



INSURANCE-MARITIME LAW

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INSURANCE-MARITIME LAW ALERT: *Rotterdam Rules*

By James W. Zaitsoff, Articled Student, Insurance-Maritime Practice Group

Background

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* (the “*Rotterdam Rules*”). The Convention is open for signature by all states on September 23, 2009.¹

While it is unclear how many countries will be adopting the *Rotterdam Rules*, it has been observed that “the new Convention appears to have the backing of many important maritime nations and could come into force soon, especially if the United States decides to sign the Convention, subject to ratification.”²

It is also not certain whether Canada will immediately adopt the *Rotterdam Rules*. As of February, 2009, Transport Canada was seeking views and recommendations on whether Canada should sign, subject to ratification, the *Rotterdam Rules*, or whether Canada should delay signature and ratification until the intentions of its major maritime trading partners become more certain.³ The National Maritime Law Section of the Canadian Bar Association has recommended that Canada sign the Convention, subject to ratification. In the interim, it is recommended that Canada maintain the *Hague/Visby Rules*, and review those Rules in 2010, at which time the intentions of Canada’s major maritime trading partners regarding the new Convention should be known.⁴

This alert provides an overview of the *Rotterdam Rules*, and discusses some of the key differences between the *Rotterdam Rules* and the *Hague/Visby Rules*.

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Summary

The following is a summary of the key differences between the *Rotterdam Rules* and the *Hague/Visby Rules*.

The *Rotterdam Rules* have a greater scope than the *Hague/Visby Rules*, both in terms of the period of responsibility, as well as the parties which are caught under the convention. The *Rotterdam Rules* apply to any international carriage of goods with a sea leg. In terms of period of responsibility, the *Rotterdam Rules* are meant to provide “door-to-door” coverage, while the *Hague-Visby Rules* only cover the period from the time the goods are loaded to the time they are discharged from the ship (i.e. “tackle-to-tackle coverage”).

In terms of the parties covered by the convention, the application of the *Rotterdam Rules* is not limited to the parties entering into the contract of carriage. The *Rotterdam Rules* introduce the concepts of “performing parties” and “maritime performing parties.” It should be noted that a “maritime performing party” includes ocean carriers, feeder carriers and stevedores that work within the port area, marine terminal operators and port authorities to the extent that they may be involved in the handling of the cargo in the port. The *Rotterdam Rules* provide that a maritime performing party is subject to the obligations and liabilities imposed on the carrier under the convention.

Under the *Rotterdam Rules*, the carrier still has an obligation to properly receive, load, handle, stow, carry, keep, care for, unload and deliver the goods. However, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper. In addition, the *Rotterdam Rules* extend the carrier’s obligation to keep the ship seaworthy to the entire voyage, rather than merely the beginning of the voyage.

The approach to determining the liability of the carrier under the *Rotterdam Rules* has been compared to a “ping-pong” match. First, the claimant establishes a *prima facie* case for loss. The carrier then has the option to refute the claim by disproving the claim or asserting that an “excepted peril” was responsible (it should be noted that some changes have been made to the list of “excepted perils,” when compared to those included in the *Hague/Visby Rules*). The claimant may then rebut the carrier’s defence by proving that the carrier was responsible for the loss, or that the carrier did not meet his obligation to keep the ship seaworthy, regardless of the existence of an excepted peril. The carrier then has the option of arguing that it exercised due diligence in the discharge of its obligations, so that it is relieved of liability.

With respect to the obligations and liabilities of the shipper, the *Rotterdam Rules* do not include an overriding provision which provides that a shipper shall not be responsible for loss or damage resulting from any cause without the act, fault or neglect of the shipper (as is found in the *Hague/Visby Rules*). The shipper has certain obligations with respect to delivery of the goods to the carrier. The shipper must also provide all reasonably necessary information, instructions, and documents to the carrier. The shipper is liable if the carrier proves that loss or damage was caused by a breach of the shipper’s obligations under the convention (whether caused by an act of the shipper, or any person to which the shipper has entrusted the performance of any of its obligations, except for the carrier, or a performing party acting on behalf of the carrier).

The *Rotterdam Rules* increase the limits of liability of a carrier to the higher of (1) 875 units of account per package, or (2) three units of account per kilogram of the gross weight of the goods (unless the value of the goods has been declared by the shipper and included in the contract, or a higher amount has been agreed upon between the carrier and the shipper). The *Rotterdam Rules* also include a specific limit of liability for loss caused by delay: liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. A party can still lose the benefit of the limitation of liability, if a breach of the carrier’s obligation was committed with the intent to cause such loss or recklessly and with knowledge that such loss would probably result. Nothing in the *Rotterdam Rules* affects the application of any international convention or national law regulating the global limitation of liability of vessel owners. The *Rotterdam Rules* do not appear to include a limit on the liability of the shipper.

Under the *Rotterdam Rules*, notice of loss or damage to the goods must be given within seven working days of delivery of the goods. This is an extension from three days under the *Hague/Visby Rules*. Failure to provide this notice shall not affect the right to claim compensation for loss or damage. No compensation is payable for delay, unless notice of loss is given within 21 days of delivery of the goods.

The limitation period for bringing an action for breach of an obligation under the convention has been extended from one year to two years.

Unless otherwise provided in the new convention, any term in a contract is void to the extent that it excludes or limits the obligations or liabilities of a carrier, maritime performing party or shipper. The *Rotterdam Rules* do not include a provision which allows a carrier to surrender all or any of its rights and immunities, or to increase any of its responsibilities and liabilities under the rules (a provision to this effect can be found in the *Hague/Visby Rules*). However, the *Rotterdam Rules* include special rules for “volume contracts,” which are defined as contracts of carriage that provide for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. A volume contract may provide for greater or lesser rights, obligations and liabilities than those imposed by the convention, provided that certain requirements are met. One of the requirements is that the shipper must be given an opportunity to conclude a contract of carriage on terms that comply with the convention. It should be noted that, even in volume contracts, parties cannot derogate from certain obligations and liabilities under the convention.

The *Rotterdam Rules* include new provisions relating to transport documents, of which carriers and shippers should be aware. The *Rules* also introduce the idea of “electronic transport records” as an alternative to transport documents.

The *Rotterdam Rules* address the right of control of the goods, as well as the transfer of rights under the contract of carriage, two areas which are not addressed in the *Hague/Visby Rules*.

The *Rotterdam Rules* also address issues of jurisdiction and arbitration, two areas which are not covered by the *Hague/Visby Rules*. However, these provisions are only binding on states which declare that they will be bound by them.

Discussion

SCOPE:

The *Rotterdam Rules* have a greater scope than the *Hague/Visby Rules*, both in terms of the period of responsibility covered by the convention, as well as the parties which are caught under the convention.

A. Period of Responsibility

The *Rotterdam Rules* apply to any international carriage with an international sea leg, as long as the place of receipt and the place of delivery are in different states, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different states.⁵

A “Contract of Carriage” is defined as:

a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the carriage.⁶

This is in contrast to the definition of “Contract of Carriage” in the *Hague/Visby Rules*: “a bill of lading or similar document, insofar as relates to carriage of goods by water.”

The *Hague/Visby Rules* provide that “carriage of goods” covers the period from the time when the goods are loaded to the time they are discharged from the ship. This has been described as the “tackle-to-tackle” principle.⁷ The *Rotterdam Rules*, in comparison, are meant to provide “door-to-door” coverage. The new convention provides that the period of responsibility of the carrier for the goods begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.⁸

However, the *Rotterdam Rules* provide that when loss, damage or delay occurs during the carrier's period of responsibility, but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of the Convention do not prevail over the provisions of another international instrument which would have applied.⁹ This has been described as the "limited network exception," which may arise in Europe for road and rail transport, which is governed by two regional international conventions.¹⁰

B. Parties Covered

In addition to widening the scope with respect to period of responsibility under the convention, the *Rotterdam Rules* also widen the scope with respect to parties which are governed by the convention. Unlike the *Hague/Visby Rules*, the application of the *Rotterdam Rules* is not limited to the parties entering into the contract of carriage. Instead, the *Rotterdam Rules* introduce the concepts of "performing parties" and "maritime performing parties."¹¹

A "performing party" is a person, other than the carrier, that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that each person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

A "maritime performing party" refers to a "performing party" to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the point of loading of a ship and their departure from the port of discharge of a ship. The convention provides that an inland carrier is a maritime performing party only if it performs or undertakes to perform its services explicitly within a port area.

It has been observed that a "maritime performing party" includes ocean carriers, feeder carriers, and stevedores that work within the port area, marine terminal operators and port authorities to the extent that they may be involved in the handling of the cargo in the port.¹² This is where the concern arose that the *Rotterdam Rules* will apply to stevedoring companies and cargo terminals at sea ports. Before the *Rules*, such parties were not subject to any mandatory international conventions, which enabled them to limit their liabilities to less than the limits set out in the conventions.

The *Rotterdam Rules* provide that a maritime performing party is subject to the obligations and liabilities imposed on the carrier under the convention, and is entitled to the carrier's defences and limits of liability.¹³ However, if the carrier agrees with the shipper to assume greater obligations or limits of liability, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or limits of liability.¹⁴ Nothing in the *Rotterdam Rules* imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.¹⁵

The *Rotterdam Rules* do not apply to a contract of carriage for passengers and their luggage.¹⁶

OBLIGATIONS AND LIABILITIES OF THE CARRIER

A. Obligations of the Carrier

The obligations of the carrier are set out in Chapter 4 of the *Rotterdam Rules*. The carrier shall, subject to the 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.¹⁷ As noted above, the period of responsibility of the carrier begins when the carrier or a performing party receives the goods for carriage, and ends when the goods are delivered.¹⁸

During this period of responsibility, the carrier has an obligation to properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.¹⁹ A similar provision exists in the *Hague/Visby Rules*.²⁰ However, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper, or the consignee.²¹

Once at sea, the carrier has specific obligations under the *Rotterdam Rules* (similar to those contained in the *Hague/Visby Rules*²²) to exercise due diligence to make and keep the ship seaworthy, properly crew, equip and supply the ship throughout the voyage, and keep the holds and all other parts of the ship in which goods are carried fit and safe for the reception, carriage and preservation of goods.²³ It should be noted that the *Rotterdam Rules* extend the carrier's obligation to keep the ship seaworthy to the entire voyage, not just the beginning of the voyage.

The carrier is also given certain rights with respect to dangerous goods, including the right to decline to receive or load such goods, as well as the right to unload, destroy or render such goods harmless.²⁴ A similar provision exists in the *Hague/Visby Rules*.²⁵

B. Liabilities of the Carrier

Chapter 5 of the *Rotterdam Rules* addresses the liability of the carrier for loss, damage or delay. The carrier is liable for loss or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it, took place during the period of the carrier's responsibility.²⁶

The carrier is relieved of all or part of its liability if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault.²⁷

The carrier is also relieved of all or part of its liability if it proves that one or more of a list of events or circumstances caused or contributed to the loss.²⁸ The list of perils is similar to those listed in the *Hague/Visby Rules*,²⁹ with a few notable exceptions:

1. The *Rotterdam Rules* only list "fire on the ship" as an event, whereas the *Hague/Visby Rules* include "fire, unless caused by the actual fault or privity of the carrier";
2. The *Hague/Visby Rules* include "saving or attempting to save life or property at sea." The *Rotterdam Rules* include "saving or attempting to save life at sea" and "reasonable measures to save or attempt to save property at sea". As a result, if a carrier's measures to save or attempt to save property at sea were found to be unreasonable, it appears that they would not be able to take advantage of this provision; and
3. The *Rotterdam Rules* do not include the exception contained in the *Hague/Visby Rules* which protects carriers from responsibility for the act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship.

If a carrier attempts to rely on one of the excepted perils, the carrier is still liable for all or part of the loss, damage, or delay if the claimant proves that the fault of the carrier caused or contributed to the event or circumstance on which the carrier relies, or that an event or circumstance not listed contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault.³⁰

The carrier is also liable if, notwithstanding the list of excepted perils, the claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried were not fit and safe for reception, carriage, and preservation of the goods.³¹

This approach to liability has been compared to a "ping-pong" match.³² The claimant establishes a *prima facie* case for loss. The carrier has the option to refute the claim by disproving the claim or asserting that an "excepted peril" was responsible. The claimant may rebut the carrier's defence by proving that the carrier was responsible for the loss, or that the carrier did not meet his obligation to keep the ship seaworthy. The carrier can then argue that it exercised due diligence in the discharge of its obligations, so that it is relieved of liability.

The carrier is also liable for breach of its obligations caused by acts or omissions of certain other persons, including:

- (a) Any performing party;
- (b) The master or crew of the ship;
- (c) Employees of the carrier or a performing party; or
- (d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.³³

If the carrier and one or more maritime performing parties are liable, their liability is joint and several, but the aggregate liability of all such persons shall not exceed the overall limits of liability.³⁴

OBLIGATIONS AND LIABILITIES OF THE SHIPPER

The *Hague/Visby Rules* provide that the shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.³⁵ Such an overriding provision is not found in the *Rotterdam Rules*.

The obligations of the shipper to the carrier are set out in Chapter 7 of the *Rotterdam Rules*. The shipper shall deliver the goods ready for carriage, in such condition that they will withstand the intended carriage.³⁶ This includes the careful stowing, lashing and securing of contents in or on any container or vehicle. The shipper shall, if applicable, fulfil any obligations assumed under an agreement made pursuant to article 13, paragraph 2.³⁷ The shipper and the carrier shall cooperate in providing information and instructions with respect to the carriage of the goods.³⁸ The shipper must provide all reasonably necessary information, instructions and documents to the carrier.³⁹

The shipper is liable if the carrier proves that loss or damage was caused by a breach of the shipper's obligations under the convention.⁴⁰ A shipper is liable for the breach of its obligations caused by the acts or omissions of any person (including employees, agents and subcontractors) to which it has entrusted the performance of any of its obligations, but the shipper is not liable for the acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.⁴¹ The shipper has special obligations with respect to dangerous goods.⁴² The shipper must inform the carrier of the dangerous nature or character of the goods, and mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods.

LIMITATION OF LIABILITY

Chapter 12 of the *Rotterdam Rules* addresses limits of liability. A carrier's liability for breaches of its obligations is limited to the higher of:

- (a) 875 units of account per package or other shipping unit,⁴³ or
- (b) three units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute,⁴⁴

except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.⁴⁵

This represents an increase in limits of liability. The *Hague/Visby Rules* provide that, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, the limits for liability are set at the higher of 666.67 units of account per package or unit or 2 units of account per kilogram of gross weight of the goods lost or damaged.⁴⁶ The *Hague/Visby Rules* also provide that the carrier and the shipper may, by agreement, fix other maximum amounts of liability, provided that no maximum amount shall be less than the maximum amount provided for in the convention.⁴⁷

The *Rotterdam Rules* provide that when goods are carried in or on a container, pallet or similar articles of transport, the packages or shipping units enumerated in the contract particulars are deemed packages or shipping units.⁴⁸ A similar provision exists in the *Hague/Visby Rules*.⁴⁹

The *Rotterdam Rules* include a specific limit of liability for loss caused by delay.⁵⁰ The convention provides that liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. However, the total amount payable pursuant to article 60 (limits of liability for delay) and article 59 (limits of liability generally) may not exceed the limit that would be established pursuant to article 59, in respect of the total loss of the goods concerned.

A party can lose the benefit of the limitation of liability, if the claimant proves that the loss resulting from the breach of the carrier's obligation was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.⁵¹ A similar provision exists in the *Hague/Visby Rules*, which provides that neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.⁵²

Nothing contained in the *Rotterdam Rules* affects the application of any international convention or national law regulating the global limitation of liability of vessel owners.⁵³

The *Rotterdam Rules* do not appear to include a limit on the liability of the shipper.

NOTICE PERIODS

Under the *Rotterdam Rules*, the carrier is presumed, in the absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars, unless notice of loss of or damage to the goods was given to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days at the place of delivery after the delivery of the goods.⁵⁴ The *Hague/Visby Rules* only provide for a three day notice period.⁵⁵ However, failure under the *Rotterdam Rules* to provide this notice shall not affect the right to claim compensation for loss of, or damage to, the goods.⁵⁶

With respect to claims resulting from delay, no compensation is payable under the *Rotterdam Rules* unless notice of loss due to delay is given within 21 days of delivery of the goods.⁵⁷

LIMITATION PERIODS

The period in which a party may bring a suit is set out in Chapter 13 of the *Rotterdam Rules*. No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under the convention may be instituted after the expiration of a period of two years.⁵⁸ This is a change from the one year limitation period provided in the *Hague/Visby Rules*.⁵⁹ This two-year period commences on the day on which the carrier has delivered the goods, or the last day on which the goods should have been delivered.⁶⁰ The person against whom a claim is being made may extend the limitation period by declaration.⁶¹ There are special rules for an action for indemnity,⁶² as well as an action against the person identified as the carrier.⁶³

FREEDOM OF CONTRACT: VOLUME CONTRACTS

With respect to the obligations of a carrier, the *Rotterdam Rules* provide that unless otherwise provided in the convention, any term in a contract of carriage is void to the extent that it directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party, or excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this convention.⁶⁴

With respect to the obligations of a shipper, the *Rules* provide that unless otherwise provided in the convention, any term in a contract of carriage is void to the extent that it directly or indirectly excludes, limits or increases the obligations, or the liability resulting from a breach of the obligations, of the shipper, consignee, controlling party, holder or documentary shipper under this convention.⁶⁵

There is a similar provision in the *Hague/Visby Rules*.⁶⁶ However, the *Hague/Visby Rules* go on to provide that a carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the rules, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.⁶⁷

There does not appear to be such a provision in the *Rotterdam Rules*. However, there are special rules for “volume contracts”. Article 1 of the *Rotterdam Rules* defines a “volume contract” as follows:

“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.

The convention provides that a volume contract may provide for greater or lesser rights, obligations and liabilities than those imposed by the convention.⁶⁸

Specific requirements must be met for a volume contract to be binding, including:⁶⁹

1. The volume contract must contain a prominent statement that it derogates from the convention;
2. The volume contract must be:
 - (a) individually negotiated, or
 - (b) prominently specify the sections of the volume contract containing the derogations; and
3. The shipper must be given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and in conditions that comply with the convention.

These provisions have been met with some criticism. The concern is that smaller shippers may be placed at a disadvantage, as they may be forced into contracts offering less legal certainty than the *Hague/Visby Rules*.⁷⁰ However, these concerns have arguably been addressed by the requirement that the shipper must first be given an opportunity to conclude a contract of carriage on terms and conditions which comply with the convention for a volume contract to be binding. If the shipper declines to enter such an agreement, and agrees to enter into a volume contract which includes derogations from the convention, it is only then that the volume contract would be considered binding.

In addition, even in volume contracts, the parties cannot derogate from certain obligations under the convention, including (i) the carrier’s obligation to ensure continuous seaworthiness; (ii) the shipper’s obligation to provide complete instructions and documentation for the carriage of goods; and (iii) the shipper’s obligations with respect to dangerous goods. The special rules for volume contracts also do not apply to any liability arising from a personal act or omission done with the intent to cause loss or recklessly and with knowledge that such loss would probably result (as described in article 61).⁷¹

The derogations from the convention which are contained in a volume contract only apply between the carrier and any person other than the shipper if that third person was given notice, and gave its express consent to be bound by such derogations.⁷²

DEVIATION

The *Hague/Visby Rules* provide that any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of the rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.⁷³ As a result, if a deviation (for a purpose other than saving life or property) is unreasonable, a carrier may lose some or all defences to liability.

The *Rotterdam Rules* provide that a deviation does not deprive the carrier or maritime performing party of any defence or limitation, except to the extent provided in article 61 (personal act or omission done with the intent to cause loss or recklessly and with knowledge that such loss would probably result).⁷⁴ As a result, it appears that shippers may no longer be protected from unreasonable deviation, unless the carrier is guilty of wilful misconduct.

TRANSPORT DOCUMENTS

Under the *Rotterdam Rules*, unless the shipper and the carrier have agreed not to use a transport document or electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage, the shipper is entitled to obtain from the carrier, at the shipper's option, a non-negotiable transport document, or a negotiable transport document.⁷⁵

The convention sets out what must be included in such a document.⁷⁶ The document should identify the carrier. If it does not, the registered owner of the ship onto which the goods have been loaded is presumed to be the carrier. This presumption may be rebutted by the registered owner.⁷⁷

Except to the extent that the contract particulars have been qualified,⁷⁸ a transport document is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars, and proof to the contrary by the carrier in respect of any contract particulars shall not be admissible.⁷⁹ A similar provision can be found in the *Hague/Visby Rules*.⁸⁰

The *Rotterdam Rules* also introduce the idea of "electronic transport records." Anything which is to be in or on a transport document may be recorded in an electronic form, provided that the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper.⁸¹

RIGHT OF CONTROL AND TRANSFER OF RIGHTS

Chapters 10 and 11 of the *Rotterdam Rules* address the issues of right of control, and transfer of rights, respectively. These matters are not addressed in the *Hague/Visby Rules*. Canada currently relies on the *Bills of Lading Act* to address these issues. The *Bills of Lading Act* would need to be amended to ensure that there would be no inconsistencies between the Act and the *Rotterdam Rules*.⁸²

The *Rotterdam Rules* define "right of control" as "the right under the contract of carriage to give the carrier instructions with respect to the goods."⁸³ There are some limitations on this right of control.⁸⁴ With respect to transfer of rights, the provisions vary depending on whether the transport document or electronic transport record is non-negotiable or negotiable.

When a transfer of rights occurs, the obligations of the controlling party are also transferred to the new holder. However, a holder that is not the shipper and that does not exercise any rights under the contract of carriage does not assume any liability solely by reason of being a holder.⁸⁵ However, if the holder exercises any right under the contract of carriage, that holder assumes any liabilities imposed on it under the contract of carriage.⁸⁶

JURISDICTION

Chapter 14 of the *Rotterdam Rules* address the issue of jurisdiction. The issue of jurisdiction is not addressed in the *Hague/Visby Rules*. It should be noted that the provisions of Chapter 14 shall only bind contracting states that declare that they will be bound by them.⁸⁷

The convention provides that unless the contract of carriage contains an exclusive choice of court agreement, the plaintiff has the right to institute judicial proceedings under the convention against the carrier in a competent court in the jurisdiction of (i) the domicile of the carrier; (ii) the place of receipt agreed in the contract of carriage; (iii) the place of delivery agreed in the contract of carriage; (iv) the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or (v) any competent court(s) designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under the convention.⁸⁸ After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.⁸⁹

If the parties have chosen a jurisdiction by agreement, that court only has exclusive jurisdiction for disputes between the parties to the contract if the agreement (1) is contained in a volume contract, and (2) clearly designates the court(s) of one contracting state.⁹⁰ However, a person that is not a party to the volume contract is only bound by such an exclusive choice of court agreement if certain requirements are met.⁹¹

Actions against maritime performing parties can be commenced in a competent court within the jurisdiction of (i) the domicile of the maritime performing party; or (ii) the port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party, or the port in which the maritime performing party performs its activities with respect to the goods.⁹²

None of the above provisions affect jurisdiction with regard to provisional or protective measures, including arrest (although such a court does not have jurisdiction to determine the case upon its merits unless it meets the requirements of the convention).⁹³

ARBITRATION

The *Rotterdam Rules* address the issue of arbitration in Chapter 15. Again, it should be noted that the provisions of Chapter 15 shall only bind contracting states that declare that they will be bound by them.⁹⁴

Under the *Rotterdam Rules*, parties may agree that a dispute that arises under the convention may be referred to arbitration.⁹⁵ Arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at any place designated for that purpose in the arbitration agreement, or any other place situated in a state where any of the following is located: (i) the domicile of the carrier; (ii) the place of receipt agreed in the contract of carriage; (iii) the place of delivery agreed in the contract of carriage; or (iv) the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.⁹⁶ After the dispute has arisen, the parties to the dispute may agree to resolve it by arbitration in any place.⁹⁷

The designation of the place of arbitration in an agreement is binding if the agreement is contained in a volume contract.⁹⁸ Once again, a person that is not party to the volume contract is bound by the designation of the place of arbitration in that agreement only if certain requirements have been met.⁹⁹

¹ *Rotterdam Rules*, article 88.

² United Nations Commission on International Trade Law *Convention on Contracts for the International Carriage of Goods Wholly or Partly by [sic] Sea – Information Paper*, Transport Canada, International Marine Policy, February 2009 [*Transport Canada*] at p. 12.

³ *Transport Canada* at p. 12.

⁴ Letter dated March 27, 2009 from Simon P. Barker, Chair, National Maritime Law Section, Canadian Bar Association to Mr. Tim Meisner, Director General, Marine Policy, Transport Canada.

⁵ *Rotterdam Rules*, article 5, para. 1.

⁶ *Rotterdam Rules*, article 1.

⁷ *Transport Canada* at p. 3.

⁸ *Rotterdam Rules*, article 12, para. 1.

⁹ *Rotterdam Rules*, article 26.

¹⁰ *Transport Canada* at p. 4.

¹¹ As defined in *Rotterdam Rules*, article 1.

¹² *Transport Canada* at pp. 4-5.

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- 13 *Rotterdam Rules*, article 19, para. 1.
 - 14 *Rotterdam Rules*, article 19, para. 2.
 - 15 *Rotterdam Rules*, article 19, para. 4.
 - 16 *Rotterdam Rules*, article 85.
 - 17 *Rotterdam Rules*, article 11.
 - 18 *Rotterdam Rules*, article 12, para. 1.
 - 19 *Rotterdam Rules*, article 13, para. 1.
 - 20 *Hague/Visby Rules*, article III, para. 2.
 - 21 *Rotterdam Rules*, article 13, para. 2.
 - 22 At article III at para. 1.
 - 23 *Rotterdam Rules*, article 14.
 - 24 *Rotterdam Rules*, article 15.
 - 25 *Hague/Visby Rules*, article IV, para. 6.
 - 26 *Rotterdam Rules*, article 17, para. 1.
 - 27 *Rotterdam Rules*, article 17, para. 2.
 - 28 *Rotterdam Rules*, article 17, para. 3.
 - 29 *Hague/Visby Rules*, article IV, para. 2.
 - 30 *Rotterdam Rules*, article 17, para. 4.
 - 31 *Rotterdam Rules*, article 17, para. 5.
 - 32 *Transport Canada* at p. 5.
 - 33 *Rotterdam Rules*, article 18.
 - 34 *Rotterdam Rules*, article 20.
 - 35 *Hague/Visby Rules*, article IV, para. 3.
 - 36 *Rotterdam Rules*, article 27.
 - 37 Discussed above, at note 21.
 - 38 *Rotterdam Rules*, article 28.
 - 39 *Rotterdam Rules*, article 29.
 - 40 *Rotterdam Rules*, article 30.
 - 41 *Rotterdam Rules*, article 34.
 - 42 *Rotterdam Rules*, article 32.
 - 43 Estimated at \$1,620 CAD in *Transport Canada* at p. 6.
 - 44 Estimated at \$5.50 CAD in *Transport Canada* at p. 6.
 - 45 *Rotterdam Rules*, article 59, para. 1.
 - 46 *Hague/Visby Rules*, article IV, subparagraph 5(a).
 - 47 *Hague/Visby Rules*, article IV, subparagraph 5(g).
 - 48 *Rotterdam Rules*, article 59, para. 2.
 - 49 *Hague/Visby Rules*, article IV, subparagraph 5(c).
 - 50 *Rotterdam Rules*, article 60.
 - 51 *Rotterdam Rules*, article 61.
 - 52 *Hague/Visby Rules*, article IV, subparagraph 5(e).
 - 53 *Rotterdam Rules*, article 83.
 - 54 *Rotterdam Rules*, article 23, para. 1.
 - 55 *Hague/Visby Rules*, article III, para. 6.
 - 56 *Rotterdam Rules*, article 23, para. 2.
 - 57 *Rotterdam Rules*, article 23, para. 4.
 - 58 *Rotterdam Rules*, article 62, para. 1.
 - 59 *Hague/Visby Rules*, article III, para. 8.
 - 60 *Rotterdam Rules*, article 62, para. 2.
 - 61 *Rotterdam Rules*, article 63.
 - 62 *Rotterdam Rules*, article 64.
 - 63 *Rotterdam Rules*, article 65.
 - 64 *Rotterdam Rules*, article 79, para. 1.
 - 65 *Rotterdam Rules*, article 79, para. 2.
 - 66 *Hague/Visby Rules*, article III, para. 8.
 - 67 *Hague/Visby Rules*, article V.
 - 68 *Rotterdam Rules*, article 80, para. 1.
 - 69 *Rotterdam Rules*, article 80, para. 2.
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- ⁷⁰ See, for example, "The Belgian Position on the New UNCITRAL Convention: position paper by the Belgian Maritime Law Association regarding the UNCITRAL draft *Convention on the Carriage of Goods Wholly or Partly by Sea*," Belgian Maritime Law Association, 10 October 2008 at p. 2.
- ⁷¹ *Rotterdam Rules*, article 80, para. 4.
- ⁷² *Rotterdam Rules*, article 80, para. 5.
- ⁷³ *Hague/Visby Rules*, article IV, para. 4.
- ⁷⁴ *Rotterdam Rules*, article 24.
- ⁷⁵ *Rotterdam Rules*, article 35.
- ⁷⁶ *Rotterdam Rules*, article 36.
- ⁷⁷ *Rotterdam Rules*, article 37.
- ⁷⁸ As contemplated in *Rotterdam Rules*, article 40.
- ⁷⁹ *Rotterdam Rules*, article 41.
- ⁸⁰ *Hague/Visby Rules*, article III, para. 4.
- ⁸¹ *Rotterdam Rules*, article 8.
- ⁸² *Transport Canada*, pp. 9-10.
- ⁸³ *Rotterdam Rules*, article 1.
- ⁸⁴ *Rotterdam Rules*, article 50, para. 1.
- ⁸⁵ *Rotterdam Rules*, article 58, para. 1.
- ⁸⁶ *Rotterdam Rules*, article 58, para. 2.
- ⁸⁷ *Rotterdam Rules*, article 74.
- ⁸⁸ *Rotterdam Rules*, article 66.
- ⁸⁹ *Rotterdam Rules*, article 72.
- ⁹⁰ *Rotterdam Rules*, article 67, para. 1.
- ⁹¹ *Rotterdam Rules*, article 67, para. 2.
- ⁹² *Rotterdam Rules*, article 68.
- ⁹³ *Rotterdam Rules*, article 70.
- ⁹⁴ *Rotterdam Rules*, article 78.
- ⁹⁵ *Rotterdam Rules*, article 75, para. 1.
- ⁹⁶ *Rotterdam Rules*, article 75, para. 2.
- ⁹⁷ *Rotterdam Rules*, article 77.
- ⁹⁸ *Rotterdam Rules*, article 75, para. 3.
- ⁹⁹ *Rotterdam Rules*, article 75, para. 4.

Please contact us if you would like to discuss the above.

Gregory J. Tucker
Direct: 604-691-7553
E-mail: gtucker@owenbird.com

Paul A. Brackstone
Direct: 604-691-7554
E-mail: pbrackstone@owenbird.com

James W. Zaitsoff
Direct: 604-691-7563
E-mail: jzaitsoff@owenbird.com

OWEN · BIRD
LAW CORPORATION

29th Floor, Three Bentall Centre
595 Burrard Street, PO Box 49130
Vancouver, BC V7X 1J5 Canada

Telephone (604) 688-0401 Fax (604) 688-2827
<http://www.owenbird.com>