ROTTERDAM RULES
By Antonio Zuidwijk.

Generally, lawyers are publishing notes on this Convention, but in this case, instead of a technical presentation of a lawyer, I transcribe the explanation I made as a layman in a presentation for students of an Argentine University at the begin of June 2011.
I started with the following questions:
1° What are the Rotterdam Rules?,
2° Why are new rules needed?
3° What problems have arisen in the world with the introduction of containers and the advance of Electronic Commerce?
4° How do these problems affect transport costs and transactions?
5° How was the "process" to get to RR?
6° What analysis should South American countries make to decide whether they should ratify or reject this International Convention?

40 Years ago the widespread use of containers began and since more than 20 years the use of Information Technology is advancing worldwide. With the use of containers the face of transport has changed in the whole world and the way transport chains are hired, has undergone a complete change. The container made it possible to have efficient Intermodal Transport and from Segmented Transport, where each segment had to be hired separately, we came to contracts that cover much or many times the whole transport chain from origin to destination. It is very important to take note that Intermodal Transport greatly lowered transportation costs. In addition, the use of Information Technology improved transactions and electronic commerce became a reality. From shipments of "Port to Port" with a paper bill of lading (B / L's) and many individual land-transport contracts, we now have Intermodal Transport "house to house" with the use of electronic documents. But these improvements also brought many problems of interpretation of laws and rules and in many parts of the world. Now very often the relations between all participants in a commercial transaction and the related transport chain, are unclear. Laws and regulations for ground transport and transfer between modes that take place in terminals, are totally different in many parts of the world. In the absence of clear rules, conflicts and disputes over interpretations of rights and obligations of the parties showed up. Almost all industrialized countries solved these problems over time and adapted their laws and rules to support these important changes. Europe developed Regional Conventions, but in most developing countries no changes were made at all in their old laws. During 40 years of constant and significant changes many attempts were made to develop globally applicable rules. But never agreements could be reached and always somebody managed to put a stick in the wheel. So now many problems have accumulated, which are very difficult to fix in one step. But the Rules of Rotterdam aim to provide a uniform framework for the whole world and offer the possibility to arrive at an uniform and modern legal system, which regulates rights and obligations of shippers, carriers and consignees.

The text of the Convention was adopted by the General Assembly of the United Nations on December 11, 2008 and was opened for signature by countries in Rotterdam in
September 2009. So far (Sept.2011) it received 24 signatures and one ratification. (Spain January 11). The RR will take effect 1 year after the 20th ratification. It will apply to contracts for international shipments "port to port" and also to a contract of carriage "door to door" (or "point to point"), comprising an international "leg" by sea. Many are "against" the RR: To mention some: Prominent lawyers in the U.S., Canada, Europe and South America, the European Shippers Council, Freight forwarders in Britain,. But there are as many or more in favor of the Rules: Lawyers from around the world, as prominent as the former group. The Shippers 'Council of the United States (National Industrial Transportation League), which can demonstrate studies they conducted, which are much more important than the European Shippers’ Council. And almost all organizations that bring together Maritime Carriers and their Mutual Insurance System, PROTECTION & INDEMNITY CLUBS, (P & I Clubs) which play an important role in shipping.

If there are so many in favor and so many against, how should the process be to decide what is best for our country? The correct decision can only be taken after a broad and transparent debate, to clarify all the substantive issues. After a thorough study, somebody must weigh "pros" and "cons" and then choose the best. Those who must decide, should begin their analysis by reading the words of the Secretary General of the United Nations in the General Assembly of 1996, when the "Model Law of Electronic Commerce" was adopted. This Model Law was the result of a successful joint action of UNCITRAL (United Nations Conference on International Trade Law) and the CMI, Comité Maritime International, which brings together lawyers from maritime transport organizations and their insurers. It was the great success that the joint efforts of UNCITRAL and CMI have shown during the discussions to develop the Model Law on Electronic Commerce, which inspired the Secretary-General to recommend them to continue to work together. He gave an overview of the serious problems that existed in 1996 (and still exist). He noted the lack of clear rules that prevent the efficient flow of goods in the world. He stressed that there are many loopholes that cause serious problems that increase transaction costs and do damage to many countries. Therefore he ordered UNCITRAL to try to continue its contacts with the C.M.I and to consider in which areas of Transport Law, which now are not covered with an international liability regime, they could work together to find ways that could lead to greater uniformity.

At this point we may put the question: What rules do we have now in the world? Although World Trade and Transportation Contracts have changed fundamentally, there are still many countries with laws of the days of horses and carts. Shipping is still governed by the International Convention of 1924, when ships loaded many packages loose in the holds (Breakbulk). These rules do not cover the needs of Multimodal Transportation that now is the norm in many parts of the world. That's why the Secretary General of the United Nations recommended in 1996 to begin a new joint effort of the CMI and UNCITRAL. During 2 years a special committee formed by CMI worked and listened to the views of all participants in modern supply chains. Everyone could contribute opinions and ideas. After those 2 years, C.M.I formulated the basic ideas of the new Convention and handed their work to UNCITRAL with the suggestion how to follow the proceedings. UNCITRAL then worked for 6 years on these proposals.
and listened again to all parties who wanted to contribute ideas. Who are those participating in modern supply chains?

The owners of the merchandise (shippers) and banks involved in the purchase and sale transactions.

Shippers

Forwarders (freight-forwarders),

Carriers,
   a) contractual carriers
   b) effective carriers,

Insurers,
   a) insuring the cargo,
   b) insuring the carrier, (liability insurance).

And there are many "sub-stakeholders", such as terminal operators. They have an important role in the connection between the various modes. All these "stakeholders" have different and sometimes conflicting interests and the Rotterdam Rules sought a balance between those interests, to come to the best solution for the public interest. A convention is always a "trade off". A compromise between parties. We must "give and take" and find the lowest total cost for the system.

Let's see briefly how the system operated before the widespread use of containers which together with electronic commerce brought great changes and how things work now.

Before the "container" existed, the shipowner / sea carrier only offered services on board the ship. Transport was from "hook to hook" (beginning under the hook in the loading port and finishing under the hook in the port of discharge). The maritime carrier was afraid to extend his operation on land and their P & I Clubs (mutual insurance) did not cover ground operations. The freight-forwarder only acted as agent for the exporter / importer, offering the usual ancillary services. The Shipper had to make separate and individual "contracts of carriage" for each segment. Remember that in land transport each country has its own rules, many with rules written in 1890, as is the case in Argentina.

Now let's see what happens in a modern transport chain with the use of a container and we shall take as an example a container with wine going from Mendoza to a city in Germany, close to Frankfurt:
By truck from the vineyard in San Rafael to a rail terminal Palmira, near Mendoza,
By train from Palmira to a station in Buenos Aires.
From there by truck to the Port
By ship Buenos Aires - Rotterdam
By train from Rotterdam to Frankfurt
By truck Frankfurt to Offenbach

In industrialized countries this could be done now with a single contract and clear rules.

But not all countries have clear rules. This container will go through different "regimes of responsibility" according to the modes of transport that are used (trucking, rail or water). There are different laws in certain countries and regions and international conventions for the different modes:
Road transport
Rail transport,
By sea and river / inland waterway
Airways,
Pipelines / ducts.

There are also countries and regions that have rules for transfer terminals. (Ports and Intermodal Terminals)
These different laws and agreements set the rules of the liability of carriers and thus influence their risk, for example, when there are claims for damages or shortages. And in the end the different laws and conventions strongly influence the cost of insurance of carriers and cargo owners. In the case of inland transport and terminal operations in Argentina, claims can be for the value of damaged goods plus lost profits and sometimes even loss of “commercial image”. The final value of a claim can never be predicted. Because of this, the carrier has certain problems in obtaining adequate liability insurance. The same complication he will find in many other "developing" countries. A survey of ALADI in 2007 showed that multimodal transport is practically nonexistent in South America. (Multimodal Transport is a transport that uses more than one mode of transport, but with a single contract from origin to destination, with a single responsible party and with a single transport document).

Many think that there is no Multimodal Transport in the region because there is a lack of infrastructure. This is wrong. There is enough infrastructure to begin with MT, but there are no CLEAR RULES! Nor do Customs rules facilitate multimodal transport. South America has about 6 Regional Conventions for Multimodal Transport, all are different and none of them has an effective implementation. Many countries have their own M.T.Law. The only thing all these legal instruments have in common, is that none of them can be applied in practice. This is the huge difference between South America and Europe, where regional agreements work very well. No country in Europe has a special Multimodal Transport Law, but all have modernized their laws of Transportation.

People in South America should study the results of advanced Intermodal Transportation and the benefits it brought to many countries. It started all in 1956 in the U.S A. where Intermodal Transport began to reduce transport-costs and after 1965 it passed to Europe and from the eighties onwards it advanced worldwide. If you wish to get an idea of the benefits this produced, you must read the studies of Eno Transportation Foundation of the USA, which show with hard numbers how the costs of logistics were reduced in the USA between 1982 and 1991.
Europe made regional conventions for transport by road (CMR), rail (CIM-COTIF) and inland waterways (CMNI), but it took them 30 years of debate. Between 1997 and 2001, U.S.A and Europe made several studies "how to improve intermodal transport between the U.S.A and Europe".

What about the rest of the world? It has been over 45 years since they began the first meetings to find rules for Intermodal Transportation: UNIDROIT (1963) CMI (1969), "Rome" (1970). In 1975 the ICC issued the Rules 298 for Combined Transport. This was not a Convention and its use was not mandatory (Freedom of contract).

In 1980 UNCTAD in Geneva made a CONVENTION FOR MULTIMODAL TRANSPORT. It would be mandatory, but it was impossible to put into practice, and did not receive enough ratifications. After 11 years UNCTAD recognized this and began discussions with the International Chamber of Commerce in 1991 and together they made the UNCTAD-ICC Rules for Multimodal Transport Documents. Again, this is not a Convention and its use is not mandatory (Freedom of contract), but it is widely used among developed countries. However these rules are not applicable in "emerging countries", which have no clear national transport laws.

WHAT RULES DO WE HAVE NOW IN THE WORLD?

Three Conventions on maritime transport, ALL TOTALLY OUTDATED and a multimodal Convention that is impractical and MANY DIFFERENT LAWS OF LAND TRANSPORT IN DEVELOPING COUNTRIES.

Do you think that this is a good basis for efficient flow of cargoes worldwide or do you agree that the Secretary General of the United Nations did the right thing when he ordered his UNCITRAL to sit together with CMI and start to find solutions?

Let’s now see something about the Montevideo Group, which is the main group that is against RR in South America. What is their strongest argument? In the report of a C.M.I. Symposium in B.A. in November 2009 you can see that they mainly reject the value of the limitation of liability of the carrier. They denounce this value as "meager" but this argument has clearly been refuted in several international forums. In this respect I made a presentation at the Ibero-american Institute of Maritime Law in June of this year, where I presented data from studies in the U.S. and Europe of the positive effect that the possibility of limiting the liability of the carrier, has on the final costs of transportation. All international and regional agreements offer this possibility and RR do so as well. But it is important to clarify that the decision whether or not there will be a limitation of liability, depends exclusively on the shipper himself. If a shipper declares the value of the goods, there are no limits of responsibility of the carrier, but probably the shipper will have to pay a higher freight-rate.

The U.S.A. is the country where most research is done on the effects that the costs of transport and logistics have on the economy. Some of these studies are dedicated especially to the effects that the limitation of the liability of the carrier has on the total costs and these studies should be read. Especially the studies made by the Ministry of Transportation (DOT) by order of Congress in 1975 which was updated in 1998.

Congress gave specific orders to D.O.T. to study how the limitation of the carrier's liability works in the total transport costs, to control the transport efficiency and to see if it was in harmony with international rules. DOT should first consider the public interest, then the interests of shippers and only after that the interest of the carriers. D.O.T. had to determine how the final costs of transport are affected by the application of different
regimes of liability of carriers in different modes. It is important to mention some points of the report. On page 25 we read: It is not fair to charge shippers of common cargoes with costs of damages or other losses that shippers have with cargoes of a higher value than usual. And on page 30 a definition to which transport laws should respond: an efficient legal system is one in which the cost of transportation and the cost of loss and damage will be the lowest. The study makes an analysis of the relations between the participants of the transport chain and included how the insurance payments of shippers and carriers work in the final cost. It was concluded that a system that offers the possibility of limiting the liability of the carrier, reduces the total cost in the whole chain and is to the benefit of the economy. The same conclusions can also be found in two other studies:

1) 2001 European Union, title: The economic impact of the liability of carriers in intermodal transport, where they discussed among other things, the values of goods transported in different transport modes.

2) 2001 O.E.C.D. (Cargo liability regime). This study makes recommendations for updating the values of the limitation of liability of the Hamburg Rules. After extensive debate the new Convention set the limitation of 875 SDRs (Special Drawing Rights) per package or 3 SDR per kilo, whichever is greater. What is a SDR? It is a monetary value of the I.M.F. (International Monetary Fund) and it is a basket of four currencies: U.S. Dollar, Pound Sterling, Euro and Yen. The ratio of the value of those currencies that are most used in world trade are reviewed every 5 years.

In the 3 studies you can see, that the insurance premium payable by the carrier depends on the risk he assumes. If he must cover claims of very high values, his insurance costs will rise and insurance costs are very large sums for carriers, which somehow will be transferred to the users. What should then be the goal when developing a system that offers the possibility to limit liability? The carrier should charge a fair price to all shippers and this is achieved if the sets the value of limitation of liability that covers a large percentage of the values of the goods that are normally transported. Shippers whose goods have higher values, may declare this and request a higher limit, probably having to pay a higher freight-rate. The vast majority of general cargo is now transported in containers, often in packages in the range of 50 kilos. All packages are declared in the transport documents. This means that 875 SDR per package of 50 kilos, is equivalent to 875: 50 = 17.50 DEG x kilo. But there are many packages of 25 kilos and then the limitation is equal to 875: 25 = 35.00 SDR per kilo. For packages of 100 kilos it turns out to be 8.75 SDR x kilo and only for a package of 291.8 kilos, per kilo the limitation of 3 DEG per kilo starts to be applied. And this is not a "meager" value, as a table of comparative values of the 2001 study of the European Union, which can be found at the end, clearly shows.

The possibility of limiting the carrier's liability is universally accepted and included in various international conventions. In no region of the world, the inclusion of the limitation of liability of carrier is used as an argument to reject the Rules of Rotterdam, with the exception of the Montevideo Group. I think many are against the RR, without having done a full analysis. Should we not organize a public debate and study carefully all the "pros and cons"? Should we not consider how we can develop multimodal transport in the whole world? Should we not read the history of Intermodal Transport and see what contributions ship- owners made? You can check that Sea-Land, APL and Maersk
were the pioneers that began Intermodal transport, first in the U.S. and then in Europe. You can check with figures how intermodal / multimodal transport has benefited the economies of all countries that enabled its implementation. Once intermodal transport demonstrated its benefits for the economies of the industrialized countries, it began its worldwide advance and gradually conquered most parts of the world, which also benefited. The only exceptions are Africa, South America and parts of Asia. Was it lack of infrastructure? No, sir, it is because clear rules are missing. There is sufficient infrastructure to start Intermodal Transport in most South American countries. If an international agreement such as the Rules of Rotterdam is universally accepted, the maritime carriers will do what they did in core countries: they will bring multimodal transport also to our region and this will "drag" our internal transport-system and thus we will also gradually implement intermodal transport for all our internal transport. (Do not forget that Argentina is a country with long distances). The RR can have a great ultimate benefit to our economy, which must be analyzed. Think a little what happened since 2000 in other emerging countries which "accepted the container "and implemented intermodal / multimodal transport, especially in Southeast Asia, where many countries have benefited a lot with the changes. There can be no doubt about that. Does anybody think what Brazil and Argentina could have achieved if they had agreed to promote the use of containers and the new rules, instead of putting up a great resistance and rejecting them? Possibly many industries that are now in China would be in South America.

In these discussions, many put the interests of their own small circle before the general interest and jeopardize a solution which in the future will favor them also. Now it is important to have fluid multimodal transport in the whole world. Now is the time to begin studies to replace those of 1997 to 2001 "Towards improved Intermodal Transport between USA and Europe" with new studies "TOWARDS BETTER MULTIMODAL TRANSPORT IN THE ENTIRE WORLD." (Not only US-Europe, also in Africa, South America and Asia).

Take into account that 80% of Multimodal Transport in the world has a "sea leg" and after having duly considered all the points, FINALLY PUT THIS QUESTION: What is better: Start with the "complicated" Rotterdam Rules as they are, seek solutions during a few years for the problems that will surely occur and improve as we go? Or do we want to start all over again and repeat all the endless discussions that were made during 48 years, from the 1963 Unidroit meeting to date?

Personally I think that we should deeply study the positive impact that RR will have for our region, considering that 80% of multimodal transport in the world has a "leg of international sea transport".
STUDY 2001 OF THE EUROPEAN UNION.
AVERAGE VALUES PER KILO OF CARGOES AND
LIMITATIONS OF LIABILITY IN EUROS.
RATES SDR / EURO 2001

<table>
<thead>
<tr>
<th>Mode</th>
<th>Value Cargo Per kilo In Euros</th>
<th>Value Limit in Euros</th>
<th>Convention Limit in SDR</th>
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</thead>
<tbody>
<tr>
<td>AIR</td>
<td>44.65</td>
<td>23.12</td>
<td>Warsaw Conv 17.00 SDR</td>
</tr>
<tr>
<td>ROAD</td>
<td>1.62</td>
<td>11.4</td>
<td>CMR 8.33 SDR</td>
</tr>
<tr>
<td>RAILWAYS</td>
<td>0.93</td>
<td>23.12</td>
<td>CIM 17.00 SDR</td>
</tr>
<tr>
<td>INLAND NAVIG.</td>
<td>0.10</td>
<td>2.72</td>
<td>CMNI 2.00 SDR</td>
</tr>
<tr>
<td>MARITIME CABOTAGE</td>
<td>0.88</td>
<td></td>
<td>Hague VISBY IF THERE IS A B/L</td>
</tr>
</tbody>
</table>

Only the limitation of Air-convention is much lower than average value per kilo of cargo transported by air, but few complaints are published about that.