

# **The Rotterdam Rules & “Wet” Multimodal Shipping: Important Concepts for Lawyers**

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## ***Overview – The Long Voyage From the Hague to Rotterdam***

On December 11, 2008, the United Nations Commission on International Trade Law (UNCITRAL) adopted the *Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, more colloquially known as the “Rotterdam Rules” for the city which hosted the convention’s signing ceremony on September 23, 2009.<sup>1</sup> Depending on one’s point-of-view, the Rotterdam Rules were 8 years, 30 years, 80 years, or millennia in the making. For our present purposes, however, we can consider the Rules as a late response to three trends:

- i.) the system of containerization and door-to-door transport that has been developing in the industrialized world, and beyond, since the 1960s;
- ii.) computer record keeping, which has been developing in the shipping industry since the 1970s, and the advent of widely used electronic communications, including e-mail; and
- iii.) the increasingly high value of shipped cargo.

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<sup>1</sup> Text available online: < [http://www.uncitral.org/pdf/english/texts/transport/rotterdam\\_rules/09-85608\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/09-85608_Ebook.pdf)>. The Convention was approved by the United Nations General Assembly on December 11, 2008, during its 63rd session by resolution A/RES/63/122 (see online: <[http://www.uncitral.org/pdf/english/workinggroups/wg\\_3/res122e.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_3/res122e.pdf)>).

By the early 1960s, modern methods of containerization and multimodal transport had begun to bloom in the face of a system of shipping laws that remained archaic, based primarily upon the simple idea of a bill of lading (often: “b/l” or “BOL”) as a transferable or negotiable document of title: the holder received the goods, no questions asked.<sup>2</sup> That system simplified the chain of title so that a person merely had to show-up at a port of delivery, present the bill to the carrier, and demand the cargo. The carrier would accept the bill, unload the goods, and move on to his other business. It made no difference whether ownership of the cargo had passed multiple times during the voyage, and bills of lading were often endorsed blank or “to order”. This facilitated trade and commerce, as it allowed for the sale of the goods whilst still in transit. It also provided a level of certainty in ownership (seriously impeded only by fraud) and a level of certainty with respect to the carrier’s liability, which related to his care of the goods during the course of the marine voyage. However, it did not provide for any nuanced apportionment of risk or loss. Moreover, it left shippers at the mercy of carriers insofar as aggrieved shippers generally had no means to prove negligence claims against carriers because all of the evidence regarding the cause of the loss would ordinarily lie with the carrier. Thus, some carriers developed profit-maximizing practices at the peril of cargo safety onboard. These issues were at the core of the early cargo liability regimes.

The lack of a cohesive system of transport documentation did not stop industry. Containerization meant that various modes of transport would coordinate with one another to gain cost advantage. Meanwhile, technologies developed to facilitate trade, including basic communications tools, such as the telephone, fax machine, and the internet. These increased the logistical complexity of international shipping, as well as the demand for just-in-time deliveries.

While private international law lagged, the legal space around the bill of lading system was occupied by various conventions designed to regulate unimodal carriage (for sea, road, rail, air, etc.), by certain national or sub-national (provincial) laws, and by the freedom of parties to contract. Unfortunately, such a lack of uniformity, or even harmonization, was no

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<sup>2</sup> Bills of lading have been considered title documents at common law since at least the 1794 case of *Lickbarrow v. Mason*, 5 T.R 367, 101 E.R. 206.

longer adequately conducive to the safe, efficient and reliable movement of goods, particularly because of uncertainties relating to liability for loss and delay (including limitations of liability), where the goods had passed from one carrier to another during transit. Further, while a carrier's legal liability lay in the idea of bailment (*i.e.* that he would take measures to protect to the goods and return them in the same condition in which he received them), carriers could contractually lessen that risk by forcing liability-limiting contractual terms upon their customers.

Efforts at early reform are often traced to the time when steel ships were starting to replace wooden ones. The *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* was adopted at The Hague in 1921 and known, accordingly, as the "Hague Rules". Most of the seafaring world signed-on at a follow-up convention in Brussels in 1924.

At their core, the Hague Rules are still with us today. They are a so-called "tackle-to-tackle" system, applying to cargo from the time that it is loaded onto a ship until the time that it is unloaded. The new convention provided a framework for the carriage of goods by sea, including imposing duties of care on carriers. For example, carriers had to keep their ships in good order and they were *prima facie* liable for cargo damaged in transit, subject to certain exceptions and a limitation of liability based upon the weight of each package. Once the goods were unloaded, however, a carrier was only liable in bailment or pursuant to local laws. Liability for incidents at the relevant ports or beyond has never been regulated in a coordinated way, except by contract and local laws.

Today, the Hague-Visby Rules are incorporated in Canada's *Marine Liability Act*, S.C. 2001, c. 6, as they were amended by a 1968 protocol, known as the "Visby Amendment" for the name of the historic Viking town in Sweden where it was signed, and a 1979 protocol increasing the limitation of liability. It is the most widely adopted set of rules, but is far from universal. Canada only ratified the Visby Amendment in 1993 and the United States, our closest and greatest trading partner, has never ratified it. To this day, the USA is governed by its domestic *Carriage of Goods by Sea Act* (the "COGSA") instead.

The Hague Rules and the Hague-Visby Rules successfully placed obligations on carriers with respect to the handling of cargo and the maintenance of a ship's seaworthiness. Shippers also had obligations with respect to the preparation of the goods and the payment of the freight. However, the Rules did not satisfy the basic desire to reduce transport documentation to a single form that could serve all stages of carriage. Further, they failed to provide a mechanism for an aggrieved shipper or consignee to pursue a single responsible party in the case of loss or delay.

Certain model agreements and protocols have come and gone, attempting to update the system and to create a standard set of combined transport documents. The most notable were the *U.N. Convention on the Contract for the International Carriage of Goods by Sea*, also known as the "Hamburg Rules". Those rules extended the "tackle-to-tackle" principle from the Hague Rules to full "port-to-port" coverage. They applied at the ports of loading and discharge in addition to the carrier's custody of the cargo on board its ships. Further, the Hamburg Rules made provision for sub-carriers, who have no direct privity of contract with the shipper, placing liability on the "actual carrier". However, Canada, like many other nations, did not ratify the Hamburg Rules.

A *U.N. Convention on the International Multimodal Transport of Goods* was signed in Geneva in 1980, addressing questions of documentation and liability for all multimodal transport operators, including the use of a single multimodal transport document to govern the entire transit of any cargo by any means. That convention was not limited to voyages wholly or partly including a sea-leg. However, it required 30 countries to ratify it before taking effect and it has received little support to date, with fewer than a dozen countries having ratified it.

For most of the 1970s, 1980s and 1990s, the Comité Maritime International worked to seek a consensus regarding necessary amendments to the Hague-Visby Rules that would unify the international shipping system, culminating with a *Final Draft Instrument on Issues of Transport Law* in late 2001 that proposed a door-to-door regime, distinct from the tackle-to-tackle approach contained in the Hague-Visby Rules and the port-to-port approach contained in the Hamburg Rules. That draft was the basis for what became the Rotterdam Rules, which have been labeled as a regime for "wet multimodal transport", "inland marine" or "maritime-plus".

The Rules are long (18 chapters, 96 Articles, 26 pages) and somewhat complicated, but the impact for most lawyers can be summarized succinctly:

- i.) the Rules replace bills of lading with “transport documents” (including electronic documents),
- ii.) the scope of the Rules exceeds purely sea-based shipments and includes shipments that are “partly by sea”,
- iii.) the period of application is from “door-to-door”, moving beyond the “tackle-to-tackle” provisions of the Hague-Visby Rules and the “port-to-port” provisions of the Hamburg Rules,
- iv.) parties are given the ability to contractually opt-out of central provisions of the Rules (including the carrier’s limitation of liability) in the case of “volume contracts”,
- v.) new obligations are imposed, including the carrier’s continuing duty to maintain the seaworthiness of its vessel at all material times, not just up to the commencement of the voyage,
- vi.) the new Rules alter the carrier’s defences, including removing the “error of navigation” defence and adding a terrorism provision,
- vii.) the new Rules alter the procedure for proving liability (“ping pong”),
- viii.) the time periods to give notice and to commence a suit are extended,
- ix.) there are increased limits of liability for carriers, and
- x.) the new Rules provide for jurisdiction clauses.

The Rotterdam Rules are now at a critical point. Although it has taken a long time to negotiate and draft, the new regime has not yet been widely accepted throughout the world. They will not take effect until ratified by 20 countries. At present, nine months after the signing ceremony, 21 countries have signed it, including the United States and France, several European Union countries and a handful of African countries. However, that number is only about 10% of the 191 countries of the world and the convention has not been signed by

important maritime nations, including the United Kingdom, China, India, Germany, Japan, Australia, Russia and Brazil. Canada has not signed it either, but is contemplating doing so.

The United States is the most important and influential country to sign (but not yet formally ratify) the Rotterdam Rules in domestic legislation. Assuming that all 21 countries that have presently signed will formally adopt the Rotterdam Rules, the bloc will represent about a third of the world's gross domestic product. Without the inclusion of the USA, it will only represent about a quarter of the world's GDP. The United States is also the country most likely to be influenced by Rotterdam, considering its impact on the liner-container trade. The USA is the world's largest importer of containerized cargo and the second largest exporter (behind China) of container cargo. Thus, its leadership is crucial to the convention's success. Without American support, the Rotterdam Rules will likely be dust-binned, like the U.N.'s *Multimodal Convention*. With American support, it might become the preeminent regime.

### ***Basic Concepts, Terminology & Application of the Rules***

Rather than extending the Hague-Visby Rules inland as a true multimodal instrument, the drafters sought to regulate contracts of carriage that include at least one sea leg. In doing so, they developed the new convention upon the structure of the Hague-Visby regime, but added new concepts.

The following are fundamental to the Rotterdam Rules:

- i.) **“contracts of carriage”**: the Rules apply to any “contract of carriage”, which is extremely broadly defined to mean any contract to carry goods from one place to another, where at least one leg is by sea.
- ii.) **“carriers”, “shippers” and “holders”**: understandably, a “carrier” is a person who enters into a contract of carriage with a shipper, and a “shipper” is a person who enters into a contract of carriage with a carrier. A “holder” is a person who is entitled to stand in the place of a shipper and give directions to a carrier, for example because he is the named consignee or because he is the bearer of a negotiable bill of lading (now generically called a “negotiable transport document”, see below). Although Article 1 of the Rules (“Definitions”) is not explicit on this

point, these terms can include non-obvious parties, such as freight forwarders and logistics companies.

- iii.) **“performing parties” and “maritime performing parties”**: the carrier’s subcontractors are called “performing parties” and where they have a nexus to a relevant sea port they are called “maritime performing parties”. These might include stevedores, terminal operators, warehousemen, or any others operating inland at the port. Under Article 19 of the Rotterdam Rules, these independent contractors are given Himalaya protection so that they may take the benefit of the carrier’s defences and limitations of liability. Pursuant to Article 20, their liability is joint and several.
- iv.) **“transport documents”**: so-called “transport documents” cover the full gamut of permissible documents that may be used in respect of a “contract of carriage”. Some are akin to traditional, negotiable bills of lading; some are not. They are discussed in detail below.
- v.) **“liner transportation” and “non-liner transportation”**: the Rotterdam Rules distinguish liner transportation from non-liner transportation and generally only apply to liner operations, unless a contract of carriage otherwise adopts the Rules by issuing a “transport document”. In any case, the Rules exclude all charter parties and other similar contractual arrangements. However, the Rules do apply to third party consignees (*i.e.* “holders” of “transport documents”), even in the case of what might otherwise have been considered non-liner transport. This is parallel to hereto existing standards, where shipping rules apply to any situation once a bill of lading has been issued.
- vi.) **“volume contracts”**: framework agreements to govern multiple shipments are called “volume contracts”. Generally, parties are permitted to contract out of most of the provisions of the Rules in the case of volume – meaning an agreement respecting any number of shipments more than one. It can include a minimum, a maximum or a certain range.
- vii.) **“negotiable transport documents” and “non-negotiable transport documents”**: as discussed below, some documents are negotiable and some are not.

- viii.) **“electronic communications” and “electronic transport records”**: as discussed below, the Rotterdam Rules are permissive of electronic communications and even electronic transport records.

Article 5 provides that the Rules apply to any contract of carriage, where a sea-leg connects two different states *and* one of the following is in a contracting state:

- i.) the place of receipt,
- ii.) the port of loading,
- iii.) the place of delivery, or
- iv.) the port of discharge.

Note that one or more sea-legs, each wholly within national waters, is insufficient to trigger the application. The sea leg must connect two different states. Thus, carriage aboard a vessel from Quebec City to Thunder Bay, with a rail connection to Vancouver and a truck connection to Seattle, for example, would not be covered, despite the sea-leg from Quebec City to Thunder Bay. The situation is less clear if the carrier was forced to stop at Sault Ste. Marie, Michigan *en route* to Thunder Bay for repairs. If the cargo was moved on its final leg from Vancouver to the USA by sea rather than by truck, though, it is clear that the Rules would apply.

### ***Types of Transport Documents Created by the Rotterdam Rules***

Pursuant to the Hague-Visby Rules and the Hamburg Rules, after receiving cargo into one’s charge, the carrier must issue a “a bill of lading or any similar document of title” upon the shipper’s demand, and must issue a shipped bill of lading upon delivery. The main difference between the Hague-Visby Rules and the Hamburg Rules, in this regard, is that the Hamburg Rules permit the carrier to qualify the description of the goods (rather than to refuse to insert the particulars upon reasonable grounds that they are incorrect). By contrast, under the Rotterdam Rules, no particular type of document is necessary. A written transport document may be issued, similar to a bill of lading that would be issued under the Hague-Visby or Hamburg Rules. However, in the case of Rotterdam, the shipper is also entitled to a non-negotiable transport document. Articles 45-47 effectively create four categories of transport documents, as follows:

- ix.) **Article 45**: a “non-negotiable transport document”  
(*i.e.* a sea waybill),



x.) **Article 46:** a “non-negotiable transport document that requires surrender”  
(*i.e.* a sea waybill requiring surrender),

xi.) **Article 47(1):** a “negotiable transport document” requiring surrender  
(*i.e.* a traditional bill of lading),

and

xii.) **Article 47(2):** a “negotiable transport document” dispensing with surrender  
(*i.e.* a bill of lading that does not require surrender).

The definition of a transport document includes the requirements that it is a receipt of the goods and that it contains or evidences the contract of carriage.

The first type of document – a non-negotiable transport document – is effectively a sea waybill. It requires the carrier to deliver the goods to the consignee, but permits the carrier to exercise discretion to refuse delivery where the consignee “does not properly identify itself as the consignee on the request of the carrier”. The identification requirement only arises if requested and, even then, the carrier need not refuse delivery (as the clause provides that the carrier “may” refuse delivery, not that it “must” do so). In effect, then, the carrier may give the goods to any person who simply self-identifies as the consignee. Although the carrier *may* withhold delivery in the face of an identification problem, the Rules do not actually require such a withholding, even if the person who demands the goods fails, or refuses outright, to properly identify himself as the consignee.

Three particular concerns have been raised with respect to the foregoing. First, the Rules are silent as to what constitutes “proper” identification. Secondly, in connection with the first concern, it may weaken the ability of a party to satisfy itself that the carrier will take reasonable steps to ensure that the person saying he is the consignee actually is that person. Finally, sellers and financing institutions who lend credit may have concerns about the buyer’s ability to pay. With respect to the latter concern, it has been suggested that lenders may want to ensure that they are listed on the document, not the buyers.

Article 46 creates a document akin to a sea waybill but requiring surrender – a non-negotiable transport document that requires surrender. The document is unlike a traditional bill of lading insofar as the named consignee cannot transfer its rights to a subsequent buyer by endorsing the document. However, like a transferable bill of lading, it must actually be surrendered in exchange for delivery of the goods. Further, the consignee must also identify

himself upon request, failing which the carrier must refuse delivery. However, it remains in the discretion of the carrier whether or not to demand identification and to determine whether it is adequate. Notably, even if the party surrendering the document fails to properly identify itself upon request, the carrier may still make the delivery.

Article 47(1), regarding negotiable bills of lading – now called negotiable transport documents – requires both identification *and* surrender of the document. If those two things are not provided, the carrier has no choice but to withhold delivery. This goes beyond the traditional entitlement of a person to delivery of the goods upon proof that he holds the bill. Pursuant to this clause, the holder has a new obligation to identify himself and the carrier has an increased risk of liability for misdelivery.

With respect Article 47(1), there is some uncertainty as to whether identification means identification of who he is or identification that he is the holder. Assuming the latter, there is a problem *vis-à-vis* Article 1.10(a), which defines the holder as the shipper, the consignee, or a “person to which the document is duly endorsed”. It not clear how much scrutiny will be expected of shippers.

Article 47(2) creates another hybrid transport document. It looks like a traditional, negotiable bill of lading insofar as it is transferrable, but it need not be surrendered. The subrule regulates how the carrier’s liability for the cargo is discharged in alternate types of situations, including where the consignee does not claim them and where the carrier refuses delivery because the person claiming to be a holder does not properly identify himself.

Third parties are protected by the foregoing documents similarly to the ways they are protected pursuant to the Hague-Visby and Hamburg Rules. Any third party in possession of a transport document (bill of lading) is covered, so long as the document is in respect of non-liner trade and no charter party has been issued. Article 7 specifically provides that the Rotterdam Rules apply as between the carrier and the consignee, controlling party, or holder that is not an original party to the contract of carriage.

The foregoing Articles are supplemented by Article 48, which generally provides rules to be followed for the carrier to dispose of the goods in the event of non-acceptance (subject to modifications by Article 47(2)). No such rules existed before.

The foregoing are also supplemented by various clauses in the Rules providing for the use of electronic documents, mostly located in Chapter 3 (“Electronic Transport Records; Articles 8 to 10) and in Articles 1 and 35 to 42. The Chapter 3 provisions begin with Article 8, which is clear on its face:

*Subject to the requirements set out in this Convention:*

- (a) *Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and*
- (b) *The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.*

Further to this, Article 10 provides for the replacement of paper documents by electronic ones upon the consent of the parties.

In short, electronic documents may be used in place of paper documents on the consent of the parties. Article 9 requires the parties to include provisions in their agreement how a negotiable electronic transport record will function, including the method of issuance, the method of transfer to an intended holder and the method by which a holder can prove its status, an assurance that the electronic document retains its integrity, and the manner to provide confirmation of delivery or confirmation that the contract is otherwise at an end.

### **Volume Contracts**

Under the Hague-Visby Rules, freedom of contract was removed with respect to carriers' liability. They were *prima facie* liable, subject only to certain exceptions, in exchange for a pre-set limitation of liability. Contracts that purported to lessen carriers' liability any further than that were void. The Rotterdam Rules follow this model and even extend it by augmenting the limitation amount. However, they also specifically permit derogation in the context of so-called "volume contracts", which carriers often use to regulate their relationships with parties with whom they do regular business, including freight forwarders and others.

Currently, approximately 80% of the global container trade is controlled by the top 25 largest container-liner companies. Accordingly, the vast majority of international sea cargo is transported under a volume contract of some kind; and it is a regular practice for many shippers to require freight forwarders and others to enter into complex agreements to govern their relationships, beyond what legislation minimally provides. Today, those agreements generally incorporate terms to allocate risk, but, to this point, have done so within the context of the limits set by the Hague-Visby Rules or other applicable conventions or laws. Article 80 of the Rotterdam Rules changes that considerably.

Article 80 permits parties to derogate from the convention, including with respect to the limits of liability. Thus, potentially, the new Rules, including the limits of liability, may only fully apply to a very small fraction of world shipping agreements.

With recent trends in the container shipping industry as an indicator, there could be even greater consolidation of liner companies and even greater market dominance by a few companies. This ultimately means more and more cargo will be carried by fewer and fewer companies with the resulting savings of volume business and the preeminence of volume contracts.

As defined in Article 1, “a ‘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.” Of course, this is very broad. For example, it could include a contract to ship two packages over a period of three-and-a-half years, with an option to cancel the second shipment.

In the case of volume contracts, the parties may exempt themselves from the application of portions of any or all of the following Rules, if they so choose:

- i.) **Article 14:** requiring the carrier to keep its ship seaworthy, etc.,
- ii.) **Article 29:** requiring the shipper to provide certain information, instructions and documents to the carrier,
- iii.) **Article 32:** regulating the shipment of dangerous goods, and
- iv.) **Article 61:** exempting the convention’s limitation of liability in the case of intentional or reckless conduct.

The remainder of the Rules will continue to apply in all cases. It is only with respect to the foregoing that “greater or lesser rights, obligations and liabilities” may be negotiated. To do so, the parties must comply with a series of relatively complex conditions, including:

- i.) **Article 80(2)(a) and (d):** making an express, written, “prominent statement” in their agreement that it derogates from the convention (presumably, such as bolding or capitalized letters), without using any incorporation by reference or contract of adhesion;
- ii.) **Article 80(2)(b):** individually negotiating the volume contract or prominently specifying the provisions of the agreement that contain the derogations (ensuring not to use any incorporation by reference), and

- iii.) **Article 80(2)(c):** ensuring that the shipper has an opportunity to conclude a contract of carriage on terms that comply with the Rules fully, and notice of such opportunity.

For the derogation to be valid against third parties, there are further conditions, including the following:

- i.) **Article 80(5)(a):** the third party must receive information that prominently states that the volume contract derogates from the Rules, and give its express consent to be bound, and
- ii.) **Article 80(5)(b):** the third party's consent may not be solely set forth in the carrier's public schedule of prices and services, transport documents or electronic transport records.

The full effect that contractual freedom might have on pricing and insurance is unclear. Shippers could theoretically negotiate higher liability for higher freight rates, but it is far from certain that they would want to, or that they would have the negotiating clout to do so. With respect to the exemption of Article 61 (regarding intentional or reckless conduct), in particular, shippers will likely see an increase in their risk (and the risk to their cargo insurers). Accordingly, non-vessel-operating common carriers (who will now often be "shippers"), may demand lower freight rates to compensate. In theory, in volume contracts, shippers might negotiate a limitation with respect to their own liability, including with respect to dangerous goods other than for intentional acts or recklessness.

It might be noted that, even outside of the context of volume contracts, the parties have a degree of freedom of contract under the Rotterdam Rules. If they so choose, they can restrict their relationship to a traditional tackle-to-tackle or port-to-port arrangement. In that regard, Article 12(3) specifically permits freedom to agree upon the time and location of the receipt and delivery of the goods and Article 13 permits arrangements to be made for shippers to do loading and stowing work. This may be beneficial to certain shippers, such as those whose goods require special treatment or who have specialized equipment necessary to handle them. However, it is likely to be more beneficial to carriers who will want to limit their liability.

In the Canadian context, it should further be noted that the *Marine Liability Act* currently permits carriers to contract out of the Hague-Visby Rules if no bill of lading is issued. By contrast, if the Rotterdam Rules are fully applied in Canada, parties will lose that flexibility except in the case of volume contracts. This is subject, though, to an option to opt-out of Chapter 14 regarding jurisdiction, described below.

## ***Limitations of Liability***

Under the Rotterdam Rules, the limitation of liability for cargo loss is the greater of 875 SDR per package or 3 SDR per kilogram, which is a marked increase from the Hague-Visby Rules (666.67 SDR per package or 2 SDR per kilogram). An “SDR” is a notional value (“special drawing rights”) set by the International Monetary Fund, based upon a basket of currencies, unequally weighted and expressed in American dollars. Currently the SDR is composed of the US dollar (44%), the Euro (34%), the British pound (11%) and the Japanese Yen (11%). At the date of writing, 1 SDR is worth approximately \$1.50 CDN,<sup>3</sup> meaning the Rotterdam limitations would theoretically be approximately \$ 1,312.50 per package or \$4.50 per kilogram at today’s rates.

The limitation of liability for economic loss resulting from delay is limited to 2.5 times the freight, which mirrors a provision in the Hamburg Rules, but which was not present in the Hague-Visby Rules. Delay occurs when the goods are not delivered within the time agreed.

There is no limitation of liability for shippers, notwithstanding that their liabilities with respect to giving instructions and failing to label dangerous goods are unique to the Rotterdam Rules.

Until quite recently, one of the criticisms of the Rotterdam Rules from a Canadian perspective has been that the 3 SDR limit was significantly higher than the 2 SDR limit set-out in the Hague-Visby Rules and the \$4.41 limit that is built into the Canadian motor-carrier regime.<sup>4</sup> When an SDR was worth over \$1.70 CDN, it would have translated to a limitation amount reaching close to \$1,500 per package and well exceeding \$5.00 per kilogram. However, because the Canadian dollar has had a steady increase over all of the SDR basket currencies, the increase is much more marginal. Of course, the opposite is true in other countries, where the higher Rotterdam limit may be exaggerated by a fall in the national currency vis-à-vis the SDR rate.

Despite the above, the difference for a large bulk carrier still may be very considerable. At an SDR rate of \$1.70, for a loss of 20,000 tonnes of bulk cargo, the per-kilogram limitation amount under the Hague-Visby Rules would be \$68 million, whereas the Rotterdam limit would be \$102 million. At an SDR rate of \$1.50, the Hague-Visby calculation would be \$60 million and the Rotterdam limit would be \$90 million. In either case, the motor carrier limit of \$4.41 would be \$88.2 million.

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<sup>3</sup> SDR rates are published online: [http://www.imf.org/external/np/fin/data/rms\\_five.aspx](http://www.imf.org/external/np/fin/data/rms_five.aspx).

<sup>4</sup> See, for example, the *Carriage of Goods Regulation*, O. Reg. 643/05, to the *Ontario Highway Traffic Act*, R.S.O. 1990, c. H.8.

For motor carriers in Canada, there will likely be disputes about which limitation applies and about whether there was a “volume contract”. However, the concern about Rotterdam limits far exceeding motor carrier limits may be less significant than first thought, at least for the moment.

### ***Proving Liability***

Article 17 provides that the carrier is liable where a claimant can prove that the loss, damage or delay (or the event that caused or contributed to it) occurred during the period of the carrier’s responsibility, which includes the acts and omissions by a list of persons set out in Article 18:

- i.) any performing party,
- ii.) the master or crew of the ship,
- iii.) its employees or the employees of a performing party, or
- iv.) any other person that performs or undertakes any of the carrier’s obligations.

However, the carrier will be relieved of all or part of its liability if it can prove that the cause of the loss was either not attributable to its fault, or that it falls within a list of defences, such as fire or perils of the sea. This is much the same as with the current Hague-Visby regime, but it has some differences.

One of the most significant differences between the Rotterdam Rules and the Hague-Visby and Hamburg Rules is that pursuant to Article 17(6) of the Rotterdam Rules, liability will be apportioned where the shipper and the carrier each contribute to a loss. Up to now, it was borne entirely by the carrier.

A second significant change is that under the old rules, a carrier was only bound to exercise due diligence to keep the vessel seaworthy prior to the voyage. The Rotterdam Rules extend that to the period of time after the vessel has set sail. Thus, carriers will now have a continuing obligation of seaworthiness during the voyage itself – and it is enshrined as one of the provisions that may not be contracted away in volume contracts. However, pursuant to Article 17(v)(a)(1), the shipper has the onus to prove that the ship was unseaworthy in order to push some of the liability to the carrier, although it is unlikely that they will have the evidence available to them.

Other notable, but less significant, changes include modifications to the list of excepted perils which will relieve a carrier of liability. As with the Hamburg Rules, but in contrast to the Hague-Visby Rules, there is no defence for “nautical fault” or “error in navigation or management of the ship” defence. That defence has stood to protect carriers from allegations that damage was the result of their navigation or management. However, in practice, the defence was problematic because of the grey line between nautical fault (handling the ship, etc.) and commercial fault (handling the cargo, etc.). A second change, also mirroring the Hamburg Rules, is that the defence of fire aboard the ship is restricted so that a carrier will not be relieved of liability for a fire that was caused by a performing party or an employee. Thirdly, terrorism was added as a new twenty-first-century peril.

Two final substantive changes are worth noting: changes to the notice periods and time limitations. The time to give notice of a claim for loss or damage is at the time of delivery if the loss or damage is apparent, or seven working days thereafter if it is not apparent (compared with three days under both the Hague-Visby and Hamburg Rules). If the notice is not given, then the carrier is presumed to have delivered the goods, absent later proof to the contrary. In the case of delay, notice must be given within 21 days of the date of delivery, failing which the party’s entitlement damages for the delay will be lost. The time limit to commence a suit in any case is two years (twice as long as under the Hague-Visby and Rotterdam Rules).

With respect to the procedure to determine liability, Article 17 of the Rotterdam Rules continues the “ping pong” approach set under the Hague-Visby Rules, but with some modifications. First, the claimant must prove the loss, damage or delay and that it occurred during the period of the carrier’s responsibility. Once that is done, the carrier is *prima facie* presumed liable. This is a codification of the practice that is familiar under the Hague-Visby Rules. To defeat the presumption, the carrier must then either prove the absence of fault, or that the loss, damage or delay was caused or contributed to by one of the enumerated perils (which are generally parallel with the perils enumerated in the Hague-Visby Rules, as modified by the changes with respect to nautical fault, fire and terrorism).

If the carrier proves an absence of fault, it is excused from liability. However, if it proves the existence of one of the excepted perils or the right to contribution, the ping pong match continues. In the latter case, the claimant must then show that the fault of the carrier caused or contributed to the excepted peril relied upon, that an event other than an excepted period was the cause, or that the loss, damage or delay was caused, or probably caused, by the unseaworthiness of the ship or improper crewing, equipping and supplying of the ship. The ping pong system of presumptions and rebuttals includes no room for un-specified defences, such as port congestion, derailments, bad weather or Acts of God.



Note that, if the goods are damaged before or after loading and/or discharge from the ship, other international instruments have precedence. Thus, the Rules will occasionally only apply to the sea-leg of a multimodal transport chain, such as in the case of European motor carriers. In North America, however, there is no competing international road or rail instrument.

### ***Jurisdiction***

Chapter 14 concerns jurisdiction and generally prohibits an otherwise competent court from assuming jurisdiction, except with respect to provisional or protective measures, including arrest. However, even a court with the power to make orders regarding such measures may not determine the case upon its merits unless it has jurisdiction otherwise under the Rules or another international convention grants it that right.

Importantly, countries subject to the Rotterdam Rules may opt-out of Chapter 14 altogether. It is suspected that Canada will do so if it ratifies. As alluded to above, Canada's *Marine Liability Act* currently permits carriers to contract out of the Hague-Visby Rules where no bill of lading is issued. Chapter 14 would close that option.

With respect to the substance of the jurisdictional provisions, Article 66 is the most important. It provides that unless the contract of carriage contains an exclusive jurisdiction clause, the claimant has the right to institute proceedings against a carrier in a competent court in any one of the following places:

- i.) the domicile of the carrier,
- ii.) the place of receipt,
- iii.) the place of delivery that had been agreed upon,
- iv.) the port where the goods were initially loaded or the port where they were finally discharged, or
- v.) any other competent court that the parties may agree upon, even after the dispute has arisen.

No such provision previously existed under the Hague-Visby or Hamburg Rules.

The parties to a volume contract are permitted to select an exclusive jurisdiction to settle their disputes. However, that jurisdiction will only be exclusive if it:

- i.) was individually negotiated, or
- ii.) the volume contract contains a prominent statement that there is an exclusive jurisdiction clause within it, specifically specifying the relevant sections.

Third parties will only be bound an agreement regarding exclusive jurisdiction if certain conditions are met, including that the exclusive jurisdiction agreement is contained on the relevant transport document or electronic record.

Article 68 provides for jurisdiction with respect to proceedings against a maritime performing party. Such proceedings may be commenced either at:

- i.) the domicile of the maritime performing party, or
- ii.) the port where the goods are received or delivered by the maritime performing party, or the port where it performs its services.

Similar provisions to those in Chapter 14 apply with respect to arbitration agreements in Chapter 15. That Chapter, too, is subject to a potential opting-out by any ratifying country. However, where the Chapter does apply, arbitration may be required by the party asserting the claim pursuant to a volume contract.