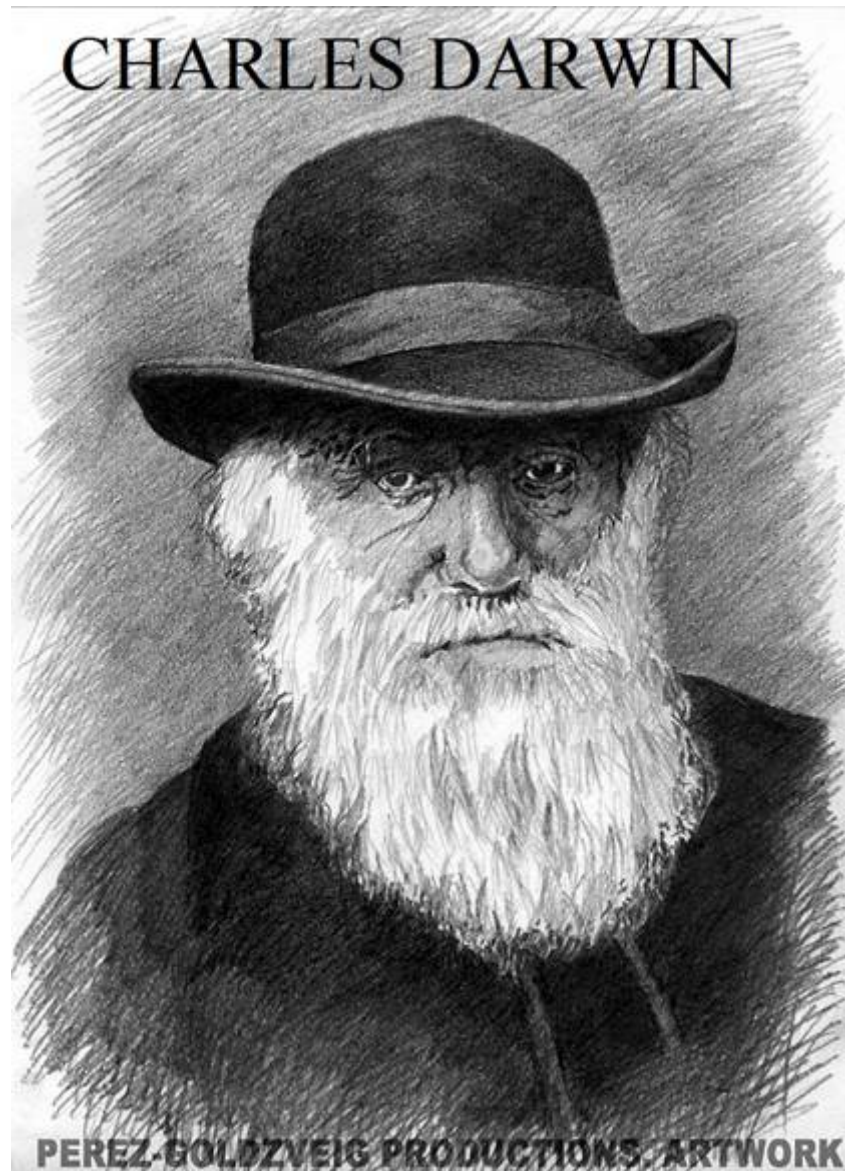


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(AUTHORISED) ECONOMIC OPERATORS^[1] /
“ROTTERDAM RULES”: FINANCIAL SERVICES
AUTHORITY REPORT PUBLISHED.

The Financial Services Authority (FSA) has published a report on the failure of the Royal Bank of Scotland (RBS). In its press release dated 12/12/11 three important elements are identified in respect of the failure:

- (i) That there were errors of judgment and execution made by RBS
- (ii) That global capital standards were severely deficient and
- (iii) That the FSA was too focused on conduct regulation championed by the Government and its prudential supervision of major banks was inadequate.

In our opinion these three elements deal with three fundamental strands of governance that must operate efficiently through effective management, communication and constant review for there to be successful regulation in any area of regulated business. These are: **effective corporate management and standards** on one side and **effective regulatory standards** on the other and the **democratic management** of both the **government** and the **rule of law** in order to control commercial activity in respect of its **infrastructure, systems** and **operations**. If one or more of these three strands fail to manage the commercial activity in terms of its infrastructure, systems and operations, the events that follow could be catastrophic as evidenced by the financial crisis that developed. It is a fine balance of democracy, the rule of law and a healthy commercial framework around the world that avoids crisis. The FSA had the power to regulate by law. It failed to do this. Democracy failed to operate by the Government wrongly interfering and championing the “light touch” approach to the benefit of a commercial venture where there was an apparent unhealthy attitude towards effective corporate governance which therefore also failed.

Can we afford to allow effective regulation to fail again? Should the “Rotterdam Rules” be permitted to come into force and should the World

[1] Read “WCO Research Paper No. 14 - Compendium of Authorized Economic Operator Programmes 2011 edition - Mariya Polner”

Customs Organization programme known as the Authorised Economic Operator (WCOAEO) be supported without strong regulation in place? We fear that both are to be found wanting in terms of effective regulation for the following reasons:

1. **The “Rotterdam Rules”**: The clause known as the “Volume contract exemption” under which more than one shipment under a contract of carriage can lead to contracting out of the Rules will lead to large scale deregulation in an area of international trade that has been regulated since 1925 and the danger of unfair contract terms. Its supporters contend that only knowledgeable parties will use this clause but we are sure RBS management would have asserted themselves as knowledgeable but look at what they did and there will be no regulation left in place if parties to contracts of carriage contract out. Effective Corporate governance in terms of management and standards may fail, and governments may sign up and ratify these Rules in a bid to help the bigger firms to win business. In doing so, they would facilitate lack of regulation and the global supply chain could eventually collapse as a result. There will also follow legal uncertainty due to a new system very different to that in place around the world concerning carriage of goods by sea. Governments and commercial entities will have to wait for years for the legal implications of these Rules to be played out around the world over a period of decades and by then the commercial fallout of such deregulation will be too late to reverse.
2. **WCOAEO**: Initial certification of authorised operators is only one small part of the regulation. Each country’s customs authority also has to have an effective system of ongoing regulation meaning necessary communication and constant review. This is possible only if a high level of financing could guarantee the standard of the WCOAEO and customs officers and their internal governance in respect of the programme in order to ensure effective maintenance of the standards required of those who obtain the certificate of an Authorised Economic Operator. Has this been checked or do we have ineffective regulation because customs authorities around the globe are struggling to deal with frontline problems and have not been adequately financed by Governments to run an effective regulatory section? What will the fallout be if a major security issue develops through lack of effective regulation? The problem with this programme and its similar **US-CTPAT** is that they can not guarantee to those commercial entities who seek authorisation that

compliance will lead to authorised operators being given priority for fast track clearance and that should be the case. We need compliance with the rule of law and **all should be treated equally** under it and not be favoured through being authorised. A failure of governance, whether with the authorised firm or the regulatory body or with the improper operation of democracy and the rule of law could lead to a catastrophic result particularly in the area of security. All that regulation does is to produce another layer of governance that could fail, as shown in the RSB case.

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Disclaimer: This is not legal advice. We cannot advise any party to act based on this report without first consulting a specialised solicitor. The opinions in this report are those of the writers.

Note: In producing this press release by Pysdens Solicitors, the model published in the book entitled "GUIDELINES TO CONSIDERATION IN RESPECT OF COMMERCIAL DEALINGS" by S. Perez-Goldzveig and K.Pysden forming part of the research and development programme "COMMERCIAL GUIDE INITIATIVE" by S. Perez-Goldzveig and K.Pysden being part of "TheHouseofBranchofGold" was used with the authorisation of the authors.

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