

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

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Introduction

1. One of the main concerns in Latin America about the ratification of the Rotterdam Rules resides in the carrier's limitation of liability provided for in this new convention. It is not possible to state a uniform position in this respect for the region as a whole, since the situation differs from country to country.
2. There are countries where no limitation of liability is applicable to the carrier, because they have not ratified any of the existing conventions on the carriage of goods by sea, nor their domestic law provides for a limitation of carrier's liability. This is the case of Brazil and Uruguay, where the value of the goods at the port of destination is the maximum limitation of the carrier's liability.
3. Other Latin American countries have ratified either The Hague or The Hague-Visby Rules, so the limits set forth in these conventions become applicable. That is the case of Argentina, Bolivia, Cuba and Peru, which have ratified The Hague Rules, and of Ecuador and Mexico, which have ratified The Hague-Visby Rules.
4. A third group of Latin American countries have ratified the Hamburg Rules, such as Chile, Paraguay and The Dominican Republic.
5. The rest of Latin American countries¹, amounting to approximately a 60% of them, have not ratified any of the existing conventions. In some of them, domestic law allows the carrier to limit its liability by virtue of a contract stipulation. This is the case of Colombia, where a recent case decided by the Supreme Court of Justice put an end to a discussion about this possibility and set the rule that it is valid under Colombian Law that the carrier limits its liability by contract, provided that such limit is reasonable, and not derisory. The court decision makes express reference to the international conventions, including the Rotterdam Rules, as instruments of the international law with reasonable

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¹ According to the definition of the Dictionary of the Real Academia de la Lengua, "Latin American" is the name given to "all American countries colonized by Latin nations, namely Spain, Portugal or France." However, they are usually identified as "Latin" American countries where the Spanish or Portuguese are the official languages, or the languages spoken predominantly by the population. Following these guidelines, for the purposes of this document we have deemed as Latin Americans the following countries: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Paraguay, Panama, Peru, Puerto Rico, Dominican Republic, Uruguay and Venezuela.

limitations of liability for carriers of goods by sea².

The limits of liability as an instrument for the allocation of the transportation risks

6. 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.
7. 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. They are also present in the Hamburg Rules and the 1980 Geneva Convention on Multimodal Transport. In Latin America, Decisions 399 (International Carriage of Goods by Road) and Decisions 331/393 (Multimodal Transport) of the Andean Community, also establish liability limits applicable to the carrier.
8. The Agreement on Multimodal Transport of MERCOSUR (MERCOSUR/CMC/DEC N°15/94), article 13, establishes limits of liability applicable to Multimodal Transport Operators for damage to or loss of goods carried. Those limits were set by each one of the States Parties of MERCOSUR, namely Argentina, Brazil, Uruguay and Paraguay, in Annex I to this Agreement.³
9. It means that the limitation of carrier's liability is not at all a strange institution in Latin America. But strong voices have been heard against it, in the context of the convenience or inconvenience of the Rotterdam Rules for the region, as it could be evidenced in the 2010 CMI Colloquium held in Buenos Aires.

² Supreme Court of Justice of Colombia; Decision dated 8th of September, 2011 (Ref.: 11001-3103-026-2000-04366-01. M.P. Dr. William Namén Vargas).

³ Article 13 - Unless the nature and value of the goods have been declared by the shipper before the Multimodal Transport Operator has taken custody of the goods, and that have been entered in the Transport Multimodal Document, the Multimodal Transport Operator may not be held liable for any loss of or damage to goods in an amount that exceeds the liability limit established by each State Party in accordance with the statement made by each of them in Annex I, part of this Agreement. Notwithstanding this, States Parties agree that these limits of liability of the Multimodal Transport Operator may be amended by giving the other States Parties notice of the modification.

ANNEX I - LIABILITY LIMIT OF THE MULTIMODAL TRANSPORT OPERATOR

The limit of liability of the Multimodal Transport Operator under Article 13 ° of this Agreement will be:

1 - For Argentina, unless the nature or value of the goods have been declared by the shipper before the Multimodal Transport Operator have taken them under his custody and entered in the multimodal transport document, the responsibility of Transport Operator Multimodal will not exceed, in the event of total or partial loss, damage or delay in delivery of the goods with a value higher than 400 Argentinean pesos gold per kilogram of volume or affected part, or 10 Argentinean pesos gold per kilo of the volume or parts concerned, whichever is greater.

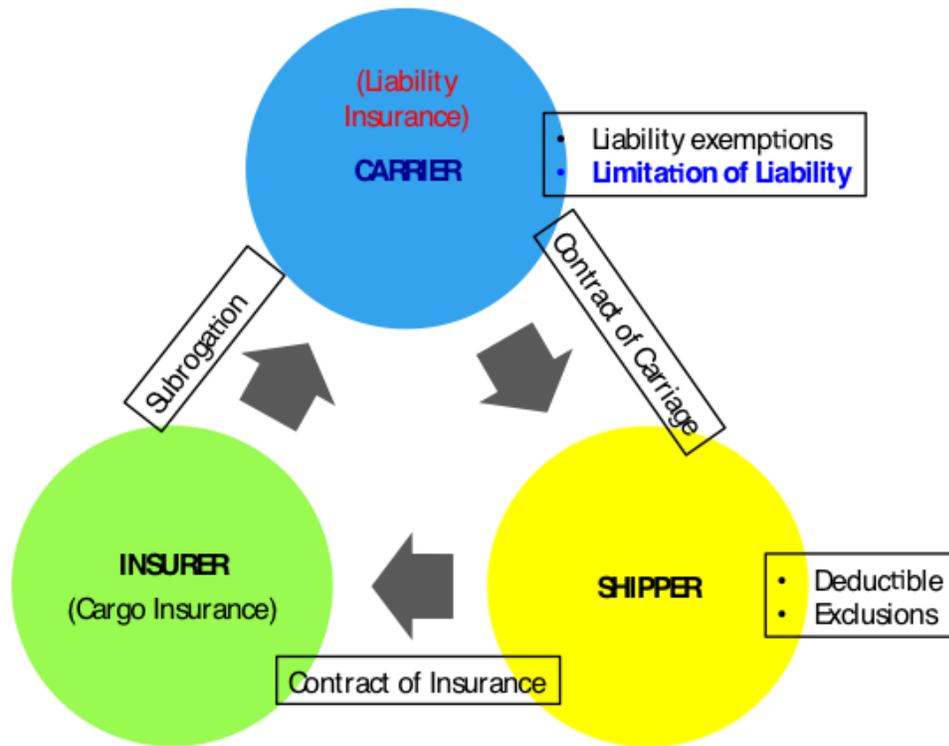
2 - For Brazil - the equivalent of 666.67 DES per volume or unit of cargo, or by 2 (two) DES per kilo of gross weight of the goods lost or damaged, whichever is greater.

3 - For Paraguay - the equivalent of 666.67 DES volume or unit of cargo, or by 2 (two) DES per kilo of gross weight of the goods lost or damaged, whichever is greater.

4 - For Uruguay - the equivalent of 666.67 DES volume or unit of cargo, or by 2 (two) DES per kilo of gross weight of the goods lost or damaged, whichever is greater.

10. The 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.
11. 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 parameter to determine the compensation in case of death and injury to passengers.
12. 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.
13. 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:

Figure 1
Transport Risk's Allocation



14. 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 cargo; 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.
15. The retention of a portion of the transportation risk's 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

16. 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. Thus, one can clearly see that the limits under the new convention are higher than those set out by their predecessors.
17. 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.
18. 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).
19. 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 shippers⁴ and to setting up a regime that provides certainty to the parties to the contract⁵, reasons why consensus was reached to set limits on the amounts raised by the Convention.
20. 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.

⁴ 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.

⁵ See *Ibid*, p. 165.

21. 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 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.

A possible Latin American perspective

22. 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 – in Latin American countries. Again, it is not possible to get a uniform position in the region, but an overall approach could be useful.
23. 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 proposes an increase rather than a reduction regarding applicable liability limits in the case of loss of or damage to the goods.
24. Special mention must be made about the situation of Argentina, where the gold pattern is still in force to calculate the limits of liability under The Hague Rules regime and their Supreme Court of Justice has set in an amount around US\$30,000 per package of the goods lost or damaged. As it has been mentioned by the National Association of Maritime Law of Argentina, the decision of ratifying or not ratifying the Rotterdam Rules, as to the decrease in the carrier's limitation of liability that it would imply, is a political decision that must be made having regard to the economic interests at stage in that decision.
25. Other Latin American 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. This would be the case of countries such as Colombia, Venezuela and Panama. For these countries, in my view, it would also be a consistent decision to ratify the Rotterdam Rules.
26. 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. Again, a detailed analysis shall be made in each country, but I would be able to anticipate that this would be the case of Brazil and Uruguay.

27. Since the carrier's limitation of liability provided for in the Rotterdam Rules has been a great concern in Latin America, 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.
28. If the majority of countries with whom Latin American nations maintain 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.
29. 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.
30. The discussion around the convenience or inconvenience of the Rotterdam Rules to Latin American countries 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.