but the opting-outs could also allow them to avoid many provisions of the Rules that do not favour them.

The United States of America and those nations, which like the United States of America have not adopted the Hague, or Hague/Visby or Hamburg Rules, will

seemingly have progressed to some extent by the adoption of the Rotterdam Rules but is this “half loaf” better than a new try at adopting a uniform, binding, modern Multimodal Carriage of Goods by Sea Convention of the 21st Century?

Are not the Rotterdam Rules a step backwards for the vast majority of shipper/carrier nations of the world, who have already adopted a universal and uniform, and less complex carriage of goods by sea legislation with broader scope and fewer opting-outs, particularly for jurisdiction and arbitration and for volume contracts?

And are the Rotterdam Rules really universal and uniform as so declared in the Preamble to those Rules?

The Rotterdam Rules provide a detailed set of rules for three types of transport documents: negotiable transport documents, non-negotiable transport documents, and straight bills of lading. These different types of transport documents entail different results when determining the evidentiary effect of the contract particulars (Article 41), delivery of the goods (Chapter 9), and rights of the controlling party (Chapter 10). Will the average shipper or carrier be able to distinguish between a negotiable and a non-negotiable transport document? This could lead to confusion and mistakes. Furthermore, a contract which is simply called a “bill of lading” is liable to be characterized as any one of the three legal characterizations, which again can only create confusion.¹

The excessive detail of the Rotterdam Rules is liable to create uncertainty and hinder the goal of attaining legal certainty in multimodal transport

regulation. The Rotterdam Rules seem fit only for a small select group of trained lawyers. A more pragmatic approach of introducing only two types of transport documents: a negotiable and a non-negotiable multimodal transport document as is found in the United Nations Convention on International Multimodal Transport of Goods (Multimodal Convention (1980)) would make the rules simpler and more understandable to merchants, shippers, consignees, carriers and even to lawyers and judges.

Drafting Deficiencies in the Rotterdam Rules

An example of a drafting deficiency can be found in Article 12, which deals with the 'period of responsibility' of the carrier. Article 12(1) states: "The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered." Article 12(2) (a) and (b) provide specific criteria to determine when the period of responsibility begins and ends. At the same time, however, Article 12(3) allows the parties to determine this period themselves, subject to two exceptions. Article 12(1) and Article 12(3) therefore appear to be contradictory. It is suggested that Art. 12(1) should start with "Subject to paragraph 3..." The current wording of Article 12 may lead to

mistakes and confusion. Careless readers might simply read the first paragraph and conclude that the period of responsibility can only conform to that stipulation. The reader may also wonder whether one paragraph trumps the other.

Article 51(1) states: "Except in the cases referred to in paragraphs 2, 3 and 4...", in other words, except when there is, respectively, a non-negotiable transport document, a negotiable transport document, and a negotiable electronic transport record. There are, however, three different types of transport documents: negotiable, non-negotiable, and straight bill of lading. Thus, given the exceptions, article 51(1) would seem to be dealing with non-negotiable electronic transport documents, as well as straight bills of lading. But there is doubt without a specific stipulation to that effect in law. Why should we have to guess? And perhaps paragraph 1 also contemplates all residual transport documents as well (i.e., those that are not readily able to be characterized under the Rotterdam Rules). Defining the purview of a given stipulation solely by stating its exceptions lends itself to ambiguity.

It is plain from the above extract from one of our papers drafted by Bill that he had masterfully surveyed a broad

subject and analysed it critically. These words show the drawbacks of the Rules as effectively as any written on the subject since they were opened for signing in Rotterdam in September 2009. Many words have been written on the subject and when read against the even greater number of words written in favour of the Rules, they show the flaws in those words and their sentiment.

We can say no more in ending than that it would be a fitting tribute to Bill if the Rules were not signed or ratified by any country which has yet to do so. The silence of most of the main commercial trading powers across the globe has been loudly heard by the rest and should be heeded, particularly when the main purpose of the entire project that led to the creation of these Rules was to seek to bring uniformity to the law of carriage of goods by sea. In this purpose it has plainly failed, but let us not forget the good work done. Let us take the e-commerce clauses, the navigational fault exemption and the initial comparative work done by CMI groups to bring out the best from the Hague, Hague-Visby and Hamburg Rules and focus on effectively dealing with multimodal transport to create a set of rules that will work for all.

Notes

¹ See Anthony Diamond, "The Next Sea Carriage Convention?" [2008] LMCLQ at p. 163.

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