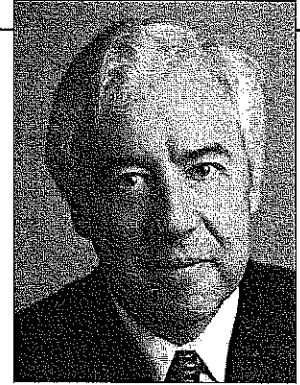


# Will Rotterdam Succeed? Testing the Waters at CMI Buenos Aires

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## Introduction

The CMI Colloquium at Buenos Aires, Argentina in October 2010, devoted a day to panels titled "Rotterdam Rules – an Alternative for Maritime Carriage for South America?." It was a perfect forum to gauge the level of interest and support for *Rotterdam*.<sup>1</sup>

CMI drafted the initial text of *Rotterdam* starting in 1999, and in 2002 delivered it to UNCITRAL for six years of negotiation, after which it was approved by the UN General Assembly in December 2008. CMI, understandably, is following *Rotterdam* closely. The CMI Colloquium drew together a room full of expert participants including drafters of *Rotterdam*, and many involved in the current process of consideration, lobbying for and against *Rotterdam*.

In 2010, the European Parliament passed a non-binding resolution recommending that EU member states ratify *Rotterdam*. In February 2010, commercial delegates from 15 Arab League states signed the Alexandria Declaration 2010 recommending that Arab League states support *Rotterdam*. There is also vocal opposition to *Rotterdam*.<sup>2</sup>

At the time of writing, the number of signatory countries is 23, most recently Luxembourg on August 31, 2010, an increase from 16 at the September 2009 opening ceremony. There have been no ratifications or adoptions by domestic law.

If 20 countries ratify *Rotterdam* then it will be in force in those countries. Also, if a single state adopts

*Rotterdam* as national legislation without ratification, *Rotterdam* will apply to shipments under the law of that state. Lawyers in Canada and the USA would then see claims to which *Rotterdam* applies, and should get ready for them, even if neither country adopts *Rotterdam*.

## Good Intentions of *Rotterdam*

The laudable goal of *Rotterdam* was to make maritime law more uniform and modern. The resulting convention expanded to include multi-modal aspects; liability of transport intermediaries and shippers; and more. For better or worse, the much-needed electronic commerce rules are now grafted on to *Rotterdam*, with its sweeping scope and controversial issues. If *Rotterdam* does not succeed, then it is unlikely that our generation will live to see another similar broad international convention.

## Problems with *Rotterdam*

In the writer's view, *Rotterdam* has failed to meet its goals in four major ways:

- (a) Freedom of contract, to vary most terms of *Rotterdam*, is allowed for "volume contracts" which are broadly defined. Carriers will arrange to carry most goods under "volume contracts" with trivial carrier liability limits, adding great uncertainty to carriage of goods situations, and encouraging negligent cargo handling.
- (b) The exceptions to the door-to-door provisions of *Rotterdam* are so broad that they do not solve the

problem of inconsistent inland liability regimes in different countries. Also, some provisions can be opted out of by ratifying states, including the choice of forum provisions. Uniformity of law will not be achieved.

- (c) The *Rotterdam* liability regime is significantly different from existing, established, liability regimes. Unless *Rotterdam* is immediately widely adopted (which is unlikely) it will create yet another unwanted liability regime. Uniformity of law will be set back.
- (d) The drafting is long, complex and difficult to understand in its original drafting language, English. Interpretations of *Rotterdam* will vary between countries that adopt it.

The compromise of the difficult issue of trying to unify the many differing inland transport liability regimes, is that *Rotterdam* does not apply where there is an international agreement for inland transport liability, like CMR (road) or CIM (rail). That exempts inland transport in Europe. The compromise creates issues about whether *Rotterdam* applies to the inland transit leg in countries with no international agreement about inland transit, like the USA and Canada.

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The *Rotterdam* liability limits (the higher of 3 SDR/kg or 875 SDR/package) exceed the usual Canadian motor carrier statutory limit of Cdn \$4.41 per kilogram. For example, a container with 1,000 packages weighing 10,000 kilograms would allow the motor carrier to limit liability to Cdn \$44,100 under the motor carrier regime. However, the *Rotterdam* limit is 875,000 SDRs. There are serious issues about whether *Rotterdam* applies. This shortfall of liability on the contracting multimodal carrier under *Rotterdam* will encourage carriers to seek "volume contracts" that reduce their liability to below CDN \$44,100, often to zero. Cargo interests will then sue motor carriers, freight forwarders, and all other available targets seeking to avoid the low motor carrier limit, or the zero limit in a *Rotterdam* "volume contract." There will be uncertainty about the effect of *Rotterdam* and litigation with unpredictable results in different countries.

In summary, the excellent door-to-door concept in *Rotterdam* has so many exceptions that it does not achieve its purpose. *Rotterdam* would create theoretical door-to-door uniformity of law, but at the unacceptably high cost of re-creating the chaotic freedom of contract which necessitated the creation of the *Hague Rules* in 1924.

### CMI Colloquium, October 2010

The CMI Colloquium panel members included many distinguished *Rotterdam* supporters and participants in the CMI's early work and subsequent UNCITRAL negotiations. There was a lively debate, particularly by Spanish speaking lawyers. Simultaneous Spanish/English translation allowed all delegates to enjoy Latin American style advocacy, with (rare in Canadian courts) quotes from memory of great literature supporting one's cause, including Gabriel Garcia Marquez, and Jorge Luis Borges (a local favourite who lived in Buenos Aires).

### Declaration of Montevideo

Some of the debate at the CMI Colloquium concerned the Declaration of Montevideo which had recently been signed (on October 22, 2010) by 58 individuals from 11 Latin American countries plus several Uruguay business associations. It was also signed (under an endorsement supporting the view that *Rotterdam* should not be brought into force) by 8 maritime lawyers including the author and Prof. William Tetley, Q.C. and Barry Oland (all from Canada), the others from Australia, the U.K., Spain and Sweden.

A link to an English translation of the Declaration of Montevideo as prepared by Pysdens Solicitors (England) can be found at [http://www.ahbl.ca/files/publications/Declaration\\_of\\_Montevideo.pdf](http://www.ahbl.ca/files/publications/Declaration_of_Montevideo.pdf).

The Declaration of Montevideo generated three written responses which were distributed at the CMI Colloquium:

- (a) "Montevideo Declaration – The Facts" by Manuel Alba, Spain and others, including Francesco Berlingieri, Michael Sturley and Alexander Von Ziegler;
- (b) "The *Rotterdam* Rules, a Latin American Response to the "Declaration of Montevideo"" by Jose Vincente Guzman and others;
- (c) "Limitation of Liability in the *Rotterdam* Rules, A Latin American Perspective" by Alberto Cappagli (President of Argentine Maritime Law Association).

A link to "Montevideo – The Facts" is <http://www.cmi2010buenoaires.com.ar/Facts%20-%20Montevideo%20Declaration%20-%20final%20-%20English.pdf>. A link to "Limitation of Liability in the *Rotterdam* Rules, a Latin American Perspective" by Alberto Cappagli (President of the Argentine Maritime Law Association) is [http://www.ahbl.ca/files/publications/Limitation\\_of\\_Liability\\_in\\_the\\_R.pdf](http://www.ahbl.ca/files/publications/Limitation_of_Liability_in_the_R.pdf).

### International Interest in *Rotterdam*

Comments by panelists, questions from the floor, and informal discussions at the CMI Colloquium gave the author the impression that the overall world status is a cautious wait and see approach, with all eyes still on the USA.

Among other influential jurisdictions, the United Kingdom government is now seeking stakeholder input and expects to formulate a position in late 2011. The People's Republic of China may delay ratification because its demand during negotiation for a lower liability limit than that finally in *Rotterdam* was not met; however, this might be revisited if there is general widespread adoption. Argentina is reluctant to adopt *Rotterdam* because the liability limits are dramatically below the current limitation under Argentina law which is based on the *Hague Rules* gold value.

### Status of USA Ratification

The USMLA strongly supports *Rotterdam* and reasons include the outdated U.S. \$500 per package limitation amount. Unofficially, the USMLA stance seems to be driven by the (debateable) perception that *Rotterdam* will help USA lawyers to overcome the *Sky Reefer* decision of the U.S. Supreme Court which has been sending cargo claims out of the USA to be litigated elsewhere.

Reportedly, the status of USA ratification of *Rotterdam*, at the date of writing this article (January, 2011), is that the U.S. State Department is preparing a "transmittal package" with input from relevant executive departments, supporting *Rotterdam*. Such packages then are reviewed by the Secretary of State and the President, for submission to the Senate. The time estimate for submission to the Senate would be roughly March, 2011.

If the USA ratifies then all countries particularly its largest

trading partner Canada, will pause to reflect on the new reality.

### **Proposed Alternative Convention if Rotterdam Fails**

Being concerned that *Rotterdam* is an unnecessary additional liability regime that is a bad thing for the transportation industry generally, particularly cargo interests, 9 lawyers from several jurisdictions (UK, Australia, Canada, Norway, Sweden, Spain, and Uruguay), including the writer, in April 2010, wrote and widely circulated a paper titled "Particular Concerns with Regard to the *Rotterdam Rules*." It points out some flaws and proposes an alternative convention. A link to the paper is: [http://www.ahbl.ca/files/publications/transportation/Rotterdam\\_Rules\\_Apr\\_10.pdf](http://www.ahbl.ca/files/publications/transportation/Rotterdam_Rules_Apr_10.pdf)

There is a lot to be said for not throwing away that which has not ceased to work, and for simplicity. With less than 20 articles, *Hague-Visby* has been a long lived and successful Convention and Protocol. With over 90 articles and many new concepts, *Rotterdam* may fail to be adopted. Fortunately, we have the makings of

a network liability system in other conventions that are well-established and relatively simple.

The work of CMI initially involved considering *Hague*, *Hague-Visby* and *Hamburg* with a view to bringing back uniformity to international maritime law. That work should be used as a base to create a maritime core similar to *Hague-Visby*. Inevitably, due to modern technology, the error in navigation clause in *Hague-Visby* should be removed, and the electronic documentation provisions from *Rotterdam* could be included. The Montreal Convention for air carriage and CMR Convention for road (liability limit: 8.33 SDR/kg) and CIM-COTIF for rail could all be adopted on a wider basis. CMR and CIM-COTIF (liability limit: 17 SDR/kg) are European Conventions but there is no reason why they should not work across the globe. A clause to deal with potential clashes between the conventions would not be too complex to draft; for example, the CMR Convention already has such a clause dealing with when CMR should apply when the goods being carried are on water: as long as the goods

remain on wheels then the CMR applies.

These conventions covering the four major transport modes, are tailored to deal with these modes (which *Rotterdam* is not) have long worked well, and are widely ratified. Why reinvent the wheel? If these conventions were offered for wider acceptance with a view to uniformity with an agreement that any gaps would be dealt with by national law, we would have a tailored worldwide system already widely in use, rather than a more fragmented system than that already in place which *Rotterdam* appears to be heading for, instead of reaching its goal of uniformity.

### **Conclusion**

*Rotterdam* is at a critical stage and USA ratification would influence world opinion. *Rotterdam's* e-commerce provisions are generally considered to be a long needed modernization of carriage of goods law. If *Rotterdam* does not become generally accepted, then these electronic commerce provisions should be adopted in some other international instrument as soon as possible.

### **Endnotes**

1. International Carriage of Goods Wholly or Partly by Sea, (U.N. Doc. E.09.V9 (2009) – [http://www.uncitral.org/uncitral/en/uncitral\\_texts/transport\\_goods/2008rotterdam\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html).
2. "Shipowner Associations Welcome EP Support for Rotterdam Rules," in Transportweekly, posted May 17, 2010 at [www.transportweekly.com/pages/en/news/articles/72043](http://www.transportweekly.com/pages/en/news/articles/72043).