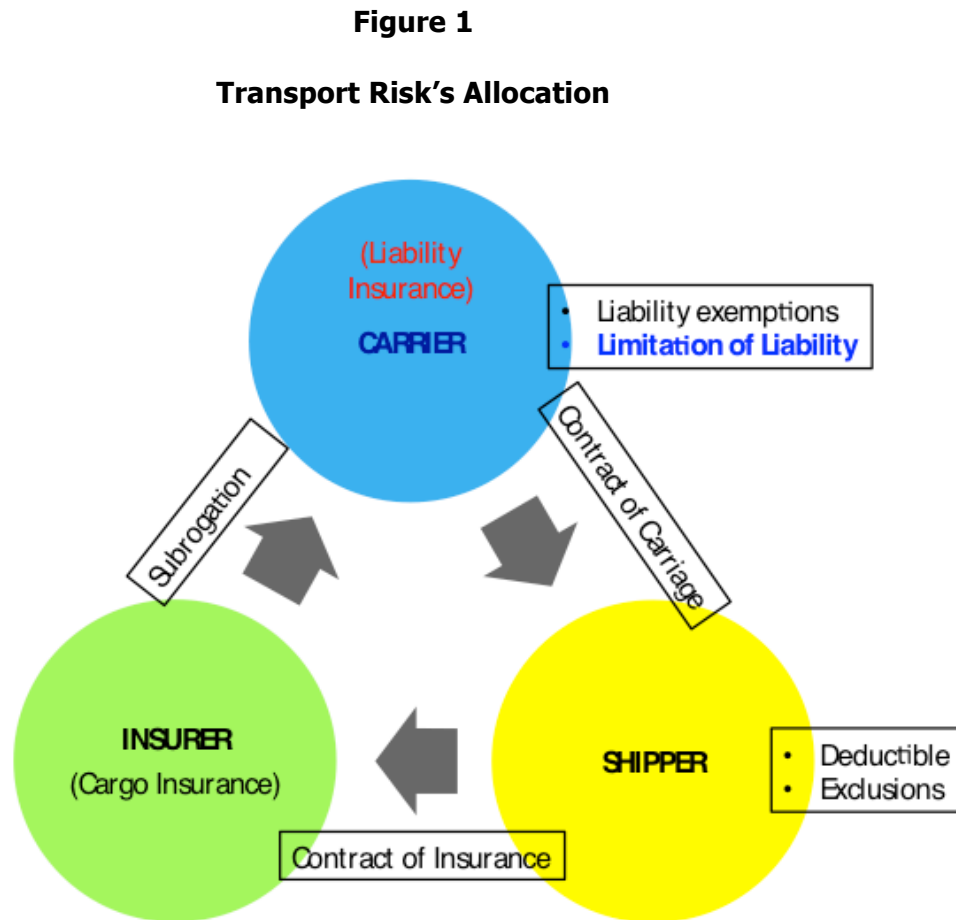


## **The limitation of liability of the carrier from an allocation of risks point of view**

***José Vicente Guzmán***

1. One of the main concerns in different countries about the ratification of the Rotterdam Rules, including Latin American countries as I mentioned in panel 1, resides in the carrier's limitation of liability provided for in this new convention.
2. My personal view is that the limitation of liability should not be merely seen as a matter of law, but rather as a tool for the allocation of the transportation risk's between the parties involved in the operation, from an economic point of view.
3. The limits of liability are an institution of the carrier's liability regulation present in all the international conventions governing contracts of carriage by any mode of transport.
4. Civil liability regimes for damage, loss or delay in delivery of goods in international transport are set out having regard to a policy of allocation of the transportation risks between the parties concerned, such as the carrier, the shipper of the goods, and the insurers (both cargo insurers and carrier's civil liability insurers). Liability limits are one of the ways by which this allocation of risks is presented.
5. Even in air transport of passengers, being human life and integrity much higher values than the goods, the Montreal Convention of 1999 limits the carrier's liability and uses the IMF's SDR as the pattern to calculate the compensation in case of death and injury to passengers.
6. Liability limits are not exclusive of transportation. They are also present in work-related accidents in most of international laws. Additionally, the same principle applies in relation to corporations and limited liability partnerships as a way of limiting the liability of their owners and shareholders.

7. Back into the contract for the carriage of goods, the following figure shows the way in which the transportation risks are allocated between the shipper, the carrier and the cargo insurer:



8. In case of loss or damage to the cargo, the carrier's limitation of liability allows that every party with an economic interest in the transport operation retains a portion of the risk of such loss or damage. These economically interested parties are the shipper (or consignee), the carrier and the cargo insurer. With predictable limits of liability, the carrier is able to know beforehand how much he would have to pay in case of loss or damage to the goods; the cargo insurer will also be able to know how much he would have to pay – by virtue of the contract of insurance –, to either the shipper or the consignee and what value of it he will be able to recover (up to the limit of carrier's liability) from the carrier by way of subrogation. And finally, the shipper (or consignee) will also be able to know, in

advance, how much money he would have to assume by application of the deductible of the insurance.

9. The retention of a portion of the transportation risks by each one of the parties with an economic interest in the transaction means that every one of them will make their best efforts to avoid loss or damage to the cargo. Thus, the shipper will appropriately pack the goods and provide the carrier with complete and accurate information about its nature and care. The carrier will make his best effort to carry and custody the goods to avoid loss or damage to them. And the insurer will implement a good system of risk management with the shipper aimed at choosing diligent carriers.

### **The limits of liability in the Rotterdam Rules**

10. The Rotterdam Rules proposes an increase rather than a reduction regarding applicable liability limits in the case of loss of or damage to the goods. This can be simply noted by making a comparison between the numbers provided for in the relevant provision of the "SDR" protocol, in which the liability limit was established for The Hague - Visby scheme (except in case of declared value of goods) in 666.67 SDR (Special Drawing Rights) per package or unit or 2 SDR per kilogram of gross weight of goods, whichever is higher, with the numbers as provided for in the Rotterdam Rules, namely, 875 SDR (208,33 SDR more than in the Hague – Visby Rules) per package or unit or 3 SDR (1 SDR more than in the Hague – Visby Rules) per kilogram of gross weight of the goods, whichever is higher. Therefore, one can clearly see that the limits under the new convention are higher than those set out by their predecessors.
11. On the other hand, with regard to the applicable liability limit for delay, it should be noted that this situation was not expressly regulated at all in The Hague or in The Hague - Visby Rules (on which it was not clear whether the carrier was liable for delay). In any case, the value set forth in the Rotterdam Rules for this event represents an increase in the amount provided for in the respective provision of the Hamburg Rules.
12. Regarding the calculation of compensation when the shipper has declared the value of the

cargo, the new convention only reflects what its predecessors (Hague, Hague – Visby and Hamburg Rules) have previously stated. In fact, according to Article 59, the declared value will be the applicable limit in this case (Art. 59.1).

13. It is worth noting that the new convention was drafted having regard in this particular to maintain a “balance” between the interests of carriers and shippers<sup>1</sup> and to setting up a regime that provides certainty to the parties to the contract<sup>2</sup>, reasons why consensus was reached to set limits on the amounts raised by the Convention.
14. In any case, from a predominantly empirical point of view, it must be borne in mind that only a few goods frequently transported by sea – having regard to their cost of production – will not be properly covered by the "per package" limitation as provided for in the Convention, that is approximately \$ 1.350 USD per package or unit.
15. It is true that the Rotterdam Rules do not establish a limitation of liability for the shipper, as it does for the carrier's responsibility. However, no one can say that this is a disadvantage of the Rotterdam Rules in front of the Hague Rules, the Hague - Visby Rules or the Hamburg Rules, because all of these conventions neither provide for any limitation of liability of the shipper. So in this particular issue the Rotterdam Rules can not be accused of being in detriment of the legal position of the cargo interests, because they simply maintain the same line of the preceding conventions.
16. Endless arguments, both in favour and against the carrier's limitation of liability set forth in the Rotterdam Rules, can be raised, and have in fact been invoked, as an argument against the new convention. It is not possible to get a uniform position, but an overall approach could be useful.
17. For those countries that have ratified any of the existing conventions, I think that giving a step forward to ratify the Rotterdam Rules should be an easy decision, consistent with their present policy on this particular subject, since as it was seen, the Rotterdam Rules

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<sup>1</sup> Sturley, Michael. "Setting the Limitation Amounts for the UNCITRAL Transport Law Convention: The Fall 2007 Session of Working Group III" in *Benedict's Maritime Bulletin*, Vol. 5, No. 3/4, p. 165.

<sup>2</sup> See *Ibid*, p. 165.

proposes an increase rather than a reduction regarding applicable liability limits in the case of loss of or damage to the goods.

18. Other countries that have not ratified any of the existing conventions have their domestic law drafted with a very similar scheme to that of The Hague or The Hague-Visby Rules. Some countries either have a carrier's limitation of liability in their domestic law or allow such limitation by contract. For these countries, in my view, it would also be a consistent decision to ratify the Rotterdam Rules.
19. Countries that definitively do not accept any limitation of liability in their carriage of goods by sea laws, and have a very strong position against it, face a more difficult decision as to the ratification of the Rotterdam Rules.
20. Since the carrier's limitation of liability provided for in the Rotterdam Rules has been a great concern in some countries, may be a strictly legal analysis is not the right path to make a decision, because the individual point of view of shippers, carriers and insurers is obviously different and contradictory. I think that discussions should be made from a broader perspective: I mean a commercial orientated point of view, whereby the interests of the industry and commerce in general are taken into account. An international uniform regime for the applicable law to the carriage of goods by sea will provide certainty to foreign trade.
21. If the majority of countries with whom a particular country maintains commercial relationships do ratify the Rotterdam Rules, the most reasonable decision would be to ratify them as well. It is more beneficial for a country to get the economic growth brought by the increase of industry and commerce, than the existence of a limitation of liability that, in practice, will only affect a reduced number of goods carried, whose owners, in any case, will always be able to get the protection of cargo insurance.
22. Entrepreneurs, in general, are more interested in the growth of their business than in the recovery of the value of a loss or damage to their cargo. In addition, most of the transport

operations end successfully and cargo arrives safely at its destination and only a small proportion suffers loss or damage.

23. The discussion around the convenience or inconvenience of the Rotterdam Rules should not be focused in a strictly legal discussion. Maybe a broader approach, having regard to all the economic interests involved, bearing in mind that the carrier's limitation of liability is a way of allocating the risks of transportation between the parties economically interested in the operation, and considering the commercial interests of the country as a whole, rather than those of specific groups, will be the best way to reach a better decision.