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**Update on the United Nations Convention on Contracts for  
the International Carriage of Goods  
Wholly or Partly by Sea ("*Rotterdam*")  
The Effect of *Rotterdam* on Canadian Cargo Claims**

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**Introduction**

1. *Rotterdam* was our generation's only chance at major reform and unification of international carriage of goods law. With respect to all the negotiators, it was not worth the huge effort.
2. *Rotterdam* is at a critical stage at the time of writing this paper, August, 2009. After then but before the CTLA conference in October, we will know the outcome of the September 23, 2009 signing ceremony for *Rotterdam* which will indicate the level of international support and whether *Rotterdam* is the way of the future, or a thing of the past.
3. After almost a decade of negotiation at UNCITRAL and CMI, on December 11, 2008 the United Nations General Assembly approved *Rotterdam*. If 20 countries ratify *Rotterdam* then it will be in force in those countries. Also, if a state adopts *Rotterdam* as national legislation without ratification, *Rotterdam* will apply to shipments under the law of that state. Canadian Courts will eventually see claims to which *Rotterdam* applies. The writer's view is that Canada should not sign or ratify *Rotterdam*.
4. *Rotterdam* has failed to meet its essential goals in 4 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”, adding great uncertainty to carriage of goods situations.

- (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 writer suspects that one reason for the relatively small vocal opposition to *Rotterdam* is that almost no one except the negotiators has the stamina to read it; and, few people will take a position on something they have not read.

### **History of *Rotterdam***

5. When what is now *Rotterdam* was first discussed at UNCITRAL and CMI in 1996, the writer was cautiously optimistic that a new door-to-door liability regime might create uniformity of maritime law. *Hague-Visby* is used widely, but not universally, and was adopted by Canada in 1993. The only hope for success of *Rotterdam* would be to simply extend *Hague-Visby* inland, thereby replacing conflicting liability regime limits with one time-tested solution. The result is the exact opposite.
6. *Rotterdam* is a grand vision that governs carriers’ liability, and also liability of shippers who, for example, fail to give the carrier instructions to deliver the cargo. It deals well with electronic commerce, containers and other modern transport issues.
7. In 2001 the first draft, from Comité Maritime International (“CMI”) was delivered to UNCITRAL for 13 working sessions alternating between New York and Vienna from 2002 to July, 2008. With great respect to all those diplomats and lawyers, the final document is unnecessary.

### **Problems with Rotterdam**

8. The UNCITRAL negotiation led to compromises with new limits of liability different from the *Hague*, *Hague-Visby* and *Hamburg Rules* (“*Hamburg*”). *Rotterdam* will probably just become yet another controversial liability regime in addition to *Hague*, *Hague-Visby*, *Hamburg*, and others like US COGSA.

9. 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.

10. Even if there is superficial uniformity of law by wide adoption of *Rotterdam*, the result on day-to-day claims will be a great increase in the number of disputes and uncertainty, due to the freedom of contract for volume contracts.

11. 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 *Hague* in 1924.

### **Reaction to Rotterdam**

12. The European Shippers’ Council (“ESC”), which represents freight transport interests of about 100,000 companies is strongly against *Rotterdam* and takes the position that it would put some shippers in a worse position to that of the pre-1924 *Hague* liability environment. They say on page 1 of their position paper:

*“... the present draft contains a few thin potential improvements for shippers. However these are at best uncertain as they are usually qualified in such a way that they may prove illusory.”*

(ESC Position Paper on the Draft Maritime Instrument of the United Nations Commission on International Trade Law[.pdf], (A/CN.9/WGIII/WP.81), April, 2007)

13. The ESC position paper and other documents criticizing *Rotterdam* are found in a collection of links at Professor William Tetley's website, <http://www.mcgill.ca/maritimelaw/rotterdamrules>. On his website, Professor Tetley posts his opinion on *Rotterdam*; he recommends that the United Nations General Assembly return *Rotterdam* to UNCITRAL Working Group III for revision.

14. *Rotterdam* will come into effect for Canadian outbound shipments only if Canada ratifies *Rotterdam* or passes Canadian legislation which incorporates the same terms. International carriers' organizations, and some nations particularly carrier nations who were actively involved in the UNCITRAL negotiation, are lobbying other states to ratify *Rotterdam*. Most states are now consulting with their own commercial interests. These commercial interests are represented by industry groups and national maritime law associations, which are different from the diplomatic and governmental organizations most involved in UNCITRAL.

15. CMI is the umbrella organization of most of the world's national maritime law associations. At the CMI conference in Athens in October 2008, the Canadian Maritime Law Association (CMLA) took the considered position to abstain from the CMI's vote on whether to endorse *Rotterdam*. Canada and 6 other countries abstained. 22 countries voted yes. Only one (Belgium) voted no.

### **The Future**

16. *Rotterdam* is at a critical point. If there is immediate adoption led by the USA and other major trading nations, then there is hope for unprecedented uniformity of international maritime law, at least in its statutory wording.

17. Canada and other shipper nations will probably take a cautious approach and only adopt *Rotterdam* if it is widely adopted by their major trading partners. One big question is whether the necessary 20 states will actually ratify the Convention in order to bring it into force. This depends on the commercial and political decisions to be made by each state.

18. Informal discussions at IUMI and CMI gave the writer the impression that *Rotterdam* contains several terms, notably "volume contracts", that will make *Rotterdam* a difficult sell to many governments. These terms were added at the USA's insistence, and based on the USA negotiators' advice that the USA would ratify *Rotterdam* only if these terms were present. If the USA ratifies, then most countries will seriously consider *Rotterdam* in

order to achieve uniformity with the USA, despite its flaws. If the USA does not ratify, then everyone will be disappointed with a convention with unacceptable flaws due to the USA's terms, and years of work will have been wasted.

19. The US Maritime Law Association (“USMLA”) assisted the USA negotiators throughout the UNCITRAL negotiation. There is significant support for *Rotterdam* within the USMLA. In 2009 the USMLA voted to support *Rotterdam* and urged the USA government to adopt it. There was vocal dissent within USMLA.

20. The USA’s government position is hard to predict. Reportedly, the USA has indicated that it will sign *Rotterdam*. Reportedly, the USA motor carrier lobby may start opposing *Rotterdam*, and if there is vocal position *Rotterdam* would have much less chance of success. The recent USA federal election and other factors make it difficult to say whether the USA will actually adopt *Rotterdam*. There is no political incentive in the USA, or Canada, to adopt *Rotterdam*. No politician will risk adverse publicity in order to promote or oppose *Rotterdam*.

### **Summary of *Rotterdam***

21. *Rotterdam* is 96 Articles long in 18 Chapters covering many more subjects than *Hague-Visby*. It is impossible in a short seminar to summarize *Rotterdam* or to explain its nuances of meaning which will affect maritime business practices and legal liability. If *Rotterdam* comes into effect, shippers, forwarders and carriers must review every aspect of their businesses for compliance.

22. Below is a sequential review of some important chapters in *Rotterdam* with the writer’s brief, simplified summary of the effect of a few of the many significant provisions:

#### **Chapter 2. Scope of Application**

23. *Rotterdam* applies to contracts of carriage involving international sea carriage between 2 different states, where at least one of the places of receipt, port of loading or discharge, or place of delivery is in a contracting state.

24. Article 6 excludes charterparties from *Rotterdam*.

### **Chapter 3. Electronic Transport Records**

25. *Rotterdam* recognizes throughout that electronic bills of lading have largely superseded paper documents.

### **Chapter 4. Obligations of the Carrier**

26. Article 11. The carrier must deliver the goods from the place of receipt to the place of destination where it is delivered to the consignee. This is the door-to-door provision.
27. Article 13 allows the carrier to contract with the shipper to load, stow etc. This allows the carrier to reduce its liability for loading and stowing below that found in *Hague-Visby*.
28. Article 14 provides that the carrier must at all stages during the voyage make and keep the ship seaworthy. This is a carrier's "super-obligation" which cannot be contractually waived under *Rotterdam*.

### **Chapter 5. Liability of the Carrier for Loss, Damage or Delay**

29. Article 17 sets out 4 phases of shifting burden of proof during trial, from the claimant to the carrier and back again. It is complicated. It resembles but differs from the *Hague-Visby* burdens of proof.
30. From the shipper's point of view, *Rotterdam* contains difficult new burdens of proof. For example, under Article 17(v)(a)(1) the shipper has the onus of proving that the ship was unseaworthy, if the shipper wishes to shift some liability to the carrier. The shipper may have no way to obtain this evidence, which is exclusively possessed by the carrier.
31. Significantly, Article 17(6) greatly shifts liability from the carrier to the shipper in the common situation where loss is attributed to several causes, only some of which are the carrier's fault. Under *Hague-Visby* all that loss is paid by the carrier; under *Rotterdam*, it will be apportioned partly to the shipper.

### **Chapter 6. Additional Provisions Relating to Particular Stages of Carriage**

32. Article 26 provides that the conditions of *Rotterdam* do not prevail over the provisions of other international instruments for inland carrier liabilities. The lack of application of *Rotterdam* to most European and

other inland liability regimes is unsatisfactory and defeats the praiseworthy uniform door-to-door purpose of *Rotterdam*.

33. In Canada and the USA, where there is no such international instrument, presumably *Rotterdam* would apply to the inland leg of multi-modal carriage. Where does this leave the inland carrier of a multi-modal container, which the inland carrier may not know is part of an international sea carriage chain under *Rotterdam*? One answer is that such local carriers may still rely on the limits of their own local terms of carriage, which may be lower than the *Rotterdam* limit. *Rotterdam* would apply only to the multi-modal carrier's liability to the shipper, for all stages of transit. However, a reasonable argument that *Rotterdam* does apply to the Canadian inland carrier is as follows:

- A. Article 61(1) deals with the loss of the benefit of limitation of liability under *Rotterdam* (i.e. the 875 SDR per package/3 SDR per Kg limits under Article 59. Article 61(1) states that neither the carrier nor any of the persons referred to in Article 18 is entitled to the benefit of that limitation of liability in certain circumstances.
- B. Article 18 deals with the liability of the carrier for other parties' acts, specifically listing in Article 18(a) "Any performing party". Article 1(6) defines "Performing party" broadly enough to include a Canadian motor carrier handling the inland leg of a multi-modal shipment.
- C. Therefore, Article 61(1) implies that Canadian inland carriers are subject to the limitations of liability under *Rotterdam*. If they did not have that benefit, then why would *Rotterdam* provide that they lose that benefit in certain circumstances, under Article 61(1)?

## **Chapter 7. Obligations of the Shipper and Forwarder to the Carrier**

- 34. Super-obligations (which cannot be contracted out) require the shipper to give instructions to the carrier to deliver the goods, and shippers are liable for failure to label dangerous goods.
- 35. Shipper's liabilities of this sort are not found in other carriage of goods regimes. The definition of shipper is very broad, "*a person that*

enters into a contract of carriage with a carrier” and may include freight forwarders. Freight forwarders and other transport intermediaries will face these new liabilities if the actual shipper does not provide instructions. *Rotterdam* limits the maximum amount of carrier liability, but there is no maximum limit on shipper liability.

### **Chapter 8. Transport Documents and Electronic Transport Records**

36. The extensive rules about electronic documents in this chapter are welcome, but complicated.

### **Chapter 9. Delivery of the Goods**

37. Forwarders complain that carriers are required to issue a “negotiable” transport document, but carriers retain the right to deliver the goods without surrender of the document (Article 47(2)) so the document is not really “negotiable”. This will create litigation about ownership and cause problems with payment for cargo and letters of credit.

### **Chapter 10. Rights of the Controlling Party**

38. This chapter modernizes the old rules based on paper bills of lading.

### **Chapter 12. Limits of Liability**

39. Article 59 limits the carrier’s liability for damage or loss of the goods to 875 SDR per package or shipping unit, or 3 SDR per kilogram of the goods, whichever is higher, except when the value of the goods has been declared. Article 60 limits liability for delay to 2 ½ times the freight payable on the goods delayed, subject to the package / weight limit in Article 59.

40. To compare the limits of liability under various regimes:

	Loss and Damage (the higher of)	Delay
<i>Rotterdam</i>	3 SDR/kg or 875 SDR / package	2.5 times the freight on the goods delayed
<i>Hamburg</i>	2.5 SDR/kg or 835 SDR / package	2.5 times the freight on the goods delayed

<i>Hague-Visby</i>	2 SDR/kg or 666.67 SDR / package	no limit
US COGSA, 1936	US \$500 / package	no limit

41. The *Rotterdam* limits are much higher than the common Canadian motor carrier statutory limit of Cdn \$4.41 per kilogram, so motor carriers are concerned about *Rotterdam*. 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 SDR's (about Cdn \$1.5 million dollars). There are serious issues about whether it applies. This shortfall of liability on the contracting multi-modal 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 *Rotterdam*. There will be great uncertainty about the effect of *Rotterdam* and much litigation with unpredictable results in different countries.
42. There are serious issues to be decided about whether *Rotterdam* applies inland in Canada to multi-modal shipments with a sea carriage leg.
43. Article 61 provides that the carriers' limit of liability cannot be broken unless the loss results from a personal act of the carrier done with intent to cause such loss or recklessly and with knowledge that such loss would probably result. Compared to other carriage regimes, this limitation will be very difficult to break, and this is a super-obligation under Article 80(4) which cannot be varied by contract.

### **Chapter 13. Time for Suit**

44. There is a two year suit time limit. This is one year longer than the one year suit time limit under *Hague-Visby*.

### **Chapter 14. Jurisdiction / Chapter 15. Arbitration**

45. These chapters allow a carrier to enforce a contractual choice of forum clause for arbitration or courts. Ratifying states may opt out of

the provisions, resulting in different laws in different contracting states.

46. Canadian interests should oppose adoption of these Chapters because they are inconsistent with the broader right to commence an action found in Section 46 of Canada's *Marine Liability Act* which allows a claim to be pursued in similar jurisdictions to *Hamburg*:

*46(1) ... a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where*

*(a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;*

*(b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or*

*(c) the contract was made in Canada.*

## **Chapter 16. Validity of Contractual Terms**

47. Article 80 allows parties to derogate their obligations under *Rotterdam* in volume contracts, which are extremely broadly defined in Article 1:

*“Volume contract” means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum, or a certain range.*

48. Shippers will find this definition too broad and unspecific. It includes any contract for more than one shipment in a period of time, for example a contract to ship two packages over a period of more than a year with an option in the contract to cancel the second shipment.
49. *Rotterdam* contains controversial minimum requirements that the carrier must meet in order to have a contract qualify as a “volume contract”. In theory, these should give the shipper an opportunity to negotiate a higher freight rate for a higher liability under *Rotterdam*.

In reality, creative carriers will use contractual forms that arguably comply with *Rotterdam*, but without real negotiation. The requirements are:

*Article 80. Special rules for volume contracts*

1. *Notwithstanding article 81, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.*

2. *A derogation pursuant to paragraph 1 of this article is binding only when:*

(a) *The volume contract contains a prominent statement that it derogates from this Convention;*

(b) *The volume contract is (i) individually negotiated or (ii) prominently specifies the section of the volume contract containing the derogations;*

(c) *The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and*

(d) *The derogation is not (i) incorporated by reference from another document or (ii) included in a contract of adhesion that is not subject to negotiation.*

50. Freight forwarders will probably face more law suits under *Rotterdam* than at present. *Rotterdam* is more likely to allow the ocean carrier to avoid liability under volume contracts, leaving forwarders more exposed to cargo claims because forwarders have more “one off” (not “volume”) contracts with shippers than do carriers.

**Effect of *Rotterdam* on Canadian Carriage of Goods Law: Would *Boutique Jacob* Have the Same Result?**

51. If the *Rotterdam Rules* are adopted they will add another level of uncertainty to the already difficult task of predicting the outcome of multi-modal cargo claims. A real example is the facts in *CP Rail v. Boutique Jacob*, 2008 FCA 85 in which the Federal Court of Appeal reversed the

Trial Division decision, 2006 FC 217, about whether a rail carrier could limit liability. At trial, the railway was held liable and had to pay full damages, but on appeal the railway was allowed to limit its liability based on the railway's standard "confidential rate contract", to a trivial maximum set out in an ocean bill of lading. The facts are a classic multi-modal cargo claim, with a layer cake of sub-contracts, each layer dimly aware of the possible existence of other layers, and striving to adopt the most benefit for the carrier from the contract terms and laws of those other layers:

- A container of clothing shipped from Hong Kong to Montreal was damaged in a train derailment in Ontario.
- The cargo interests' freight forwarder, Panalpina, contracted with Pantainer (an NVOCC) to carry the goods from Hong Kong to Montreal.
- Pantainer sub-contracted the Hong Kong / Montreal carriage to OOCL, who issued an electronic bill of lading to Pantainer for the whole trip.
- OOCL sub-contracted the Vancouver / Montreal leg to CP Rail. OOCL had a "confidential rate contract" with CP Rail. CP Rail issued no bill of lading when it received the container in Vancouver, but recorded the shipment electronically.
- Cargo interests sued the forwarder Panalpina, Pantainer, OOCL and CP Rail for damages exceeding \$35,000. The damaged cargo weighed 494.1 kg.

### **Federal Court Trial Decision**

52. Pantainer, a contracting carrier (NVOCC), was found not liable but, if liable, would have been entitled to limit its liability based on its standard bill of lading, to 1,000 SDR per bill of lading.

53. OOCL could exclude its own liability completely by its contract with Pantainer.

54. CP Rail was held fully liable and could not rely on *Himalaya* clauses or any other contract terms because they were inconsistent with the requirement for a "signed agreement" in the *Canada Transportation Act*.

55. The requirement that a rail carrier's limitation must be "in writing" was not satisfied by the electronic contract between CPR and OOCL. OOCL was not the "shipper" under Section 137 of the *Canada Transportation Act*. CP Rail could not limit its liability because its electronic system did not create "a written agreement signed by the shipper or by an association or other body representing shippers".

### **Federal Court of Appeal Decision**

56. The Court of Appeal reversed the trial decision and held that CP Rail could rely on contractual limits of liability and was not required to have the written signature of cargo interests on an agreement. The electronic acceptance by OOCL (directly contracting with the railway) was sufficient to bind cargo interests.

57. The Court of Appeal rejected the argument that a shipper's signature was required, because neither OOCL nor CP Rail were complaining about the absence of a signature.

58. CP Rail therefore got the benefit of the lowest of its various listed desired contractual limits, including Cdn \$250,000 per container. The lowest such limit was the liability of the ocean carrier under the OOCL ocean bill of lading which was US \$2/kg. which, for this shipment resulted in a judgment for Cdn \$1,433 against CP Rail.

### **Effect of *Rotterdam* on *Boutique Jacob***

59. The shipment in *Boutique Jacob* would almost certainly be a "volume contract" and thus subject to freedom of contract, which would result in a generally similar result as the Federal Court of Appeal's analysis, i.e., applying the lowest available possible liability limit. After the commercial world gets used to *Rotterdam*, that low liability in the OOCL bill of lading (US \$2/kg.) would probably be further reduced by amended bills of lading with even lower limits allowed under *Rotterdam*.

60. If the shipment was not a "volume contract", and if the 875 SDR/package or 3 SDR/kg. limit applied, then the limit applicable to the approximately 80 cartons damaged would be about 70,000 SDR, somewhat more than the claim amount. However, there would be a serious issue about whether the *Rotterdam* limits apply to inland transit damage, discussed in the comments about Chapter 6, above.

## **Conclusions**

61. In summary, the effect of *Rotterdam* would be:

- (a) Increased uncertainty about contractual limits of liability and other terms, including whether the carrier can limit liability under the Convention or exclude liability if the shipment is a volume contract; and
- (b) Increased shipper (including freight forwarder) legal liability for delay or failure to give instructions; and
- (c) Increased costs of litigating cargo claim recoveries due to the greater complexity and uncertainty of the liability regime.

Respectfully,

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