

**MIABC Education Seminar,  
May 4, 2010**

***Rotterdam Rules Update: Prospects for USA Ratification;  
and the Effect of *Rotterdam* on Cargo Insurance Risks and  
Transport Contracts; and an  
Alternative Proposed Convention***

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**Introduction**

1. *Rotterdam* has been over 10 years in the making by a vast international negotiation. Even though, in the writers opinion, *Rotterdam* is a bad thing for Canada and any other ship using nations, *Rotterdam* has momentum from that negotiation, and the lack (so far) of a viable alternative, that we must all prepare for the possibility that *Rotterdam* will apply to situations that Canadian business must confront, by making business and insurance decisions about them. This paper is about the prospects of USA ratification; considers the effect of *Rotterdam* on transportation contracts including insurance; and, proposes an alternative convention.

2. Since the *Rotterdam* official signing ceremony on September 23, 2009, *Rotterdam* has been signed by 21 states, including the USA but not Canada, most recently Mali on October 26, 2009. No state has ratified *Rotterdam*, a situation that the writer hopes continues. However, there is now pending USA domestic legislation by which the USA would adopt *Rotterdam*. If passed, *Rotterdam* would apply to any contracts governed by or invoking, USA law, which is many contracts.

3. 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 would thus see claims to which *Rotterdam* applies and Canadian exporters or insurers must make decisions applying *Rotterdam* to Canadian business.

4. *Rotterdam* has failed to meet its 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.

### **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 best hope for success of *Rotterdam* would be to 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.

### **Problems with Rotterdam**

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

8. 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.

9. 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**

10. *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 stakeholder interests. These stakeholders are represented by industry groups and national maritime law associations, which are different from the diplomatic and governmental organizations most involved in UNCITRAL.

11. 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 – Will the USA Ratify?**

12. *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.

13. 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.

14. Informal discussions at IUMI and CMI gave the writer the impression that *Rotterdam* contains several terms, notably “volume contracts”, that 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.

15. 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.

16. The USA State Department has indicated that it supports *Rotterdam*. The USA has signed the Convention but not yet passed domestic legislation needed to adopt *Rotterdam*. The USA Senate legislation has been drafted and circulated, but whether it will ever be passed is another matter. The USA is far along the road to adopting *Rotterdam*, but there are still hurdles to overcome.

17. Major shipping lines and P&I Clubs are lobbying to support *Rotterdam*. Reportedly, the USA motor carrier lobby may oppose *Rotterdam*, and if there is vocal position *Rotterdam* would have much less chance of success. 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**

18. *Rotterdam* is 96 Articles long in 18 Chapters covering many more subjects than *Hague-Visby*. It is impossible in a short paper 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, carriers and their insurers must review every aspect of their businesses for compliance.

19. Below is a sequential review of *Rotterdam* with the writer's brief, simplified summary of the effect of a few of the many significant provisions:

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

20. *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.

21. Article 6 excludes charter parties from *Rotterdam*.

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

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

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

23. 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.

24. 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*.

25. 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**

26. 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.

27. 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.

28. 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**

29. 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*.

30. 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.

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

31. 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.

32. 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**

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

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

34. 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**

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

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

36. 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.

37. 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

38. 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 (at CDN \$1.52 per SDR) now about CDN \$1.3 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 a *Rotterdam* volume contract. There will be uncertainty about the effect of *Rotterdam* and litigation with unpredictable results in different countries.

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

39. 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**

40. 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.

41. 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 ... 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**

42. 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.*

43. 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.

44. *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. *... as between the carrier and the shipper, a volume contract ... 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.*

### **Effect of Rotterdam on Cargo Insurers**

45. The overall effect of *Rotterdam* will be to allow ocean carriers to avoid, by bill of lading terms, liability for the damage that only they have the ability to prevent. This will encourage carriers to cut costs by reducing safety precautions, increasing the number of claims for which the carriers will pay no direct costs. Cargo interests and their insurer's will bear these costs.

46. The effect on policies will not be so much wordings, but on loss ratios.

### **Effect of Rotterdam on Contracting Parties**

47. 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. The result is that freight forwarders, and cargo interests and terminal operators, should review all of their contracts and bill of lading forms in order to do their best to protect themselves from this extra level of liability that would be imposed by *Rotterdam*. They will need appropriate liability insurance.

### **Effect of Rotterdam on Canadian Motor Carriers**

#### (a) Higher Liability Limit

48. The *Rotterdam* limit is often much higher than the C\$4.41 / kg. in most Canadian provinces' motor carrier statutes. The *Rotterdam* limit is the higher of 3 SDR / kg. or 875 SDR per package. The SDR is now worth about C\$1.52, so the *Rotterdam* limit for a typical 10,000 kg. container with 1,000 valuable packages is 875,000 SDR, or C\$1,330,000. The statutory C\$4.41 / kg limit for that cargo is only C\$44,100.

#### (b) More Disputes About Which Limit May Apply

49. The two possible limits described above will cause disputes. Even worse, if the shipment is a "volume contract" under Rotterdam, then multimodal carriers can limit their liability down to zero. To avoid zero recovery, cargo claimants will sue motor carriers hoping to rely on the higher liability limits in Canadian statutes. Furthermore, if it is not a "volume contract", then multimodal carriers must pay the high *Rotterdam* limit to cargo interest, and will then try to recover that higher amount from motor carriers.

(c) Uncertainty About Whether *Rotterdam* Applies To A Shipment

50. *Rotterdam* only applies to inland carriage that is part of a contract of carriage including a sea link. It may be difficult for inland carriers to know in advance whether a particular shipment is a link in such a chain, and therefore, which liability regime applies - *Rotterdam* or the Canadian statutes.

**Proposed Alternative Convention**

51. 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, have written and widely circulated a paper titled "Particular Concerns with Regard to the *Rotterdam Rules*". It points out some flaws and proposes an alternative convention.

52. The threshold for *Rotterdam* coming into force is set fairly low with ratifications by only 20 countries needed out of about 195 countries worldwide. To date only 21 have signed and it remains to be seen whether any of these 21 will ratify by making the Convention law in their respective countries.

53. There is a lot to be said for not throwing away that which has not ceased to work. There is also a lot to be said for simplicity. With less than 20 articles, *Hague-Visby* has been a very long lived and successful Convention and Protocol. With over 90 articles and many new concepts, *Rotterdam* should not prosper as we do have the makings of a network liability system in other Conventions that are long lived, well used and relatively simple.

54. The work of CMI initially involved comparing and contrasting *Hague*, *Hague-Visby* and *Hamburg* with a view to bringing back uniformity to

international maritime law. That work should be used as a core base to create the maritime core. 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 suitable clause to deal with any potential clashes between the conventions would not be too complex to draft. Indeed the CMR Convention already has such a clause dealing with when the convention should apply and when not when the goods being carried are on water. As long as the goods remain on wheels then the CMR convention applies.

55. These conventions covering the four major transport modes that are specifically tailored to deal with these modes (which *Rotterdam* is not) have been long tried and tested and work well with many countries across the globe having ratified in large numbers. 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 creating instead of reaching its goal of uniformity.

56. We urge those countries that have signed and those that have not to consider the many problems with *Rotterdam* and the potential alternative we have in the form of current conventions meshed together with national law.

57. To reach overall global uniformity along the lines of the conventions dealing with non maritime transport may well be cumbersome. However, the main merits of *Rotterdam* (the deletion of the error in navigation defence and introduction of the electronic record) could easily be saved by protocols to the existing maritime conventions. This would leave the field free for adopting a more suitable international regime than *Rotterdam* to govern transport in the modern era of transport logistics.

## **Conclusions**

58. 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 *Rotterdam* or exclude liability completely 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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