

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

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“Friends, Romans (maritime lawyers?), Countrymen ...”

- I come to discuss Rotterdam, not to praise it (nor condemn it);
The evil that Carriers and Cargo interests do lives after them;
The good is oft interred with their settlement agreements
- Not about Rotterdam Good or Bad
- Not about Rotterdam “pro” or “anti” carrier, forwarder, or cargo or national interests

The Rotterdam Rules

- The United Nations Convention for the International Carriage of Goods Wholly or Partly by Sea
- Open for signing in Rotterdam on September 23, 2009
- Lengthy Project of UNICTRAL involving approximately 12 years of consultation, negotiation and deliberation

Rotterdam is coming

- When is it coming?
- How will affect me – A humble Canadian maritime lawyer trying to get by in this ever crazier multi-modal electronic world?

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Where are we with Rotterdam?

21 Countries have signed Rotterdam since it was open for signing in September 2009. The 21 are:

Armenia
Cameroon
Congo
Denmark
France
Gabon
Ghana

Greece
Guinea
Madagascar
Mali
Netherlands
Niger
Nigeria

Norway
Poland
Senegal
Spain
Switzerland
Togo
United States

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Rotterdam Signatories

- Notable exceptions:

China India Germany

Japan Russia Brazil

Italy United Kingdom

Australia Canada

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Notable Exceptions – G8

- United Kingdom
- Germany
- Japan
- Russia
- Italy
- Canada

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Notable Exceptions – G20

South Africa	Japan	Italy
Canada	South Korea	United Kingdom
Mexico	India	Australia
Germany	Indonesia	Turkey
Argentina	Saudi Arabia	China
Brazil	Russia	

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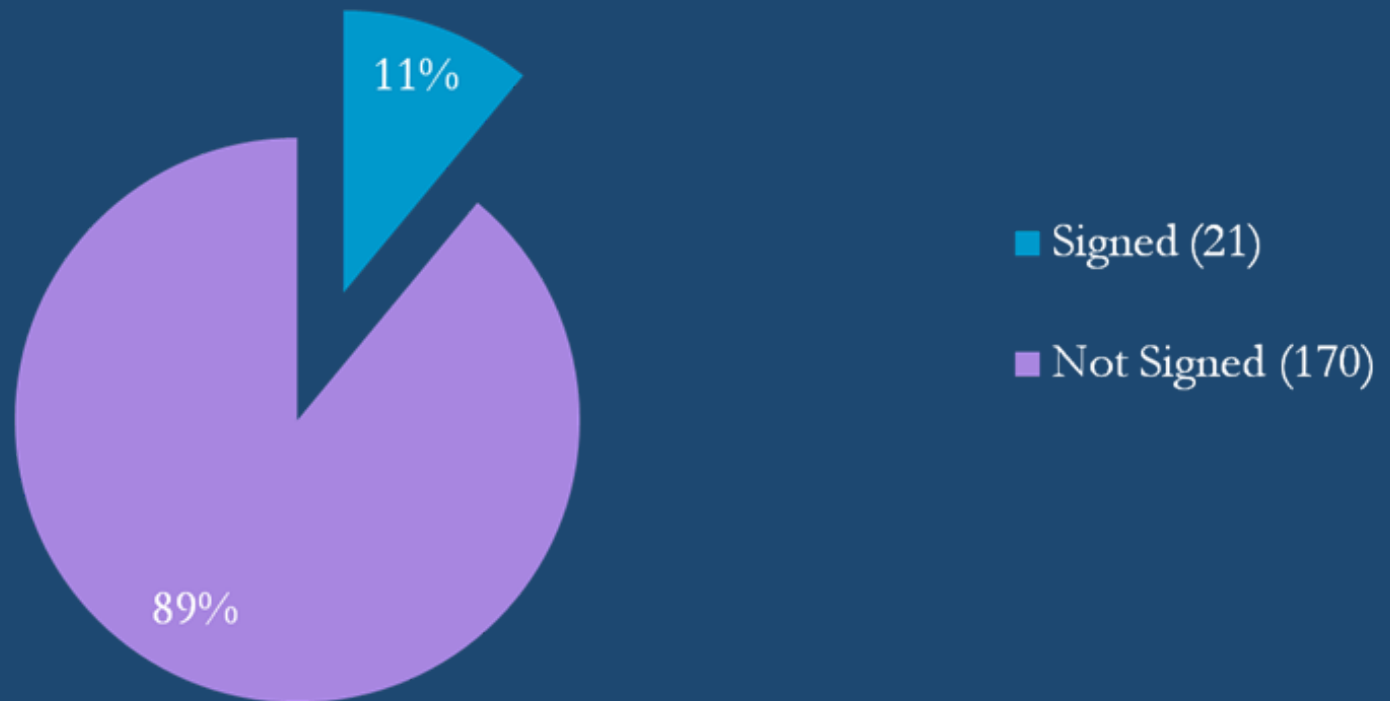
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Rotterdam Ratios

Percentage of Countries Signing Rotterdam



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Rotterdam Ratios

G8 Countries



G20 Countries



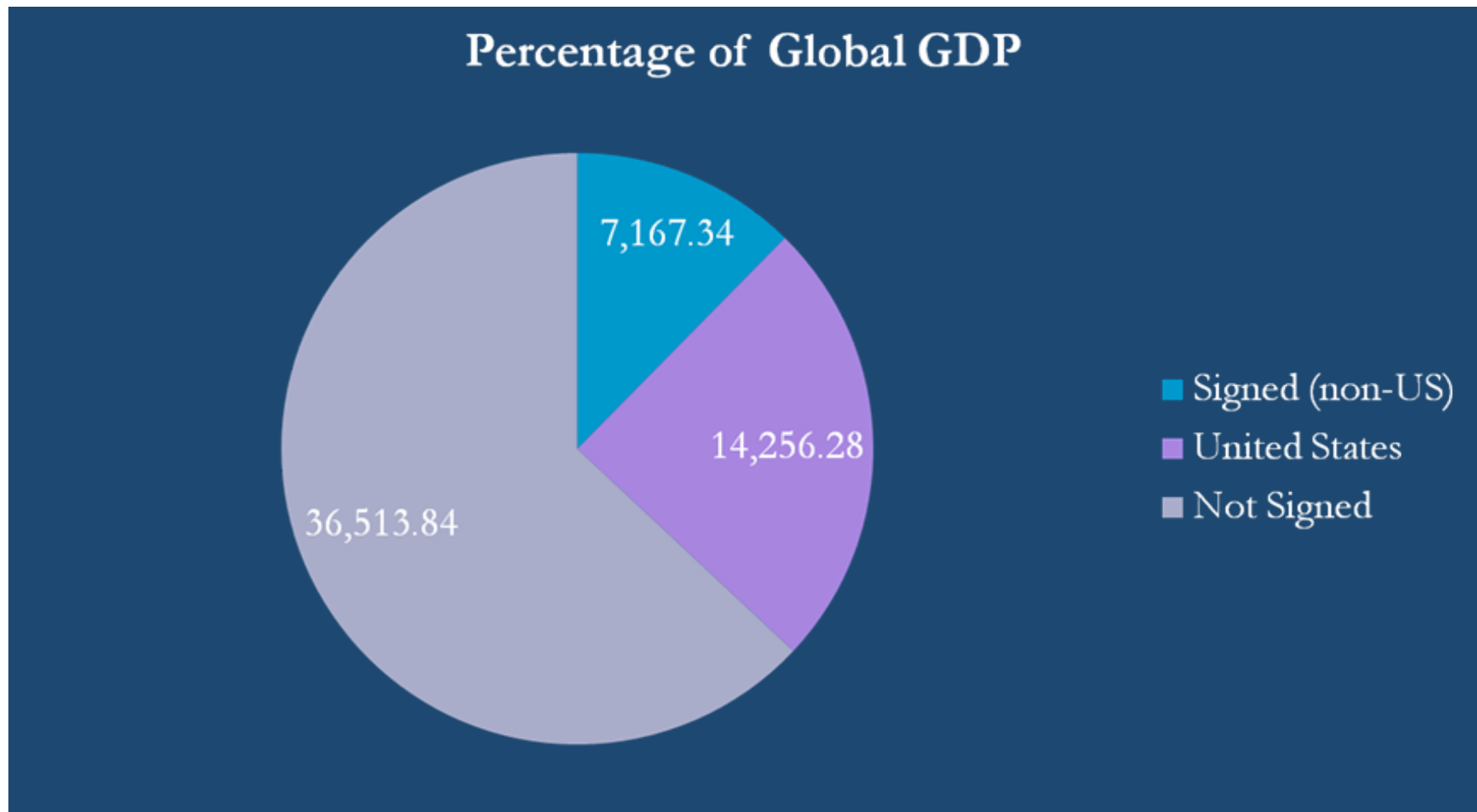
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Rotterdam by Gross Domestic Product



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Rotterdam & the U.S.A.

- USA is likely to be the “tail that wags the dog”
- Rotterdam was very US centric in its design
- This is a regime for multimodal cargo – containerized cargo
 - US is largest importer and second largest exporter of container cargo
- US is the major signatory to Rotterdam
- US ratification will be crucial

Rotterdam & the U.S.A.

- Will the US ratify?
- In light of current economic and legislative climate, how high will this be on the agenda?
 - Energy Policy – revisions to offshore drilling and oil exploration in light of BP's Deepwater Horizon
 - Financial Services reform in light of mortgage and derivatives crisis
- How much political capital can be invested into this?

Rotterdam Ratification

- Convention requires 20 ratifications to take effect
- Convention has been signed by 21 but not ratified by any
- Ratified requires the country to accept the Convention into its national law
 - i.e. the U.S. Senate must vote to approve it

Rotterdam Ratification Predictions

- US will have ratify, other signatories will then follow
- After US ratification, others may sign and ratify
- Unlikely currently – midterm elections in November 2010
 - Will there be change in the Senate?
 - When is the earliest it could come to a vote?

Rotterdam Ratification

- Convention comes into force one year after the deposit of the 20th instrument of ratification, acceptance, approval or ascension
- Likely take several more years
 - Mid 2010's at earliest

How does this affect me?

- For many maritime lawyers, cargo claims are the “bread and butter” work.
- After all the carriage of goods by sea is the very foundation of Admiralty law and all that goes with it.

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The new Cargo file ...

- Upon receipt of a new file on behalf of a cargo claimant there are some important questions to be asked. Deep meaningful questions...
- Beyond just, “Will I make any money on this file”?
- These questions will serve as a format to discuss Rotterdam

The new Cargo file ...

1. Will Rotterdam apply?
 - a. Scope of application
 - b. Volume Contracts
2. Is the case time -barred?
 - a. Notice
 - b. Suit
3. Can I sue in Canada?

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The new Cargo file ...

4. What is the case worth?
 - a. What are the limits?
5. Who are the defendants?
6. Is there a defendant that is liable?
 - a. How do I prove liability?

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Application of Hague - Visby

- Canada applies the Hague-Visby rules to:
- Domestic carriage
 - Unless no B/L and contract stipulates such
- Bills of Lading between the ports of two different states, if:
 - The BL issued in a Contracting State;
 - The carriage is from a Contracting State;
 - The contract contained in or evidenced by the BL provides that the rules are to govern;

Will Rotterdam apply?

- Rotterdam applies where a sea-leg connects two different states and one of the following is in a contracting state:
 - the place of receipt
 - the port of loading
 - the place of delivery
 - the port of discharge

Will Rotterdam apply?

The Rotterdam Rules:

- **do** apply to liner transportation (*i.e.* regularly scheduled service)
 - Exception: charter parties and similar contracts (*i.e.* slot charters)
- **do not** apply to non-liner transportation unless a transport document is issued. (A “transport document” is evidence of receipt by carrier and evidences/contains the contract of carriage)
 - Exception: charter parties and similar contracts (*i.e.* slot charters)
- **do** apply between carriers & third parties
 - *i.e.* a consignee (or holder of the transport document) is covered

Will Rotterdam apply?

- Door-to-Door application
 - Application from loading to delivery
 - Parties may agree for loading, etc. to be done by shipper
 - Concept: “performing parties”
 - subcontractors, agents, etc.
 - Concept: “maritime performing parties”
 - nexus to a port
 - May affect port authorities, NVOCCs, etc. to the extent that they handle cargo

Will Rotterdam apply?

- The carrier is liable for:
 - any performing party
 - the master and crew of the ship
 - its employees or the employees of a performing party
 - any other person that performs or undertakes any of its obligations

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Will Rotterdam apply?

- The Hague (Visby) Rules removed freedom of contract:
 - Terms of a contract that lessened the carriers liability were void
 - Trade-off: carrier liability in exchange for limited liability
 - Similar concept exists in Rotterdam (Art. 79)
- Freedom on contract concept returns, in certain circumstances, which could reduce the extent by which the terms of Rotterdam apply

Rotterdam & Volume Contracts

- The Rotterdam Rules permit derogation from the rules in “volume contracts”
- There are exceptions to the ability to contract out. No derogation from:
 - a) Carriers obligation of Seaworthiness obligation;
 - b) Shipper’s obligations to provide information, instructions & documents;
 - c) Shipper’s obligations regarding dangerous goods;
 - d) Liability for intentional/reckless conduct;

Rotterdam & Volume Contracts

- “Volume Contract” definition:
 - 1.) a specified quantity of goods;
 - May be a minimum, maximum or certain range
 - 2.) in a series of shipments;
 - 3.) during an agreed period of time;
- Example: a commitment to ship 100 containers in a year.
- Possibly: “Not less than 2 containers in a 5 year period. Shipper shall have the option to cancel the second shipment at the end of the contract for a cancellation fee of \$1.00.”

Rotterdam & Volume Contracts

- Currently, volume contracts are the norm
- The vast majority of the world's cargo moves under a volume contract of some form – large shipping companies doing business with large freight forwarders /NVOCC”S
- 25 Liner companies control 80% of world trade
- Rotterdam may end up applying to very little of the world's trade

Rotterdam & Volume Contracts

- “Volume Contract” opt-outs require:
 - A prominent, written statement
 - *e.g.* bolding or capitalized letters, etc.
 - No incorporation by reference & no contracts of adhesion
 - Notice and opportunity for the shipper to have a fully Rotterdam-compliant contract
 - Express notice to the shipper that it may have a fully Rotterdam-compliant contract

Rotterdam & Volume Contracts

- “Volume contract” derogations will apply to third parties (the consignee) if there is both:
 - a) prominent notice that the contract derogates from the Rotterdam rules, and
 - b) Consent by the party to be bound.
- The party claiming benefit of the derogation bears burden of proving conditions fulfilled

Is the case time-barred?

- Notice of Cargo damage:
 - Hague-Visby: 3 days after delivery otherwise presumption (rebuttable) of good delivery
 - Rotterdam: 7 working days after delivery otherwise presumption (rebuttable) of good delivery
- Notice of damage for delay:
 - Hague-Visby: n/a
 - Rotterdam: 21 days from date of delivery
 - Non-compliance is an absolute bar

Is the case time-barred?

- Time for Suit:
 - Hague - Visby: 1 year after delivery
 - Rotterdam: 2 years after delivery

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Can I sue in Canada?

- Different question from whether the Rotterdam rules apply or not. If they do, then where is the matter to be heard?
- Jurisdiction and Arbitration clauses in the transport documents i.e “exclusive jurisdiction clauses”.

Can I sue in Canada?

- Will a court in Canada hear a case involving an Italian shipper, a German ocean shipping line carrying the cargo from a Dutch port carrying the cargo to Halifax?
 - Particularly if there is a clause in the B/L stating that “all disputes shall be exclusively heard and determined by the courts in Hamburg, Germany”?

Marine Liability Act, s.46

- Exclusive jurisdiction clauses are not *prima facie* pre-emptive if:
 - Actual or intended port of loading or discharge is Canadian;
 - The carrier resides, has a place of business, branch or agency in Canada
 - The contract was made in Canada
- Certain minimum Canadian contact to prevent preclusion

Can I sue in Canada?

- S. 46 gives the claimant the option to sue in Canada, but it is not preclusive either;
- Carriers can still seek anti-suit injunctions in their home courts and a stay of proceedings in the Canadian courts based on “comity” for the anti-suit injunction or *forum non-conveniens*

Rotterdam Jurisdiction

- Chapter 14 (Art. 66-74) “Jurisdiction” & Chapter 15 (Art. 75-78) “Arbitration”
- Contracting states have the ability to opt out of these provisions – A contracting state must declare that they will be bound by them.
- The first issue will be whether Canada is a Contracting State, if so then whether Canada has opted in or out.

Rotterdam Jurisdiction

- The claimant may sue the carrier in the court of the country where:
 - The carrier is domiciled;
 - The place of receipt agreed in the contract;
 - The place of delivery agreed in the contract;
 - The port of loading or discharge
- Or, the claimant may sue in the court designated by the agreement between carrier and shipper

Exclusive Jurisdiction Clauses

- An exclusive jurisdiction clause is exclusive for disputes between the “parties to the contract” only if the parties agree and:
 - Is contained in a volume contract that clearly states the names and addresses of the parties and is either individually negotiated or has a prominent statement that the is an EJC.
 - Clearly designates the courts of one Contracting state

Exclusive Jurisdiction Clauses

- A person “not a party” to the volume contract (i.e. the consignee / receiver of the cargo) is only bound by the EJC if:
 - The court is one where plaintiff could have commenced (from above)
 - The agreement is contained in the transport document
 - Claimant given “timely and adequate notice” of the exclusive court
 - Law of the court seized recognizes the EJC

Jurisdiction against the maritime performing party

- Right to institute proceedings in a court located in:
- The domicile of the maritime performing party;
- Port where cargo received or delivered or in which the activities in respect of the cargo were performed.

What's it worth?

- *Hadley v. Baxendale*
 - Damages which arise naturally from the breach
 - Special circumstances
 - Mitigation
- *Redpath v. The Cisco* (cargo loss)
 - The ordinary measure is ASMV less ADMV
- Consider economic loss for delay

What's it worth?

- Apportionment of liability
 - Hague-Visby: the carrier is solely liable
 - Rotterdam: liability may be apportioned

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What are the limits of liability?

- Carrier remains entitled to limit its liability to a pre-set amount.
- Does not apply to intentional damage or damage caused recklessly and with knowledge that such loss would probably occur.
- Rotterdam increases the limits.
- Hague-Visby: 2 SDR's per kilogram or
666.67 SDR's per package
- Rotterdam: 3 SDR's per kilogram
875 SDR's per package
- a “package” is determined by reference to the contract

Cargo Limitation of Liability

- 1 SDR = \$1.54 CDN
- Hague-Visby: \$3.08 per kilogram or \$1,100.01 per package
- Rotterdam: \$4.62 per kilogram or \$1,347.50 per package

Rotterdam Limits

- Assume a container of cargo is lost at sea
- a 40 foot “standard” dry ocean shipping container.
- Loaded with cargo of electronic toys packed in individual boxes. Each weighs 5 kilos.
- Boxes are packed on pallets and shrink-wrapped. 100 boxes to a pallet.
- 36 Pallets loaded in to the container.

Rotterdam Limits

- Further limits in the case of delay:
 - Hague-Visby: n/a
 - Hamburg: 2.5 x freight
 - Rotterdam: 2.5 x freight
- “Delay” = no delivery in the time agreed

Rotterdam Limits

- Total weight of cargo lost:
 - $5 \times 100 \times 36 = 18,000$ kilos
 - Limit: $18,000 \times 3 \times 1.54 = \$83,154$
- Total packages lost:
 - $36 \times 875 \times 1.54 = \$48,510$
- If pallets not enumerated on transport document and number of individual boxes, then:
 - $3600 \times 875 \times 1.54 = \$4,851,000$

Additional Features

- Codifies the “Himalaya Clause” – other parties get protection.
- Permits use of electronic transport documents
- Transport documents may be negotiable or not, and may require surrender or not
- New Rules regarding right of control and transfer of rights.

“Ping Pong” Procedure

- The claimant must show *prima facie* proof
- The carrier may disprove the claim or assert an “excepted peril”
- The claimant may rebut the carrier’s defence or show failure to keep the ship seaworthy, improper crewing, etc.
- The carrier can argue due diligence in its duties

Rotterdam Modifications to the Excepted Perils

- Modifies fire defence
 - Hague-Visby: “unless caused by the actual fault or privity of the carrier”
 - Rotterdam: extended to include fire caused by performing parties or employees
- Removes “nautical fault” or “error in navigation or management of the ship”
- Adds terrorism



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work of my associate,
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Thank you!

**Marc D. Isaacs &
Alan S. Cofman**

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