

PARTICULAR CONCERNS WITH REGARD TO THE ROTTERDAM RULES

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Resumen: A medida que el proceso de firma de las Reglas de Rotterdam va tomando cuerpo, también cobran fuerza las voces discordantes. Este artículo o manifiesto recoge la opinión crítica colectiva de un grupo de nueve destacados especialistas en Derecho marítimo de distintas partes del mundo, pertenecientes a los sectores académico y profesional. El artículo analiza con brevedad y precisión los rasgos más destacados de las Reglas de Rotterdam, particularmente aquéllos que, a juicio de los firmantes, meritan mayor debate y crítica. La conclusión a la que llegan los miembros de este grupo de juristas es que las Reglas de Rotterdam no vienen sino a añadir más complejidad a la actual regulación internacional del transporte marítimo y multimodal. El artículo finaliza con una propuesta de alternativas que permitan aprovechar lo mejor de la regulación vigente y abrir las puertas a una actualización y complementación de dicha regulación.

Palabras clave: Reglas, Rotterdam, Crítica, Alternativas.

Abstract: As the Rotterdam Rules signature process gains momentum, strong dissenting opinions are also starting to be heard. This article or manifesto sums up the collective critical voice of nine worldwide leading shipping lawyers and professors. It provides a short and precise analysis of the Rotterdam Rules main features from the point of view of those issues which the authors find unworthy of praise. And their conclusion is that the Rotterdam Rules simply just add up more complexity to the present shipping and multimodal international regulation. The article closes with a quest for alternatives aimed to get the best of what we already have and opens the gate to proposals based on the updating and complementation of the regulation in force today.

Key words: Rules, Rotterdam, Critical, Alternatives.

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I. Background

1. Approximately six months ago with a view to pointing out concerns with the Rotterdam Rules before the signing ceremony held in Rotterdam on 23 September 2009, six of us produced a paper and circulated it worldwide. The threshold for this Convention 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. It may well be that those 21 who signed are looking over their shoulders and wondering where the signatures of the rest of the world are; and, whether they will be entered.

2. Uniformity is the goal of this convention but already it is apparent that it is in danger of further splintering maritime law across the globe. All of the signatories signed up between the date of the signing ceremony on 23 September 2009 and 29 September 2009 apart from Mali which signed on 26 October 2009. This illustrates that those that have signed already had a mind to sign before the signing ceremony took place. It also illustrates concern among the wealth of countries that did not sign. Why is there such reticence? Below we aim to set out some of the main reasons why the Convention is problematic. In closing we also answer the question that has been raised by a number of those that support the Convention – what is the alternative?

II. The application of the Convention

3. Whereas the Hague Visby Rules apply to carriage by sea and contain a few exceptions, e.g. charterparties, (not surprisingly, as these are contracts of hire as opposed to contracts of carriage) the Rotterdam Rules are designed to apply to a transport contract that involves sea carriage in whole or in part. The exemptions are wide under Article 6 and Article 80. Again charterparties are excluded from application, but of more concern is the fact that particular types of trade are exempted or have the power to take steps to achieve exemption. Non liner transportation is exempted in the main. The volume contract exemption is of particular concern and is dealt with later on in this paper. Suffice it to say here that the exemption is effectively a license to allow the big players to play by their own rules. This removes the central purpose of the Rules, which was to bring back uniformity to carriage of goods by sea.

4. The Rules introduce the new concept of the “maritime performing party”. This is a party that conducts its business wholly within a port area. Therefore, a party that collects from the environs of the port and delivers inland is not a maritime performing party, whilst a port operator is a maritime performing party provided its duties do not exceed the boundaries of the port. It is, of course, not unusual for a port operator to deal with on carriage inland. The issuer of a transport document involving carriage wholly or partly by sea, and the maritime performing party may both be sued directly; whereas, an inland carrier involved in part of the international venture may not be sued directly. This is, again, a protection for certain sectors involved in the carriage such as inland waterways, railways and inland road carriers. There are cases where some carriers will be subject to another Convention that takes precedence over the Rotterdam Rules under Chapter 17, but not always. Where the carriage of goods involved is by a means other than by sea which involves a partial sea movement another Convention may override the application of the Rotterdam Rules. For example, a door to door carrier may carry goods from Germany via France via road to the UK inland involving a channel crossing. If the goods stay on wheels throughout the journey, the CMR Convention would override the application of the Rotterdam Rules but if the goods come off wheels for the channel crossing, the CMR Convention would apply to the road movement from Germany to France but the Rotterdam Rules would apply from when the goods come off wheels for the channel crossing though to the UK inland destination. Therefore, the Rotterdam Rules fall short of creating a fair and reasonable liability system governing all those involved in the transport venture. A full network liability system would have been fair and reasonable but unfortunately the Convention creates a partial network liability system or, as some people have described it, a maritime plus system which causes unfortunate anomalies such as that described in the example above.

5. To draw a further comparison with CMR, cargo may sue the first, last or actual carrier, but those carriers may then sue the actual carrier under the successive carrier provisions. Under the Rotterdam Rules, the choice is to sue the issuer of the transport document or maritime performing party, but those parties found liable and wishing to sue the party actually causing the damage for recovery will have to

rely on their terms of contract with the underlying carrier and perhaps suffer a serious gap in the extent of liability recoverable compared with the liability it faces pursuant to the Rotterdam Rules.

6. Article 12 raises some problems. This deals with the period of responsibility of the carrier. The primary position is that the carrier is responsible for the period covered by the transport contract. However, Article 12(3) permits the parties to agree on the time and location of receipt and delivery of the goods, although this ability is limited because such agreement will be void if the time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage, or if the time of delivery is prior to the completion of their final loading under the contract of carriage. In terms of a carriage by road with a long sea journey in between, e.g. inland UK by road to Liverpool and then by sea to Shanghai with final delivery by road to inland China, this exemption does not mirror normal custom in terms of who is responsible for loading and discharge in road carriage. These duties are normally those of cargo unless the carrier agrees to be responsible for loading and/or discharge. Therefore, the multimodal carrier that takes on responsibility for this entire journey will be responsible for loading and discharge whereas the inland carriers in China and the UK will probably not be responsible for loading and discharge. In such a case, the multimodal carrier will be responsible to cargo for damage on loading and discharge. Although this damage may have been caused by the inland carrier, the multimodal carrier will be unable to pass down liability. This will mean that multimodal carriers will have to reconsider all sub contracts to ensure there are no such gaps in terms of flowdown of responsibility.

7. However, as so often happens in this overly complex set of Rules, pursuant to Article 13 whilst the Rules make the carrier responsible to properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods pursuant to 13(1), 13(2) allows the shipper and carrier to agree that loading, handling, stowing and unloading be performed by the shipper, the documentary shipper or the consignee. Such an agreement has to be within the contract particulars. Again, this will involve a wholesale review of inland transport contracts with sub contractors by multimodal contractors taking on primary responsibility door to door. The problem with Article 13 is that it does not deal with initial loading and final discharge as does Article 12, so a multimodal carrier can contract out of responsibility at any stage during the carriage when the goods are being loaded, handled and stowed or unloaded by express contractual provision. This is a watering down of the strict liability provision under Article 3 of the Hague Visby Rules.

III. Basis of Liability

8. The basis of liability is set out in Article 17 and this is a good example of the excessive and unnecessary complexity that pervades the Rules. The only saving grace is the disappearance of the error in navigation defence which was long overdue for removal given advances in technology. However, the exceptions are maritime in nature and do not pay heed to exceptions apparent in contracts and Conventions governing other modes. We expect the answer to this point would be that other Conventions governing other modes are given precedence under Chapter 17, but that is only in certain circumstances as explained above. Furthermore, and surprisingly, pursuant to Article 17.5(a) the Carrier is liable notwithstanding the exceptions if the Claimant proves that the loss, damage or delay was probably caused by or contributed to by the unseaworthiness of the ship, improper crewing, equipping and supplying of the ship, or the holds or other parts of the ship where the goods were carried were not fit and safe for the reception, carriage and preservation of the goods. The burden of proof is invariably on the party who has the ability to prove the issue in question. How would the shipper be able to prove the liability of the Carrier under this provision without the full and detailed co operation of the Carrier? Even if the Shipper overcomes this apparently insurmountable burden, the Carrier is then able to relieve itself of liability if it can prove that none of the factors in Article 17.5(a) caused the loss, damage or delay or it complied with its obligation to exercise due diligence. Therefore the duty of due diligence is effectively reduced from the standard set pursuant to the Hague Visby Rules which would appear to be a retrogressive step.

9. Articles 18 and 19 deal with liability of the Carrier for other persons and of maritime performing parties which respectively extend the liability of the carrier for breaches by any performing party and the ability of the shipper to pursue another specific performing party within the transport venture. This appears to be an unnecessary extension and is evidence of the Rules increasing the duties of the carrier to cover other principal parties yet not ensuring that those parties are governed under the Convention when it comes to dealing with carriers' liabilities as between themselves. It also gives the shipper another party to sue that is not a principal carrier in the transport venture. Under Article 20, joint and several liability is also provided for and that limits aggregate liability, so that if more than one party is liable and that liability is aggregated, the Rotterdam Rules liability prevails despite the fact that one of those parties (pursuant to Article 61) may have agreed to pay increased levels of liability above those provided for by the Rules.

10. Article 25, dealing with deck cargo, is surprising in its distinction between deck cargo as required by law and in accordance with the contract of carriage or custom, usages or practices of the trade in question on the one hand; and, carriage in containers or vehicles fit for deck carriage and the decks are specially fitted to carry such containers or vehicles on the other hand. In respect of the former, the Carrier is not liable for loss and damage or delay in delivery if such losses are caused by the special risks involved in their carriage on deck whereas no such exemption from liability prevails in respect of the latter. One can only wonder at the reason for such distinction. Given advances in technology one would expect all cargo, whether on deck or under deck, to be treated with an even hand but such is not the case.

IV. Delivery and the carrier's right to deliver the goods without the surrender of an original bill of lading

11. When encountering problems in finding out who is the consignee or the controlling party, the carrier may in accordance with Articles 46 (b), 47.2 (a) and 55.2 request instructions from the shipper. Such practice may be appropriate when delivery is intended straight to the consignee but not when the goods will or may be sold in transit. INCOTERMS 2000 CFR/CIF Article 8 provides that the document to be tendered to the buyer must "unless otherwise agreed, enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer (the negotiable bill of lading) or by notification to the buyer". The notification provision has been inserted in order to allow, for example an electronic bill of lading as referred to in the 1990 CMI Rules on Electronic Bills of Lading or the electronic record as now referred to in the Rotterdam Rules. The electronic procedures rest on notifications transmitted electronically.

12. When the goods are intended to be sold in transit, it would be wholly inappropriate to ask a shipper having sold the goods to a first buyer, for instructions with respect to delivery if the ultimate bill of lading holder or the controlling party does not appear to collect the goods at destination. Indeed, such a procedure may even invite a shipper to collude with the first buyer in order to defraud subsequent buyer(s) entitled to delivery.

13. Although, in recent years, some shipping lines have included clauses in their bills of lading entitling them to deliver the goods without the surrender of an original bill of lading, it is unacceptable to support and further enhance such malpractice by statutory provisions in the nature of Article 47.2. This becomes further aggravated by the carrier's right to limit its liability for any breach of his obligations including misdelivery (Article 59.1) with the result indicated by Professor Ramberg in his comments to Article 47.2 at the CMI 2009 Athens Symposium (see CMI Yearbook 2009 at p. 264). Although the instructing shipper may be requested to provide "adequate security" for the liability which the carrier may incur in relation to the rightful holder this may be cold comfort for the holder who may find himself in the unfortunate position that he cannot get hold of the goods and not even full compensation for the loss of his right to get them.

14. In cases where the goods are intended to be sold in transit, a prospective holder has not yet entered into a contractual relationship with the carrier. However, Article 58.2 refers to liability imposed “on it” under the contract of carriage. Although the holder does not incur any liability to the carrier until he exercises any right under the contract of carriage, Article 58.2 seems to be based upon the peculiar idea that the contract of carriage as such may impose liability on prospective holders.

V. The extension of the Rotterdam Rules to cover more than loss of or damage to goods and delay

15. The Rotterdam Rules extend the imposition of liability on the carrier also for other loss than loss of or damage to goods and delay. This follows from Article 11 stipulating that “The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee” as well as the specific obligations in Articles 24,25,28,35-36,38,40 and 45-48. The carrier’s breach of these obligations may result in economic loss for the shipper, e.g. when the purchaser justifiably refuses to accept a bill of lading as being dated too late or otherwise not conforming to the contract of sale. Customary bill of lading clauses exempt the carrier from “consequential” or “indirect loss” but such clauses now seem invalidated under Article 79. In turn, the carrier has a right to limit his liability according to Article 59.1 for “all breaches of its obligations under this Convention”. This raises the question as to which limit applies. Should it be the SDR unit limitation, when the dispute does not relate to the goods as such (“weight of the goods that are subject to the claim or dispute”) but rather an economic loss for the shipper because of his buyer’s repudiation of the contract? Should the limit specifically relating to “loss caused by delay” in Article 60 be used, as this is the only article relating to “economic loss”? Article 60 seems to relate only to delay in delivery, but could possibly be used to cover loss due to delay in shipment as well, at least by analogy. Nevertheless, in case the carrier inflicts economic loss on the shipper in other cases, such as providing incorrect information (Article 28), refusal to issue a negotiable transport document upon demand (Article 35) or to enter the required particulars (Article 36) or failing to sign (Article 38), what is the limit? Furthermore, what is the basis of liability? Would it be possible to use the basis of liability in Article 17 when the carrier refuses to issue a negotiable transport document upon demand? The answer may well be negative, as a clear breach of such nature may require a strict liability under general principles of contract law.

16. Apparently, the extension of the Rotterdam Rules to cover more than the traditional types of losses (loss of or damage to the goods and delay) was not followed up by decisions on these important questions. It will be the task of courts of law to find appropriate solutions and Article 2 on the interpretation of the Convention will probably not provide a sufficient impetus to ensure international uniformity.

VI. Period of time for suit

17. The Rotterdam Rules provides a two-year time limit for filing suit, but refers to judicial or arbitral proceedings not being “instituted” after the expiration of a period of two years. The term “instituted” is derived from Article 20 of the Hamburg Rules and is vague and unclear. It is apparent that Article 62 was drafted in this way to make the time bar procedural, rather than substantive, but it would be preferable to have consistency by setting the effective date of the limitation to the bringing of suit, which must be achieved through commencement of the proceedings validly in accordance with the requirements of the relevant jurisdiction in which the proceedings are commenced. In that context, it would have been clearer to use the phrase “unless suit is brought”, as used in the Hague Rules and the Hague-Visby Rules.

18. Article 62.3 is confusing in that it implies that one party can still make use of a time-barred claim by offsetting it against the timely claim made by another party. Whilst such an action may not be extinguished (being procedural only), it still cannot be enforced, so it is not clear how Article 62.3 will work in practice.

VII. Action for Indemnity

19. Claims in relation to Indemnity (recourse) may be made beyond the two year period provided it is made within:

- (a) the time allowed by the applicable law in the jurisdiction where the proceedings are instituted; or
- (b) within 90 days commencing from the day when the party instituting the claim either settled the claim or was served with process in an action against itself, whichever is the earlier.

20. Article 64 adopts the wording of Article 20.5 of the Hamburg Rules by referring to that party seeking the indemnity as the “person held liable” which is obviously inconsistent with the fact that such a party can “institute” the action for indemnity in circumstances where there has been no finding or declaration of liability at that time. Again, wording similar to Article III Rule 6 bis of the Hague-Visby Rules “an action for indemnity against a third person may be brought...” would have been clearer.

VIII. Actions against the person identified as the carrier

21. Under Article 37.2, it is presumed that the registered owner of the carrying vessel is the carrier, unless he can rebut the presumption by establishing a presumption in relation to a bareboat charterer or that another party was in fact the carrier. In turn, the presumption in relation to the bareboat charterer may be rebutted in the same manner. In any of these circumstances, the claim may be instituted beyond the two year time limit in Article 62, provided that it is instituted within:

- (a) the time allowed by the applicable law and the jurisdiction where the proceedings are instituted; or
- (b) 90 days commencing from the day when the carrier has been identified, or the registered owner or bareboat charterer has rebutted the presumption that he is the carrier, whichever is the later.

22. Whilst this qualification seeks to protect claimants where the identity of the contractual carrier is not ascertained until late in the day and, possibly, only after the claim has been initially instituted against the wrong defendant, it places the correct defendant carrier at a distinct disadvantage in circumstances where national laws overrule the two year time bar in the period in the Convention, giving claimants a considerably longer period for instituting proceedings where the party that issued the transport document failed to comply with Article 36, paragraph 2(b) in failing to disclose the name and address of the carrier in that document. There is no justification for referring to the national laws overruling the convention time bar period, particularly as so many common law jurisdictions provide for a six year time limit from accrual of the cause of action for breach of contract. 90 days from the date of notification would have been more than sufficient to protect such claimants.

IX. Actions against the carrier

23. Article 66 does not apply where “the contract of carriage contains an exclusive choice of court agreement that complies with Article 67 or 72”. Provided there is no such exclusive jurisdiction agreement, the claimant can elect to sue the carrier in a competent court where the carrier is domiciled, or one of the four places which are the trigger for the application of the Rotterdam Rules in Article 5, that is, the place for receipt of the goods agreed in the contract of carriage, the place of delivery agreed in the contract of carriage, the port where the goods are initially loaded on to a ship or the port where the goods are finally discharged from a ship, or in a competent court or courts agreed between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under the Rotterdam Rules.

24. Where the parties conclude a jurisdiction agreement after the dispute has arisen (Article 72.1), is not clear how such a jurisdiction of agreement would comply with Article 66 where the contract of carriage did not have a jurisdiction agreement that was exclusive. In such circumstances, it is arguable that the

claimant could still bring proceedings in a competent court and one of the four places identified in Article 66, although not in the court agreed by the parties after the dispute has arisen. Such a claimant may or may not be met with an anti-suit injunction, if available to the other party to the dispute. Article 66 would need to be interpreted broadly to include jurisdiction agreements concluded after the dispute has arisen.

X. Choice of court agreements

25. Under Article 67.1, an exclusive jurisdiction clause between the shipper and the carrier will only be binding if it is in a volume contract, the parties agree on exclusive courts jurisdiction, the volume contract clearly states the names and addresses of the parties and either:

- (i) is individually negotiated; or
- (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement, and clearly designates the courts of one contracting state or one or more specific courts of one contracting state.

26. In relation to a carrier and a third party (but not a maritime performing party), an exclusive jurisdiction clause will only be binding if it is in a volume contract and satisfies the requirements of Article 67 paragraph 1 above, together with additional requirements set out in Article 67, paragraph 2, being :

- (a) the court is in one of the places designated in Article 66 subparagraph (a);
- (b) the agreement is contained in the transport document or electronic transport records;
- (c) that person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of the court is exclusive; and
- (d) the law of the court seized recognises that that person may be bound by the exclusive choice of court agreement.

27. Whilst private international law will continue to evolve, Chapter 14 of the Rotterdam Rules will add an additional layer of complexity for parties seeking to rely upon choice of jurisdiction clauses as they must now also establish that the relevant contract is a volume contract, and that it was individually negotiated etc. For third parties, however, Article 67 adds even further complexity where the court seized must recognise that the third party may be bound by the exclusive choice of court agreement. Obviously, the law will differ from state to state as to whether such a third party is bound by such a clause (Article 67.2(d)) leading to further disputes and litigation. Potentially there will be different results in different contracting states, depending on whether they regard the question as one of procedural law or substantive contract law, leading to potential problems of enforcement. The third party will require preliminary advice as to whether they are bound by the exclusive choice of agreement which will depend on which law is applicable. This may, in turn, depend upon whether the procedural or substantive law of the contract is applicable.

XI. Actions against the maritime performing party

28. A claimant can only bring proceedings against a maritime performing party either where the maritime performing party is domiciled or where that party receives or delivers the goods, or performs its activities in respect to the goods, unless the parties agree some other court after the dispute arises (Article 72.1), or the maritime performing party submits to the jurisdiction of another court without contesting its jurisdiction (Article 72.2). Significantly, maritime performing carriers, such as stevedores, terminal operators and warehouseman, cannot be bound by an exclusive jurisdiction clause in the contract of carriage – Article 69 provides that a maritime performing carrier cannot be sued anywhere other than these places. Accordingly, a claimant who is subject to an exclusive jurisdiction clause in the contract of carriage can be prevented from suing the maritime performing carrier in the chosen jurisdiction. Article 71 permits consolidation of actions (and removal of actions through declaration of non-liability) when the relevant jurisdiction satisfies the dual tests of Articles 66 and 68, so article 71 is superfluous.

XII. No additional bases of jurisdiction

29. As Chapter 14 is optional for contracting states, it is unclear what purpose Article 69 seeks to achieve. The contracting states that adopt Chapter 14 will be limited to courts designated in Articles 66 and 68 and the contracting states who do not adopt Chapter 14 will follow their respective national laws in deciding jurisdictional issues.

XIII. Arbitration Agreements

30. Article 75 permits the parties to refer any dispute that may arise relating to the carriage of goods under the Rotterdam Rules to arbitration. Chapter 15 is similar to Chapter 14 in that it draws a distinction between volume and other contracts and between the parties to the agreement and a person who is not a party to the Volume Contract, save for the fact that the applicable law permits that person to be bound by the Arbitration Agreement, rather than the law of the forum which applies to courts jurisdiction clauses (Article 67.2(d)). Any term of an arbitration clause that is inconsistent with these provisions is void (Article 75.5).

31. Apart from the possibility of having arbitration taking place in a number of different possible locations will reduce commercial certainty, the contracting states that adopt Chapter 15 may or may not be properly equipped or have the expertise or experience to handle maritime disputes, nor have a court system which will support those arbitration proceedings.

32. Article 75.4(d) provides for the applicable law to determine whether arbitration agreement is binding on a third party. Potentially there will be different results in different contracting states, depending on whether they regard the question as one of procedural law or substantive contract law, leading to potential problems of enforcement. The third party will require preliminary advice as to whether they are bound by the arbitration agreement which will depend on which law is applicable. This may, in turn, depend upon whether the procedural or substantive law of the contract is applicable.

33. Article 78 makes the arbitration provisions of chapter 15 binding only on states that declare under article 91 that they will be so bound. It echoes the opt-in provision in article 74 regarding court jurisdiction in chapter 14. Each opt-in provision in *Rotterdam* decreases uniformity of law, introducing uncertainty that will discourage international commerce. In a particular claim, even if all relevant jurisdictions adopt *Rotterdam* it will still not be clear which arbitral *fora* are permitted. This will encourage disputes about jurisdiction, which are expensive distractions from dealing with the merits of the claim.

XIV. Exclusions of liability and the volume contract exemption

34. Article 79 laudably follows the principle of the *Hague Rules*, making void any term of a contract of carriage that excludes or limits the liability of the carrier (or excludes, limits or increases the liability of the shipper) beyond those allowed by *Rotterdam*.

35. However, article 80 undermines the principle in article 79 for “volume contracts” and is the most objectionable part of *Rotterdam* according to many commentators. *Rotterdam* creates theoretical door-to-door uniformity of law, but at the unacceptably high cost of reviving the chaotic freedom of contract which necessitated the creation of the *Hague Rules* in 1924.

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.

36. Shippers will find this definition too broad and unspecific. It includes any contract for more than one shipment in any period of time; for example, a contract to ship two packages over a period of three years with an option to cancel the second shipment.

37. Article 80 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 practice, 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.*

38. A typical multi-modal container shipment would almost certainly be a “volume contract” and thus subject to the freedom of contract which, even now, often leads to complex contractual arrangements with many layers of sub-contracts, making claim outcomes difficult to predict. *Rotterdam* will worsen this problem.

39. *Rotterdam* may apply to inland transit in states where there is no “international instrument” affecting inland transit under article 26, for example, in North America. There are serious issues about whether *Rotterdam* applies to inland transit damage. The *Rotterdam* limits differ from existing inland regimes. For example, they are higher than the Canadian motor carrier statutory limit of Cdn \$4.41 per kilogram. A container with 1,000 packages weighing 10,000 kilograms would allow the motor carrier to limit liability to Cdn \$44,100 under the Canadian motor carrier regime. However, the *Rotterdam* limit for that container is 875,000 SDR’s (about Cdn \$1.4 million dollars). The limit under the CMR Convention (road) for that container is 83,300 SDR’s (about Cdn \$133,000) and under both the Cotif/CIM Convention (rail) and the Montreal Convention (air) is 170,000 SDR’s (about Cdn \$270,000). These different liability limits, for the same claim, will encourage multi-modal carriers under *Rotterdam* 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 either the low motor carrier limit, or the zero limit permitted by *Rotterdam*. There will be uncertainty about the effect of *Rotterdam*, and much litigation with unpredictable results in different countries.

40. 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.

XV. Special Agreements

41. Article 81(b) allows freedom of contract for “special agreements”, being agreements unrelated to ordinary commerce and where no negotiable document is issued. Although this provision has

the potential for abuse by carriers in some circumstances, that potential is entirely overshadowed by the “volume contract” freedom of contract problem in Article 80.

XVI. Ratification

42. Article 94(1) provides that *Rotterdam* comes into force on the first day of the month one year after the 20th ratification, a day that the authors of this paper hope never comes. At the time of writing, no state has ratified, and the most recent (21st) signatory on October 26, 2009 was Mali. Signature, of course, is far less significant than ratification.

XVII. Summary

43. In summary, *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 many 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.

XVIII. What Alternative?

44. 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, the Hague-Visby Rules has been a very long lived and successful Convention and Protocol. With over 90 articles and many new concepts we are of the view that the Rotterdam Rules should not prosper as we do have the makings of a network liability system in Conventions that are long lived, well used and relatively simple.

45. The work of CMI initially involved comparing and contrasting Hague, Hague-Visby and Hamburg Rules 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 the Hague-Visby Rules should be removed and the electronic documentation provisions from the Rotterdam Rules could be included. The Montreal Convention for air carriage and CMR Convention for road and CIM-COTIF for rail could all be adopted on a wider basis. CMR and CIM-COTIF 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 Convention applies.

46. These conventions covering the four major transport modes that are specifically tailored to deal with these modes (which the Rotterdam Rules 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 the Rotterdam Rules appears to be heading for creating instead of reaching its goal of uniformity. We urge those countries that have signed and those that have not to consider the many problems with the Rotterdam Rules and the potential alternative we have in the form of current conventions meshed together with national law.

47. 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 the Rotterdam Rules (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 the Rotterdam Rules to govern transport in the modern era of transport logistics.

48. The Rotterdam Rules are clearly in danger of causing further splintering of international maritime law despite the intention of the same to bring back uniformity. There is no doubt that uniformity is what is needed and furthermore all stakeholders need to be dealt with fairly under any international regime. The central issue with these Rules is the fact that certain stakeholders are able to contract out or are not even covered and once liability as between cargo and Carrier has been dealt with there are no provisions for dealing with liability between carriers involved in the contractual chain to ensure that the actual liable party ends up paying for the loss. The volume contract exemption is a most worrying development that favors the large scale stakeholders and allows them to make their own rules. Allowing such freedom on an international basis in the banking sector recently created a worldwide financial crisis. We could end up with the large scale stakeholders gaining such sufficient market power to enable them to hold the international supply chain to ransom. Do we really want to facilitate what happened in the banking world becoming a potential reality in the field of international transport?