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## A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive AND Efficient, or Just Another One for the Shelves?

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Nikaki and Soyer: A New International Regime for Carriage of Goods by Sea: Contempo

# A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive AND Efficient, or Just Another One for the Shelves?

By  
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## I. INTRODUCTION

For decades, sea carriers—taking advantage of their superior bargaining power—insisted on the inclusion of clauses into contract of carriages that exempted them even from their basic common law liability. National-level legislation attempted to curtail such unlimited freedom of contract<sup>1</sup> but proved to be insufficient. Therefore, at the turn of the last century, the international community recognized that for international trade to flourish it would be essential to create an international legal regime that could accommodate two purposes: (i) flexibility to allocate risks in line with their commercial needs, and, (ii) prevention of abuse and protection for the parties in a weaker bargaining position. This led to the drafting and implementation of the Hague Rules in 1920s,<sup>2</sup> which was the first ever international convention to unify certain rules

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1. *See, e.g.*, Harter Act 1893, 46 U.S.C. app. §§ 190-96 (U.S.); Canadian Water Carriage Act, 10 Edw. 7 (1910) (Can.); Australian Sea-Carriage of Goods Act, 4 Edw. 7 (1904) (Austl.). *See also* discussion in SIR GUENTER TREITEL & FRANCIS M.B. REYNOLDS, *CARVER ON BILLS OF LADING* ¶ 9-062 (Sweet & Maxwell et al. eds., 3d ed. 2011).

2. The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, and Protocol of Signature, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155, commonly known as the Hague Rules, was adopted under the auspices of the Comité Maritime International (“CMI”) and was opened for signature in 1924. For the list of the Contracting States to the Hague Rules, *see Status of the Ratifications of and Accessions to the Brussels International Maritime Law Conventions*, 2010 COMITÉ MAR. INT’L, Y.B. 569 [hereinafter 2010 CMI Yearbook], available at <http://www.comitemaritime.org/Uploads/Yearbooks/Yearbook%202010.pdf> (last visited Sept. 1,

relating to bills of lading and set forth a minimum protection for the cargo interests.

Presently, the most prominent regime that governs a large majority of international shipments is an amended version of the original Hague Rules, the Hague-Visby Rules.<sup>3</sup> The Hamburg Rules,<sup>4</sup> which were later developed as an alternative to the Hague-Visby regime with a view to redressing the balance between the interests of the shippers and carriers, have so far failed to attract the support of major shipping powers.<sup>5</sup> As a result, the Hamburg Rules frustrated the hopes of achieving worldwide uniformity in this field by creating yet another international carriage regime that applies to a truncated proportion of international shipping contracts.

Once it became apparent that the Hamburg Rules had failed to provide a uniform replacement for the Hague-Visby regime, lobbying began afresh for the establishment of an alternative system. A variety of international bodies criticized the Hague-Visby regime as out-of-step with modern shipping and international trade practices.<sup>6</sup> The preliminary work on the new regime was carried out by the Comité Maritime International (“CMI”) until the end of 2001,

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2011).

3. The Hague Rules were altered in 1968 and then in 1979 following an intensive consultation carried out by the CMI in an attempt to modernize the rules in light of developments in container transport and also to increase the limitation limits. *See* Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1412 U.N.T.S. 127 and Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, 1412 U.N.T.S. 146. The amended version of the Hague Rules, which is commonly known as the Hague-Visby Rules, has been adopted by a wide majority of trading states, representing approximately two-thirds of world trade, whilst the United States remains a Hague country. *See* Carriage of Goods by Sea Act (“COGSA”), 46 U.S.C. § 30701 (2006). Also, the Nordic countries have developed the Scandinavian Codes, adopted by Denmark, Finland, Norway and Sweden; these are based on the Hague-Visby Rules but have deleted the catalogue of defenses that were originally included in Article IV, r.2 of the Hague Rules. It should also be noted that some countries, like Australia and Canada, have enacted the Hague-Visby Rules by national legislation without ratifying the Convention. *See* Australian Carriage of Goods by Sea Act 1991 (Act No. 160/1991), sch. 1 (Oct. 1, 1991, as subsequently amended); Canadian Marine Liability Act, S.C. 2001, c.6, pt. 5, sch. 3 (Aug. 8, 2001). The list of the contracting states to the Hague-Visby Rules is available in the 2010 CMI Yearbook, *supra* note 2, at 575, 577.

4. Officially known as the United Nations Convention on the Carriage of Goods by Sea. *See* G.A. Res. 48/34, U.N. Doc. A/RES/48/34 (Dec. 9, 1993) [hereinafter Hamburg Rules].

5. As of 1 September 2011, only thirty-four countries have ratified or acceded to the Hamburg Rules; however, these countries represent only a small proportion of world trade. For the list of the contracting countries, *see* Status: 1978 – United Nations Convention on the Carriage of Goods by Sea – the “Hamburg Rules,” UNCITRAL (2012), available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/transport\\_goods/Hamburg\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html).

6. One of the main criticisms directed towards the Hague-Visby regime is that it was negotiated in the early days of the container revolution when contracts for door-to-door/multimodal transport were not in constant use. Also, it is often voiced that the Hague-Visby regime does not accommodate the developments in electronic commerce. *See, e.g.*, Rep. of the U.N. Comm. on Int’l Trade Law, 29th Sess., ¶ 210, 1996, U.N. Doc. A/51/17 (June 14, 1996); U.N. GAOR, 51st Sess., Supp. No. 17, ¶ 210, U.N. Doc. A/CN.9/421 (1996) [hereinafter Report of the U.N. Comm’n on Int’l Trade Law on Twenty-Ninth Session].

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and was eventually passed on to the United Nations Commission on International Trade Law (“UNCITRAL”), which finalized the draft text of a new convention following almost a decade of intensive work.<sup>7</sup> In December 2008, the General Assembly of the United Nations formally adopted the new carriage convention, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (“Convention”).<sup>8</sup> The Convention was then formally opened to signature at Rotterdam on September 23 2009, after which it has since been popularly christened the Rotterdam Rules.<sup>9</sup>

In recent years, the potential impact of the Rotterdam Rules has been the source of intense academic<sup>10</sup> and industry debate. Whereas the Rotterdam Rules do have their supporters,<sup>11</sup> a number of organizations have expressed strong opposition.<sup>12</sup> Inevitably, the debate has moved into the political arena with the

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7. The CMI official working documents are published in the 2000 and 2001 CMI Yearbooks, available at <http://comitemaritime.org/Yearbooks/0,2714,11432,00.html>, whilst the UNCITRAL respective documents may be found on UNCITRAL’s website, available at <http://www.uncitral.org/uncitral/en/index.html>.

8. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, G.A. Res. 63/122, U.N. GAOR, 63d Sess., U.N. Doc. A/RES/63/122, Annex (Feb. 2, 2009) [hereinafter Rotterdam Rules].

9. See *id.* For a comprehensive review of the stages see Michael F. Sturley, *Transport Law for the Twenty-First Century: An Introduction to the Preparation, Philosophy, and the Potential Impact of the Rotterdam Rules*, 14 J. INT’L MAR. L. 461 (2008), reprinted in *A NEW CONVENTION FOR THE CARRIAGE OF GOODS BY SEA – THE ROTTERDAM RULES* 1 (D. Rhidian Thomas ed., 2009) [hereinafter THE ROTTERDAM RULES].

10. Most notable contributions are: Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel, *THE ROTTERDAM RULES* (Sweet & Maxwell 2010) [hereinafter Sturley et al., THE ROTTERDAM RULES]; *THE ROTTERDAM RULES*, *supra* note 9; *THE ROTTERDAM RULES* 2008, (Alexander von Ziegler, Johan Schelin and Stefano Zunarelli eds., 2010) [hereinafter Ziegler et al., THE ROTTERDAM RULES 2008]; Francesco Berlingieri, *Revisiting the Rotterdam Rules*, LLOYD’S MAR. & COM. L.Q. 585 (2010) [hereinafter Berlingieri, Revisiting the Rotterdam Rules], Anthony Diamond, *The Rotterdam Rules*, LLOYD’S MAR. & COM. L.Q. 445 (2009) [hereinafter Diamond, The Rotterdam Rules], Michael F. Sturley, *The UNCITRAL Carriage of Goods Convention: Changes to Existing Law*, 2007-08 COMITÉ MAR. INT’L, Y.B. 254 [hereinafter Sturley, The UNCITRAL Carriage of Goods Convention: Changes to Existing Law].

11. The following organizations have expressed support for the Rotterdam Rules: The European Community Shipowners’ Association (“ECSA”), the Baltic and International Maritime Council (“BIMCO”), the International Chamber of Shipping (“ICS”), the World’s Shipping Council, the National Industrial Transportation League (“NITL”) and the World Shipping Council (“WSC”). See Press Release, Int’l Chamber of Shipping et al., ICS / ECSA / BIMCO / WSC Press Release: The Rotterdam Rules, Wide Support by States at Signing Ceremony in Rotterdam, UNCITRAL (Sept. 23, 2009), available at [http://www.uncitral.org/pdf/english/news/ICS\\_ECSA\\_BIMCO\\_WSC\\_press\\_release.pdf](http://www.uncitral.org/pdf/english/news/ICS_ECSA_BIMCO_WSC_press_release.pdf) (last visited Sept. 1, 2011).

12. Most notably, the International Federation of Freight Forwarders Association (“FIATA”) and the European Association for Forwarding Transport Logistics and Customs Services (“CLECAT”), as well as the European Shippers’ Council, all of whom have been very vocal. See Freight Forwarders Ass’n, *FIATA Position on the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the “Rotterdam Rules”)*, UNCITRAL (Aug. 11, 2009), available at [http://www.uncitral.org/pdf/english/texts/transport/rotterdam\\_rules/FIATApaper.pdf](http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/FIATApaper.pdf) (last visited Sept. 1, 2011); European Ass’n for Forwarding, Transport, Logistic and Customs

European Parliament urging member states to adopt the Rules without delay.<sup>13</sup> This is, in fact, the venue that will likely determine the future of the Rotterdam Rules. Ultimately, however, ratification of the Rotterdam Rules at the national level remains a political decision, and the views and lobbying efforts of relevant interest groups such as traders, carriers, terminal operators and insurers active within that jurisdiction will influence ratification. Like any other political decision, prior to determining its ultimate position on the Rotterdam Rules, each state will also consider factors such as their national interests, the stand taken by their main trading partners, and the consequences of having various carriage regimes for the development of their economy, as well as the impact of the Rotterdam Rules on their judicial sector. It is obvious that some groups will be discontent whatever stand a state takes on the matter; but, of course, that is the inevitable consequence of any political decision making process.

As the day of reckoning for the Rotterdam Rules approaches,<sup>14</sup> there is an increasing need to broaden the debate by considering the wider implications, particularly social and economic, of the Rotterdam Rules rather than merely engaging in a microanalysis of the Rotterdam Rules from a legal perspective. The main aim of this Article is to contribute to the debate carried out at the political decision making level by considering the implications of the Rules not only on the shippers and carriers, but also on traders, banks, insurers, lawyers and other sectors providing support services to the maritime sector. The starting point will be to assess the extent to which the implementation of the Rotterdam Rules will achieve the objectives identified in its preamble.<sup>15</sup>

Priorities may vary from state to state and fulfillment of certain objectives might carry more weight in one state's decision making process than another. For instance, much will depend on whether a country is mainly cargo or carrier-

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Services, *Position Paper RE: 2008 - United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules")*, CLECAT (May 29, 2009), available at <http://www.clecat.org/dmdocuments/PP0100MAma090529PosPapRottRules.pdf> (last visited Sept. 1, 2011); European Shippers' Council, *View of the European Shippers' Council on the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea also known as the 'Rotterdam Rules'* (Mar. 1, 2009), available at [http://www.uncitral.org/pdf/english/texts/transport/rotterdam\\_rules/ESC\\_PositionPaper\\_March2009.pdf](http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/ESC_PositionPaper_March2009.pdf) (last visited Sept. 1, 2011).

13. See Resolution of 5 May 2010 on Strategic Goals and Recommendations for the E.U.'s Maritime Transport Policy Until 2018, EUR. PARL. DOC. A7-0114/2010 (2010).

14. As of 1 September 2011, only Spain has ratified the Rotterdam Rules. In all significant jurisdictions, politicians with the aid of industry experts, lawyers and academics are currently assessing the merits of implementing the Rotterdam Rules into their own legal systems. It is expected that states will formulate their official positions within the next two to three years as a result of the consultations currently taking place. For the status of the Rotterdam Rules, see Status: 2008 – United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea – the “Rotterdam Rules,” UNCITRAL (2012), available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/transport\\_goods/rotterdam\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html) (last visited Sept. 1, 2011).

15. See Rotterdam Rules, *supra* note 8, at Preamble.

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oriented. Nevertheless, this Article focuses on each objective identified in the preamble from a neutral perspective, taking into account current shipping practices and the nature of international trade as well as economic and legal considerations.

The drafting expectations underpinning the Rotterdam Rules are that adoption of the rules will contribute to:

- a) Promotion of legal certainty;
- b) Harmonization and modernization of the rules governing international contract of carriages;
- c) Promotion of the development of trade in an equal and mutually beneficiary manner;
- d) Enhancement of efficiency.<sup>16</sup>

Each of these will be evaluated in the context of the parameters set out above.

## II.

### THE PROMOTION OF LEGAL CERTAINTY

One of the main objectives for any international instrument attempting to regulate international trade is enhancing legal certainty. The Rotterdam Rules were driven by the same desire. Thus, the drafters expended considerable effort to ensure that the new Convention's final text would be as clear as possible so as to assist in enhancing efficiency and predictability in the context of cargo transportation.<sup>17</sup> These improvements should, in turn, reduce some of the transaction costs and litigation arising out of sea contract of carriages.

Applying a single body of law to the entire contract of carriage undoubtedly will promote some degree legal certainty.<sup>18</sup> But accomplishing this in the modern context is not as easy as it once was, given that it is now customary practice in the liner trades for carriers to undertake responsibility under a single contract for both the carriage of goods by sea and also for the inland legs of the journey that precede or follow sea transportation.<sup>19</sup> In order to promote legal certainty and predictability, the Convention's drafters had to consider whether the new set of rules should also apply to other modes of transport with respect to inland carriage contracts. In spite of objections raised during the Convention's negotiations, the drafters decided that they should

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16. *Id.*

17. *Id.*

18. *See also* statement in *Norfolk S. Ry. Co. v. James N. Kirby Pty Ltd.*, 543 U.S. 14, 29 (2004).

19. *See, e.g.*, facts in *Kirby*, 543 U.S. at 18-19, 25-26; *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2439 (2010). *See also* remarks made in U.N. Comm'n on Int'l Trade Law (UNCITRAL), Working Grp. on Transp. Law, Rep. of the Working Grp. on Transp. Law on the Work of its Ninth Session (New York, Apr. 15-26, 2002), ¶ 26, U.N. Doc. A/CN.9/510 (May 7, 2002) [hereinafter UNCITRAL Working Group III, Report of Ninth Session].

broaden the application of the Rotterdam Rules.<sup>20</sup> As a result, the Convention applies not only to contracts for carriage of goods by sea but also to contracts for the transportation of cargo by sea and any other transport mode, the expanded scope of application being referred to as “maritime plus.”<sup>21</sup> Likewise, to encompass the possibility of sea-land contracts of carriage, the duration of the carrier’s responsibility extends to the entire period for which the carrier is in charge of the cargo, as such period may be defined in the contract of carriage.<sup>22</sup> In “wet multimodal” contracts this period may range from “door-to-door” or “terminal-to-terminal,” whereas in simple sea carriage contracts this period may be restricted to the more limited “tackle-to-tackle.”<sup>23</sup>

Though the Rotterdam Rules, in terms, go beyond the existing sea carriage conventions,<sup>24</sup> they are not as revolutionary as they seem. Modern contracts of carriage by sea often extend the application of the Hague regimes to inland transport as a matter of contract.<sup>25</sup> Arguably, the Rules enhance legal certainty by making it clear that the new regime is to apply *ex proprio vigore* to “wet multimodal” contracts for carriage of goods.<sup>26</sup> Moreover, since the Rules explicitly clarify when they apply versus when they give way to international instruments on carriage by other transport modes,<sup>27</sup> there will be less room for dispute over the applicability of national regimes to the inland portion of multimodal shipments.<sup>28</sup>

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20. The Rotterdam Rules were originally conceived as a port-to-port instrument but were later extended to also cover door-to-door contracts. Rep. of the U.N. Comm. on Int’l Trade Law, 34th Sess., U.N. Doc. A/56/17 (June 25-July 13, 2001); U.N. GAOR, 56th Sess., Supp. No. 17, ¶ 345 (2001); Rep. of the U.N. Comm. on Int’l Trade Law, 35th Sess., June 17-28, 2002, U.N. Doc. A/57/17 (July 23, 2002); U.N. GAOR, 57th Sess., Supp. No. 17, ¶ 224 (2002). For the objections to the multimodal/door-to-door scope of application of the Rotterdam Rules, see discussion in UNCITRAL Working Group III, Report of Ninth Session, *supra* note 19, ¶¶ 26-32.

21. Rotterdam Rules, *supra* note 8, at arts. 1.1, 5.

22. *Id.*, at art. 12; see also *infra*, at 15-16 (discussing the interpretation of Article 12).

23. *Id.*; see also art. 12.3 (setting limits on the contractual freedom of the parties to agree on the carrier’s period of responsibility).

24. See Hague and Hague-Visby Rules, *supra* notes 2-3, applying to “tackle-to-tackle” transport operations (art. I(e)), and Hamburg Rules, extending to port-to-port transport (arts. 1.6, 4).

25. See, e.g., Multimodal Transport Bill of Lading, The Baltic and International Maritime Council, ICC Publication No. 481, cl.25 (1995); see also *Kawasaki Kisen Kaisha*, 130 S. Ct. 2433 at 2439.

26. See also Sturley, *The UNCITRAL Carriage of Goods Convention: Changes to Existing Law*, *supra* note 10, at 257.

27. See *infra* Part II discussion on arts. 26, 82.

28. See e.g., the disputes arising in the United States over the applicability of the Carmack Amendment, 49 U.S.C. § 11706 (2006) (rail carriage), 49 U.S.C. § 14706 (2006) (motor carriage), to the inland legs of sea-land transport operations to which COGSA applied by the agreement of the parties. The disputes have been resolved to a certain extent by the recent decision of the Supreme Court in *Kawasaki Kisen Kaisha*, 130 S. Ct. 2433. In this case, the Supreme Court ruled that the Carmack Amendment did not apply to the rail leg of an overseas import shipment under a single through bill of lading. See *id.* at 2446. However, the case left open the issue of whether the Carmack Amendment applies to rail carriage within the United States under an outbound ocean through bill of

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Clear provisions that guide carriers and shippers through their respective rights and obligations under the contract of carriage also promote legal certainty. To that end, the Rotterdam Rules set forth the carrier's obligations and also introduce a comprehensive and detailed set of provisions outlining the shipper's corresponding obligations to the carrier. Thus, the new rules exceed existing sea carriage conventions<sup>29</sup> to regulate obligations and liabilities that have traditionally been governed by the applicable national law<sup>30</sup> or contractual terms.<sup>31</sup> Prime examples of such innovative provisions include the shipper's duty to deliver the goods ready for carriage and in a safe condition, a duty that is not restricted to dangerous goods;<sup>32</sup> the obligations to properly stow the cargo in containers<sup>33</sup> and to properly and carefully perform the operations of loading, stowage and discharge of the goods it has assumed under a Free-In-and-Out ("FIO") or a similar clause;<sup>34</sup> as well as the obligation to provide information, instructions and documents in a wider context than that specified in the Hague and Hague-Visby system<sup>35</sup> and Hamburg<sup>36</sup> system.<sup>37</sup> Also, conducive to

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lading. *Id.* at 2444. This issue was addressed recently by one of the lower federal courts, where it was decided that the Carmack Amendment governed the inland leg of a multimodal shipment originating within the United States and traveling on to Australia on a through bill of lading. *See* *Am. Home Assur. Co. v. Panalpina, Inc.*, No. 07 CV 10947(BSJ), 2011 WL 666388 (S.D.N.Y. Feb. 16, 2011). *See also* the conflicting decisions issued by the American courts before *Kawasaki, e.g., Sampo Japan Ins. Co. of Am. v. Union Pacific R. Co.*, 456 F.3d 54 (2d Cir. 2006) (abrogated by *Kawasaki Kisen Kaisha Ltd.*) (holding that the Carmack Amendment did apply to the rail segment of a shipment originating overseas covered by a through bill of lading); *Contra* *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700 (4th Cir. 1993); *Am. Road Serv. Co. v. Consol. Rail Corp.*, 348 F.3d 565 (6th Cir. 2003); *Capitol Converting Equip., Inc. v. LEP Transp., Inc.*, 965 F.2d 391 (7th Cir. 1992); *Altadis USA, Inc. ex rel. Fireman's Fund Ins. Co. v. Sea Star Line, LLC*, 458 F.3d 1288 (11th Cir. 2006).

29. Hague and Hague-Visby Rules, *supra* notes 2-3, at arts. III, r.5 and IV, r.3, r.6; Hamburg Rules, *supra* note 4, at arts. 12-13, 17.1.

30. *See, e.g., Sw. Sugar & Molasses Co. v. The Eliza Jane Nicholson*, 138 F. Supp. 1, 3 (S.D.N.Y. 1956) (holding that the shipper owed to the carrier the duty not to ship defective goods that could cause damage to other cargo). The court found that general maritime law imposed such an obligation on the shipper, or was implied by the Carriage of Goods by Sea Act. *Id.*

31. *See, e.g.,* CONLINEBILL 2000 (as amended Jan. 1950; Aug. 1952; Jan. 1973; July 1974; Aug. 1976; Jan. 1978; Nov. 2000), cl. 17; COMBICONBILL 95 (as adopted by the Baltic and International Maritime Council in Jan. 1971 (as revised 1995)), cl.17.

32. Rotterdam Rules, *supra* note 8, at art. 27.1. Dangerous goods are dealt with separately. *See id.* at art. 32.

33. *Id.* at art. 27.3.

34. Variations on such clauses include the: Free-In-and-Out Stowed ("FIOS") and Free-In-and-Out Stowed Trimmed ("FIOST"). *See* Rotterdam Rules, *supra* note 8, at art. 27.2. A FIOS or similar clause transfers the cost and/or risk of loading, stowage and discharge of the goods from the carrier to the shipper or the consignee.

35. Hague-Visby Rules, *supra* notes 2-3, art. III, r.5.

36. Hamburg Rules, *supra* note 4, at art. 17.1.

37. Rotterdam Rules, *supra* note 8, at arts. 28-29, 31. *See generally* Simon Baughen, *Obligations Owed by the Shipper to the Carrier*, in *THE ROTTERDAM RULES*, *supra* note 10, at 169 (discussing the shipper's duties under the Rotterdam Rules).

certainty is the two-way mandatory approach for shipper's obligations and liabilities adopted in the Rotterdam Rules, which only allows for derogations from the relevant provisions in cases where the terms of the Convention grant contractual freedom to the parties to the contract of carriage.<sup>38</sup>

In addition, the Rotterdam Rules will end the ambiguity over the division of responsibilities between the carrier and the shipper or the consignee. For years, the courts in the major jurisdictions have been split over whether the responsibility for the operations of loading, stowage and discharge of the goods may be validly transferred from the carrier to the shipper or the consignee and, in turn, whether FIOs and similar clauses incorporated in bills of lading are valid.<sup>39</sup> The Rotterdam Rules restore legal certainty in this matter by expressly allowing the carrier and the shipper to agree that the shipper, documentary shipper or consignee may perform the loading, handling, stowing or unloading of cargo, thus validating the commonly used FIO and similar clauses.<sup>40</sup>

Another provision that imparts legal certainty is the automatic Himalaya-type protection provided in Article 4.1 of the Rotterdam Rules, which confers the carrier's protection to certain classes of third parties that assist the carrier in performing the contract of carriage. This provision designed to cure any ambiguity with respect to both the scope of the third-party beneficiaries and the type of Himalaya protection afforded to them.<sup>41</sup> To accomplish this purpose, Article 4.1 provides that only specific categories of third parties, such as maritime performing parties, as further defined in Article 1.7,<sup>42</sup> and their

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38. Rotterdam Rules, *supra* note 8, at art. 79.2. *See, e.g., id.* at art. 27.1.

39. On the one hand, English courts have held that the obligations of loading, stowage and discharge of the goods may be transferred to the shipper or the consignee. *See, e.g., Jindal Iron & Steel Co. Ltd. v. Islamic Solidarity Shipping Co. Jordan Inc.*, [2004] UKHL 49 (H.L.) (Eng.). On the other hand, the American Courts are divided, with the majority of the courts in the Second Circuit and the United States Court of Appeals for the Fifth Circuit ruling that the carrier is ultimately responsible for improper loading and stowage in all circumstances, and that any attempt to shift responsibility for the loading, stowage and discharge of the cargo to the cargo owners runs contrary to COGSA, Section 1303 (8). *See e.g., Demsey & Assoc., Inc. v. S/S Sea Star*, 461 F.2d 1009 (2d Cir. 1972) (in dictum), *on remand to* 1974 AMC 838 (S.D.N.Y. 1973), *aff'd* 500 F.2d 409 (2d Cir. 1974); *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951 (5th Cir. 1995) (in dicta). By contrast, one district court within the Second Circuit, the United States Court of Appeals for the Ninth Circuit, and the Western District of Kentucky, have reached the opposite conclusion on the basis that a carrier remains liable for its negligence (or the negligence of its agents) in loading and stowage for as long as it in fact control those processes. *See e.g., Sumitomo Corp. of Am. v. M/V Sie Kim*, 632 F. Supp. 824 (S.D.N.Y. 1985); *Atlas Assurance Co. v. Harper, Robinson Shipping Co.*, 508 F.2d 1381 (9th Cir. 1975); *Sigri Carbon Corp. v. Lykes Bros. S.S. Co., Inc.*, 655 F. Supp. 1435 (W.D. Ky. 1987).

40. Rotterdam Rules, *supra* note 8, at art. 13.2. *See also id.* at art. 17.3(i).

41. *See also* Theodora Nikaki, *The Statutory Himalaya-Type Protection Under the Rotterdam Rules – Capable of Filling the Gaps?* J. BUS. L. 403 (2009).

42. A maritime performing party is 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. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area. Rotterdam Rules, *supra* note 8, at art. 1.7.

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employees, the carrier's employees and the master, crew or any other person that performs services on board the vessel, may benefit from its protection. Hence, by avoiding any reference to general classes of persons such as "independent contractors" or "agents" employed by the carrier, the Rotterdam Rules minimize disputes over whether a person is entitled to rely on their statutory Himalaya-type protection. Such terms, which are found in a typical Himalaya clause,<sup>43</sup> frequently have been the crux of controversial litigation over the years, usually in the context of who is or is not an "agent" or "independent contractor."<sup>44</sup> Article 4.1 also sets out clear rules on the scope of the automatic Himalaya-type protection afforded to the third-party beneficiaries, as the third parties referred to in Article 4.1 are entitled to benefit from the protection provided in *any provision* of the Rotterdam Rules on the carrier's *defenses* and *limits of liability*.<sup>45</sup> This means that any variations of the contract of carriage, such as contractual agreements between the carrier and the shipper waiving defenses or increasing the limits of liability, have no prejudicial or binding effect on third parties' rights.<sup>46</sup> This is because the "provisions" of the Rotterdam Rules and not just the "defenses and limits of liability of the carrier" define the scope of the Himalaya protection.

The Rotterdam Rules will also reinstate legal certainty over the exceptional circumstances that justify the loss of the carrier's right to limit its liability, which has been diluted by the development in the United States of the obscure doctrines of the "quasi-deviation"<sup>47</sup> and the "fair opportunity."<sup>48</sup> (Indeed,

43. See, e.g., CONLINEBILL 2000, cl. 15(b) (2000), available at [http://maritimeknowhow.com/English/Know-How/Bill\\_of\\_Lading/types\\_of\\_bill\\_of\\_lading/conlinebill\\_2000.html](http://maritimeknowhow.com/English/Know-How/Bill_of_Lading/types_of_bill_of_lading/conlinebill_2000.html) (last visited Mar. 30, 2012); COMBICONBILL 95, cl. 14(4) (1995), available at [https://www.bimco.org/en/Chartering/Documents/Bills\\_of\\_Lading/COMBICONBILL.aspx](https://www.bimco.org/en/Chartering/Documents/Bills_of_Lading/COMBICONBILL.aspx) (last visited Mar. 30, 2012).

44. See, e.g., *Homburg Houtimport BV v. Agrosin Private Ltd. (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715, 742-45, 748-49, 759 (H.L.) (Eng.) (disputing whether a shipowner qualifies as an "independent contractor" for the purposes of the Himalaya clause that protected "a servant or agent of the carrier, including every independent contractor" of the carrier); *Certain Underwriters at Lloyd's v. Barber Blue Sea Line*, 675 F.2d 266, 270 (11th Cir. 1982) (examining whether a carrier's agent, who stored and handled the cargo was protected by a Himalaya clause that referred to an "agent" or "independent contractor"). See also Theodora Nikaki, *Himalaya Clauses and the Rotterdam Rules*, 17 J. INT'L MAR. L. 20 (2011).

45. See also Rotterdam Rules, *supra* note 8, at arts. 19.1-2 (also conferring the same protection on maritime performing parties).

46. See, e.g., the position under § 2(1) of the English Contracts (Rights of Third Parties) Act, 1999, c.31 (Eng.), which makes such contractual agreements binding on third parties if certain preconditions are met. See also CARVER ON BILLS OF LADING, *supra* note 1, ¶ 7-078; Andrew Jamieson, *Shipping Contracts*, in *PRIVITY OF CONTRACT* ¶ 6.106 (Robert Merkin ed., 2000).

47. In the United States, the courts of the Second, Fourth, Fifth, Ninth and Eleventh Circuits have held that the pre-COGSA law survived the passage of the new Act, and therefore the carrier that is found liable for quasi-deviation (i.e., unauthorized deck carriage, overcarriage, vessel substitution and intentional destruction of the cargo) is not entitled to invoke the \$500 per package limitation. See *Jones v. The Flying Clipper*, 116 F. Supp. 386, 391 (S.D.N.Y. 1953) (as the leading

American courts have even been inconsistent in the application of both doctrines.<sup>49</sup>) Article 61, which is the main provision on limitation of liability under the Rotterdam Rules, clarifies matters and sets only one precondition for the loss of the limitation right in both cases of loss or damage to the goods or delay in their delivery—namely the proof of “a personal act or omission of the party claiming the right.” Also, the only other instance in which the Rules deprive the carrier of the benefit of the limitation of liability is if it carries the cargo on deck in breach of an express agreement for deck carriage.<sup>50</sup>

Under the Rotterdam Rules, exceptional circumstances based on common law doctrines developed with respect to the Hague regimes, like “fair opportunity” and “quasi deviation,” will play no role. When interpreting the requirements for the loss of the carrier’s right to limit, national courts will consider the international character of the Rotterdam Rules, as well as the need to promote the Convention’s uniform application.<sup>51</sup> In addition, Article 24, a provision, which in its current form was introduced in the Rotterdam Rules upon the recommendation of the United States,<sup>52</sup> reinforces the same message with

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case); *Encyclopaedia Britannica, Inc. v. S. S. Hong Kong Producer*, 422 F.2d 7, 18 (2d Cir. 1969); *Spartus Corp. v. S.S. Yafo*, 590 F.2d 1310, 1313 (5th Cir. 1979); *Nemeth v. Gen’l S.S. Corp.*, 694 F.2d 609, 612-13 (9th Cir. 1982); *Unimac Co. v. C.F. Ocean Serv., Inc.*, 43 F.3d 1434, 1437 at n.5 (11th Cir. 1995) (in dicta); *Caterpillar Overseas, S.A. v. Marine Transp., Inc.*, 900 F.2d 714, 720-21 (4th Cir. 1990) (in dicta). By contrast, the Court of Appeal for the Seventh Circuit has ruled that COGSA abolished the pre-existing law, and therefore the \$500 per package limitation applies to unreasonable deviation because 46 U.S.C 1304 § 5 refers to “any event.” *Atl. Mut. Ins. Co. v. Poseidon Schiffahrt*, 313 F.2d 872, 874-75 (7th Cir. 1963); see also Theodora Nikaki, *The Quasi-Deviation Doctrine*, 35 J. MAR. L. & COM. 45-78 (2004).

48. Under the “fair opportunity” doctrine, a shipper must have had a “fair opportunity” to declare a higher liability value for its cargo in order for a carrier to limit its liability under COGSA. See *New York, N.H. & Hartford. R. Co. v. Nothnagle*, 346 U.S. 128, 135-36, (1953). The United States’ courts, with the exception of the Third Circuit in *Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212 (3d Cir. 2006), agree that a carrier that has not given the shipper a “fair opportunity” to declare a higher value will lose its benefit of limitation of liability, but are divided over whether the notice requirement needs to be met. For instance, the Ninth Circuit holds that the mere incorporation of COGSA by reference in the bill of lading is not *prima facie* evidence of a fair opportunity to negotiate for a higher value. See *Pan Am. World Airways, Inc. v. Cal. Stevedore and Ballast Co.*, 559 F.2d 1173, 1177 (9th Cir. 1977). Other circuits have held that a clause paramount in the bill of lading is sufficient to afford the shipper the opportunity to declare excess value. See *Fireman’s Fund Ins. Co. v. Tropical Shipping and Const. Co., Ltd.*, 254 F.3d 987, 996 (11th Cir. 2001). Also, the Fifth Circuit requires the shipper to provide evidence that the shipper could have declared a higher value. See *Brown & Root, Inc. v. M/V Peisander*, 648 F.2d 415 (5th Cir. 1981). See further discussion on the “fair opportunity” doctrine in Michael F. Sturley, *The Fair Opportunity Requirement*, in 2A *BENEDICT ON ADMIRALTY* ¶ 166, at 16-31 to 16-41 (7th rev. ed. 2009).

49. See *supra* note 47.

50. Rotterdam Rules, *supra* note 8, at art. 25.5.

51. Rotterdam Rules, *supra* note 8, at art. 2. See also Michael F. Sturley, *Modernizing and Reforming U.S. Maritime Law: The Impact of the Rotterdam Rules in the United States*, 44 *TEX. INT’L L.J.* 427, 449-50 (2009).

52. See U.N. Comm’n on Int’l Trade Law (UNCITRAL), Working Grp. III, Preparation of a Draft Instrument on the Carriage of Goods [by Sea], Proposal by the United States, ¶¶ 37-38, U.N. Doc. A/CN.9/WG.III/WP.34 (Oct. 6-7, 2003) [hereinafter 2003 U.S. Proposal].

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respect to the quasi-deviation doctrine by expressly ruling out quasi-deviation *per se* as one of the exceptional cases that validate the loss of the carrier's benefit of limitation of liability.<sup>53</sup> Hence, the Rotterdam Rules negate the operation of any of those doctrines, or, in turn, of any additional legal basis for the loss of a carrier's benefit of limitation of liability that do not derive from its text, remedying any ambiguity over the issue of the loss of the carrier's limitation of liability.

Although the Rotterdam Rules certainly constitute a step toward achieving predictability in the laws governing carriage of goods by sea, there are still provisions in the Convention that raise alarming uncertainties for prospective litigants. Ironically, one such clause is the cornerstone provision on the definition of the "contract of carriage,"<sup>54</sup> which in conjunction with Article 5.1, forms the basis for the scope of application of the Rules. The difficulty with Articles 1.1 and 5.1 is that while the Rotterdam Rules may only be invoked if the contract of carriage provides for international carriage of goods wholly or partly by sea, the Convention's text does not clarify what is required for this precondition to be met.<sup>55</sup> While this requirement will be easily satisfied if the parties to the contract of carriage have expressly agreed to transport the cargo in whole or in part by sea. But uncertainty will arise in situations where the parties do not make the contract of carriage "mode specific," or merely give the carrier the liberty or option to carry the goods by sea, and the goods are actually carried (wholly or partly) by sea—will the Rotterdam Rules apply then?<sup>56</sup> That is, will a loosely worded contract be deemed to "provide[] for carriage of goods by sea" and trigger the application of the Rotterdam Rules? The answer is probably not; drafters certainly assumed in the course of the negotiations that the key for determining the Rules' sphere of application should emerge from the contract of carriage and not the actual carriage of goods.<sup>57</sup> Moreover, the *travaux préparatoires* suggest that there must exist at least an implicit requirement of

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53. In cases of quasi-deviation, the loss of the right to limit will only be lost if the preconditions set forth in Article 61 are met. Rotterdam Rules, *supra* note 8, at art. 24.

54. *See id.* at art. 1.1.

55. *Id.* at art. 1.1. *See also* U.N. Comm'n on Int'l Trade Law (UNCITRAL), Working Grp. on Transp. Law, Rep. of the Working Grp. on Transp. Law on the Work of its Fifteenth Session (Vienna, July 4-15, 2005), ¶¶ 33-34, U.N. Doc. A/CN.9/576 (May 13, 2005) [hereinafter UNCITRAL Working Group III, Report of Fifteenth Session] (rejecting the proposal for adding a clarification to cover cases where the contract of carriage contains an option to carry by sea only if the goods are in fact carried by sea).

56. U.N. Comm'n on Int'l Trade Law (UNCITRAL), Working Grp. on Transp. Law, Rep. of the Working Grp. on Transp. Law on the Work of its Twelfth Session (Vienna, Oct. 6-17, 2003), ¶¶ 62-63, U.N. Doc. A/CN.9/544 (Dec. 16, 2003) [hereinafter UNCITRAL Working Group III, Report of Twelfth Session]; UNCITRAL Working Group III, Report of Fifteenth Session, *supra* note 55, at ¶ 33. *See also* Diamond, *The Rotterdam Rules*, *supra* note 10, at 451-52, and Berlingieri, *Revisiting the Rotterdam Rules*, *supra* note 10, at 585.

57. UNCITRAL Working Group III, Report of Fifteenth Session, *supra* note 55.

such carriage.<sup>58</sup> Nevertheless, the point remains uncertain, and there is no guarantee of uniform interpretation of Article 1.1. In turn, there exists no guarantee of predictability with respect to the applicability of the Rotterdam Rules. This assumption is supported by a parallel to the interpretation of the definition of the “contract of carriage by road” in the application<sup>59</sup> of the Convention on the Contract for the International Carriage of Goods by Road (“CMR”).<sup>60</sup>

The Rotterdam Rules generate further ambiguity concerning the extent of the period of the carrier’s responsibility in cases where the carrier or a performing party<sup>61</sup> received the goods before the date agreed in the contract of carriage. Such cases leave unclear whether the carrier’s period of responsibility under the Rotterdam Rules commences when the carrier actually received the goods or at the time agreed upon in the contract. The pertinent provision is Article 12.3; however, this article provides only for the contractual agreements on the time of receipt and delivery of the goods without further clarifying its relationship with the general proviso in Article 12.1 on the carrier’s period of responsibility. Far-reaching consequences may arise depending on which provision of Article 12 is accorded interpretive priority.

One may construe Article 12.3 as prevailing over Article 12.1, resulting in the carrier’s responsibility under the Rotterdam Rules only during the period for

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58. *Id.*

59. See *Quantum Corp Inc. v. Plane Trucking Ltd.*, [2002] EWCA (Civ) 350, [2002] C.L.C. 1002, 1008 (the English Court of Appeal, ruling that the CMR applies to contracts of carriage that leave the means of transport open, either entirely or as between a number of possibilities at least one of them being carriage by road, as well as to contracts under which the carrier may have undertaken to carry by some other means, but reserved either a general or a limited option to carry by road, provided that the goods were actually carried by road). *But see* *TNT Express Belgium, SA c. 1. Mitsui Sumitomo Insurance Company Europe Ltd.*, 2. *Sony Service Centre Europe, SA* 3. *Sony Deitchland GmbH/4. Media Markt Tv-Hifi-Elektro GmbH*, Cour de Cassation [Cass.] [Court of Cassation], Nov. 8, 2004, AR C030510N, available at <http://www.cass.be> (Belg.) (holding the CMR inapplicable to a consignment though carried by road on the decisive ground that “application of the [CMR] requires the existence of a contract whose object is the carriage of goods by road”). The court found that this condition is not met if the contract does not specify the mode of transport and it is not clear from the circumstances of the case that the parties envisaged transport by road. *Id.* It thus derives from the case that, in contrast to what was decided in *Quantum*, the actual carriage of goods by road in cases of unspecified transport does not by itself trigger the application of the CMR.

60. Convention on the Contract for the International Carriage of Goods by Road, May 19, 1956, 399 U.N.T.S. 189 (as amended by Protocol to the Convention for the International Carriage of Goods by Road, July 7, 1978, 1208 U.N.T.S. 427) [hereinafter CMR]. For the list of the contracting states, see <http://www.unidroit.info/program.cfm?menu=contractingstates&file=instrument&pid=1&lang=en&do=states> (last visited Sept. 1, 2011).

61. A performing party is defined as a person other than the carrier who 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. Rotterdam Rules, *supra* note 8, at art. 1.6.

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which agreement has been reached with the shipper.<sup>62</sup> Such agreements are constrained only by the terms of Article 12.3, in that the parties cannot override the period of responsibility prescribed by the Rotterdam Rules, such as by contracting for a period shorter than “tackle-to-tackle.”<sup>63</sup> Thus, if such an interpretation is adopted, it will be the applicable national laws that will determine the carrier’s responsibility for the cargo prior to the start of the carrier’s period of responsibility under the Rotterdam Rules. This may, however, result in fluctuating obligations upon carriers, as different jurisdictions apply varying standards of liability.<sup>64</sup>

A contrary interpretation suggests that Article 12.1 determines the period of the carrier’s responsibility under the Rotterdam Rules. In such case, the carrier assumes responsibility for the goods under the Convention from the time the carrier or a performing party actually receives the cargo, which may arise even before the time agreed to in the contract of carriage.<sup>65</sup> Under this interpretation, Article 12.3 only serves the purpose of protecting the cargo interests by invalidating contractual agreements that limit the carrier’s period of responsibility to exclude the time after the initial loading of the goods or prior to their final offloading.<sup>66</sup>

The conflicting interpretations of Article 12.3, and their potential impact upon the duration of the carrier’s responsibilities, came to the attention of the UNCITRAL Commission at its 41<sup>st</sup> Session.<sup>67</sup> Notwithstanding the Commission’s extensive efforts to resolve the ambiguity, the Commission concluded that it had not been possible to reconcile the different interpretations of Article 12.3.<sup>68</sup> Lack of clarification on this point fails to promote legal certainty, as the extent of the carrier’s period of responsibility under the Rotterdam Rules will depend on the interpretation adopted by the national court hearing the case. Thus, in the absence of judicial clarification, in cases where the carrier has received the goods prior to the contractually-agreed-upon date, the

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62. U.N. Comm’n on Int’l Trade Law (UNCITRAL), Rep. of the U.N. Comm’n on Int’l Trade Law on its Forty-First Sess. (New York June 16-July 3, 2008), U.N. Doc. A/63/17; U.N. GAOR, 63d Sess., Supp. No. 17 (2008), ¶ 40 [hereinafter Report of the U.N. Comm’n on Int’l Trade Law on its Forty-First Session].

63. *Id.*

64. For instance, under English law the carrier’s responsibility during that period is subject to the common law rules of tort or bailment, *see* CARVER ON BILLS OF LADING, *supra* note 1, at ¶ 9-129, whilst at least in one of the Canadian provinces (Quebec), the law (Civil Code of Québec, S.Q. 1994 (Can.)) imposes a standard of care higher than that of a bailee; i.e., close to that of an insurer, as “force majeure” is the only defense available to the carrier for the period that covers long-term port storage of goods by the carrier. *See also* William Tetley, MARINE CARGO CLAIMS 1263-82 (4th ed. 2008).

65. Report of the U.N. Comm’n on Int’l Trade Law on its Forty-First Session, *supra* note 62, at ¶ 41.

66. *Id.*

67. *Id.* at ¶¶ 39-43.

68. *Id.* at ¶¶ 42-43.

parties will not know definitively whether the carrier's period of responsibility had commenced under the Rotterdam Rules.

Further, given that the Rotterdam Rules extend to land, uncertainty may arise from potential conflicts between the Rotterdam Rules and international conventions on carriage by other transport modes that may also apply to the inland transport leg of a journey in the course of which the goods are lost, damaged, or delayed. The drafters explored the possibility of such conflicts throughout the preparation of the Rotterdam Rules and ultimately introduced provisions to that effect—namely Articles 26 and 82—into the Convention's text. The end result is unsatisfactory, however, as the relevant provisions fail to avoid all possible conflicts with pre-existing international regimes governing other modes of transport. This failure may create uncertainty over the applicable rules in particular situations.

For instance, Article 26 adopts a "limited" network system, which may prove inadequate in addressing potential conflicts arising during inland transportation. Under this approach the Rotterdam Rules will yield only to mandatory provisions on liability, limitation, and time for suit of the international unimodal instrument (international transport convention or mandatory regulation of regional organization) that would have applied to the inland leg where the loss, damage, or event causing the delay occurred.<sup>69</sup> Hypothetically, if during the inland leg the cargo is lost, damaged, or delivery is delayed, Article 26 would not thus resolve potential conflicts between the pertinent international unimodal instrument and the Rules on matters such as transport documents, delivery of goods, transfer of rights, rights of the controlling party, or issues of jurisdiction.<sup>70</sup> Similarly, Article 26 is not designed to address overlaps with unimodal transport conventions in cases where the cargo loss, damage, or delay was progressive. Instead, Article 26 deals only with cases where the loss of, damage to, or delay in delivery of the goods occurred "solely" in the course of a single inland leg.

By the same token, it is debatable whether Article 82 will also serve as a successful conflict-resolving clause, as its scope appears limited by the inclusion of the term "to the extent."<sup>71</sup> If interpreted literally, the words "to the extent"

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69. See e.g., the examples given in Tomotaka Fujita, *The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implication*, 44 TEX. INT'L L.J. 349, 360-62 (2009).

70. It should also be noted that as CMR art. 41§1 nullifies any direct or indirect derogation from any of their provisions, the Rotterdam Rules will overlap with its provisions on matters other than the carrier liability, limitation of liability and time for suit that are not identical to the respective provisions of the Rotterdam Rules.

71. See also Diamond, *The Rotterdam Rules*, *supra* note 10, at 453-55. *Contra* Berlingieri, *Revisiting the Rotterdam Rules*, *supra* note 10, at 587-89; Christopher Hancock, *Multimodal Transport Under the Convention*, in A NEW CONVENTION FOR THE CARRIAGE OF GOODS BY SEA – THE ROTTERDAM RULES, *supra* note 10, at 35, 48-50 (suggesting an expansive interpretation that would avoid such conflict, as it is the relevant inland convention rather than the Rotterdam Rules that would apply throughout the transport operation by sea and land).

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seemingly suggest that the provisions of the CMR, the Convention Concerning International Carriage of Goods by Rail (“COTIF”) and its adjoining appendix—the Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (“CIM”)<sup>72</sup>—and the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (“CMNI”)<sup>73</sup> will prevail over the Rotterdam Rules only in relation to the sea carriage that is subject to their terms,<sup>74</sup> but not with respect to the road, rail, or inland water transportation preceding and/or following the sea leg, or of the non-localized damages occurring in the course of combined sea-rail/road/inland waterways carriage.<sup>75</sup> It would accordingly fall on Article 26 to address conflicts between the Rotterdam Rules and the aforementioned regimes arising out of the prior or subsequent carriage by road, rail, or inland waterway. As outlined above, however, Article 26 does not offer a panacea to all possible conflicts. Therefore, identifying the applicable legal regime in the case of a conflict between the Rotterdam Rules and specific unimodal conventions may constitute a matter of considerable uncertainty. Moreover, since the ambiguity of the Rules requires national courts to determine the outcome of any such conflicts, such equivocation may further jeopardize the twin objectives of legal certainty and harmonization of sea carriage laws, given the inherent risk of inconsistent judicial interpretations between jurisdictions.

Finally, problems may arise in the case of joint causation. Article 17 provides for the allocation of the burden of proof between carriers and cargo

72. Convention Concerning International Carriage of Goods by Rail (COTIF), app. B, (May 9, 1980); Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM) (as amended June 3, 1999) [hereinafter COTIF-CIM 1999]. COTIF-CIM 1999 has now largely superseded the earlier 1980 version as forty-five countries have now ratified COTIF-CIM 1999. For a full list of the countries that are parties to COTIF-CIM 1999, see *State of the Signatures, Ratification, Acceptances, Approvals, Accessions and Entry into Force*, Intergovernmental Organization for International Carriage by Rail, available at [http://www.otif.org/fileadmin/user\\_upload/otif\\_verlinkte\\_files/07\\_veroeff/02\\_COTIF\\_99/Prot-1999-ratifications\\_07\\_07\\_2011\\_fde.pdf](http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/02_COTIF_99/Prot-1999-ratifications_07_07_2011_fde.pdf) (last visited Sept. 1, 2011).

73. Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (Apr. 1, 2005) [hereinafter CMNI], available at <http://www.unece.org/fileadmin/DAM/trans/main/sc3/cmniconf/cmni.pdf>. For a list of the contracting states to the CMNI, see Budapest Convention on the Carriage of Goods by Inland Waterways, U.N. Econ. Comm’n for Eur., <http://live.unece.org/?id=4038> (last visited Mar. 11, 2012).

74. CMR, *supra* note 60, at art. 3.1; COTIF-CIM 1999, *supra* note 72, at art. 2.2; CMNI, *supra* note 73, at art. 2.2.

75. In such cases, the Rotterdam Rules will be in conflict with CMR, COTIF-CIM 1999 or CMNI, as such shipments are subject to both the Rotterdam Rules and the relevant inland transport convention. The Rotterdam Rules will apply to them as a default; by virtue of the Rotterdam Rules, *supra* note 8, at art. 26, they are only displaced if the cargo loss, damage or delay in delivery is solely identified in the inland leg. Also, the respective inland convention will be applicable since CMR, *supra* note 60, at art. 2.1, COTIF-CIM 1999, *supra* note 72, at art. 1.4, and CMNI, *supra* note 73, at art. 2.2, all do not make a distinction between localized and non-localized damages in multimodal transport shipments.

owners, and to a certain extent, codifies the burden-shifting system of the widely accepted Hague regimes (colloquially described as a “ping-pong” game because of the potential for the burden to continually shift between the sides).<sup>76</sup> It therefore addresses some of the ambiguities of existing regimes, such as the burden of proof of unseaworthiness.<sup>77</sup> However, while Article 17 overcomes some of the complexities of the previous regimes, it also has the potential to project ambiguity in a situation where a combination of causes results in loss, damage, or delivery delay—while exempting some but not all as “excepted perils.”<sup>78</sup> Such situations may arise in the context of Article 17.2-5, which relieves the carrier from all or part of the liability if one or more carrier-exempting-circumstances contributed to the loss, damage, or delay in delivery of the cargo. However, although Article 17 refers to the carrier’s relief “of all or part of its liability” or to the carrier’s liability “for all or part of the loss,” unnecessary uncertainty will nevertheless arise since Article 17 does not clarify allocation of liability for losses caused by a combination of causes.<sup>79</sup>

Similarly, Article 17.6 is another provision that fails to provide clear rules on the apportionment of liability in case of partial liability of the carrier. Article 17.6 provides that “when the carrier is relieved of part of its liability, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable.” There is no further guidance on the apportionment of the loss, e.g., burden of proof, method of calculation, etc.<sup>80</sup> The drafters’ decision to defer to national courts in allocating liability in partial liability cases where multiple causes lead to the loss<sup>81</sup> will lead to uncertainty insofar as national courts adopt divergent approaches to apportionment.

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76. The Rotterdam Rules followed all the rules of the “ping-pong” game with the exception of the Vallescura Rule (*Schnell v. Vallescura*, 293 U.S. 296 (1934)), which was effectively dismissed in the Rotterdam Rules, *supra* note 8, at art. 7.6.

77. *E.g.*, the issue of the effect of unseaworthiness on the burden of proof under the fire defense in the United States. Whilst the Second Circuit, followed by the Fifth and Eleventh Circuits, have ruled that the proof of due diligence on the part of the carrier is not a condition precedent to the reliance on the fire exception, the courts of the Ninth Circuit have subordinated the fire exemption to the seaworthiness requirement. *See Asbestos Corp. v. Compagnie de Navigation Fraissinet et Cyprien Fabre*, 480 F.2d 669, 672-73 (2d Cir. 1973); *Westinghouse Elec. Corp. v. M/V Leslie Lykes*, 734 F.2d 199, 207-08 (5th Cir. 1984), *rehearing denied*, 739 F.2d 633 (5th Cir.), *cert. denied*, 469 U.S. 1077 (1984); *Sunkist Growers, Inc. v. Adelaide Shipping Lines Ltd.*, 603 F.2d 1327, 1341 (9th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980); *Banana Serv., Inc. v. M/V Tasman Star*, 68 F.3d 418, 420 (11th Cir. 1995).

78. *See also* Regina Asariotis, *Loss Due to a Combination of Causes: Burden of Proof and Commercial Risk Allocation*, in *A NEW CONVENTION FOR THE CARRIAGE OF GOODS BY SEA – THE ROTTERDAM RULES*, *supra* note 10, at 138; Diamond, *The Rotterdam Rules*, *supra* note 10, at 477.

79. *See* Asariotis, *supra* note 78, at 150; *see generally* Diamond, *supra* note 10.

80. *See* Asariotis, *supra* note 78, at 148; Diamond, *supra* note 10, at 477-78.

81. *See also* U.N. Comm’n on Int’l Trade Law (UNCITRAL), Rep. of Working III on Transp. Law on the Work of its Fourteenth Session (Vienna, Nov. 29-Dec. 10, 2004), 38th Sess., July 4-July 22, 2005, ¶ 74, U.N. Doc. A/CN.9/572 (Dec. 21, 2004) [hereinafter UNCITRAL Working Group III, Report of Fourteenth Session].

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Of course, no international regime can achieve a degree of legal certainty such that national courts will never need to resolve difficulties stemming from the wording and terminology employed in the text. Of particular concern, however, is that the ambiguities embodied in the text of the Rotterdam Rules do not relate to merely technical matters. Instead, there are ambiguities at the substantive core of the Convention, such as its physical scope and the central provisions of liability. An opportunity to send a strong message on the ability of the Rotterdam Rules to promote an advanced degree of legal certainty may have been missed by shying away from resolving such issues, perhaps due to overarching political concerns.

### III.

#### THE HARMONIZATION AND MODERNIZATION OF THE LEGAL REGIME GOVERNING THE INTERNATIONAL CARRIAGE OF GOODS BY SEA

Harmonizing the regime governing the international carriage of goods by sea, which is one of the Convention's foremost aims, entails the enactment of uniform rules that will be acceptable to at least the major shipping nations as a wholesale replacement for the existing Hague, Hague-Visby and Hamburg Rules.<sup>82</sup> To achieve that objective, the Rotterdam Rules draw from the already existing rules but also amend them where necessary to take into account new commercial practices or technological advances.<sup>83</sup> In addition, the Rotterdam Rules cover a wide range of issues not currently regulated, such as door-to-door transport, electronic transport documents,<sup>84</sup> liability of third parties now falling into the category of maritime performing parties,<sup>85</sup> delay in delivery,<sup>86</sup> delivery

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82. Rotterdam Rules, *supra* note 8, at art. 89.1.

83. *See, e.g., id.* at arts. 13-14 (based on the Hague Rules, *supra* note 2, at arts. 3.1-2, and the Hague-Visby Rules, *supra* notes 2-3, at arts. III.1-2); *see also* Rotterdam Rules, *supra* note 8, at art. 25 (following to some extent the Hamburg Rules, *supra* note 4, at art. 9).

84. Rotterdam Rules, *supra* note 8, at art. 12 (covering door-to-door transport); *id.* at arts. 1.17-22, ch. 3 (electronic transport records).

85. *See supra* note 42; Rotterdam Rules, *supra* note 8, at art. 19. Under national laws, third persons that assisted the carrier in the performance of its duties in the course of the port-to-port transport operation are liable in tort or bailment. *See, e.g.,* N.Z. Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd. (The Eurymedon) [1974] 1 NZLR 505 (P.C.) (against stevedores for negligent discharging of the cargo); Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 (against stevedores for negligent loading); The Pioneer Container [1994] 2 A.C. 324 (P.C.) (appeal taken from H.K.) (action in sub-bailment against the subcontracting carrier); Philipp Bros. Metal Corp. v. S.S. Rio Iguazu, 658 F.2d 30 (2d Cir. 1981) (action in bailment against stevedores). It is worth mentioning that the Hamburg Rules, *supra* note 4, do cover the issue of the liability of third parties, at least in part, in Article 10 (actual carrier).

86. The widely accepted Hague and Hague-Visby Rules do not regulate delay in delivery and it is therefore the domestic legislation that governs this issue. The Hamburg Rules, *supra* note 4, at art. 5 provide for delay. The seminal cases in England on delay in delivery are Hadley v. Baxendale, [1854] EWHC Exch J70 and Koufos v. C Czarnikow Ltd (The Heron II), [1969] 1 AC 350, [1967] UKHL 4. For the United States, *see, e.g.,* Comercio Transito Inter. v. Lykes Bros. Steamship Co., 243 F.2d 683, (2d Cir. 1957).

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of goods, rights of the controlling party, etc.<sup>87</sup> The advantage of this approach is that it fills in the gaps of the existing sea carriage regimes with uniform rules, while still promoting the consistent interpretation and application of the Rotterdam Rules, given that the courts in major jurisdictions have adopted a uniform interpretation at least with respect to most of the core provisions of the Hague regimes.<sup>88</sup> In addition, the uniformity of international sea transport laws will be further enhanced through new provisions of the Rotterdam Rules dealing with issues that fell within the scope of the Hague or the Hague-Visby Rules but led to conflicting decisions, such as the quasi-deviation doctrine, FIOS and similar clauses.<sup>89</sup>

Moreover, the uniform rules on carriage of goods by sea provided in the Rotterdam Rules have also been drafted with the view to modernizing the existing sea transport laws.<sup>90</sup> To that end, the Rotterdam Rules account for technological and commercial developments that have taken place since implementation of the Hague, Hague-Visby and Hamburg Rules.<sup>91</sup> This notably includes the use of containers, now almost universal in many trades, which allows the safe carriage of cargo consolidated in containers on the decks of specially designed containerhips—something which makes nonsense of the traditional sidelining of so-called “deck cargo” in the Hague regimes.<sup>92</sup> Additionally, there is the fact that arrangements for transportation more often than not envisage the use of different means of transport under a single contract,<sup>93</sup> thus calling into question the tradition of regarding sea transport as something separate from other modes. The Rotterdam Rules directly address both of these factors insofar as they apply to contracts of carriage by sea and other transport modes (“wet multimodal”/“door-to-door” scope of application of the Rotterdam Rules),<sup>94</sup> as well as to deck carriage of cargo “in or on containers or vehicles provided that the containers or vehicles are fit for deck carriage and

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87. Rotterdam Rules, *supra* note 8, at ch. 9 (delivery of the goods), ch. 10 (rights of the controlling party).

88. *See, e.g.*, the decisions on the seaworthiness obligation: Northern Shipping Co v. Deutsche Seereederei GmbH (The Kapitan Sakharov), [2000] 2 Lloyd’s Rep 225 (P.C.); C. Itoh & Co. (America), Inc. v. M/V Hans Leonhardt, 719 F. Supp. 479 (E.D. La. 1989); Grain Growers Export Co. v. Canada S.S. Lines, 43 O.L.R. 330 (Ont. Ca. 1918), *upheld*, (1919) 59 S.C.R. 643 (Can.).

89. *See supra* Part II.

90. *See* Rotterdam Rules, *supra* note 8, at Preamble.

91. *Id.*

92. The Hague regimes expressly exclude deck carriage if the goods are actually carried on deck and the deck carriage is also stated in the bill of lading. *See supra* notes 2-3, at art. I(c); *see, e.g.*, Sideridraulic Sys. v. BBC Chartering & Logistic [2011] EWHC 3106 (Comm). The Hamburg Rules, *supra* note 4, at art. 9, allow deck carriage if certain preconditions are met.

93. UNCTAD Secretariat, Implementation of Multimodal Transport Rules, ¶ 7, U.N. Doc. UNCTAD/SDTE/TLB/2 (June 25, 2001); UNCITRAL Working Group III, Report of Ninth Session, *supra* note 19, at ¶ 26.

94. Rotterdam rules, *supra* note 8, at arts. 1.1, 12.

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the decks are also specially fitted to carry such containers or vehicles.”<sup>95</sup> Moreover, the Rotterdam Rules establish in detail the carrier’s right to qualify shipper-furnished information regarding the contents and weight of a closed container or other vehicle. This reflects the reality that the carrier or its independent contractors, servants or agents usually will not open or inspect containers of consolidated cargo, in part because doing so often would not allow them to verify much information.<sup>96</sup>

Similarly, in the last fifty years, ships have become faster and easier to load and unload, and cargo now often reaches the port of discharge before the bill of lading. As a result, the industry began to experience delays at the port of discharge because of the traditional rule that delivery is only possible against the bill of lading.<sup>97</sup> To avoid these unacceptable delays, the shipping industry substituted traditional paper bills of lading for electronic bills or, more radically, sea waybills along the lines of the CMR consignment note that do not have to be surrendered against the delivery of the cargo.<sup>98</sup> This led to unsatisfactory ambiguity in applying Hague and the Hague-Visby Rules to electronic documentation and to non-coverage with respect to sea waybills.<sup>99</sup>

The Rotterdam Rules once again update the existing rules by setting forth a broad definition of the applicable transport documents and electronic transport records,<sup>100</sup> as well as by establishing comprehensive rules on electronic

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95. *Id.*, at art. 25.1(b). It is worth noting that art. 25.1(b) is not breaking new ground in recognizing that vessel design may justify stowage and carriage on deck of containers as, to a certain extent, it codifies the existing case law on the carriage of containers on the deck of specially designed containerhips. *See, e.g.*, *Du Pont de Nemours Intern. S.A. v. S.S. Mormacvega*, 493 F.2d 97, 102, (2d Cir. 1974). Also, although the Hamburg Rules, *supra* note 4, at art. 9, allow deck carriage, they do not expressly provide for the deck carriage of containers.

96. Rotterdam Rules, *supra* note 8, at art. 40.4. *See also* U.N. Comm’n on Int’l Trade Law (UNCITRAL), Rep. of Working Grp. III on Transp. Law on the Work of its Eighteenth Session (Vienna, Nov. 6-17, 2006), 40th Sess., June 25-July 12, 2007, ¶ 33, U.N. Doc. A/CN.9/616 (Nov. 27, 2006) [hereinafter UNCITRAL Working Group III, Report of Eighteenth Session].

97. On the presentation rule, *see, e.g.*, *Sze Hai Tong Bank v. Rambler Cycle Co.*, [1959] 2 Lloyd’s Rep. 114 (P.C.); *Kuwait Petroleum Corp. v. I&D Oil Carriers Ltd. (The Houda)*, [1994] 2 Lloyd’s Rep. 541 (A.C.); *Allied Chemical Intern. Corp. v. Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476 (2d Cir 1985), *cert. denied*, 475 U.S. 1099 (1986); *Kanematsu GmbH v. Acadia Shipbrokers Ltd.*, [1999] 1999 A.M.C. 1533 (Fed. Ct.) (Can.) *rev’d on other grounds*, [2000] 259 N.R. 201 (Fed. Ct. C.A.).

98. The sea waybill is evidence of the contract of carriage and receipt of the goods but not a document of title. Rotterdam Rules, *supra* note 8, at arts. 1.1, 5.

99. Hague and Hague-Visby Rules, *supra* notes 2-3, at art. I(b). It is worthy to note that countries like Australia have implemented domestic laws that regulate electronic bills of lading, *e.g.*, the Australian COGSA applies to both negotiable and non-negotiable sea-carriage documents, whether in paper or electronic form. Australian Carriage of Goods by Sea Act 1991, *supra* note 3, at §7, sch. 1A.

100. The Rotterdam Rules apply to contracts for the international carriage of goods wholly or partly by sea, without regard to the issuance of transport documents. Rotterdam Rules, *supra* note 8, at arts. 1.1, 5. The issuance of transport documents comes into play only in limited instances, *i.e.*, to exclude charterparties and charterparties’ equivalents (in liner trade) and to include “on demand”

transport records that facilitate electronic commerce.<sup>101</sup> In particular, the Rotterdam Rules go beyond the outdated Hague regimes to cover a wider range of transport documents by making reference to the generic terms “transport document” and “electronic transport record,” rather than “bill of lading,” as the latter term would have unjustifiably limited the Convention’s scope of application.<sup>102</sup> Also, a document or electronic record qualifies as a transport document or electronic record for the purposes of the Rotterdam Rules, if it is evidence of the contract of carriage and also evidence of the carrier’s or a performing party’s receipt of goods under the contract.<sup>103</sup> Thus, unlike the Hague regimes, the Rotterdam Rules apply to transport documents or electronic records that serve the first two functions of the traditional bills of lading, but, like the sea waybills, do not necessarily qualify as documents of title.

Further, the Rotterdam Rules contain innovative provisions for negotiable and non-negotiable electronic transport records,<sup>104</sup> which are recognized as the “functional equivalent” of transport documents.<sup>105</sup> The Rotterdam Rules expressly recognize in Article 8 (and elsewhere) that electronic transport records may fulfill the same functions as traditional paper documents: anything that may be included in a transport document may be recorded in an electronic transport record, if the carrier and the shipper consent to an electronic transport record’s issuance and subsequent use.<sup>106</sup> The Rules also make clear that the issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.<sup>107</sup> In substance, the new provisions on electronic transport records are carefully drafted to meet any future developments, as they are both “medium”<sup>108</sup> and “technology”<sup>109</sup> neutral, and thus adaptable to all types of systems (i.e., registry, open, or closed environment).<sup>110</sup>

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carriage and charterparty bills of lading. *Id.* at arts. 6.1-2, 7.

101. The facilitation of e-commerce is one of the main objectives of the Rotterdam Rules. *See* Report of the U.N. Comm’n on Int’l Trade Law on Twenty-Ninth Session, *supra* note 6, at ¶ 210.

102. *See, e.g.*, Rotterdam Rules, *supra* note 8, at arts. 1.14, 1.18.

103. *Id.*

104. *Id.* at arts. 1.18-1.20.

105. *Id.* at art. 8. Also noteworthy is that the term “electronic transport record” is used alongside the words “transport document” throughout the Rotterdam Rules. On electronic transport records, *see generally* Manuel Alba, *Electronic Commerce Provisions in the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 44 *TEX. INT’L L.J.* 387 (2009); Miriam Goldby, *Electronic Alternatives to Transport Documents: A Framework for Future Development*, in *A NEW CONVENTION FOR THE CARRIAGE OF GOODS BY SEA – THE ROTTERDAM RULES*, *supra* note 10, at 225.

106. Rotterdam Rules, *supra* note 8, at art. 8.

107. *Id.*

108. *Id.*

109. *Id.* at arts. 9, 38.

110. Preamble to CMI Draft Instrument on Transport Law, 2001 COMITÉ MAR. INT’L, *Y.B.* 532, at 533.

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These provisions suggest that, if implemented, the Rotterdam Rules would be well-placed to successfully meet the challenges of harmonizing and modernizing the carriage of goods by sea rules. This is because they offer a comprehensive, updated set of uniform rules for the international regime. But several other provisions suggest otherwise.

In terms of harmonization, a good step towards the unification of the international laws on carriage of goods by sea would have been the unification of rules on jurisdiction and arbitration. The Rotterdam Rules in Chapters 14 and 15 begin this process by establishing detailed rules on choice of forum and arbitration.<sup>111</sup> Succinctly, cargo claimants may litigate or arbitrate their claims only in one of the competent forums provided in the rules—i.e., either (i) the place of the domicile of the carrier, (ii) the place of receipt or delivery of the goods agreed in the contract of carriage, (iii) the port of the initial loading or discharge of the cargo, or (iv) the place designated in the choice of court/arbitration clause, if included in the contract of carriage.<sup>112</sup> Additionally, exclusive choice of court or arbitration clauses are enforceable against the shipper and third parties only in the case of volume contracts and only upon satisfaction of strict preconditions referred to in Articles 67 and 75.3-4.<sup>113</sup> By standardizing jurisdiction and arbitration rules, the Rotterdam Rules fill in the gap left by the Hague regimes and put an end to the inconsistent treatment of the choice of forum and arbitration clauses under the national laws that govern them absent a relevant provision in the Hague and Hague-Visby Rules.<sup>114</sup>

There are, however, two possible factors against uniformity in this respect. First, are Articles 67.2 and 75.4 on the enforcement of exclusive forum selection and arbitration clauses against a party other than the shipper acquiring rights against the carrier. Here, the enforceability of such clauses also depends on whether the national jurisdiction or arbitration law of the court seized permits

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111. For further discussion on jurisdiction and arbitration, see Yvonne Baatz, *Jurisdiction and Arbitration*, in *A NEW CONVENTION FOR THE CARRIAGE OF GOODS BY SEA – THE ROTTERDAM RULES*, *supra* note 10, at 258; Chester D. Hooper, *Forum Selection and Arbitration in the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, or The Definition of Fora Conveniens Set Forth in the Rotterdam Rules*, 44 *TEX. INT'L L.J.* 417 (2009).

112. Rotterdam Rules, *supra* note 8, at arts. 66, 75.2.

113. See *infra* Part IV.

114. See, e.g., *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) (upholding the validity of arbitration clauses); *Acciai Speciali Terni USA, Inc. v. M/V Berane*, 181 F. Supp. 2d 458 (D. Md. 2002) (holding a forum selection clause enforceable under the *Sky Reefer* test). *Contra* Australian Carriage of Goods by Sea Act 1991, *supra* note 99, at § 11(1)-(2) (invalidating any agreement that precludes or limits the jurisdiction of Australia's federal, state or territorial courts in disputes arising out of sea carriage documents to which the Hague/Visby Rules apply, in respect of inbound and outbound shipments to and from Australia). See also *id.* at § 11(3) (permitting arbitration agreements in carriage cases only if under the agreement or provision, the arbitration is to be conducted in Australia). Similar provisions may be found in the laws of New Zealand (Maritime Transport Act 1994 (N.Z.) § 210). *But cf.* Hamburg Rules, *supra* note 4, at arts. 21-22 (on jurisdiction and arbitration).

that person to be bound by the exclusive jurisdiction or arbitration agreement.<sup>115</sup>

Second, it should be noted that the new rules on jurisdiction and arbitration are not made mandatory on states adopting the Convention: They are merely opt-in provisions.<sup>116</sup> Even the states that have signed such a declaration may opt-out of the choice of court and arbitration rules at any time by withdrawing their previous declaration.<sup>117</sup> Moreover, although it is almost certain that states like the United States that drove the drafting of the jurisdiction and arbitration provisions will make necessary declarations to opt-in,<sup>118</sup> doing so will be more time-consuming and bureaucratic for the EU member states that are bound by the Brussels I Regulation.<sup>119</sup> EU member states have to submit a request to the European Commission under Article 67 of the European Union Treaty and follow the relevant procedures.<sup>120</sup> Further, it is doubtful that all the contracting states will opt-in to the jurisdiction and arbitration provisions. During negotiations, some states expressed hostility toward adoption of these provisions. Thus, the final opt-in solution<sup>121</sup> reflects a delicate compromise designed to improve the probability of adoption of the new convention.<sup>122</sup>

The attempted harmonization of the sea transport rules will be further jeopardized by the failure of the Rotterdam Rules to define key terms of the

115. Rotterdam Rules, *supra* note 8, at arts. 67.2(d), 75.4(d).

116. The jurisdiction and arbitration provisions apply to contracting states that will declare, either at the ratification stage or later, that they wish to be bound by the relevant provisions on jurisdiction and arbitration. Rotterdam Rules, *supra* note 8, at arts. 74, 78, 91. *See also* William Tetley, *A Critique of and the Canadian Response to the Rotterdam Rules*, in *A NEW CONVENTION FOR THE CARRIAGE OF GOODS BY SEA – THE ROTTERDAM RULES*, *supra* note 10, at 285.

117. *See* Rotterdam Rules, *supra* note 8, at art. 91.5.

118. *See, e.g.*, 2003 U.S. Proposal, *supra* note 52, at ¶¶ 30-33; U.N. Comm'n on Int'l Trade Law (UNCITRAL), Working Grp. IV, Preparation of a Draft Instrument on the Carriage of Goods [by Sea], Proposal by the United States of America Regarding the Inclusion of "Ports" in Draft Article 75 of the Draft Convention in the Chapter on Jurisdiction, U.N. Doc. A/CN.9/WG.III/WP.58 (Nov. 28–Dec. 9, 2005); *see also* Mary Helen Carlson, *U.S. Participation in the International Unification of Private Law: The Making of the UNCITRAL Draft Carriage of Goods by Sea Convention*, 31 TUL. MAR. L.J. 615, 633-35 (2007) [hereinafter Carlson, *U.S. Participation in the International Unification of Private Law*].

119. Council Regulation 44/01, 2001 O.J. (L 12) 1, 8 (EC) (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

120. Consolidated Version of the Treaty on European Union and of the Treaty Establishing the European Community, Dec. 29, 2006, 2006 (O.J. C 321/E/2) art. 67.

121. *See, e.g.*, UNCITRAL Working Group III, Report of Fourteenth Session, *supra* note 81, at ¶¶ 111, 130, 154; U.N. Comm'n on Int'l Trade Law (UNCITRAL), Working Grp. III, Preparation of a Draft Instrument on the Carriage of Goods [by Sea], Comments by the United Kingdom of Great Britain and Northern Ireland Regarding Arbitration, U.N. Doc. A/CN.9/WG.III/WP.59 (Nov. 18, 2005).

122. The "opt-in" approach was adopted as a compromise solution as it was felt that the mandatory application of the jurisdiction and arbitration provisions might have created barriers to states wishing to ratify the instrument. *See* U.N. Comm'n on Int'l Trade Law (UNCITRAL), Report of Working Grp. III on Transp. Law on the Work of its Sixteenth Session, ¶¶ 74-75, 81, 84, U.N. Doc. A/CN.9/591 (Dec. 2005); UNCITRAL Working Group III, Report of Eighteenth Session, *supra* note 96, at ¶¶ 246-52, 273.

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previous conventions, especially in cases where their interpretation has resulted in conflicting decisions in the major trading jurisdictions. The most obvious example is that of the terms “package” and “unit,” which have been adopted throughout the international rules on carriage of goods by sea as a basis for calculating the carrier’s limitation of liability.<sup>123</sup> In fact, the plethora of conflicting decisions on interpreting those terms demonstrates the need to provide clear definitions for terms with such significant practical implications. Whereas the English,<sup>124</sup> American,<sup>125</sup> and Australian<sup>126</sup> courts have defined “package” as entailing some type of packaging of the cargo, the Canadian courts have construed the term so broadly as to exclude the need for wrapping or boxing the goods, thus equating even a large unpacked machine to a “package” within the meaning of the limitation rules.<sup>127</sup> There are instances even *within* some jurisdiction—namely, the federal maritime jurisdiction of the United States—where there is no consistency between circuits in defining a “package,” as occurs with respect to cases of goods not fully boxed or crated.<sup>128</sup>

Compounding these difficulties, courts have issued irrational decisions on

123. Hague Rules and Hague-Visby Rules, *supra* notes 2-3, at art. IV, r.5; Hamburg Rules, *supra* note 4, at art. 6; Rotterdam Rules, *supra* note 8, at art. 59. Another example of a core term that has been interpreted inconsistently by the different courts is that of the perils of the sea. The U.S. courts, for one, have adopted different definitions on the “peril of the sea” from Australian courts. *See, e.g.*, *The Giulia*, 218 F.744, 746 (2d Cir. 1914) (discussing the extraordinary or irresistible nature of the peril); *Great China Metal Indus. Co. Ltd. v. Malay Int’l Shipping Corp. Bhd. (The Bunga Seroja)*, [1998] 158 A.L.R. 1, 16 (High C. Austl.) (discussing foreseeable, or even foreseen, dangers may be perils of the sea and support a defense under the Rules). For Canadian courts, *Canadian Nat’l Steamships Ltd. v. Bayliss*, [1937] S.C.R. 261, 263 (discussing the unforeseeability and inevitability of the peril). For English courts, *The Xantho*, [1887] 12 App. Cas. 503, 509 (H.L.) (Eng.) (discussing the test of foreseeability and possibility of averting the danger).

124. *See, e.g.*, *Bekol B.V. v. Terracina Shipping Corp.*, [1988] Q.B. (considering the meaning of “package” in the Hague Rules with reference to the Oxford English Dictionary, defining the terms as, “a bundle of things packed up, whether in a box or other receptacle, or merely compactly tied up”).

125. *Aluminios Pozuelo Lid. v. S.S. Navigator*, 407 F.2d 152, 155 (2d Cir. 1968) (following the Third, Fourth and Eleventh Circuits’ definition of “package” as “a class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods”); *see, e.g.*, *Philips-Van Heusen Corp. v. Mitsui O.S.K. Lines Ltd.*, 2003 A.M.C. 2471, 2489 (M.D. Pa. 2002); *Maersk Line, Ltd. v. U.S. 513*, F.3d 418, 422-23 (4th Cir. 2008); *Fireman’s Fund Ins. Co. v. Tropical Shipping & Constr. Co.*, 254 F.3d 987, 996-97 (11th Cir. 2001); *Hartford Fire Ins. Co. v. Pac. Far East Line, Inc.*, 491 F.2d 960 (9th Cir. 1974) (adopting the definition but for the subjective purpose language part).

126. *Chapman Marine Pty Ltd. v. Wilhelmsen Lines A/S*, 1999 A.M.C. 1221, 1233 (Austl.).

127. *Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd.*, [1974] S.C.R. 933, 952 (Can.).

128. *Compare, e.g.*, *Companhia Hidro Electrica do Sao Francisco v. S.S. Loide Honduras*, 368 F. Supp. 289, 291-92 (S.D.N.Y. 1974) (holding that semi-enclosed circuit breakers were “packages”), *with Gulf Italia Co. v. Am. Export Lines, Inc.*, 263 F.2d 135 (2d Cir. 1959) (finding that a not fully-enclosed caterpillar tractor was not shipped in a “package” within the meaning of a statute limiting liability to \$500 per package). *See also Sturley, Packages*, in 2A *BENEDICT ON ADMIRALTY*, *supra* note 48, at ¶ 167.

the construction of the words “*packages or other units* enumerated in the bill of lading as *packed*” in cases of goods that have been containerized, that seem to defeat the rationale of the limitation of liability.<sup>129</sup> The most famous—or infamous—decision is that of the Federal Court of Australia in *El Greco Pty Ltd v. Mediterranean Shipping Co.*,<sup>130</sup> where the court equated 200,945 posters and prints carried in a container under a bill of lading referring to “1 × 20 ft FCL/FCL general purpose containers said to contain 200,945 pieces posters and prints” to one “package” under the default rule for containers in Hague-Visby Rules, Article IV.5(c).<sup>131</sup> The court examined the text of the Hague-Visby Rules, the *travaux préparatoires* of the Visby amendments, and relevant American authorities to conclude that the enumeration in the bill of lading did not disclose how and in what number the goods had been made up for transport *as packed* in the container.<sup>132</sup> One of the fallacies of the court’s rationale, however, is that the prerequisite for enumeration of the units in the bill of lading “as packed” seems as indecisive as the concept of “unit” *per se*, since the term “packed” can also apply to fairly small unpackaged items.<sup>133</sup> Additionally, the decision seems to suggest that the unit must be packaged, a requirement that is inconsistent with the concept of “unit” that encompasses goods that do not qualify as packages.<sup>134</sup> The inconsistent interpretation of the terms “package” and “unit” will probably reappear with respect to the Rotterdam Rules, since the Rules do not define these terms and it is likely that the national courts will apply the interpretations they developed for the Hague and Hague-Visby Rules.<sup>135</sup> Thus, it appears that the drafters of the Rotterdam Rules missed the opportunity to define these core terms and thereby promote the uniform application of the new sea carriage Convention.

129. See also Marc A. Huybrechts, *Package Limitation as an Essential Feature of the Modern Maritime Transport Treaties: A Critical Analysis*, in *THE CARRIAGE OF GOODS BY SEA UNDER THE ROTTERDAM RULES* 119, 130-135 (D. Rhidian Thomas ed., 2010), reprinted in 17 *J. INT’L MAR. L.* 90, 98-103 (2011).

130. *El Greco Pty Ltd. v. Mediterranean Shipping Co.*, [2004] FCAFC 202 (Austl.). See also Cour d’Appel [regional court of appeal] de Rouen, Feb. 28, 2002, 2004 *DROIT MARITIME FRANCAIS*, 648 (holding that thirty-eight cartons containing 18,000 watches carried in a container counted as only thirty-eight packages for the limitation purposes, as the watches were not individually marked and could not be distinguished from each other; therefore, it could not be established whether the carrier considered the watches as “packages” when it accepted the cargo for carriage). See Huybrechts, in *THE CARRIAGE OF GOODS BY SEA UNDER THE ROTTERDAM RULES*, *supra* note 129, at 134-35, 17 *J. INT’L MAR. L.*, *supra* note 129, at 102-03.

131. *El Greco Pty Ltd.*, [2004] FCAFC at 371 (Austl.).

132. *Id.* at 360-72.

133. Francis Reynolds, *The Package or Unit Limitations and the Visby Rules*, [2005] *LLOYD’S MAR. & COM. L.Q.* 1, 3.

134. CARVER ON BILLS OF LADING, *supra* note 1, at ¶¶ 9-261, 9-269.

135. See, e.g., U.N. Comm. on Intn’l Trade Law (UNCITRAL), Working Grp. III on Transp. Law, Transp. Law-Preliminary Draft Instrument on the Carriage of Goods by Sea, 9th Sess., Apr. 15-26, 2002, U.N. Doc. A/CN.9/WGIII/WP.21, Annex, art. 5, ¶ 60, art. 6.1.3, ¶ 78 (Jan. 8, 2002) [hereinafter UNCITRAL Prelim. Draft Instrument of Jan. 8, 2002].

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Last but not least, although there is no doubt that the Rotterdam Rules will make some contribution towards the modernization of sea transport law, the innovative provisions concerning the “maritime plus” and “door-to-door” scope of the Convention’s application leave are unsatisfactory. In addition to the complications arising out of the possible conflicts between the Rotterdam Rules and the unimodal conventions, and the definition of the contract of carriage already analyzed in Part II, the Rotterdam Rules constitute a “maritime-plus” convention, rather than a fully-fledged regime on international multimodal transport. This means that the Convention’s application to multimodal transport will be triggered only if the contract of carriage provides for sea carriage in addition to carriage by other transport modes—and different national courts may interpret such a requirement inconsistently<sup>136</sup>—but not if the contract of carriage contemplates carriage by any possible combination of transport modes. Therefore, the inevitable consequence of the Rotterdam Rules’ is that the addition to the array of international transport rules of another regime with a limited scope will further fragment international transport law. This may confuse rather than provide greater clarity to the transport industry.

Moreover, compatibility issues may exist between the door-to-door scope of application of the Rotterdam Rules and the long standing customary practice in the liner trade of “through” transport contracts.<sup>137</sup> Under such mixed contracts of carriage and freight forwarding, the carrier and the shipper agree that the carrier, acting as an agent of the shipper, will arrange the performance of a transport leg(s) by other carrier(s), while the carrier will remain responsible for the goods only while in its charge. However, under such an arrangement the carrier assumes responsibility only for certain parts of the transport operation. Upon the shipper’s request, it also usually issues a single transport document, which goes beyond the scope of its contract of carriage to cover the entire transport operation. This is because only a transport document that covers the entirety of the transit of goods satisfies good tender on the underlying contract of sale<sup>138</sup> and is an acceptable document under the Uniform Customs and Practice for Documentary Credits (UCP”), Article 19.<sup>139</sup> While, previous drafts of the Rules declared the validity of mixed contracts of carriage and forwarding and also expressly provided that the period of the performance of the carriage by the third party fell outside the scope of the period of the responsibility of the carrier,<sup>140</sup> the UNCITRAL Commission deleted the relevant provision in review,

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136. See *supra* Part II.

137. See also Hamburg Rules, *supra* note 4, at art. 11 (on through carriage).

138. *Hansson v. Hamel & Horley, Ltd.*, [1922] 2 A.C. 36 (H.L.) (Eng.).

139. The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No. 600 (July 7, 2007) [hereinafter UCP 600]. The UCP is a set of rules on the issuance and use of letters of credit that is utilized by bankers and commercial parties in trade finance, and the UCP 600 is its sixth revision. *Id.*

140. U.N. Comm’n on Int’l Trade Law (UNCITRAL), Working Grp. III on Transp. Law, Transp. Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea], art. 9, U.N.

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although it stated that it did not intend to “criticise or condemn the use of such types of contracts of carriage.”<sup>141</sup>

Such a statement does not, however, resolve the issue of the responsibility of the carrier while the goods are transported by the on-carrier. In particular, given that in the majority of the cases, the carrier will issue a transport document or electronic record covering the entire transport operation to meet the requirements of the underlying contracts, it does not answer the question of whether the period of such carriage falls outside the period of the carrier’s responsibility under the Rotterdam Rules. The combined reading of Article 12 and Chapter 9 would most probably lead to the conclusion that non-responsibility clauses included in the transport document or electronic transport record issued by the carrier, which cover periods during which the cargo is not in the carrier’s custody, will run contrary to Article 79. Indeed, even under the most flexible interpretation of Article 12.3,<sup>142</sup> the parties are only free to agree on the time and location of receipt and delivery of the goods, which define the period of the carrier’s responsibility. They are not allowed to agree that the carrier will not be responsible for certain part(s) of the transport operation. Additionally, in cases where a negotiable document or a negotiable electronic transport record is issued, it is unlikely that delivery to the on-carrier will be equated to delivery to the consignee under Article 12 and Chapter 9, which will end the period of the carrier’s responsibility under the terms of the Rotterdam Rules.<sup>143</sup> It is unclear how the courts will deal with this issue and whether they will attempt to improvise a pragmatic solution to accommodate the common practice of through carriage. Nonetheless, the last minute deletion of the specific provision on “[t]ransport beyond the scope of the contract of carriage” was unwise, as the retention of the relevant article would have avoided possible future litigation over the liability of the contracting carrier for loss or damage to the goods or delay in their delivery which may be attributed to the on-carrier.

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Doc. A/CN.9/WG.III/WP.32 (Sept. 4, 2003); U.N. Comm’n on Int’l Trade Law (UNCITRAL), Working Grp. III on Transp. Law, Transp. Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea], art. 12, U.N. Doc. A/CN.9/WG.III/WP.56 (Sept. 8, 2005); U.N. Comm’n on Int’l Trade Law (UNCITRAL), Working Grp. III on Transp. Law, Transp. Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea], art. 12, U.N. Doc. A/CN.9/WG.III/WP.81 (Feb. 13, 2007); U.N. Comm’n on Int’l Trade Law (UNCITRAL), Working Grp. III on Transp. Law, Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea], art. 13, U.N. Doc. A/CN.9/WG.III/WP.101 (Nov. 14, 2007); U.N. Comm’n on Int’l Trade Law (UNCITRAL), Working Grp. on Transp. Law, Rep. of Working Grp. III on Transp. Law on the Work of its Twenty-First Session (Vienna, Jan. 14-25, 2008), Annex. art. 13, U.N. Doc. A/CN.9/645 (Jan. 30, 2008) [hereinafter UNCITRAL Working Group III, Report of Twenty-first Session].

141. Report of the U.N. Comm’n on Int’l Trade Law, Forty-First Session, *supra* note 62, at ¶ 53.

142. *Id.* at ¶ 40.

143. See Rotterdam Rules, *supra* note 8, at art. 47.

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#### IV.

##### DEVELOPING TRADE IN AN EQUAL AND MUTUALLY BENEFICIAL MANNER

The implementation of international rules to promote equity and reciprocal benefits in international trade is another objective of the Rotterdam Rules, it being generally (and correctly) thought that the development of trade on the basis of equality and mutual benefit plays a fundamental role in promoting friendly relations among States.<sup>144</sup> To achieve this objective, the drafters of the Rotterdam Rules aimed to carry out a balancing exercise between potentially conflicting interests, such as carriers, shippers and third parties (such as consignees), and established a regime that aims to strike a fair balance between the interests of all parties concerned. Some might argue that the balance between carriers and shippers is relatively unimportant, and the only issue should be who insures what. This argument, however, presupposes that cargo insurance is the norm, which is not always the case. The impact of the Rotterdam Rules on insurance matters will be discussed in Part V.

Promoting equality among the parties involved in the carriage transaction entails eliminating the provisions of the existing sea carriage regimes that are seen as privileging the interests of one party without good reason. A notable instance of this in the Rotterdam Rules is the elimination of the venerable “navigational fault” exception in the Hague-Visby Rules<sup>145</sup> and the extension of the seaworthiness obligation to cover the whole of the voyage rather its mere commencement.<sup>146</sup> The premise underlying both of these old rules is the anachronistic assumption that the shipowner neither had control over the vessel once she sailed, nor sophisticated technical navigational aids once at sea<sup>147</sup>—assumptions that clearly fail with respect to technical developments in communication and by institutions such as the International Management Code for the Safe Operation of Ships and for Pollution Prevention (“ISM Code”).<sup>148</sup>

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144. See Rotterdam Rules, *supra* note 8, Preamble. See also U.N. Convention on the Law of the Sea Preamble, U.N. Doc. A/CONF.62/L/78 (Aug. 28, 1981) (noting that the “realization of a just and equitable international economic order” and “the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights will promote the economic and social advancement of all peoples of the world”).

145. Hague-Visby Rules, *supra* note 3, at art. IV.2(a) (allowing carriers to exclude liability for losses caused by navigational error; i.e. loss from any act, neglect or default of the pilot, master or mariners in navigating the ship). The origins of the defense could be traced to the bills of lading issued in the nineteenth century. See, e.g., *Hayn v. Culliford*, [1878] 3 C.P.D. 410, *aff'd* [1879] 4 C.P.D. 182 (C.A.), *in re Carron Park*, [1890] 15 P.D. 203 (Eng.); *in re Accomac*, [1890] 15 P.D. 208 (C.A.) (Eng.); *Norman v. Binnington*, [1890] 25 Q.B.D. 475 (Eng.). It is also worth mentioning that this defense is not available to the carrier under the Hamburg Rules, *supra* note 4.

146. Rotterdam Rules, *supra* note 8, at arts. 14, 17.3.

147. Hague Rules, *supra* note 2, at arts. III, r.1, IV.2(a); Hague-Visby Rules, *supra* note 3, at arts. III.1, notes 2-3, IV.2(a); UNCTAD Secretariat, *The Economic and Commercial Implications of Entry into Force of the Hamburg Rules and Multimodal Transport Convention*, TD/B/C.4/3/5/Rev.1 (1991), ¶ 26.

148. See, e.g., International Management Code for the Safe Operation of Ships and for

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Conversely, the Rotterdam Rules remove the curious pro-shipper rule, which many jurisdictions have characterized as depriving carriers of their right to limit and of the benefit of a number of excepted perils in the cases of “quasi deviation” and the “fair opportunity” doctrines.<sup>149</sup>

The Rotterdam Rules’ provisions on arbitration, discussed above, also attempt to level the playing field between shippers and carriers. There is evidence that at present, cargo interests are prejudiced by the enforcement of boilerplate exclusive forum selection and arbitration clauses included in liner transportation bills that designate a forum with no connection to the contract of carriage against them.<sup>150</sup> Consequently, cargo claimants may tend to settle for considerably less when faced with litigating or arbitrating in an inconvenient jurisdiction.<sup>151</sup> The Rotterdam Rules address the inequity of the Hague regimes arising out of such situations and protect cargo claimants from such abusive practices by prohibiting the inclusion of exclusive jurisdiction and arbitration clauses in standardized carriage of goods by sea contracts.<sup>152</sup> As mentioned above, under the new regime, exclusive jurisdiction and arbitration clauses are valid between the carrier and the shipper only if they are freely negotiated. In particular, an exclusive jurisdiction or arbitration clause will bind only the original parties to volume contracts (which denote individual negotiation of the terms anyway) and only if such clause is contained in a volume contract, which is either individually negotiated or contains a prominent statement that it contains such a provision.<sup>153</sup>

Further, a third party holder of a transport document or electronic record issued under a volume contract (e.g., a consignee) also receives protection. Exclusive jurisdiction or arbitration clauses may be enforced against the third party holder only if certain strict prerequisites, which aim to ensure that it is not

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Pollution Prevention (“ISM Code”), arts. 5, 10. The ISM Code is one of the latest international instruments related to the prevention of human injury or loss of life and avoidance of damage to the environment, particularly to the marine environment, and to property. It was adopted by the International Maritime Organization (“IMO”) on November 4, 1993, and later incorporated into the International Convention for the Safety of Life at Sea Convention (“SOLAS”) 1974. *See also* UNCITRAL Prelim. Draft Instrument of Jan. 8, 2002, *supra* note 135, at art. 5.61.

149. *See supra* Part II.

150. *See, e.g., Vimar Seguros y Reaseguros, S.A.*, 515 U.S. 528, *supra* note 114 (arbitration clauses); *Acciai Speciali Terni USA, Inc. v. M/V Berane*, 181 F. Supp. 2d 458 (D. Md. 2002) (forum selection clauses). There is a good chance that the U.S. will declare itself bound by the jurisdiction and arbitration provisions since U.S. negotiators of the Rotterdam Rules actively supported their inclusion in the Rules. *See* Carlson, *U.S. Participation in the International Unification of Private Law*, *supra* note 118, at 633-35.

151. *See* Robert Force & Martin Davies, *Forum Selection Clauses in International Maritime Contracts*, in *JURISDICTION AND FORUM SELECTION IN INTERNATIONAL LAW* 1, 10 (Martin Davies ed., 2005); Carlson, *U.S. Participation in the International Unification of Private Law*, *supra* note 118, at 633-34.

152. Rotterdam Rules, *supra* note 8, at arts. 67.1, 75.3, 80.

153. *Id.* at arts. 67.1, 75.3. In the case of choice of forum clauses, the designated venue or venues must be located in a contracting state. *Id.*

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dragged into litigation at a place that has no connection with the dispute or without adequate notice, are met.<sup>154</sup> *Inter alia*, the relevant clause must be included in the transport document or electronic transport record, the forum or place of arbitration should be located in a place convenient for it (i.e., a place that has a connection with the contract of carriage), and the third party must be made aware of the exclusive jurisdiction or arbitration clause and the forum or place of arbitration in the form of a “timely and adequate notice.”<sup>155</sup> For instance, a CIF buyer will be bound by an exclusive jurisdiction clause if: (i) the jurisdiction clause provides for litigation before the courts of one of the places designated in Article 66(a); (ii) the agreement is contained in the transport document or electronic transport record; (iii) the law of the court seized recognizes that it may be bound by the exclusive choice of court agreement; and (iv) the buyer receives notice that the jurisdiction of that court is exclusive as well as notice of the court before which it must bring its action before it is irrevocably committed to the contract of carriage.<sup>156</sup>

The Rotterdam Rules also promote the development of trade on the basis of equality and mutual benefit through provisions that establish an appropriate balance between freedom of contract, which allows for commercial flexibility, and the adequate protection of the contracting parties. For instance, Article 12.3 expressly allows for the freedom of the parties to determine the carrier’s period of responsibility under the Rotterdam Rules by agreeing on the time and place of the receipt and delivery of the cargo. At the same time, it protects the cargo interests from abusive practices on the part of the carrier by invalidating any agreement that provides that the time of receipt of the goods will be after the beginning of their initial loading, and the time of delivery of the goods will be before the completion of their final unloading.

Similarly, the Rotterdam Rules recognize that today cargo owners are not always the weaker party in the contract of carriage.<sup>157</sup> Cargo owners do not need the protection of a mandatory law if they are in the position to negotiate the terms of their contract of carriage with the carrier. Therefore, the Rotterdam Rules allow sophisticated shippers to enter into customized contracts for the carriage of a specified quantity of goods in a series of shipments during an

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154. Rotterdam Rules, *supra* note 8, at arts. 67.2, 75.4.

155. *Id.* See also Hooper, *supra* note 111, at 421 (discussing the requirement of the “timely and adequate notice”).

156. It is, however, unclear when this requirement is met. One may argue that it is satisfied in a case in which the buyer receives the transport document/electronic record, which contains the exclusive jurisdiction clause before its bank pays for the goods under an irrevocable letter of credit. See Sturley et al., *THE ROTTERDAM RULES*, *supra* note 10, at ¶¶ 10, 12-056. It may be, however, also argued that a CIF buyer is irrevocably committed to the contract of carriage once it has agreed to buy the cargo.

157. A multinational company that imports and exports large quantities of goods every year is not the weaker party to the contract of carriage.

agreed period of time (volume contracts).<sup>158</sup> Under such contracts, carriers and shippers may opt-out of most of the provisions of the new regime,<sup>159</sup> and accordingly, agree on greater or lesser rights, obligations and liabilities than under the Rotterdam Rules.<sup>160</sup> The presumption is that rates will reflect the reduced or increased liability.

However, there is always the risk that unlimited freedom of contract might deprive smaller or less sophisticated shippers of any protection against unreasonable unilateral terms imposed on them by carriers. To address this concern, the Rotterdam Rules set forth strict conditions that aim to ensure that both the shipper and the consignee are adequately protected against possible abuse of the volume contracts.<sup>161</sup> The main prerequisite is the conclusion of a volume contract requiring a “series of shipment” during a specified period of time, and in turn a larger shipper that will ship more than one cargo. But shippers are further protected through Article 80.2, which ensures that smaller shippers will not lose the protection of the Rotterdam Rules by being forced into concluding a standardized volume contract with the carrier. The Rotterdam Rules accomplish this goal by requiring volume contracts containing derogations to be “individually negotiated” or to “prominently specify the sections of the volume contract containing the derogations.”<sup>162</sup> The Rotterdam Rules further stipulate that valid derogations can be “neither incorporated by reference from another document . . . nor included in a contract of adhesion that has not been negotiated.”<sup>163</sup> Moreover, for derogations from the Rotterdam Rules to be binding on a shipper, the shipper must also have an opportunity and notice of the opportunity to negotiate the terms of the contract, in that it should have a choice between concluding a contract of carriage on either a lower freight rate based on volume contract derogations, or a much higher freight rate based on the full Rotterdam Rules.<sup>164</sup> Finally, if the shipper decides to enter into a volume contract, the Rotterdam Rules require the carrier to include a prominent statement in the contract that it derogates from the terms of the Rotterdam Rules.<sup>165</sup>

Third parties other than the shipper (e.g., consignees) are also protected, as they are not automatically bound by valid derogations in the volume contract by

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158. “Volume contracts,” which were included in the Rotterdam Rules following the recommendation of the United States, are based on the concept of “service contracts” regulated in the United States Shipping Act 1984, 46 U.S.C. §§ 1701 et seq., subsec. 3.19 (as amended by Ocean Reform Act, 112 Stat. 1902 (1998)). See 2003 U.S. Proposal, *supra* note 52, at ¶¶ 18-29.

159. The “opt out” option does not apply to the “super-mandatory” provisions, such as Rotterdam Rules, *supra* note 8, at arts. 14(a)-(b), 29, 32, 61; see also *id.* at art. 80.4.

160. Rotterdam Rules, *supra* note 8, at arts. 1.2, 80.1.

161. *Id.* at art. 80.2.

162. *Id.* at art. 80.2(b).

163. *Id.* at arts. 80.2(b), (d).

164. *Id.* at art. 80.2(c).

165. *Id.* at art. 80.2(a).

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simply becoming parties to the contract of carriage at a later stage. The volume contract and its terms opting-out of the provisions of the Rotterdam Rules apply to such third parties only if they were able to make an informed decision to that effect. This condition will be satisfied in a case where a consignee has expressly consented in writing or by electronic communication after receiving information that prominently states the derogations.<sup>166</sup> For instance, such derogations will have a binding effect on a CIF buyer if the buyer received the information that prominently stated the terms of the contract of carriage that deviate from the Rotterdam Rules from the CIF seller or the carrier, and if it gave its express consent to the carrier.<sup>167</sup> To further protect the third party—the hypothetical buyer—the Rotterdam Rules clearly state that its consent has to be given separately and cannot be set forth in a carrier’s public schedule of prices and services, transport document, or electronic transport record.<sup>168</sup>

Perhaps the innovative provisions of Articles 1.2 and 80 will achieve the objective of setting forth satisfactory safeguards for the protection of small shippers with unequal bargaining power to that of the carrier and of consignees. Much depends on the construction of the definition of “volume contract” by the courts, as the definition itself does not set forth a threshold for the operation of volume contracts.<sup>169</sup> A restrictive interpretation<sup>170</sup> alone will not, however, deprive the shippers of the application of the Rotterdam Rules, as all of the preconditions set forth in Article 80 also need to be satisfied for a valid derogation from the provisions of the Rotterdam Rules. What will complicate matters is the possibility of litigation over the interpretation of the requirements included in Article 80. Therefore, the scope of the protections provided by these safeguards remains uncertain until courts settle the interpretation of terms like “contract of adhesion” (a term that is not to be found in all jurisdictions or may be unclear), “subject to negotiation” or “express consent.”<sup>171</sup>

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166. *Id.* at arts. 3, 80.5(a).

167. *Id.* at arts. 80.5(a)-(b).

168. *Id.* at art. 80.5(b).

169. See the suggestion made in the course of the negotiations of the Rotterdam Rules to adjust the definition of volume contracts to provide for a specific number of shipments or containers or a specific amount of tonnage of cargo. *E.g.*, UNCITRAL Working Group III, Report of Twenty-first Session, *supra* note 140, at ¶ 246; Report of the U.N. Comm’n on Int’l Trade Law on its Forty-First Session, *supra* note 62, at ¶ 32.

170. It is debatable whether a contract for the carriage of goods in a series of two shipments in a period of a year qualifies as a volume contract. Diamond argues for this opinion, while Honka argues that it is not a volume contract. Diamond, *The Rotterdam Rules*, *supra* note 10, at 487. Hannu Honka, *Validity of Contractual Terms*, in Ziegler et al., *THE ROTTERDAM RULES 2008*, *supra* note 10, at 331, 341-42.

171. Philippe Bonnevie, *Evaluation of the New Convention from the Perspective of Cargo Interests*, 2009 *TRANSPR* 361, 364 (2009); Diamond, *The Rotterdam Rules*, *supra* note 10, at 488. See also the concerns expressed by the European Shipper’s Council. View of the European Shipper’s Council on the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea also Known as the ‘Rotterdam rules.’ European Shipper’ Council, (Mar. 1, 2009), available at [http://www.uncitral.org/pdf/english/texts/transport/rotterdam\\_rules/ESC\\_PositionPaper\\_March2009](http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/ESC_PositionPaper_March2009).

Finally, the Rotterdam Rules promote international trade by providing pragmatic solutions to problems commonly encountered in modern shipping practice. An example is the unavailability of the bills of lading for presentation to the carrier at the port of discharge,<sup>172</sup> a problem that is often overcome through the delivery of the goods against a letter of indemnity—which is not always satisfactory in practice.<sup>173</sup> The Rotterdam Rules have recognized the difficulties arising from such situations and the lack of international regulation, and they aim to eliminate the problems resulting from goods that arrived at the place of destination prior to the arrival of the bill of lading. As mentioned, one solution is facilitating the use of electronic transport records and non-negotiable transport documents,<sup>174</sup> which will accelerate cargo delivery. The novel provision of Article 47.2 provides a statutory solution to the delivery of the goods without the production of the negotiable document. It simply discharges the carrier of the delivery obligation under the contract of carriage by delivering the cargo under instructions received from the shipper or the documentary shipper. It accomplishes this even without the surrender of the negotiable transport document or the required identification of the holder of the electronic transport record under Article 9.1. Article 47.2 is triggered only when goods cannot be delivered because the consignee does not claim delivery, does not hold the proper documentation, or cannot be located by the carrier after reasonable effort. However, the carrier can only employ the Article 47.2 option if the parties have agreed to allow the carrier to deliver the goods without surrendering the negotiable transport document or electronic transport record, and if the transport document or electronic transport record contains an express statement to that effect (e.g., “delivery clause”).

Article 47.2 arguably provides a practical and pragmatic solution that balances the interests of all concerned parties. This is first achieved through the contractual “opt-in” system, which ensures that delivery of the goods without the surrender of the negotiable transport document or electronic transport record is allowed under the Rotterdam Rules only by agreement of the parties to the contract of carriage. Further, Article 47.2 also protects potentially affected third parties, such as banks and subsequent holders of the negotiable transport document or electronic transport record, as the “delivery clause” in the transport document or electronic transport record gives them notice and hence operates as

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pdf (last visited Sept. 1, 2011).

172. Such situations can arise in cases where the bill of lading cannot be surrendered to the carrier due to delays occurring in the course of the financing of the sale contract system, or also in trades, like the oil trade, because it is not possible to make the bill of lading available at the port of offloading since the goods are resold several times during their transit.

173. Risks associated with delivery against a letter of indemnity include the additional cost of obtaining such a letter (i.e., guarantee costs), the risk of insolvency of the person claiming delivery without the bill of lading/indemnifier, and the risk of non-enforceability of the letter of indemnity in some jurisdictions. For a comprehensive analysis on the legal position of letters of indemnity, see Richard Williams, *Letters of Indemnity*, 17 J. INT'L MAR. L. 394 (2009).

174. Rotterdam Rules, *supra* note 8, at arts. 1.14, 1.16-1.22, ch. 3.

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a warning that the goods may be delivered without the surrender of the relevant transport document or electronic transport record.<sup>175</sup> Consequently, as Article 47.2 protects only the bona fide acquirer of the negotiable transport document or electronic transport record, such a notice affords third parties the opportunity to take an action to protect their interests (e.g., a prospective holder of a bill of lading who is unsure about whether the cargo has already been delivered must contact the carrier and clarify this issue before obtaining the bill of lading).<sup>176</sup>

In addition, Article 47.2 secures protection for the interests of all parties involved in the carriage transaction. It releases the carrier from the delivery obligation under the contract of carriage if the carrier delivers the cargo in accordance with the shipper's or the documentary shipper's instructions, even without the surrender of the otherwise required negotiable transport document or electronic transport record.<sup>177</sup> The carrier only remains liable to the third party who became a bona fide holder of the negotiable transport document after delivery.<sup>178</sup> The reason is that since the holder in good faith acquires all the rights incorporated in the transport document or electronic transport record, including the right to claim delivery, it would have been unjust to deprive it of the rights it legitimately expects to gain by becoming holder of the negotiable transport document or electronic transport record.<sup>179</sup> But even in such cases the carrier is protected, as the Rotterdam Rules provide for the statutory indemnity of the carrier for any loss arising from it being held liable to the bona fide holder of the negotiable transport document or electronic transport record.<sup>180</sup> This indemnity is also reinforced through the right of the carrier to demand adequate security.<sup>181</sup>

The Rotterdam Rules also protect the consignees, since consignees with genuine reasons for not claiming delivery (e.g., because the transport document was delayed in the bank, but obtains the negotiable transport document or electronic transport record after delivery through "contractual or other arrangements"),<sup>182</sup> are deprived only of the right to obtain delivery and not of

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175. The express statement requirement was inserted in the course of the final negotiations of the Rotterdam Rules before the UNCITRAL Commission to address the concerns of the negative impact that delivery without the production of the negotiable transport document/electronic transport record may have on common trade and banking practices. See Report of the U.N. Comm'n on Int'l Trade Law on its Forty-First Session, *supra* note 62, at ¶ 154.

176. Rotterdam Rules, *supra* note 8, at art. 47.2(e). See also Gertjan van der Ziel, *Delivery of the Goods*, in Ziegler et al., *THE ROTTERDAM RULES 2008*, *supra* note 10, at 189, 209.

177. Rotterdam Rules, *supra* note 8, at art. 47.2(b).

178. See also *id.* at art. 47.2(e) (establishing the presumption that the holder, at the time that it became a holder, had or could reasonably have had knowledge of the delivery of the goods if the contract particularly states the expected time of arrival of the goods, or indicates how to obtain information as to whether the goods have been delivered.)

179. *Id.* at art. 47.2(e).

180. *Id.* at art. 47.2(c).

181. *Id.*

182. E.g., under the underlying contract of sale. See also U.N. Comm'n on Int'l Trade Law

any other right under the contract of carriage.<sup>183</sup> One example is that the arrival of damaged goods entitles a holder of the document or electronic record to claim for relief. Similarly, Article 47.2 maintains the interests of innocent third parties that obtain the bill of lading in good faith after delivery of the goods, since a bona fide acquirer of the negotiable transport document or electronic record acquires all the rights incorporated in the transport document or electronic transport record.<sup>184</sup>

The solution provided in Article 47.2 resolves a real and practical problem for carriers without disturbing the status quo. On one hand, Article 47.2 merely provides an alternative for the letter of indemnity system without prohibiting the carrier from requesting one. On the other hand, the option to deliver without surrendering requisite documentation does not undermine the function of a negotiable transport document or electronic transport record as a document of title.<sup>185</sup> This is because delivery of goods only occurs if the negotiable transport document is surrendered or the holder of the electronic transport record demonstrates that it is the holder under the relevant Article 47.1 procedures. Thus, Article 47.2 comes into play only in cases where the cargo owners appeared at the place of destination without the requisite documentation, or failed to appear at all, provided that the aforementioned preconditions are met.

## V.

### ENHANCING EFFICIENCY

#### A. *Insurance Costs*

Supporters of the Rotterdam Rules argue that worldwide adoption of the Rules will enhance economic efficiency by decreasing total insurance costs. They argue that this follows from the provisions of the Rotterdam Rules that shift a great proportion of the risk to the carrier.<sup>186</sup> Decline in the risk of cargo interests should correspond to a remarkable decline in the premiums that cargo insurers seek under the Rotterdam regime. But it is also inevitable that the carriers' liability insurers—effectively protection and indemnity (“P & I”) clubs—will increase the cost of insurance because insurers would bear higher risks under the Rotterdam regime. Nevertheless, the general view is that the increase in the cost of P & I will be much less than the decrease in the premium

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(UNCITRAL), Working Grp. on Transp. Law, Rep. of the Working Grp. on Transp. Law on the Work of its Eleventh Session, Mar. 24-Apr. 4, 2003, ¶ 87, U.N. Doc. A/CN.9/526 (May 9, 2003).

183. Rotterdam Rules, *supra* note 8, at art. 47.2(d).

184. *Id.* at art. 47.2(e).

185. See Report of the U.N. Comm'n on Int'l Trade Law on its Forty-First Session, *supra* note 62, at ¶ 146 (expressing concerns at the discussion of the final draft).

186. See, e.g., the discussion on the extension of the seaworthiness obligation and the alteration of the overall risk allocation between the carrier and cargo interests. UNCITRAL Working Group III, Report of Ninth Session, *supra* note 19, at ¶ 43; UNCITRAL Working Group III, Report of Twelfth Session, *supra* note 56, at ¶ 149.

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for cargo insurance, primarily because P & I clubs operate on a mutual basis without any concern for generating profits for their shareholders.<sup>187</sup> If this theory holds true, the cumulative effect of these changes in the underwriting practice will be a reduction in the total cost involved in insuring cargos against marine risks.<sup>188</sup>

The most obvious drawback to this argument is the absence of supportive empirical evidence. Such data does not exist in any useable form, nor has anyone publicly attempted to collate existing data. Insurance companies might have the information but they do not openly share the details of actuarial studies that form the foundations of their premium calculations. Alternately, insurance companies may have already decided that the value of such information is not worth the cost of gathering it.<sup>189</sup> Further, measuring the potential impact on the liability of the carrier arising from the Rotterdam Rules might not be straightforward. Apart from removing the navigational error defense, the Rules introduce several other fundamental changes in the liability regime, including extending the carrier's duties in terms of providing a seaworthy ship,<sup>190</sup> and also affording the carrier new defenses relating to FIOSST clauses and environmental protection.<sup>191</sup> Given the magnitude of the changes introduced in the liability system, it is indisputable that quantifying the precise impact of the changes on the carrier's liability will be a very difficult, if not impossible, task, regardless of any general consensus on the merits of such a study.

One might go even further to suggest that gathering such data *ex ante* in a way that will be useful for insurance companies in assessing their exposure would also be a very challenging task even if the Rotterdam Rules were to gain worldwide recognition. Fundamentally, this is because Article 80.1 of the Rotterdam Rules enables the parties to provide for greater or lesser rights, obligations and liabilities than those imposed by the Rules when they enter into a volume contract. It is estimated that about 90 percent of containerized cargo in the world moves under volume contracts, meaning that in those cases it is

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187. Robert Hellowell, *Less-Developed Countries and Developed Country Law: Problems from the Law of Admiralty*, 7 COLUM. J. TRANSNAT'L L. 203, 212 (1968). Similar sentiments were echoed in *Cargo Liability Study*, U.S. Dep't of Transp. 1975 (YS-32004), at 65, where it was stated that P & I clubs utilize around 85-90 percent of their premium income for the payment of compensation, whilst this amount is a little more than half for the commercial insurers.

188. If taken to its natural conclusion, the carriers will pass on the increase in their liability insurance to the shippers, and ultimately consumers, in the form of an increase in freight rates. However, the cost to society as a whole for the carriage of cargoes will still be less, mainly because the increase in freight rates will be quite modest considering the reduction in the cost of cargo insurance.

189. A similar point was made by Professor Michael Sturley when discussing the insurance implications of moving from Hague-Visby to the Hamburg regime. Michael F. Sturley, *Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments about Hague, Visby and Hamburg in a Vacuum of Empirical Evidence*, 24 J. MAR. L. & COM. 119, 148 (1993).

190. See Rotterdam Rules, *supra* note 8, at art. 14.

191. See *id.* at arts. 17.3(i), (n).

conceivable that parties may contract out of most of the liability provisions of the Rotterdam Rules (except for the “super-mandatory” provisions).<sup>192</sup> Assuming that most of the trade would be carried out under volume contracts that would essentially be subject to different liability regimes, trying to collate data to reveal the impact of the implementation of the Rotterdam Rules would be like searching for a needle in a haystack. Another factor that might cause serious difficulties in terms of gathering data to assess the impact of the Rotterdam Rules (even following their adoption) is the possibility that national courts might construe and apply the Rules differently.<sup>193</sup> Although this risk is inherent in any international convention,<sup>194</sup> the risk is aggravated with respect to the Rotterdam Rules because of the existence of several legal concepts that are novel to international regimes on carriage of goods by sea, such as the conflict of conventions rules<sup>195</sup> and the extensive delivery provisions.<sup>196</sup>

Regardless, on a practical level it is doubtful whether the assumptions upon which the insurance argument is based will hold sway in the real world of shipping and insurance. Let us first turn to the proposition that adoption of the Rotterdam Rules will result in a decline in cargo insurance premiums. This bold statement perhaps over-simplifies the risk assessment and premium calculation processes. These processes are very complicated<sup>197</sup> and can be influenced by various external factors such as market conditions and competition for market share. The argument, however, is based simply on the premise that cargo insurers will have an increased prospect of recovery from the carrier because the extent of the carrier’s liability has been expanded under the Rules. Undoubtedly, the availability of recourse action against the carrier will be a relevant factor in determining the amount of the premium, but it is by no means certain that the prospect of recovery for cargo insurers will increase dramatically under the Rotterdam Rules. The reasons for this are considered below in turn.

First, as indicated before, the Rotterdam Rules enable the parties to a volume contract to create a different liability regime by contracting out of most of its provisions. Thus, it is conceivable that carriers might offer better freight rates to cargo interests who agree to accept a liability regime with terms more favorable to the carrier under a volume contract arrangement. In that case, the cargo interests will benefit from a freight discount but the position of their cargo insurer will not necessarily be enhanced in terms of recovery prospects against

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192. See *id.* at art. 80.4 (referring to the rights and obligations provided in arts. 14(a)-(b), 29, 32).

193. See, e.g., *infra* Part II (discussing the interpretation of arts. 1.1, 12, 26, 82).

194. See generally Patrick Griggs, *Obstacles to Uniformity of Maritime Law*, 34 J. MAR. L. & COM. 191 (2003).

195. See *infra* Part II (discussing the Rotterdam Rules, *supra* note 8, at arts. 26, 82).

196. See Rotterdam Rules, *supra* note 8, at arts. 45(c), 46(b), 47.2(a).

197. For a recent study on the subject, see VITALIY DROZDENKO, *PREMIUM CALCULATIONS IN INSURANCE ACTUARIAL APPROACH* (VDM Verlag Dr. Muller Aktiengesellschaft & Co. KG 2008).

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the carrier.

Second, uncertainties regarding the prospect of recovery from the carrier can arise from the complex conflict of other conventions' provisions with the Rotterdam Rules. This is best illustrated by the following hypothetical. Assume that the assured is a German exporter who purchases computer games from a factory in Mongolia to be delivered to its shop in Bonn, Germany. Also assume that the cargo is insured against all risks and that a multimodal transport operator ("MTO") has made all transport arrangements. Assume further that either China, the Netherlands or Germany have become contracting states to the Rotterdam Rules.<sup>198</sup> The goods are placed in a container and loaded onto a lorry in the factory in Mongolia. The goods are then brought to Shanghai where the lorry is loaded on a Ro-Ro (roll on-roll off) ship to Rotterdam. The lorry then continues by road to its destination in Bonn. Upon delivery, imagine that the cargo is damaged but it proves impossible to localize the damage. The cargo interest will possibly recover from its cargo insurer who will in turn try to recover this amount from the MTO.<sup>199</sup> At this juncture difficulties emerge, as both the CMR<sup>200</sup> and the Rotterdam Rules<sup>201</sup> apply to this shipment. This unfortunate conflict between these international regimes would not be resolved by Article 82(b) because of the limited remit of this proviso, which serves to resolve only disputes arising out of cargo, loss, damage, or delay in delivery that occurred in the course of the sea carriage of the road cargo vehicle, on which the cargo remained loaded.<sup>202</sup> Thus, it will be left to the courts to decide whether the Rotterdam Rules or the CMR will apply. The solution adopted might vary from jurisdiction to jurisdiction, adding another complexity for the cargo insurer, who might wish to pursue the MTO in a recourse action.

Lastly, we should not lose sight of an inherent restriction that cargo insurers face when engaging in recourse actions of this nature. In the case of loss or damage to the goods, cargo insurers usually only manage to recover a proportion of the payment they make to their assureds from the carrier, simply because the insured value of the goods is higher than the limits that carriers enjoy under international carriage regimes. While the Rotterdam Rules increased the limits of the carrier's liability from what was previously allowed under the Hague-Visby Rules,<sup>203</sup> this increase is minimal, since the Special Drawing

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198. See Rotterdam Rules, *supra* note 8, at art. 5.1.

199. In such a scenario, the MTO might have a recourse action against subcontractors as well.

200. The CMR Convention will be relevant here because the overall carriage contact involves an international road transport to a contracting state (Germany), which also entails a ro-ro transport leg to which the CMR applies by virtue of CMR, art. 2 § 1. Within the context of the CMR Convention, the sea carriage may be viewed as incidental to the road carriage.

201. Rotterdam Rules, *supra* note 8, at arts. 1.1, 5.1.

202. See *infra* Part II.

203. Compared to the limits specified in the Hague-Visby Rules, the increase is in the region of 40 percent. See Rotterdam Rules, *supra* note 8, at art. 59.

Rights' (SDR) purchasing power is likely to erode over time.<sup>204</sup> In fact, one study demonstrated that from 1976 until 1996, the purchase power of the SDR dropped on average, 58 percent in developed countries like Canada, Germany, Japan, the United Kingdom, and the United States.<sup>205</sup> By extension, it is unlikely that worldwide implementation of the Rotterdam Rules would yield a significant advantage for the cargo insurers in financial terms through recourse actions.

The second part of the insurance argument presupposes that the increase in the cost of P & I cover will be less in comparison with the increase in the cost of cargo insurance. The nature of P & I cover and the practices adopted by the clubs, however, casts doubt on this hypothesis. A cursory glance at the claims profile of large P & I clubs reveals that cargo claims form a vast majority of the claims submitted to a club.<sup>206</sup> If, as generally acknowledged, the implementation of the Rotterdam Rules increases the number of cargo claims coming to the clubs, the cost of P & I insurance inevitably will rise. The degree of increase will depend on the ability of the clubs to spread the risk of loss. Unlike cargo insurers, clubs will not be able to spread their loss by diversifying their insurance portfolios, or even by pursuing other types of businesses. Under the current pooling agreement, a club that is a member of the International Group will retain claims up to £8 million.<sup>207</sup> That the majority of cargo claims will be below this figure limits the prospect for P & I clubs to spread the loss for cargo claims. Of course, in clubs where cargo ships form a smaller proportion of the entered tonnage, the prospect of risk spreading is greater; but this will not be the case for the vast majority of the clubs. In light of the limited prospect of risk spreading, it would not be fanciful to suggest that the increase in the cost of P & I cover might not be as modest as contended.

Another reason to doubt that the implementation of the Rotterdam Rules might result in a modest increase in P & I cover is that the settlement of cargo claims involves huge sums. Statistics suggest that fees constitute around 60 percent of the value of cargo claims submitted to the P & I clubs.<sup>208</sup> A dramatic increase in the amount of cargo claims will increase the fees that clubs pay. This

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204. See Baris Soyer, *Sundry Considerations on the Draft Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage at Sea 1974*, 33 J. MAR. L. & COM. 1, 2, n.6, 14 (Oct. 2002).

205. Baris Soyer, *1996 Protocol to the 1976 Limitation Convention: A More Satisfactory Global Limitation Regime for the Next Millennium?* 2000 J. BUS. L. 153, 155-56 (2000).

206. The reports published by the UK P & I Club, for example, suggest that 80 percent of the claims paid by the Club between 1998-2006 were cargo claims. See *Quality Shipping Co. Risk Profile*, UK P&I Club, Powerpoint (Feb. 2007) (containing relevant data), available at <http://www.ukpandi.com/fileadmin/uploads/uk-pi/LP%20Documents/Quality%20Shipping%20Co%20Profile.pdf> (last visited Mar. 9, 2012). Similar figures have been reported by other P & I clubs.

207. See Pooling Agreement, International Group of P&I Clubs (containing more information on the Pooling Agreement), available at <http://www.igpandi.org/Group+Agreements/The+Pooling+Agreement> (last visited Feb. 15, 2012).

208. See *Quality Shipping Co. Risk Profile*, supra note 206.

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will impede settlement for a modest increase in the cost of cover

Yet another shortcoming of the insurance argument in relation to the cost of P & I cover is that it fails to take into account that the Rotterdam Rules will impact different types of cargo claims differently. For example, the common cause of claims for short delivery is theft or poor tallying or checking on the part of the carrier. Implementation of the Rotterdam Rules is not likely to enhance the legal position of the carrier in relation to such claims. Thus, in practice, the Rotterdam Rules may not affect the number of such claims.<sup>209</sup> Alternately, the Rules may greatly affect routine damage and serious damage claims. Most routine claims are settled by applying a formula that might vary depending on the location and type of commodity in question. It is very likely that the cargo interest will attempt to replace any existing settlement agreements by others more favorable to them if the Rotterdam Rules are implemented, given that the liability of the carrier under the Rules will be extended. Similarly, the elimination of the “navigational error” defense might assist cargo interests by making it rather difficult for carriers to defend against large serious damage claims. Therefore, implementation of the Rules will apparently precipitate an increase in the amount for which the P & I clubs are responsible, especially in the case of routine and serious damage claims. Again, there is no available data enabling calculation of the amount of potential increase in the cost of P & I cover. Much will depend upon the impact of the elimination of the “navigational error” defense. Without this information, the insurance argument regarding the potential increase in the cost of P & I cover may not carry much force, as the increase could be quite modest.

The above analysis and the absence of statistical and empirical data undermines the argument that implementation of the Rotterdam Rules will enhance efficiency by reducing the cost of insuring carriage of goods by sea. Indeed, there are reasons to believe that implementation of the Rules might *increase* the potential liability of the third parties (parties other than the cargo interests, carriers, and their insurers). One response of such parties may be to purchase additional liability insurance, possibly even without a careful assessment of the need for such coverage. Of course, this is mere speculation, but if it were common practice the cost of insurance associated with international trade would undoubtedly rise. In these cases, three groups of parties would likely be affected by changes contained in the Rotterdam Rules. These are multimodal transport operators, subcontractors, and freight forwarders. The potential impact of the Rotterdam Rules on the liability of these parties and the respective insurance implications will be considered next.

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209. Similar observations were made in the context of the Hamburg Rules. See Charles Goldie, *Effect of the Hamburg Rules on Shipowners' Liability Insurance*, 24 J. MAR. L. & COM. 111, 113 (1993).

*i. Multimodal Transport Operators*

Multimodal transport operators normally contract with the cargo interests by using standard multimodal bills of lading. Such documents set out the liability regime governing the relationship between the parties in the absence of any mandatory application of international convention or national law.<sup>210</sup> Therefore, if a multimodal transport operator issues a multimodal bill of lading to a German trader exporting computer games from Mongolia to Bonn for Lo-Lo transport (load on-load off carriage) via Rotterdam, the bill of lading will likely dictate that for damage—e.g., to the cargo caused during the road carriage from the Mongolian warehouse to the Shanghai port, by terminal handlers at the Shanghai port, or at the discharge port in Rotterdam—the liability regime applied to the multimodal transport operator will be the one set out in the bill. This would apply in the absence of any mandatory international or national law.

Most multimodal bills of lading, by making full use of freedom of contract, will afford a favorable liability regime for multimodal transport operators by listing a generous list of exclusions that vastly outnumber the exclusions in most international carriage regimes like the Hague-Visby Rules. For example, clause 9(3) of the COMBICONBILL 95 stipulates that:

The Carrier shall . . . be relieved of liability for any loss or damage if such loss or damage arose or resulted from:

- (a) The wrongful act neglect of the Merchant.
- (b) Compliance with the instructions of the person entitled to give them.
- (c) The lack of, or defective conditions of packaging in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or when not properly packed.
- (d) Handling, loading, stowage or unloading of the goods by or on behalf of the Merchant.
- (e) Inherent vice of goods.
- (f) Insufficiency or inadequacy of marks or numbers on the goods, covering, or unit loads.
- (g) Strikes or lock-outs or stoppages or restraints of labor from wherever cause whether partial or general.
- (h) Any cause or event which the Carrier could not avoid and the consequences whereof he could not prevent by the exercise of reasonable diligence.

The multimodal transport operator might also benefit from a presumption in terms of the burden of proof when seeking to rely on some of these defenses.<sup>211</sup>

210. Most multimodal transport contracts adopt a liability system whereby the liability of the carrier depends on the location of the loss or damage. They apply either the relevant international convention regulating that particular leg of transit (if it can be proven that the loss or damage occurred during such leg), or they apply more general contractual provisions of the contract of carriage. This system is commonly known as the “network liability system.” See, e.g., COMBICONBILL 95, cls. 9, 11 (1995), available at [https://www.bimco.org/en/Chartering/Documents/Bills\\_of\\_Lading/COMBICONBILL.aspx](https://www.bimco.org/en/Chartering/Documents/Bills_of_Lading/COMBICONBILL.aspx) (last visited Mar. 30, 2012).

211. See *id.* at cl. 9(6) (“When the carrier establishes that in the circumstances of the case, the loss or damage could be attributed to one or more of the causes or events, specified in (c) to (g) of

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The underlying reason behind the introduction of a transport operator-friendly liability regime is to enable the operator to restrict its potential liability to the level of indemnity that it will be able to recover from its subcontractors (like the road carrier and terminal handlers at Shanghai and Rotterdam), in the event that it has to settle a claim brought by the cargo interests.

The implementation of the Rotterdam Rules might, however, affect the operations of the multimodal transport operators differently. Turning back to the hypothetical scenario, if the sea carriage is a Lo-Lo carriage operation, the Rotterdam Rules will apply to the entire voyage from Mongolia to Bonn, including the road carriage in China and terminal operations at both Shanghai and Rotterdam (assuming of course that China, the Netherlands, or Germany become party to the Rotterdam Rules).<sup>212</sup> In that case, the Rotterdam Rules will form the basis of the recourse action that multimodal transport operators might use against maritime-performing parties,<sup>213</sup> like the terminal handlers, but the position in relation to non-maritime performing parties, like the road carrier, will be rather complex from the multimodal transport operator's perspective. While the multimodal transport operator's liability to the cargo interest will be determined on the basis of the Rotterdam Rules for loss of or damage to cargo suffered during this leg of the voyage,<sup>214</sup> the contractual relationship between the multimodal transport operator and the road carrier will be determined by Chinese standard road carriage terms or Chinese local law, which might afford greater protection to road haulers than the Rotterdam Rules.<sup>215</sup> Potentially, this might expose multimodal transport operators to greater liability than under the current regime, which would raise the cost of their liability insurance.

*ii. Subcontractors*

Subcontractors' operations will be affected by the implementation of the

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sub-clause 9(3), it shall be presumed that it was so caused.”).

212. Rotterdam Rules, *supra* note 8, at arts. 1.1, 5.1, 26.

213. Article 19.1 of the Rotterdam Rules stipulates:

A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defenses and limits of liability as provided for in this Convention if:

The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage. Rotterdam Rules, *supra* note 8, at art 19.1.

214. Rotterdam Rules, *supra* note 8, at arts. 1.1, 5.1, 26.

215. The road carriers will also enjoy the protection of the circular indemnity clauses in the multimodal bill of lading, which will prevent cargo interests from bringing a claim directly against them.

Rotterdam Rules, particularly those who are classified as maritime performing parties.<sup>216</sup> In the hypothetical example in Section (i), above, the Rules treat Shanghai and Rotterdam terminal operators as maritime performing parties. Under present rules such parties operate under a terminal handling agreement, which determines the multimodal transport operator and their liability. The striking feature of this contract is that the parties have complete freedom to determine the scope of the liability regime. In practice, more often than not, the handling agreement replicates the liability provisions expressed in the multimodal transport operator's bill of lading. Such subcontractors are also usually protected against cargo claims that could be proven to have occurred during their stage of the transit by "circular indemnity clauses."<sup>217</sup>

The implementation of the Rotterdam Rules will do away with the freedom of contract such subcontractors enjoy. As a maritime performing party under the Rotterdam regime, terminal operators will be jointly and severally liable to the cargo owner together with the carrier and to the same extent as the carrier for events occurring during the period between the arrival of the goods at the loading port and their departure at the discharge port if they performed their activities with respect to the goods in a port of a Contracting State.<sup>218</sup> Further, circular indemnity clauses or similar clauses designed to prevent cargo interests from bringing a claim against terminal operators will be void under Article 79(1) of the Rules.<sup>219</sup> It is apparent that being subject to the Rotterdam regime will not only potentially increase the amount of their liability, but will also present terminal operators as a more attractive target for the cargo interest. It is likely that liability insurers providing cover to such terminal operators<sup>220</sup> will be wary

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216. See definition of maritime performing party, *supra* note 42.

217. See e.g., COMBICONBILL 95, cl. 14(3) (stating that "[t]he Merchant undertakes that no claim shall be made against any servant, agent or other persons whose services the Carrier has used in order to perform this Contract and if any claim should nevertheless be made, to indemnify the Carrier against all consequences thereof.").

218. See Rotterdam Rules, *supra* note 8, at arts. 19-20.

219. This provision reads:

Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

- (a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;
- (b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or
- (c) Assigns a benefit of insurance of the goods in favor of the carrier or a person referred to in article 18.

Rotterdam Rules, *supra* note 8, at art. 79(1).

220. Liability insurance for terminal operators can be obtained directly from the commercial market or from the TT Club, which is a mutual association providing liability, property and equipment insurance coverage to marine terminal, stevedores, inland clearance depots, river terminals, container freight stations, container storage depots and airfreight handling terminals (this type of cover is also known as "cargo handling facility cover").

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of the prospect of being targeted more often than they are at the moment—resulting in the increased cost of liability insurance.

*iii. Freight Forwarders*

Freight forwarders play a significant role in the context of multimodal transport operations. It is common for a shipper of goods to appoint a freight forwarder whose main function will be to appoint a carrier (usually a multimodal transport operator) who will make arrangements with subcontractors such as terminal operators, road carriers and ocean carriers for the carriage of the goods. In contemporary practice, freight forwarders appear in multimodal bills of lading as the “shipper” even though they enter into the contract with the carrier in question to the account of their customer,<sup>221</sup> thereby protecting themselves against actions that might be brought by carriers for breaches relating to the contract of carriage, such as failing to inform the carrier of the dangerous nature of the goods shipped.

However, under the Rotterdam Rules, the freight forwarders’ legal position will be radically different. If the current practice continues and freight forwarders continue to accept being named as “shipper” in the transport document or electronic record, as a documentary shipper<sup>222</sup> they will be subjected to the obligations and liabilities imposed on the shipper<sup>223</sup> and will at the same time be entitled to the shipper’s rights and defenses.<sup>224</sup> This will make freight forwarders directly responsible to the carrier. Most importantly, from an insurance perspective, the freight forwarders shall bear unlimited liability for incorrect information provided to the carriers.<sup>225</sup> In theory, as documentary shippers freight forwarders might retain a recourse action against the real shipper. In practice, this right might well prove superficial for various reasons such as insolvency of the real shipper or judicial difficulties in pursuing the real shipper in certain jurisdictions.<sup>226</sup> The logical inference is that insurers will increase liability premiums on freight forwarders as a result of the unlimited liability they would possess as documentary shippers under the Rules.

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221. In its most straightforward form, the relationship between a freight forwarder and its customer is one of agency. *See also* David A. Glass, *FREIGHT FORWARDING AND MULTIMODAL TRANSPORT CONTRACTS*, at ch. 2 (LLP 2004).

222. Rotterdam Rules, *supra* note 8, at art. 1.9.

223. *See* Rotterdam Rules, *supra* note 8, at arts. 27-29.

224. Rotterdam Rules, *supra* note 8, at art. 33.

225. Any term in a contract of carriage that directly or indirectly excludes, limits or increases the liability of the documentary shipper for breach of any of its obligations under this Convention will be void by virtue of Article 79.2(b) of the Rotterdam Rules.

226. The real shipper can be the seller or buyer of the goods, depending on the type of the sale contract. In a Free-On-Board (“FOB”) sale, for example, the buyer, who is based in a foreign jurisdiction, will be the real shipper. Bringing a claim against that party might prove problematic under the regime that governs.

### B. Other Transaction Costs

Undoubtedly, implementation of the Rotterdam Rules will induce major changes in the shipping industry, not only in legal terms but also financially. Parties will need to update the contracts of carriage, related documents, and underlying contracts (e.g., contracts of sale to conform to the Convention's terms. New transport documents or electronic transport records will need to reflect the requirements of the new Convention. These will specifically need to address, among others: (i) the pure maritime or the "maritime plus" scope of application of the Rotterdam Rules, (ii) the extended scope of the information to be included in the contract particulars (compared to the volume of information required by the Hague regimes),<sup>227</sup> and (iii) the "delivery clause" requirement in Article 47.2. This is a one-off expense the shipping industry will incur, but it is absolutely necessary for the operation of the Convention.

Further, carriers and shippers wishing to derogate from the terms of the Rotterdam Rules under a volume contract cannot benefit from standardized contracts. They will bear the recurrent expenses of individually negotiating their volume contracts and terms that deviate from the Rotterdam Rules, as well as the costs of drafting tailor-made documents to meet the requirements of the Rotterdam Rules.<sup>228</sup> If the contract is not individually negotiated, they will have to produce volume contracts containing a prominent statement that the contract opts-out of the Rotterdam Rules, and they will also have to prominently specify the sections of the volume contract that contain the derogations.<sup>229</sup> Similarly, parties to a volume contract wishing to incorporate an exclusive choice-of-forum or arbitration agreement will incur the additional expenses of either individually negotiating such a clause or customizing the volume contract to include a prominent statement that there is an exclusive jurisdiction or arbitration clause. They will also need to specify the sections of the volume contract that contains that clause.<sup>230</sup> An unfortunate difficulty with such derogations and clauses is that the Rotterdam Rules do not define the term "prominent," despite raising this issue during negotiations.<sup>231</sup> Litigation expenses may increase the aforementioned costs until the courts authoritatively resolve this issue.

Moreover, given that third parties, such as consignees or buyers, will only be bound by the derogations from the terms of the Rotterdam Rules included in

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227. Compare Rotterdam Rules, *supra* note 8, at art. 36, with the minimal requirements set forth in Hague and Hague-Visby Rules, *supra* notes 2-3, at art. III, r.3.

228. Rotterdam Rules, *supra* note 8, at art. 80.2.

229. *Id.* at arts. 80.2(a)-(b).

230. *Id.* at arts. 67.1, 75.3.

231. UNCITRAL Working Group III, Report of Fifteenth Session, *supra* note 55, at ¶ 84. See also Honka, *Validity of Contractual Terms*, *supra* note 170, at 343 (interpreting the term as "particularly noticeable"); Sturley et al., THE ROTTERDAM RULES, *supra* note 10, at ¶ 13.054 (providing a similar interpretation, i.e., that a prominent statement must be written in a form that attracts the reader's attention, such as in bold or large, capitalized letters).

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a volume contract meeting the strict preconditions of Article 80.5, the practices related to the underlying contracts, such as contracts of sale, will need to be revised in order to correlate with the Rotterdam Rules. For instance, a CIF seller or shipper may wish to enter into a volume contract that opts-out of the Rotterdam Rules while binding the buyer in the process. If so, it will bear the expense of ensuring that it or the carrier provides information to the CIF buyer prominently stating that the volume contract deviates from the Convention. It will also bear the expense of securing the buyer's express consent.<sup>232</sup>

The new regime will likely provoke increased transaction costs. Whether the recurrent transaction costs would be such that the efficiency expected of the introduction of the new rules will be eroded remains to be seen.

## VI. CONCLUSION

The analysis carried out in this Article demonstrates that a number of significant benefits will emerge, especially in terms of modernizing the rules governing international contracts, should the Rotterdam Rules gain international recognition. It is also undeniable that the Rules would enhance certainty in international trade by establishing one regime that applies to "wet multimodal" contracts of carriage and defining rights and obligations of carriers, shippers and consignees in a clear fashion under a contract of carriage, and by making obscure doctrines such as "quasi-deviation" and "fair opportunity" redundant. Further, a more balanced liability regime, which extends the carrier's seaworthiness obligation and eliminates the "navigational error" defense, will assist in developing international trade in an equal manner by affording greater protection to cargo interests from developing countries.

This is not to suggest that the Rotterdam Rules will emerge unburdened by any difficulties. The Rules contain several provisions, particularly regarding the scope of application and some of the liability provisions, which are rather vague and likely to generate a certain degree of ambiguity, contrary to their stated objective of achieving legal certainty. In similar fashion, the conflict provisions of the Rotterdam Rules are flawed, failing to identify how potential conflicts between the Rules and other international conventions, such as CMR, should be resolved. It is also doubtful whether harmonization can be achieved given that provisions on jurisdiction and arbitration are not mandatory, allowing member states to opt-out of this section of the Rules. There are legitimate concerns in the sector that the carriers might exploit cargo interests by making use of volume contracts despite the safeguards that the Rules have attempted to establish.<sup>233</sup> It

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232. Rotterdam Rules, *supra* note 8, at arts. 80.5(a)-(b).

233. See, e.g., European Shippers' Council, *View of the European Shippers' Council on the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea also known as the 'Rotterdam Rules'*, *supra* note 12 (discussing concerns).

is also a serious possibility that the introduction of the Rules will lead to an increase in transaction costs, while a corresponding reduction in the cost of insurance is more doubtful. This Article submits, however, that the implementation of the Rules might lead to an increase in the liability of maritime performing parties such as terminal handlers, multimodal transport operators and freight forwarders, and any such increase might lead to irrational purchase of liability insurance, thereby increasing the cost of international carriage of goods by sea.

Where does this leave states currently considering whether or not to ratify the Rules? Although the answer is not easy, ultimately, states will have to assess the advantages and disadvantages of acceding to this new international regime designed for international carriage of goods by sea in the new millennium, based on their national priorities. This Article takes the stance that some of the objectives identified in the Preamble of the Rules have been realized to an extent. Whether this will be deemed to be adequate by the majority of the international community remains to be seen. In the coming months, the position taken by the major shipping nations on the Rules will be critical in determining the future of the new regime. So far, only the United States has stated that it intends to ratify the Rules.<sup>234</sup> Canada has openly declared its opposition.<sup>235</sup> China has not issued any official statement. The United Kingdom has established a Consultative Committee, which, in consultation with the industry, is examining the possibility of acceding to the Convention. Thus far only Spain has ratified the Rules.

Thus, the Rotterdam Rules are unlikely to gain sufficient international recognition to replace the Hague-Visby regime in the immediate short-term. The nightmare scenario is that the Rules enter into force by attracting the minimum number of ratifications required (i.e., twenty) without securing the endorsement of major shipping nations. This would inevitably lead to further diffusion of the sea transport laws, adding another regime to the complex array of the international conventions that currently regulate sea carriage. While a distinct possibility, this outcome hopefully can be avoided.

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234. See, e.g., Mary Helen Carlson, *U.S. Participation in Private International Law Negotiations: Why the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea is Important to the United States*, 44 *TEX. INT'L L.J.* 269, 272-73 (2009).

235. See Notice to Industry on the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules") (Can.), available at [http://www.mcgill.ca/files/maritimelaw/Notice\\_to\\_industry\\_Rotterdam\\_Rules.pdf](http://www.mcgill.ca/files/maritimelaw/Notice_to_industry_Rotterdam_Rules.pdf) (last visited Sept. 1, 2011).