

The Rotterdam Rules

A Latin-American Response to the "Declaration of Montevideo"

Introduction

The so-called "Declaration of Montevideo" is a critique to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009 (The "Rotterdam Rules") with the purpose of indicating the problems that its application could mean for Latin American countries. However, the vast majority of the inconvenience that is attributed to the new Convention on this Declaration is not based in a technical analysis of its provisions, and in some cases, its statements are in contrast with the text of the Rules themselves.

This paper is intended to give a technical response to the Declaration of Montevideo, making reference to the criticisms contained on it in front of the text of the Convention, to show a balanced view of the Rotterdam Rules, in order to help countries in the region to make an informed decision based on clear and sufficient, but overall objective, views about the proposal that the new Convention represents for the international carriage of goods.

Response to the Declaration of Montevideo

To this effect, we will transcribe the issues raised by the Declaration of Montevideo¹ and then their answers.

1. The Convention is highly inconvenient for importers and exporters in Latin American countries, almost all users of international carriage of goods by sea.

Answer: Since this first criticism is a general statement without any support in technical aspects of the Convention, it is only possible to answer it by saying that the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009 (The "Rotterdam Rules"), was the product of more than 13 years of analysis and discussion, first in the Comité Maritime International - CMI, and then at conferences convened by UNCITRAL², which had active participation of different groups and associations of users of international carriage of goods by sea, and the strong support of some of them. In particular, it should be taken into account the favourable position towards the Rotterdam Rules by the United States of America, a country which, as well as Latin American countries, is more a nation of users of carriage of goods by sea, rather than a country of carriers; and in that country, the National Industrial Transportation League (NITL) has publicly expressed its support to the Rotterdam Rules³, as they have done other transport users' associations, such as the Nigerian Shipper's

¹ The Declaration of Montevideo is only available in Spanish, so this is a free translation, where the writers of this paper have tried to remain as faithful as possible to the original text in Spanish.

² Kate Lannan; Overview of the Convention The UNCITRAL Perspective; 39th CMI Conference - Athens, October 2008 Panel 1.

³ The press release can be consulted at: www.nitl.org/press.htm

Council⁴. In Europe the views of users' associations are divided, but it is important to note that the European Union invited its Member States to rapidly ratify the Convention (Resolution of the European Parliament, June, 2010). All this indicates that there are significant association's opinions from people from countries with dominant presence of transport users in favour of the Rotterdam Rules. There is no association of transport users of Latin America signing the Montevideo Declaration and we are unaware of any statement coming from any shipper's association in the region.

60% of Latin American countries⁵ have not ratified any of the existing international conventions on the contract for the carriage of goods by sea (Hague Rules, Hague – Visby Rules, Hamburg Rules). The Hague Rules have been ratified by Argentina, Bolivia, Cuba, Peru and The Dominican Republic. The Hague – Visby Rules were ratified by Ecuador. Mexico ratified the Hague - Visby Rules with the SDR Protocol of 1979. And the Hamburg Rules have been ratified by Chile and Paraguay⁶.

This means that most Latin American countries are not satisfied with the existing international conventions, which will continue to govern the international carriage of goods by sea if the Rotterdam Rules are not widely ratified by the international community. Therefore, it would be appropriate to undertake a complete, detailed and objective study of the new proposal before being dismissed without real grounds.

In some Latin American intergovernmental organisms such as the “Comité Andino de Autoridades de Transporte Acuático – CAATA”, at the time, the draft convention that today turned into the Rotterdam Rules was analyzed and it was not deemed as negative for the region. Just on the contrary, they made recommendations that, in their integrity, were adopted by the new convention⁷.

In Addition, despite the criticism does not refer to any specific provision of the Rotterdam Rules, the truth is that it could hardly be said that this convention is “highly inconvenient for importers and exporters in Latin America” when, as for example: i) the new convention is meant to be interpreted “taking into account its international character” (Art. 2), which means that is no longer based on the precedents and/or laws of any nation in particular; ii) eliminates the exceptions of carrier's liability known as “nautical fault” and fire (leaving only the fire on board); iii) increased the compensation limits of the carrier as compared with those provided by their predecessors (Art. 59); iv) would allow to initiate a lawsuit against the carrier or its representative at the place of delivery or port of delivery

⁴ Cfr. www.shippersvoice.com/2010/06/09/nigerian-shippers-council-supports-new-liability-rules/#comments

⁵ According to the definition of the Dictionary of the Real Academia de la Lengua, “Latin American” is the name given to “all American countries colonized by Latin nations, namely Spain, Portugal or France.” However, they are usually identified as “Latin” American countries where the Spanish or Portuguese are the official languages, or the languages spoken predominantly by the population. Following these guidelines, for the purposes of this document we have deemed as Latin Americans the following countries: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Paraguay, Panama, Peru, Puerto Rico, Dominican Republic, Uruguay and Venezuela.

⁶ Source: CMI Yearbook 2005-2006.

⁷ Comunidad Andina de Naciones – CAN, Annex IV of the “Acta de la Vigésimo Primera Reunión Extraordinaria del Comité Andino de Autoridades de Transporte Acuático – CAATA”, April 2003, pp. 29, 30. Document available at <http://www.comunidadandina.org/transportes/maritimo.htm>, consulted in September 2008.

of the goods under certain conditions, as it is often the interest of consignees of goods in Latin American countries (Art. 66); v) facilitates the operation of alternative conflict resolution mechanisms of high credibility in Latin America such as arbitration (Art. 75 et seq.); vi) facilitates the use of electronic transport documents (Article 8 et seq.); vii) extends the period of liability of the carrier (Art. 12); viii) establishes the liability of the carrier for delay in delivery of the goods, claim which is fairly common in countries of users of carriage services (Art. 21); and ix) allows, within its area of operation and as a difference from its predecessors, the applicability of certain forms of subregional instruments (Latin American) that regulate other modes of transport, as is the case of Decision 399 of the Andean Community on International Carriage of Goods by Road.

2. It does not provide equity and mutual benefit in international trade, constituting a very complex legal instrument, reglamentarist, full of referrals among its provisions, tautological definitions, and introducing a neo maritime language, which leaves out of any value the international jurisprudence from 1924 to date and causes for its poor legislative drafting very different interpretations.

Answer: The systems of civil liability for damage, loss or delay in delivery of goods in international transport by all modes of transport, are due to a policy of allocation of risks associated with transport between the parties concerned, such as the carrier, the shipper or consignor of the goods, and insurers, both of goods, and of carrier's liability. This system of "allocation of transport related risks" is characterized by the establishment of periods of liability of the carrier, exceptions to carrier's liability, limitations of liability of the carrier and short terms of time bars. These features are present, without exception, in all international conventions and instruments governing the contract of carriage, both international and regional⁸. The Rotterdam Rules only continued this trend. It is in this system of "allocation of transport related risks", typical of all international regimes for the carriage of goods, and also present in the Rotterdam Rules, where the "equity and mutual benefit in international trade", claimed by the Declaration of Montevideo, can be found.

The Rotterdam Rules are, undoubtedly, a complex and extensive Convention, as complex and extensive is the area it covers. Therefore, with all due respect, we believe that this cannot be, by itself, a valid criticism for the Convention. There are many other international legal instruments, which are also extensive and complex, but this has not been an obstacle to its successful implementation.

But to answer this criticism, it should be noted that many technological and commercial developments have taken place since the late nineteenth century, when the Harter Act of 1893 was enacted in the United States of America and the early twentieth century when the so-called "Hague Rules" were adopted as an international convention. Among them we can mention the growing trend of the phenomenon of containerization of cargo in liner trades, the use of payment

⁸ In this regard see the Montreal Convention of 1999 (air transport), Decisions 331, 393 (multimodal transport) and 399 (international carriage of goods by road) of the Andean Community, Hague Rules, Hague - Visby Rules, Hamburg Rules (carriage of goods by sea), COTIF, CMR, among others.

mechanisms such as letters of credit (whereby the banks are indirectly involved in the transport logistics network), new port technologies and the use of electronic transport documents. These new technologies, in turn, have meant new relationships and new players in the maritime trade, which were not present when the Hague Rules were drafted. What the Rotterdam Rules have done is just to recognize and regulate these new realities, which obviously introduces new aspects to regulation. There are not, thus, the Rotterdam Rules, but the subject matter to be ruled, which gives rise to the complexity of the regulation contained in them.

The "excessive reglamentarism" that the Rotterdam Rules are accused of, stems from the need to fully regulate the field for the benefit of, precisely, the uniformity which is claimed in other paragraph of the Declaration of Montevideo, also bearing in mind the mandate of article 2 of the Rules about the interpretation of the Convention, a provision that has proven successful in other international instruments such as the case of the 1980 Vienna Convention on International Sale of Goods. It is well known that the Hague Rules were intended as a "de minimis rule", which sought to regulate only those aspects of the contract of carriage in which was considered essential the State intervention in a time when freedom of contract was given a higher prevalence, than in present times. This feature produced an extensive case law that, despite having passed over 80 years, still has certain issues where no express precedent can be found. The existing case law on the Hague Rules, far from ignored or neglected, shall continue to apply and be consulted on those aspects of the Rotterdam Rules maintaining the same scheme of that preceding Convention, but now as part of an international regulatory system. In this context, the criticized "reglamentarism" of the Rotterdam Rules will produce greater certainty about the interpretation and application of the Convention, as it reduces the subjects of the contract with no express regulation.

The presence of cross-references in a legislative text follows a valid and internationally implemented law-drafting system, which has proven effective in various international instruments currently in force. On the other hand, cross-references are very common in the drafting of laws in Latin America, of so much tradition, such as Andrés Bello's Civil Code, adopted by countries like Chile, Colombia and Ecuador. It is therefore surprising that this criticism comes precisely from mostly Latin American lawyers. Besides, cross-referencing system allows greater certainty in the application of the regime.

The use of definitions sometimes "tautological" is necessary, even if it is not the more desirable legislative drafting technique. However, note that this technique was already used in some cases by previous regimes preceding the Rotterdam Rules, as for example, in Article 1 of the Hague Rules, where it is provided that the term "contract of carriage" applies for the purposes of the convention, "only to contracts of carriage....", without expressly defining the term "contract of carriage" as such.

The new expressions relating to the contract of carriage of goods by sea derive from the emerging of new technologies and new maritime trade practices which, although not present in the language of the Hague Rules are not currently strange

in the sea trade, only that they were, till now, not regulated by an international convention. That is to say that the “neo-legal language” is just a reflection of the “neo-technology” of the maritime trade.

Finally, without diminishing the importance of respect for legal tradition, it is not possible to forget that the national and international positivist order is called to respond to social or economic phenomena, which of course, change from time to time. So, not everything can be said about legal terminology when every day we see new business realities to which legal rules should provide adequate regulation.

3. Represents a step back of the rules and practices in multimodal transport, when excluding other means of transport when ocean carriage is not present: it only regulates the sea leg and linked segments (maritime plus). Moreover, in itself it is not a convention of a uniform and universal scope, allowing departure from its own terms, as in the “volume contract”, and also allows countries not to ratify the rules of Jurisdiction and Arbitration (Chapters 14 and 15), which become binding or not binding to the contractors. (sic).

Answer: This comment has three parts, so that its response will be divided into three parts as well.

Part I - Multimodal Transport: Since 1970⁹ the international community has tried, unsuccessfully, to have an international convention governing multimodal transport of goods. The last attempt, sponsored by the UN, as well as the Rotterdam Rules, was the 1980 Geneva Convention, which has not had, in practice, the success desired, and is not expected to receive further ratifications in the near future. Subsequently, they were issued the UNCTAD/ICC Rules for Multimodal Transport Documents of 1992¹⁰, which are not universally applicable, since they are mostly used by Multimodal Transport Operators who are not ocean carriers, particularly freight forwarders¹¹. Therefore, although it would be ideal from a strictly legal point of view, it is unlikely that the international trade and transport community wants to receive a single convention with a comprehensive regulation of multimodal transport, particularly by the difficulty that would exist to reach agreement between the carriers of different modes of transport about the amounts for limitations of liability.

Instead, the reality is that there are international conventions which, though, referring to a specific mode of transport, they also contain rules providing for the involvement of other transport modes, such as the Montreal Convention 1999 (International Air Transport¹²) The CMR Convention (international road transport in Europe) and the CIM - COTIF (international rail transport in Europe)¹³. None of them fully regulate multimodal transport, but would conflict with a Convention that tries to regulate the matter exclusively. The Rotterdam Rules do not prevent

⁹ Draft Combined Transport Convention - TCM 1970, with the auspices of UNIDROIT and CMI.

¹⁰ ICC Publication N° 481.

¹¹ The FIATA Bill of Lading expressly incorporates the UNCTAD/ICC Rules, 1992.

¹² Or the Warsaw regime (1929 Warsaw Convention and the 1955 Hague Protocol) in those countries in which is still applicable.

¹³ Cfr. Berlingieri, Francesco; Carrier's Obligations and Liabilities; CMI Yearbook 2007 – 2008; p. 284.

the application of any of the above mentioned international conventions, but in case of any possible conflict between them and the Rotterdam Rules, the text of its Article 82 makes it evident that the intention of the drafters was to allow the application of those other conventions to all international multimodal transport operations, which do not include an international sea leg, trying to reconcile its provisions with the above conventions, of extensive application in international trade. Thus, upon entry into force of the Rotterdam Rules they would not meet frequent situations of incompatibility with the implementation of those Conventions, which will facilitate the process of ratification.

Latin American countries should make the same analysis, as one of the elements to decide on the convenience or inconvenience of ratifying the Rotterdam Rules.

As to the Andean Community legislation (applicable in Bolivia, Colombia, Ecuador and Peru), the Rotterdam Rules would be easily consistent with Decision 399, which regulates the international transport of goods by road.

Nonetheless, in our view, with a possible ratification of the Rotterdam Rules by the member countries of the Andean Community, the new regime would prevail in its application against the multimodal transport regime provided for in Decision 331 of the Andean Community, a system that in any case, is very similar to that under the new international Convention having regard the amendments introduced by Decision 393, which modifies Decision 331. Indeed, the liability regime of the Rotterdam Rules is similar to that established in the Andean System of Transportation Multimodal whenever Decision 393 eliminated the exceptions of liability for "nautical fault"¹⁴, fire and due diligence to make the ship seaworthy (where the damage/ loss/delay is caused by such unseaworthiness); likewise, the amounts of limitation of liability of the carrier when there is a sea leg in the multimodal transport operation, are lower than those provided for in the Rotterdam Rules.

Each country shall analyze whether the ratification of the Rotterdam Rules would be in conflict with any agreement or domestic legislation governing the multimodal transport contract, and if so, whether it is appropriate that this regime is replaced, at least in part, by the new Convention. In such an analysis it is advisable to take into account that the multimodal transport contract is essentially international, and therefore it is desirable that an instrument of broad international scope and application regulates the subject.

Part II - Volume Contract: The so-called "volume contracts" respond to a reality and a necessity of international trade. They have as an antecedent the "service contracts" provided for in U.S. law, but also used in other parts of the world. The Hague Rules also allow excluding contracts of carriage from its mandatory scheme, with the simple expedient of not issuing a bill of lading. Moreover, its Article 6 allows entering into contracts of carriage outside the regime in cases of "particular goods", provided that a bill of lading is not issued. Therefore, the Hague Rules also allow for "freedom of contract" to depart from the Convention, with no mechanism at all to defend the interests of the shipper or the consignee. The Rotterdam Rules

¹⁴ Error in navigation or in the Management of the ship.

recognize that freedom of contract, but only under the frame of a volume contract, which have significant restrictions for them to be valid and enforceable against third parties other than the shipper who has concluded the contract (art. 80) and impose minimum obligations the carrier cannot depart from (art. 14). Both protections are absent in the Hague Rules. In fact, the Rotterdam Rules state that a volume contract will only be valid when, among other requirements, the shipper has been given the opportunity to enter into a contract under the original terms of the Convention (Art. 80.c), provided that the agreement has not been a contract of adhesion (Article 80.d), and certain "core" provisions of the Convention cannot in any case be ignored or superseded (Art. 80.4). Therefore, it does not seem to be accurate the comment that the Convention allows, without more, to step aside from its provisions.

Part III - Jurisdiction and Arbitration: Even if it was desirable that the provisions on jurisdiction and arbitration were also mandatory, the Convention opted for a flexible schedule to prevent this situation from becoming an obstacle to its ratification process, taking into account, for example, the existing provisions on the subject in the European Union. But in any case, the Hague Rules had no provision on jurisdiction and arbitration at all, so this aspect of the Rotterdam Rules can not be regarded as a step back, but as a breakthrough, given the uncertainty produced by the lack of regulation on the matter in the Hague Rules and the extensive use of clauses conferring jurisdiction on bills of lading.

4. Introduces definitions legally inconsequential to the contract of carriage, such as: the volume contract, the liner transport and the non-liner transport, the performing party or the maritime performing party, divestitures which do not alter the concept or the purpose of the contract of carriage.

Answer: Quite the contrary, these definitions are of the utmost importance for the functioning of the contract of carriage in the context of the Rotterdam Rules, but especially having regard to the current reality of maritime trade. The definition of the volume contract is essential to the operation of this type of contract. That of liner and non-liner transport is necessary to determine the scope of application of the Convention.

The concepts of performing party and maritime performing party are important to define the period of liability of the carrier, to the extent that, under Article 18 (a), the carrier is liable for the acts of performing parties. The extension of the period of liability of the carrier to the concept of door-to-door (art. 12) required the provision of vicarious liability of the carrier for the acts of its employees, agents and subcontractors, which is definitely an improvement in front of the Hague Rules regime.

In particular, the definition of maritime performing party is indispensable, not only for the previous remark, but also because it is jointly and severally liable for damage, loss or late delivery of goods to occur while in their own period of liability (that of the maritime performing party) in accordance with Articles 19 and 20 of the Rotterdam Rules. The definition of "maritime performing party" comprehends the concept of "actual carrier" as it had already been provided for in the Hamburg

Rules (art. 10), but is extended to other actors in the transport chain, such as ports, stevedores, ship agents, warehouse operators in ports and freight forwarders (when handling goods in the port area). This is an advantage over the Hamburg Rules, and even more as compared with the Hague Rules, which do not provide anything about it.

On the other hand, the inclusion of extensive listings in the section of "definitions" is not an unusual practice in the drafting of legal harmonization schemes, which have proved to be successful (see the corresponding provision in the 1980 Vienna Convention on the International Sale of goods) and, additionally, that situation is precisely what allows application of Article 2 of the Convention on the interpretation of its provisions.

5. Introduces the concept of documentary shipper, other than the shipper, that the Convention itself admits to not being the true party to the contract of carriage, as well as eliminates the figure of the freight forwarder or cargo agent.

Answer: The role of the "documentary shipper" is not new to the maritime trade. It is common in cases of an FOB seller that delivers the goods to the carrier chosen by the buyer (who is the real party to the contract of carriage), and agrees to be named as "shipper" in the bill of lading or multimodal transport document. But his legal situation is highly uncertain under international regimes currently in force. Under the Hague and Hague - Visby Rules, in some jurisdictions the mere fact that a person delivers the goods to the carrier for the purpose of loading (i.e., the FOB seller) is enough to deem it as a shipper, with all the legal duties and liabilities that it entails, such as the guarantee to provide exact information about the goods and the liabilities derived from the dangerous nature of the goods. This unfavourable position of the FOB seller is consolidated in the Hamburg Rules, whose article 1.3 includes in the definition of shipper the person who actually delivers the goods to the carrier in relation to the contract of carriage.

On the contrary, under the Rotterdam Rules, the FOB seller who effectively delivers the goods to the carrier for loading will only be deemed as shipper if he has voluntarily accepted to be named as such in the document of transport (art. 1.9). And only if this requirement is met, then the Rotterdam Rules establishes that the "documentary shipper" have the same obligations and rights of the "shipper" (art. 33), so at least there is a uniform treatment of this situation, which will serve as basis for the "documentary shipper" to obtain contractual protection in front of the person at whose request he agreed to be named as "shipper" in the bill of lading or multimodal transport document.

There is no single provision of the Rotterdam Rules of which the elimination of the freight forwarder or cargo agent may be inferred from. On the contrary, the Convention could be applicable to the freight forwarder in so far as he assumes obligations as carrier before the shipper or the consignee (art. 1.1 and 1.4), or when acting as a maritime performing party.

6. Eliminates the terms of consignee and endorsee of the cargo, established

in nearly two centuries by the laws, doctrine and case law, replacing them with terms without legal significance such as the bearers of the transport document, "destinatario", right of control and controlling party.

Answer: The term "consignee", in fact, is not removed by the Rotterdam Rules. Its English version maintains the expression of "consignee", what happens is that the Spanish version (also official) translated it as "*destinatario*". This same translation exists in the Spanish version of the Montreal Convention of 1999 (arts. 13 to 16, among others), which regulates the international air transport contract and for which there has been no criticism in this regard. The "*destinatario*" is defined as the person who is entitled to claim the goods from the carrier, when they reach their destination, whether according to the provisions of the contract of carriage, or by virtue of a document of transport, either physical or electronic. The same treatment is set forth in other international instruments such as in the Decision 399 of the Andean Community on the International Carriage of Goods by Road¹⁵.

7. Removes the term bill of lading, contemplated in all legislation, doctrine and jurisprudence, and replaces it by vague terms such as transport document or electronic transport document.

Answer: It is good for the shipper to be certain about the applicable legal regime, even if a bill of lading has not been issued, a document, which, moreover, is being replaced by other documents of transport and, as recognized internationally, it is not the contract itself, but only proof of its existence. So, particularly in the Latin American context where the contract of carriage is consensual, what is really logical is that the legal regime be independent of the issuing of a document of transport. On the other hand, over the time technology is increasingly influencing the development of the transportation business. Indeed, the issue of the UNCITRAL Model Law on the use of electronic documents (which has inspired local laws on the subject, such as Law 527 of 1999 in Colombia) accounts for this trend. Thus, it seems only appropriate that the new Convention also regulates the use of such "electronic" documents.

In any case, the term "bill of lading" has been replaced by "document of transport" in other international conventions and instruments such as the 1980 Geneva Convention, Decisions 331 and 393 of the Andean Community and the Multimodal Transport Agreement of MERCOSUR.

In this regard, it should be noted that the term "document of transport" is more generic, and comprehends the concept of "bill of lading" and therefore, although the Rotterdam Rules refers to "document of transport" it does not prevent the maritime community to use the "bill of lading", as it is, in any case, a "document of transport".

8. Wrongly states that the substitute of the bill [of lading] - the document of transport - is the contract of carriage, when it is only a proof of its existence

¹⁵ Art. 1 of the Decision 399 of the CAN defines "*destinatario*" as "the natural or legal person on whose name are named or shipped the goods and as such is designated in the Consignment Note for International Road or in the contract of carriage, or to whom it belongs by an order after its issuance or by endorsement." (Free translation).

and ignores its other functions to constitute receipt of goods on board and document of title.

Answer: This statement is inaccurate in light of the provisions of the Convention. It is enough to compare this statement with the wording of Article 1.14 (b) of the Rotterdam Rules, according to which "document of transport" means the document issued by the carrier that "evidences or contains a contract of carriage". This provision is in line with international case law and doctrine under which a bill of lading is the evidence of the contract of carriage as between the shipper and the carrier, but it is the contract of carriage itself for a third person, who without having intervened in the conclusion of the contract, later on became holder of the bill of lading or document of transport.

On the other hand, it should be noted that the application of the Rotterdam Rules is not dependant on the issuance of a document of transport, since a contract of carriage would be governed by the Convention upon completion of the circumstances mentioned in Article 5, even if a document of transport has not been issued, because in these cases a contract of carriage exists irrespective of the existence or issuance of a document of transport.

Nor is it true that the Rotterdam Rules ignore the functions of the transport document as a receipt of goods, which are specifically regulated in article 41, by provisions similar to those found in the Hague Rules and the Hamburg Rules. Indeed, the definition itself of document of transport provided for in article 1.14 (a) requires that the document of transport be evidence of the receipt of the goods by the carrier.

As for the role of the transport document as "receivable" or "document of title of goods", it is also covered under Article 1.15, which defines the negotiable transport document, and 4.7, which regulates the delivery of the goods when a negotiable document of transport (physical or electronic) has been issued.

9. Admits the inclusion of special clauses in the transport document, altering the present, where it is only permissible in charter party contracts freely negotiated.

Answer: This is not an accurate statement. Under the Conventions currently in force, the original parties to the contract may stipulate additional provisions as provided in the "form" or "type" (bill of lading or multimodal transport document) which, if anything, can be subject to amendments by the parties. In effect, what happens is that such additional clauses or covenants, when they are outside the "bill of lading" will not circulate with an eventual endorsement of the document to a third party acting in good faith (note that in our legal tradition the bill of lading is a receivable document of title) but remain valid and therefore, enforceable, only between the original parties to the contract.

The Rotterdam Rules maintain the same principle (art. 79) and only accepts contract modifications departing from the regime under a volume contract (art. 80) with the restrictions mentioned above for its conclusion, to protect the shipper

and third persons that could become holders of a document of transport.

10. Supports the validity of the adhesion clauses inserted in the document of transport, which give exclusive jurisdiction to the courts chosen by the carrier. This, in practice, will force users to always go to the courts of the of carrier's domicile, thus excluding the courts of the consumer countries of transportation services, and in particular, will prevent the victim of a breach of contract to appeal to the courts of the place of destination.

Answer: This is also an inaccurate statement, because, first, the chapter on jurisdiction is one that may or may not be accepted by states upon ratification of the Rotterdam Rules. And secondly, that in light of the Convention for an exclusive jurisdiction or forum selection clause to be valid it requires that the same has been inserted in a "volume contract" (Art. 67.1), with the restrictions imposed for the conclusion of this type of contracts (Art. 80) aiming at the protection of the shipper and the third persons that could become holders of a document of transport.

Failure to meet these requirements, mean that the exclusive jurisdiction clauses will be null and void (Art. 79) and, consequently, the shipper (or the holder of the document of transport) will always have the option to sue the carrier or a maritime performing party in the place of delivery of the goods (Art. 66.iii) or the port of discharge (Art. 66.vi), i.e. the contractual "place of destination", which is exactly the effect claimed for in the Declaration of Montevideo.

11. It does not apply to documents of transport issued under charter party contracts for total or partial use a vessel, a commercial form that has many years of peaceful application.

Answer: This statement is also inaccurate. Just on the contrary, the Rotterdam Rules do apply to documents of transport in general, and in particular to bills of lading, which are issued under a charter party for the total or partial use of a ship, provided that the holder of such document of transport or bill of lading is not an original part of the charter party contract. Moreover, the Rotterdam Rules apply in this situation even if no document of transport or bill of lading is issued, which gives third persons who are receivers of cargo shipped under charter parties a greater level of protection than which is provided by the Hague and Hague - Visby Rules.

The Hague and Hague - Visby Rules (section 1b) as well as the Hamburg Rules (section 2.3) apply to all bills of lading issued under a charter party from the moment where the bill of lading governs the relationship between the carrier and the holder of the bill of lading, which is a third party in respect of the charter party. But in all the above-mentioned conventions (Hague Rules, Hague - Visby Rules and Hamburg Rules) this person loses the protection of the regime if no bill of lading is issued.

By contrast, Article 7 of the Rotterdam Rules provides the protection of the mandatory regime to all persons who have the status of consignee ("*destinatario*" in the Spanish version of the Rules), controlling party or holder [of the document

of transport or bill of lading] in respect of goods which have been shipped pursuant to a charter party, even if no bill of lading or document of transport has been issued, under the condition that the consignee, controlling party or holder are not an original party to that charter party contract.

Therefore, the protection of third parties to whom goods are shipped under a charter party contract for the total or partial use of a vessel (including space and slot charter parties) is greater in the Rotterdam Rules (art. 7) than in the Hague and Hague - Visby Rules (section 1.b), because in the latter such protection is dependant on the issuance of a bill of lading, which does not occur in the Rotterdam Rules.

12. Leave the carrier the liberty to receive on board or destroy goods, if they, at any time can turn dangerous in the course of transportation, and exonerates the carrier's liability for any natural loss of volume or weight, without setting specific limits for each type of merchandise. It also allows the carrier to deviate from the route, without losing the right to the exoneration or limitation of liability for such deviation.

Answer: Article 15 of the Rotterdam Rules regulates the subject of dangerous cargo with the same principle applicable in the light of previous conventions (Article IV.6 of the Hague Rules and article 13.2.b of the Hamburg Rules). In effect, the carrier, in case the shipment of dangerous goods may well refuse to receive them (as it could do under the previous regimes), or having received them, to take measures if they become dangerous or "*reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment*" (same as in the previous regimes). Note that now, under the new Convention, based on more than justifiable reasons, the carrier may also adopt the same measures if the goods are dangerous or could reasonably be expected to become dangerous to the environment, something for which most governments worldwide are seeking to establish standards of protection. Article 15 is expressly subject to carrier's compliance with the obligations set forth in article 13, which implies that if the carrier knew the potentially dangerous nature of the goods he may only be exempted from liability for their destruction or unloading, if proves the compliance of these obligations.

On the other hand, it is common in transport laws to provide for the possibility of exempting the carrier of liability in the transportation of certain type of goods in cases of loss of volume or weight bulk when they arise out of the so-called "natural losses" that are usual in some traffics; the new Convention only acknowledges this situation beyond what could be possibly argued, for example, under the exceptions (m) and/or (q) of the Hague and Hague - Visby Rules.

With respect to deviation, it should be noted that the Rotterdam Rules do not provide for "justifiable deviations" (Article 4.4 of the Hague and Hague - Visby Rules), but establishes (Art. 24) that if according to the applicable law a deviation or a departure from the route amounts to a breach of contract by the carrier, he can nevertheless rely on the exceptions and limitations of liability set forth in the Convention, thereby preventing the overall displacement of the regime in case of

deviation, as it happens in some jurisdictions. Thus, it is left to national law determining whether a deviation constitutes a breach of the contract of carriage, but it is prevented that, if so, the whole regime becomes inapplicable. So, it cannot be understood as a right of "deviation" granted to the carrier.

13. Change the rules governing clearly to date the carrier's responsibility and greatly increases the burden of proof on the claimant (the consignee or shipper), substantially altering the burden of proof. There is no reason to abandon the traditional system where the victim should only prove the existence of the contract of carriage and its breach: So far, the carrier had to prove the "extraneous cause" which relieved him from liability.

It remains in the nebula (sic) is bound to an obligation of result, with the cumulus (sic) of exceptions the carrier's obligation to the custody of what he receives on board disappears. If the contract is, in essence, with an obligation of result, this leads to a basic obligation for the carrier: to take custody of the goods.

Regarding the loading and stowage of the ship, the carrier is allowed to move these operations to the shipper or third party operators, which will result in a release of the carrier's obligations of custody and supervision of the good stowage, being that this compromises the seaworthiness.

Answer: This criticism stems from a mistaken reading of the Rotterdam Rules. The answer will be divided into two parts.

Part One – Obligation of the Carrier, carrier's liability and burden of proof: First, one must start from the basis that article 11 of the Rotterdam Rules expressly provides that *"the carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee"* ("destinatario" in the Spanish version of the Rules). From the general perspective of Latin American legal systems, this article clearly establishes an "obligation of result" of the carrier¹⁶, which implies the obligation of "custody" of the goods during his period of liability, that unlike what happened under the scheme of Hague and Hague - Visby Rules does not end with the mere discharge of the goods, but with the actual delivery of the goods to the consignee or the legitimate holder of the document transport. In this regard, the obligation to "take care of the cargo" or "custody" not only still exists, but it is now more exigent to the carrier because it goes up to the "actual delivery" of the goods.

Secondly, according to article 17.1 of the Rotterdam Rules in order to get the carrier liable, the claimant (shipper/consignee/legitimate holder of the document of transport) must prove *"that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4"*. This evidentiary requirement is

¹⁶ In the same line, Ricardo Sandoval says: *"Según el artículo 11, del Convenio, el porteador se obliga a "transportar las mercancías hasta el lugar de destino y entregarlas al destinatario". Se trata de una obligación de hacer, cuya ejecución no es personalísima y que corresponde a la categoría de obligación de resultado y no de una simple obligación de medios."* Sandoval, Ricardo: *Convenio de las Naciones Unidas sobre el Contrato de Transporte Internacional de Mercancías Total o Parcialmente Marítimo*, p. 22.

equal to that normally provided for in all liability regimes for contracts of carriage, and consist of the simple evidence that the goods were delivered to the carrier, and then that he (the carrier) did not deliver them to the consignee, or delivered them damaged or incomplete (or that incurred in delay), for which it is enough to restore to the evidentiary value of the document of transport, specifically regulated in Article 41 of the Rotterdam Rules¹⁷.

And with regard to the basis of liability of the carrier, as from formulation of the general principle of liability, Article 17.2 of the Rotterdam Rules states that *"the carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18"* (underlines not original from the quote). In order to prove that the cause or one of the causes of the loss is not attributable to the carrier it is essential for the carrier to first identify that cause, because if he does not, it becomes impossible to prove that it is not attributable to him or to the people for whom he is vicariously liable according to Article 18. In other words, for the carrier to be exonerated of liability he must:

- i. Identify the cause of loss, damage or delay in delivery of the cargo¹⁸; and
- ii. Prove that such cause is not attributable to his fault or the fault of the persons for whom he is vicariously liable according to Article 18 of the Rotterdam Rules.

Therefore this proof, as described in Art. 17.2 and i) and ii) above, is not a simple proof of absence of fault "in abstract", but rather a "concrete" proof of absence of fault relating to the cause or causes of the damage that the carrier must have identified previously. In other words, for the carrier to be exempted from liability he must show the "extraneous cause".

Under the Rotterdam Rules, in all possible events, the carrier cannot be exempted from liability arising out of damage/loss/delay in delivery of the goods if the cause of the damage remains unknown¹⁹, which is more characteristic to a strict liability regime than to a fault based liability regime²⁰. Furthermore, in all cases the carrier must positively identify the cause of the damage/loss/delay and prove that the cause is not attributable to his conduct (his "fault"). The only difference is that

¹⁷ Sandoval, Ricardo: Convenio de las Naciones Unidas sobre el Contrato de Transporte Internacional de Mercancías Total o Parcialmente Marítimo, p. 24: "Al parecer el nuevo texto uniforme al exigir que el reclamante "pruebe que el hecho que causó o contribuyó a causar la pérdida el daño de las mercancías o el retraso en su entrega, se produjo durante el período de custodia", estaría imponiendo una carga de prueba superior a la prevista en las RH, pero no es así, porque para demostrar que el daño se produjo durante el período de responsabilidad del porteador, basta con que el demandante pruebe que las mercancías han sido entregadas al porteador en buen estado y que el consignatario las ha recibido con averías".

¹⁸ In words of Ricardo Sandoval (op. cit., p. 25) "... [al transportador] se le impone el deber de identificar la causa o una de las causas de la pérdida, daño o retraso y probar que dicha causa no es imputable a su culpa ni a la de ninguna de las personas por cuyos actos el porteador responde".

¹⁹ "El supuesto básico del Convenio es que no pueden existir daños sin que se pueda explicar su causa y que si la causa resulta inexplicable o inexplicable, la responsabilidad recae automáticamente sobre el porteador." Ricardo Sandoval, op. cit. P. 24.

²⁰ Delebecque, Philippe, op. cit., p. 275: "As for the carrier liability (art. 18), if it is true that the basis of this is not exactly the same that the HVR one, it is impossible to say, in our opinion, that is a 'fault based liability regime'. Furthermore, it is false to say, while the language of the HVR is retained, that the risk has shifted from ship to cargo. The carrier liability is still, in our opinion, a strict liability, given that the carrier could not withdraw his liability if the cause of damage is unknown (...)".

when the cause of the damage is one of the events listed in article 17.3, then the carrier is relieved from proving that the cause "is not attributable to him", but then the claimant will always have the possibility of proving that there was "fault" on the part of the carrier or the people for whom he is vicariously liable according to article 18.

A detailed analysis of the liability system set forth in article 17 of the Rotterdam Rules allows us to qualify it as a regime that is more similar to what is commonly known in Latin America as an "*objective*" regime (strict liability), than to a "*subjective*" liability regime (fault based liability). Indeed, in order to get exempted from liability under this regime, the carrier is always required to identify the actual cause of the damage, loss or delay in delivery of the goods, and also to demonstrate that such cause is not attributable to his conduct, or the conduct of the people for whom he is vicariously liable according to article 18 of the Convention. Nevertheless, which is important in this analysis is not whether the basis of the carrier's liability under the Rotterdam Rules regime can be described as a "subjective" regime, as a "subjective" regime with a presumption of fault and exoneration by the proof of "extraneous cause", or as an "objective" regime. The title of the regime is actually not the most important point here. What is really relevant is that the carrier's liability regime under the Rotterdam Rules always requires the identification of the actual cause of the damage/loss/delay in delivery of the goods, that the carrier may not be exempted from his liability in a simple (abstract) test of absence of fault on his part, and that the carrier will not be exonerated from liability if the cause of the damage remains unknown. All what is mentioned above is sufficient to say that the Rotterdam Rules is a much more favourable regime to cargo interests than the one set forth in the Hague - Visby Rules and the Hamburg Rules.

Part II - Liability for loading and stowage and its relationship with the obligation of seaworthiness: The possibility that the carrier agrees with the shipper, the documentary shipper or the consignee for them to carry out loading, handling, stowing or unloading of goods (Art. 13.2) is simply a recognition of the reality of maritime trade and modern logistics operations and also a recognition of the current trend in the case law on article 2 of the Hague and Hague - Visby Rules. Nevertheless, these agreements in no way diminish the scope of the obligation of the carrier to exercise due diligence to make the ship seaworthy. In the new Convention this is a continuing obligation throughout the journey and must be exercised not just "before and at the beginning of the voyage" as required by article 3.1 of the Hague - Visby Rules. In fact, the wording of article 13.2 of the Rotterdam Rules indicates that such agreements are subject to Chapter 4 (Obligations of the Carrier), where article 14 specifically refers to the continuing obligation of seaworthiness.

14. It sets nominal limits of liability for loss or damage - 875 SDR per package and 3 SDR per kilogram of gross weight - that entail a radical decrease of the limits set out in The Hague-Visby Rules. Furthermore, as the unit of account is a monetary unit that is subject to inflation, the passage of time will tend to lead to a progressive increase in carriers' irresponsibility. The limitation on liability for delay (two and a half times the value of the

freight) seems insufficient too. In addition, the rules with respect to the amount of compensation due when the value of the goods has been declared are not clear either.

The limitation of liability only applies to the carrier but not to the shipper (Articles 17/24) whose liability is integral and unlimited. The carrier is therefore granted an unacceptable privilege.

Answer: Contrary to what is stated in the Declaration of Montevideo on the point, the Rotterdam Rules proposes an increase rather than a reduction regarding applicable liability limits in the case of loss of or damage to the goods. This can be simply noted by making a comparison between the numbers provided for in the relevant provision of the "SDR" protocol, in which the liability limit was established for the Hague - Visby scheme (except in case of declared value of goods) in 666.67 SDR (Special Drawing Rights) per package or unit or 2 SDR per kilogram of gross weight of goods, whichever is higher, with the numbers as provided for in the Rotterdam Rules, namely, 875 SDR (208,33 SDR more than in the Hague - Visby Rules) per package or unit or 3 SDR (1 SDR more than in the Hague - Visby Rules) per kilogram of gross weight of the goods, whichever is higher. Thus, one can clearly see that the limits under the new convention are higher than those set out by their predecessors. On the other hand, the reference to special drawing rights (SDR) is of frequent use in international instruments governing contracts of carriage by different modes of transport, such as the 1999 Montreal Convention on carriage of goods by air. Additionally, it must be said that the use of SDR aims at establishing a pattern that has nothing to do with the "irresponsibility of the carriers", but with the preservation of the calculated liability limit provided for in the international convention.

On the other hand, with regard to the applicable liability limit for delay, it should be noted that this situation was not expressly regulated at all in the Hague or in the Hague - Visby Rules (on which it was not clear whether the carrier was liable for delay). In any case, the value set forth in the Rotterdam Rules for this event represents an increase in the amount provided for in the respective provision of the Hamburg Rules.

Regarding the calculation of compensation when the shipper has declared the value of the cargo, the new convention only reflects what its predecessors (Hague, Hague - Visby and Hamburg Rules) have previously stated. In fact, according to Article 59, the declared value will be the applicable limit in this case (Art. 59.1).

It is worth noting that the new convention was drafted having regard in this particular to maintain a "balance" between the interests of carriers and shippers²¹ and to setting up a regime that provides certainty to the parties to the contract²², reasons why consensus was reached to set limits on the amounts raised by the Convention.

²¹ Sturley, Michael. "Setting the Limitation Amounts for the UNCITRAL Transport Law Convention: The Fall 2007 Session of Working Group III" in *Benedict's Maritime Bulletin*, Vol. 5, No. 3/4, p. 165.

²² See *Ibid*, p. 165.

In any case, from a predominantly empirical point of view, it must be borne in mind that only a few goods frequently transported by sea – having regard to their cost of production – will not be properly covered by the "per package" limitation as provided for in the Convention, that is approximately \$ 1.312 USD per package or unit.

It is true that the Rotterdam Rules do not establish a limitation of liability for the shipper, as it does for the carrier's responsibility. However, no one can say that this is a disadvantage of the Rules of Rotterdam in front of the Hague Rules, the Hague - Visby Rules or the Hamburg Rules, because all of these neither provide for any limitation of liability of the shipper. So in this particular issue the Rotterdam Rules can not be accused of being in detriment of the legal position of the cargo interests, because they simply maintain the same line of the preceding conventions.

15. The limitation of carriers' liability is prejudicial for transport users as it entails a transfer of costs in favour of ship-owners and affects the balance of payments of countries that are reliant on shipping services. It must be pointed out that limitation of liability is not admissible in the laws of many countries in this region of the world (for example, Brazil and Uruguay) and that the limits adopted by Argentina and other countries that have ratified the Hague Rules are significantly higher.

Answer: The limits of liability are an institution of the carrier's liability regulation present in all the international conventions governing contracts of carriage by any mode of transport. They are also present in the Hamburg Rules and the 1980 Geneva Convention on Multimodal Transport. In Latin America, Decisions 399 (International Carriage of Goods by Road) and 331/393 (Multimodal Transport) of the Andean Community, also establish liability limits applicable to the carrier.

The Agreement on Multimodal Transport of MERCOSUR (MERCOSUR/CMC/DEC Nº 15/94), article 13, establishes limits of liability applicable to Multimodal Transport Operators for damage to or loss of goods carried. Those limits were set by each one of the States Parties of MERCOSUR, namely Argentina, Brazil, Uruguay and Paraguay, in Annex I to this Agreement.²³

²³ Article 13 - Unless the nature and value of the goods have been declared by the shipper before the Multimodal Transport Operator has taken custody of the goods, and that have been entered in the Transport Multimodal Document, the Multimodal Transport Operator may not be held liable for any loss of or damage to goods in an amount that exceeds the liability limit established by each State Party in accordance with the statement made by each of them in Annex I, part of this Agreement. Notwithstanding this, States Parties agree that these limits of liability of the Multimodal Transport Operator may be amended by giving the other States Parties notice of the modification.

ANNEX I - LIABILITY LIMIT OF THE MULTIMODAL TRANSPORT OPERATOR

The limit of liability of the Multimodal Transport Operator under Article 13 ° of this Agreement will be:

- 1 - For Argentina, unless the nature or value of the goods have been declared by the shipper before the Multimodal Transport Operator have taken them under his custody and entered in the multimodal transport document, the responsibility of Transport Operator Multimodal will not exceed, in the event of total or partial loss, damage or delay in delivery of the goods with a value higher than 400 Argentinean pesos gold per kilogram of volume or affected part, or 10 Argentinean pesos gold per kilo of the volume or parts concerned, whichever is greater.
- 2 - For Brazil - the equivalent of 666.67 DES per volume or unit of cargo, or by 2 (two) DES per kilo of gross weight of the goods lost or damaged, whichever is greater.
- 3 - For Paraguay - the equivalent of 666.67 DES volume or unit of cargo, or by 2 (two) DES per kilo of gross weight of the goods lost or damaged, whichever is greater.
- 4 - For Uruguay - the equivalent of 666.67 DES volume or unit of cargo, or by 2 (two) DES per kilo of gross weight of the goods lost or damaged, whichever is greater.

As mentioned above, the civil liability regimes for damage, loss or delay in delivery of goods in international transport are set out having regard to a policy of allocation of risks associated with transport between the parties concerned, such as the carrier, the shipper of the goods, and insurers (both cargo insurers and carrier's civil liability insurers). Liability limits are one of the ways by which this allocation of risk is presented.

Even in air transport of passengers, being human life and integrity much higher values than the goods, the Montreal Convention of 1999 utilizes the SDR as parameter to determine the compensation in case of death and injury to passengers.

Liability limits are not exclusive of transportation. They are also present in work-related accidents in most of international laws. Additionally, the same principle applies in relation to corporations and limited liability partnerships as a way of limiting the liability of their owners and shareholders.

16. With a view to achieving unanimity juridical principles and provisions have been incorporated into these new Rules both from those adopted by the Hague Rules of 1924 and from the Hamburg Rules.

To put it another way, a framework based on Common Law has been covered over with extracts from the Hamburg Rules which are founded on European codified civil law.

When it is said that the aim is to achieve uniformity in applicable law in order to facilitate international maritime trade, this ignores the incoherence of the mass of Rotterdam provisions designed to please everybody which, in fact, only leads to a legal Tower of Babel. This outcome is considerably more inappropriate than analysing the laws of other countries that have been built up to protect the rights of users, i.e. importers and exporters.

Modern information technology allows the world to have access to local laws and regulations along with the courts' and legal authorities' interpretations thereof. In other words it is not so difficult to find out about transoceanic rules and regulations.

To sum up, it is a mistake to proclaim that the Rotterdam Rules will put an end to the "worldwide confusion currently affecting this sector" as the promoters of the new regulations enthusiastically assert.

Answer: It is not true that when the Convention makes reference to certain "categories" or "expressions" inherent to the Hague or the Hague - Visby Rules that situation has been originated in the "rush to achieve unanimity". Quite the contrary, this situation arises since the convention sought to keep the categories used in the past that have proved to be useful and appropriate in these schemes. On the other hand, it is a constant complaint in Latin America that previous regimes were developed in a context of common law and thus, without having regard to our traditional categories build up from the Roman - Germanic law.

Thus, it seems paradoxical that it is precisely Latin American lawyers who signed the Declaration of Montevideo, who now attack the new convention by suggesting that the result is undesirable because it is "a skeleton originated in the Common Law" that "has been dressed up with clothes taken from the Hamburg Rules". This statement dismisses the antecedents of the new Convention. It is enough a review of its working papers to evidence that the Rotterdam Rules seeks to set up a "balance" between different legal systems, by recognizing the different legal families of law from which local laws come from, to pursue the creation of an equilibrated system that could offer solutions to common problems of sea trade while providing "familiarity" to different States not being tied to a single legal tradition. This is precisely what did not achieve, for instance, neither the Hague Rules, the Hague - Visby Rules, or the Hamburg Rules.

Furthermore, it is not shared the view suggesting that it would be preferable to continue studying foreign laws that supposedly promote consumer protection. This is because, on one side, it cannot be said that using that formula the shipper will always be more protected than through the application of the Rotterdam Rules and, secondly, because the study of foreign laws - which is not always an easy task for the foreign lawyer, nor for a judge of the eventual dispute - in many cases ends up favouring the phenomenon - very much criticized - of the so called "forum shopping". Indeed, it allows the carrier, who usually drafts the contract, to previously check what law is more favourable to his interests (in some cases far beyond the limits of the Convention) and set it up as the substantive law governing disputes arising out of the contract.

Thus, in our view, it is not about ignoring the benefits of the previous systems but, on the contrary, it is about building up from basis in order to have at hand a proposal that harmonizes legislation in accordance with the needs of the sector through a Convention that brings together elements from various legal traditions in an effort to become a universally applicable legal instrument.

Conclusion: For all the above reasons we call on the governments and parliaments of our respective countries NOT to ratify or become party to the "Rotterdam Rules".

Answer: The answers given in this document to the Declaration of Montevideo are intended to provide a more objective view about the proposal contained in the Rotterdam Rules, which we hope will be useful for governments and parliaments of Latin America to adopt an informed decision about the desirability or otherwise of its ratification.

Buenos Aires, October 27th, 2010.

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