

Responsabilité, fraternité et développement durable en droit:

Une conférence en mémoire de l'honorable Charles D. Gonthier

Responsibility, Fraternity, and Sustainability in Law

A Symposium in honour of Charles D. Gonthier

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**Transports de cargaison par mer, les
règles de Rotterdam, leur adoption par
les États-Unis, le Canada, l'Union
Européenne et les pays transporteurs
du monde?**

William Tetley

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A Symposium in honour of Charles D. Gonthier

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Unis, le Canada, l'Union Européenne et les pays transporteurs du monde?

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by

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A Tribute to Charles Gonthier

Charles Gonthier's law career was first and foremost as a scholar of law, but with a vision of the law as part of Quebec, Canadian and world culture, and society. It was a very elevated and humane view.

Charles and I met in 1948 when we were both first year law students at McGill. Charles was a very serious student, but also a friend to all about him. I left McGill the next year for second year law at Laval University Law School, but he never lost touch, a practice he had with all those around him.

Charles was a brilliant student, graduating with a First Class Degree from McGill. Thereafter, he dutifully and effectively went through all the stages of law practice and judgeship until his inevitable ascendancy to the Supreme Court of Canada. There, he continued his assiduous efforts to uphold his vision of law as an essential part of society and humanity.

Throughout, Charles neither lost the human touch, nor contact with his friends of even the earliest days of his career.

William Tetley

Abstract

The Rotterdam Rules have been vigorously promoted by the United States of America.

In this paper, however, I suggest that no shipping nation, and particularly Canada, should either sign or ratify the Rotterdam Rules, because they neither harmonize, nor improve the law of the international carriage of goods. Instead, the shipping nations of the world should reconvene to draft a truly uniform and binding multimodal convention.

It is important to note that the United States of America has not adopted the Visby Rules (1977) nor the Hamburg Rules (1992) which are part of the carriage of goods law of most of the world's shipping nations.

The Rotterdam Rules are perhaps fitting for the United States, which has only adopted the Hague Rules (1924), but are retrograde for Canada and the world's shipping nations, whose carriage of goods by sea law is much more advanced.

I. Introduction to Transport by Sea

Sea transport refers to the movement of goods and/or passengers wholly or partly by sea. It is also known to be the largest form of transporting cargo throughout recorded history.

In this symposium, I will (1) judge the advantages and disadvantages of uniformity, as it is hoped to be achieved by means of international conventions governing sea transport. (2) I will suggest that Canada not ratify the Rotterdam Rules. (3) I will suggest a way to promote uniformity in international maritime law.

II. Maritime law regimes

Before considering uniformity of international maritime conventions governing sea transport, it is important to first outline the various conventions that have been negotiated in the last hundred years.

1. The Hague Rules

The International Convention relating to the Unification of Certain Rules relating to Bills of Lading (the Hague Rules) were adopted on 25 August 1924 at Brussels. They were one of the earliest conventions relating to sea transport. The Hague Rules establish a mandatory legal regime governing the liability of a carrier for loss of, or damage to, goods carried under a bill of lading. They cover the period from the time the goods are loaded onto the ship until the time they are discharged.

2. The Hague/Visby Rules

The Visby Rules get their name from the City of Visby in Stockholm, where the Comité Maritime International Conference (CMI) of 1963 was held. The 1963 CMI

conference adopted changes to the Hague Rules and on February 23, 1968, a Protocol (the Visby Rules) was signed at Brussels amending the Hague Rules. On June 23, 1977, the Visby Rules came into force. The Visby Rules are amendments to the Hague Rules.

Art. 6 of the Protocol/the Visby Rules stipulates:

“As between the Parties to this Protocol the Convention and the Protocol shall be read and interpreted together as one single instrument.

A Party to this Protocol shall have no duty to apply the provisions of this Protocol to bills of lading issued in a State which is a Party to the Convention but which is not a Party to this Protocol.”

Thus the result of ratification of, or accession to, the Visby Protocol by a nation is that the nation consents to be bound by the Hague/Visby Rules.

A majority of the world's shipping nations have adopted the Visby Rules. Over time, there have been problems with the Hague Rules and the Hague/Visby Rules, based on the perception that these rules heavily favor carriers at the expense of shippers. Several of their provisions have also been regarded as ambiguous and uncertain and the rules have become outdated, given that there have been improvements in technology and practices over time.

3. The Hamburg Rules

The wish to improve the Hague Rules and the Hague/Visby rules, led to the adoption of the United Nations Convention on the Carriage of Goods by Sea (‘Hamburg Rules’), by a diplomatic conference on 31 March 1978. The Hamburg Rules entered into force on 1 November 1992. The Hamburg Rules, like the Hague Rules and the Hague/Visby Rules, establish a uniform legal regime governing the rights and obligations of shippers, carriers and consignees under a contract of carriage of goods by sea. The central focus of the Hamburg Rules is the liability of a carrier for loss of, and damage to,

the goods and for delay in delivery. The Rules also deal with the liability of the shipper for loss sustained by the carrier and for damage to the ship, as well as certain responsibilities and liabilities of the shipper in respect of dangerous goods. And to achieve international uniformity in the law relating to the carriage of goods by sea, the Hamburg Rules were given a wider scope of application than that of the Hague Rules and the Hague/Visby Rules.¹

4. The Rotterdam Rules

The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules") (R. Rules) are the international community's latest attempt to replace the Hague Rules, the Hague-Visby Rules, and the Hamburg Rules. Just as the Hague Rules were drafted by CMI over 80 years ago, so the R. Rules emanated from groundwork done by CMI, that issued the first draft for consideration by the UNCITRAL working Group on Transport Law. The CMI's work began with consideration of the current international regimes in place to cover sea carriage and considering what regime would take the best from each in order to arrive at a unified set of rules potentially acceptable to interests worldwide. The purpose of the work was to attempt to bring back uniformity to carriage of goods by sea law.

The Rotterdam Rules were supposed to create a uniform regime governing international contracts of carriage of goods wholly or partly by sea². A CMI working

¹ (From UNCITRAL's website - http://www.uncitral.org/pdf/english/texts/transport/hamburg/hamburg_rules_e.pdf)

² *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (The Rotterdam Rules), United Nations Commission on International Trade Law (UNCITRAL), See paragraph 6 of the Preamble: "Believing that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of

group was then formed to consider issues of transport related to sea carriage. The primary consideration was that the Hague Rules and Hague/Visby concept of "tackle to tackle" no longer reflected modern sea carriage involving containerized traffic, so discussions considered actions beyond the ship's rail and into the port area. The R. Rules were also supposed to promote legal certainty in the area of international carriage of goods wholly and partly by sea. In sum, the existing conventions were to be brought up to date in order to take into account modern trends in sea transport, such as containerization and specialized deck vehicles of carriage.

The United Nations General Assembly approved a resolution adopting the R. Rules on December 11, 2008. In that resolution, the U.N. General Assembly called on all Governments to consider becoming a party to the new convention.

The Rotterdam Rules are currently being considered for signature by Canada, ratification by the United States and adoption by various members of the European Union. To date, 23 countries have signed the R. Rules, including countries with significant trade relations with Canada, such as the U.S., France, Spain, Netherlands, Norway, Greece and Luxembourg. For the R. Rules to come into force, however, 20 countries must ratify it. So far, only Spain has ratified the R. Rules, which it did on January 19, 2011.

III. Should Canada Sign or Ratify the Rotterdam Rules?

The question for Canada is whether the Rotterdam Rules will enable reforms in Canada's carriage of goods legislation concerning transport documentation, electronic

international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally.

commerce, multi-modalism, both within Canada and across North America? Far from achieving its proclaimed aim, however, the R Rules created a legal patchwork rife with optings-out and jurisdictional and arbitrational problems. Shippers, carriers, receivers and other parties must also refer to other international conventions and national laws to determine liability. Moreover, the scope of the R. Rules is severely impeded by the broad exemptions found under article 6 (õSpecific Exclusionsö) and article 80 (õSpecial Rules for Volume Contractsö). The R. Rules also scrap years of carriage of goods law based on the Hague, Hague-Visby, and Hamburg Rules and replace them with a much longer, international law written in new terminology without historical precedent to rely on.

In effect, the R. Rules fail to create a fair and reasonable liability system governing all parties involved in a transport venture. They neither harmonize, nor improve the law of the international carriage of goods; rather, they will create confusion and dissension amongst all parties adopting and ratifying them. They will create what can be termed as a õpartial networkö liability system, with little legal certainty for the parties involved.

1. The case for adopting the Rotterdam Rules

Many commentators to date have noted how the consideration of the Rotterdam Rules has for eight or more years resulted in endless meetings at enormous expense and has absorbed the energy and attention of Canadians, Transport Canada and the Canadian Maritime Law Association, amongst others.

The Rotterdam Rules, from the beginning, have been promoted by a very small number of fine dedicated Americans. The United States of America, however, has a very different maritime legislative background than Canada and the world's shipping nations.

The USA has not adopted the Visby Rules 1968, the Visby SDR Protocol or the Hamburg Rules and, in consequence, the Rotterdam Rules are deemed to be an improvement, by some Americans., who have only the U.S. Carriage of Goods by Sea Act (COGSA) 1936 (the equivalent of the Hague Rules 1924), as their Carriage of Goods by Sea law. The Rotterdam Rules, however, do not improve the laws of Canada and of the world's shipping nations, the vast majority of which have advanced their maritime carriage of goods law far beyond the Hague Rules 1924.

2. The Case against adopting the Rotterdam Rules

A. Multiple exemptions, exceptions, exclusions, optings-out and optings-in provisions.

The stated purpose of the R. Rules was to bring uniformity to the carriage of goods by sea law, where there is also a land carriage element. The R. Rules, however, do not achieve uniformity. They contain multiple exemptions and opting-out provisions. They cannot bring about international uniformity unless all major trading nations adopt them without exceptions. I will discuss some of the exemptions, exceptions, exclusions, optings-out and optings-in provisions found under the new regime set out in the R. Rules.

(i) The Charterparty Exclusion

While Article 5 defines the general scope of application of the R. Rules regime, Article 6 specifically outlines those transactions that are excluded from its application. By virtue of Article 6.1 (a), charterparties are explicitly excluded from coverage in liner trades.³ Furthermore, Article 6.1 (b) excludes other contracts in liner transportation for the use of a ship or of any space thereon.

³ Article 6.1 (a) of the R. Rules: *This Convention does not apply to the following contracts in liner transportation: (a) Charter parties.*

This exclusion is not unique to the R. Rules. The Hague-Visby Rules and the Hamburg Rules also excluded charterparties. Charterparties have been historically excluded from maritime law regimes because of the comparable bargaining power of commercial entities involved in the carriage of goods by sea in the charter context.⁴ The R. Rules, however, add more confusion because article 7 confusingly declares that the Rules apply whenever a carrier, a consignee, a controlling party or a holder is not an original party to the charter party⁵

(ii) Non-Liner Transportation

Article 6.2 excludes contracts of carriage in non-liner transportation from application of the R. Rules, except when there is no charter party or other contract between the parties for the use of a ship or any space thereon, and a transport document or an electronic transport record is issued. The R. Rules define non-liner transportation as any transportation that is not liner transportation.⁶ This type of contract is also called on demand carriage. Again, by virtue of Article 7, the R. Rules confusingly apply to the carrier, consignee, controlling party, or holder that is not an original party to the contract of carriage.⁷

⁴ Michael F. Sturley, "Scope of Application" in A. von Ziegler, J. Schelin, and S. Zunarelli, "The Rotterdam Rules 2008" (New York, NY: Kluwer Law International, 2010) at p.39 [Sturley, Application]. Regarding the documentary approach, professor Sturley reminds us that: "When the Hague Rules were negotiated during the early 1920s, the drafters decided (after considerable debate) to distinguish between shipments under bills of lading (for which mandatory rules were thought appropriate) and shipments under charterparties (for which mandatory rules were thought unnecessary). Thus whereas bills of lading are explicitly subject to the regime, charterparty transactions are explicitly excluded from the scope of the Hague Rules" at pp.47-48.

⁵ Article 7 ("Application to Certain Parties") of the R. Rules: "Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charter party or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6."

⁶ Article 1.4 of the R. Rules.

⁷ *Ibid*, supra note 5.

(iii) Volume Contracts

Article 80 of the R. Rules allows parties to exclude volume contracts from application of the Rules. This "volume contract exemption" under article 80 is one of the most questioned provisions of the R. Rules. Article 80 (1) of the R. Rules reads as follows: "Notwithstanding article 79, 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". This broad approach adopted under Article 80 pushes aside all mandatory rules in favor of mere contract formulation, thus creating legal uncertainty for both shippers and carriers. From the most basic standpoint, if one seeks to bring back uniformity to carriage of goods by sea law, why allow any such exemption? It is hardly unusual in terms of commercial trade that one should get some kind of a discount in price for volume whether one is trading in apples, electronics or carriage, but that does not lead to a change in liability in respect of such contracts. The liability is related to the risks of the adventure, not the amount of business done.

Also, the definition of volume contracts provides more uncertainty and confusion. The definition of a volume contract in article 1 of the Rotterdam Rules provides 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.

A volume contract, therefore, is only a type of contract of carriage. According to the above definition, three requirements must be met for a contract of carriage to be

considered a volume contract. The contract must provide (1) a specified quantity of goods; (2) in a series of shipments; and (3) during an agreed period of time. It must be noted that (a) the series of shipments may or may not be consecutive and (b) the period of time may extend from a few days to several months or years. As noted by Baatz et al, the intention behind the three requirements is twofold: "on the one hand to preserve the current level of freedom to parties to the so-called Ocean Liner Service Agreements and, on the other hand, to allow shipowners or pools to tender for contracts of affreightment in full freedom, whether or not the issue of a negotiable bill of lading is required."⁸

So, what *type* of volume contracts are covered by the volume contract exemption under article 80? Only those to which the R. Rules apply by virtue of Articles 5 ("Scope of Application") and 6 ("Specific Exclusions: Charterparties and Non-Liner Transportation"). Hence, mixed volume contracts are excluded. Honka notes, for example, that the R. Rules fail to provide a liability regime for mixed volume contracts "in which the individual voyages are performed partly in non-liner trade and partly in liner trade". Here again, the R. Rules create more confusion.

Article 80 also opens the doors to potential abuses. For instance, most multimodal container shipments could potentially become volume contracts under the above definition as there is "no minimum quantity, period of time or frequency and the minimum number of shipments is clearly just two"⁹. This inherent vagueness would therefore be open to the parties excluding or limiting the liability of the carrier or shipper, or even increasing the liability of the shipper. Because existing multimodal container shipments are based on complex contractual agreements, the very broad and very vague

⁸ Baatz, p. 247.

⁹ Baatz, p. 248

definition of volume contracts would also make the liability for claims difficult to predict not only for lawyers and courts, but also for the parties to the contract. For example, under article 80, both contracts of affreightment pursuant to a previous oil supply agreement as well as individually negotiated contracts of carriage for two containers have the same right to be excluded from the R. Rules.

Further, there is considerable possibility that shippers may use the volume contract exemption to establish contractual forms which ostensibly respect the R. Rules, but without real negotiation. The volume contract exemption may thus become entrenched commercial practice at a very high cost for both shippers and carriers.

Article 80's requirements for derogation from the R. Rules, pursuant to the volume contract exemption, results in more confusion and uncertainty. Article 80(2) allows for derogation where: (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 sections 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 neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.¹⁰ As per Article 80(6), the burden of proving the fulfillment of all four conditions rests on the party claiming the right to derogate.

According to Baatz et al., requirement (c) of Article 80(2) is the most difficult to comply with as it requires both a separate notice to the shipper of the opportunity to conclude a

¹⁰ Article 80(2) of the R. Rules

contract of carriage on terms and conditions that comply with the Rules without derogation, and an actual opportunity to conclude such a contract.¹¹

In practice, a commercially strong shipper may insist on receiving a written notice which will clearly be an "actual opportunity", whereas a strong carrier may only give notice under Article 80(2)(c) and yet attempt to contract on its own terms. As noted by Asariotis, an offer made in compliance with the R. Rules but accompanied with a cheaper derogatory alternative may not always constitute a commercially viable opportunity.¹² Article 80(2) must be read in light of Article 80(3), according to which "the relevant communication has to take place in writing or by electronic communication"¹³.

To cement the confusion further, article 80(4) provides "super-mandatory rules" under which derogation to Article 80 would not be allowed, even if all four requirements are fulfilled. Article 80(4) reads: "Paragraph 1 of this article does not apply to rights and obligations provided in Articles 14, subparagraphs (a) and (b), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in Article 61". The super-mandatory rules, in summary are (1) the carrier's duty to provide and maintain a seaworthy ship¹⁴; (2) the shipper's obligation to provide to the carrier, such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary; and (3) the shipper's obligation to inform the carrier of the dangerous nature or character of goods before they are delivered to the carrier or a performing party.

¹¹ Baatz, p 249

¹² See R. Asariotis, "Uncitral Draft Convention on Contracts for the International Carriage of Goods Wholly and Partly by Sea: Mandatory Rules and Freedom of Contract", in A. Antapassis, E. Roseng (eds.), *Competition and Regulation in Shipping and Shipping Related Industries* (Martinus Nijhoff, Athens, 2009) 349, at pp. 358-363.

¹³ Honka, p. 344.

¹⁴ Article 80(4) only refers to seaworthiness in the technical sense (Article 14(a)) and to the seaworthiness in terms of the intended voyage (article 14(b)).

Article 80(5) complicates things even further for carriers because it sets forth the derogation possibilities of volume contracts involving parties other than the shipper: "The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that: (a) such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and (b) such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record." This provision, however, fails to adequately protect third parties. As noted by Baatz et al., Article 80(5) "appears to offer such parties insufficient protection against potential collusion between carriers and shippers."¹⁵

From the above discussion, it is clear that defining the liability regime applicable to volume contracts can be rather burdensome for affected parties. It is unnecessarily complex and confusing even to maritime law practitioners.

(iv) Special Agreements: Live Animals

The R. Rules also permit parties to freely agree on the conditions for carriage of live animals by providing a broad "live animals exception" Article 81(a) reads as follows:

"Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if: (a) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier or of a person referred to in article 18, done with the intent to cause such loss of or damage to the goods or such loss due to delay or done recklessly and with knowledge that such loss or damage or such loss due to the delay will probably result."

¹⁵ Baatz, p. 252.

Article 81 essentially permits parties to freely agree on the conditions for the carriage of live animals.

In comparison with past maritime conventions, the -live animals exception is much closer to the Hague Rules and Hague-Visby Rules than the Hamburg Rules¹⁶. Whereas Article 1(4) of the Hamburg Rules suggests that "goods includes live animals", Article 1(c) of the Hague-Visby Rules has decided to exclude live animals from the concept of goods. The -live animals exception is also in accord with the requirements established by Article 61 of the R. Rules, by which "neither the carrier nor any of the persons referred to in article 18 is entitled to the benefit of the limitation of liability as provided in article 59, or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier's obligation under this Convention 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".¹⁷

The scope of liability defined in Article 81 also goes beyond the carrier himself. It includes any person that the carrier is liable for according to Article 18 of the R. Rules, namely (1) any performing party, (2) the master or crew of the ship, (3) employees of the carrier or a performing party, and (4) "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 request or under the carrier's supervision or control".¹⁸ The -live animal exception is

¹⁶ Honka, p. 347.

¹⁷ Article 61 Loss of the benefit of limitation of liability

¹⁸ Article 18 of the R. Rules

therefore very broad and opens the door to a number of unique and special arrangements, thus creating more uncertainty.

(v) The U.S. Coastal Trade exception

It has been declared that the U.S.A., which has a coast on the Atlantic Ocean, the Gulf of Mexico, the Pacific Ocean, and the Arctic Ocean, will not apply the R Rules to its coasting trade (however loosely defined it may be) but that trade should be subject to the US COGSA 1936, which itself is replete with optings-out. (See the notes on the meeting of May 5, 2010 of the Committee of the Carriage of Goods of the United States Maritime Law Association, where a White Paper was circulated on the R Rules. This White Paper advocated an exemption for the U.S. Coastal Trade, where the R Rules would be replaced by US COGSA 1936.) The proposed exemption for the US coastal trade has profound implications. The United States has one of the world's longest coastlines, and to exempt the trade along the U.S. coasts, including carriage with stopover at foreign ports on the way to other U.S. ports as final destination, would have the effect of severely limiting the application of the new R Rules. It would also be a questionable example of opting-out to other nations of the world.

(vi) Jurisdiction and Arbitration: Opt-In Provisions

The inclusion of jurisdiction and arbitration provisions in international carriage of goods by sea instruments is a relatively new trend. For example, the first two widely adopted and recognized instruments governing the carriage of goods by sea, the Hague Rules¹⁹ and the Hague/Visby Rules²⁰, did not address jurisdictional issues per se. These

¹⁹ *The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* (Brussels, 25 August 1924).

issues were left for national courts to decide. The Hamburg Rules²¹, however, contained two articles that dealt with jurisdictional and arbitration matters. Article 21 of the Hamburg Rules allowed the plaintiff, at his option, to institute proceedings in one of the following places: (1) the principal place of business or, in the absence thereof, the habitual residence of the defendant, or (2) the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made, or (3) the port of loading or the port of discharge, or (4) any additional place designated for that purpose in the contract of carriage by sea. By virtue of Article 21.3 of the Hamburg Rules, provisional and protective measures could be taken in any jurisdiction of the Contracting Parties. Further, the Hamburg Rules permitted parties to agree and designate the place where the claimant may institute action, even "after a claim under the contract of carriage by sea has arisen". Contrary to the approach subsequently adopted by the Rotterdam Rules, there was no "opting-in" provision in the Hamburg Rules.

Although the jurisdiction and arbitration provisions of the Rotterdam Rules were greatly influenced by that of the Hamburg Rules, Baatz suggests that the R. Rules are more complex and "differ in their approach because, in certain circumstances, they give effect to an exclusive jurisdiction clause or arbitration clause, so party autonomy plays a greater, albeit restricted, role"²².

In the early negotiation stages, jurisdiction and arbitration provisions were omitted from the Rotterdam Rules because parties could not find consensus. As pointed

²⁰ *The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* (As amended by the Protocol signed at Brussels on 23 February 1968, and by the Protocol signed at Brussels on 21 December 1979).

²¹ *The UN Convention on the Carriage of Goods by Sea of 1978* [H. Rules].

²² Baatz, *ibid.* p. 263

by Baatz, there were diametrically opposed views as to whether all or any exclusive choice of court clauses should be recognized and whether, if they were recognized, they should bind third parties, and on what conditions²³. With the objective to encourage states to ratify the R. Rules²⁴, a compromise was finally reached during the twentieth session of Working Group III in October 2007. The compromise was that the provisions on jurisdiction and arbitration would not apply unless a state specifically chose them and that a state could make that choice at any time. States can still decide to be bound to either or both Chapters, thus adding greater uncertainty to the legal regime of the R. Rules.

The Rotterdam Rules, unlike the Hague-Visby Rules²⁵, contain chapters on jurisdiction (Chapter 14) and arbitration (Chapter 15). These provisions of the Rotterdam Rules, however, are not mandatory. The states that have ratified the Convention are given the choice of whether or not to opt-in to the provisions on jurisdiction and arbitration.

a. Jurisdiction

Chapter 14 (Jurisdiction) of the R. Rules is optional for contracting parties in virtue of Article 74 (Application of Chapter 14) of the Rules²⁶. Thus parties who decide to adopt Chapter 14 are limited to courts designated in Articles 66 (Actions

²³ Yvonne Baatz, Jurisdiction and Arbitration in D. Rhidian Thomas, ed., *An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Oxon, UK: Lawtext Publishing Limited, 2009) at p.261.

²⁴ Reports of Working Group III on its fourteenth session, paras. 151-57; fifteen session paras. 176-79; sixteenth session paras. 85-103; eighteen sessions paras. 267-79.

²⁵ International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels, August 25, 1924 and in June 2, 1931 (Hague Rules 1924), as amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, adopted at Brussels, February force 23, 1968 in force June 23, 1977 (Visby Rules 1968).

²⁶ Article 74 of the R. Rules: *The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.*

against the Carrier) and 68 (Actions against the Maritime Performing Party). Parties who decide not to adopt Chapter 14 will be obliged to refer to their own national laws.

The uncertainty created by Article 74 is likely to encourage disputes in and out of court over jurisdictional issues, thus creating costly distractions and proceedings for parties involved in litigation. For instance, parties to volume contracts have the freedom to conclude clauses on court jurisdiction or arbitration agreements. Professor Baatz notes that it must also be for the party relying on the exclusive jurisdiction clause to prove that the conditions of exclusivity have been complied with²⁷.

A person who is not a party to the volume contract can also be bound by the exclusive jurisdiction clause if it satisfies the requirements set out in article 67.2, namely that (a) the court is in one of the places designated in article 66, subparagraph (a)²⁸; (b) the agreement is contained in the transport document or electronic transport record; (c) the person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive, and (d) the law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement²⁹.

But a question must be answered when thinking about the group of persons that could potentially be affected by this provision. Professor Baatz suggests that this provision may extend to consignees and transferees of the bill of lading (straight or negotiable) and to assignees of the bill of lading and insurers exercising their subrogated rights against the carrier. Third parties such as terminal operators, warehousemen and

²⁷ Baatz, p. 266 (reference to case *Bols Distilleries v. Superior Yacht Services Limited* [2006] UKPC 45.

²⁸ (a) The domicile of the carrier, (b) The place of receipt agreed in the contract of carriage, (c) the place of delivery agreed in the contract of carriage, and (d) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.

²⁹ Article 67.2 of the R. Rules.

stevedores could not be part of the group suggested by Baatz because they are governed by Article 68 and 69 of the R. Rules.

b. Arbitration

The intended purpose of the arbitration chapter is to allow parties to arbitrate potential disputes in a convenient, efficient, and effective fashion. The provisions of Chapter 15 (Arbitration), however, tend to be long, detailed, complicated, and somewhat more demanding. For example, they make no distinction between volume and other contracts; contracts between the original parties and consignees or transferees of the contract of carriage of goods; liner transportation and non-liner transportation³⁰.

But the most important feature of the Arbitration Chapter is that parties to the R. Rules have the option of opting-in, which means that adoption and ratification of the R. Rules does not necessarily mean that countries accept the arbitration provisions. In particular, Article 75 of the R. Rules provides for the possibility of arbitration in venues which may not have sufficient expertise in maritime matters and maritime law. The parties, it should be noted, may select from a broad range of venues. Thus this provision introduces great uncertainty and inconsistency into the process of arbitrating maritime disputes.

The opting-in nature of Chapter 15 may not be in the best interest of parties to the R. Rules because they now find themselves with an uncertain place of arbitration. According to professor Baatz, contrary to common wisdom, Chapter 15 will not only take away resources on the part of those countries without a proper arbitration system, but it will also mean that commercial parties are effectively treated as guinea pigs while a

³⁰ Yvonne Baatz, 'Jurisdiction and Arbitration' in D. Rhidian Thomas, ed. *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules* (Lawtext Publishing Limited, 2009) at p.281.

system of arbitration³¹ is developed. Moreover, Chapter 15 does not tackle the issue of competency in regards to determining the validity of the arbitration agreement for those parties who did not opt in. This, again, creates great uncertainty for those parties involved in the carriage of goods.

Furthermore, article 75.4(d) provides that "when an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only (d) Applicable law permits that person to be bound by the arbitration agreement". In practice, this provision may lead to different approaches being adopted by contracting states, thus nurturing uncertainty and increasing transaction costs for parties to the contract of carriage of goods by sea. A uniform system of law cannot depend on local procedural/substantive law when it comes to the recognition and enforcement of arbitration agreements or clauses. In professor Baatzø words, this "could lead to a contracting state refusing to recognize or enforce an arbitration award because its law as to whether there was an arbitration clause which bound the parties at all differed from that of the state in which the award was made"³².

Article 78 states that "the provisions of this chapter shall bind only Contracting States that declare so in accordance with article 91 that they will be bound by them". This provision echoes the uncertainty found in Article 74 ("Jurisdiction") of the R. Rules.

Article 76.1 permits for the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation provided the Rules apply by reason of the application of Article 7 or the parties' voluntary incorporation of the Rules into the contract of

³¹ Ibid. p. 282

³² Ibid. p. 283

carriage. Again there are so many variables and even an opting-in, that there is little certainty of enforceability of an arbitration agreement.

It must be noted that by virtue of Article 77, parties are free to agree to resolve a dispute by arbitration in any place ðafter a dispute has arisenö, notwithstanding the provisions in Chapter 14 (ðJurisdictionö) and Article 78. Again, there is thus uncertainty ó in this case the place of the dispute. The apparent reason for the existence of multiple exemptions and optings-out was the successful lobbying of large shipping interests who wish to be free of governmental restrictions.

B. Failure to provide a binding multimodal regime.

(i) Door-to-Door Contract of Carriage

The R Rules failed to provide a truly updated, binding multimodal regime which would have been required to modernize the law of the carriage of goods by sea. Perhaps one of the greatest pitfalls of the R. Rules in unifying the international carriage of goods wholly or partly by sea is that they do not always apply ðdoor-to-doorö. Although the R. Rules would normally be expected to adopt the ðdoor-to-doorö principle, Article 12(3) explicitly permits contractual parties to ðagree on the time and location of receipt and delivery of goodsö. Since the carrier's period of responsibility under this provision ultimately depends on the terms of the contract, it makes it possible for parties to enter into a traditional ðport-to-portö ó or even a ðtackle-to-tackleö ó contract of carriage.

There are only two restrictions to the application of the principle of freedom of contract under Article 12(3), namely: (a) the time of receipt of the goods cannot be subsequent to the beginning of the initial loading, and (b) the time of delivery cannot be before to the completion of the final unloading. It must be noted, however, that nothing in

the R. Rules prevents the parties to enter into a "door-to-door" contract of carriage, where the carrier also assumes responsibility for land legs.

In a hypothetical case where the parties enter into a "door-to-door" contract, it would be possible under Article 12(3)(a)(b) of the R. Rules to agree on a period of responsibility that begins after the loading onto the truck/train/aircraft, which is considered the initial loading under the R. Rules. It should be noted that in the hypothetical case noted above where goods are damaged prior to loading onto a ship or after discharge from a ship the parties would be obliged to refer to other international liability regimes in order to fix responsibility for loss or damage. This is another example of the failure of the R. Rules to provide a truly multimodal instrument for the carriage of goods. Evidently, they must be in synch.

The basic difficulty with the R. Rules is that its original draft was drafted by CMI which is essentially sea related in its interests and the drafting came out of a central core consideration of international sea carriage. To give credit to CMI its initial draft left the additional multimodal aspect in square brackets and gave precedence to a full network liability system including national law. This was presumably because much of what is part of an international movement is essentially domestic and the expectation of the ability to widen the Convention to something beyond coverage of international sea carriage was limited. (It should not be forgotten that the Multimodal Convention 1980 never came into force having found insufficient support and that was a concerted effort from the outset to create a true international multimodal regime.)

Sea carriage does not have the same risks as air carriage which does not have the same risks as road carriage which does not have the same risks as rail carriage. All these

different modes of carriage have something intrinsically different about them and to give precedence to one type of carriage was to approach the project from a flawed basis. This is not about possibility or convenience but about why an international movement by sea should be stretched beyond an international sea movement to include port movements and other land or air based movements so long as they are not covered by other transport regimes. The problem with that approach made in an effort not to interfere with other international conventions covering the same mode of transport is to fail to consider on what basis it is just or equitable or even appropriate for an international regime to impinge on an essentially domestic movement. CMR covers international road movements; CIM covers international rail movements and the Montreal convention covers international air movements.

Had the original work done by CMI focused on door to door movements rather than a sea core with other aspects tacked on in square brackets it is suggested that a very different draft would have emerged. Those who were responsible for creating this draft have a particular interest in international sea carriage whereas what has in fact emerged is something of a hybrid which has been termed Maritime Plus meaning that the parts additional to the sea carriage are effectively incidental and only partially covered. This has the unfortunate effect of interfering with a complex but perfectly working body of law that has grown up on a regional if not national basis to deal with multimodal transport.

The network liability system of the Rotterdam Rules does not represent a novelty. Nevertheless, the extension of the Rotterdam Rules to permit the inclusion of non-maritime transport (ömay includeö) aggravates the problem. In particular, it may be

difficult to ascertain from time to time whether Rotterdam Rules carriers will make use of the option to include non-maritime transport. Further, the exclusion of mandatory national law from the network is particularly harmful for States with mandatory regulation of domestic transport used in connection with maritime transport.

(ii) Performing Party (PPF) and Maritime Performing Party (MPP)

Introducing the concepts of "performing party" and "maritime performing party" adds further uncertainty to the carriage of goods wholly or partly by sea because it is a new concept and has not yet been tested in courts. In line with basic rules of statutory interpretation, any attempt to attribute meaning to these concepts will have to rely on the definition provided in Articles 1.6 and 1.7 of the Rotterdam Rules (the R. Rules). The concept of "Performing Party (PPF)" is defined as follows: "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 such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control". It must be noted that a PPF "does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier".³³

By virtue of Article 1.7 of the R. Rules, a "Maritime Performing Party (MPP)" can be defined as "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 port of loading of a ship and their departure from the port of discharge of a ship. An

³³ Article 1.6(b) of the Rotterdam Rules

inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.³⁴

In light of these articles, a party who happens to collect goods from outside the boundary of the port and delivers inland is not a MPP. Since port operators often deal with inland carriage in their day-to-day operations, it is uncertain how an inland carrier involved in an international venture could be sued under the R. Rules. The introduction of the concept of MPP is likely to create confusion amongst all the parties involved in transport ventures. In particular, the concept could be particularly worrisome for those port operators who are also involved in inland carriage activities. For example, which liability regime would apply to a port operator who decides to carry its duties beyond the boundaries of the port? Unfortunately, the R. Rules fail to tackle such a basic question.

Moreover, the above-defined concepts contradict the spirit and initial intention of the R. Rules, namely to provide a comprehensive liability regime regulating multimodal transportation. After all the R. Rules have embraced the "maritime plus" concept, and consequently have sought to extend their scope of application from the receipt of the goods by the carrier to final delivery ("door-to-door"). However, when read in conjunction with Article 12 ("Period of Responsibility of the Carrier"), the MPP concept seems to refer to a carrier involved in the carriage of goods from port-to-port, instead of door-to-door. Moreover, the interrelationship between Articles 1(6), (7) and Art. 19(1)(b)(i) is slightly problematic³⁵.

³⁴ Article 1.7 of the Rotterdam Rules

³⁵ Kerim Atamer, "Construction Problems in the Rotterdam Rules regarding the Performing and Maritime Performing Parties" (2010) 41:4 Journal of Maritime Law & Commerce 469.

(iii) Period of Responsibility and Liability Provisions

The R. Rules are vague regarding the period of responsibility and may astronomically increase the limits of liability for countries with national limits of liability for road transport, such as Canada. Article 12 of the R. Rules contains an apparent contradiction regarding the period of responsibility. The initial position is that the period of responsibility begins when the carrier or the performing party receives the goods for carriage and ends when the goods are delivered (i.e., the period covered by the transport contract). The same article, however, permits parties to agree on the time and location of receipt and delivery of goods, upon the condition that (a) the time of receipt of the goods is not subsequent to the beginning of the initial loading, and (b) the time of delivery of the goods is not prior to the completion of their final unloading. This provision forces multimodal carriers to reevaluate all their sub-contracts in order to avoid gaps (and surprises!) regarding unusual or unexpected situations in terms of distribution of responsibility.

Chapter 12 of the R. Rules also presents further uncertainty on the limits of liability. Under Chapter 12 "Limits of Liability", the carrier's liability for breaches of its obligations under the Rules is limited to 875 units of account per package, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is higher, which for example in Canadian dollars is \$1,620 or \$5.50 respectively. This limitation represents an increase of approximately 33% and 50% from the 666 S.D.R. (\$1,200) per package or 2 S.D.R. (\$3.70) per kilogram limitations of liability under the Hague-Visby Rules currently applicable in Canada. Because of the purported "door-to-door" application of the R. Rules, these new limitations of liability

will apply both to the sea and to the land leg of the carriage. The Hague-Visby Rules, on the other hand, apply "tackle-to-tackle" (i.e. on the sea leg), leaving the determination of limitations of liability for the damage caused on land to other applicable international conventions or to the national legislation. In Canada, for example, the maximum liability for road transport is \$4.41 per kilo under provincial laws. If the limitation of liability of the R. Rules will apply to damage caused during land carriage the increase in the liability of the carrier will be substantially higher than in the existing regime for a country like Canada. Thus, if a container containing 1,000 packages weighing 10,000 kilos was lost during road carriage, the carrier's maximum liability will be \$1,620,000 under the R. Rules, as opposed to the present maximum of \$44,100 under provincial highway transport liability regimes in Canada, since the provincial regime is national law and not international convention.³⁶

In this illustration, the contracting carrier and his liability insurer will need to cover a liability shortfall of almost \$1.6 million between what he is liable for and how much he could recover from the trucking company. The new Convention will dramatically alter the presently existing dynamics between the shipper, carrier, performing parties and insurers.

There are other vague and ambiguous provisions in the R. Rules. For example article 13 sets out clear responsibilities of the carrier during the period of responsibility but also allows the shipper and the carrier to assign all the responsibilities to the shipper or the consignee, while article 17 sets out a basis for apportionment of liability without

³⁶ Illustration discussed in CIFFA Submission to Transport Canada, Commentary on the Rotterdam Rules March 21, 2009, available at <http://www.ciffa.com/downloads/2009/03/30/CIFFA%20Submission%20to%20Transport%20Canada%20on%20the%20Rotterdam%20Rules%20March%202009.pdf>

providing a method for such apportionment. These ambiguities create further uncertainty for contracting parties.

C. Failure to address piracy issues

The R. Rules have completely failed to properly address piracy, a major problem threatening the very essence of the shipping industry worldwide. The R. Rules only names piracy as one of the defences to carrier liability in the list of exclusions under article 17(3). (In comparison, the Hague-Visby rules did not expressly name piracy in the list of exclusions). This list of exclusions in article 17(3) is similar to the long list established by case law over the centuries, with the exception of the elimination of the errors in navigation or management of the ship defences. The defence of piracy under the R. Rules applies in any action against the carrier or a performing party whether the action is founded in contract or in tort.

The Rotterdam Rules provide that a claimant establishes a prima facie case of liability of the carrier if the consignee proves (1) that it has given notice of loss or delay as required by Article 23, and (2) that the loss took place during the period of responsibility³⁷ of the carrier. The burden of proof then shifts to the carrier, for example, to prove a defence such as piracy. (Neither the Hague-Visby Rules nor the Hamburg Rules make any reference to the initial burden of proof lying on the claimant.) Under the Rotterdam Rules, if the carrier relies on one of the exemptions from liability under Article 17(3), such as piracy, the burden shifts to the claimant to prove that the loss or damage was probably caused by unseaworthiness of the vessel.

³⁷ Under article 12(1) of the R. Rules, the period of responsibility begins when the carrier or a performing party receives the goods and ends when the goods are delivered.

The upshot of these provisions is that piracy is a defence to carrier liability. This is not adequate to address the grave danger that piracy poses to the shipping industry. The President of The Baltic and International Maritime Council (BIMCO), one of the largest international shipping associations, issued a press release on April 15, 2011, announcing a protest from the shipping industry in form of a 30-second blast from ships' sirens every day at noon in every port of the world, to draw public attention to the problem of piracy.³⁸ According to the International Maritime Organization (IMO), the number of acts of piracy and armed robbery against ships, which were reported to the IMO to have occurred or to have been attempted in 2010, was 489, an increase of 83 (20.4%) over the figure for 2009.³⁹ The IMO also reports that the total number of incidents of piracy and armed robbery against ships, reported to have occurred or to have been attempted from 1984 to the end of December 2010, has risen to 5,716.

These statistics represent a growing threat to the shipping industry that must be dealt with decisively. Although other international conventions such as the United Nations Convention on the Law of the Sea (UNCLOS), the 1958 High Seas Convention and the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention") allow warships to stop, search and seize vessels suspected to be engaged in piracy and to punish pirates, a military solution is not the answer to the problem of piracy. The military process can only succeed in apprehending the suspected pirates and, other than killing them, must handover such suspects to national governments for prosecution, sentencing and incarceration. In other words, there has to be an effective penal system willing to deal with suspected pirates.

³⁸ BIMCO Press release, 15 April 2011 available at <https://www.bimco.org>

³⁹ IMO Report available at <http://www.imo.org>

This penal system does not exist in the areas most affected by piracy, in particular East Africa.

This is the precise reason why the shipping industry should take the lead in providing a non-military solution through a uniform international private maritime law regime. Such a regime should address the problem of piracy as a crime perpetrated by individuals seeking private gain. Hence the maritime law regime should deny such individuals any gain from their despicable acts. The regime should prohibit carriers and shippers (broadly defined) from paying ransoms to suspected pirates. If any carriers or shippers pay ransoms to suspected pirates, they should incur additional costs, including, but not limited to, additional insurance, additional personnel, and mandatory contribution to a fund to be set up under the regime for the prevention of piracy.

D. Constitutional issues

The R. Rules could potentially create a constitutional dilemma in Canada if the Government of Canada decided in favor of their adoption. "Navigation and Shipping" are deemed to be of Federal constitutional authority. Nevertheless, matters which are not strictly of navigation and shipping (being concerned with matters on shore) are of the jurisdiction of the Canadian Provinces and Territories. Thus signing and acceding to the R. Rules would require the intervention of both the Federal government and the Provinces and Territories of Canada. The R. Rules also discard more than a hundred years of decisions and jurisprudence of the courts of Canada, the Provinces and of the world. For example, the R. Rules do not permit the extension of the Himalaya clause (that enabled other participants in transport operations to avail themselves of carrier's defenses and limitations of liability) beyond the port-to port limits.

E. The Canadian Arctic

An enormous subject, which I only mention at this time, but which is not addressed by the Rotterdam Rules, is the Canadian Arctic. The subject is of utmost importance to Canada and the Rotterdam Rules do not take it into consideration, but can be considered to have weakened the rights of Canada in the Arctic. The subject is too vast for this paper but will be dealt with elsewhere.

3. Suggestions for the future of sea transport

The Rotterdam Rules should be neither signed nor ratified by Canada. Instead, a new international drafting committee should prepare a new draft convention for discussion and approval. In the meantime, I support incremental change to Canada's carriage of goods legislation. I suggest amending Canada's Marine Liability Act to modernize our carriage of goods legislation in the following areas:

A. Package and kilo limitations

The package and kilo limitations for Canada are lower than the Hamburg Rules and the proposed Rotterdam Rules. These package and kilo limitations should be raised.

B. Extension of waiver of subrogation

The general rule of contract is that a third party can neither benefit from, nor be burdened by, a contract. The Canadian Supreme Court has relaxed this rule in circumstances involving waiver of subrogation clauses. In Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd., 1999] S.C.J. No. 48, the Supreme Court of Canada stated that "when sophisticated commercial parties enter into a contract of insurance which expressly extends the benefit of a waiver of subrogation clause to an ascertainable class of third-party beneficiary, any conditions purporting to limit the extent of the benefit or

the terms under which the benefit is to be available must be clearly expressed. See also Timberwest Forest Corp. v. Pacific Link Ocean Services Corporation, 2008 FC 801; National Railway Co. v. Norsk Pacific Steamship Co., [1992] 1 S.C.R. 1021; Bow Valley Husky (Bermuda) v. Saint John Shipbuilding Ltd., [1997] 3 S.C.R. 1210; and Ordon Estate v. Grail, [1998] 3 S.C.R. 437 (all calling for extension of waiver of subrogation clauses to benefit ascertainable classes of third party beneficiaries on policy grounds). The Marine Liability Act should, therefore, extend the benefits of waiver of subrogation to ascertainable classes of third party beneficiaries.

C. Definition of "ship"

The definition of "ship" in section 36 paragraph (1)(a) of the Marine Liability Act should be amended to exclude "any vessel, boat or craft, of any length, propelled manually by oars or paddles and inflatable hull vessels and rigid inflatable boats" in recognition of the unique characteristics of these adventure tourism activities.

D. Definition of "contract of carriage"

The definition of "contract of carriage" in the Marine Liability Act should also be reformed to include waybills and seawaybills so that the definition would be the same as the definition adopted by major Canadian trading partners.

E. Canadian jurisdiction

Section 46 of the Marine Liability Act (MLA) provides for Canadian jurisdiction over claims arising from carriage of goods by sea. It is similar to the jurisdictional provisions of the Hamburg Rules, but allows claimants, in some situations, to institute judicial or arbitral proceedings in Canada. Section 46 needs to be reformed to allow

contracting parties more freedom in choice of judicial or arbitral forum in line with modern commercial practice.

IV. Conclusions

1) The R Rules do not bring uniformity to International Carriage of Goods by Sea law. They provide a long, verbose convention in new, untried, untested, and unclear language.

2) The Rotterdam Rules should be neither signed nor ratified by Canada. Instead, the shipping nations of the world should meet again and quickly nominate an international sub-committee to draft a binding multimodal convention based on the Hague Rules, Hague/Visby Rules, and Hamburg Rules. Thereafter, the draft would be submitted to UNCITRAL for discussion, amendment if necessary, and adoption.

3) In the meantime, Canada should adopt incremental reforms to the Marine Liability Act (MLA) to bring Canadian maritime law into conformity with modern improvements in technology and practices, and with laws and regulations adopted by major Canadian trading partners.

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Suggested Readings available on my website. Tetley's maritime & admiralty law:
<http://www.mcgill.ca/maritimelaw>:

1. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules) (A/RES/63/122), 2 February 2009. (For the text of the Convention in English, French and Spanish see Journal of Law and Economics Vol. XLIV No. 4 - 2009.)

2. Francesco Berlingieri, Philippe Delebecque, Tomotaka Fujita, Rafael Illescas, Michael Sturley, Gertjan Van Der Ziel, Alexander Von Ziegler, Stefano Zunarelli, The Rotterdam Rules an Attempt to Clarify Certain Concerns that Have Emerged, 5 August, 2009.

3. Svante O. Johansson, A. Barry Oland, Kay Pysden, Jan Ramberg, Douglas G. Schmitt, William Tetley, A Response to the Attempt to Clarify Certain Concerns over the Rotterdam Rules Published 5 August 2009, 1 September, 2009.

4. The following questions were submitted by the Canadian Delegation Spokesemen Barry Oland and Douglas Schmitt for consideration and answer by members of Panels speaking on the Convention on Contracts for International Carriage of Goods Wholly or Partly by Sea at the CMI (Comité Maritime International) Conference in Athens, Greece, 12-18 October, 2008: Questions for consideration at CMI Athens

5. D. Rhidian Thomas, Editorial Article of the Journal of International Maritime Law (JIML) "And Then There Were the Rotterdam Rules," (2008) 14 JIML at pp. 189-190.

6. European Shippers' Council Position Paper on the Draft Maritime Instrument of the United Nations Commission on International Trade Law (A/CN.9/WG.III/WP.81), April, 2007.

7. Position Paper of the Belgian Maritime Law Association ó Regarding the UNCITRAL Draft Convention on the Carriage of goods Wholly or Partly by Sea signed by the President of the Belgian Maritime Law Association Guy van Doosselaere and the Chairman Ralph de Witt, Antwerp, 10 October, 2008.

8. William Tetley, Summary of Some General Criticisms of the UNCITRAL Convention, 5 November, 2008.

9. David Maloof, As the UN General Assembly Nears Adoption of a New Proposed Shipper Compensation Treaty, Should the United States Ratify It or Simply Amend Existing Law, received on 30 October, 2008.

10. Questions and Answers Why the MLA Needs An Open Debate Concerning the óVolume Contractsö Exception to the Proposed Rotterdam Rules, sent by David Maloof before 5 November, 2008.

11. William Tetley, Some General Criticisms of the Rotterdam Rules, 20 December, 2008

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April 26, 2011