

**Maritime Carrier's Liability for Loss of or Damage to  
Goods under the Hague Rules, Visby Rules and the Hamburg  
Rules, compared with his Liability as an Operator under  
the Relevant Rules of the International Multimodal  
Transport Convention.**

**A Thesis Submitted for the Degree of  
Doctor of Philosophy  
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To

My mother, brothers, sisters

and

in memory of my father.

### **Acknowledgements**

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## Summary

The system of the carrier's liability, in respect of carriage of goods, is a very controversial issue which raises many difficulties in solving the problems thereto related, whether in national laws or in international Conventions.

The present thesis, dealing with the carrier's liability, consists of five chapters and final conclusions.

The first four chapters concentrate, theoretically, practically and in detail on analysing and comparing the liability regimes in relation to the carrier's liability under the Hague/Visby Rules and the Hamburg Rules, in order to ascertain which is more conducive to international certainty and uniformity. The Hague/Visby Rules and the Hamburg Rules have played a vital role in the international transport industry. They are correspondingly discussed in the thesis. Chapter five is devoted to discussion of the liability of the multimodal transport operator as one of the most important parts of the International Multimodal Transport Convention (1980). The chapter also evaluates the situation when, in the future, the Convention comes into force.

In its structure the thesis is divided as follows: chapter one deals with a brief history and the scope of application of the Rules. The liability of the carrier

and the limitation of the carrier's liability are considered in chapters two and three. Chapter four deals with the procedures of action for lost or damaged cargo. The liability of the multimodal transport operator for loss or damage to the goods under the 1980 United Nations Multimodal Transport of Goods Convention is dealt with in chapter five.

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### Abbreviations

A.C.	.....	Law Reports, Appeal Cases.
A.M.C.	.....	American Maritime Cases.
Adm.	.....	Admiralty Court.
All E.R.	.....	The All England Law Reports.
Am.J.Comp.Law.	.....	American Journal of Comparative Law.
Asp.M.L.C.	.....	Aspinall's Maritime Cases.
C.A.	.....	Court of Appeal.
C.J.	.....	Chief Justice.
C.L.R.	.....	Commonwealth Law Reports.
Can.Sup.Ct.	.....	Canadian Supreme Court.
Ch.	.....	Law Reports, Chancery.
Ch.D.	.....	Chancery Division.
C.M.I.	.....	Comité Maritime International.
COGSA.	.....	Carriage of Goods by Sea Act.
Com.Cas.	.....	Reports of Commercial Cases.
Ct.	.....	Court.
Ct.J.	.....	Circuit Judge.
Ct. of App.	.....	U.S. Circuit Court of Appeals.
D.J.	.....	District Judge.
Dist.Ct.	.....	U.S. District Court.
Div. Ct.	.....	Divisional Court.
E.C.E	.....	Economic Commission for Europe.
E.C.O.S.O.C.	.....	Economic and Social Council.
E.L.D.	.....	European Law Digest.
E.T.L.	.....	European Transport Law.
Ex.C.R.	.....	Exchequer Court Reports.
F.2d.	.....	Federal Reporter, Second Series.
F.C.	.....	Federal Court Reports (Canada).
F.Supp.	.....	Federal Supplement (USA) 1932.
Fed.Rep.	.....	Federal Reporter (USA) 1880.
H.L.	.....	The House of Lords.
H.L.R.	.....	Harvard Law Review.

I.C.A.O.	.....	International Civil Aviation Organization.
I.C.C.	.....	International Chamber of Commerce.
I.C.L.Q.	.....	International and Comparative Law Quarterly.
I.L.A.	.....	International Law Association.
I.M.C.O.	.....	Intergovernmental Maritime Consultative Organization.
I.P.G.	.....	Intergovernmental Preparatory Group
J.	.....	Mr. Justice.
J.B.L.	.....	The Journal of Business Law.
J.M.L.C.	.....	Journal of Maritime Law and Commerce.
Jur.R.	.....	The Juridical Review.
J.World Trade.	.....	Journal of World Trade [Law] from 1988.
K.B.	.....	Law Reports, King's Bench.
L.C.	.....	Lord Chancellor.
L.J.	.....	Lord Justice.
L.Q.R.	.....	The Law Quarterly Review.
L.R.Ex.	.....	Law Reports Exchequer.
L.T.	.....	Law Times.
L.T.(O.S.)	.....	Law Times. Old Series 1843-59.
LL.L.Rep.	.....	Lloyd's List Law Reports (prior to 1950).
Lloyd's Rep.	.....	Lloyd's Law Reports (after 1950).
LMCLQ	.....	Lloyd's Maritime and Commercial Law Quarterly.
M.L.R.	.....	Modern Law Review.
McGill L.J.	.....	McGill Law Journal.
N.Y.Sup.2d.	.....	New York Supplement (Second Series) (U.S.).
P.C.	.....	Judicial Committee of the Privy Council.
Para. (s).	.....	Paragraph(s).

Q.B.	.....	Law Reports, Queen's Bench.
Q.B.D.	.....	Queen's Bench Division.
S.C.	.....	Session Cases.
S.C.R.	.....	Supreme Court Reports (Canada).
S.D.N.Y.	.....	Southern District of New York.
S.E.2d.	.....	South Eastern Reporter (Second Series)(U.S.).
S.J.	.....	Scottish Jurist; Solicitors Journal.
S.L.T.	.....	Scots Law Times.
Sch.(s)	.....	Schedule(s).
Sh.App.	.....	Shaw's Scotch Appeal Cases, H.L.
Sup.Ct.	.....	Supreme Court.
T.D.B.	.....	Trade and Development Board.
T.L.R.	.....	Times Law Reports.
Tul.L.R.	.....	Tulane Law Review.
UNCTAD.	.....	United Nations Conference on Trade and Development.
UNCITRAL.	.....	United Nations Commission on International Trade Law.
UNIDROIT.	.....	International Institute for the Unification of Private Law.
U.S.	.....	United States Supreme Court Reports
W.L.R.	.....	Weekly Law Reports.
W.L.R.	.....	World Law Review (USA).

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## Introduction

In today's world, different nations and countries have, through international trade, close economic and commercial relations with each other. Every day huge volumes of cargoes are sent from one part of the world to another. Transport appears to be one of the key factors in overall economic development; it will be even more important in the future.

Damage to cargo is a foreseeable occurrence in international transport. It results in unwanted loss or damage and expense to all participants in the transport industry. Carriers and cargo-owners both try to avoid the burden of absorbing these costs, either directly or through insurance. The laws of most countries originally made, with few exceptions, the carriers of cargo strictly responsible for any loss or damage to cargo entrusted to their care. However, when the bill of lading came into general use, as a receipt for goods and as a document of title, carriers began to insert various exception clauses to diminish their liability. This was the result of the 19th century freedom to contract for the shipment of goods, but this situation was considered unsatisfactory. It removed any incentive to take care of the cargo. Owing to the international nature of maritime commerce, the problem was international in character.

In 1924 the Brussels Convention for the unification of certain Rules Relating to Bills of Lading (commonly known as the Hague Rules) was adopted in an attempt to establish a balance between commercial risks and legal responsibilities between carriers and cargo-owners. These international rules were designed to provide a definite measure of protection to cargo-owners. In return they gave carriers some valuable exemptions from liability in certain circumstances.

The Hague Rules served their purpose reasonably well, but in the course of time, with changes in vessel design and communication technology, together with the increase in trade, certain weaknesses became apparent. These were dealt with by the introduction of an amended set of rules under a Protocol signed in 1968.<sup>1</sup> These rules are known as the Visby Rules and have been in force since June 1977.

The amendments contained in the Visby Rules were few and not very significant, and have not gained universal approval. They have been regarded by many cargo owning countries as constituting merely a temporary expedient and there was a growing demand for a thorough reappraisal of carrier liability designed to produce a comprehensive code covering all aspects of the contract of carriage. This culminated in the drafting of a new convention, which was adopted at an international conference

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<sup>1</sup> There was another Protocol which followed the 1968 Visby amendments usually called the "Special Drawing Right 'S.D.R.' Protocol", 1979, which came into force in 1984. See p.14 n.2

sponsored by the United Nations in Hamburg, in March 1978. The Convention, known as the "Hamburg Rules", came into force on November 1, 1992. In respect of the carrier's liability the Hamburg Rules make some radical changes in international maritime law.

The past two decades have witnessed an explosion in demand for multimodal transportation. This has coincided with a technical revolution in the transport industry. A great volume of goods are moved by different modes of transport and by increasingly sophisticated cargo handling techniques. Transportation has become more complex and legal regimes within which it operates have become less predictable when the existing unimodal conventions are applied in cases where the goods are carried by more than one mode of transport and involve more than one carrier. Parallel to these developments in multimodal transport operations, a need was felt for a convention governing the multimodal transport of goods. This was why for many years there have been efforts by different bodies to provide such a Convention. Therefore, following the successful development in 1978 of the Hamburg Rules, it was possible in 1980, under the supervision of the United Nations, to conclude an International Convention on Multimodal Transport of Goods (not yet in force). This Convention has been substantially based on the Hamburg Rules. It is the only Convention which tackles liability and other problems arising in multimodal transport.

It is to be noted that the crux of any international convention on the contract of carriage is the liability system. It will therefore be necessary to consider the main features of the carrier's liability under the Hague/Visby Rules and the Hamburg Rules with reference to relevant experience of the Carriage of Goods by Sea Acts (COGSA) of the United Kingdom and the United States; and the liability of the multimodal transport operator (MTO) under the International Multimodal Transport Convention (IMTC), considered to be one of the most important parts of this Convention.

The study is divided into five chapters:

- Chapter One: A brief history and the scope of application of the Rules.
- Chapter Two: The liability of the carrier.
- Chapter Three: The limitation of the carrier's liability.
- Chapter Four: Procedures of action for lost or damaged cargo.
- Chapter Five: The liability of the multimodal transport operator for loss of or damage to the goods under the 1980 United Nations Multimodal Transport of Goods Convention.

## Chapter One

### A Brief History and The Scope of Application of the Rules

Before discussing the scope and application of the Rules, it is useful to refer briefly to the historical background of the Hague Rules and Visby Rules in order to follow the evolution of what are known as the "Hamburg Rules".

#### 1.1 A brief history of the Hague Rules, Visby Rules and the Hamburg Rules

Historically, maritime law held the carrier absolutely liable for loss or damage to cargo during the voyage, whether or not such loss or damage resulted from the negligence of the carrier. He could only escape from this liability if the loss or damage was caused by an act of God,<sup>1</sup> the Queen's enemies,<sup>2</sup> the inherent vice of the goods themselves,<sup>3</sup> the fault of the shipper, or losses suffered by a general average sacrifice. Even where the loss was caused by one of these "common law exceptions" the carrier remained liable if he had been negligent or otherwise at fault.<sup>4</sup> Therefore, in order to recover the value of the

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- 1- Nugent v. Smith, (1876) 1 C.P.D.423 at p.444 (per James L.J); see also (per Cockburn C.J) at pp. 437, 438; Nichols v. Marsland, (1876) 2 Ex. D. 1.
  - 2- Russell v. Niemann, (1864) 17 C.B.(N.S). 163.
  - 3- Blower v. G.W.R.Co (1872) L.R.7 C.P. 655; Bradley v. Federal Steam Navigation Co. (1927) 27 Ll. L.R. 395; Albacora S.R.L. v. Westcott & Laurance Line Ltd, [1966] 2 Lloyd's Rep. 53.
  - 4- United Nations Conference on Trade and Development/Geneva, Report by the Secretariat of UNCTAD, New York, Doc.TD/B/C.4/ISL/6 /Rev.1, (1971) par.49, p.11, hereinafter cited as "UNCTAD,

cargo loss or damage, the cargo owner would only need to prove that the carrier received the goods on board the vessel in good order and condition and prove either non-delivery or delivery in bad order at the place of discharge.<sup>1</sup>

The carrier's liability under the common law and civil law codes is in theory strict liability, and the carrier and cargo interests generally seem to have been in agreement that it was the responsibility of the carrier to carry and deliver the goods to the port of discharge in the same apparent order in which they were shipped or otherwise make good any loss suffered by the cargo owner by reason of any loss or damage that the goods had sustained.<sup>2</sup> And so, it can be seen that a code of rules governing the carriage of goods by sea was being formed.

It is necessary here to refer briefly to the events leading to the development of the bill of lading. For so long as the merchants travelled with the goods, their particulars would be entered in a book or register which was part of the ship's papers. But as trade developed, the

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TD/B/C.4/ISL/6/Rev. 1"; John D. Kimball, Shipowner's liability and the proposed revision of the Hague Rules (1975-76) 7 J.M.L.C, 217 at p.220, hereinafter cited as "Kimball"; Malcolm A. Clarke, Aspects of the Hague Rules, 1976, pp.118-19, hereinafter cited as "Clarke"; Benjamin W. Yancey, The carriage of Goods: Hague, COGSA, Visby and Hamburg, (1983) 57 Tul.L.R.pp.1238-1239, hereinafter cited as "Yancey"; Scrutton on Charter Parties and Bills of Lading, 19th ed, 1984, p.201, hereinafter cited as "Scrutton", 19th ed; G. Gilmore & C.L. Black, The Law of Admiralty, 2nd ed, 1975, p.139, hereinafter cited as "Gilmore & Black".

1- UNCTAD, TD/B/C.4/ISL/6/Rev.1, par. 50, p.12; Gilmore & Black, p.140.

2- Paul Todd, Modern Bills of Lading, 1986, p.102, hereinafter cited as "Todd"; Clarke, p.119; Yancey, 1238.

merchant ceased to accompany his goods, and the necessity then arose for a separate document which was at first in the nature of a receipt for the goods and later became a document which embodied the terms on which the carrier would carry and deliver the goods at the port of destination.<sup>1</sup> At first these were customary terms, which came in time to be incorporated into the common law of England and the commercial codes of continental Europe. Thus was born the bill of lading which, in future years, was to develop into the document of the present time with its special legal features. The bill of lading became, in the course of time, the basic shipping document, embodying or evidencing the contractual relationship between the carrier and the shipper.<sup>2</sup> But with the growth of seaborne commerce and the increasing complexity of business and in consequence of the concern for speed, the need was felt for a means of transferring the title in the goods before they arrived at their destination. From this in turn arose the practice of transferring the ownership of the goods by endorsing the bill of lading to the buyer, and so by the eighteenth century, this practice was established and the transferable bill of lading as a document of title was in common use.<sup>3</sup> These early bills of lading did not contain any clauses exempting the shipowner or carrier from liability for loss or damage to cargo occurring during the voyage. However, as a result of eighteenth century

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<sup>1</sup>- UNCTAD, TD/B/C.4/ISL/6/Rev.1, note.61, p.12.

<sup>2</sup>- Ibid, para. 58, p.13.

<sup>3</sup>- Ibid; Gilmore & Black, p.140.

judicial decisions, when the cargo interests began to take action against the shipowners for recovery of loss or damage to cargo occurring during the voyage, and to obtain legal rulings establishing shipowners' liability for such loss or damage to their goods, shipowners generally began seeking to counter this by including in their bills of lading clauses exonerating them from liability for cargo loss or damage and so limiting contractually the strict liability imposed upon them by maritime law.<sup>1</sup> Carriers were entitled to do this by reason of the freedom of contract principles expressed in both the common law and civil law, whereby the carrier was enjoined on the one hand to strict liability by maritime law, but could, on the other, contract out of almost all liability by appropriately framing the clauses in the bill of lading.<sup>2</sup> These rights were generally exercised, so that from a position where the carrier of goods by sea under contracts of carriage evidenced by bills of lading was virtually the insurer of the goods and responsible for any loss or damage sustained by the cargo, the situation under general maritime law was reversed. Instead of being absolutely liable irrespective of negligence, the carrier enjoyed a contractual exemption from liability regardless of negligence, and this contractual exemption became as wide as the carrier's bargaining position would allow.<sup>3</sup>

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1- Ibid; Kimball, p.221.

2- Todd, p.103; Kimball, p.222; UNCTAD, TD/B/4.4/ISL/6/Rev.1, par.58, p.13.

3- Gilmore & Black, p.142.

The manner in which this right of freedom of contract was being exercised caused serious concern among trading nations, because overseas commerce was developing upon credit and bills of lading were the medium through which credits financing overseas commerce were arranged. Also, banking interests, quite apart from cargo interests, were being seriously affected by this right of the shipowner to relieve himself of responsibility for delivering the cargo to its destination in sound condition or paying for any loss or damage that the cargo had suffered. Thus, as a result of the growing dissatisfaction of cargo and banking interests about the manner in which shipowners were (in their opinion) abusing the right of freedom of contract, legislation was demanded to remove the perceived abuse thus produced.<sup>1</sup> After considerable negotiation, the demands of shippers for legislation was acceded to in the form of a compromise between the shippers and carriers. The Harter Act was enacted in the United States in 1893.<sup>2</sup> Differing standards then existed in other countries. In the nineteenth century, with the growth of international trade, accelerated by the development of steamships, the need for further reform was generally felt, but shipowning countries

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1- A simultaneous development took place in the United States and the British Dominions, whose ocean trade depended heavily on United Kingdom shipowners.

2- On the details of the Harter Act, see A. Knauth, *American Law of Ocean Bills of Lading*, 4th ed, 1953, p.121, hereinafter cited as "Knauth"; Several Commonwealth countries followed the model of the Harter Act. Australia passed an Act, the *Sea Carriage of Goods Act*, 1904; the *Canadian Water Carriage of Goods Act*, 1910, and series of acts in New Zealand in 1908, 1911 and 1912 leading to the *New Zealand Carriage of Goods by Sea Act* 1922, which gave way eventually to the countries giving effect to legislation incorporating the Hague Rules.

feared that the re-imposition of liabilities upon their carriers would increase their freight charges and place them at a disadvantage by comparison with others. They did not like the idea of abridging the principle of freedom of contract which formed a fundamental feature of their legal systems. It also came to be realized that any solution would have to be based on international agreement in order to be of any practical value in international trade.<sup>1</sup> Accordingly, in 1921, the Comité Maritime International (CMI) of the International Law Association (ILA) held a meeting at the Hague, when the views of the shipowning and cargo interests, in relation to proposals being put forward for introduction of uniform legislation world-wide, were discussed.<sup>2</sup> As a result, the ILA, at the Hague, adopted a set of rules which had been formulated by the CMI, and which came to be known as the Hague Rules, 1921. But the Rules were not immediately adopted.<sup>3</sup> The Rules were amended at the London Conference of CMI in 1922, and followed by a diplomatic conference on maritime law which was held in Brussels in 1922. As a result of that conference, a draft convention was drawn up at Brussels in

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1- John C. Moore, *The Hamburg Rules*, (1978)10 JMLC, p.2, hereinafter cited as "Moore", Yancey, p.1241; Gilmore & Black, p.141.

2- W.E. Astle, *Shipowners' Cargo Liabilities and Immunities*, 3rd ed, 1967, pp.3-4, hereinafter cited as "Astle"; D.C. Toedt, *Defining "package" in the Carriage of Goods by Sea Act*, (1982) 60, *Texas Law Review*, p.964, hereinafter cited as "Toedt"; *Scrutton on Charterparties and Bills of Lading*, 18th ed, 1974, p.403, hereinafter cited as "Scrutton, 18th ed"; UNCTAD, TD/B/C.5/ISL/6/Rev.1, par. 62, p.15.

3- "The Hague Rules were drafted in the form of a uniform Bill of lading in the hope that the great shipping companies would adopt them voluntarily and that similar enterprises would soon follow suit". UNCTAD, TD/B/C.4/ISL/6/Rev. 1, p.15; Gilmore & Black, p.143; *Scrutton*, 18th ed, p.410.

1923, and in due course an international convention was ultimately signed there by the most important trading nations on 25 August 1924,<sup>1</sup> but it did not come into force until 1931.<sup>2</sup>

The Hague Rules have proved remarkably successful in practice. Their success has been due in large measure to the Rules being based on commercial practicality. Subsequently, the Hague Rules have been especially successful in dealing with the following points:

1. The Hague Rules redressed the traditional imbalance which had formerly existed between the carrier and cargo owner as regards the risks of loss or damage occurring to goods. In place of exclusion clauses which exempt the carrier from loss or damage sustained by the cargo, the Rules imposed upon him a duty to use due care to put

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<sup>1</sup>- The Rules adopted by this convention are popularly known as the "Hague Rules", because they were originally drafted at The Hague in 1921. The terms "Brussels Convention" and "Hague Rules" are sometimes used interchangeably, to indicate those rules which were approved at the 1924 Conference, of the "International Convention for the Unification of Certain Rules relating to Bills of Lading"; it is noteworthy that the Hague Rules embodied the Harter Act compromise in its main outline. See Astle, p.3; Toedt, p.964; Gilmore & Black, p.143; UNCTAD, TD/B/C.4/ISL/6/Rev. 1, p.14.

<sup>2</sup>- It is to be noted that the United Kingdom enacted the Carriage of Goods by Sea Act (COGSA) 1924 on the basis of the 1923 draft convention which came into force on January 1st, 1925; The United States acceptance came in 1936 through enactment of COGSA, which closely follows the Hague Rules, but modifies them significantly in a few areas. See, Gilmore & Black, p.144; Astle, p.6, Scrutton, 18th ed, p.404, Michael J. Mustill, Carriage of Goods by Sea Act, 1971, Arkiv-for-sjorett, (1972) Vol, II, p.685, hereinafter cited as "Mustill"; George F. Chandler III, A comparison of "COGSA", the Hague/Visby Rules and the Hamburg Rules, (1984)15 JMLC p.235, hereinafter cited as "Chandler"; Kimball, p.222; Joseph C. Sweeney, the UNCITRAL Draft Convention on Carriage of Goods by Sea (part 1), (1975) 7 JMLC, p.72, hereinafter cited as "Sweeney, part 1".

his vessel in good condition for the voyage and to care properly for the goods entrusted into his custody.<sup>1</sup>

2. The Hague Rules were designed to strike a compromise between the strict liability of the carrier under the common law on the one hand, and the freedom of contract which permitted the carrier to insert broad exceptions into the contract of carriage exonerating him from liability for loss or damage on the other.<sup>2</sup> In achieving this compromise, the Hague Rules intended "to standardize within certain limits the rights of every holder of a bill of lading against the shipowner, prescribing an irreducible minimum for the responsibilities and liabilities to be undertaken by the latter."<sup>3</sup>
3. The Hague Rules have proved successful in their principal objective of regulating and standardising the contractual relationship between the carrier and cargo interests by controlling the terms of bills of lading, and this of course is very important to the speedy conduct of commerce and settlement of claims.<sup>4</sup>

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<sup>1</sup>- Clarke, p.6; Anthony Diamond, *The Hague/Visby Rules*, (1978)2 LMCLQ, p.226, hereinafter cited as "Diamond".

<sup>2</sup>- David M. Sassoon & John C. Cunningham, *Unjustifiable Deviation and the Hamburg Rules*, published in the *Hamburg Rules on the Carriage of Goods by Sea*, edited by Samir Mankabady, 1978, p. 167, hereinafter cited as "Sassoon & Cunningham".

<sup>3</sup>- The "Muncaster Castle", (1961) 1 Lloyd's Rep. 57 at p. 67 (per Viscount Simonds).

<sup>4</sup>- James J. Donovan, *Existing problems under the Hague Rules and need for Changes in U.S. Legislation*, published in the *Speakers' papers for the Bill of Lading Conventions Conference*, New York, November, 29/30, 1978, p.1, hereinafter cited as "Donovan".

4. The Hague Rules encourage quick settlement of disputes by providing that the carrier shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.<sup>1</sup>

While the Hague Rules served ocean transport reasonably well for over forty years, eventually it became obvious that technological progress had made it necessary to amend the Rules to suit modern developments in transportation. Their ambiguities and inadequacies such as the carrier's "per package or unit limitation" of liability, i.e. 100 sterling gold value<sup>2</sup> on the one hand, and the development of shipping technology such as the introduction of containers on the other, caused the container package problem to which the Hague Rules did not provide a solution. This led to proposed changes by the CMI, which became known as the "Visby amendments".<sup>3</sup> Finally, after lengthy discussions<sup>4</sup> a diplomatic conference was held in Brussels in May 1967 to consider the amendments, but the work was not completed until February 23, 1968,<sup>5</sup> and the

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1- Article 3(6) of the Hague Rules.

2- Article 4(5) of the Hague Rules.

3- Chandler, p.235; Joseph C. Sweeney, UNCITRAL and The Hamburg Rules - The Risk Allocation Problem in Maritime Transport of Goods, (1991) 22 J.M.L.C. p.519, hereinafter cited as "Sweeney".

4- The CMI held different meetings: In 1959 (held at Rijeka); and in 1963 (held at Stockholm); see, Diamond, p.228; Moore, p.3; UNCTAD, TD/B/C.41/ISL/6/Rev.1, p.15.

5- The Brussels Protocol of amendments to the Hague Rules signed in February 1968. In 1979 a new diplomatic conference was held in Brussels. This added a protocol to the Visby Protocol, 1968, that is, to express the amount of unit limitation of carrier liability in terms of the International Monetary Fund (IMF) "Special Drawing Right" (SDR). This protocol came into force in 1984.

new Rules known as the "Visby Rules" were adopted. This protocol came into force on June 23, 1977.<sup>1</sup>

The 1968 Protocol amendments to the Hague Rules and the new provisions such as the "container clause", were few and not very significant, particularly in respect of the carrier's liability so that it appeared that the Protocol had failed to bring the Hague Rules up to date.<sup>2</sup> In other words, despite the various amendments made to the Hague Rules in one form or another, it became clear that they could no longer hide the fact that technological developments had rendered those Rules outdated. It was felt by many countries (particularly the developing countries) that their interests were not sufficiently covered by the existing rules.<sup>3</sup> Therefore, in order to update the Hague

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<sup>1</sup>- So far as the United Kingdom is concerned, the amendments agreed at the convention are incorporated in the Carriage of Goods by Sea Act, 1971. This replaced the 1924 Act, and re-enacted the Hague Rules in their modified form. The Act came into effect in 1977.

<sup>2</sup>- Anthony Diamond, A Legal Analysis of the Hamburg Rules, published in The Hamburg Rules, A one-day seminar organised by Lloyd's of London Press Ltd, London, 1978, p.2, hereinafter cited as "Diamond, The Hamburg Rules".

<sup>3</sup>- It has to be said that, there were two dissimilar sources of the the dissatisfaction with the Hague Rules: the traditional maritime states and the newly independent states of the developing world in Asia and Africa. The dissatisfaction of the traditional maritime states is said to have led to the Visby Rules. The dissatisfaction of the developing world stemmed from the belief that the operation of traditional maritime law (along with other aspects of international trade law) continued to impair the balance of payments position and ensured its continued poverty and perpetual under-development in an industrial age; Yancey, p.1250; Sweeney, p.520; for more details, see also, Sweeney, The UNCITRAL Draft Convention of Carriage of Goods by Sea, (part I), (1975) J.M.L.C.,69 at p.72. This Article, which included five parts and appeared in two volumes (7 & 8) sets forth the development of the drafts which eventually emerged as the Hamburg Rules, and is the work of one of the principal proponents of the movement; Samir Mankabady, Comments on the Hamburg Rules, published in the Hamburg Rules on the Carriage of Goods by Sea, edited by Samir Mankabady, 1978, p.30, hereinafter cited as "Mankabady"; Erling Selvig, The Hamburg Rules, the Hague

Rules and their amendments, and to achieve a fairer balance in the allocation of risks, rights and obligations in the rules on liability between the carriers and shippers, UNCTAD decided to review the Hague Rules and to produce a new convention on carriage of goods by sea to replace the Hague/Visby Rules.<sup>1</sup> The evidence of the need to revise the Hague Rules, beyond what was achieved by the Brussels Protocol of 1968, came from several sources. Firstly, there were the complaints made in response to the inquiries of the UNCTAD secretariat; secondly, from a study of standard texts and periodicals; and thirdly, there was the result of the analysis of the commercial and economic aspects and consequences, and of the analysis of the Hague Rules themselves.<sup>2</sup> In the UNCTAD study, the main grounds for concern were identified as follows:

- a. Uncertainties arising from vague and ambiguous wording in certain areas of the Rules, which led to conflicting interpretations and which complicated such matters as the allocation of responsibility for loss or damage to cargo; and the burden of proof, (this being the subject of complaints by both carrier and cargo interests);

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Rules and Marine Insurance Practice, (1981)12 J.M.L.C.299 at p.303, hereinafter cited as "Selvig".

- 1- UNCTAD, Report, The Economic & Commercial Implications of the Entry into force of the Hamburg Rules & the Multimodal Transport convention, (1987, part 1, p.7 (TD/B/C.4/315), hereinafter cited as "UNCTAD, TD/B/C.4/315"; M.J. Shah, The Revision of the Hague Rules on Bills of lading within the UN system - key issues, published in the Hamburg Rules on the Carriage of Goods by Sea, edited by Samir Mankabady, 1978, p.9 hereinafter cited as "Shah".
- 2- UNCTAD, TD/B/C.4/ISL/6/Rev.1, par.72, p.17.

- b. The continued retention in bills of lading of exoneration clauses of doubtful validity, and the existence of restrictive exemption and time limitation clauses in the terms under which cargo is deposited with warehouses and port authorities;
- c. The unfairness of exemptions in the Hague Rules which are peculiar to ocean carriage, in cases where the liability should logically be borne by the ocean carrier, such as those which exempt him from liability in respect of the negligence of his servants and agents in the navigation and management of the vessel, and in respect of perils of the sea, etc;
- d. The uncertainties caused by the interpretation of terms used in the Hague Rules, such as "reasonable deviation", "due diligence", "properly and carefully", "in any event", "loaded on", "discharge";
- e. The ambiguities surrounding the seaworthiness of vessels for the carriage of goods;
- f. The unit limitation of liability;
- g. Manifestly unfair jurisdiction and arbitration clauses;
- h. Insufficient legal protection for cargoes with special characteristics requiring special stowage, adequate ventilation, etc., and cargoes requiring deck shipment;
- i. Clauses which permit carriers to divert vessels, and to tranship or land goods short of or beyond the port of destination specified in the bill of lading at the risk and expense of cargo owners;

j. Clauses which entitle carriers to deliver goods into the custody of shore custodians on terms which make it almost impossible to obtain settlement of cargo claims from either the carrier or the warehouse.<sup>1</sup>

After considerable lengthy discussions, the UNCITRAL Working Group which had undertaken to review the Rules, produced a draft convention on carriage of goods by sea.<sup>2</sup> The draft was adopted by UNCITRAL and was then submitted to a United Nations diplomatic conference held in Hamburg in March 1978. The draft convention was, with slight amendments, adopted by the conference and was known as the 1978 Hamburg Rules, which came into force on November 1, 1992.

Lastly, it is important to mention that the form and structure of the Hamburg Rules are entirely different from those of the Hague Rules and its amendments (Visby Rules).

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1- Ibid.

2- In pursuing that task, UNCITRAL had the following aims: "...the removal of such uncertainties and ambiguities as exist and at establishing a balanced allocation of risks between the cargo owner and the carrier, with appropriate provisions concerning the burden of proof; in particular the following areas, among others should be considered for revision and amplification: a) responsibility for cargo for the entire period it is in the charge or control of the carrier or his agents; b) the scheme of responsibilities and liabilities, and rights and immunities, incorporated in Articles III and IV of the convention as amended by the Protocol and their interaction and including the elimination or modification of certain exceptions to carrier's liability; c) burden of proof; d) jurisdiction; e) responsibility for deck cargoes, live animals and transhipments; f) extension of the period of limitation; g) definition under Article 1 of the convention; h) elimination of invalid clauses in bills of lading; i) deviations in seaworthiness and unit limitation of liability".

TD/B/C.4/86; TD/B/C.5/ISL/8 Annex 1; Mankabady, p.31; Shah, p.10.

They introduced several substantive changes in maritime law. These changes will therefore be shown through our discussion and analysis in so far as the Rules are concerned, especially in respect of the basis of liability, the limitations of liability and the "common understanding" attached to the convention which are deemed to be the heart of the Hamburg Rules.<sup>1</sup>

## 1.2 Scope of Application of the Rules

The scope of the Hague Rules is limited as follows:

1. The kind of contract: the Rules apply only to contracts of carriage covered by a bill of lading or any similar document of title. They do not apply to charter parties as such, but if a bill of lading is issued in the case of a ship under a charter-party, it will be governed by them.
2. The class of the goods: the Rules do not apply to the carriage of live animals<sup>2</sup>, nor to cargo which by the contract of carriage is stated as being carried on deck and is so carried.<sup>3</sup>

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<sup>1</sup>- Moore, p.6.

<sup>2</sup>- There have been many explanations for the exclusion of live animals from the scope of the Hague Rules. It is outside the scope of this thesis to deal with all these explanations; See Mankabady, p.38.

<sup>3</sup>- Concerning the position of deck cargo and live animals under the Hague Rules and the Hamburg Rules, see chapter two of this thesis (2.1.1 at p.62, 2.1.2 at p.89, 2.2.2 at p.117).

3. The period of carriage: the Rules only apply from the time of loading until the time when the goods are discharged from the ship.<sup>1</sup>
4. The place of issue of the bill of lading: the Rules apply to all bills of lading issued in any of the contracting states.

In the Comité Maritime International at the Stockholm Conference in 1963, many delegations criticised these limitations and proposed to expand the scope of the Rules. The 1968 Protocol brought certain changes to their scope. Moreover, the Hamburg Rules brought radical changes in that respect. Accordingly, I will discuss the following points:

- 1.2.1 The documents governed by the Rules.
- 1.2.2 The functions of the Bill of Lading.
- 1.2.3 The voyages governed by the Rules.

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<sup>1</sup>- Concerning the period of responsibility under the Hague Rules and the Hamburg Rules, see chapter two of this thesis (2.1.1 at p.61, 2.1.2 at p.89).

## 1.2.1 The documents governed by the Rules

### 1.2.1.1 Under the Hague Rules

The general principle of the Hague Rules is that they only apply to contracts of carriage covered by a bill of lading, "or similar document of title".<sup>1</sup> This means that there must be a contract of carriage for the Rules to apply.

It is necessary to mention that the Hague/Visby Rules make no distinction between common or public carriage and private carriage,<sup>2</sup> and apply to both because the criterion is simply that there be a contract of carriage covered by a bill of lading or similar document of title.<sup>3</sup> Furthermore, by virtue of Article 1(b) of the Hague Rules the contract of carriage is defined as meaning in the Rules "contract of carriage covered by a bill of lading or any similar document of title". That definition cannot be interpreted to include only contracts in which a bill of lading is in

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<sup>1</sup>- Article 1(b) of Hague Rules. The Rules will also apply if there is an express provision to this effect even if this agreement is evidenced by a non-negotiable receipt, S.1(6)(b) of COGSA 1971.

<sup>2</sup>- "'Common or public carriage' is a contract of carriage arranged after public offers and advertisements and is usually by liner bills of lading i.e. a bill of lading issued by a steamship company whose ships ply an advertised route on a regular 'liner' basis. 'Private carriage' is usually by charter-party and takes place when a special contract is entered into for the transportation of particular goods". Quoted from William Tetley, *Marine Cargo Claims* 3rd ed, 1988, pp.9-10, hereinafter cited as "Tetley, 3rd ed".

<sup>3</sup>- Hugh Mack & Co. Ltd V. Burns & Laird Lines, Ltd, (1944)77 Ll. L.Rep. 377 at p.383; Nichimen Co. V. N/V Farland & A/S Virgo, (1972) A.M.C. 1573 (2 Cir. 1972); General Glass V. Livorno, (1977) A.M.C. 2050 (S.D.N.Y.1977).

fact issued, because under Article 3(3) of the Hague Rules, after receiving the goods, the shipper is entitled to demand from the carrier or master a bill of lading, and if the Rules are not to apply at all unless a bill of lading has already been issued, that provision is rendered meaningless.<sup>1</sup> The term "covered by a bill of lading" is therefore generally interpreted as referring to all contracts of carriage of goods in which the shipper has the right to demand a bill of lading from the carrier.<sup>2</sup> To such a contract the Hague Rules apply even if no bill of lading is in fact demanded or issued.<sup>3</sup> On the other hand, the Hague Rules do not apply even if the bill of lading has been issued, if the carrier has not received the goods. This is because the contract of carriage has not yet commenced.<sup>4</sup>

It should be noted that the Hague/Visby Rules apply to all contracts of carriage of goods by sea, except where by Article 6 of the Hague Rules,<sup>5</sup> a non-negotiable receipt is

1- Anticosti Shipping Company V. Viateur St. Amand, (1959)1 Lloyd's Rep. 353 at p.354; Carver's Carriage by Sea, (1982)Vol.1, 13th ed, para.470, p.322, hereinafter cited as "Carver".

2- Harland & Wolff V. Burns & Laird Lines, 1931 S.C. 722 at p.728.

3- In Pyrene Co V. Scindia Steam Navigation Co, (1954)1 Lloyd's Rep 321 at p.329, [1954]2 Q.B.402 at pp.419-420, the criterion was whether a bill of lading was intended and not whether it was issued, Devlin J, said: "In my judgment, whenever a contract of carriage is concluded, and it is contemplated that a bill of lading will, in due course, be issued in respect of it, the contract is from its creation "covered" by a bill of lading, and is therefore from its inception a contract of carriage within the meaning of the Rules and to which the Rules apply".

4- Scrutton, 19th ed, p.114; Tetley, 3rd ed, p.13; Strohmeyer & Arpe V. American Lines S.S. Corp. (1938)A.M.C. 875.

5- Article 6 of the Hague Rules provides:  
"Notwithstanding the provisions of the preceding articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any

issued in an extraordinary shipment in non-commercial trade.<sup>1</sup> Thus Article 6 of the Hague/Visby Rules permits the issue of a non-negotiable receipt which is not subject to the Rules only if the following conditions are fulfilled:

- a) a non-negotiable receipt (i.e. a waybill) must be issued and marked non-negotiable;
- b) the carriage must be of particular goods, and shall not be contrary to public policy; and
- c) ordinary commercial shipments must not be involved.<sup>2</sup>

It is important to note that the operation of the Hague/Visby Rules in the U.K., has been extended by Section 1(6)(b) of COGSA 1971; the Rules are given the force of law in relation to "any receipt, which is a non-negotiable document marked as such, if the contract contained in or evidenced by it is a contract for the carriage of goods by

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agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such. Any agreement so entered into shall have full legal effect. Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement".

1- Tetley, 3rd ed, p.11.

2- The Vechscroon, (1982)1 Lloyd's Rep. 301 at p.305; Astle, p.185; Anthony Diamond, The Hague/Visby Rules, published in the Hague/Visby Rules and the Carriage of Goods by Sea Act 1971, published by Lloyd's of London Press Ltd, London, 1977, p.25, hereinafter cited as "Diamond, The Hague/Visby Rules"; Tetley, 3rd ed, p.945.

sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading."<sup>1</sup> It seems that the object of this provision is to indicate the legal effect of a clause in a non-negotiable receipt expressly incorporating the Rules, rather than any attempt to delimit the circumstances in which the Rules will be applicable to such a document.<sup>2</sup>

Concerning the Rules relating to the bill of lading issued under a charter-party, the Hague/Visby Rules do not apply to a charter-party,<sup>3</sup> "but if bills of lading are issued in the case of a ship under a charter-party, they shall comply with the terms of these Rules."<sup>4</sup> This provision is supplemented by Article 1(b) of the Hague Rules where "contract of carriage" is defined as including any bill of lading "issued under or pursuant to a charter-party from the moment at which such bill of lading ...regulates the relations between a carrier and a holder of the same".<sup>5</sup>

Under the charter-party the operative document between the charterer and the shipowner is the charter-party, and the bill of lading issued to the charterer generally acts as a receipt when it is in the hands of the charterer.<sup>6</sup> In other words, when the bill of lading is still in the hands of the charterer, there is no "contract of carriage" within

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1- Section 1(6)(b) of COGSA 1971.

2- The Vechscroon, (1982)1 Lloyd's Rep. 301.

3- Article 5 of the Hague Rules.

4- Ibid (second sentence).

5- Article 1(b) of the Hague Rules.

6- Scrutton, 19th ed, p.417.

the meaning of Article 1(b) of the Hague Rules, and therefore the shipowner is not a carrier within the meaning of Article 1(a) of the Hague Rules.<sup>1</sup> When the bill of lading, then, is in the hands of the charterer, it is merely a receipt and the Rules do not apply, but when the bill is negotiated to a third party who is not a party to the charter-party, the Rules apply to the bill of lading, and this document ordinarily becomes the contract which regulates the relationship between the transferee and the carrier.<sup>2</sup>

This situation was summarized by Astle<sup>3</sup> as follows:

"If the charterer be the shipper also, the charter-party governs his rights, but when the goods are transferred by endorsement<sup>4</sup> of the bill of lading the rights of the endorsee or holder of the bill of lading will be governed by the bill of lading".

Carver points out that when a bill of lading issued under a charter-party is transferred to a buyer, a new contract appears to spring up between the carrier and the consignee or endorsee on the terms of the bill of lading. In general, the consignee then acquires the right to claim

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<sup>1</sup>- Article 1(a) of the Hague Rules provides: "'Carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper".

<sup>2</sup>- TD/B/C.4/ISL/6/Rev. 1/p.53; Payne & Ivamy's, *Carriage of Goods by Sea*, 2nd ed, 1985, p.86 hereinafter cited as "Payne & Ivamy"; Mankabady, p.45; Norce (Dodds Shipping) Ltd V.Karoli Lumber Co, (1968)A.M.C.1524.

<sup>3</sup>- Astle, p.41.

<sup>4</sup>- "Endorsement" means a written endorsement and transfer of the document, see The Delfin, (1990)1 Lloyd's Rep.252 at p.270 (C.A.).

for breaches of that contract before, as well as after, the transfer of the bill.<sup>1</sup>

Undoubtedly, where the charterer issues a bill of lading to a third party who endorses it back to the charterer, the bill of lading is a mere receipt and the Hague Rules do not apply.<sup>2</sup>

One can, therefore, conclude that the Rules do not apply as long as the bill of lading issued under the charter-party remains in the hand of the charterer; on the other hand, considering Articles 5 and 1(b) together, one can conclude that the Rules apply to any bill of lading issued under a charter-party when the bill of lading is in the hands of the third party holder of the bill of lading. In such a case, the bill of lading should expressly incorporate the Rules. Consequently, many countries have included in their Acts a provision which requires the parties to bills of lading governed by the Act to include therein an express statement that the bill of lading is to have effect subject to the provisions of the Hague Rules enacted by that Act.<sup>3</sup> This express statement is called a "paramount clause".<sup>4</sup> The paramount clause which appeared

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<sup>1</sup>- Carver, par.496, p.349; Monarch Steamship Co. Ltd V. Karlshamns Oljefabriker (A/B), [1949]A.C. 197 at p.218, (Lord Porter).

<sup>2</sup>- 'The Dunelmia' President of India V. Metcalfe Shipping Co. Ltd, (1969)2 Lloyd's Rep.476.

<sup>3</sup>- T.M.C. Asser, Choice of Law in Bills of Lading, (1974)5 JMLC, p.388, hereinafter cited as "Asser".

<sup>4</sup>- E.g. Section 3 British COGSA of 1924, which provides: "Every bill of lading or similar document of title in Great Britain or Northern Ireland which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Act"; Section 13 United States COGSA of 1936.

in the Anglo-Saxon Petroleum Co. Ltd. V. Adamastos Shipping Co. Ltd.,<sup>1</sup> is a clear example of the normal paramount clause, which reads as follows:

"This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16th, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities and liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but not further".

It is to be mentioned that charter-parties, occasionally, specifically invoke the Hague/Visby Rules by means of a paramount clause; and this may have the effect of invalidating all of the charter-party clauses which may be contrary to the Hague/Visby Rules.<sup>2</sup> Nevertheless, the Court of Appeal in England decided in Anglo-Saxon Petroleum Co.Ltd V. Adamastos Shipping Co. Ltd,<sup>3</sup> that the paramount clause must be properly drafted to be upheld by the courts, otherwise it may cause such confusion that it will not be deemed incorporated into contracts.

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1- [1957] 2 Q.B.233; (1957)1 Lloyd's Rep. 271.

2- Tetley 3rd ed, p.38; TD/B/C.4/ISL/6/Rev.1.p.51; Article 3(8) of the Hague Rules provides:

"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect. A benefit of insurance clause in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability."

3- [1957]2 Q.B.233.; (1957)1 Lloyd's Rep. 271.

The incorporation of the Rules into the charter-party, therefore, must be explicit, i.e. by express terms. In the Marine Sulphur Queen,<sup>1</sup> the United States Court of Appeals held that: "This mere similarity of rather common phrases does not invoke the entirety of COGSA, including its burden of proof rules, [...] while par. 28, captioned 'limitation of liability', does provide that the owner shall have 'privileges, rights and immunities as are contained in Sects. 3(6), 4 and 11 of the Carriage of Goods by Sea Act'; this too is not a general incorporation of COGSA, as the reference is limited to specific provisions of COGSA favourable to the owner. When a statute is incorporated by reference, its terms become the terms of that part of the charter-party, but limited incorporation does not trigger the entire Act". In consequence the general exception clauses and the terms of the charter-party applied.<sup>2</sup>

Furthermore, failure to insert in the bill of lading a paramount clause or the fact that it does not contain such a clause, does not, however, render the bill of lading void and the Rules will still apply.<sup>3</sup>

One can, therefore, conclude that the Hague/Visby Rules apply to waybills by force of law<sup>4</sup>, as well as the Rules

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1- (1973)1 Lloyd's Rep. 88 at p.97.

2- 'The Satya Kailash' Seven Seas Transportation Ltd V. Pacifico Union Marina, (1982)2 Lloyd's Rep. 465 (Staughton J), affirmed at (1984)1 Lloyd's Rep. 588 (C.A.)

3- In Kwei Tek Chao V. British Traders & Shipper, [1954]2 Q.B. 459; (1954)1 Lloyd's Rep. 16, it was held that a forgery did not necessarily nullify a bill of lading. If the forgery corrupted the whole instrument, then the instrument was destroyed; but if it corrupted merely a part then the instrument remained alive.

4- Tetley, 3rd ed, p.11.

applying to a charter-party, when a bill of lading is issued under the charter-party and the bill of lading rather than the charter-party regulates the relations between the carrier and the holder of the bill of lading, i.e., when the bill of lading is in the hands of a person not a party to charter-party. They also apply when the charter-party specifically incorporates the Rules, usually by a paramount clause as discussed above.

#### 1.2.1.2 Under the Hamburg Rules

As already noted above, the Hague Rules applied to the contract of carriage covered by a bill of lading or to bills of lading issued under a charter-party but negotiated to a third party. This limit of applicability was because in the early part of this century the bill of lading was a unique shipping document. This view is confirmed by Sweeney<sup>1</sup> where he said: "The Hague Rules had been prepared at a time when international trade involving ocean transport was financed solely through documentary credits, a method of procedure which began in the nineteenth century and reached its greatest development in the middle years of the twentieth". Consequently, the Hague Rules do not provide satisfactory solutions to the problems raised by the use of new types of documents used in modern liner trade, e.g. waybills and computerised documents. In other words, it is not clear whether these Rules apply to liner

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<sup>1</sup>- Joseph C. Sweeney, The UNCITRAL Draft Convention on Carriage of Goods by Sea, (1975-76) 7 JMLC, part III, p.495, hereinafter cited as "Sweeney, part.III".

waybills and other similar computerised documents if these are non-negotiable and do not expressly incorporate the Rules.<sup>1</sup>

The UNCTAD Working Group held its first session in Geneva in December 1969, and, at its ninth meeting, decided to discuss bills of lading in its programme.<sup>2</sup> In accordance with this discussion the UNCTAD Secretariat prepared a report entitled "Bills of lading". This report was presented to the UNCTAD Working Group in its second session held in Geneva in February 1971. In this session the Working Group adopted the resolution to expand the coverage of new Rules to this various types of document used in maritime transport.<sup>3</sup> This expansion, of course, would remove the problem which exists under the Hague Rules where it is not clear whether these Rules apply to liner waybills and other similar computerised documents if these

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- 1- Anthony Diamond, *The Division of Liability as between Ship and Cargo, (in so far as it affects cargo insurance) under the New Rules proposed by UNCITRAL (1977)*1 LMCLQ, p.49, hereinafter cited as "Diamond, UNCITRAL"; Selvig, p.303.
  - 2- Report of Working Group on International Shipping Legislation on its first session held at the Palais des Nations, Geneva, from 1 to 12 December, 1969, UNCTAD Doc. TD/B/289, TD/B/C.4/64, TD/B/C.4 ISL/4, par. 17, hereinafter cited as "UNCTAD Doc. TD/B/289, TD/B/C.4/64, TD/B/C.4/ISL/4"
  - 3- Paragraph 1 of the Resolution states:  
"Considers that the rules and practices concerning bills of lading, including those rules contained in the International convention for the unification of certain Rules of Law relating to Bills of Lading [the Brussels Convention 1924] and in the protocol to amend that Convention [the Brussels Protocol 1968] should be examined with a view to revising and amplifying the rules as appropriate, and that a new international convention may if appropriate be prepared for adoption under the auspices of the United Nations". UNCTAD Doc. TD/B/C.4/86, TD/B/C.4/ISL/8, pars 1-81; Gabriel M Wilner, *Survey of the Activities of UNCTAD and UNCITRAL in the field of International Legislation on shipping, (1971)*3 JMLC, p.139, hereinafter cited as "Wilner".

are non-negotiable and do not expressly incorporate the Rules.<sup>1</sup>

During the discussions, therefore, on the scope of new Rules many proposals were presented by different countries.<sup>2</sup> Finally, they agreed that the new Rules should apply to "all contracts of carriage of goods by sea"<sup>3</sup>, including all types of maritime transport, and all types of documents in use in maritime transport.

As far as charter-parties are concerned, there was agreement that the new Rules should not be applicable. However, where a bill of lading is issued pursuant to a charter-party, the Rules will apply to the contractual relation between the carrier and the cargo owner under a bill of lading who is not himself the charterer.<sup>4</sup> These principles are now found in Articles 2 and 18 of the Hamburg Rules as follows:

Article 2 of the Rules provides:

"1. The provisions of this convention are applicable to all contracts of carriage by sea...

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1- However this idea was criticised by some delegates, because they believed that the expansion would weaken the traditional bill of lading as the principal documentation in ocean transport, whereas some other countries supported the idea that the new convention should be given the broadest possible scope. Sweeney, part.III, p.497; Diamond, UNCITRAL,p.49.

2- The U.K. presented a draft as follows:  
 "1.These Rules shall apply to all contracts for the carriage of goods by sea where a bill of lading or similar document of title is issued.  
 2.These Rules shall apply to all other contracts for the carriage of goods by sea unless the parties have expressly agreed otherwise and a statement to that effect is endorsed on the document evidencing the contract of carriage and signed by the shipper.  
 3.These Rules shall not apply to charter-parties". Sweeney, part III, pp.497-498.

3- Article 2(1) of the Hamburg Rules.

4- Mankabady, p.45; Sweeney, part.IV, p.500.

2. ....

3. The provisions of this convention are not applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.<sup>1</sup>

4. If a contract provides for future carriage of goods in a series of shipments during an agreed period, the provisions of this Convention apply to each shipment. However, where a shipment is made under a charter-party, the provisions of para.3 of this Article apply".

Article 18 of the Rules provides:

"Where a carrier issues a document other than a bill of lading to evidence the receipt of the goods to be carried, such a document is prima facie evidence of the conclusion of the contract of carriage by sea and the taking over by the carrier of the goods as therein described".

This Article is quite useful because of the increasing use in maritime transport of transport documents other than bills of lading, such as waybills. Since there are various types of documents within this category, the Article is rather general. By according to transport documents other than bills of lading certain important effects, not granted under the Hague Rules, the Hamburg Rules give increased legal security to shippers and carriers alike and promote the use of such documents. Article 2(1) of the Hamburg

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<sup>1</sup>- The Hague Rules (Articles 5 and 1(b)) contain a similar provision, with the same effect; but the Hamburg Rules are perhaps clearer.

Rules also makes it clear that even where there is no bill of lading, the Rules will apply, if another maritime document was issued, because the words "all contracts of carriage" cover all documents used in maritime transport such as a shipping receipt, a consignment note or contracts recorded and produced by computer or other electronic devices.<sup>1</sup> Furthermore, the Hamburg Rules Convention is very broad, that is to say, where a non-negotiable receipt is issued<sup>2</sup>, none of the exceptions described in Article 6 of the Hague Rules as extraordinary shipments not met in the ordinary course of trade is permitted, because Article 29 of the Hamburg Rules disallowed all reservations.<sup>3</sup>

One can, therefore, conclude that the Hamburg Rules by Articles 2(1) and 18 now have a much broader and clearer scope of application than the Hague Rules.

It should be mentioned that the definition of the "contract of carriage" in Article 1(b) of the Hague Rules was most unsatisfactory. Therefore, the Working Group also attempted to define the contract of carriage by using some of the language which had been used as part of the definition of carrier. The following definition was proposed: "5. 'Contract of carriage' means a contract whereby the carrier agrees with the shipper to carry by sea against payment of freight, specified goods from one port to

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1- Mankabady, p.44.

2- William Tetley, *The Hamburg Rules - A Commentary*, (1979)1 LMCLQ, p.7, hereinafter cited as "Tetley, *The Hamburg Rules - A Commentary*".

3- Article 29 of the Hamburg Rules provides:  
"No reservations may be made to this convention".

another where the goods are to be delivered".<sup>1</sup> This definition became paragraph 6 of Article 1 of the Hamburg Rules providing that a

"'Contract of carriage by sea' means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purpose of this convention only in so far as it relates to the carriage by sea".

The phrase "from one port to another" in the Hamburg Rules' definition should not be interpreted too restrictively. The purpose of those words is to support the reference to sea transport. Thus, it is believed that a "port" may mean also a river port.<sup>2</sup>

As to the definition of the bill of lading, it is to be noted that there is no definition of it under the Hague Rules<sup>3</sup>; Article 3 of the Hague Rules deals only with the contents of the bill of lading. Therefore, the fourth session of UNCITRAL considered the recommendations made by its Working Group. A great deal of discussion was given to the term "Bills of lading". Some representatives considered that the use of the term "bills of lading" might give rise to a misunderstanding, and various suggestions

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1- Report of the Seventh Session, U.N. Doc. A/CN.9/96 of 18 November, 1974, pars.99-103 at 33, hereinafter cited as "U.N.Doc.A/CN.9/96"; Sweeney, part. IV, p.615.

2- Mankabady, p.40.

3- The Hague Rules define only "contract of carriage". Under that definition a contract of carriage is one "covered by a bill of lading or similar documents of title". Article 1(b) of the Hague Rules.

were made for modifying the designation of the subject to be examined, such as "Bills of lading with respect to transport by sea", "ocean bills of lading", "contracts of international transport of goods by sea". Most of the representatives, however, desired to retain the term "bills of lading", because the substitution of a different term could lead to confusion. It was therefore agreed to retain the term "bills of lading".<sup>1</sup> On the other hand, in order to avoid the defect found under the Hague Rules, the Secretary General, in his fourth report, proposed two alternative definitions of the bill of lading.<sup>2</sup> Consequently, after long discussions the following definition of a bill of lading became paragraph 7 of Article 1 of the Hamburg Rules, providing:

"'Bill of lading' means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the

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1- Report of the United Nations Commission on International Trade Law on the work of its fourth session [Geneva from 29 March to 20 April, 1971], official Records of General Assembly, twenty-sixth session, supplement no.17 par. 18, U.N. Doc.A/8417; Wilner, p.141.

2- Draft provisions A-1. "'Bill of lading' means a document which evidences [ the receipt of goods and] a contract for their carriage and by which a carrier undertakes to deliver the goods only to a person in possession of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to bearer, constitutes such an undertaking". Draft provision A-2. "'bill of lading' means a document which evidences [ the receipt of goods and] a contract for [their] carriage and by which a carrier undertakes to deliver the goods to the order [ or assigns] of a named person or to bearer". Report of the Secretary General, Fourth Report on Responsibility of Ocean Carriers for Cargo; Bill of lading (U.N. Doc. A/CN.9/WG.111/Wp.17 (Vols. I and II) of 13 August 1974), pars. 4-13 at 8-12.

order of a named person, or to bearer constitutes such an undertaking".

It is now clear enough that the aim of the Hamburg Rules, by Article 1(7) is to clarify the ambiguities contained in the Hague/Visby Rules<sup>1</sup>. As discussed below, these ambiguities may be clarified by explaining the functions of the bill of lading and whether the bill of lading is a contract or not.

Lastly, it is noteworthy that when the bill of lading stipulates that the goods will be carried through a series of shipments during an agreed period, the Hamburg Rules will apply to each shipment, unless the shipment is made under a charter-party, in which case the provisions of Article 2(3) of the Hamburg Rules apply.<sup>2</sup>

### **1.2.2 The Functions of the Bill of lading**

A bill of lading is a document signed by the carrier, or by the master or other agent of the carrier, and issued to the shipper of goods after the goods have been placed on board the vessel. In this document the goods are described and it is stated to which place the carrier shall bring them and to whom delivery shall be made.<sup>3</sup> The bill of lading has however different functions depending upon the

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1- Chandler, p.239.

2- Article 2(4) of the Hamburg Rules.

3- Mankabady, p.41; David M. Walker, Principles of the Scottish Private Law, (4th ed, Vol, II, 1988), p.338, hereinafter cited as "Walker, Private Law, Vol, II"; Halsbury's Laws of England, Shipping and Navigation, (4th ed, Vol 43, 1983), para. 490, p.328, hereinafter cited as "Halsbury's Shipping & Navigation".

principal purpose of the bill of lading which may be described:

**A. As evidence of a contract.**

Doubt has sometimes been raised whether the bill of lading is a contract between the shipowner and the shipper, or if it is only a piece of evidence which assists with others to show what the contract is.<sup>1</sup> It is often said that the bill of lading is not itself considered as a contract of carriage, rather it is the best evidence of the contract of carriage which can be produced. Lord Bramwell in Sewell V. Burdick,<sup>2</sup> states this quite clearly by saying: "To my mind there is no contract in it. It is a receipt for goods, stating the terms on which they were delivered to and received by the ship, and therefore excellent evidence of those terms, but it is not a contract".

The contract of carriage may be made without any writing at all<sup>3</sup>, and therefore the issue of the bill of lading does not necessarily mark any stage in the development of the contract.<sup>4</sup>

Article 1(b) of the Hague/Visby Rules states however that the contract of carriage applies only to a contract of

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1- Carver, para.84, p.59.

2- (1884) 10 App. Cas, 74 at p.105; The Ardennes, [1951]1 K.B.,55, at p.57, where Lord Goddard C.J, states: "A bill of lading is only 'best evidence' of a contract: it is not the true contract"; Per Lush, J, in Crooks V. Allan, (1879)5 Q.B.D. 38 at p.40; Moss S.S.Co. V. Whinney, [1912]A.C.254 at p.264.

3- Harland & Wolff V. Burns & Laird Lines, 1931 S.C.722 at p.729 (Per Lord President Clyde).

4- Pyrene Co. Ltd V. Scindia Navigation Co. Ltd, [1954]2 Q.B.402, at p.419 (Per Devlin J).

carriage covered by a bill of lading. The use of the word "covered" therefore recognizes the fact that the contract of carriage is always concluded before the bill of lading is issued. The bill of lading evidences the terms of the contract.<sup>1</sup>

The terms of the bill of lading will then be in force from the inception of the contract of carriage; if it were otherwise the bill of lading would not be evidence of the contract but would be a variation of it. Moreover, it would be unreasonable to suppose that the parties intend that the terms of the contract should be changed when the bill of lading is issued.<sup>2</sup> Thus it is accepted that one looks to the bill of lading for the terms of the contract of carriage which the bill of lading covers, despite the fact that the bill of lading may be issued several days after the conclusion of the contract.<sup>3</sup>

Furthermore, if there is a discrepancy between the written terms of the contract of carriage and the terms included in the bill of lading, precedence will be given to the document creating the contract rather than to the bill of lading as a document evidencing it.<sup>4</sup>

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1- Ibid.

2- Ibid; Harland & Wolff Ltd V. Burns & Laird Lines Ltd, 1931 S.C. 722, (Lord President Clyde).

3- Charles Debattista, The Bill of Lading as the contract of carriage, (1982)45 M.L.R. 652 at p.654; hereinafter cited as "Debattista".

4- For instance, where the contract of carriage did not contain any conditions which allowed the vessel to deviate from the agreed or customary route, then nothing could change the terms of that contract though such a condition was subsequently printed on a bill of lading. Debattista, at pp. 655,656.

On the other hand, if there is a discrepancy between a bill of lading and a previous oral representation the latter could not alter the terms of the bill of lading<sup>1</sup> but the oral representation would have precedence over the bill in determining the rights of parties. Thus, in The Ardennes,<sup>2</sup> the plaintiff shipped a cargo of mandarin oranges on the defendant's ship on the basis of an oral promise by the defendant's agent that the cargo would be shipped direct from Cartagena, Spain, to London. Under a bill of lading issued subsequent to the loading of the goods the shipowners were "at liberty to carry the said goods to their port of destination [...] proceeding by any route and whether directly or indirectly to such port". The ship did in fact stop over at Antwerp on its way to London, and the delay caused by this call led to losses being incurred by the plaintiff, losses which he sought to recover in an action for breach of contract. Lord Goddard C.J. found for the plaintiff, holding that the bill of lading was not itself the contract of carriage, and oral evidence was admissible to prove the existence of a previous bargain or promise, the terms of which were at variance with the terms contained in the bill of lading and could prevail over those terms.

Thus, the bill of lading is only evidence of the contract of carriage, but it is liable to be rebutted by contrary evidence. Therefore it is open to the shipper to

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1- Sewell V. Burdick, (1884)10 App. Cas, 74 at p.105, (Per Lord Bramwell).

2- [1951]1 K.B.55.

adduce even oral evidence to show that the true terms of the contract are not those contained in the bill of lading, but are to be gathered from a mate's receipt,<sup>1</sup> shipping-cards<sup>2</sup>, placards, handbills<sup>3</sup> announcing the sailing of the ship, advice-notes, freight-notes<sup>4</sup> or undertakings or warranties by the broker, or other agent of the carrier.<sup>5</sup>

**B. As a Receipt for goods shipped.**

The bill of lading is also a document which acknowledges receipt of the goods shipped by the carrier.<sup>6</sup> The carrier or the master or agent of the carrier shall on demand by the shipper issue a bill of lading showing:

- a. the leading marks necessary for the identification of the goods.<sup>7</sup>
- b. either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.<sup>8</sup>
- c. the apparent order and condition of the goods.<sup>9</sup>

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1- De Clermont V. General Steam Nav. Co., (1891)7 T.L.R.187.

2- Peel V. Price, (1815)4 Camp. 243.

3- Phillips V. Edwards, (1858)3 H & N. 813, Cf. Anglo-Continental Holidays V. Typaldos Lines, (1967)2 Lloyd's Rep. 61.

4- Lipton V. Jescott Steamers (1895)1 Com. Cas, 32.

5- Runquist V. Ditchell, (1800)3 Esp. 64.

6- Article 3(4) of the Hague/Visby Rules provides:  
"Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods and therein described in accordance with paragraph 3 (a,b and c); Section (3) of the bill of lading Act, 1855; Ronald Bartle, Introduction to Shipping Law, 1963, p.17, hereinafter cited as "Bartle"; Todd, p.14, where he states: "The function of the bill of lading have not altered significantly since the 1855 Act".

7- Article 3(3) of the Hague/Visby Rules, and COGSA 1971 (schedule).

8- Ibid.

9- Ibid; Apparent order and condition was defined by Sir R. Phillimore in The Peter Der Grosse, (1875)1 P.D. 414 at p.420, as

Such a bill of lading is prima facie evidence of the receipt by the carrier of the quantity and the apparent order and condition of the goods shipped, and the ship must deliver the same goods as therein described. On the other hand, it is considered conclusive evidence when the bill of lading has been transferred to a third party in good faith.<sup>1</sup> The shipowner is bound by the bill of lading which is considered to be conclusive evidence by the contracting parties, unless the shipowner can prove error or fraud, or that the goods have not been shipped.<sup>2</sup>

The shipowner, or the master is nonetheless not bound to show both the number of packages and the weight. That means, if the number of packages is stated in the bill of lading, then the phrase "weight unknown" may properly be inserted in the bill of lading, and will have full legal effect. Thus, in Oricon Waren-Handels G.m.b.h V. Intergraan N.V.,<sup>3</sup> the bill of lading acknowledges the

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meaning that "apparently, and so far as met the eye, and externally, they were placed in good order on board this ship"; this statement relates only to their apparent condition. The shipowner is saying in effect "I accept this case as it appears on the outside; I know nothing about the inside, and will be bound by no statement in reference to it". New Zealand Shipping Co.Ltd V. Lewis's Ltd, (1920) N.Z.L.R.243(N.Z.S.Ct.1919).

- 1- Scrutton, 19th ed, p.111; John F Wilson, Carriage of Goods by Sea, 1988, p.130, hereinafter cited as "Wilson"; Article 3(4) of the COGSA 1971.
- 2- Royal Commission on the Sugar Supply V. Hartlepoons Seatonia S. Co, [1927]2 K.B. 419, where it was held, it was not enough for the shipowner "to give evidence from which it might be inferred that a mistake had been made in the bill of lading; there must be actual proof of a mistake to show how the discrepancy arose"; Goddard, J, in Lauro V. Dreyfus & Co, (1937)59 Ll. L.R. pp.110,117; Carver, para.106, p.77; Halsbury, Shipping & Navigation, para. 493, p.331.
- 3- (1967)2 Lloyd's Rep. 82; New Chinese Antimony Co. Ltd V. Ocean S.S. Co, [1917]2 K.B.664 at p.669 (Viscount Reading L.J); The Ermua V. Coutinho Caro & Co (Canada) Ltd, (1982)1 F.C 252 at p.257; The Esmerelda, (1988)1 Lloyd's Rep.206; However, if the

receipt of 2000 packages of Copra Cake. A clause in it stated: "Contents and conditions of contents ... measurement ... weight ... unknown, any reference in this bill of lading to these particulars is for the purpose of calculating freight only". The bill of lading also stated under the heading "Description of Goods" "said to weigh Gross, 105,000 Kg..." It was held that the bill of lading was prima facie evidence of the number of packages shipped, but was no evidence whatever of their weight.

The bill of lading normally describes the condition of the goods by providing a general statement that the goods are "shipped in good order and condition". This is so especially when the shipper insists upon inserting such a statement in the bill of lading and the shipowner or his agent has had an opportunity to inspect the goods so shipped.<sup>1</sup>

It is then necessary to distinguish between the condition of the goods, which means their apparent or external condition, and the non-apparent condition when the skilled carrier cannot find out the condition of these goods. In Compania Naviera Vasconzada V. Churchill & Sim,<sup>2</sup>

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carrier acknowledged both, he should be liable for both. Spanish American Skin Co. V. M.S. Ferngulf, (1957) A.M.C.611.

<sup>1</sup>- Spartus Corp V. S.S. Yafo, 590 F. 2d, 1301 (1979), where it is stated: "Although a bill of lading can establish prima facie that the merchandise being shipped was in good condition, the 'apparent good condition' clause applies only to those portions of the shipment which are visible and open to inspection"; The Isle De Panay 267 U.S, p.260 (1925); Carver, par. 110, p.82; Payne & Ivamy, p.79.

<sup>2</sup>- [1906]1 K.B. 237 at .245; Ponce, (1946) A.M.C. 1124, where it is stated: "The specification in the 'shipped on board in apparent good order and condition, contents unknown' constitutes prima

Channell, J. states: "I think that 'condition' refers to external and apparent condition, and 'quality' to something which is usually not apparent, at all event to an unskilled person. I think a captain is expected to notice the apparent condition of the goods, though not the quality".

Proof to the contrary, viz, against the value of the statement concerning the condition of the goods carried, contained on the face of the bill of lading, is not admissible when the bill has been transferred to a third party acting in good faith,<sup>1</sup> or the goods have not been inspected by the carrier at the time of loading, or the damage was caused by inherent vice in the goods.<sup>2</sup>

It is noteworthy that the shipper is deemed to have guaranteed to the carrier the accuracy of any information supplied by him for incorporation in the bill, and he is required to indemnify the carrier against all loss or damage arising in the event of any inaccuracies.<sup>3</sup> On the other hand, the carrier is under no obligation to issue a bill containing such information unless requested to by the shipper<sup>4</sup> and, even then, he can refuse if either he has reasonable grounds for believing the information supplied

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facie evidence that on the exterior there are no signs of damage".

1- The "Esmerelda 1", (1988)1 Lloyd's Rep.206 at p.208; Silver V. Ocean S.S. Co, Ltd, [1930]1 K.B.416 at p.425; Article 3(4) of COGSA 1971; Article 1(1) of the Visby Rules.

2- TD/B/C.4/ISL/6 Rev.1/p.1 at p.25.

3- Article 3(5) of the Hague/Visby Rules; however, under the Hamburg Rules, there is the additional provision that the shipper remains liable even if he has transferred the bill of lading to someone else (Article 17(1)).

4- In practice, however, the carrier will almost always want to issue a bill for reasons of his own.

to be inaccurate, or has no reasonable means of checking it.<sup>1</sup> Under the Hamburg Rules the situation is somewhat different. The carrier must insert a reservation in the bill of lading if:

- a. he knows or has reasonable grounds to suspect certain inaccuracies in the bill of lading description of the goods taken over or loaded<sup>2</sup>, or
- b. he had no reasonable means of checking such particulars. The reservation must specify the inaccuracies, grounds of suspicion or absence of reasonable means of checking.<sup>3</sup>

The last sentence of Article 3(3) of the Hague/Visby Rules deals with the same matter. However, one difference is that the Hamburg Rules, unlike the Hague/Visby Rules, require the carrier, master or carrier's agent to specify the grounds for suspicion as to the accuracy of the particulars and the absence of reasonable means of checking. For instance, if there are no facilities or possibilities of examining the weight of the cargo; this must be stated in the bill of lading. Another difference is that the Hamburg Rules regulate the insertion of reservations. In order for such inserted reservations to be effective, they must be inserted in the bill of lading in writing and with reasons.<sup>4</sup>

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1- Article 3(3) of the Hague/Visby Rules.

2- Article 16(1) of the Hamburg Rules.

3- Ibid.

4- A.J.Waldron, *The Hamburg Rules - A Boondoggle for Lawyers?*, (1991) J.B.L. p.316, hereinafter cited as "Waldron"; it has been submitted that the use of the words "a reservation specifying" will clearly prevent the use of old terms such as "weight

However, requiring such reservations is to the benefit of the carrier, who bears the burden of proof under the Hague/Visby Rules and Hamburg Rules. In practice, reservations are also used nowadays.

With respect to the particulars of state and condition demanded, the Hamburg Rules add little to the Hague/Visby Rules. The carrier must include a statement of the "general nature of the goods"; he must include not only the number of packages or pieces but also the weight or their quantity.<sup>1</sup> All this information, it should be noted, is a mere reflection of information provided by the shipper. The carrier, therefore, is only obliged to include, from his own observation, a description of apparent condition of the goods. Otherwise, he will be "deemed to have noted on the bill of lading that the goods were in apparent good condition".<sup>2</sup> This provision answers the question which, under the Hague/Visby Rules, is sometimes uncertain.

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unknown", "particulars furnished by shipper", "said to contain". It will also, possibly prevent a general standard form reservation such as "the carrier had no reasonable means of checking the particulars given", unless the carrier states in the bill of lading the reasons for no reasonable means of checking. See R.J.L. Thomas, A Legal Analysis of the Hamburg Rules, part III, p.2, published in the Hamburg Rules, A one-day seminar organised by Lloyd's of London Press Ltd, London, 1978, hereinafter cited as "Thomas".

1- Article 15(1)(a) of the Hamburg Rules; whereas, the Hague/Visby Rules gives the carrier the option of specifying only one of these particulars [Art.3(3)(b)]; Waldron, p.316.

2- Article 16(2) of the Hamburg Rules.

### C. As a Document of Title to the Goods

The bill of lading is considered as a symbol of the right of the property in the goods shipped as specified in the bill.<sup>1</sup> The possession of the bill of lading is therefore treated as equivalent to possession of the goods<sup>2</sup>, and its transfer as being a symbolical delivery of the goods.<sup>3</sup> The carrier is then entitled to deliver the goods to the consignee or any person holding the bill of lading,<sup>4</sup> that is to say, the latter is entitled, on the production of the bill, to delivery of the goods.<sup>5</sup>

A bill of lading is not in itself a negotiable instrument<sup>6</sup>, but in some ways it resembles a negotiable instrument.<sup>7</sup> Thus the contract which it contains is transferred simply by delivery of the bill, without a separate contract for the assignment itself being required.<sup>8</sup>

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- 1- Sanders Bros V. Maclean & Co, (1883)11 Q.B.D. 327 at p.341; Barber V. Meyerstein, (1870) L.R.4HL 317; Halsbury's, Shipping & Navigation, par. 494, p.339; Walker, Private Law, Vol, II, p.341.
  - 2- Wilson, p.144; Kum V. Wah Tat Bank Ltd, (1971)1 Lloyd's Rep. 439 at p.440.
  - 3- Horst Co. V. Biddell, [1912] A.C.18 at p.21; Sanders V. Maclean & Co, (1883) 11 Q.B.D. 327 at p.341.
  - 4- Trucks & Spares Ltd V. Maritime Agencies, (Southampton), Ltd, (1951)2 Lloyd's Rep. 345; Mankabady, p.43.
  - 5- Lord Denning in Hai Tong Bank Ltd. V. Rambler Cycle Co. Ltd, [1959] A.C.576 at p.586, where he stated: "It is perfectly clear that a shipowner who delivers without production of the bill of lading does so at his peril"; Barber V. Meyerstein, (1870) L.R. 4HL,317.
  - 6- Tetley, 3rd ed, p.220; Walker, private law, Vol, II, p.343, where he states "A bill of lading is not a negotiable instrument Stricto Sensu and the transferor's title to the bill and his competency to dispose of the goods therein are important factors in the validity of the transaction".
  - 7- Mark S.W. Hoyle, The Law of International Trade, 2nd ed, 1985, p.190, hereinafter cited as "Hoyle".
  - 8- Walker, Private Law, Vol, II, p.343; Bartle, p.34.

When the word 'negotiable', however, is used in relation to a bill of lading, it merely means transferable.<sup>1</sup> By mercantile usage, however, recognised by the courts, a bill of lading can be regarded as negotiable if it is stated that delivery of the goods is to be made to "order or assigns" of the shipper or consignee.<sup>2</sup>

The real function of the bill of lading, then, as a document of title to the goods, is to give the consignee a document which he can, to some extent, negotiate whether by delivery or endorsement and delivery of the bill of lading.<sup>3</sup>

The endorsee or transferee of the bill of lading has the same rights and duties which emerge from the bill. Therefore, he will be subject to the same liabilities as if the bill of lading has been made with himself, and also all rights of suit should be transferred to him.<sup>4</sup> Consequently, the endorsee cannot enjoy a better title than the holder of the bill of lading himself, but if the endorser has no title, then he cannot pass one.<sup>5</sup>

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1- Kum, Supra, at p.446 (Per Lord Devlin); Lickbarrow V. Mason, (1794)5 T.R. 683.

2- Henderson V. Comptoir D'Escompte de Paris, (1873) L.R.5.P.C.253 at pp. 259-260 (Sir R.P. Collier); cf. Lickbarrow V. Mason, (1794)5 T.R. 683, where it is stated: "By the custom of merchants, bills of lading, expressing goods as merchandise to have been shipped by any person or persons to be delivered to order or assigns, have been, and are, at any time after such goods have been shipped, and before the voyage performed, for which they have been or are shipped, negotiable, and transferable..."; Kum, Supra, at p.448; Scrutton, 19th ed, p.185; Carver, par. 1598, p.1115.

3- Kum, Supra, at p.440.

4- Mankabady, p.43; Walker, Private Law, Vol.II, p.344.

5- Payne & Ivamy, p.81.

It is to be noted that there is a document other than the bill of lading sometimes issued by the shipowner or his agent, to the shipper. This document is known as a "mate's receipt" which acknowledges receipt of the goods as it states their quantity and condition and the name of the owner of the goods.<sup>1</sup> Further, it may be given when the goods are in the custody of the ship but no bill of lading has yet been issued.<sup>2</sup> These goods, which have been delivered alongside the ship at the port of loading, will be in the shipowner's possession and at his risk.<sup>3</sup>

The mate's receipt is not however a document of title to the goods shipped, but is only deemed prima facie evidence of receiving such goods by the shipowner and giving the cargo-owner a right to receive a bill of lading.<sup>4</sup> The main purpose, then, for issuing such a receipt is to accelerate the preliminary measures of issuing the bill of lading according to the cargo-owner's instructions.<sup>5</sup>

It may, however, be treated as a document of title, in some cases, by virtue of trade custom,<sup>6</sup> or if the

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1- Halsbury's, Shipping & Navigation, para. 500, p.337; Carver, par.119, p.89.

2- D.M.Day, The Law of International Trade, 1981, p.21, hereinafter cited as "Day".

3- British Columbia Co. V. Nettleship, (1868)L.R.3 C.P.499, where it is stated: "The defendant was liable for the loss of the machinery, as delivery to the defendant's servants alongside the vessel was equivalent to a delivery on board"; Hoyle, p.201.

4- Nippon Yusen Kaisha V. Ramjiban Serowgee, [1938] A.C. 429 at pp. 445,446, (per Lord Wright); Scrutton, 19th ed, p.176; Jasper Ridley, The Law of the carriage of Goods by Land, Sea and Air, 6th ed, 1982, p.115, hereinafter cited as "Ridley".

5- Walker, Private Law, Vol.II, p.351.

6- Kum, Supra, at p.440.

contracting parties have intended to replace the bill of lading with a mate's receipt.<sup>1</sup>

Whatever characterization is made for the functions of the bill of lading, it is still considered to be an important and effective document in transporting sea-borne goods.

It is worthwhile to mention that the increased speed of ocean transport, fast container ships, and current payment and financing arrangements have led to shipment under a document, often called a "waybill".<sup>2</sup> In consequence, in recent times, waybills have often replaced bills of lading.

What is, then, a waybill? The United Nations Economic Commission for Europe (ECE) defines the term "Seawaybill" as:

"A non-negotiable document which evidences a contract for the carriage of goods by sea and the taking over or handing of the goods by the carrier, and by which the carrier undertakes to deliver the goods to the consignee named in the document".<sup>3</sup>

A waybill therefore performs two out of the three functions of a bill of lading:

a) it acts as a receipt for the goods;<sup>4</sup>

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1- Bryans V. Nix, (1839) 4 M&W.775, (150 E.R. 1634), where it is stated: "Whether a document, similar in form to a bill of lading, but given by the master of a boat navigating an Inland canal, has the effect of such an instrument in transferring the property in the goods"; Evans V. Nichol, (1841) 4 Scott's N.R. 43, 3 Man & G 614 (133 E.R. 12861).

2- John O. Honnold, *Ocean Carriers and Cargo: Clarity and Fairness - Hague or Hamburg?* (1993)24 J.M.L.C. p.83, hereinafter cited as "Honnold".

3- Tetley, 3rd ed, p.942.

4- Todd, p.133.

b) it provides evidence of the contract of carriage.<sup>1</sup>

The basic difference between a waybill and a bill of lading is that the waybill does not constitute a negotiable document of title in any sense<sup>2</sup>. In other words, it does not share the third function of a bill of lading, i.e., as the waybill is a wholly non-negotiable document, it cannot be a document of title.

One can therefore conclude that the contract of carriage of goods is not always evidenced by a bill of lading.<sup>3</sup>

The position under the waybill, unlike the bill of lading, is such that the carrier is bound to deliver the goods only to the consignee named in the waybill, unless he receives instructions to do otherwise from the named shipper.<sup>4</sup>

It should be mentioned that the terms and conditions of carriage of a waybill are usually the same as those of the carrier's bill of lading.<sup>5</sup> The contents of the waybill, as no negotiation of the document is envisaged, can be telexed to the destination<sup>6</sup>, thus speeding up the receipt of the required information. However, despite the fact that the waybill is neither negotiable nor a document of title may

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1- Wilson, p.159.

2- Hoyle, p.201.

3- Tetley, 3rd ed, p.941.

4- Richard Williams, Waybills and Short Form Documents: A lawyer's view, (1979) L.M.C.L.Q.p.308, hereinafter cited as "Williams".

5- Gordon Humphreys & Andrew Higgs, Waybills: A case of common law Laissez Faire in European Commerce, (1992) J.B.L.p.457, hereinafter cited as "Humphreys & Higgs".

6- Wilson, p.159; Humphreys & Higgs, p.458.

be deemed to be a major deficiency,<sup>1</sup> it is believed that the sea waybill will eventually replace the bill of lading as the universal contract for carriage of goods by sea.<sup>2</sup>

The obvious advantage of the waybill is that it avoids the difficulties in delivery that may result from delayed arrival or loss of a "document of title".<sup>3</sup> It would also help in reducing the risk of fraud presented by a bill of lading.<sup>4</sup>

### **1.2.3 The Voyages governed by the Rules**

#### **1.2.3.1 Under the Hague Rules and the Visby Rules**

The concept of the voyage governed by the Hague Rules is expressed by Article 10 of the Hague Rules providing that "The provision of this convention shall apply to all bills of lading issued in any of the contracting states".

This Article endeavours to widen the scope of application of the Rules to outward and inward voyages by making the Rules applicable to all bills of lading issued in any of the contracting states. In other words, it was the purpose of the Hague Rules that they should apply to all bills of lading anywhere in the world, thus intending to unify the law applicable to the carriage of goods by sea

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1- For more details see Humphreys & Higgs, p.459; Tetley, 3rd ed,944.

2- Anthony Lloyd, The bill of lading: do we really need it?, (1989) L.M.C.L.Q. p.56, hereinafter cited as "Lloyd".

3- Wilson, p.159.

4- Lloyd, p.57; Humphreys & Higgs, p.461.

under bills of lading and thereby eliminating the need for choice of law.<sup>1</sup> However, national legislation implementing the Hague Rules has not always complied with this Rule. Some contracting states only subject all outward voyages to the Hague Rules while others apply the Rules to both inward and outward voyages.<sup>2</sup>

Section 1 of the United Kingdom COGSA 1924 provides: "Subject to the provisions of this Act, the Rules shall have effect in relation to and in connection with carriage of goods by sea in ships carrying goods from any port in Great Britain or Northern Ireland to any other port whether in or outside Great Britain or Northern Ireland."

This section limited the concept of a voyage by providing that the Rules shall apply only to outward voyage. By applying only to bills of lading issued in Great Britain or Northern Ireland, this section has a narrower scope than that sought by Article 10 of the Hague Rules. The latter was intended to be applied to bills of lading issued in any of the contracting states.<sup>3</sup> It is noteworthy that in contrast Article 13 of the United States COGSA 1936<sup>4</sup> has adopted the same attitude as the Hague Rules themselves by applying the Rules to inward and outward voyages.<sup>5</sup>

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1- Asser, p.358.

2- D.C. Jackson, *The Hamburg Rules and conflict of laws*, published in *The Hamburg Rules on the carriage of Goods by Sea*, Edited by Samir Mankabady, 1978, p.227, hereinafter cited as "Jackson".

3- Clarke, p.18.

4- Article 13 of the United States COGSA 1936 provides: "This act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade".

5- Gilmore & Black, p.130; Jackson, p.227, Schroeder Bros Inc V. The Saturina, (1955) A.M.C. 1935.

As already mentioned in the present Chapter, the failure to insert the paramount clause does not render the bill of lading void. A difficulty arises, however, when the carrier inserts in the bill of lading a clause for the selection of a proper law of contract other than that of the port of shipment. Reference here should be made to an important case, namely The Torni<sup>1</sup>; an action was brought against the shipowner for short delivery and damage in consignment of oranges shipped from Jaffa in Palestine to Hull in the U.K. The bills of lading were issued in Palestine with the provision that the terms and conditions of these documents were to be construed in accordance with English law. They did not expressly incorporate the Hague Rules, although by clause 4 of the Palestine Carriage of Goods by Sea Ordinance 1926 (corresponding to Section 3 of the British Act) "every bill of lading .... issued in Palestine .... shall contain an express statement" that it is subject to them, and further that the bill of lading should "be deemed to have effect subject thereto, notwithstanding the omission of such express statement". The Court of Appeal held that the laws of Palestine could not be evaded by an illegal declaration that the bills of lading were to be construed according to English law; consequently, it interpreted the bill of lading as if Palestine law had been complied with. This ruling was given in 1932 and held good until 1939. In that year an

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<sup>1</sup>- (1931) 41 Ll. L. Rep. 174.

appeal in Vita Food Products V. Unus Shipping Company<sup>1</sup> was heard before the Privy Council. In this case, the cargo-owner claimed against the shipowner for damage to a cargo of herrings shipped from Newfoundland to New York. The Newfoundland Act (1932) has in Section 3 a similar provision to Section 3 of the British Act. The bill of lading did not contain a reference to the Newfoundland Act, but included a wide exception clause not permissible by this Act, and also a statement that the contract should be governed by English law. The Privy Council held that the requirement of Section 3, that bills of lading "shall contain" an express statement, was directory and not mandatory. The bills of lading were, therefore, not illegal. The Privy Council then went on to decide that the applicable law was not the Newfoundland Act but the law of England for which the parties had expressly contracted.

The view that the stipulation of Section 3, that every bill of lading contain a paramount clause, is directory and not mandatory, is open to objection. Tetley points out<sup>2</sup>: "It would appear that the Privy Council, upon deciding that S.3 was directory and not mandatory, came to the confused conclusion that the Rules themselves were therefore not mandatory. There is a strong argument that the Rules are mandatory, and that the Rules themselves make this abundantly clear". In this connection Asser also said<sup>3</sup>:

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<sup>1</sup>- [1939] A.C. 277; (1939) 36 Ll. L. Rep. 21; [1939] 1 All E.R. 513.

<sup>2</sup>- William Tetley, *Marine Cargo Claims*, 1st ed, 1965, p.274, hereinafter cited as "Tetley, 1st ed."

<sup>3</sup>- Asser, p.375.

"In the Vita Food case the interests of international maritime commerce as expressed in the convention were sacrificed without justification on that score to a very liberal choice of law principle". However, the decision of the Privy Council in Vita Food case need no longer be followed<sup>1</sup>: the solution adopted by C.M.I. Conference in 1959, and reiterated in 1963, was that the Hague Rules should apply to both inward and outward shipments to or from any state which was a party to the convention.<sup>2</sup> This solution effected the widening of the concept of the voyage subject to the Rules.<sup>3</sup> In 1968, it was replaced by Article 5<sup>4</sup> of the Visby Protocol which attempted to remedy the unsatisfactory situation under Article 10 of the Hague Rules. By contrast, Article 5 of the Visby Rules has amended Article 10 of the Hague Rules so that the latter no longer applies unless the ports of loading and discharge are in two different states.<sup>5</sup> Accordingly, the Visby Rules

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1- The Morviken, (1983) 1 Lloyd's Rep. 1 at p.9 (Lord Diplock); Scrutton, 19th ed, p.418, Tetley, 3rd ed, p.6.

2- CIM. Stockholm Conference, 1963, p.101.

3- Diamond, 1978, p.230.

4- Article 5 of the Visby Rules provides: "Article 10 of the convention shall be deleted and replaced by the following: The provisions of this convention shall apply to every bill of lading relating to the carriage of goods between ports in two different states if:  
 a. the bill of lading is issued in a contracting state, or  
 b. the carriage is from a port in a contracting state, or  
 c. the contract contained in or evidenced by the bill of lading provides that the rules of this convention or legislation of any state giving effect to them are to govern the contract. Whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person. Each contracting state shall apply the provisions of this convention to the bills of lading mentioned above. This Article shall not prevent a contracting state from applying the rules of this convention to bills of lading not included in the preceding paragraphs".

5- Diamond, The Hague/Visby Rules, p.257.

will apply to inward and outward voyages to or from the contracting states, as follows:

- a. If the bill of lading is issued in a contracting state regardless of where the shipment it refers to is situated, so long as the port of destination is in a different state.<sup>1</sup>
- b. If the carriage is from a port in a contracting state.
- c. If the contract contained or evidenced by the bill of lading provides that these Rules or legislation of any state giving effect to them are to govern the contract.<sup>2</sup>

The United Kingdom COGSA 1971 has applied the same approach as the Hague/Visby Rules as set out in the schedule of this Act. In addition, COGSA 1971 has dealt with two other types of voyages not covered by the Visby Rules, as follows:

1. Section 1(3) of COGSA 1971 provides:

"Without prejudice to subsection (2) above, the said provisions shall have effect (and have the force of law) in relation to and in connection with the carriage of goods by sea in ships where the port of shipment is a port in the United Kingdom, whether or not the carriage is between ports in two different states within the context of Article X of the Rules".

2. Section 1(6) of COGSA provides:

"without prejudice to Article X(c) of the Rules, the Rules shall have the force of law in relation to

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<sup>1</sup>- Hoyle, p. 219.

<sup>2</sup>- Article 5 of the Visby Rules.

a. any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract..."

Consequently, the practical effect of S.1(3) of COGSA 1971, is to apply the Rules to all voyages where the port of loading and the port of discharge are both within the area of Great Britain and Northern Ireland, whereas S.1 (6)(a) of COGSA 1971 purports to apply principles which are similar to Article 5(c) of the Visby Rules to coastal voyages.<sup>1</sup> This position is summed up in the words of Diamond: "Both Article X(c) and S.1 (6)(a) set out the principle that even a voluntary paramount clause will attract the statutory application of the Rules. But S.1 (6)(a) is slightly wider than Article X(c) since the former applies to all voyages while the latter applies only to international carriage".<sup>2</sup>

Lastly, it is important to note that the Hague/Visby Rules will apply independently of the presence or absence of a relevant clause in the bill of lading incorporating the Hague/Visby Rules. In other words, the paramount clause is no longer required under the Hague/Visby Rules because they specifically apply by force of law.<sup>3</sup>

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1- Diamond, 1978,p.260.

2- Ibid; see also,Sweeney, p.537.

3- The Morviken, [1983]1 Lloyd's Rep.1 at p.8; Scrutton, 19th ed, p.419; Tetley, 3rd ed, p.6; Wilson, p.177; Todd, p.110.

### 1.2.3.2 Under the Hamburg Rules

Despite the improvement brought by Article 5 of the Visby Rules which amended Article 10 of the Hague Rules, the Hague/Visby Rules did not provide a sufficiently broad scope of application for the Rules.

In order to resolve this defect the Secretariat of UNCTAD prepared two draft proposals:<sup>1</sup>

Draft Proposal A<sup>2</sup> was a similar formula to Article 5 of the Visby Rules and provided that the contracting states were free to apply the rules of the convention to bills of lading not included within the convention's scope. Draft Proposal B<sup>3</sup> would apply the convention to every bill of lading (or contract of carriage) between two different states if:

- a. the bill of lading or other document evidencing the contract of carriage is issued in a contracting state, or
- b. the port of loading or the port of discharge or one of the optional ports of discharge provided for in

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1- Sweeney, part III, p.501.

2- This proposal was supported by Japan and the United Kingdom.

3- This proposal was supported by Egypt, Hungary, Singapore, India, Tanzania, Nigeria, Ghana, Argentina, Chile and Australia; it is to be mentioned that Australia proposed permissive language to authorize contracting states to apply the convention to coastal voyages. The Norwegian proposal, which was supported by the Soviet Union, was to state directly that the convention shall apply to domestic transport, but the United States indicated that this proposal might raise problems. See Secretary-General Report (A/CN.9/WGIII/W.P.12) at par. 5 (1973); Sweeney, part III, p.502.

the documents evidencing the contract of carriage is located in a contracting state, or

c. the document evidencing the contract of carriage provides that the provisions of this Convention or the legislation of any state giving effect to them are to govern the contract.

2. The provisions of paragraph 1 are applicable without regard to the nationality of the ship, the carrier, the shipper, the consignee or any other interested person.

Finally, the Drafting Party proposed a new text which is now incorporated in Article 2 of the Hamburg Rules. Accordingly, the following provisions of this Article will be applicable to all voyages which emerge from the contracts of carriage between ports in two different states if:

- a. the port of loading is located in a contracting state;
- b. the port of discharge is located in a contracting state;
- c. an optional port of discharge mentioned in the contract of carriage which becomes the actual port of discharge and such a port is located in a contracting state;
- d. the bill of lading or other document is issued in a contracting state;
- e. an agreement is inserted in the bill of lading or other document for application of the provisions of the Hamburg Rules.<sup>1</sup>

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<sup>1</sup>- Article 2 of the Hamburg Rules.

It is clear, now, that the Hamburg Rules brought a radical change concerning the application of the Rules by increasing the number of voyages covered by the Rules.<sup>1</sup> It also makes no distinction between inward and outward voyages as the Rules are applicable to both.<sup>2</sup>

Lastly, it should be mentioned that the Hamburg Rules, like the Hague/Visby Rules, apply merely to contracts of carriage by sea where the port of loading and discharge are in two different states.<sup>3</sup> These Rules, therefore, do not apply to the coastal trade<sup>4</sup> because it is outside the scope of the Rules which purport to apply to the trade between two different states.

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1- Mankabady, p.44.

2- Wilson, p.203; Mankabady, p.44; Tetley, The Hamburg Rules, p.7.

3- Article 5 of the Visby Rules and Article 2 of the Hamburg Rules.

4- Wilson, p.203.

### Concluding Remarks

We can conclude from the foregoing discussion that the Hamburg Rules seem to have a much broader and clearer scope and application than the Hague Rules or the Visby Rules.

The Hamburg Rules apply to all documents which are used in maritime transport. That is to say, the Hamburg Rules have adopted a flexible approach by using the phrase "contract of carriage by sea" instead of the "bill of lading", whereas the Hague Rules limited their application, by applying only to the contract of carriage covered by a bill of lading or similar document of title. The number of voyages governed by the Hamburg Rules is sharply increased. Furthermore, the scope of application of the Hamburg Rules, generally, would resolve many existing problems in maritime transport. The Hamburg convention, in my opinion, has also achieved a very important political objective, by giving the developing countries, through the committee which drafted the Rules, a good opportunity of participation in the formulation of maritime law.

## **Chapter Two**

### **The Liability of the Carrier**

Both the Hague/Visby Rules and the Hamburg Rules set out the rules concerning the liability of the carrier. These Rules differ from each other in respect of the rights and obligations of the carrier. In order to get a proper conception of these differences, it is necessary to highlight in detail, in the present chapter, the following points, followed by the limitation of the carrier's liability which is the subject of chapter three.

- 2.1 The basis of the carrier's liability and the period of responsibility.
- 2.2 The burden of proof.
- 2.3 The immunities of the carrier.

#### **2.1 The basis of the carrier's liability and the period of responsibility**

It is important to discuss this point under the following headings:

- 2.1.1 Under the Hague/Visby Rules.
- 2.1.2 Under the Hamburg Rules.

### **2.1.1 Under the Hague/Visby Rules.**

The Hague/Visby Rules and some domestic laws, such as those of United Kingdom and the United States of America, impose on the carrier the following duties:

- A - Exercising due diligence to make the vessel seaworthy.
- B - Loading the cargo properly and carefully.
- C - Stowing the cargo properly and carefully.
- D - Discharging the cargo properly and carefully

#### **A - Exercising due diligence to make the vessel seaworthy**

Article 3(1) of the Hague/Visby Rules provides that:

"The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

- a) Make the ship seaworthy.
- b) Properly man, equip and supply the ship.
- c) Make the holds, refrigerating and coolchambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation".

The first of the carrier's major obligations under the Hague rules is "to exercise due diligence to make the vessel seaworthy".

It is to be noted that, before the Hague Rules came into force, the shipowner's duty to furnish a seaworthy vessel was an implied warranty. After these Rules entered into

force, the duty of the shipowner bound him to exercise due diligence to make the vessel seaworthy.<sup>1</sup>

The phrase "exercise due diligence to make the vessel seaworthy" in the Hague Rules was adopted from the American Harter Act, 1893, and similar British Commonwealth statutes. The words in the phrase were understood to carry the meaning attributed to them prior to the Hague Rules.<sup>2</sup>

"Due diligence" may be however defined as follows:

"The basic definition of due diligence is the use of all reasonable means to make the vessel seaworthy".<sup>3</sup>

It may also mean that a carrier has exercised due diligence when he pays:

"all attention to his duties to provide a seaworthy ship as is properly to be expected of a carrier of goods by sea".<sup>4</sup>

Consequently, the carrier guarantees the shipper that the carrying vessel of goods is seaworthy. The question is, then, what is the meaning of seaworthiness? In principle, seaworthiness is a relative term, because the meaning of the word is dependent upon the context in which it is used.<sup>5</sup> As a result, the meaning of "seaworthiness"

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1- R.Dewey, *The Concept of due diligence in maritime law* (1971)2 JMLC, p.763, hereinafter cited as "Dewey"; Astle, p.52

2- Riverston Meat Company Ptd. Ltd V. Lancashire Shipping Company, Ltd. The "Muncaster Castle", (1961)1 Lloyd's Rep.57 at p.58; Diamond, UNCITRAL, p.46; F.J.J.Cadwallader, *Seaworthiness - An Exercise of Due Diligence*, published in the speaker's papers for the Bill of Lading Conventions Conference, organized by Lloyds of London Press in New York, November, 1978, p.2, hereinafter cited as "Cadwallader, Seaworthiness"; W.E. Astle, *Bills of Lading*, 1982, p.26, hereinafter cited as "Astle, Bills of Lading".

3- Dewey, p.767.

4- Cadwallader, *Seaworthiness*, p.3.

5- Astle, p.52; Waddle, V Wallsend Shipping Co. Ltd, (1952)2 Lloyd's Rep.105.

may differ from case to case. Hence, "seaworthiness" may be defined as the:

"state of a vessel in such a condition, with such equipment, and manned by such a master and crew, that normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage"<sup>1</sup>

The ship, then, should be fit in design, structure, condition, equipment and also have a competent and sufficient master and crew.<sup>2</sup>

It is to be noted that the duty to supply a seaworthy ship does not mean that the carrier should provide a perfect ship, but it means that the ship must have a degree of fitness which an ordinary careful and prudent owner would require his ship to have at the commencement of her voyage, having regard to all the probable circumstances.<sup>3</sup>

In The Good Friend<sup>4</sup>, Staughton, J. stated that the

"obligation is to see that the ship is fit for cargo service. Where the particular service is specified in the contract, it is an obligation to see that the ship is fit to carry the specified cargo on the specified voyage".

It is noteworthy that the warranty of seaworthiness at common law which was absolute is replaced under the Hague Rules Article 3(1) by the duty of the carrier to exercise due diligence to make the vessel seaworthy, that is, as a relative term dependent on the kind of adventure

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1- Tetley, 3rd ed, p.371

2- Carver, p.114

3- Mcffaden V. Blue Star Line [1905]1 K.B.697 at p.706 (Channell. J.); The "Gundulic" [1981]2 Lloyd's Rep.418; Carver, p.115.

4- (1984)2 Lloyd's Rep.586 at p.592.

contemplated and the particular voyage undertaken, the goods to be carried and their stowage, and the state of knowledge and scientific progress at the time of the contract.<sup>1</sup> In "Muncaster Castle"<sup>2</sup> Lord Keith of Avonholm said:

"The Hague rules abolished the absolute warranty of seaworthiness. They substituted a lower measure of obligation...The carrier will have some relief which, weighed in the scales, is not inconsiderable when contrasted with his previous common-law position. He will be protected against latent defects<sup>3</sup>, in the strict sense, in work done on his ship, that is to say, defects not due to any negligent workmanship of repairers and, as I see it, against defects making for unseaworthiness in the ship, however caused, before it became his ship, if these could not be discovered by him or competent experts employed by him, by the exercise of due diligence".

We must now consider the question as to the time when due diligence is to be exercised to make the vessel seaworthy. Article 3(1) of the Hague Rules makes this point clear when it refers to "before and at the beginning of the voyage". This means that the obligation to exercise due diligence covers the period from at least the beginning of loading until the vessel starts on her voyage.

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<sup>1</sup>- Bradely & Sons V. Federal Steam Navigation Co, (1927) 27Ll. L.R.395 at p.396, where Lord Sumner said: "...neither seaworthiness nor due diligence is absolute. Both are relative, among other things, to the state of knowledge and standards prevailing at the material time."; Chorly & Giles, Shipping Law, 7th ed, 1980, p.132, hereinafter cited as "Chorley & Giles, 7th ed"; Clarke, p.125.

<sup>2</sup>- (1961)1 Lloyd's Rep.57 at p.58.

<sup>3</sup>- The Walter Raleigh (1952) A.M.C.618 at p.619 where it is stated that: "A latent defect is one that could not be discovered"; see also, Charles Brown & Co. and others V. Nitrate Producers' Steamship Co. (1937) 58 Lloyd's Rep.188 at p.191.

Furthermore, due diligence must also be exercised before the commencement of each voyage.<sup>1</sup>

Seaworthiness must concern many aspects of a vessel such as the hull, machinery, personnel and stowage of cargo. Failure to exercise due diligence in these respects will make the vessel unseaworthy, but the unseaworthiness is not sufficient in itself yet to make the carrier responsible. Responsibility will be invoked when it can be shown that loss of or damage to the cargo is the result of unseaworthiness. Accordingly, questions may arise as to how there can be unseaworthiness? The integrity of the hull is an important condition for seaworthiness. The bulkheads, the wasting of shell plates through the passage of time has often produced leakage and consequent cargo damage, and accordingly testing of each rivet, and dry docking is needed from time to time.<sup>2</sup> In Federazione Italiana V. Mandask Compania<sup>3</sup>, which concerned the shipowner's failure to investigate or determine the cause of small cracks in bulkhead plating, it was held that due diligence had not been exercised. Moreover, the ship

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<sup>1</sup>- The case of Maxine Footwear Co. Ltd. V. Canadian Government Merchant Marine Ltd, (1959)2 Lloyd's Rep.105, is good evidence of the effect of the words "before and at the beginning of the voyage". This case concerned the loss of goods before the vessel actually left the port and after the goods were loaded on the vessel, due to a fire which caused the scuttling of the vessel. It was held that the words "before and at the beginning of the voyage" mean the period from at least the beginning of loading until the vessel started on her voyage.

<sup>2</sup>- Dewey, p.770; The "Tolmidis" (1983)1 Lloyd's Rep.530.

<sup>3</sup>- (1968) A.M.C.315 U.S. Court of Appeal; The Torenia" (1983)2 Lloyd's Rep.210 at p.230, where Hobhouse. J, states: "The unseaworthiness was not latent nor was it undiscoverable by due diligence. Due diligence was not exercised"; Astle, p.59.

should have competent propulsion machinery and sufficient fuel, refrigeration and ventilation machinery. Failure to supply these things is a failure to use due diligence to make the ship seaworthy.<sup>1</sup>

Seaworthiness is also dependent upon a competent and adequate number of crew members who have to be experienced and trained in the operation of the ship. Thus, in the Makedonia<sup>2</sup>, it was held that the ship was unseaworthy because the ship's engineers were inefficient at the commencement of the voyage, and the shipowners had failed to exercise due diligence before and at the beginning of the voyage to man their vessel properly.

It is to be noted that not only should the carrier exercise due diligence, but due diligence to make the vessel seaworthy should also be exercised by every person to whom any part of a necessary work is entrusted, (whether servants, agents or independent contractors). The question of unseaworthiness concerns whether the carrier will be liable for the negligence of such a person. This was made clear in the case of "Muncaster Castle"<sup>3</sup>, which concerned damage to cargo resulting from the negligence of a ship-repairers' fitter in tightening up the nuts on the storm valve covers of the vessel after they had been removed for the inspection of the storm valves by the surveyors. Because an employee of the ship-repairers had tightened up

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1- The "Toledo" (1939) A.M.C.130; Dewey, p.772

2- (1962) 1 Lloyd's Rep.316 at p.317; the "Farrandoc", (1967) 1 Lloyd's Rep.232; Tetley, 3rd ed, p.385.

3- (1961) 1 Lloyd's Rep.57.

the nuts unevenly, causing the covers eventually to become loose, and sea-water entered into the vessel hold, the House of Lords held that the carrier was liable to the cargo-owner, no matter whether he was carrier's servant, agent or independent contractor.<sup>1</sup>

It should be borne in mind that unseaworthiness may be caused not only by faulty construction of the vessel itself, as we have already discussed, but also by the manner in which the stowage of cargo takes place. Due diligence must, then, also be exercised to make the vessel seaworthy with respect to the stowage of cargo. That is, due diligence also requires attention to see that the vessel is balanced and not overloaded. The carrier in this way must take into account the nature and characteristics of the goods offered for shipment when planning the voyage, and the holds must be cleaned in preparation for receipt of cargo.<sup>2</sup>

Due diligence should be exercised not only to provide a vessel fit to undertake a voyage, but also fit to carry the cargo safely to its destination.<sup>3</sup> An important case that can be mentioned in connection with the stowage of cargo and unseaworthiness is that of Kopitoff V. Wilson<sup>4</sup>, where

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1- Ibid at p.58; It was also held in Charles Goodfellow Lumber Sales V. Verreault, Hovington and Verreault Navigation Inc., (1971) 1 Lloyd's Rep.185 at p.194, that the production of a certificate of seaworthiness is not sufficient to discharge the statutory onus of proof that due diligence was exercised to make the ship seaworthy.

2- Dewey, p.774.

3- Scrutton, 19th ed, p.85; Astle, p.59.

4- (1876)1 Q.B. p.377; The "Standale", (1938) 61 LI.L.R.223. A cargo of grain in bulk was stowed in the hold without adequate protection having been taken against its shifting. It was held

armour plates broke loose from their stowage and sank the ship. The court found that the ship was unseaworthy as regards the mode of stowage, because the ship was not fit for the voyage. Another interesting case in this connection is Paterson Zochonis, and Company Ltd V. Elder Dempster and Co. Ltd<sup>1</sup>, where Scrutton, L.J. said:

"The ship must be fit at loading to carry the cargo the subject of the particular contract. If she is so fit, and the cargo when loaded does not make her unseaworthy, as in the case of the iron plates which might go through the ship's side, the fact that other cargo is so stowed as to endanger the contract cargo, is bad stowage on a seaworthy ship, not stowage of the contract cargo on an unseaworthy ship."

#### **B. Loading the Cargo Properly and Carefully**

In addition to the carrier's duty to exercise due diligence in providing a seaworthy ship, there is another duty. Article 3(2) of the Hague Rules provides that: "Subject to the provisions of Article 4, the carrier shall properly and carefully load, ...the goods carried". That is the carrier's duty is to load the cargo properly, carefully and safely on the vessel and in a manner so that it can be found for quick and safe discharge without delay.<sup>2</sup>

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that this mode of stowage made the ship unseaworthy; The "Friso" (1980)<sup>1</sup> Lloyd's Rep.469; The "Torenia" (1983)<sup>2</sup> Lloyd's Rep.210 at p.234; The "Tolmidis" (1983) 2 Lloyd's Rep.530 at p.540; The "Thorsa" (1916)P. 257.

<sup>1</sup>- [1923]1 K.B.420 at p.438

<sup>2</sup>- International Packers Ltd V Ocean Steamship Company Ltd, (1955)<sup>2</sup> Lloyd's Rep.218, where it was held that there was a failure of the ship under Article 3(2) of the Hague Rules to care for the

It is important in defining due diligence, as found in Article 3 (1) of the Hague Rules, that it involves an overriding obligation. Lord Somervell, in Maxin Footwear Co, Ltd V. Canadian Merchant Marine Ltd<sup>1</sup>, said that:

"Article III, Rule I, is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage, the immunities of Article IV cannot be relied on. This is the natural construction apart from the opening words of Article IV, Rule 2. The fact that that Rule is made subject to the provision of Article IV and Rule 1 is not so conditioned makes the point clear beyond argument".

Consequently, in order to allow the carrier to rely on the exceptions in Article IV(2), the carrier must first show that he has exercised due diligence and that he has been careful in accordance with Article III(2) such as showing reasonable care in loading etc. the goods; he must also show such care in preparing the ship that will carry the goods.<sup>2</sup>

The question, then, is: when does loading begin, and when do the Rules begin to apply?

Under Article 3(2) of the Hague Rules, the carrier is responsible for the operation of loading; therefore, it seems that the loading will begin from the time the goods are received into tackle for lifting on board the vessel and does not cease until the goods are released from the

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cargo and that the carrier was responsible for the damage sustained by canned meat; Gosse Millerd Ltd V. Canadian Government Merchant Marine Ltd, [1929] A.C.223.

1- (1959)2 Lloyd's Rep.105 at p.113.

2- Clarke, p.140.

discharge tackle.<sup>1</sup> This means that the carrier's liability related to the operation of loading is limited to a "tackle to tackle" period.<sup>2</sup> This has meant that, if the ship's tackle is used or the carrier is doing the loading with shore personnel, loading will then begin and the Rule will apply when the tackle is hooked onto the cargo. However, if the shore tackle is used, then the loading will begin and the Rules shall apply when the cargo crosses the rail. An interesting case that can be cited is Pyrene Company Ltd v. Scindia Steam Navigation Co<sup>3</sup> where the tender was being lifted onto the vessel by the ship's tackle and before crossing the ship's rail it was dropped and damaged. It was held that since the accident occurred outside the period specified in Article 1(e), the Rules did not apply.<sup>4</sup> As far as the question of loading is concerned, Devlin, J. said that:

"The phrase 'Shall properly and carefully load' may mean that the carrier shall load and that he shall do it properly and carefully: or that he shall do whatever loading he does properly and carefully. The

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1- Goodwin, Ferreira & Co V. Lamport & Holt, Ltd, (1929)34 Lloyd's Rep.192 at p.194; Astle, p.80.

2- So-called "maritime stage". This means that the Hague/Visby Rules do not apply when the loss or damage to the goods occur before the loading or after discharge, even though the goods are still in the control of the carrier or his servants or agents, unless there is an agreement between the contracting parties to extend the scope of the Hague/Visby Rules to apply in such cases. Léopold Peyrefitte, *The period of maritime transport comments on Article 4 of the Hamburg Rules*, published in the *Hamburg Rules on the Carriage of Goods by Sea*, edited by Samir Mankabady, 1978, p.125, hereinafter cited as "Peyrefitte"; Tetley, 3rd ed, p.528; Wilson, p.185

3- (1954)1 Lloyd's Rep.321; (1954)2 Q.B.402 at p.403.

4- Article 1(e) of the Hague Rules provides that: ("carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.).

former interpretation phrase fits the language more closely, but the latter may be more consistent with the object of the Rules"<sup>1</sup>

It can be concluded from this case that the carrier was responsible for loading before the goods crossed the ship's rail.<sup>2</sup>

Devlin, J. said that the whole contract of carriage was thus subject to the Rules, but the extent to which the loading stage of the carriage is brought within the carrier's undertaking is left to the parties themselves to decide, depending upon different systems of law, the custom and practice of the port and nature of the cargo.<sup>3</sup>

If loading is from lighters, when does the carrier's responsibility begin? The answer to this question depends upon whether the carrier owns or controls the lighters, both in terms of the contract of carriage and the lighterage contract.<sup>4</sup> When the carrier does not own or control the lighters, his responsibility commences at the point when the vessel's tackle is hooked onto the cargo.<sup>5</sup> In the United States a court held that the carrier was responsible for the cargo lost when a lighter capsized alongside.<sup>6</sup>

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1- Pyrene Company Ltd V. Scindia Steam Navigation Company Ltd. (1954)1 Lloyd's Rep.321 at p.328.

2- Carver, para. 515.

3- Pyrene Co Op.Cit, p.328-9; C.H.Renton & Co V. Palmyra Trading Corp at Panama, [1957] A.C.149 at p.170.

4- Tetley, 3rd ed, p.529.

5- The E.T. Barwick Mills V. Hellenic, (1972) A.M.C.1802.

6- The Scow Steelweld, (1968) A.M.C.2064 at p.2073, where the court stated "The barge and its contents had come within the actual control of the carrier at its terminal. Furthermore, additional

The carrier should be liable for any loss of or damage to goods at least from the beginning of loading until the completion of discharge unless the carrier agreed to extend the period of liability during his control of the goods (at the port of loading or discharge) or during his custody of the goods, such as, where the carrier discharged the goods in his warehouse.

Article 7 of the Hague Rules grant complete freedom of contract prior to the loading on and subsequent to discharge, when it states:

"Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to, the discharge from the ship on which the goods are carried by sea".

Therefore, I am inclined to agree with Justice Devlin's view that the whole of the contract of carriage which is covered by a bill of lading is subject to the Rules, but at what point the goods are loaded on and brought within the carrier's obligation is a matter left to the parties to decide.<sup>1</sup>

Coming now to the consideration of the phrase used in Article 3(2) of the Hague Rules, that is, "properly and

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evidence of delivery includes acceptance of the scow's papers and direction of a particular berth, and orders by the ship to tie a scow alongside, and control by the ship of the place and speed of loading operations from the scow"; The Yoro, (1952) A.M.C.1094 at p.1096.

<sup>1</sup>- See Pyrene Co (1954)<sup>1</sup> Lloyd's Rep. at p.329.

carefully", we find that this phrase originated from the Harter Act in which these words are used alternatively or interchangeably<sup>1</sup>. That means the two expressions are intended to have the same meaning. They are employed jointly in the Hague Rules.<sup>2</sup> Viscount Kilmuir L.C. expressed the opinion that:

"The natural and ordinary meaning of 'properly' in antithesis to 'carefully' in the phrase 'properly and carefully load, handle stow, carry keep, care for and discharge', is in accordance with a sound system. It has not a geographical significance".<sup>3</sup>

The House of Lords accepted such an interpretation of "properly", but pointed to some differentiation between "properly" and "carefully" when Lord Pearson said that:

"'properly' meant in an appropriate manner; that if 'carefully' meant merely taking care, 'properly' required, in addition, the element of skill or sound system".<sup>4</sup>

whereas Lord Pearce added that:

"The word 'properly' presumably adds something to the word 'carefully' and means upon a sound system. A

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- 1- Section 1 of the Harter Act provides that: "All clauses exonerating the carrier from liability for loss or damage arising out of "negligence, fault or failure in proper loading, stowage, custody care, or proper delivery..." are null. Section 2 of the Harter Act provides that: "The clause that are designed to lessen the carrier's obligation to exercise due diligence in rendering the vessel seaworthy, and also to "carefully handle and stow her cargo and to care for and properly deliver same..." are equally void.
  - 2- Guido Alpa & Francesco Berlingieri, *The Liability of the Carrier by sea: Present Regulation and Prospects of Reform*, published in the *Studies on the Revision of the Brussels Convention on Bills of Lading*, 1974, p.79, hereinafter cited as "Alpa & Berlingieri".
  - 3- G.H. Renton & Co. Ltd V. Palmyra Trading Corporation, (1957)2 Lloyd's Rep.p.379 at p.388; Gosse Millerd Ltd V. Canadian Government Merchant Marine, (1927) 28 Ll.L.R.88 at p.103; (1927)2 K.B.432 at p.434.
  - 4- Albacora S.R.L. V. Westcott & Laurence Line Ltd, (1966) 2 Lloyd's Rep.53 at p.54.

sound system does not mean a system suited to all the weaknesses and idiosyncrasies of a particular cargo, but a sound system under all the circumstances in relation to the general practice of carriage of goods by sea".<sup>1</sup>

Therefore, a "sound system" is "tantamount to efficiency".<sup>2</sup>

Thus, the carrier must adopt a system which is sound in the light of all the knowledge about the nature of the goods.<sup>3</sup>

It should be mentioned that in the absence of an express agreement, the duty of the shipper is to bring the goods alongside the ship at his own expense, and the duty of the carrier is to load the goods on to the ship by the ship's tackle at his expense unless there is a custom of the port of loading to the contrary.<sup>4</sup> It is important to note that the shipper will be only liable for any loss or damage to his own cargo resulting from his failure when bringing the goods alongside the ship. What happens, however, if he, while succeeding in bringing the goods alongside the ship, does damage to a third party's cargo? The carrier rather than the shipper will be liable as being responsible to the

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1- Ibid, p.62.

2- Ibid, p.62.

3- Ibid, p.58.

4- Argonaut Navigation Company Ltd v. Ministry of Food: SS. "Argobec", [1949]1 K.B.572, at p.580 (Per Bucknill L.J.); Harris v Best, Ryley & Co [1891] All E.R.567 at 569 (per Lord Esher); National Steam Co, Ltd v. Sociedad Anonima comercial De Exportacion Y Importacion & c (1932) Com, Cas.283 at p.290 (per Greer L.J.).

third party or parties whose cargo is damaged during the loading operations.<sup>1</sup>

### C. Stowing the Cargo Properly and Carefully

The stowing of the cargo is closely connected with the loading of the cargo. Article 3(2) of the Hague Rules provides that:

"Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried".

Having received the cargo over the ship's rail or otherwise as is customary or provided by the contract, it becomes the carrier's duty to stow it. Therefore, the carrier must stow the goods with due skill and care in the proper place and condition in accordance with the nature of the goods.<sup>2</sup>

The duty of stowing the cargo in the ship is arranged by the master of the ship or his representative. The master has to be a competent stevedore, and he must have a full knowledge to see that the stowage is done with skill and care. Otherwise the carrier will be responsible for any loss or damage to cargo.<sup>3</sup>

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<sup>1</sup>- Ridley, p.123; Tetley, 3rd ed, p.532.

<sup>2</sup>- Blackwood Hodge (India) Private, Ltd V. Ellerman Lines Ltd, (1963)1 Lloyd's Rep.454, where the pieces of cargo were lashed and there were gaps in the stowage and it was not sound block stowage; and that, therefore, shipowners were liable; Elder Dempster Co. V. Paterson Zochonis [1924] A.C.522; Walker, Private Law, p.354.

<sup>3</sup>- Canadian Transport Co. V. Court Line, Ltd, [1940] A.C.934 at p.943, where Lord Wright said:  
"In modern times the work of stowage is generally deputed to stevedores, but that does not generally relieve the shipowners of their duty, even though the stevedores are under the charter party

It must be mentioned that part of the shipowner's duty is to stow the goods properly and carefully not only with regard to the seaworthiness of the ship, but also to avoid damage to the goods.<sup>1</sup> If the carrier, however, inserts a clause in the bill of lading that he is not responsible for bad stowage, this clause would be invalid under Article 3(8) of the Hague Rules.<sup>2</sup> But, the carrier may be relieved from the liability by virtue of Article 4(2)(i)<sup>3</sup> of the Hague Rules, if he proves that the method of the stowage has been directed by the shipper, and that the damage caused to the cargo by improper stowage was due to the shipper's directions.<sup>4</sup> If the carrier chooses to carry a number of different types of goods together, he does so at his own risk, nevertheless while using all possible care in stowing the goods, he will be responsible for the damage they may cause to each other.<sup>5</sup> However, the carrier is relieved from the liability if he has adopted the customary

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to be appointed by the charterers, unless there are special provisions which either expressly or inferentially have that effect"; Heinze Horn Marie Horn, [1970]1 Lloyd's Rep.191 at p.198.

1- Ibid.934 at p.943.

2- Article 3(8) of the Hague Rules provides that:

"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect."

3- Article 4(2)(i) of the Hague Rules provides that:

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (i) act or omission of the shipper or owner of the goods, his agent or representative".

4- Arrond Rotterdam, (1978) 13 E.T.L.483, where insistence on a certain type of stowage by the shipper, which stowage proved to be faulty, permitted the carrier to rely on Article 4(2)(i).

5- The Freedom, (1869) L.R.3 P.C.594; Carver, p.832.

method of stowage for the cargo.<sup>1</sup> Thus, in Silversandal,<sup>2</sup> bales of crude rubber were stowed so that pressure was generated on the tiers. This caused the crushing of some bales. The crushed bales could not fit into the slicing machines for treatment. It was held that they had been stowed in the customary way and that the shipowners were not therefore liable. But, it is no defence to stow the goods according to the custom if that custom is improper. Thus, in Canadian Co-operative Wheat Producer V. Paterson SS. Ltd.,<sup>3</sup> which concerned shipment of grain, the grain was loaded in bulk without shifting boards in accordance with practice in the region of the Great Lakes over the previous 20 years. It was held that due diligence had not been exercised to provide a seaworthy ship. It must be mentioned that the shipper should provide the carrier with sufficient information for a cargo requiring special care or involving a dangerous character, because the carrier is expected to be experienced in respect of normal cargo not requiring special information and he should stow it properly and carefully.<sup>4</sup> That means unless the carrier knows or is expected to know that the goods need special care or involve a dangerous character, there will be an implied warranty by the shipper that goods are fit for stowing in a proper way without having special

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1- For a custom to be enforced by the courts it must be (a) reasonable; (b) certain; (c) consistent with the contract; (d) universally acquiesced in; (e) not contrary to the law. See Scrutton, 19th ed, p.15.

2- (1940) A.M.C.731.

3- (1939)49 Ll. L.Rep.421.

4- Tetley, 3rd ed,p.546.

instructions.<sup>1</sup> However, the carrier or the master is entitled to refuse any package which, he suspects, to contain dangerous goods and he may request that it should be opened to ascertain that fact. Moreover, if the dangerous goods have been brought on board the ship without being marked, or without notice being given as prescribed, the carrier or the master may give orders to throw the cargo overboard without being in any way liable.<sup>2</sup> It is to be noted that the master has absolute control over stowage of the goods. As such he alone is responsible for this matter not only because of the carrier's responsibility for the stability of the ship but also because of the carrier's duty to care for other cargo as well as part of the carrier's responsibility for any loss or damage to cargo.<sup>3</sup> Then, mere ignorance of the effect of stowing particular kinds of goods together will not make the carrier liable, unless as a competent person he may reasonably be expected to know it. In Ohrloff V. Briscall<sup>4</sup>, which concerned 47 casks of olive oil stowed in a hold together with some rags and wool, the latter became heated; the staves of the casks dried and the casks became leaky. A large part of

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1- Bamfield V. Goole, etc. Transport co, [1910]2 K.B.94

2- Scrutton, 19th ed,p.103; see also Article 4(6) of the Hague Rules.

3- Olsen V. U.S. Shipping Co., 213 Fed.Rep.18 (1914) at p.21, where Hinckes Ct. J, relied on, it was stated that "It makes no difference whether this was due to the amount or the stowage of the deckload alone or also to the fact that the largest ballast tank could not be filled. All these matters were under the absolute control of the master and it was his duty to see they were right". It was held that the carrier was therefore responsible for the loss; Canadian Transport V. Court Line [1940] A.C.934 at p.943.

4- (1866) L.R.1 P.C.231.

the oil escaped. It was held that the carrier was responsible for this loss, as caused by negligent stowage. This decision was reversed by the Privy Council. Turner, L.J. said:<sup>1</sup>

"Notwithstanding the evidence of the notoriety at Liverpool of the deleterious consequences of the collection of oil in casks with rags and wool, or other matters tending to generate heat, we do not believe that either the shippers or the shipowners in this case were aware of them... Nor do we think the ignorance of the shipowners in itself amounted to negligence. It can hardly be imputed as misconduct that the shipowners should be ignorant of latent mischief of this nature, when *Lloyd & Co.*, who are proved to have had very great experience as Oil merchants, were in the same state of ignorance".<sup>2</sup>

We must now consider the question of whether cargo may be stowed on deck. This depends on the conditions of the ship, and on the probable circumstances of the intended voyage. In the ordinary way, the cargo must be stowed in the holds and other usual carrying parts of the ship, not on deck where it may be exposed to greater risks.<sup>3</sup> Certain kinds of cargo are frequently carried on deck for different reasons, among which the most important is that the cargo is too large to be stowed in the hold, such as railway engines, containers, coaches and timber cargo.<sup>4</sup>

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<sup>1</sup>- Ibid, p.238.

<sup>2</sup>- Ibid, p.239; Union Castle SS Co. V. Borderdal Shipping Co., [1919]1 K.B.612.

<sup>3</sup>- Chorley & Giles, Shipping Law, 8th ed, 1987, p.236, hereinafter cited as "Chorley & Giles, 8th ed"; Carver, p.858.

<sup>4</sup>- R. V. Campbell, Ex parte Nomikos, [1956]2 All E.R.280; Mankabady, p.75.

An important point to be mentioned is that the shipowner is not entitled to carry the goods on deck unless the shipper has accepted, or permitted this in accordance with usage of trade.<sup>1</sup> Therefore, in the absence of any contrary usage in the particular trade, it is required that the goods shall be stowed under deck, otherwise the carrier and the ship will be responsible for any damage to the cargo.<sup>2</sup> Insofar as the custom and usage of stowage on deck is concerned, whether a shipper knew of the existence of such a practice, or is justifiably ignorant of the practice, and does not object to it, he cannot be said to have consented to modification of the contract embodied in his bill of lading.<sup>3</sup> If the shipper then accepts the bill of lading at the carrier's option to stow the goods either on deck or under deck, the shipper has no right to a claim for any damage resulting from such goods carried.<sup>4</sup> If the goods, however, are carried on deck without the shipper's acceptance, or a clean, unclausd bill of lading calls for under deck stowage, and stowage is on deck, the shipowner becomes liable for damage from such stowage.<sup>5</sup> Moreover, if the goods are shipped on deck at the shipper's risk, the carrier is not relieved of the duty of due care and

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1- Burton V. English, (1883)12 Q.B.D.218; The Royal Exchange Shipping Co. V. Dixon, (1886) 12 App. Cas.11.

2- Schooner St. Johns N.F., (1923) A.M.C.1131; Chorley & Giles, 8th ed, p.237.

3- The Royal Exchange Shipping Co. Ltd, V. Dixon, (1886)12 App. Cas.11 at p.18 (Lord Watson).

4- Peter Helms, (1938) A.M.C.1220 at p.1122, Walker, Private Law,p.354.

5- Wright V. Marwood, (1881) 7 Q.B.D.62 at p.67.

attention towards the cargo.<sup>1</sup> The question may also arise if a ship adapted for container transport carries them on deck. The stowage of containers on deck, without any reference to that fact in the bill of lading, constitutes a breach of the carrier's duty and he will be liable for the amount of damage.<sup>2</sup> However, the stowage of the containers on deck of a container ship may not be a breach of the carrier's duty, because the deck of the container ship is held to be exactly the place where containers are reasonably intended to be carried.<sup>3</sup>

Lastly, it is noteworthy that the goods carried on deck and stated to be so carried in the bill of lading are not "goods" within the meaning of Article 1(c)<sup>4</sup> of the Hague Rules. In other words, where the parties agree on cargo being carried on deck, the Hague Rules do not apply and the carrier remains liable for stowing the goods carried properly and carefully.<sup>5</sup>

Thus it seems clear that the carrier is bound to stow the cargo properly and carefully throughout the whole voyage. That means the duty of the carrier to stow the cargo set out under Article 3(2) of the Hague Rules is not

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1- The Ponce, (1946) A.M.C.1124; Shaw, Savil V. Electric Reductions Sales Co "The Mahia", [1955]1 Lloyds Rep.264.

2- Encyclopedia Britannica, Inc V. Hong Kong Producer & Universal Marine Corp, [1969]2 Lloyd's Rep.536, (1969)A.M.C.1741.

3- The Mormacvega, (1973)1 Lloyd's Rep.267.

4- Article 1(c) of the Hague Rules defined the goods as: "goods, wares, merchandise and articles of every kind whatsoever except ... cargo which by the contract of carriage is stated as being carried on deck and is so carried".

5- Svenska Traktor Aktiebolaget V. Maritime Agencies (Southampton), Ltd, [1953]2 All E.R.570; The Royal Exchange Shipping Co. V. Dixon, (1886)12 App. Cas.11.

a strict obligation which is not required for goods carried during the voyage, but the carrier must be shown to have exercised all due care and stow the goods properly and carefully.<sup>1</sup>

#### **D. Discharging the Cargo Properly and Carefully**

According to Article 3(2) of the Hague Rules, the carrier's duty is to discharge the cargo properly and carefully. And Article 1 (b) and (e), taken together, state that the contract of carriage of goods "covers the period from the time when the goods are loaded on to the time they are discharged from the ship".

Discharge is a joint operation, the carrier being also responsible for shifting the cargo from the hold to the ship's side, while the consignee is responsible for taking it from alongside.<sup>2</sup> Lord Wright has defined however, a proper discharge as follows:

"Deliver from the ship's tackle in the same apparent order and condition".<sup>3</sup>

The scope and the meaning of the word "discharge" can be found through consideration of what is meant by the port or place of discharge, the manner in which discharge is to take place, the party to whom discharge is to be made, and the question of substituted delivery.<sup>4</sup>

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<sup>1</sup>- Silversandal, (1940) A.M.C.731 at p.734; Diethelm & Co.Ltd V. Flying Trade, (1956) A.M.C.1550; Tetley,3rd ed,p.541.

<sup>2</sup>- Wilson, p.87.

<sup>3</sup>- Gosse Millerd, Ltd V. Canadian Government Merchant Marine, (1927) 28 Ll. L. Rep.88 at p.103 (Lord Wright).

<sup>4</sup>- William Tetley & Cleven, Prosecuting the voyage,(1970-71)45 TUL.L.R.p.824, hereinafter cited as "Tetley & Cleven".

The word "discharge" is used, in place of "deliver", because the period of responsibility to which the Rules apply (Art.1(e)), ends when they are discharged from the ship.<sup>1</sup> The carrier, then, is practically bound to play some part in discharging the goods from the ship.<sup>2</sup>

The bill of lading must contain the name of the port of discharge. The carrier, then, is obliged to discharge the goods at the named port. The port may be, however, defined as follows:

"Port, a place for the loading or unloading of ships, created by royal charter or lawful prescription. A port is a harbour where customs officers are established, and where goods are either imported or exported to foreign countries, as distinguished from a mere harbour which is simply a place, natural or artificial, for the safe riding of ships. It is said that every port comprehends a city or borough, with a market and accommodation for sailors. No person may land customable goods on his own land or elsewhere than at a port".<sup>3</sup>

It should be mentioned that the words "port or ports" must be taken to mean, functionally, not only those places which are technically called ports, but all the places to which ships may be accustomed to resort for the purpose of

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1- Gosse Millerd, Ltd V Canadian Government Merchant Marine, op.cit,p.103.

2- Pyrene Co.Ltd V. Scindia Navigation Co. Ltd, [1954]2 Q.B.402 at p.418.

3- John Burke, Jowitt's Dictionary of English Law, (1977)Vol.II pp.1384-1385, hereinafter cited as "Burke"; To be a port, "it seems that it should have somewhere for vessels to lie safely, and a shore where goods may be safely landed; also that there should be some conveniences for trade, such as wharves and warehouses; and that it should be a place to which vessels are allowed to come by the government of the country". Carver, p.1064,para.1504.

taking cargo.<sup>1</sup> The port also must be safe,<sup>2</sup> and taken as meaning to be a port by businessmen, insurance companies etc.<sup>3</sup>

The carrier's duty is to discharge the goods at the port named in the bill of lading or at the port about which the parties have agreed in the contract, but if the named port is found unsafe, for example, with respect to natural dangers of the seas, or for political reasons, such as war, blockade, the carrier is entitled to discharge the goods at the nearest safe place (as a port) which the ship can reach and return from safely.<sup>4</sup> On the other hand, a temporary danger, condition or obstruction, such as ice, will not make the port unsafe and the carrier is bound to wait for a reasonable time until the temporary obstacle ends, and then

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- 1- Harrower V. Hutchinson, (1869) L.R. 4 Q.B.523 at p.540, (Lush.J.)
  - 2- Hall Brothers Co, Ltd V. Paul Ltd, (1914) 30 T.L.R.598, where Sankey J, said: "A 'safe port' means a port to which a vessel can get laden as she is and at which she can lay and discharge, always afloat".
  - 3- Leonis S S. Co V. Rank Ltd, [1908] 1 K.B.499 at p.520 (Kennedy, L.J.); The Robert Dollar Co. V Blood, Holman & Co., (1920)4 Ll. L. Rep.343 at p.345 (McCardie, J).
  - 4- G.W. Grace & Co. Ltd V. General Steam Navigation Co. Ltd, [1950]1 All E.R.201; Limerick SS. Co. V. Stott & Co, [1921]1 K.B.568 at p.575; Leeds Shipping Co. Ltd, V. Société Francise Bunge, [1958]2 Lloyd's Rep.127 at P.131, Sellers, L.J. where he states: "A port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship"; Bartle, p.6, said : "A port where she can enter and remain, whether for the purpose of loading or unloading, without danger from either physical or political causes. If such a danger exists the shipowner may require another port to be named and, failing direction by the charterer, should proceed to the nearest convenient port"; Unitramp v. Garnac Grain Co. Inc, The Hermine, [1978]2 Lloyd's Rep.37 at p.46 (Donaldson, J); Kodros Shipping Corpn V. Empresa Cubana de Fletes, [1982]2 Lloyd's Rep.307 at p.320 (per Lord Roskill); Aktieselskabet Olivebank V. Dansk Fabrik, [1919]2 K.B.162.

he is bound to proceed to the port.<sup>1</sup> However, if the reasonable time has elapsed or when there is no chance for the ship to get to a discharge place within a reasonable time, the ship is at liberty to go to a reasonable discharging place (port) as near as she can safely get to.<sup>2</sup>

As has already been mentioned, the carrier's duty is defined in the Hague/Visby Rules: he is to discharge the goods carried properly. Therefore, the carrier will be subject to the liability contained in the Rules until the end of the "tackle to tackle" period. Accordingly, if the goods are put into a lighter while other goods are being discharged into the same lighter, liability prevails until the discharge operations of these goods are completed. This point is covered by the Rules, because the Hague Rules are intended to apply only to the contract of carriage not to a period of time.<sup>3</sup> The carrier may also remain responsible for loss of or damage to the cargo caused by negligence or improper discharge.<sup>4</sup> This means that the ocean carrier

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1- Steamship. Knutsford, Ltd V. Tillmanns & Co, [1908] A.C.406, where it was stated that the shipowners could not justify ceasing to attempt to enter the port of discharge, which was blocked by ice, after three days trial, whereas in fact the next day the ice cleared and access to the port became safe; see also Reardon Smith V. Ministry of Agriculture, [1962]1 Q.B.42 at pp. 109-110.

2- The Varing, [1931] P.79 at p.87 (Scrutton, L.J.)

3- Goodwin, Ferreira & Co. Ltd V. Lamport & Hold, Ltd, (1939)34 Ll. L. Rep.192; Falconbridge Nickel Mines. V. Chimo Shipping, [1973]2 Lloyd's Rep.469 at p.472, it was held that the discharge into barge alongside the ship was considered as part of the discharge operation, and the obligation to take the cargo ashore was part of the contract; East & West S.S.Co. V. Hossain Bros, [1968]2 Lloyd's Rep.145 at p.164 where it was stated that the carriage of goods under the Hague Rules did not cease when the goods were discharged from the ship into lighter; Captain V. Far Eastern, [1979]1 Lloyd's Rep.595 at p.602.

4- The Astri, (1945) A.M.C.1064, where iron plates were damaged by a leaky drum of acetic acid stowed on top of them in the ship.

will still be responsible for damage resulting from the goods discharged into a lighter, unless such damage occurs through the negligence of the lighter operators.<sup>1</sup> Furthermore, the duty of the shipowner is to get the goods out of the ship's hold,<sup>2</sup> to put them on the ship's deck or alongside for the purpose of discharging the cargo from the ship.<sup>3</sup>

It is to be noted that the carrier's obligation to deliver must be carried out in accordance with the custom or usage of the port of destination. In some cases, the delivery to a terminal operator or to customs authorities may terminate the carrier's liability.<sup>4</sup> However, the contracting parties are at liberty to stipulate any special terms and conditions for the manner of discharging the cargo.<sup>5</sup>

It is to be noted that the carrier must notify the consignee of the expected time and place of arrival of the ship; also the notice should specify the wharf or pier where the goods are to be available.<sup>6</sup>

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After discharge sound plates were mixed with the damaged ones. It was held that the carrier was responsible not only for the damage which took place on board, but also for the damage ashore; Tetley & Clevens, p.825.

- 1- Domestic Insurance Co. V. Barber Line, [1970]1 Lloyd's Rep.49 at p.50.
- 2- Ballantyne & Co. V. Paton & Hendry, 1912 S.C.246.
- 3- Hang Fung Shipping Co. V. Mullion & Co; [1966]1 Lloyd's Rep.511 at p.523.
- 4- "A delivery to certain other particular persons may, by virtue of the custom, be equivalent to a delivery to the consignee himself". Carver, p.1098; Tetley & Clevens, p.825; Peninsular & Oriental Steam Navigation Co. Ltd. V. Leatham Sons Ltd, (1915)32 T.L.R.153 at p.155 (Lush, J); A/S Samelling V. Grain Importers [EJRE], Ltd, [1952]1 Lloyd's Rep.313.
- 5- Regina V. Montreal Shipping Co., (1956) Ex.C.R.280.
- 6- Tetley, 3rd ed, p.565.

Lastly, the term "substituted delivery" purports to terminate the carrier's liability when the carrier discharges the goods on the wharf at the end of ship's tackle. Such a discharge is intended to complete the performance of the carrier's duty, and the consignee is required to receive the cargo as soon as discharged.<sup>1</sup> Non-responsibility clauses are then valid after discharge and as such are not contrary to U.K. law.<sup>2</sup> Thus, in Bank of India, Australia & China V. British India Steam Navigation Co. Ltd.,<sup>3</sup> it was stated that: "In all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee". However, the United States Court of Appeals held that a bill of lading clause relieving the carrier of responsibility in the delivery from the ship's deck was null and void under the Harter Act, as was a clause that the ship's responsibility ceased if the consignee did not immediately receive the goods.<sup>4</sup>

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<sup>1</sup>- Under the Harter Act, a clause of a similar nature was held void, see Caterpillar Overseas S.A V. S.S. Expedito, (1963) A.M.C.1662 at p.1666.

<sup>2</sup>- The Arawa, [1980]2 Lloyd's Rep.135; Tetley, 3rd ed, p.583.

<sup>3</sup>- [1909] A.C.369; Scrutton, 19th ed, Note 4, p.304, where he states: "In the absence of any such express provision, the question must be decided by the custom of the port of discharge; and, if no such custom can be proved, the general rule appears to be "that goods are delivered when they are so completely in the custody of the consignee that he may do as he pleases with them".

<sup>4</sup>- David Crystal V. Cunard S.S.Co, (1965) A.M.C.39; Monsieur Henri Wines Ltd, V. S.S.Covadonga, (1965) A.M.C.740.

### 2.1.2 Under the Hamburg Rules

The basic rules governing the responsibility of the carrier were discussed by the Working Group on Merchant Shipping Legislation of UNCITRAL at its third session in February 1972. Alternative schemes of liability to replace the existing Articles 3 and 4 of the Hague Rules were considered.

Both carrier nations and shipper nations supported the principle of the carrier's liability being based on fault, and it was believed to be desirable, at the outset, that the basic principle of fault be simply stated while the rules for the burden of proof were separately elaborated together with a separate consideration of the exceptions to liability.<sup>1</sup>

At the fourth session in Geneva, in September 1972, of the Working Group on International Legislation on Shipping of UNCITRAL, after lengthy discussions, the majority of the members reached an agreement on the principles which should be incorporated in a set of rules that would govern the responsibility of the carrier for loss of or damage to cargo and which would replace Articles 3(1)and(2) and 4 (1)and(2) of the Hague Rules.<sup>2</sup> Accordingly, they chose to state an affirmative rule of responsibility based on

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<sup>1</sup>- Sweeney, part 1, p.102

<sup>2</sup>- This session adopted the following working basis; 1.Retention of the principle of Hague Rules that the responsibility of the carrier should be based on fault; 2.Simplification and strengthening of the above principle by removing or modifying the exceptions that relieve the carrier of responsibility for negligence or fault of his employees or agents (Article 4,2(a) and (b) Hague Rules); and 3. Simplification and unification of the rules on burden of proof; Cleton, p.5; Kimball, p.233; UNCITRAL Year Book, vol, IV (1973),pp.138-139.

presumed fault and to abolish the catalogue of exceptions contained in Article 4(2) of the Hague Rules. This statement of basic liability was drafted and has been adopted under Article 5(1) of the Hamburg Rules, which provides that:

"The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences".

Thus, the new Rules do not endeavour to introduce a "strict" or "absolute" system of the carrier's liability under which the carrier is liable for all loss or damage which may affect the cargo whilst in his custody.<sup>1</sup> This basis then does not change the concept of the Hague Rules, but the fundamental difference between the two systems lies in the different ways in which the "fault" principle is applied in each.<sup>2</sup> Accordingly, the basic duties of the carrier set forth in Article 3(1) and (2) of the Hague/Visby Rules would remain in effect under the Hamburg Rules Article 5(1) as part of the carrier's overall responsibility to perform with due care all of his obligations under the contract of carriage. However, the

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<sup>1</sup>- B.K.Williams, *The Consequences of the Hamburg Rules on Insurance*, published in the *Hamburg Rules on the Carriage of Goods by Sea*, edited by Samir Mankabady, 1978, p.252, hereinafter cited as "Williams".

<sup>2</sup>- *Ibid.*

Hamburg Rules provide a general rule which is based on the principle of presumed fault or neglect.<sup>1</sup>

As it has already been mentioned that the first of the carrier's major obligations under the Hague Rules is to exercise due diligence to make the vessel seaworthy, the carrier is accordingly liable not only for any negligence committed by himself or by his servants or employees, but also he is responsible for the negligence of independent contractors such as surveyors and ship repairers.<sup>2</sup> In this connection then Article 5(1) of the Hamburg Rules intended to achieve the same result by providing that the carrier would be liable for any negligence in making the ship seaworthy whether caused by his own employees or by the employees of an independent contractor, such as a ship repairer.<sup>3</sup> However, instead of referring to the seaworthiness of the ship and instead of providing that the shipowner has a positive and non-delegable duty to exercise due diligence, it provides that "The carrier is liable for loss resulting from loss of or damage to the goods,[....] unless he proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences".

Furthermore, the Hamburg Rules are also intended to eliminate the discrepancies and ambiguities which are found under the Hague Rules. Under the Hague Rules, the

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<sup>1</sup>- Annex II of the Hamburg Rules (Common understanding adopted by the United Nations Conference on carriage of goods by sea).

<sup>2</sup>- Muncaster Castle, [1961]1 Lloyd's Rep.57.

<sup>3</sup>- Diamond, UNCITRAL, p.47.

obligation of the carrier to provide a seaworthy ship is restricted to a duty to exercise due diligence before and at the beginning of the voyage.<sup>1</sup> However, the carrier's duty to provide a seaworthy ship under the Hamburg Rules is to be judged on the same basis as his duty towards the cargo, and both obligations are to run throughout the voyage.<sup>2</sup> In other words, the provision of Article 3(1) of the Hague Rules is not specifically set out in the Hamburg Rules but is effectively covered by Article 5(1). This means that Article 5(1) of the Hamburg Rules covers the meaning of seaworthiness by the term of "reasonable measures" and that an implicit undertaking should be adhered to throughout the period of carriage.

Undoubtedly, it is clear that para.1 of Article 5 of the Hamburg Rules contains a rule of liability for fault. However, one must recognize that such a rule, combined with a reversal of the burden of proof, can be close to a rule of strict liability.<sup>3</sup> Accordingly, it can be noted that, par.1 of Article 5 includes two stages concerning the carrier's liability. The first stage is to establish that the "occurrence" which caused the loss or damage incurred occurred while the goods were in the carrier's charge. If it did, then the second stage will follow. This second stage means that it is for the carrier to prove that he

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<sup>1</sup>- Article 3(1) of the Hague Rules.

<sup>2</sup>- Wilson, p.204.

<sup>3</sup>- Robert Cleton, The Special Features arising from the Hamburg Diplomatic Conference, published in the Hamburg Rules, A One-Day Seminar, organised by Lloyd's of London Press Ltd, 1978, London, p.5, hereinafter cited as "Cleton".

took all measures that could reasonably be required to avoid the occurrence and its consequences.

A question may then arise as to what is the significance of the term "occurrence"? It may mean something other than the fact that the goods have sustained damage or that they have become lost while in the carrier's charge.<sup>1</sup> In other words, the occurrence need not be of an extraordinary nature or arise from irresistible force. All that is required is that it happens while the carrier is in charge of the goods,<sup>2</sup> namely that the occurrence must have occurred while the goods are in the shipowner's charge, and that the only real effect of the Rule is to oblige the shipowner to prove that he took reasonable measures affecting the goods.<sup>3</sup>

Another important question is: What is it that the carrier has to prove in order to escape liability? Does he have to show solely that a reasonable shipowner in his position would not have done more to safeguard the cargo than he did? Or is it necessary for him to go further and prove that it would have been totally impracticable to take further steps in this respect? It is believed that Article 5(1) of the Hamburg Rules does not impose a more extensive duty on the shipowner than that of ordinary reasonable care. Annex II of these Rules makes it clear that all the shipowner needs to do is to show that he took reasonable

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1- Diamond, *The Hamburg Rules*, p.10.

2- Mankabady, p.55.

3- Diamond, *The Hamburg Rules*, p.11.

care of the goods.<sup>1</sup> Article 5(1) of the Hamburg Rules makes clear that the carrier is liable for loss or damage caused by his own fault or neglect or by the fault of his servants or agents. It is then necessary to establish the criterion by which the carrier, servants and the agents can be defined.

The Hamburg Rules have made two separate provisions for the carrier and the actual carrier as follows:

"1. 'Carrier' means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.

2. 'Actual carrier' means any person to whom the performance of carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted."<sup>2</sup>

It seems that the definition of the carrier under the Hamburg Rules is somewhat wider than that provided under the Hague/Visby Rules.<sup>3</sup> However, there is no article in the Hamburg Rules which attempts to define the concept of "servants" and "agents". It is not difficult to define the concept of "servants". It is well defined in the U.K. as "A person usually employed on a regular basis, who as distinguished from an independent contractor, is subject to the command of his employer as to the manner in which he

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1- Ibid

2- Article 1(1,2) of the Hamburg Rules.

3- Article 1(a) of the Hague Rules defined the carrier as follows: "'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper".

shall do his work."<sup>1</sup> It is to be noted that the concept of "agents" tends to have a different meaning because it is not always easy to determine the exact role of the intermediaries as to whether they are acting as servants, agents or independent contractors. Also most intermediaries do not adhere strictly to their role and undertake associated activities.<sup>2</sup> For instance, a freight forwarder may act as an independent contractor,<sup>3</sup> or as an agent acting on behalf of the shipper,<sup>4</sup> the consignee or the carrier. However, it is believed that the concept of "agents" "must include persons whom the carrier may employ ad hoc (for example, as independent contractors) for the purpose of performing the contract of carriage".<sup>5</sup>

As has already been mentioned, stevedores are the most important category in this respect. Then what is the criterion for deciding whether the stevedore is a servant, agent or independent contractor? In most countries the status of stevedores is not clear, and the courts have adopted different solutions in this matter.<sup>6</sup> However, in

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1- Diamond, *The Hamburg Rules*, p.13.

2- Mankabady, p.69.

3- J.Evans & Sons (Portsmouth) Ltd V. Andrea Merzario Ltd, [1976]2 Lloyd's Rep.165 at p.168 (L.J. Roskill) when he said: "The defendants are not carriers .... they are forwarding contractors who arranged for the transport of goods .... The work which they do is performed by them through many sub-contractors".

4- The freight forwarder may also: a) obtain the necessary documents for export and import; b) carry the customs formalities and check the packages; c) pay the dues and, d) arrange for an insurance cover.

5- Diamond, *The Hamburg Rules*, p.13.

6- Heyn V. Ocean S.S.Co., (1927) 27 T.L.R.358, where it was held that "the stevedores are the ship's servants, and the shipowner or charterer, as the case may be, is vicariously liable for damage done by stevedores".

English case law, there are two criteria used to clarify the position of stevedore as follows:

1. The degree of control and supervision of his work by the principal.<sup>1</sup>
2. The work to be done within the scope of his employment.<sup>2</sup>

If a stevedore satisfies these criteria he will be held to be a servant for whom the carrier will be vicariously liable. It is worthy of note that if the meaning of the terms "servants or agents" is left to be determined according to the concepts established under each legal system, different interpretations may prevail, because each contracting state may apply its own rules of vicarious liability when applying Article 5(1) of the Hamburg Rules and that widely differing results may be expected in different states.<sup>3</sup> However, if the courts, guided by Article 3 of the Hamburg Rules,<sup>4</sup> give weight to the international character of the rules, one may expect some uniformity in this respect.

It is to be noted that the Hamburg Rules may be, on a carrier, rather stricter than the provisions of the Hague

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<sup>1</sup>- Canadian Transport Co. V. Court Line Ltd. [1940] A.C.934 at pp.937-938, (Lord Atkin).

<sup>2</sup>- United Africa Co. Ltd V. Saka Owode, [1955] A.C.130, where it is stated: "There is no difference in the liability of a master's wrongs whether for fraud or any other wrong committed by a servant in the course of his employment"; The Eurymedon, [1971]2 Lloyd's Rep.399 at p.408; Mankabady, p.70.

<sup>3</sup>- Diamond, The Hamburg Rules, p.13.

<sup>4</sup>- Article 3 of the Hamburg Rules provides that:

"In the interpretation and application of the provisions of this convention regard shall be had to its international character and to the need to promote uniformity".

Rules, where Article 7(2) provides<sup>1</sup> that the carrier's servants or agents can avail themselves of the defence in the Rules if only they prove that they acted within the scope of their employment.<sup>2</sup> It is also noteworthy that where the contract of carriage wholly or partially is concluded by someone who is not the contracting carrier or the carriage is performed by such carrier, he is called "the actual carrier".<sup>3</sup> The carrier is responsible for acts or omissions of the actual carrier and for the acts or omissions of his servants or agents acting within the scope of their employment according to Article 10(2) of the Hamburg Rules. On the other hand, the shipper has a right to bring his claim against the actual carrier if the loss, damage or delay of the goods occurred while they were in his charge.<sup>4</sup> The actual carrier will under the Hamburg Rules be under an entirely statutory liability, neither contractual nor tortious, regarding the carriage of goods.<sup>5</sup> On the other hand, the statutory protection and defence of the servants and agents of the carrier are extended to the servants and agents of the actual carrier.

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1- Article 7(2) of the Hamburg Rules provides:

"[....] such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this convention".

2- Diamond, *The Hamburg Rules*, p.14.

3- Article 10(1) of the Hamburg Rules.

4- Articles 10(2) and 11(2) of the Hamburg Rules.

5- Gordon Pollock, *A Legal Analysis of the Hamburg Rules (part II)*, published in the Hamburg Rules, A One-day Seminar organized by Lloyd's of London Press Ltd, London, 1978, p.9, hereinafter cited as "Pollock".

It is to be mentioned that Article 11 of the Hamburg Rules together with Article 10 exonerates the carrier from liability in the following situations:<sup>1</sup>

1. Where the contract of carriage provides explicitly that a specified part of the carriage covered by the contract is to be performed by a named person other than the carrier;
2. When a contract provides that the carrier is not liable for loss, damage or delay caused by an occurrence which takes place when the goods are in the charge of such a named person;
3. If the carrier can prove that the damage occurred whilst the goods were in the charge of such a named person.<sup>2</sup>

Insofar as loss or damage caused by delay in delivery is concerned, it is important to note that the Hague/Visby Rules contain no specific provisions in respect of delay; but that does not mean that the Hague/Visby Rules leave cargo-owners unprotected. Such an obligation could be then implied in Article 3(2), which imposes a general duty of care in handling the cargo.<sup>3</sup> However, para.1 of Article 5

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<sup>1</sup>- Article 11(1) of the Hamburg Rules.

<sup>2</sup>- Wilson, p.214; Thomas, p.7; J.P.Honour, *The P & I, Clubs and the New United Nations Convention on the Carriage of Goods by Sea 1978*, published in *The Hamburg Rules on the Carriage of Goods by Sea*, edited by Samir Mankabady, 1978, p.247, hereinafter cited as "Honour".

<sup>3</sup>- Report of the Working Group of UNCITRAL, A/CN. 9/WG. III/WP. 12 (Vol.1) of 30 November 1973, where it was believed that the language of Article 3(2) of the Hague Rules authorized recovery for physical damages caused by delay because of the carrier's obligation to, "... properly and carefully load . . . , carry . . . , and discharge the goods carried". Thereafter, the Report pointed out that the recovery of economic loss is also authorized under

of the Hamburg Rules makes it clear that the carrier is liable for loss resulting from delay in delivery of the goods. Para.2 of the same Article then defines what constitutes delay. Two possibilities are provided for: first, there is delay in delivery if the parties have expressly agreed upon a time for delivery and the goods are not delivered at the port of discharge within that time. Secondly, where there is no such express agreement, there is delay if the goods are not delivered within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.<sup>1</sup> What is then the situation if the goods are not delivered within the estimated time? Para.3 of Article 5 of the Hamburg Rules resolves this situation by providing that the consignee is entitled to recover for loss of the goods if they have not been delivered within 60 consecutive days following the expiry time for delivery.<sup>2</sup> In other words, failure to deliver the goods within 60 consecutive days following the expiry of the above defined delivery date entitles the consignee to treat the goods as lost. However, this provision gives rise to some considerable difficulties. One of these is that para.3 of Article 5 can operate even where the carrier has been guilty of no fault whatsoever. For instance, if the carrier and the shipper

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the Hague Rules. Report of Working Group A/CN. 9/88 of 29 March 1974, para.13-17; Wilson, p.208.

<sup>1</sup>- Article 5(2) of the Hamburg Rules.

<sup>2</sup>- This provision is similar to Article 20 of the CMR Convention, Article 30 of the CIM Convention and Article 16(2) of the IMT Convention (but 90 days instead of 60 days).

have agreed a time for delivery, and the ship is delayed through no fault of the carrier more than 60 days beyond the agreed period, then the owner of the goods is entitled to deem the goods to have been lost.<sup>1</sup> Furthermore, how does the claimant treat the goods as lost? Does he abandon them, in the sense of making no attempt to obtain possession? If so, who then owns the goods, is it the carrier or the cargo insurer if the latter has settled a claim for non-delivery? Moreover, at the end of 60 days period the place where the goods are may be known, although some further time may elapse before they can be delivered at the intended destination. The Hamburg Rules do not say which claimant shall have the goods.

In practice, it has been said that no carrier would ever guarantee anything beyond the date of arrival of his vessel at the contractual destination (port of discharge), because it may be that many factors could combine to delay berthing, discharging, customs and quarantine formalities. Also, these provisions for liability in case of delay are unworkable, unless there is a firm written agreement between the carrier and the shipper at the outset as to the time to be taken to perform the carriage. Accordingly, I

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<sup>1</sup>- It is noteworthy that there were differing views as to whether the carrier should have the right to prove that the goods were not in fact lost. Some favoured retention of the language "unless the carrier proves the contrary" following the expression "may treat the goods as lost", in order to permit the carrier to prove that the goods were not lost, and thereby overcome the presumption of their loss. But, the majority considered it unnecessary to include provisions regulating in detail the rights of the claimant and the carrier if the goods should be recovered, trusting that the problems would be solved in commercial practice. Report of the Working Group of the Seventh Session (A/CN. 9/88) at par.25 and 28; Sweeney, part III.p.494.

am inclined to agree with the view that the carrier should be advised not to agree to any specific delivery period in order to minimize the risk of liability due to delay.<sup>1</sup>

Insofar as the consequences of delay are concerned, the question is what is to be the measure of damages in cases of delay? Obviously the words "loss or damage" cover physical damage<sup>2</sup> to the goods caused by delay, but it is not clear whether these words also cover loss of value through delay. The measure is the difference between the market value of the goods on the date they should have arrived and the market value at the date of actual arrival.<sup>3</sup> What is the meaning of market value? Market value is an important criterion for estimating damages considered to be the commonest basis in this respect and the only one which ascertains the loss to the shipper or consignee.<sup>4</sup> It is easy to estimate damages, if there is a market value or price with published listing at the place of discharge; but when there is no such market price, the value must be ascertained by substituted methods which

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<sup>1</sup>- Pollock, p.5, Robert Schilling, The effect on International Trade of the Implementation of the Hamburg Rules from the point of view of the shipper, published by Comité Maritime International, Colloquium on the Hamburg Rules, 1979, p.7, hereinafter cited as "Schilling".

<sup>2</sup>- Such as, the goods carried may suffer a minor loss or damage from natural causes during the course of the voyage. See Sweeney, part III, pp.488-490; Tetley, 3rd ed, p.332.

<sup>3</sup>- Koufos V. C. Czarnikow, Ltd, [1969] 1 A.C.350; Heskell V. Continental Express, (1950)83 Ll.L.R.438; Scrutton, 19th ed, p.404.

<sup>4</sup>- The Queen Dynamic, [1982]2 Lloyd's Rep.88 at p.89, where it stated that: "On the issue of damage, the sound arrived value shall be assessed on the basis that a higher rate of duties would be payable on them".

apply criteria of the value, or the nearest date as a governing basis.<sup>1</sup>

Coming now to the consideration of the period of responsibility, we have to ask whether the question may arise as to when the period of the carrier's responsibility would begin and when it would end.

First of all, it has already been mentioned that under the Hague/Visby Rules the period of the carrier's responsibility is limited to a "tackle to tackle" period.

The Working Group on International Legislation on Shipping of UNCITRAL, considered two problems concerning the operation of the existing Article 1(e) of the Hague Rules:

1. Doubt as to whether the Rules apply to loss or damage occurring during loading or unloading operations;<sup>2</sup>
2. The fact that the existing Rules do not cover loss or damage occurring prior to loading or subsequent to discharge even while goods are in the charge or control of the carrier or its agents.<sup>3</sup>

The constituted Working Group established two points:

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- 1- The Juno, [1986] 1 Lloyd's Rep.190 at p.191; Tetley, 3rd ed, p.325.
  - 2- The Report of the Secretary General suggested the following draft: "Carriage of goods covers the period from the commencement of loading operations until the completion of discharge of the goods from the ship." Doc.No.A/CN.9/63/Add.1.par.26 (1972).
  - 3- The Report of the Secretary General suggested a modification draft to the above suggested draft, as follows: "Carriage of goods covers the period from the time the goods are (in charge of) (accepted for carriage) (received by) the carrier to the time of their discharge". Doc.No.A/CN.9/63/Add.1.par.37,

1. The New Rules should be extended to govern the entire period during which the carrier was actually in charge of the goods.
2. The period of responsibility under the New Rules should not begin prior to the carrier's custody at port of loading and should not continue beyond the port of discharge.<sup>1</sup>

After long discussions, the Drafting Party reached agreement on the period of responsibilities as follows:

"The responsibility of the carrier for the goods under this convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge."<sup>2</sup>

It will be noted that this Article is wider than Article 1(e) of the Hague Rules which adopted a narrow concept of period of responsibility, namely "covering the period from the time when the goods are loaded on to the time when they are discharged from the ship". That Article then covers only the sea carriage, whereas the Hamburg Rules cover the period during which the carrier is in charge of the goods at the port of loading, during the carriage itself and at the port of discharge. Therefore, the period of the carrier's responsibility under the Hamburg Rules governs different operations whether on land or waterways which are deemed to be necessary for the carriage of goods by sea.<sup>3</sup>

Thus, Article 4 of the Hamburg Rules, designed to replace

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<sup>1</sup>- Sweeney, part 1. p.78.

<sup>2</sup>- Article 4(1) of the Hamburg Rules.

<sup>3</sup>- Peyrefitte, pp.125-126.

Article 1(e) of the Hague Rules, abandoned the so-called "tackle to tackle" rule<sup>1</sup>.

Article 4(2) of the Hamburg Rules provides:

"For the purpose of paragraph 1 of this Article, the carrier is deemed to be in charge of the goods:

(a) from the time he has taken over the goods [...]"

The Hamburg Rules do not define the terms "in charge of the goods" or "has taken over the goods". It is therefore important to find out the precise moment of taking charge of the goods. The terms "taking over" the goods have different interpretations. In the literature it is said that the carrier's responsibility is linked with the supervision of the cargo. In other words, effective supervision is an important element in taking charge of the goods.<sup>2</sup> Another approach believes that taking over the goods commences from the moment when the carrier exercises or is able to exercise his right of checking the cargo.<sup>3</sup>

In my opinion these views are too rigid and I consider that the best approach is to say that taking over the goods is a matter of fact which can be proved by any means in any given case. Of course, in determining the time of taking over the goods, supervision of the cargo and checking of the cargo are both highly relevant factors. I submit, however, that neither are conclusive of the question of taking over the goods. It is also possible for the parties

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<sup>1</sup>- Mankabady, p.50

<sup>2</sup>- Ibid.

<sup>3</sup>- Peyrefitte, p.130.

to specifically agree to determine the moment of taking over the goods. This must, however, be subject to the provision of the convention.<sup>1</sup> This is made clear by Article 23<sup>2</sup>, that the Rules under this convention have a compulsory character. That means any clause which derogates, directly or indirectly, from the provisions of the Convention is null and void. Therefore, it prohibits any clauses by which the carrier limits the scope of his obligation in a way different from the provisions of the Convention<sup>3</sup>. An example would be a contractual clause which sought to use the "tackle to tackle" period. Such a clause although purporting to determine the timing of taking over the goods would not be consistent with the Hamburg Rules and would thus be invalid under those rules. It would be an attempt to re-introduce an aspect of the Hague/Visby Rules by contract.

It is to be mentioned that Article 14(1) of the Hamburg Rules states that "when the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading"; but the carrier may take over the goods before issuing the bill of lading. In such a case, it would be wise for the

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<sup>1</sup>- Peyrefitte states that: "As the provisions of the new convention have a compulsory character (Article 23), clauses which stipulate different places for taking over the liquid will be null and void". p.131.

<sup>2</sup>- Article 23 (1) of the Hamburg Rules provides that:  
"Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this convention".

<sup>3</sup>- Peyrefitte, p.130.

shipper or his representative to ask for a delivery receipt indicating the exact date of taking over the goods.<sup>1</sup> Furthermore, the carrier takes over the goods from the shipper, or any person acting on his behalf or an authority or other party to whom, pursuant to law or regulations applicable at the port of loading.<sup>2</sup> As a result, all the operations after taking over the goods, such as loading operations, are part of the performance of the contract of carriage.

Insofar as the goods are carried by lighter, the question concerns the point when the exact moment of taking charge of the goods begins. The answer depends on the circumstances, that is, if the carrier owns or controls the lighters, then carriage by lighters is deemed part of the performance of the contract of carriage, whereas, if the carrier does not own or control the lighters, but they are owned or controlled by an independent contractor, the exact moment of taking charge of the goods begins at the place where the carrier has a right to check the contents of the shipment.<sup>3</sup>

In the case of carriage by containers, usually the carrier takes over the container at the place of business of the shipper e.g. his warehouse. Then the moment of taking over the goods by the carrier will be the time when the carrier exercises or is able to exercise his right of checking the container. Even a partial exercise of this

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<sup>1</sup>- Mankabady, p.50.

<sup>2</sup>- Article 4(2)(a) of the Hamburg Rules.

<sup>3</sup>- Peyrefitte, p.131.

right of checking, either by the carrier himself or by his servants or agents, is sufficient to take the containers into his charge.<sup>1</sup>

It is noteworthy that Article 23 (2) of the Hamburg Rules permits the carrier to extend the period during which he is in charge of the goods<sup>2</sup>. Accordingly, the carrier can be responsible for any loss or damage to the container while it is carried from the shipper's warehouse to the port of loading if he so agrees by contract with the shipper<sup>3</sup>.

We must now consider the question of whether the goods may be carried on deck. Unlike the Hague Rules<sup>4</sup>, the definition of goods in the Hamburg Rules is wide enough to include deck cargo. Article 9 of the Hamburg Rules deals specifically with deck cargo. The carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper, or with the usage of the particular trade, or is required by statutory rules or regulations<sup>5</sup>. This means that if the goods are carried on deck contrary to the agreement, usage of trade or statutory rules, the carrier will be in breach of the

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1- Ibid, p.132.

2- Article 23(2) of the Hamburg Rules provides:  
"Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this convention".

3- Mankabady, p.51.

4- Article 1(c) of the Hague Rules.

5- Article 9(1) of the Hamburg Rules.

contract.<sup>1</sup> Thus, cargo carried on deck in appropriate circumstances is subject to the Rules.<sup>2</sup>

It is to be noted that, in the case of agreement with the shipper to carry the goods on deck, the carrier must insert, in the bill of lading or other document evidencing the contract of carriage, a statement to that effect.<sup>3</sup> The meaning of "statement" in Article 9(2) of the Hamburg Rules does not require a statement that the goods are actually to be carried on deck, but only that there is an agreement that they may be so carried, and thus only state that the goods shall or may be carried on deck.<sup>4</sup> However, in the absence of such a statement, the carrier has the burden of proving vis-à-vis the shipper that there was an agreement to carry the goods on deck; the carrier, however, is not entitled to invoke such an agreement against a third party who has acquired a bill of lading in good faith.<sup>5</sup> The carrier will be responsible for any loss or damage to the goods, as well as for delay in delivery resulting solely from the carriage on deck,<sup>6</sup> that is, when the goods have been carried on deck contrary to the provisions of para.1

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<sup>1</sup>- Mankabady, p.76.

<sup>2</sup>- William Tetley, Articles 9 to 13 of the Hamburg Rules, published in *The Hamburg Rules on the Carriage of Goods by Sea*, edited by Samir Mankabady, 1978, p.198, hereinafter cited as "Tetley, Articles 9 to 13 of the Hamburg Rules".

<sup>3</sup>- Article 9(2) of the Hamburg Rules.

<sup>4</sup>- Article 15(1)(m) of the Hamburg Rules provides:  
"The bill of loading must include, inter alia, the following particulars:  
(m) the Statement, if applicable, that the goods shall or may be carried on deck."; Tetley, 3rd ed, p.670.

<sup>5</sup>- Article 9(2) of the Hamburg Rules.

<sup>6</sup>- Article 9(3) of the Hamburg Rules.

of Article 9 of the Hamburg Rules,<sup>1</sup> notwithstanding the provisions of Article 5(1) of the Hamburg Rules, even if he shows that he took all reasonable measures to avoid carrying the cargo on deck and the damage resulted from such carriage.<sup>2</sup> Moreover, Article 9(4) of the Hamburg Rules provides that "carriage of goods on deck contrary to express agreement [between the carrier and the shipper], for carriage under deck is deemed to be an act or omission of the carrier within the meaning of Article 8".<sup>3</sup> This means, if the shipper agreed with the carrier that his goods were to be carried below deck, and the goods were subsequently carried on deck contrary to the agreement, then the shipper will recover any loss of or damage to the cargo and delay in delivery without regard to the limitations set in Article 6 of the Hamburg Rules.<sup>4</sup>

Tetley critically concludes that Article 9 of the Hamburg Rules has done nothing to clarify what deck carriage is, nor when it may take place; and that, moreover Article 9 has enlarged the right to carry on deck, and has diminished the sanction for improper deck carriage.<sup>5</sup>

Insofar as dangerous goods are concerned, it is to be noted that the Hamburg Rules basically follow the formula of the Hague Rules, but the position has been changed in

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1- Ibid.

2- Sassoon & Cunningham, p.184.

3- Article 9(4) of the Hamburg Rules.

4- Waldron, p.313.

5- Tetley, 3rd ed, pp.669-670, The Hamburg Rules, p.11.

some respects.<sup>1</sup> Thus, the shipper is obliged to mark or label the dangerous goods in a suitable manner<sup>2</sup> and must inform the carrier of the dangerous character of the goods, and, if necessary, of the precautions to be taken.<sup>3</sup> The term "if necessary" means that if the precautions are not well known to the carrier, then the shipper must state the precautions.<sup>4</sup> The Hamburg Rules do not affect the rights and liabilities of the contracting parties if dangerous goods are shipped.<sup>5</sup> However, if the shipper fails to inform the carrier of the dangerous character of the goods, then the shipper will be liable to the carrier for any loss or damage to the cargo resulting from such goods, and the carrier shall be entitled, without payment of compensation, to discharge and destroy such goods if the circumstances may require.<sup>6</sup> On the other hand, if the carrier is told or otherwise knows of the dangerous character of the goods, the carrier will then not be able to recover loss or damage from the shipper unless any loss or damage is caused by the fault of neglect of the shipper.<sup>7</sup>

Lastly, coming now to consideration of the delivery of the goods at the port of discharge as agreed in the contract, we have to mention an important point: all operations which take place before delivery are considered

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1- Article 13 of the Hamburg Rules, Cf. Article IV (6) of the Hague Rules.

2- Article 13(1) of the Hamburg Rules.

3- Article 13(2) of the Hamburg Rules.

4- Tetley, Articles 9-13 of the Hamburg Rules, p.202.

5- Thomas, p.6.

6- Article 13(2)(a,b) and para.3 of the Hamburg Rules.

7- Thomas, p.6.

to be part of the performance of the contract of carriage.<sup>1</sup> Therefore, the delivery of the goods happens when the goods are received by the consignee or his representative.<sup>2</sup> It supposes also the readiness of the consignee or his representative to check the goods. Therefore, in order to claim for compensation, the consignee must prove that the loss or damage to the goods existed before delivery. Thus the consignee or his surveyor has the right to check the goods before delivery.<sup>3</sup> It is to be mentioned then that the rules concerning the delivery are similar to those applied to taking over of the goods by the carrier.

The carrier has a right to discharge the goods at the nearest safe port,<sup>4</sup> when the carrier is unable to deliver the goods at the named port for a reason, such as a strike or force majeure, and the carrier cannot be expected to wait for an end of a strike or the force majeure. Article 4(2)(b)(ii) of the Hamburg Rules makes clear by providing that where the consignee does not receive the goods, the carrier is deemed to deliver the goods when they are placed "at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge." Thus, in such a case the period of transport comes to an end without any acceptance of the consignee which is

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1- Peyrefitte, p.133.

2- Article 4(2)(b) of the Hamburg Rules.

3- Peyrefitte, p.133.

4- Bartle, p.6.

equivalent to delivering the goods to their final destination indicated in the bill of lading.<sup>1</sup>

It can be concluded that the above discussed Hamburg Rules are fair and equitable in safeguarding mutual interests between shipper and carrier. This view is reflected in the supporting opinions of authors. Future developments will hopefully confirm the usefulness and validity of the Hamburg Rules also in judicial practice.

## **2.2 The Burden of Proof**

The burden of proof, although a question of the law of evidence, is in practice a basic element in balancing the rights and interests of the contracting parties with respect to any legal claim. In order to find out the differences and the most satisfactory rules, it is important then to discuss and analyse the burden of proof in respect of proving or disproving the carrier's liability for loss or damage to the goods under the following points:

2.2.1 Under the Hague/Visby Rules.

2.2.2 Under the Hamburg Rules.

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<sup>1</sup>- Peyrefitte, p.134.

### 2.2.1 Under the Hague/Visby Rules.

There is no general theory of burden of proof set out in the Hague Rules<sup>1</sup>, but certain references are to be found in particular provisions where the burden of proof is prescribed.

When the goods arrive and the cargo-owner discovers that his goods have been lost or damaged, he must make a prima facie case against the carrier by showing that the loss or damage occurred while the goods were in the carrier's charge. Thus, in Gosse Millerd, Ltd V. Canadian Government Merchant Marine, Ltd<sup>2</sup>. Viscount Sumner said:

"As the cargo in question was shipped in good order and condition and was delivered damaged, in a manner which was preventable and ought not to have been allowed to occur, there was sufficient evidence of a breach by the carrier of his obligations under Article III, r.2, of the Act of 1924, to shift to him the onus of bringing the cause of the damage specifically within Article IV, r.2, so as to obtain the relief for which it provides".

Hence, the carrier's failure to deliver the goods in spite of the arrival of the ship, is considered prima facie evidence of a breach of the contract.<sup>3</sup> This is probably only enough to establish negligence on the part of the

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<sup>1</sup>- Tetley, 3rd ed, p.133.

<sup>2</sup>- [1929] A.C. 223 at p.234; Wright J. at trial also said:  
"The words 'properly discharge' in Article III, r.2., mean, I think, 'deliver from ship's tackle in the same apparent order and condition as on shipments', unless the carrier can excuse himself under Article IV. Hence the carrier's failure to deliver must constitute a prima facie breach of his obligations, casting on him the onus to excuse that breach". [1927]2 K.B. 432 at p.434.

<sup>3</sup>- Scrutton, 19th ed,p.220.

carrier,<sup>1</sup> but not wilful misconduct<sup>2</sup>. Then, in order to free himself from responsibility, the carrier must show that the goods were not shipped on his ship in case of non-delivery or that the loss or damage to the goods occurred while the goods were not in his charge.<sup>3</sup> Furthermore, if the carrier wants to invoke the protection of the immunities conferred upon him by Hague/Visby Rules, he must prove that the loss of or damage to the goods which has occurred is neither the result of his actual fault or privity nor of the fault or neglect of his agents or servants.<sup>4</sup>

It is to be mentioned that the carrier cannot rely on the "excepted perils" if he has not carried out his duty under Article 3(1) of the Hague Rules to exercise due diligence to make the ship seaworthy.<sup>5</sup> However, if there are two contributing acts affecting the cargo, one constituting unseaworthiness caused by a failure of the carrier to exercise due diligence, and the other is an act for which the carrier is entitled to exempt himself from liability (by the exceptions of Article 4(2) of the Hague

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1- The "Roberta", (1938) 60 Ll. L.R. 84.

2- Smith, Ltd V. Great Western Railway, Co. [1922]1 A.C.178.

3- Chung Hwa Steel Products & Trading V. Glen Lines, (1935) 51 Ll. L.R. 248, where cases containing wool gaberdine did not arrive. The consignees claimed damages and alleged that they had been pilfered from the ship. It was held that the plaintiffs had failed to prove with any reasonable certainty that the goods were lost while in the custody of the ship (even though it was not impossible that the goods were pilfered while on rail or in the dock shed); Scrutton, 19th ed,p.220.

4- Article 4(2)(q) of the Hague Rules; Owners of Cargo of City of Baroda V. Hall Line, Ltd, (1926) 42. T.L.R. 717.

5- Maxine Footwear Co. Ltd, V. Canadian Government Merchant Marine Ltd, [1959] A.C.589; [1959] 2 All E.R.740.

Rules), the burden of proof is then upon the carrier. He has to prove what damage was due to the cause for which he is exempted.<sup>1</sup> For instance, if the carrier proves that he exercised due diligence to make the ship seaworthy, but in spite of that some loss or damage was caused to the goods, he will be exonerated from liability by virtue of Article 4(2) of the Hague Rules.<sup>2</sup> Otherwise the carrier will be responsible for the entire damage,<sup>3</sup> unless he shows that part of the damage is proportionately attributable to the exempted peril.<sup>4</sup> Moreover, if the carrier cannot protect himself by one of the exceptions under Article 4(2) of the Hague Rules, he will be responsible for unexplained damage to the goods despite the fact that the ship was seaworthy, the goods were stowed in the driest and safest place aboard and the hold was in good condition.<sup>5</sup> On the other hand, when the carrier establishes a prima facie case that the loss or damage to the goods resulted from an excepted peril, the onus then shifts to the shipper or consignee to prove that the real cause of the loss was not within the

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1- Government of Ceylon V. Chandris, [1965] 3 All E.R.48; Scrutton, 19th ed,p.451.

2- J. Gerber & Co V. S.S. Sabine Howaldt & Co., [1971] A.M.C. 539, where the carrier showed the cause was a peril rather than lack of due diligence; Tetley, 3rd ed, p.314; Kimball, p.226; Gilmor & Black, p.163.

3- Smith, Hogg & Co. Ltd V. Black Sea & Baltic General In. Co. Ltd, [1940] A.C.997.

4- Gosse Millerd V. Canadian Government Merchant Marine, (1928)32. Ll.L.Rep.91 at p.98;[1929] A.C.223 at p.241 (per Viscount Sumner); The "Torenia", [1983]2 Lloyd's Rep.210 at p.218, where Hobhouse, J. stated that: "where the facts disclose that the loss was caused by the concurrent causative effect of an excepted and non-excepted peril, the carrier remains liable. He only escapes liability to the extent that he can prove that the loss or damage was caused by the excepted peril alone".

5- George E. Pickett, (1948) A.M.C.453.

exceptions e.g. unseaworthiness or unjustifiable deviation.<sup>1</sup> However, if the shipper fails to discharge this onus the carrier will be protected by one of the excepted perils.<sup>2</sup> Thus it is not required that the carrier has positively to prove that he was not negligent. He does have the onus of showing that the loss or damage was caused by an excepted peril or excepted cause and he will be exonerated if he establishes this and if the shipper fails to establish that the cause was outside of the excepted perils. In the course of his evidence, however, he may seek to exclude causation by his own negligence but not as definitely required by force of law to do so, but rather to discharge his onus of showing that loss or damage was due to an excepted peril.<sup>3</sup>

Lastly, it is convenient to mention that the usual method of proof is established by the claimant having surveyors on board the ship to inspect the cargo there. However, if the carrier refuses permission to the consignee or his agent to attend on board, the refusal should be indicated on the survey. It is to be noted that the Hague Rules do not specifically provide that the consignee or his

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<sup>1</sup>- London & NW.RY V. Ashton, [1920] A.C.84; Hunt & Winterbotham V. B.R.S.(Parcels) Ltd. [1962] 1 Q.B. 617; The Citta di Messina, 169 F. 472 (1909 S.D.N.Y), where it is stated that:

"Where damage to cargo was prima facie within the exceptions in the bill of lading, the burden is on the shipper to establish that the goods are removed from the operation of such exception because of the carrier's negligence"; Scrutton, 19th ed, p.220.

<sup>2</sup>- Minister of Food V. Reardon Smith Line, (1951) 2 Lloyd's Rep.265; Joseph Constantine V. Imperial Smelting Co, (1942) A.C. 154 (Lord Simon L.C.).

<sup>3</sup>- Albacora S.R.L. V. Westcott & Laurance Line, Ltd, [1966]2 Lloyd's Rep. 53 at p.64 (Lord Pearson).

agent has the authority to attend on board the ship;<sup>1</sup> but such permission seems to be presumed in Article 3(6) of the Hague Rules, which provides:

"In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods".

Then, once the damage is established, the burden of proof is shifted, and the carrier has to prove that the loss or damage falls under one of the exceptions constituted by law or by the contract of affreightment.<sup>2</sup>

### 2.2.2 Under the Hamburg Rules

As we have already seen, the general view under the Hague Rules seems to be that if the cargo-owner proves loss or damage to the goods, the carrier has the consequent onus of bringing himself within one of the exceptions set out in Article 4(2) of the Hague Rules.

The Hamburg Rules then seek to remove this confusion under the Hague Rules by adopting presumed fault or neglect in all cases of loss or damage to the goods and so imposing a burden of proof on the carrier.<sup>3</sup>

As already mentioned, the carrier is liable for loss or damage to the goods if the occurrence which caused the loss or damage took place while the goods were in his charge.

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<sup>1</sup>- Tetley, 3rd ed, p.544.

<sup>2</sup>- Chorley & Giles, 8th ed, p.202; Gilmore & Black, p.184; Kimball, p.226; "The Bulknes", [1979]2 Lloyd's Rep.39.

<sup>3</sup>- Wilson, p.205.

On the other hand, the carrier can escape from liability if he proves that he, his servants or agents took all measures that would be reasonably required to avoid the occurrence and its consequences.<sup>1</sup>

The common understanding of the Hamburg Rules made this point clear by providing that "The liability of the carrier under this convention is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the convention modify this rule".<sup>2</sup>

Obviously, the intent of the draftsmen of this convention is to direct the cargo-owner to make out a prima facie case against the carrier by showing that the goods were not received in as good condition as when they were delivered to the custody of the carrier. Once the cargo-owner makes a prima facie case, the carrier is required to show and prove that the cause of the loss or damage was not an act of fault or negligence for which he is responsible.<sup>3</sup> This differs considerably from the position under the Hague Rules where there is no positive duty to disprove negligence on the part of the carrier. While the carriage of live animals is subject to the general obligation of care outlined in Article 5(1) of the Hamburg Rules, the carrier will not be liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage or, if he can prove that he has complied

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<sup>1</sup>- Article 5(1) of the Hamburg Rules.

<sup>2</sup>- Annex II of the Hamburg Rules.

<sup>3</sup>- Kimball, p.239

with any special instructions given to him by the shipper.<sup>1</sup> Obviously, the carrier has many arguments at his disposal, such as technical details of weather conditions, navigational dangers from other ships when passing through congested seaways, and other aspects relating to sea perils which prevent the effectiveness of applied reasonable measures.<sup>2</sup> However, he will remain liable if it is proved that loss, damage or delay in delivery arose from fault or negligence on his part or his servants or agents.<sup>3</sup>

It is noteworthy that the provision of Article 5(5) of the Hamburg Rules, which deals with live animals, increases the liability of the carrier since, under the Hague Rules, live animals are not included in the definition of "goods" and the carrier can therefore exempt himself from liability.<sup>4</sup>

It is to be mentioned that the term "reasonable measures" quite clearly includes many of the exceptions provided for in Article IV(2) of the Hague Rules. It can, therefore, be said that the carrier, in attempting to prove that "he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences", would adduce evidence on the familiar exceptions under the Hague Rules, e.g. perils of the sea, latent defect, etc. "Then many of the very exceptions which have been deleted would be reintroduced by case-law

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1- Article 5(5) of the Hamburg Rules.

2- Williams, p.256.

3- Article 5(5) of the Hamburg Rules.

4- Honour, p.246.

through the back-door, as it were, and a position close to one of the status quo vis-a-vis the Hague Rules would be reached",<sup>1</sup> except for the situation in the case of fire, where under the Hamburg Rules the burden of proving the fault or neglect rests on the claimant.<sup>2</sup> In other words, the carrier is not liable for loss or damage to the goods unless the claimant proves that the fire arose from the fault or neglect on the part of the carrier, his servants or agents, presumably for the reason that no carrier would deliberately set fire to his own ship, and in the majority of cases, in any event fire is an accident.<sup>3</sup> Accordingly, Article 5(4)(a) of the Hamburg Rules states that the carrier is liable for loss or damage caused by fire if the cargo-owner proves either that the fire arose from fault or neglect on the part of the carrier, his servants or agents, or from their fault or neglect in not taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences. In order to ascertain the cause of such a fire, Article 5(4)(b) of the Hamburg Rules provides that either party (claimant or the carrier) may require a survey to be made in accordance with shipping practices, and a copy of the surveyor's report shall be made available on demand to both parties. Accordingly, I am inclined to agree with the view that the special provision on carrier's liability for fire (Art. 5(4))

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<sup>1</sup>- Shah, p.19; Doc. TD/B/C.4/148 para.9 of the UNCTAD Working Group; Mankabady, pp.55-56.

<sup>2</sup>- Article 5(4)(a.i) of the Hamburg Rules.

<sup>3</sup>- Wilson, p.205.

should be deleted in order to bring the carrier's liability for that kind of loss or damage to the goods under the main rule which is set out in Article 5(1) of the Hamburg Rules, because it is unfair to put the entire burden of proof on the claimant, and make the carrier win the action simply because the cargo-owner might be unable to present the necessary evidence of negligence against the carrier, his servants or agents, in spite of the carrier's failure to give detailed evidence as to the causes of the fire.<sup>1</sup>

It is noteworthy that the Hamburg Rules attempt to clarify the position under the Hague Rules where two contributing acts affecting the cargo, such as fault of the carrier and an act which falls within one of the exceptions, have combined to cause loss, damage or delay in delivery, by providing that the carrier shall be liable only to the extent that the loss, damage or delay in delivery is attributable to his fault or negligence.<sup>2</sup> Then, the carrier can escape from liability if he can establish the proportion of the loss attributable to other factors. Otherwise, if he fails to establish that proportion, he will be liable for the entire loss of or damage to the goods.<sup>3</sup>

Lastly, it can be concluded that the Hamburg Rules impose a heavier burden of proof than the Hague Rules do upon the carrier (except in the case of fire), as he will be in a position to control the carriage and ascertain the

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1- Cleton, p.6; Diamond, The Hamburg Rules, p.12.

2- Article 5(7) of the Hamburg Rules.

3- Ibid; Wilson, p.207.

cause of any loss or damage to the cargo. The carrier then needs to show and prove that neither he nor his servants or agents caused the loss, damage or delay in delivery by their fault or neglect.

### **2.3 The Immunities of the Carrier**

The carrier can claim many immunities throughout the agreed voyage. They are considered to be part of the contract and should be read together and reconciled with the agreed voyage in the bill of lading, taking into account the main object of the contract and must be subordinate to the performance of the voyage described. In such a context I will discuss the immunities under:

2.3.1 The Hague/Visby Rules; and

2.3.2 The Hamburg Rules.

#### **2.3.1 Under the Hague/Visby Rules**

Article 4(2)<sup>1</sup> of the Hague/Visby Rules lists the immunities which are available to the carrier so that he shall not be responsible for loss or damage to the goods.

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<sup>1</sup>- Article 4(2) of the Hague Rules provides:

It would be, however, outside the scope of this study to examine in detail all the exceptions set forth in Article 4(2), and consequently it should be sufficient here to concentrate on three exceptions which are the most important in the Hague/Visby Rules:

- A. Error in Navigation or in the Management of the ship.
- B. Fire.
- C. Peril of the Sea.

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"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

- a. Act, neglect, or default of the master, mariner, pilot or the servant of the carrier in the navigation or in the management of the ship.
- b. Fire, unless caused by the actual fault or privity of the carrier.
- c. Perils, dangers and accidents of the sea or other navigable waters.
- d. Act of God.
- e. Act of war.
- f. Act of public enemies.
- g. Arrest or restraint of princes, rulers or people, or seizure under legal process.
- h. Quarantine restrictions.
- i. Act or omission of the shipper or owner of the goods, his agent or representative.
- j. Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.
- k. Riots and civil commotions.
- l. Saving or attempting to save life or property at sea.
- m. Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.
- n. Insufficiency of packing.
- o. Insufficiency or inadequacy of marks.
- p. Latent defects not discoverable by due diligence.
- q. Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

#### A. Error in Navigation or in Management of the Ship

Article 4(2)(a) of the Hague Rules provides:

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

a: Act, neglect, or default of master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship".<sup>1</sup>

This provision is one of the most exculpatory exceptions since it allows the carrier to rely on it in order to avoid liability for loss or damage caused to the cargo.

Thus, according to this provision, the carrier's duty to exercise due diligence to make the ship seaworthy assumes considerable importance. If the goods are damaged through the negligence of the master and crew or servants of the carrier, the question will be then whether the negligent act was an act of navigation or management of the ship,<sup>2</sup> or whether it rendered the ship unseaworthy. Moreover, would this exemption apply if an error in navigation or in the management of the ship occurred after the commencement of the voyage?

The scope of the term "navigation" presents less difficulty than that of the term "management". The term "navigation" is defined as "something affecting the safe

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<sup>1</sup>- Both the U.S. Harter Act 1893 and COGSA also exempt the carrier from liability for loss or damage to the cargo resulting from error in navigation or management of the ship.

<sup>2</sup>- Tetley, 3rd ed, p.398, where he stated: "An error in the navigation or in its management is an error primarily affecting the ship. Error in the navigation and management of the ship might be defined as "an erroneous act or omission, the original purpose of which was primarily directed towards the ship, her safety and well-being and towards the common venture generally".

sailing of the ship".<sup>1</sup> A similar view was expressed in Lord V. Newsum & Co. Ltd,<sup>2</sup> when it was held that "navigation" referred to the time when the ship was in motion or was being cast off; the term consequently did not cover an error by the master while in port as to the route he should pursue to get to the port of discharge. In The Accomac<sup>3</sup>, the Court of Appeal held that the negligent removal of a bilge-pump by crew whilst the ship was discharging cargo in dock (water had entered the hold and had damaged the cargo) was not covered by the exception of negligence of the crew in the navigation of the ship 'in the ordinary course of the voyage', because although the negligent act was committed in the course of the contractual voyage, the ship, in ordinary language, was not then being navigated.

Concerning the interpretation of the term "management" of the ship, despite many court decisions, the authorities in question are not very satisfactory or convincing and hence it is still difficult to define the meaning of the term clearly and accurately.<sup>4</sup> In The Glenochil,<sup>5</sup> Sir F. Jeune said that "the word 'management' goes somewhat beyond - perhaps not much beyond - navigation, but far enough to take in this very class of acts which do not affect the

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1- The Ferro, [1893] P.38 at p.45 (Sir F. Jeune).

2- [1920] 1 K.B. 846 at p.849 (Bailhache. J).

3- (1890) 63 L.T. 737.

4- Scrutton, 19th ed, p.244; Chorley & Giles, 8th ed, p.204, stated that: "The difficulty of this clause lies in the fact that so many things are done on a ship in the course of its voyage that it is sometimes not easy to say whether any one act was done in the course of the management of the ship".

5- [1896]P.10.

sailing or movement of the vessel, but do affect the vessel herself."<sup>1</sup> The difficulty then is to distinguish, on the one hand, that fault in the management of the ship from which the carrier may exonerate himself and, on the other, fault in respect of the carrier's duty under Article 3(2) of the Hague Rules to take proper care of the cargo.<sup>2</sup> In this connection we can refer to The Glenochil, where Sir F. Jeune said: "the distinction I intended to draw... is one between want of care of cargo and want of care of vessel indirectly affecting the cargo".<sup>3</sup> This suggestion was later expanded in a leading case considered to be a most useful guide to the meaning of the terms; Gosse Millerd V. Canadian Government Marine, Ltd.<sup>4</sup> A vessel had been loaded with a cargo of tinplates on board while repairs were being executed. Workmen had to be frequently in and out of the hold where the tinplates were stored, and the hatches in consequence were often left open. Owing to the negligence of the shipowner's servants the hatches were not protected when rain was falling. Greer L.J, stated that:

"If the cause of the damage is solely, or even primarily, a neglect to take reasonable care of the cargo, the ship is liable, but if the cause of the damage is a neglect to take reasonable care of the ship, or some part of it, as distinct from the cargo, the ship is relieved from liability; for if the negligence is not negligence towards the ship, but

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<sup>1</sup>- Ibid, at p.16; see also Norman V. Binnington, [1890]2 Q.B.D. 475; The Rodney (1900)P.112; The Touraine, [1927]P.58; Rowson V. Atlantic Transport Co. Ltd, (1903)2 K.B.666.

<sup>2</sup>- Tetley, 3rd,ed, p.397; Wilson, p.252.

<sup>3</sup>- The Glenochil, [1896]P.10 at p.16.

<sup>4</sup>- (1927)29 Ll. L.R.190.

only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved."<sup>1</sup>

This view was reversed by the Court of Appeal, but the House of Lords upheld Greer L.J, declaring that (1)the shipowner had failed properly and carefully to carry, keep and care for the tinplates as required by the carriage of Goods by Sea Act, 1924, Article 3(2) and (2)the failure to cover the hatches properly was not negligence in the management of the ship and consequently the defendants were not protected from liability.<sup>2</sup>

As already mentioned, the carrier is bound to make the ship seaworthy before and at the beginning of the voyage<sup>3</sup>. To deprive, then, the carrier of the exemption of Article 4(2)(a), the unseaworthiness should occur before or at the beginning of the voyage and must contribute to the loss or damage to the cargo<sup>4</sup>.

If both unseaworthiness and error in management or negligent navigation together cause damage to the cargo,

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<sup>1</sup>- Ibid, p.200

<sup>2</sup>- [1929]A.C.223; See also Foreman & Ellams, Ltd V. Federal Steam Navigation Co. Ltd, [1928]2 K.B.424 (Wright.J) at pp.438-439; Leesh River Tea Co. Ltd V. British India Steam Navigation Co. Ltd, [1967] 2 Q.B.250; [1966]1 Lloyd's Rep. 450; [1966]2 Lloyd's Rep. 193 (C.A); The Frances Salman, [1975]2 Lloyd's Rep. 355.

<sup>3</sup>- Article 3(2) of the Hague Rules.

<sup>4</sup>- In Herald & Weekly Times, Ltd V. New Zealand Shipping Co. Ltd, (1947)80 Ll. L.Rep. 596, it was held that the carrier had failed to show that the entry of sea water due to the act or default of one of his servants in failing to close valves; nor assuming that the valves had been left open by one of their servants, had the shipowners shown that such act or default was an act or default "in the navigation or in the management of the ship"; El Carol V. Greenwood, Problems of Negligence in Loading, Stowage, Custody, Care and Delivery of Cargo; Errors in Management and Navigation; Due diligence to make seaworthy, (1971)45 Tul.L.R.790 at p.803, hereinafter cited as "Greenwood".

the carrier can escape from liability for damage to the cargo only if such error in management or negligent navigation occurs following the commencement of the voyage.<sup>1</sup> Thus, if the carrier cannot separate the resulting losses to the cargo, he will be responsible for the damaged cargo.<sup>2</sup>

Lastly, if the unseaworthiness is not involved in the cause of loss or damage to the cargo, it is consequently unnecessary to determine whether the voyage had commenced before the event, in which case an exemption would apply.<sup>3</sup>

## B. Fire

Article 4(2)(b) of the Hague Rules provides:

- "2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from [...]  
 b. Fire, unless caused by the actual fault or privity of the carrier"

Fire means a flame and not just heat. In other words, the loss or damage to the goods must be due to a flame and not merely heat. Thus in Tempus Shipping Co. Ltd V. Louis

<sup>1</sup>- The New Port, 7 F. 2d 452 (1925); The Willowpool, (1936) A.M.C. 1852; Carmichael & Co. V. Liverpool S.S. Association, (1887) 19 Q.B.D. 242, Canada Shipping Co. V. British Shipping Association, (1889) 23 Q.B.D. 342.

<sup>2</sup>- The Walter Raleigh, (1952) A.M.C, 618, where it is stated that "when two causes of damage concur and one is due to unexcused unseaworthiness, the vessel is liable for resulting cargo damaged".

<sup>3</sup>- Greenwood, p.804.

Dreyfus & Co, Ltd,<sup>1</sup> it was held that an exception of 'fire' by itself would not be apt to cover loss caused by heat short of actual ignition.

Where the loss or damage to the cargo is caused by the fire, the carrier must show that he exercised due diligence to make the ship seaworthy before and at the beginning of the voyage. The question of the relationship between the fire and unseaworthiness, and the carrier's liability, with regard thereto, was made clear in Maxine Footwear Co. Ltd V. Canadian Merchant Marine, Ltd<sup>2</sup>, which concerned certain frozen waste pipes and the application of heat to them. It was found that during the loading of the cargo a fire broke out as a result leading to the loss of the cargo. It was held that negligence of the shipowners' servants had caused the fire, as in fact a failure to exercise due diligence. It was also added that Article 3(1) which requires the carrier to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage, assumed an overriding obligation, and consequently the exception in respect of fire could not be relied on.

If the carrier fails to prove how the fire began and the fire causes loss or damage to the goods, it will be assumed that there existed a lack of due diligence in making the ship seaworthy or in the duties provided in Article 3(2) of the Hague Rules.<sup>3</sup>

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1- [1930]1 K.B. 699; Harris V. Polland [1941]1 K.B. 462; Tetley, 3rd ed, p.412

2- [1959]2 Lloyd's Rep. 105

3- The "Santa Malta", [1967]2 Lloyd's Rep. 791.

However, after proving the cause of loss or damage to the goods while due diligence had been exercised, the carrier has the burden of proving that the loss or damage occurred without his actual fault or privity.<sup>1</sup>

It is to be noted that the actual fault or privity of the carrier must be the fault of the carrier himself<sup>2</sup> and not merely of a servant or agent. The question then may arise as to what is the meaning of actual fault or privity?

These terms are derived from English law; and their meaning has been authoritatively declared by the House of Lords in Lennard's Carrying Co, Ltd, V. Asiatic Petroleum Co, Ltd<sup>3</sup> which concerned a situation in which the ship and the cargo were destroyed by fire. The ship belonged to a limited company of which Mr Lennard was an executive director. Viscount Haldane L.C. explained:<sup>4</sup>

"The fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing, respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself."

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1- Carver, p.180, where he stated: "The statutory exception protects the shipowner from fire, however caused, if it be without his actual fault or privity"; Wilson, p.261; Astle p.141; The Ocean Liberty, [1953]1 Lloyd's Rep.38; Louis Dreyfus & Co V. Tempus Shipping Co. [1931] A.C.726.

2- A/CN. 9/74 Report of the Working Group on the work of its Fourth (special) session, 1972 Annex 1, par.2 at p.8; It is noteworthy that the carrier within the meaning of Article 4(2)(b) Hague/Visby Rules "must be the person or persons with whom the chief management of the company resides" See Asiatic Petroleum Co, Ltd V. Lennard's Carrying Co. Ltd, [1914]1 K.B.419 at p.437, (per Hamilton L.J.); Tetley, 3rd ed, p.417.

3- [1915] A.C.705.

4- Ibid at pp. 713-714.

The same point was made in Paterson Steamships, Ltd V. Robin Hood Mills, Ltd,<sup>1</sup> where Lord Roche said:

"The words 'actual fault or privity' [...] infer something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the fault of his servants or agents ...Actual fault negatives that liability which arises solely under the rule of respondeat superior [...]. Another and very important principle is to be derived, namely, that the fault or privity [...] must be the fault or privity in respect of that which causes the loss or damage in question, a proposition which was acted upon and illustrated in Lennard's case"<sup>2</sup>

The result of these cases is that only very rarely will the fire be considered to be due to the actual fault or privity of the owner as that phrase has been restrictively construed. The onus of disproving actual fault or privity rests with the owner but discharging it has not been too difficult in most cases. It is noteworthy that the damage through fire includes damage to the cargo by water used to extinguish the fire.<sup>3</sup>

Lastly, if a fire results from spontaneous combustion, due to the dangerous condition of the goods, of which he could not reasonably know, the carrier will be protected by the exception of fire.<sup>4</sup>

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1- (1937)58 Ll. L. Rep.33.

2- Ibid at p.39

3- Tempus Shipping Co. Ltd, V. Louis Dreyfus & Co, Ltd, [1930]1 K.B.699.

4- Scrutton, 19th ed,p.239.

### C. Peril of the Sea

Article 4(2)(c) of the Hague Rules provides:

"2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from...  
c.perils, dangers and accidents of the sea or other navigable waters"

The meaning of 'peril of the seas' has given rise to a good deal of legal argument. It is defined by Lopes, L.J,<sup>1</sup> as follows:

"Damage to goods caused by the action of the sea during transit, not attributable to the fault of anybody, is... a danger or accident of the sea, intended to come within the exception and exonerating the shipowner".

However, this definition cannot be accepted as being exhaustive. Scrutton, criticising it, said:<sup>2</sup>

"Sea-damage, through the fault of somebody (e.g. another ship), will be a peril of the sea both under a policy of insurance and a contract of affreightment, though by reason of implied undertaking the shipowner, in the case of negligence of the crew, may not be protected under a charter".

It is also defined in the Xantho<sup>3</sup> where Lord Herschell said: "'Perils of the sea' does not cover every accident or casualty which may happen to the subject-matter (of the carriage) on the sea... not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect...against the natural and inevitable action of the winds and waves, which results in

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1- Pandorf & Co. V. Hamilton, Fraser, & Co, (1887)16 Q.B.D. 629 at p.633.

2- Scrutton, 19th ed, p.229.

3- (1887)12 App.Cas, 503 at p.509.

what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure".

This view is related to insurance cases: - 'peril of the sea' has the same meaning in policies of marine insurance and in bills of lading.<sup>1</sup> Accordingly, the most consistent definition among other authorities, is that given by Scrutton, now generally adopted. "Perils of the Sea" includes:

"Any damage to the goods carried caused by sea-water, storm, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen and guarded against by the shipowner or his servants as necessary or probable incidents of the adventure".<sup>2</sup>

In accordance with these authorities, the phrase "perils of the sea" refers only to fortuitous accidents or casualties of the seas. Perils of the sea do not include the natural action of the winds and waves which may result in what may be described as wear and tear.<sup>3</sup> Nor do they cover secondary damage such as deterioration of goods by reason of delay caused by perils of the sea.<sup>4</sup> Storms and high seas are obviously relatively common incidents in sea transit. The carrier is expected to avoid them whenever possible by exercising all reasonable care. If he does so,

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1- Chorley & Giles, 8th ed, p.206; Scrutton, 19th ed, p.227

2- Scrutton, 19th ed, p.228; Tetley, 3rd ed, p.432, where he said: "peril of the sea may be defined as some catastrophic force or event that would not be expected in the area of the voyage, at the time of the year and that could not be reasonably guarded against".

3- The Xantho, (1887)12 App.Cas 503 at p.509.

4- Scrutton, 19th ed, p.228; Pink V. Fleming (1890) 25 Q.B.D.396.

the exception of perils of the sea can apply to them. It is not necessary that these conditions are absolutely excessive or extreme for the exception to assist the carrier, it all depends on e.g. the time of year and route of the voyage.<sup>1</sup>

If the loss of goods is caused by negligence or misconduct of the master or crew of the ship,<sup>2</sup> or in consequence of the ship being unseaworthy,<sup>3</sup> the loss will not be covered by the clause 'peril of the sea', and the carrier is not entitled to the protection of this clause. Further, the cause of loss or damage to the goods must be accidental, although it has been said that the exception clause 'perils of the sea' includes only losses which are of an 'irresistible force' or 'inevitable accident'. The general principle of English law is that the losses, in order to be within the exception, need not be extraordinary, it is enough that damage is done by the fortuitous action of the sea.<sup>4</sup>

It is noteworthy that 'inevitable accident' has been defined as "something....done or omitted to be done, which a person exercising ordinary care, caution and maritime skill, in the circumstances, either would not have done or would not have left undone, as the case may be".<sup>5</sup> Thus, an inevitable accident in point of law is that in "which the

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1- Carver, p.166; Wilson, p.243.

2- The Chasca, (1875) L.R. 4 A & E, 446; (1875) 32 L.T. 836.

3- Smith, Hogg V. Black Sea & Baltic, [1940] A.C.997.

4- Carver, p.166.

5- The Marpesia, (1872) L.R. 4.P.C. 212 at p.220.

party charged with the offence could not possibly prevent it by the exercise of ordinary care, caution and maritime skill".<sup>1</sup>

To constitute losses within the exception of peril of the sea, the factual situation must be peculiar to the sea. This limitation would exclude from the ambit of exception, inter alia, damage due to rats,<sup>2</sup> or vermin<sup>3</sup> eating away the cargo, heating, sweating or explosion and other mishaps of machinery. However the damage would be within the exception

a) if the loss is due to a sea peril and the sea peril itself in turn has resulted from an accidental cause not per se qualifying as sea peril, for example, rats causing a leak in pipes carrying sea-water;<sup>4</sup> or b) if the sea peril was the operative cause of the damage, even though it was not the proximate cause, for instance, when the heating or sweating of the cargo is due to the unavoidable shutting of ventilators to prevent the entry of the sea-water.<sup>5</sup>

Lastly, it is to be mentioned that in the light of exception clauses as drafted (Article 4(2)(c)), there seems to be no difference between the phrase 'peril of the sea' and 'dangers of the sea', and either phrase can have the

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1- Ibid.

2- Laveroni V. Drury, (1852)8 Ex.166.

3- Hamilton V. Pandorf (1887) 12 App. Cas. 518 at p.525 (per Lord Watson).

4- Hamilton V. Pandorf, (1887) 12 App. Cas.518.

5- It is noteworthy that heavy weather, when 'extraordinary in character' will be deemed to constitute a peril of the sea for the purposes of Article 4(2)(c) of the Hague/Visby Rules. W. Angliss & Co V. P & O Steam Navigation Co. (1927) 28 Ll. L. Rep.202 at p.204; Tetley, 3rd ed, p.438.

same meaning attached to it,<sup>1</sup> whether occurring in a policy of marine insurance or a bill of lading. In the words 'peril', 'danger' and 'accident' there is conveyed a meaning of something fortuitous and unexpected. Thus, whether there has been a peril of the sea is a question of fact left to the decision of the court on the evidence.<sup>2</sup>

### 2.3.2 Under the Hamburg Rules

In the course of UNCITRAL discussions in regard to the catalogue of exceptions in Article 4(2) of the Hague Rules, there were controversial views concerning the merits of maintaining the two policy-based exceptions related to fault liability in the Hague Rules:

1. Error of navigation and management of the ship, Article 4(2)(a).
2. Fire. Article 4(2)(b).

The U.K. delegates opposed any changes to the existing Hague Rules because any changes would have inevitably increased freight rates, and such a proposed change would destroy the ancient institutions of salvage and general

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1- Wilson, p.243.

2- Tetley, 3rd ed, p.435.

average.<sup>1</sup> However, Norway supported the deletion of the navigation and management error and fire exceptions,<sup>2</sup> whereas the U.S. delegates proposed a drastic expansion by extending the fire defence to explosions.<sup>3</sup>

In the conclusions to the discussions, the majority of the Working Group members were in favour of deleting the general catalogue of exceptions set forth in Article 4(2)(C-P) of the Hague Rules.<sup>4</sup> In fact, however, the whole list of the catalogue of exceptions in the Hague Rules can be said to be causes of loss or damage to the goods for which the carrier cannot be responsible, or to borrow the term used in The Marine Sulphur Queen<sup>5</sup>, the "Uncontrollable Causes". In other words, this catalogue of exceptions constituted an attempt to set forth circumstances in which the carrier would not be considered to be at fault, and thus had no effect with an independent significance outside

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1- The delegations who supported the U.K. position to maintain these exceptions were: Polish, Belgian and U.S.S.R; Sweeney, part I, pp. 104-110.

2- Sweeney, p.104.

3- Ibid at p.105; Egypt had also submitted a proposed text which was criticized by developing countries. It stated that the list of exceptions were only illustrative and not mandatory. Consequently, Egypt came to approve the French proposal which as a single simple statement of the entire problem of liability, defences, and burden of proof. Ibid, pp.105,110.

4- The countries supporting these decisions were: Argentina, Australia, Brazil, Chile, Egypt, France, Ghana, India, Nigeria, Norway, Singapore, Spain, Tanzania and United States. Whereas the countries opposing deletion of the negligent navigation exception were: Belgium, Japan, Poland, U.S.S.R. and United Kingdom; See UNCITRAL Working Group on the work of its Fourth (special) Session. A/CN. 9/74, 1972, par.23,28 at pp.9-10; Sweeney, part.I.p.111.

5- [1970]2 Lloyd's Rep, 285; Mankabady, p.53.

the general rule that the carrier would only be responsible where he is at fault.<sup>1</sup>

It was generally agreed that this attempt was not satisfactory, as it did not describe all or accurately the circumstances that might arise with the carrier alleged to be at fault, and therefore, had produced uncertainty and litigation.<sup>2</sup> The majority of these exceptions do not in fact involve fault on the part of the carrier. Accordingly, it would be beneficial from a legal standpoint to remove the unnecessary and uncertain aspects surrounding the definition and extent of such exceptions, which are merely examples of circumstances in which fault cannot be attributed to the carrier.<sup>3</sup>

Hence, Article 5 of the Hamburg Rules is designed to expand the liability of the carrier to include causes of loss for which he is under the Hague/Visby Rules not responsible. The Hamburg Rules have eliminated the catalogue of exceptions contained in Article 4(2) of the Hague Rules. Article 5(1) of the Hamburg Rules states that the carrier escapes liability if he proves that he, his servants or agents took "all measures that could reasonably be required to avoid the occurrence and its consequences". Thus, one of the major changes that would result from adoption of the Hamburg Rules would be that of the abolition of the exemption covering error in navigation or management of the ship. That would lead to a substantial

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1- Doc A/CN. 9/74, (1972) par.23 at p.9.

2- Ibid, par.24 at p.9; Kimball, pp.237-238.

3- Wilson, p.204

increase in freight rates.<sup>1</sup> On the other hand, such a change would represent a clear shift by increasing the carrier's liability in favour of the cargo interests.<sup>2</sup>

The exception of fire under Article 4(2)(b) of the Hague Rules has been amended by Article 5(4) of the Hamburg Rules in the sense that the carrier is liable for loss or damage caused by fire if the claimant proves either that the fire arose from fault or negligence on the part of the carrier, or his servant or agents,<sup>3</sup> or from neglect in not taking all measures that could reasonably be required to put out the fire and avoid or mitigate the damage.<sup>4</sup> However, in practice, this puts a strict burden on the claimant who does not usually have the facts available.<sup>5</sup>

It is to be mentioned that Article 4(4) of the Hague Rules states that the carrier will not be liable for loss or damage resulting from "any deviation in saving or attempting to save life or property at sea or any reasonable deviation". There is no specific provision in the Hamburg Rules devoted to deviation. Instead, liability for deviation has been brought into the general carrier's liability (the principle of presumed fault or neglect).<sup>6</sup> Accordingly, the carrier would be liable for loss or damage or delay in delivery resulting from deviation unless he could establish that he or his servants or agents had taken

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1- Ibid, p.205.

2- Hoyle, p.230.

3- Article 5 (4.a(i) of the Hamburg Rules.

4- Article 5 (4.a(ii) of the Hamburg Rules.

5- Diamond, *The Hamburg Rules*, p.12.

6- Wilson p.207; Waldron, p.315.

"all measures that could reasonably be required to avoid the occurrence and its consequences."

However, according to Article 5(6) of the Hamburg Rules, the carrier escapes liability if the loss or damage or delay in delivery results from measures to save life, or by reasonable measures applicable to property at sea.<sup>1</sup> It can hence be said that this Article would apply to deviation as much as loss or damage to cargo is concerned. It is not however expressly mentioned within Article 5(1) of the Hamburg Rules although it was protected by Article 4(4) of the Hague Rules.<sup>2</sup>

It is noteworthy that historically accepted exceptions to the carrier's liability, including Act of God, inherent vice of the goods, fault of the shipper or his agents, and all other causes outwith the control of the carrier and his servants and agents would still exempt him from liability under the Hamburg Rules if the carrier shows the cause of the loss.<sup>3</sup>

Lastly, one can conclude that the Hamburg Rules have changed the "catalogue of exceptions" contained in Article 4(2) of the Hague Rules, but most of the exceptions are still valid in that they would be covered by the "all

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1- This position is similar to Article 4(2) (L) of the Hague Rules.

2- It is noteworthy that in discussions leading to the adoption of the Hamburg Rules, there was no objection against continuing the carrier's exception from liability for loss or damage to cargo resulting from deviation to save life or property at sea. Such exemption was criticised on the grounds that it permitted the carrier to gain substantial profit, often to the detriment of the cargo carried on his own ship; A/CN.9/74 (1972) par.25 at p.9; Wilson, p.206; Waldron, p.315.

3- Kimball, p.238.

measures that could reasonably be required to avoid the occurrence and its consequences" as a defence to liability.<sup>1</sup>

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<sup>1</sup>- Wilson, p.204; Chandler, p.244; Chorley & Giles, 8th ed, p.321; Waldron, p.319.

### Concluding remarks

We may conclude the foregoing discussion and analysis with the following points:

1. The system of the carrier's liability under the Hamburg Rules has been clarified compared with that of the Hague/Visby Rules. The liability of the carrier under the Hamburg Rules is based on the principle of presumed fault or neglect. This is made clear under Annex II (Common Understanding) of the Hamburg Rules, liberating it from the confusion found in the Hague/Visby Rules, by imposing the burden of proof on the carrier, except in the case of damage caused by fire when the onus is on the claimant. Therefore, it becomes unnecessary to retain the "catalogue of exceptions" and certain provisions specifying the obligations of the carrier which exists under the Hague/Visby Rules.
2. The period of the carrier's responsibility under the Hamburg Rules is greater than under the Hague/Visby Rules. This is made clear by abandoning the so-called "tackle to tackle" period. The Hamburg Rules extend the period of carrier's responsibility; it covers the period during which the carrier is in charge of the goods at the port of loading, until the time he has delivered the goods to the consignee.
3. Under the Hamburg Rules live animals are now included in the definition of "goods" which are entirely excluded under the Hague/Visby Rules.

4. The Hamburg Rules have enlarged the right to carry on deck, whilst deck cargo did not come within the provisions of the Hague/Visby Rules.
5. The carrier retains his immunity for loss, damage or delay to cargo resulting from measures to save life or property at sea.
6. Lastly, it can be said that the carrier is placed in a weak position compared with that of the Hague/Visby Rules, by increasing the level of his liability. On the other hand, the Hamburg Rules have removed the peculiarities and uncertainties inherent in the existing Hague/Visby Rules. Therefore, it may have a positive economic effect.

## Chapter Three

### The Limitation of the Carrier's Liability

The limitation of the carrier's liability is a universal concept amongst shipping nations and recognizes the potentially perilous nature of maritime transport.

The carrier is entitled to limit his liability for loss or damage to the goods in accordance with a certain monetary figure set out by the Rules. The purpose of these Rules is to maintain the proper balance between the rights and responsibilities of the carrier, on the one hand, and the claimant on the other.<sup>1</sup> However, the limitation of amounts and the technique used in fixing the limits exhibit an abundance of variants. Therefore it will be necessary to discuss them under the following headings:

- 3.1 The Units of Limitation.
- 3.2 The Unit of Account.
- 3.3 Loss of the Right to Limit Liability.

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<sup>1</sup>- In British Columbia Telephone Co. V. Marpole Towing Ltd. (1971)17 D.L.R.545 at p.558, Ritchie, J. said: "The limitation of liability provisions...are expressly designed for the purpose of encouraging shipping and affording protection to shipowners against bearing the full impact of heavy and perhaps crippling pecuniary damage sustained by reason of the negligent navigation of their ships on the part of their servants or agents," see also Chorley & Giles' (8th ed.) pp.394-395, which justifies the concept on the grounds that it enables an insurer to calculate with relative confidence the maximum amount to which an insured shipowner could be held liable; In The Bramley Moore, [1964]P. 200 at p.220 (C.A.), Denning, M.R. said : "...Limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience."

### **3.1 The Units of Limitation.**

The limitation of the carrier's liability is based on different methods. The Hague Rules based it on a single system, being per package or unit. The Visby Rules adopted a dual (alternative) system, being per package or unit, on the one hand, and per weight on the other. This dual system has also been adopted by the Hamburg Rules with a slight difference in the wording of the term.

The various aspects of the single and dual systems can be discussed under:

- 3.1.1 The Hague Rules.
- 3.1.2 The Visby Rules.
- 3.1.3 The Hamburg Rules.

#### **3.1.1 Under the Hague Rules**

The units of limitation are mentioned in Article 4(5) of the Hague Rules which provides:

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit, or the equivalent of the sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

It is clear from the above provision that the limitation of liability is based on a single system, being per package or unit.<sup>1</sup>

In general, the expression 'per package or unit' has its equivalent in the limitation of liability provisions of the various Hague Rules Acts, such as British COGSA. However, there is no definition of the words 'package' and 'unit' in the Hague Rules. It is therefore important to know the difference and the definitions of 'package' and 'unit' in order to delimit the carrier's limitation liability as follows:

#### **A. The concept of per package**

The Hague Rules, in Article 4(5), use the word 'package'. The question then is what constitutes a 'package' under the Hague Rules? As already said, there is no definition or meaning of 'package' in the Hague Rules. This lack of definition or meaning has caused difficulties which may exist as to the exact determination of the extent to which packing or covering is required in order to justify the conclusion that the goods in question constitute a package.<sup>2</sup> The courts of various countries diverge in trying to give a uniform standard definition of 'package'. Therefore, in order to interpret the word

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<sup>1</sup>- This system had been adopted by Comité Maritime International (CMI) conference in 1921 as a compromise solution, so as to avoid disagreement on the subject of limitation and even to prevent a breakdown of the conference itself. Erling Selvig, Unit Limitation of Carrier's Liability, 1961, pp.25-26, hereinafter cited as "Selvig, Unit Limitation"; Diamond, 1978, p.229.

<sup>2</sup>- Selvig, Unit Limitation, p.42.

'package', we should refer to the relevant legislation and certain decisions of some major maritime industrial countries which are contracting parties to the Rules, such as U.K. and U.S.A.

Before the Carriage of Goods by Sea Act 1924, the word 'package' was used in the Carriers Act 1830. In Whaite V. Lancashire & Yorkshire Ry. Co.<sup>1</sup> the case concerned a wagon prepared for shipment with wooden sides but without a top. The wagon contained articles, including oil paintings. The Court of Exchequer held that the wagon with its contents was a package within the meaning of the Carriers Act 1830.

Temperley<sup>2</sup>, indicates that the term 'package' "properly implies something packed up or made up for portability". It has also been defined by Tetley<sup>3</sup>: "a package is a wrapper, case, bag, envelope or platform in which or on which cargo has been placed for carriage".

To consider, then, the term as a package, there must be a packing. This has been made clear by Goddard, J:<sup>4</sup>

"Package must indicate something packed".

He also said:

"I do not feel that I can hold that a motor-car put on a ship without a box, crate or any form of covering is a package, without doing violence to the English language."<sup>5</sup>

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1- (1874) L.R.9 Ex.67.

2- Temperley, Carriage of Goods by Sea Act, 1924, (1927),p.79, hereinafter cited as "Temperley".

3- Tetley, 3rd ed, p.880.

4- Studebaker Distributors Ltd V. Charlton S.S.Co. Ltd, [1938]1 K.B.459 at 467.

5- Ibid.

This means that the lost or damaged goods shipped unpacked, unwrapped, unboxed, uncrated, can never be considered as 'packages'. Thus, in Hartford Fire Ins. Co V. Pacific Far East Line<sup>1</sup>, a large electrical transformer was attached by bolts to a wooden skid, but not otherwise boxed or crated. It was held by the U.S. Court of Appeals that the transformer was not a 'package'".

It may be asked: does the size or the shape of the cargo have an effect on the determination of whether the goods in question constitute a package or not? Scrutton<sup>2</sup> with reference to the case of Whaite V. Lancashire & Yorkshire Ry.Co<sup>3</sup>, in which the court held a railway wagon with wooden sides to be a 'package', said: "the Carriers Act 1830 contains provisions analogous to Article IV, Rule 5", and concludes that : "Mere size will not prevent a thing from being a package (a Hague Rules package)",<sup>4</sup> and he framed this sentence having regard not only to the domestic precedents,<sup>5</sup> but also to decisions of, for instance, American courts regarding 'package' for international uniformity in courts' decisions. Thus in Aluminios Pozuelo, Ltd V. S.S. Navigator<sup>6</sup>, Moore, J. concluded:

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1- [1974]1 Lloyd's Rep. 359; International Factory Sales V. S.S. Alexander Serafinovich, [1975]2 Lloyd's Rep, 346 at p.354; Pennell V. U.S. Lines, (1959) A.M.C.935.

2- Scrutton, 18th ed, p.442.

3- (1874) L.R.9 Ex.67.

4- Scrutton, 18th ed, p.442; in the same case Cleasby, B, said: "It would be absurd to say that the wagon was too large to be a package plainly, size cannot be a criterion", (1874) L.R.9 Ex. at p.70.

5- (1874) L.R.9 Ex. 67.

6- (1968) A.M.C. 2532.

"The meaning of 'package' which has evolved from the cases can be said to define a class of cargo, irrespective of size, shape, or weight, to which some packing preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods".

The same point was made in Mitsubishi International Corp. V. S.S. Palmetto State<sup>1</sup>. The damaged cargo consisted of a fully boxed and completely enclosed steel roll weighing 32½ tons in a wooden case. The Court of Appeals, second circuit, held that the roll was a package, ruling that "an article completely enclosed in a wooden box prepared for shipment is a 'package' within section 4(5) of COGSA, regardless of the size and weight of the package."<sup>2</sup>

It may be said that, if large items are shipped as single pieces, such items will qualify as packages if they are fully crated or boxed, irrespective of their size or shape.<sup>3</sup> But such items will not qualify as packages if they are freestanding, with no packaging or appurtenances having been attached to prevent damage or facilitate transportation.<sup>4</sup> The question is, however, whether or not such items will qualify as packages when they are partially packaged. This is made clear in Tamini V. Salen Dry Cargo A.B.<sup>5</sup> Wooden crating had been placed around the more vulnerable portions of the rig, but the rig was fully exposed. The rig was also freestanding, unattached to a

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1- (1963) A.M.C. 958.

2- Ibid, per Moore.J., at p.961.

3- Herd & Co V. Krawill Machinery Corp, (1959) A.M.C.879.

4- Hartford Fire Inc Co. V. Pacific Far East Line Ltd, (1974) A.M.C., 1478 at p.1481.

5- 866 F.2d 741 (5th Cir. 1989)

skid, cradle or other device to facilitate handling. The Court of Appeals held that the rig was not a package, because no appurtenances had been added to facilitate handling and the rig was for the most part fully exposed.<sup>1</sup>

One can conclude that the term "package" refers to any items of cargo which have been sufficiently packed for the purposes of being held and protected during transit to be thus described.<sup>2</sup> Therefore, the purpose of Article 4(5) of the Rules or COGSA was to set a reasonable figure below which the carrier should not be permitted to limit his liability<sup>3</sup> on the one hand, and on the other, to protect him from any excessive or unforeseen cargo claims resulting from goods of high value which were not inserted in the bill of lading.

#### **B. The Concept of Per Unit**

The term 'unit' set forth in Article 4(5) of the Hague Rules is not defined also and is somewhat ambiguous because it might be construed as 'shipping unit' i.e. the physical unit as received by the carrier from the shipper, for instance, an unboxed car, a barrel, a bale, a sack, etc; or it may mean the 'freight unit', i.e. the unit on which the freight for carriage of goods is calculated.<sup>4</sup> The 'freight unit' is usually a weight or volume of the goods,

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1- Ibid at p.743; Gulf Italia V. American Export Lines, Inc (1959) A.M.C.930 at p.931.

2- Diamond, 1978, p.240; Mankabady, p.58.

3- The Mormaclynx, (1971) A.M.C.2383 at p.2403, 451 F. 2d (1971)800 at pp.815-816, (Friendly, J).

4- Scrutton, 18th ed, p.443; J.F. Wilson, Basic carrier liability and the right of limitation, published in the Hamburg Rules on the Carriage of Goods by Sea, edited by Samir Mankabady, 1978, p.146, hereinafter cited as "Wilson, Basic carrier liability".

for instance, tons, cubic feet. The 'unit' may also refer to the 'commercial unit', that is the unit in which the particular commodity is customarily traded in commercial practice, for instance, the standard is the usual measure for timber.<sup>1</sup>

A question that arises is, what is the distinction between 'package' and 'unit'? If 'unit' is construed to mean a 'shipping unit' what may conceivably be called a package, equally constitutes a shipping unit,<sup>2</sup> although some shipping units are not packages as defined and discussed above. In other words, all packages are shipping units, but not all shipping units are packages. If, however, 'unit' is interpreted to mean a 'freight unit', the whole position will be significantly different, because the calculation based on 'freight unit' will be higher than that based upon 'shipping unit'. In other words, the maximum liability will be greater than that based upon 'shipping unit'.<sup>3</sup>

It is to be mentioned that the purpose of adding the term 'unit' to the term 'package' was to cover all types of goods not being shipped in packages.<sup>4</sup> In other words, the words 'per unit' were added to the term 'package' in order

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<sup>1</sup>- Erling Selvig, Unit Limitation and alternative types of limitation of carrier's liability, 1967, p.111, hereinafter cited as "Selvig, 1967"; Mankabady, p.58.

<sup>2</sup>- Selvig, Unit Limitation, p.61; Mankabady, p.58.

<sup>3</sup>- Selvig, 1967, p.111.

<sup>4</sup>- F.Bonelli, Limitation of Liability of the carrier, present regulation and prospects of reform, published in studies on the revision of the Brussels Convention on Bills of lading, edited by Francesco Berlingieri, 1974, p.169, hereinafter cited as "Bonelli"; Report of Thirtieth Conference held at the Peace Palace, The Hague, Holland, 30th August - 3rd September, 1921, Vol II, London 1922, p.158.

to establish the limitation of liability when goods are not shipped in packages. This applies even if the "shipping unit view" is followed. That position is taken in the United Kingdom. Under U.K. COGSA, the term 'unit' in Article 4(5) is defined as 'shipping unit'. This is made clear by the English writers. Carver<sup>1</sup> inclines to read 'unit' as meaning a 'shipping unit'. The wagon containing goods which was held to be a 'package' in the Whaite Case<sup>2</sup> and the unboxed motor-vehicle which was held not to be a 'package' in the Studebaker Case<sup>3</sup> are both presumably a 'unit' in Carver's view. Diamond suggests that "'unit' is to be construed as referring to an individual article or piece of goods which is not a 'package'".<sup>4</sup> Furthermore, interpreting the term 'unit' as to mean 'shipping unit' is applied by the Canadian judiciary:

"The word 'unit', [...], normally applies only to a shipping unit, that is a unit of goods, the word 'package' and the context generally seem so to limit it".<sup>5</sup>

The position in the U.S.A. stands in sharp contrast. Under U.S. COGSA, the concept of 'unit' has been made quite

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1- Carver, p.301.

2- (1874) L.R.9 Ex.67

3- [1938]1 K.B.459; Falconbridge Nickel Mines V. Chimo Shipping Ltd [1973]2 Lloyds Rep. 469 at p.475 (Ritchie.J)

4- Diamond, 1978 p.241; In that context Temperley, p.79, also said: "The natural interpretation of the word 'unit' appears to be that it has been added in order to cover parts of a cargo in general was similar to a package, but not strictly included in that term, which properly implies something packed up or made up for portability".

5- Per Rand.J. (expressing the opinion of the Can. Sup. Ct) in Anticosti Shipping Co. V. Viateur St. Amand, [1959]1 Lloyd's Rep. 352 at p.358; this case has been treated as an authority in favour of the shipping unit in Falconbridge Nickel Mines V. Chimo Shipping, (per Ritchie.J.), [1973]2 Lloyd's Rep. 469 at p.475.

clear by use of a new expression which is called 'customary freight unit'<sup>1</sup>. In Brazil Oitica, Ltd V. M/S. Bill,<sup>2</sup> Chestnut, J. said:

"The phrase 'customary freight unit' refers to the unit of quantity, weight or measurement of the cargo customarily used as the basis for the calculation of the freight rate to be charged. Generally in marine contracts the word 'freight' is used to denote remuneration or reward for carriage of goods by ship rather than the goods themselves".

It can then be concluded that, under U.K. COGSA the term 'unit' should thus be interpreted as to mean 'shipping unit', whereas, the U.S. COGSA provides 'customary freight unit' which differs from the prevailing viewpoint in the Hague Rules, where the reference is to the 'shipping unit'.<sup>3</sup>

Coming now to the consideration of the important point concerning the effect of the palletization and containerization on the 'per package or unit' concept, the following can be said:

During recent years, palletization has been employed, so that several cartons can be stacked on a flat wooden tray and then moved by means of a forklift truck;<sup>4</sup> but one of

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<sup>1</sup>- Article 4(5) of United States COGSA.

<sup>2</sup>- (1944) A.M.C. 883 at 887; Freedman and Slater V. M.V. Tofevo, (1963) A.M.C. 1525 at p.1538; Waterman S.S. Corp V. U.S.Smelting Refining & Mining, (1949) 86 F. Supp.487.

<sup>3</sup>- Chandler, p.268.

<sup>4</sup>- Seymour Simon, The Law of Shipping Containers, (1974)5 J.M.L.C. p.511, hereinafter cited as "Simon"; Tallman Bissell, The Operational Realities of Containerization and their Effect on the "package" limitation and the "on-Deck" prohibition: Review and Suggestions, (1971)45 Tul. L.R. p.907, hereinafter cited as "Bissell", where he said: "'Palletization' is a method of stowing general cargo of a fairly homogeneous nature on rectangular wooden cargo trays designed to be transported by means of a forklift truck"; Standard Electrica S.A. V. Hamburg

the most important technological developments in the transportation of goods by sea is the recent advent of the container revolution.<sup>1</sup> The introduction of the container into the maritime industry has stimulated the courts to take a new look at the package limitation in intermodal transport. Then, in considering containerized transportation, a distinction should be made between three basic types of intermodal shipments:

1. "Door-to-Door" shipment, where a container is loaded and sealed at the supplier's factory and delivered intact to the consignee's warehouse or other place of business.
2. "Point-to-Point" shipment, in which a container is loaded by a freight consolidator at an inland point and transported to an inland point overseas.
3. "Port-to-Port" or "Air terminal-to-Air Terminal" shipment: here the transport of a container is consolidated at a port or air terminal and shipped to an overseas port or air terminal where the contents then are sorted for distribution.<sup>2</sup>

Undoubtedly, the container system has brought many advantages to the different modes of transport of goods.

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Sudamerikanische, [1967]2 Lloyd's Rep. 193 (U.S. Ct. of Appeals), herein after cited as "Standard Electrica Case".

- 1- "'Container' is an article of transport equipment other than a vehicle or conventional packaging [which is] ...strong enough to be suitable for repeated use; ... specially designed to facilitate the carriage of goods by one or more modes of transport, without intermediate reloading .... [Fitted] with devices permitting its ready handling, particularly its transfer from one mode of transport to another; and .... so designed as to be easy to fill and empty". See, proposed Regulation, 49 C.F.R. par. 420.3(3), published at 34 Fed. Reg. 14054 (Sept.4.1969). Quoted in, Edward Schmeltzer & Robert A. Peavy, prospects and problems of the Container Revolution, (1970)1 J.M.L.C. p.203, Footnote, 1, hereinafter cited as "Schmeltzer & Peavy".
- 2- Schmeltzer & Peavy, pp.205-206.

One of the major advantages of the container revolution is the reduction of the total costs of transport, and increased security and protection.<sup>1</sup> It also prevents cargo damage resulting from the deliberate or otherwise throwing or dropping of packages to the deck of a pier or ship. In addition, the risk of damage to cargoes resulting from stevedores carelessly stowing heavy cargoes on top of delicate ones is eliminated under containerization.<sup>2</sup> Another advantage of the container revolution is that certain administrative costs can be reduced or even eliminated, such as the cost of purchasing cargo insurance and the cost of freight-forwarders and custom brokers for handling port and airport clearances.<sup>3</sup> The use of the container, then, has largely facilitated the carriage of goods, particularly in combined transport.<sup>4</sup>

However, despite the above mentioned advantages resulting from the container revolution, the use of containers has presented a major problem of interpretation of Article 4(5) of the Hague Rules. The question is whether the container constitutes the package, or whether the packages within the container are to be considered separately for limitation purposes. The gap in the provisions of the Hague Rules in dealing with the concept of 'package' is reflected in the container, pallet-package problem which was unknown when the Hague Rules were

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1- Carl E. McDowell, Containerization: Comment on Insurance and Liability, (1972)3 JMLC, p.503, hereinafter cited as "McDowell".

2- Simon, p.511.

3- Schmeltzer & Peavy, p.210.

4- For more details as to these advantages, see Ibid, pp.206-210; Simon, pp.511-513.

adopted. Accordingly, the container-package question has encouraged a variety of opinions to come into existence. The following are however the criteria which have emerged from the decisions of the courts of different countries.

1. "The Intention of the parties" test, and
2. "Functional Economic" test.

#### **1. "The Intention of the parties" Test**

According to this test, the question to be determined is whether the contracting parties (the shipper and the carrier) intended to treat the container or pallet as a 'package' or intended that the contents of the container or the pallet to be so treated.

The intention of the parties could be ascertained from consideration of a number of facts, such as previous course of dealings, the descriptions of the goods in the bill of lading as stated; the type of container or pallet; who shipped it; who sealed it; if it was sealed on delivery to the carrier.<sup>1</sup>

It is to be noted that Article 3(3)(b) of the Hague Rules helps in defining a package by imposing obligations on the carrier and shipper to describe the goods on the bill of lading in terms of "the number of packages or pieces". In this connection, Tetley concludes that "In deciding what the package or unit is, one must look to the

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<sup>1</sup>- J.A. Johnston Co. Ltd V. The 'Tinde fjell', [1973]2 Lloyd's Rep.253 at p.258 (per Collier, J), (Canada Federal Court).

intention of the parties and must note what has been stated on the face of the bill of lading."<sup>1</sup>

To determine whether a pallet or a container constitutes a package or not, the court extracts the characterization of the parties from the facts and shipping documents, such as the description of the goods in connection with their actual numeration by the carrier. Thus in Leather's Best Inc V. The 'Mormaclynx'<sup>2</sup> it was held that the individual bales were the packages and not the container. The court also can deduce from the facts that the dock receipt, and the bill of lading indicated that the parties regarded each pallet as a 'package'.<sup>3</sup>

However, if the bill of lading states the number of packages as (1 container) and gives no indication of the fact that '190 cartons' were inside the container, these cartons are deemed as one 'package'.<sup>4</sup> This means that the parties regarded the container as a 'package' in their dealing and not each carton individually.<sup>5</sup>

The 'intention of parties' test received some attention in J.A. Johnston Co. Ltd V. The 'Tindefjell'<sup>6</sup>, where Collier, J. said:

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1- Tetley, 3rd ed, p.641

2- [1971]2 Lloyd's Rep.476 at p.486, (U.S. Court of Appeals, Second Cir).

3- Standard Electrica V. Hamburg Sudamerikanische, [1967]2 Lloyd's Rep. 193 at p.195, (U.S. Court of Appeals, Second Cir).

4- 'The Bischofstein', [1974]1 Lloyd's Rep. 122 at p.126, (U.S. Dist Ct. of Southern Dist of New York).

5- Ibid.

6- [1973]2 Lloyd's Rep.253 at p.254. In this case the bill of lading described the shipment as two containers, in one container there were 173 cartons of shoes and 148 in the other. The court held that the individual cartons were the packages and not the container.

"Where the shipper knows his goods are to be shipped by container and specifies in the contract [usually by means of the bill of lading] the type of goods and the number of cartons carried in the container, and where the carrier accepts the description and that count, then....the parties intended that the number of packages for purposes of limitation of liability should be the number of cartons specified."<sup>1</sup>

One can then conclude that the main factors in determining whether a pallet or container is a package, depends on the facts and circumstances of each case and, in particular, on the intention of the parties as indicated by what is stated in the shipping documents and the course of dealing between them.<sup>2</sup>

This test, 'intent of the parties', has been criticised as futile when there is inequality in bargaining power between the contracting parties.<sup>3</sup> Another undesirable side effect of a rule based upon the intention of the parties is that, in fact, it might impair the value and negotiability of the bill of lading, due to uncertainty in the allocation of risks with respect to the cargo. The holder of the bill of lading may never be sure what the parties intended to treat as a package, except to the extent that said intent can be deduced from the full content of the bill of lading itself.<sup>4</sup>

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1- Ibid, at p.258.

2- International Factory Seals V. The "Aleksandr Serafimovich" [1975]2 Lloyd's Rep.346 at p.354. (Canada Federal Court).

3- Standard Electrica V. Hamburg Sudamerikanische, [1967]2 Lloyd's Rep. 193 at p. 194.

4- The 'Aegis Spirit', [1977]1 Lloyd's Rep.93 at p.100.

## 2. "Functional Economic" test.

Under this test, where the shipper's own cartons or crates have been packed in a container, a presumption is created that each of the cartons or crates is deemed a package for the purpose of limitation of liability if the shipper's cartons or crates are functional packages in the sense that they are sturdy enough to withstand the rigours of break-bulk carriage.<sup>1</sup> The burden of proof is placed on the carrier to show that both parties intended the container to be the package.<sup>2</sup> However, where the shipper's own individual cartons or crates are not functionable or usable for overseas shipment, the container is presumptively a package for the purpose of limitation of liability and the burden shifts to the shipper to show why the container should not be treated as the package.<sup>3</sup>

Oakes, Ct. J,<sup>4</sup> explained the necessity for such a test by saying:

"The 'functional package unit' test we propound today is designed to provide in a case where the shipper has chosen the container a 'common-sense test' under which all parties concerned can allocate responsibility for loss at the time of contract, purchase additional insurance if necessary, and thus 'avoid the pains of litigation'".

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<sup>1</sup>- "Break-bulk", is the term used to refer to traditional non-containerized cargo carriage, see The Aegis Spirit, [1977]1 Lloyd's Rep.93 at p.98,100

<sup>2</sup>- Royal Typewriter V. M.V. Kulmerland, [1973]2 Lloyd's Rep.428 at p.431, hereinafter cited as The 'Kulmerland'; The 'American Legion', [1975]1 Lloyd's Rep.295 at p.296.

<sup>3</sup>- The 'Kulmerland', [1973]2 Lloyd's Rep. at p.432.

<sup>4</sup>- Ibid, at p.432.

This test has been criticized for many reasons: It does not afford the predictability needed for the parties to allocate responsibility for loss at the time of contract and to purchase the necessary insurance, because neither does the carrier know how the goods inside a sealed container are packed, nor is the shipper able to obtain the benefit of a limitation based on each carton in the container.<sup>1</sup> Also, the parties' intent, as evidenced by the bill of lading, should have no effect on a COGSA determination.<sup>2</sup> Further, the test fosters economic waste by requiring the shipper to package container shipped goods expensively to avoid the statutory limitation.<sup>3</sup>

### 3.1.2 Under the Visby Rules

The Hague Rules have rendered considerable services to the maritime transport industry, but since their beginning more than 60 years ago many new problems have arisen and these Rules do not provide solutions to them. Both the

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- 1- M.E. De Orchis, *The Container and the package limitation - The Search for Predictability*, (1974)5 JMLC, p.279, hereinafter cited as "De Orchis".
  - 2- George Denegre, *Admiralty-carrier-owned shipping container found not to be COGSA "package"*, (1982)56 Tul.L.R.p.1416, hereinafter cited as "Denegre".
  - 3- *The Aegis Spirit*, [1977]1 Lloyd's Rep. 93; Simon, p.523; *Insurance Company of North America V. S/S. Brooklyn Maru*, [1975]2 Lloyd's Rep.512 at p.513, where Tyler, Jr.D.J, states: "Since the individual cases were not suitable for overseas shipment without further packaging or special shipping arrangements the 636 boxes placed in the container failed the 'functional economics test' and could not qualify as S.4(5) packages"; *The American Legion*, [1975]1 Lloyd's Rep.295 at p.304 (Wilfred Feinberg Ct. J.); It is to be mentioned, there is another criterion for the container-package issue which is called 'single shipper package test' that where a container contains goods of a single shipper and has been sealed and packed by the shipper, the container will be deemed as a 'package', see *Rosenbruch V. American Export Isbrandtsen Lines Inc.*, [1974]1 Lloyd's Rep. 119 at p.121, (U.S. District Court, Southern District of New York).

traditional maritime States (the shipowning countries) and the developing States have realized that the Hague Rules have become unsatisfactory. The dissatisfaction of the traditional maritime States arose from the realization that "the rules for unit limitation of liability which depended on shipments in boxes, bales or bags appropriate for sailing ships as well as liberty-ships and victory-ships which had been built for maritime usage in 1917-1918 and 1944-1945, could not easily be accommodated to containerized shipping. The worldwide depression had already unsettled the monetary value of the unit limitation rule so that wide disparities existed even under the laws of those states which were parties to the Hague Rules."<sup>1</sup>

The main problems, then, arising from Article 4(5) of the Hague Rules were: the terms 'per package' or 'unit' lacked any real precision and, the limitation figure itself is not precise.<sup>2</sup>

These reasons and many others prompted the Comité Maritime International [CMI] to contemplate making radical amendments to a number of some important aspects of the Hague Rules in order to eliminate their unsatisfactory features. Therefore, many conferences have been held to deal with the revision of the Rules.

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1- Sweeney, part I, pp.72-73. Whereas the dissatisfaction of the developing States consisted essentially that "the operation of traditional maritime law (along with other aspects of International trade law) impairs the balance of payments position of developing States so as to insure continued poverty and perpetual under-development in an industrial age". Ibid, p.73.

2- Diamond, 1978, p.229.

The sub-committee of the CMI in the Stockholm conference, held in June 9, 1963, after deep discussions of different solutions, finally agreed to retain the 'per package' or 'unit', changing only the amount of the maximum to be equivalent to 10,000 Poincaré francs per package or unit.<sup>1</sup>

In 1967, at the Diplomatic conference on Maritime Law convened in Brussels to discuss this subject, it was proposed by the Norwegian delegation to replace the per package or unit system embodied in Article 4(5) of the Hague Rules with a system based on weight unit which had already been adopted in the International Conventions for the carriage of goods by rail (CIM), by road (CMR) and by air (Warsaw Convention)<sup>2</sup>. Much controversy concentrated on the use of weight as a unique unit of limitation.<sup>3</sup> As a result, the British delegation suggested postponing the discussion of the units of limitation to the second phase of the conference<sup>4</sup> which took place in Brussels in Feb, 1968, again as a Diplomatic conference of maritime law, where a 'mixed or alternative system' was adopted. This alternative system has a dual limit basis, one being per package or unit, and the other being per kilo gross weight

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1- Selvig, 1967, pp.109-110; see also Manca, P. International Maritime Law, Vol.2, Belgium, 1970, p.267, hereinafter cited as "Manca".

2- Diamond, 1978, p.232. This proposal was also supported from the U.S. delegation.

3- John L DeGurse, The "Container clause" in Article 4(5) of the 1968 Protocol to the Hague Rules, (1970)2, J.M.L.C. p.138, hereinafter cited as "DeGurse"; Schmeltzer & Peavy, p,223,

4- DeGurse, p.138.

of the goods damaged or lost, whichever is the higher.<sup>1</sup> It is submitted that the per package or unit limit is intended to apply to relatively light cargoes, while the per kilo limit is intended to apply to heavier ones.<sup>2</sup>

Therefore, the proposal of alternative units of limitation, after acceptance at the Diplomatic conference became sub-paragraph (a) of paragraph 1 of Article 2 of the 1968 protocol which reads:

"a. Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of FrCs. 10,000 per package or unit or FrCs. 30 per Kilo of gross weight of the goods lost or damaged, whichever is the higher".

There had been a new proposal submitted at the conference providing that there should be a ceiling according to which the total liability of the carrier shall not be exceeded.<sup>3</sup> The conference, however, rejected the

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1- Conférence Diplomatique de Droit Maritime, Douzième Session (2e phase) Bruxelles 1968, Doc. No.1, p.187, hereinafter cited as "Brussels Conference 1968".

2- Report of the Secretary-General, second report on responsibility of ocean carriers for cargo: Bills of lading, (A/CN.9/76/Add.1), 1973, p.163, para.11; The British delegation also favoured the alternative units of limitation for the following reasons: 1. The present limitation by package or unit is inappropriate to our container traffic and causes considerable doubts and difficulties. Therefore, the per kilo base is the best way to deal with this particular problem; 2. Relying on per kilo basis only is insufficient, because it has two disadvantages; "firstly it is not really appropriate for small packages of a reasonably high value. Secondly, it gives rise to particular administrative difficulties". See Brussels Conference, 1968, p.44.

3- Several amounts were suggested, see for more details: Brussels Conference 1968, proposal of the Danish delegation, p.200, proposal of the Government of the Federal Republic of Germany, p.191, proposal of the Netherlands, pp.196-97, 215.

proposed ceiling, as it would run counter to the container clause.<sup>1</sup> In addition the parties to the contract of carriage according to paragraph 1(g) of Article 2 of the Protocol 1968, can fix maximum amounts differently than as provided for in Article 2(a).<sup>2</sup>

It is noteworthy that sub-paragraph (a) of paragraph 1 of Article 2 of the Visby Rules may produce some difficulties in certain circumstances. For instance, the loss or damage to a shipment under one bill of lading of several 'packages' or 'units' of differing weights. In such a case, it is not clear whether the criteria are available only as an alternative to the collective cargo or whether, in order to derive the maximum liability, the cargo-owner can select which of the two alternatives - package/unit or weight - is more attractive to each individual item of cargo and thereby classify some items by package or unit and others by weight. It has been

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- 1- The British delegation indicated that the proposed ceiling would run counter to "the whole philosophy of this clause (the container clause) into which it would be inserted. The philosophy of this clause is to deal with the cargo of exceptional value. It used to be only exceptional value per package or unit, it is now exceptional value per package or unit or in the case of the larger ones per weight of these goods lost or damaged. The effect of putting on a global ceiling introduces an entirely different concept. It introduces a maximum based upon the quantity of goods you ship, whatever their value. Even though you are shipping goods of ordinary value, if you ship them in a large container under rates in which the large container is the unit, then your recovery will be less because you have shipped them in a large container rather than in a small container. So to start with it runs counter to the whole system of this clause, which is to deal with goods of exceptional value, not of exceptional quantity". Brussels Protocol, 1968, p.121.
  - 2- Paragraph 1(g) of Article 2 provides: "By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph."

suggested that, in such a case, reference should be made to the bill of lading. If the bill gives the number of packages or units, the package/unit limit is used and if not, the weight limit is used.<sup>1</sup> This suggestion, however, has been contested by the editors of Chorley & Giles who state correctly, "that the plain wording of the Rules dictates an answer which is in terms independent of the bill of lading and simply on the giving the greater award of damages to the cargo-owner."<sup>2</sup> They submit that the choice of limitation - package/unit or weight - depends on the mathematical result (whichever is the higher) and not on the type of cargo.

Another difficulty arises in cases where part of the cargo is lost. It is not clear whether the limitation test is applied to the part lost or to the whole of the cargo as being damaged. Diamond suggests:

"If a package or unit weighs more than 333.3 Kilos and only some of the goods within it are lost or damaged, the limit will be 10,000 francs unless those goods weigh more than 333.3 Kilos".<sup>3</sup>

Coming now to the consideration of the container clause. It is to be noted that before the 1968 Brussels Protocol, knowing the number of packages in relation to container cases was a problem because, as stated, there were different interpretations as to whether the container or

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1- Diamond, 1978, p.241.

2- Chorley & Giles, 8th ed, p.211.

3- Diamond, 1978, p.240. He also suggests that "If a package or unit weighs 333.3 kilos or less, then the limit is 10,000 francs irrespective of whether all the goods were lost or damaged or only some of them. If a package or unit weighs more than 333.3 kilos and all the goods within it are lost or damaged, then the weight alternative will provide a higher limit". Ibid.

its contents constituted COGSA packages. Then, with a view to finding a solution to the container-package question, the Visby Rules attempt to deal with the problem of containerized goods. Article 2(c) of the Protocol 1968 (Visby Rules) provides:

"Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit."<sup>1</sup>

The above provision makes it clear that a container or pallet will cease to count as a single package if the packages or units within the container are enumerated in the bill of lading. In other words, the number of packages or units within the container must appear on the face of the bill of lading in order to constitute the basis for calculation of the limitation. Accordingly, three possibilities can arise under Article 2(c) of the Visby Rules:

1. If the bill of lading enumerates the contents of the container individually (e.g. 1 container containing 500 cases of machinery), the container is not a package but each of the 500 cases will qualify as a package or unit.

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<sup>1</sup>- This provision has been mentioned literally in Article 4(5)(c) of the Carriage of Goods by Sea Act, 1971, of the British COGSA, while the American courts still apply the American COGSA 1936 in regard to the container-package question, because the U.S. has not ratified the Brussels Protocol 1968.

2. If the bill of lading does not enumerate the contents of the container (e.g. 1 container containing machinery), then the container is deemed to be the package or unit.
3. If the bill of lading enumerates the contents of the certain packages or units plus general cargo included in the container (e.g. 1 container containing 10 cases of machinery and general merchandise), each of the 10 cases is a package or unit and the container with the remaining general goods is to be treated as another package or unit.

It is to be noted that the legislative background of the Hague/Visby Rules relating to Article 2(c) of the Visby Rules, clearly reveals that the intention of the parties has received much attention in the formulation of this provision. The British delegation, within their explanation describe the nature and purpose of the container clause as follows:

"It is for the shipper and the carrier to decide whether they want the particular container to be treated as the package for the purpose of limitation of weight, or whether they want the smaller packages or units in it to be so treated; and no doubt when the latter alternative is taken, that is to say the individual packages are to be treated as separate units, a higher rate of freight will be payable than when the container is to be the unit - a higher rate of freight because the maximum liability, may itself be higher [...] What is essential is that into whoever's hands the bill of lading may come, the hands of the consignee, of the banker who finances the transaction, or of the insurer, it will appear on the face of the bill of lading whether the package

for purposes of maximum liability is, the container, or the individual packages inside the container [...] what we want to do is to leave open to the shipping industry, the shippers and the ship owners, to decide as a matter of business whether they want to get 'per container rates' in which case the container will be treated as the package, or the ordinary freight rates in which (case) the traditional packages within it will be treated as individual packages [...] Under this paragraph all you will have to do is to look at the bill of lading and see, does it contain any figures of the numbers of packages other than the containers themselves."<sup>1</sup>

It is submitted that nothing in the language of Article 4(5)(c) of the Hague/Visby Rules indicates that for the privilege of the enumeration in the bill of lading of the number of packages or units loaded into the container, the shipper must pay an increased freight rate. The practice of charging higher rates has tended to discourage shippers from declaring the nature and value of their goods in the bill of lading. Instead, they have tended to rely on supplementary cargo insurance as a means of protection against loss, which is, for the most part, less expensive than paying a higher freight rate.<sup>2</sup>

It is noteworthy that Article 4(5)(c) of the Hague/Visby Rules has largely solved the problem of whether the container is a package for limitation purposes. Despite this a number of problems remain to be solved, for instance

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<sup>1</sup>- Brussels Conference, 1968, pp.118-119. However some delegations opposed the container clause, for instance, the Irish delegation, Ibid, pp.42-43.

<sup>2</sup>- DeGurse, p.133.

'similar article of transport' and 'used to consolidate goods'. Concerning the expression 'similar article of transport', Scrutton suggested that, 'roll on-roll off' lorries and trailers do not fall within this description."<sup>1</sup> This suggestion has been contested by Carver who finds that 'roll on-roll off, push on-push off, drive on-drive off, fly on-fly off, are not only similar to but are containers if they consolidate goods."<sup>2</sup> The question also may arise as to what is meant by 'used to consolidate', Scrutton suggested that perhaps the most obvious interpretation is 'used to carry' or 'used to contain'. The word 'consolidate' is often used in shipping practice as meaning 'treat as one consignment for the purpose of calculating freight."<sup>3</sup> Diamond reaches the same conclusion as Scrutton when he finds the expression 'used to consolidate goods' refers to the physical placing of goods together inside a container, not to the consolidation of the goods of different shippers or of the goods shipped under different contracts of carriage.<sup>4</sup>

Lastly, a question to be solved is: in what circumstances is the number of packages "enumerated in the bill of lading as packed", in the container? It is submitted that where the bill of lading is "said to contain" a certain number of packages, then this is sufficient for the purpose of Article 4(5)(c) even though it would probably not create an estoppel under Article

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1- Scrutton, 19th ed, p.455, note.33.

2- Carver, p.397.

3- Scrutton, 19th ed, p.455, note.34.

4- Diamond, 1978, p.243.

3(3). It would appear that both parties are bound, for limitation purposes, by an incorrect enumeration which is an unsatisfactory result.<sup>1</sup>

One can then conclude that the Visby Rules produce important amendments to Article 4(5) of the Hague Rules. The amendments in question are:

1. The 'per package or unit' limitation fixed earlier in gold, is changed into gold poincaré francs and is raised to Frcs. 10,000.
2. A new alternative standard limitation, the per kilo of gross weight is added, clearly improving the position of the cargo-owner since he was now allowed to claim the higher of the two figures produced by the application of the two alternative tests.<sup>2</sup>
3. The addition of the new sub-paragraph (C) to Article 4(5) solved some, although not all, of the limitation problems which containerized transport raised under the Hague Rules. In other words, we can say that the container clause was produced to clarify the question of the number of packages in container cases and consequently to make it easily possible to calculate which amount would be the higher in accordance with Article 4(5)(a) of the Hague/Visby Rules. The amended rules also provide the shipper with a choice between a weight-based limit of liability and a limit per package or unit.

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1- Scrutton, 19th ed, p.455, note 35; Carver, p.397.

2- Tetley, 3rd ed, p.885; Wilson, Basic carrier liability, p.147.

### 3.1.3. Under the Hamburg Rules

The Hamburg Rules adopted a dual system of liability limitation. The units of limitation were a matter of controversy at the relevant UNCITRAL Conference.

Some countries favoured a system based on the principle of the weight of cargo alone<sup>1</sup> as found in the CIM, CMR and Warsaw Conventions, with no reference to the package limitation system as found in the Hague rules (Art.5(4) or the Hague/Visby Rules (Brussels Protocol 1968). Some other countries were in favour of retaining the dual system which was adopted under the Hague/Visby Rules<sup>2</sup>, i.e. "per package or unit", and "weight", because of a) the difficulty of establishing weight in cases of partial loss, or broken package cases, and b) the dual system is a flexible approach to the problem of the carrier's limitation of liability.<sup>3</sup> Finally, the Hamburg Rules Conference accepted a dual system of liability limitation. Thus, Article 6(1)(a) of the Hamburg Rules provides:

"The liability of the carrier for loss resulting from loss or damage to goods according to the provisions of Article 5 is limited to an amount equivalent to 835 units of account per package or other shipping

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1- Such as Nigeria and Norway whose argument was based on the "simplicity of administration, the ambiguities and resulting friction in any 'package' system of limitation and necessity to accommodate intermodal carriage systems in the future". However, the Australian delegate indicated that he could accept the dual system. Joseph C. Sweeney, Article 6 of the Hamburg Rules, published in the Hamburg Rules on Carriage of Goods by Sea, edited by S. Mankabady, 1978, p.155, hereinafter cited as "Sweeney, Article 6 of the Hamburg Rules".

2- These countries were: The United States, the United Kingdom, the USSR and France. This view was endorsed by Belgium, Japan, Poland, Singapore, India, Argentina and Brazil. However, Japan accepted this system only on condition that the container should be governed by weight alone. Ibid, pp. 155,156.

3- Mankabady, p.62; Sweeney, part.II, p.329.

unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher".

As we have seen the limitation units under the Hamburg Rules are "per package or other shipping unit" and "weight". This test is clearly applicable when the goods are carried in packages or as shipping units and their weight is known. Where, however, the weight of lost or damaged goods is unknown, the per package or shipping unit will be the only applicable test, and, where the nature of the cargo is in a manner which is not usually carried in packages or as other shipping units, such as bulk cargo,<sup>1</sup> the weight test will clearly be applicable. This is more beneficial to the shipper.<sup>2</sup>

It is noteworthy that the Hamburg Rules used the terms "shipping unit" to remove any uncertainty caused by the term "unit" used in the Hague/Visby Rules. So the draftsmen of the Hamburg Rules use the term "other shipping unit" after the term "package". The former term thus means a shipping unit which is not regarded as "a package" like an unboxed car or tractor. Under the Hague/Visby Rules it was not completely clear whether the unit meant "shipping unit" or "freight unit", i.e. the unit upon which the freight is calculated such as tonne. This is, as already discussed, why some believe that the Hague/Visby Rules

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<sup>1</sup>- Bulk Cargo, includes such cargo as "coal, grain, sugar, various chemicals and so on, which are loaded in bulk, which are of character inclined to run under some circumstances like sand, and which are not either cases or bags or individual pieces like machinery or timber. Hird V. Rea Ltd [1939]63 Ll.L.Rep. 261 at p.263 (per Scott J.)

<sup>2</sup>- Mankabady, p.62; Chorley & Giles', 8th ed, p.211.

"unit" means "shipping unit" while some others believe that it means "freight unit". This uncertainty is resolved by the Hamburg Rules.<sup>1</sup>

It is to be noted that, Article 6(1)(b) of the Hamburg Rules brought a new unit of limitation for loss caused by delay in delivery. This limitation is based on an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage. It must be mentioned, however, that a delay may cause physical damage to the goods, so the question here is, whether this damage would be governed by Article 6(1)(b), or by the general unit limitation of liability figure found in Article 6(1)(a)?

On this point Professor Selvig (Norwegian representative) indicated that the physical damage to cargo caused by delay was clearly covered by Article 6(1)(a) and not by Article 6(1)(b) (the special delay damage figure).<sup>2</sup> Accordingly, the United States delegate (Professor Sweeney) also indicated that he would make an oral representation as part of the official documents to that effect at the Plenary Session of the Conference. The Statement was as follows:

"At the discussion on delay damages [...] a question was raised about the problem of carrier liability for physical deterioration or wasting of the cargo caused by delay. The opinion was given [...] that the expression in Art. 5(1), 'The carrier shall be liable

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1- Wilson, p.209; Bonelli, p.195

2- Sweeney, Article 6 of the Hamburg Rules, p.161.

for loss resulting from loss or damage to the goods as well as from delay in delivery...', covers physical deterioration of the cargo caused by delay. No-one disagreed. We also hold that view. We said then that we wish to place on record our understanding that the provisions of Article 5(1), and more importantly, the provisions of Article 6(1)(a) applying the unit limit of 2.5 SDR per kilo and 835 SDR per package apply to physical deterioration of the cargo caused by delay".<sup>1</sup>

It can be said then that the Article 6(1)(a) figure of the Hamburg Rules applies to physical damage to cargo caused by delay, whereas the Article 6(1)(b) figure covers only the consequential economic losses caused by delay in delivery.

As already mentioned, the Hague/Visby Rules attempted to solve the container-package problem by producing a container clause.<sup>2</sup> The Hamburg Rules too attempt to solve the container-package problem by, as we have said, adopting a dual system liability limitation, i.e. 'per package or other shipping unit' and 'weight'. The adoption of this system will be inevitably followed by the container-package problem, because, in order to calculate the carrier's liability limitation in such a system, it has to be decided whether a container is a package or not. The drafting committee after a long debate reached a general agreement that the container clause of the Hague/Visby Rules should

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<sup>1</sup>- Ibid, pp.161-162, as noted above, no contrary view as expressed.

<sup>2</sup>- Article 4(5)(c) of the Hague/Visby Rules.

be used as the basis of the new clause.<sup>1</sup> Therefore, the Hamburg Rules are based on the Hague/Visby Rules, Article 5(4)(c), but the Hamburg Rules have a more comprehensive context than the Hague/Visby Rules. Take the case where no bill of lading is issued and the number of packages or other shipping units is set out in another document evidencing the contract of carriage by sea. This situation seems not to fall within Article 4(5)(c) of the Hague/Visby Rules. In order to deal with such a situation, the Hamburg Rules conference decided to add the phrase "if issued, or otherwise in any other document evidencing the contract of carriage by sea"<sup>2</sup> after the phrase "enumerated in the bill of lading". So Article 6(2) of the Hamburg Rules reads as follows:

"For the purpose of calculating which amount is the higher in accordance with paragraph 1(a) of this Article, the following rules apply:

- a. Where a container, pallet or similar article of transport is issued to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport were deemed one shipping unit.
- b. In cases where the article of transport itself has been lost or damaged, that article of transport, if

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1- Sweeney, Article 6 of the Hamburg Rules, p.158; DeGurse, p.131.

2- These phrases were the proposal made by the Scandinavian nations, Ibid. Sweeney, p.160.

not owned or otherwise supplied by the carrier, is considered one separate shipping unit."

Another point which the Hague/Visby Rules have not dealt with concerns the above paragraph (b) of Article 6(2). The lost or damaged article of transport (such as a container, pallet) is recoverable under the Hamburg Rules as one separate shipping unit from the view point of the carrier's limitation of liability.<sup>1</sup> In other words, if the container itself is damaged or lost the carrier may be responsible for the damage. In such a case the container itself will be considered as one separate shipping unit.

One can then conclude that the Hamburg Rules have removed the uncertainty which was caused by the term 'unit' under the Hague/Visby Rules by using the term 'shipping unit', as well as resolving the problems arising from containerization more comprehensively than the Hague/Visby Rules.

### **3.2 The Unit of Account**

Units of account are employed in international transport conventions concerning the carriage of goods. In general terms, a unit of account measures the amount of any particular currency that holders can obtain for it. The Hague Rules adopted a Gold Clause, the Visby Rules adopted the Franc Gold basis and the Hamburg Rules approved the Special Drawing Right (S.D.R.) basis. They are discussed below.

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<sup>1</sup>- Chandler, p.271.

### 3.2.1 The Gold Clause Basis

The monetary limits under Article 4(5) of the Hague Rules are £100 for the lost or damaged cargo. The monetary units in question, in terms of Article 9 of the Hague Rules, were to be taken to be gold value, as Article 9 provides:

"The monetary units mentioned in this convention are to be taken to be gold value".

Thus, the unit of account under the Hague Rules is the gold standard.

The gold clause was intended to ensure international uniformity and stability in imposing an integrated charge on the carrier, for loss or damage to the goods, in different countries, as well as protecting the holder of the bill of lading against the devaluation of local currencies if the limit was expressed in terms of one of these currencies, but difficulties have arisen in application of this Article, firstly with the remarkable changes in the real value of gold over time and, secondly, with respect to the date of conversion for contracting states where the pound was but no longer is a given monetary unit.

The pound sterling is not convertible into gold and devaluation of the pound in relation to the sovereign has taken place. Consequently it has no longer the same value as the pound sterling in 1924. In other words, the pound nowadays does not represent one pound sterling in gold. Therefore, many countries adopted at that time in their

domestic legislation an amount in local currency as the equivalent of £100 sterling.<sup>1</sup> The result was that the limitation level was decreased and the carriers accordingly gained an extra profit from the £100 limit or its equivalent in other currencies. This figure became unsatisfactory to ascertain the balance between the interests of the carriers and cargo-owners, a balance which represents the merit and the ultimate object of the Hague Rules.<sup>2</sup>

In consequence, under the auspices of the British Maritime Association a number of carrier and cargo owner interests in the U.K. concluded an agreement on 1st August, 1950, known as the "Gold Clause Agreement", whereby the limitation of liability was raised to £200 sterling lawful money of the U.K.<sup>3</sup> This agreement was amended on 1st July 1977 by increasing the amount of limitation to £400 sterling lawful money of the U.K.<sup>4</sup>

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- 1- Diamond, 1978, p.240; William Tetley, *Marine Cargo Claims*, 2nd ed, 1978, p.445, hereinafter cited as "Tetley, 2nd ed".
- 2- N.W. Palmier Egger, *The unworkable per-package limitation of the carrier's liability under the Hague (or Hamburg) Rules*, (1978) 24 McGill L.J. p.459, hereinafter cited as "Egger, *The unworkable per-package limitation*".
- 3- Tetley, 3rd ed, p.1240, Astle, p.179; Ridley, p.190; This agreement appears to have been referred to once in court in Pyrene Co. V. Scindia Navigation Co, [1954]2 Q.B.402 at p.413, where Devlin J. said: "The defendants (the carriers) admit liability but claim that the amount is limited under Article 4, rule 5, of the Hague Rules. The limit stated in that rule is £100, but this is subject to article 9 which prescribes that the figure is to be taken to be gold value. There are doubts about the interpretation and effect of this latter article, and they have been very sensibly resolved for the parties to this case by the acceptance of the British Maritime Law Association's Agreement of August 1, 1950, which fixes the limit at £200."
- 4- R.E.Beare, *Forum Shopping: The Effect of Conflict of Law on the Exercise of Cargo Underwriters' Subrogation Rights*, published in the speakers' papers for the Bill of Lading Conventions Conference, Organized by Lloyd's of London Press Ltd, 1978, p.3, hereinafter cited as "Beare"; Tetley, 3rd ed, p.1241.

As already stated above, the real value of gold over time also changed with the date of conversion for contracting states where the pound was and no longer is a monetary unit. The courts of different contracting states have not reached any uniform conclusions in determining the rate of conversion. The choice has been between: 1. the date of the breach of the contract; 2. the date of the payment; 3. the date of the commencement of the proceedings; 4. the date of the judgement; 5. the date of the arrival of the ship at the port of discharge.

The English case law formerly adopted the date of breach of the contract or, in the case of tort, the date of the tortious act. Thus, in Di Ferdinando V. Simon, Smits & Co.<sup>1</sup> Bankes L.J. said:<sup>2</sup>

"The plaintiff is entitled to have his damages assessed as at the date of breach, and the court has only jurisdiction to award damages in English money. The judge must therefore express those damages in English money, and in order to do so he must take the rate of exchange prevailing at the date of breach".

This position was given judicial approval by the House of Lords in the United Railways of Havana & Regla Warehouses, Ltd case,<sup>3</sup> where Viscount Simonds said:

"...A claim for damages for breach of contract or for tort in terms of a foreign currency must be converted into sterling at the rate prevailing at the date of breach or tortious act."<sup>4</sup>

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1- [1920]3 K.B. 409.

2- Ibid at p.412.

3- [1961] A.C.1007.

4- Ibid, at p.1043.

However, a revolutionary change was made by the House of Lords in Miliangos V. Frank (Textiles) Ltd,<sup>1</sup> when it was held that the date of conversion should be at the date of payment in terms of sterling, and the above authorities were overruled. This change was made to secure a just result in a radically different economic climate, e.g. floating rather than fixed exchange rates.

In Scotland, there have been conflicting views as to what constitutes the relevant moment of conversion of a foreign currency into sterling. In Hyslops V. Gordon,<sup>2</sup> the Court of Session gave decree for a sum in U.S. dollars, which was the money of account of the contract, but the House of Lords held that decree should have been given in the sterling equivalent of the U.S. dollar converted on the date of raising the action,<sup>3</sup> whereas in Macfie's Judicial Factor V. Macfie<sup>4</sup> it was held that the amount was to be calculated in sterling, in accordance with the rate of exchange prevailing at the date when the debt became payable and not at that prevailing at the date of decree.<sup>5</sup>

However, the Court of Session in Commerzbank Aktiengesellschaft V. Large<sup>6</sup>, held that: "For the purposes

<sup>1</sup>- [1976]1 Lloyd's Rep.201 at pp.206-207 (Lord Wilberforce); Lord Denning, in George Veflings Rederi A/S V. President of India (The Bellami), [1978]1 Lloyd's Rep. 467, affirmed by the Court of Appeal [1979]1 Lloyd's Rep.123 at p.125, where Lord Denning said: "It seems to me clear that the rate of exchange should be the rate prevailing at the date of payment".

<sup>2</sup>- (1824)2 Sh. App.451.

<sup>3</sup>- Ibid, at pp.457-460 (per Lord Gifford).

<sup>4</sup>- 1932 S.L.T. 460 at p.461; see also Fiskasola V. Mauritzen, 1977 S.L.T. 76.(Sh. Ct).

<sup>5</sup>- Ibid, see for more details A.E. Anton, Private International Law, A treatise from the standpoint of Scots Law, (1990) 2nd ed, p.279, hereinafter cited as "Anton, Private International Law".

<sup>6</sup>- 1977 S.L.T. 219.

of this case the pursuers have deliberately chosen to fix the conversion date as the date of payment or at the date when the decree is extracted whichever is the earlier".<sup>1</sup> In that case the Inner House follow the approach of the House of Lords in Miliangos. The case of Hyslops V. Gordon was seen as no longer being binding in Scotland. Thus the law of Scotland is essentially the same as that of England on this point.

It is to be noted that in Miliangos the House of Lords departed from the rule, which stated that the foreign currency should be converted into sterling when the action was raised. It became possible for the plaintiff to recover the loss of or damage to the goods in a foreign currency. The English Courts can give judgement in foreign currency, and can enforce it by converting that currency into sterling at the rate current at the date of payment.<sup>2</sup> As noted above, this also applies in Scotland following the Commerzbank decision. It appears that the new rule on foreign currency applies very widely to appropriate cases of breach of contract and tort or delict as well as to claims for payment of debt.

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1- Ibid, at p.224.

2- Miliangos V. Frank (Textiles), Ltd, op. cit.p.201; Lord Denning, in The Bellami, [1979]1 Lloyd's Rep.123 at p.125, where he states: "Since so far as demurrage was concerned, the money of account was U.S. dollars and the money of payment was also U.S. dollars; and since there was no provision for it to be paid in sterling, then it is a reasonable inference that the money is payable in U.S. dollars"; The "Despina R", [1977]2 Lloyd's Rep 319; "The Folias", [1977]1 Lloyd's Rep. 39; Scrutton, 19th ed, p.395. See also North Scottish Helicopters Ltd, V. United Technologies Corp. Inc. (No.2). 1988 S.L.T. 778 at p.780.

In the United States, there have also been different rules as to the proper date of conversion. The Supreme Court has adopted the date of the commencement of the proceeding as the proper date of conversion.<sup>1</sup> However, in another much more recent case, the District Courts of the United States upheld the date of the breach as the proper date of conversion.<sup>2</sup> I.e. the same approach as that now current in the United Kingdom.

There is, however, no general principle among the contracting parties for the relevant date of conversion. Therefore, one can conclude that the relevant date for conversion is the date agreed upon by the parties<sup>3</sup> or the date which is governed by national laws of the contracting parties and by its jurisprudence in explaining this issue. These principles have been confirmed by Article 9(3) of the Hague Rules which provides:

"The national laws may reserve to the debtor the right of discharging his debt in national currency according to the rate of exchange prevailing on the day of the arrival of the ship at the port of discharge of the goods concerned".

### 3.2.2 The Gold Franc Basis

As we have already seen the Hague Rules limit of £100 sterling, coupled with the provision that it was to be "gold value", did not succeed in practice in satisfying the objectives which are intended to be achieved by a limit of

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<sup>1</sup>- Die Deutsche Bank V. Humphrey, 272 U.S.517 (1926).

<sup>2</sup>- Philip Holzman A.G. V. S.S. Hellenic Sunbean, (1977) A.M.C. 1731

<sup>3</sup>- Diamond, The Hamburg Rules, p.18.

liability, namely, (a) certainty; (b) uniformity; (c) stability and (d) the maximum degree of protection against fluctuations and devaluations in currencies.<sup>1</sup>

The Visby Rules attempted to achieve these objectives by replacing the gold clause by gold poincaré franc as a unit of account.<sup>2</sup> Article 2 par (d) of the Visby Rules defines the franc as follows;

"A Franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900"

The gold franc provided uniformity and stability as long as the dollar was linked with gold, especially before the Second World War (1939-45).<sup>3</sup> However, certain events had occurred in the practice of the international monetary system which in turn affected the stability of the gold franc. The fluctuations of currencies in varied proportions created serious doubts as to the stability of the gold franc, which reflected changes in the market rates of national currencies and it was difficult to convert an amount expressed in gold into other currencies.<sup>4</sup>

The fluctuations and the devaluations of the poincaré franc's value have made the official value different from the free market value. This situation caused uncertainty in applying the gold franc as a unit of account for the limitation of carrier's liability. The Supreme Court of the Netherlands in Hornlinie A.G. V. Société Nationale

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<sup>1</sup>- Diamond, 1978, p.236.

<sup>2</sup>- Article 2(a) of the Visby Rules fixed the limitation of liability at 10,000 francs per package or unit or 30 francs per kilo of gross weight of goods lost or damaged.

<sup>3</sup>- L.Bristow, Gold Franc - Replacement of Unit of Account, (1978)1 LMCLQ, p.31, hereinafter cited as "Bristow".

<sup>4</sup>- Mankabady, p.113.

Pétrole Aquitaine<sup>1</sup>, has solved this problem by stating that:

"The conversion rate of the gold franc, under the Brussels Convention on shipowners' limitation of liability, shall be calculated on the basis of the official value of the currency in relation to the Poincaré gold unit, and not on that of the free market".

Regarding the date of conversion, Article 2(d) of the Visby Rules provides:

"The date of conversion of the sum awarded into national currencies shall be governed by the law of the court seized of the case".<sup>2</sup>

Although the Visby Rules did not fix the date of conversion, it can be said that they are more flexible than the Hague Rules because the date of conversion is left to be decided by the national law of the court seized of the case.

Thus one can conclude that both the Hague Rules and the Visby Rules have not succeeded in satisfying the four objectives for a limit of liability set out earlier. As a result of this situation, therefore, the S.D.R. of the I.M.F.<sup>3</sup> has been introduced as the basic unit of account as seen in the discussion which follows below.

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1- (1972)7 E.T.L. 933.

2- However, the COGSA of the U.K. 1971 adopted the poincaré gold franc as a unit of account of limitation by converting the gold franc into S.D.R and then into sterling at a rate of exchange prevailing on the date in question. (Art.4(5)). Diamond, 1978, p.239.

3- International Monetary Fund; It is to be noted that the Hague/Visby Rules have adopted the S.D.R. as a unit of account by replacing the Fracs: 10,000 per package or unit and Fracs. 30 per kilo to 666.67 S.D.R. per package or unit and 2 S.D.R. per kilo according to Article II (1) and (2) of the Brussels Protocol of 1979. This protocol entered into force, February 14, 1984.

### 3.2.3 The S.D.R. Basis

The uncertainty of the value of the gold franc had been a matter of concern since currencies began to float in 1971.<sup>1</sup> The market price of gold became much higher than the official price. Determining the exact limitation amount thus became difficult with reference to the value of gold 'poincaré' franc as a basis for the conversion of the gold poincaré franc into national currencies.<sup>2</sup>

The IMF was also faced with similar problems in relation to the value of the S.D.R.<sup>3</sup> used as a form of reserve currency as well as a unit of account with a value fixed in terms of gold. In 1974, then, the IMF decided to define the value of the S.D.R. in terms of a "basket" of fixed amounts of 16 currencies.<sup>4</sup> However, on January 1, 1981, the basket was reduced to the strong currencies of the five IMF members.<sup>5</sup>

The International transport liability conventions aimed to employ the S.D.R. as a unit of account in order to avoid the fluctuations and devaluations of the poincaré franc gold by converting a gold franc first into S.D.R.s and then into national currencies at rates which reflect current

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1- Bristow, p.33.

2- Chandler, p.270.

3- The SDRs are an international value used to provide a regular comparative evaluation by the IMF of the currency of member states. Tetley, 3rd ed, p.879.

4- Bristow, p.32.

5- The value of the S.D.R. was equal to the market value of fixed amounts of five IMF members' currencies as follows: The U.S. dollar 42%, the Deutsche mark 19%, French franc 13%, British pound 13% and Japanese Yen 13%; Tetley, 3rd ed, p.879; Les Ward, The SDR in Transport Liability Conventions: Some clarification, (1981)13 JMLC, p.3, hereinafter cited as "Ward".

market conditions.<sup>1</sup> Consequently UNCITRAL has adopted the S.D.R. as a unit of account defined by the IMF in order to provide more stability in value than gold in international trade and exchange.<sup>2</sup>

Article 6(3) of the Hamburg Rules provides: "Unit of account means the unit of account mentioned in Article 26". According to Article 26(1) of the Hamburg Rules the unit of account is the S.D.R. as defined by the IMF. An analysis of Article 26 shows that the Hamburg Rules have adopted, in fact, two kinds of units of account: The S.D.R. and the poincaré franc.

The S.D.R. is used as the Hamburg Rules' unit of account for the states which are members of the IMF, or for states which are not members of the IMF but whose laws do not prohibit the application of the provisions of para 1 of Article 26 including the S.D.R. For a member-state of the IMF the value of its national currency in terms of the S.D.R. will be calculated according to the method of valuation applied by the IMF at the date in question for its operations and transactions,<sup>3</sup> whereas, for non-member States of the IMF, where their laws permit them to use the S.D.R., the value of their national currencies in terms of the S.D.R. will be calculated in a manner determined by those states.

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1- Bristow, p.32.

2- Aleksander Tobolewski, *The Special Drawing Right in Liability Conventions; An Acceptable Solution?* (1979)2 *LMCLQ*, p.173, hereinafter cited as "Tobolewski"; Ward, p.3.

3- Article 26(1) of the Hamburg Rules.

Another important point that needs to be mentioned is an exceptional option, granted by Article 26, for those states who are not members of the IMF and whose laws do not permit a calculation to be made on this basis (S.D.R.), in which case such states may use the poincaré franc as an alternative unit of account.<sup>1</sup>

Lastly, as far as the date of conversion is concerned, Article 26(1) of the Hamburg Rules provides that:

"The amounts mentioned in art. 6 are to be converted into the national currency of a state according to the value of such currency at the date of judgement or the date agreed upon by the parties".

It should be noted that the date of judgement may raise the question of how the exchange risks between that date and the date of payment are allocated. This situation would give the strong party a right to choose the date of conversion most favourable to him. Accordingly, it will be more sensible to adopt the date of payment rule as a date of conversion in order to respond to the aims of conversion by avoiding the fluctuations of exchange rates.<sup>2</sup>

One can conclude that, by adopting the SDR as a unit of account, the Hamburg Rules achieve the maximum possible uniformity, because determining the exact limitation amount through the conversion of gold francs into national currency is very difficult without a fixed relationship between national currencies and gold.

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<sup>1</sup>- Wilson, p.209.

<sup>2</sup>- Stephen A. Silard, Carriage of the SDR by Sea: The unit of account of the Hamburg Rules, (1978)10 JMLC, p.29, hereinafter cited as "Silard".

### **3.3 Loss of the Right to Limit Liability**

Two main means for eliminating the statutory limit can be deduced from the three sets of Rules read together: Hague Rules, Visby Rules and Hamburg Rules. Firstly, a declaration of the nature and value of the goods in the bill of lading; and secondly, serious faults committed by the carrier or by his servants or agents. The first means is provided for in both the Hague Rules and Visby Rules, whereas it is removed by the Hamburg Rules from the circumstances in which the limit is broken. As far as the second means is concerned, both the Visby Rules and the Hamburg Rules make it clear that serious faults of the carrier result in his being prevented from relying on the limitation of liability clause. In addition, serious faults of the servants or agents of the carrier will preclude them from invoking the statutory limit. The Hague Rules contain no provisions on this point. Therefore, in what follows below 1) The declaration of the nature and value of the goods; and 2) serious faults will be discussed.

#### **3.3.1 Declaration of the nature and value of the goods.**

Under both the Hague and Visby Rules the limitation of liability provided for therein cannot be invoked by the carrier if the nature and value of the goods have been declared by the shipper before shipment and inserted in the

bill of lading.<sup>1</sup> The original draft of the Hague Rules Article 4(5) contemplated that shippers should always declare the value of the goods. However, practice showed that shippers seldom disclosed the value of the goods in the bills of lading. The reason for that was explained by Mr. Dor in the Hague Conference 1921:

"What happens is this, that the shippers very often do not declare the value, because they are afraid of paying the taxes - the ten per cent tax, or luxury tax or one of the other taxes; for a good many reasons they do not declare the value; and what you want to declare, that the shipowner is able to limit his liability to 10 francs per package"<sup>2</sup>

By and large the prevailing point of view among representatives of the cargo interest was that having paid ordinary freight rates, they were entitled to rely on a certain minimum liability of the carrier.<sup>3</sup> On the other hand, shipowners wanted to avoid excessive and unanticipated cargo claims; the declaration of the nature of the cargo and its value was considered absolutely necessary in order to enable the carrier to exercise due care for the protection of the cargo and to ensure that the carrier did not incur a liability wholly disproportionate to the freight charged for the carriage.<sup>4</sup> Finally, the conference arrived at a compromise as expressed in Article 4(5) of the Hague Rules.

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1- Article 4(5) of the Hague Rules and Article 2(a) of the Visby Rules.

2- The Hague Rules Conference 1921, Report 1921, p.159.

3- Per Rudolf in Report 190-1.

4- Per Harris in Report.p.188.

The question then, is what are the formal requirements of declaration? According to Articles 4(5) of the Hague Rules and Article 2(a) of the Visby Rules, there are certain formal requirements for the declaration to be effective in avoiding the statutory limitation of liability. It must be express, referring specifically to the particular goods which are the subject of the carriage; the shipper must declare the nature and the value of the goods before shipment, and the nature and value must be inserted in the bill of lading.

**A. The Declaration must be express.**

The reason why the declaration must be express is clear enough. The declaration must be specific so as to enable the carrier to exercise due care for the protection of the cargo in question. Clauses in bills of lading which do not comply with this condition are generally held ineffective. In Foy & Gibson Pty, Ltd V. Holyman & Sons Pty. Ltd,<sup>1</sup> a clause in bill of lading fixing the value of each package at £5 was held not to have the character of an effective declaration of value. It was stated:-

"Clause 14 of the bill of lading does not declare 'the nature and value of such goods' within the meaning of the first paragraph of Art.IV, Rule 5. Such a declaration must be specific. It must state the nature as well as the value of the goods. A statement that none of the goods exceeds £5 in value does not declare either the nature or the value of any goods".<sup>2</sup>

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<sup>1</sup>- (1946)79 Ll. L.Rep.339 (C.A.Aust.).

<sup>2</sup>- Ibid, at pp.341-2 (per Latham, Ch.J.).

This followed the same line as in Williams V. African S.S.Co.,<sup>1</sup> where the bill of lading described the goods as "one box containing about 248 ounces of gold-dust". It was held that that was not sufficient statement of the value so as to deprive the shipowner from invoking the limitation of liability under the British Merchant Shipping Act. The same approach was taken under the Hague Rules as mentioned above.

The question may, however, be raised whether the shipper is actually required specifically to declare the nature and value of the goods, or whether information on these points otherwise conveyed to the carrier will make a special declaration superfluous. In Anticosti Shipping Co. V. Viateur St. Amand,<sup>2</sup> a truck worth more than \$500,000 suffered damage exceeding \$4000. No value was declared to the carrier. The District Judge held that the carrier was not entitled to limit his liability to \$500 of the Canadian Water Carriage of Goods Act, S.4(5), because the truck was obviously of a value well in excess of \$500,000 and therefore the shipper was not required to declare the value of the truck. This decision was rejected by the Court of Appeal which held that the carrier was entitled to limitation of liability. The Court said: "The responsibility for seeing that the value of the thing shipped is declared and inserted in the bill is on the

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1- (1856)1 H & N.300.

2- [1959]1 Lloyd's Rep. 352 (Canadian S.C.).

shipper and any consequential hardship must be charged against his own failure to respect that requirement".<sup>1</sup>

**B. The declaration must be before shipment.**

It is not enough for the purposes of avoiding the limitation of liability to declare the nature and value of the goods expressly in the bill of lading; the declaration must be "before shipment". The words "before shipment" are very important, as in practice it has been found that although the value may have been declared and entered in the bill of lading the declaration of value was made after shipment on board the vessel.<sup>2</sup> The reason why the declaration must be "before shipment" is the same as that why the declaration must be express. If no value has been declared before the goods were shipped, the carrier will be deprived of the opportunity of giving the goods the special care in handling and stowage which the value warranted. It is common practice for valuable packages to be carried in a special lock-up, but if the value is declared after the goods have been loaded on board it is too late for special handling and stowage to be made available.<sup>3</sup>

**C. The declaration must be inserted in the bill of lading.**

Article 4(5)(a) of the Hague/Visby Rules, expressly provides that the declaration of nature and value of the goods should be embodied in the bill of lading, implying

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<sup>1</sup>- Ibid, at p.358.

<sup>2</sup>- Astle, p.173.

<sup>3</sup>- Ibid.

thereby that a declaration not inserted in the bill of lading is of no effect. The effect of the requirement of inserting the declaration in the bill of lading was explained by Mackinnon, J., in Pandle & Rivett Ltd V. Ellerman Lines, Ltd.<sup>1</sup>:

"When the plaintiffs sent their shipping instructions to the defendants they did so by document addressed to the Western Laurence Line, limited (the carrier) and they said as regards case 6,855 that it weight 3 Cwt. 1qr. 13lb., that it contained wool and silk as well as woollen goods, wool and silk containing under 4 per cent of silk, and stated the value of the case as being £256. 8s. 1d. When , however, the bill of lading was issued..., it did not include any thing about the value of the goods. Therefore, though plaintiffs did declare the value of the goods for shipment, the value was not inserted in the bill of lading; and in those circumstances only one of the conditions on which the defendants could be liable for more than £100 was fulfilled".

Thus the validity of the declaration depends on its incorporation in the bill of lading.

Difficult questions arise when the goods have suffered damage before the bill of lading is issued. This interesting situation arose in Deere & Co V. Mississippi Shipping Co.<sup>2</sup> where a boxed tractor dropped forty feet into a hold whilst being loaded. The shipper had made no attempt to declare its value before shipment as required by U.S. COGSA, and no bill of lading was ever issued. The shipper asserted that since the limitation could only be

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<sup>1</sup>- (1927)29 Ll. L. Rep.133 at p.136, (1927)33 Com. Cas 70 at pp.78-79.

<sup>2</sup>- (1959) A.M.C. 480.

avoided by a declaration of value inserted in the bill of lading, and since the bill of lading was not to be issued until after the shipment was loaded, he had no opportunity to exercise that option until that time and was therefore not bound by the limitation. The Court considered that the words of COGSA, Section 4(5) had to be read in the light of Section 3(3), which gave the shipper the right to demand a bill of lading from the carrier at any time after delivery of the goods for shipment. There was nothing to show that the shipper had required the carrier to issue a "Received for shipment" bill of lading declaring the full value of the goods at the time of delivery to the wharf, and accordingly his claim was limited to the amount provided by the Act, i.e. \$500.

### **3.3.2 Serious Faults.**

Both the Visby Rules and the Hamburg Rules provide that the carrier will be deprived of the right to enjoy the limitation of liability provided by Article 4.5(a) of the Hague/Visby Rules and Article 6 of the Hamburg Rules if the loss or damage to the goods resulted from "an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that such loss, damage or delay would probably result".<sup>1</sup> A similar provision deprives a servant or agent of the carrier of the right of

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<sup>1</sup>- Article 2(e) of the Visby Rules and Article 8(1) of the Hamburg Rules.

availing himself of the limitation clause where he has displayed a similar intent or recklessness.<sup>1</sup>

The nature and degree of the seriousness of the carrier's fault for which he can limit his liability have aroused controversy as to whether the statutory limit is available to the carrier in the event of damage caused by his act or omission, be it intentional or unintentional such as, wilful misconduct or gross negligence which constitutes a fundamental breach of the contract of carriage.

It appears that the limit will be available unless the carrier's conduct can be fitted into the above formulation. The UNCITRAL discussion about the degree of seriousness of faults the carrier or his servants and agents revealed a diversity of view on the subject. The U.S.S.R. delegate supported the idea of making the carrier, his servants or agents liable for intentional damage, but he opposed the concept of damage caused recklessly having the same effect.<sup>2</sup> The Norwegian delegate offered two alternative drafts, and both alternative proposals concluded as follows:

"Nor shall any of the servants or agents of the carrier be entitled to the benefit of such limitation of liability with respect to damage caused by such an act or omission on his part".<sup>3</sup>

The French delegate pointed out that there should be a clearer distinction between the carrier's intent to cause

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<sup>1</sup>- Article 3(4) of the Visby Rules and Article 8(2) of the Hamburg Rules.

<sup>2</sup>- Sweeney, part II, p.337.

<sup>3</sup>- Ibid.

damage and the degree of misconduct by servants imposing carrier liability, and also agreed with Nigeria about recklessness and distinguished wilful misconduct from the lower standard of "inexcusable negligence" which should in his view be the test to break unit limitation of carriers.<sup>1</sup> Fundamental disagreement with the entire proposal to make special provision for serious fault by the carrier came from the delegate of the United States. He felt that "the Hague Rules dealt with the consequences of carrier negligence (or culpa) or simple breach of the contract of carriage and that there did not appear to be a need to make special provision in international law for the consequences of intentional acts (or dolus). The number of acts of deliberate damage to cargo must be few and the proof thereof extremely difficult. Further, the principal area in which intentional torts would be relevant would be with respect to theft, the proof of which was often so difficult that shippers were forced to rely on the presumption of carrier negligence to seek compensation. He noted that with respect to deliberate damage of cargo, shippers would use the traditional common law remedies which would permit punitive damages<sup>2</sup> and relaxed rules of consequential damages rather than to place any reliance on the Hague

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1- Ibid, p.338.

2- Punitive damages are apparently not allowed in cargo cases and cannot be given for breach of contract which constitutes on the basis of Article 4(5) of the United States COGSA which provides: "In no event shall the carrier be liable for more than the amount of damage actually sustained"; see George L. Waddell, *Damages in Cargo Cases*, published in *Damages Recoverable in Maritime Matters*, edited by Robert B. Acomb, Jr, Chicago, 1984, p.44, hereinafter cited as "Waddell"; Cosmos U.S.A. V. U.S.Lines, (1983) A.M.C.1172 (N.D.Cal.1980).

Rules".<sup>1</sup> The eventual text is thus obviously a compromise but one somewhat tilted in favour of the carrier's interest.

Turning now to the language of the relevant provisions, once it is proved that the loss or damage to the goods resulted either from the carrier's act or omission done "with the intent to cause such loss or damage", or from his act or omission done recklessly and with knowledge that such loss or damage would probably result, the carrier is deprived of the right to limit liability. In other words, in these two types of misconduct the carrier loses the right to limit his liability. It seems that the criterion in intentional misconduct is subjective. Therefore misconduct by itself is not sufficient to determine the liability of the carrier or his servants or agents, but it must be proved that he has knowingly done something wrong.<sup>2</sup> Just as in criminal law, intention can rarely be proved directly. Thus the existence of intent can be inferred from facts and circumstances of the case as a whole. Even this will be very difficult in practice to achieve. Likewise, on one view, the word "recklessly" implies a subjective realization involving a deliberate disregard on the part of the carrier of the consequence on his conduct.<sup>3</sup> However, the alternative to intention presents more difficulties than the provisions on intention. There is a need to clarify whether recklessness is subjective or

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1- Sweeney, part.II, p.338

2- Horabin V. BOAC, [1952] 2 All E.R.1016 at p.1020, (Barry, J.).

3- Diamond, 1978, p.245.

objective in character in determining what is meant by recklessness. Also what kind of knowledge is necessary to satisfy the Rules? It should also be noted that knowledge of probable damage is an additional criterion to recklessness.

Professor Walker<sup>1</sup> defines recklessness as:

"A frame of mind in which persons may behave, an attitude of indifference to the realised possible risks and consequences of one's actions, in which consequences are foreseen as possible but are not desired, not a form of negligence but a cause of negligence."

English writers and Judges have differed between themselves as what constitutes recklessness. It is agreed that it is more than negligence.<sup>2</sup>

Professor Powles<sup>3</sup> has adopted Megaw J.'s view<sup>4</sup> which construed recklessness as being objectively tested and has

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- <sup>1</sup>- David M. Walker, *The Law of Delict in Scotland*, 2nd ed, 1981, p.43, hereinafter cited as "Walker, Delict"; Diamond, 1978, p.246, where he states: "I therefore suggest that: 'recklessly' involve either; (i) a higher degree of subjective realisation that damage will probably occur or (ii) a deliberate shutting of the eyes to a means of knowledge which, if used, would have produced the same realisation".
- <sup>2</sup>- E.g, Humphreys, J, in John T. Ellis Ltd V. Walter T. Hinds, [1947]1 K.B. 475 at p.486, where he stated: "The word 'reckless', means a great deal more than negligence"; Lord Herschell, in Derry V. Peek, (1889)14 App.cas. 337 at p.374, stated: "recklessly, careless whether it be true or false". Nonetheless, that dictum was in the context of whether fraud has been established at a period when fraud was needed to make a misrepresentation actionable. At that time negligent misrepresentation was not a cause of action in England. Thus his Lordship was not equating recklessness and negligence.
- <sup>3</sup>- David G. Powles, *The Carriage of Goods by Sea Act 1971*, [1978] J.B.L. p.145, hereinafter cited as "Powles", where he stated: "In view of the fact that an objective assessment of knowledge can involve an element of recklessness, it could be argued that these additional words attract a subjective interpretation".
- <sup>4</sup>- Shawinigan Ltd V. Vokins & Co. Ltd, [1961]2 Lloyd's Rep. 153 at p.162; [1961] 1 W.L.R. 1206 at p.1214; [1961]3 All E.R. 396 at p.403, where he states: "Recklessness is gross carelessness - the doing of something which in fact involves a risk, whether the

applied it to the provisions under discussion here, whereas both Mustill<sup>1</sup> and Diamond<sup>2</sup> have adopted the opposite view by construing the term recklessness as having a subjective realisation. At least in the current context, these views may not differ too significantly in practice, as Professor Powles concedes that the additional requirement of knowledge adds a subjective element. It is hard to envisage a case where the result would differ between a test where subjective actual knowledge of damage resulting is demanded as well as objective recklessness and one based on subjective recklessness.

In Scots criminal law, recent authorities have stressed that recklessness is tested objectively.<sup>3</sup> It differs from negligence in requiring conduct to fall far below normal care and competence and to involve complete disregard of dangers. It is submitted that a similar description of recklessness may well be appropriate in this branch of the law too.

It should be noted that under other conventions relating to carriage<sup>4</sup> limitation of liability is lost on proof of wilful misconduct by the carrier. That phrase does not appear in the Hague/Visby Rules or Hamburg Rules. However

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doer realises it or not; and the risk being such having regard to all the circumstances, that the taking of that risk would be described as 'reckless'. The likelihood or otherwise that damage will follow is one element to be considered, not whether the doer of the act actually in ordinary parlance realised the likelihood".

1- Mustill, p.700.

2- Diamond, 1978,p.246.

3- E.g. Allan V. Patterson, 1980 S.L.T. 77.

4- The term "wilful misconduct" used under unamended provision of Article 25 of the Warsaw Convention and Article 29 of the Carriage of Goods by Road convention.

the definitions of "wilful misconduct" appear to include the types of misconduct spelled out in these Rules and discussed above.<sup>1</sup> This supports the view that it is difficult to establish conduct which removes the limitation of liability. However it is submitted that the tests under the above Rules are those laid down specifically in them rather than the concept of wilful misconduct as such.

Lastly, another question is: What kind of knowledge is necessary to suffice and satisfy the Rules? The additional words "with knowledge that damage would probably result" following the word "recklessly" set out in the COGSA 1971, the Visby Rules and the Hamburg Rules have to be construed. Certainly they cover a subjective realisation of the probability of damage occurring.<sup>2</sup> In a related context, it has been held that knowledge includes not only positive knowledge but turning a blind eye.<sup>3</sup> It is submitted that it would be appropriate to apply these dicta in this situation as well. This would be supported by the statement that such conduct is "far more blameworthy than

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1- Horabin v. BOAC, [1952]2 All E.R.1016 at pp.1020, 1022, (Barry.J.); Rustenberq v. Pan American World Airways, Inc., [1977]1 Lloyd's Rep.564 at p.569 (Ackner.J.), affirmed by the Court of Appeal (1979)1 Lloyd's Rep.19; Froman v. Pan American Airways Inc., (1954) 284 App.Div. 935; see also, Tuller v. KLM, (1961) 292 F.2d.p.775.

2- Warren A. Seavey, *Negligence - Subjective or objective?* (1928) 41 H.L.R. 1 at p.2 hereinafter cited as "Seavey", where he describes "knowledge" as "being the consciousness of the existence of a fact, it implies advertence, or focusing of the mind upon a fact".

3- Lord Denning, M.R, in Compania Maritima San Basilio S.A. v. The Oceanus Mutual Underwriting Association, Ltd, (The "Eurysthenes", (1976)2 Lloyd's Rep. 171 at p.179, where he said: "And, when I speak of knowledge, I mean not only positive knowledge but also the sort of knowledge expressed in the phrase 'turning a blind eye'".

mere negligence".<sup>1</sup> Thus extending knowledge in this way is consistent with the policy of these provisions which require more than ordinary breach of duty. Thus it is probable that 'knowledge' extends to failure to make inquiry in certain cases.

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<sup>1</sup>- Ibid.

### Concluding Remarks

From the foregoing analysis and discussions, we may conclude the following points:

The Visby Rules produced important changes in relation to the limitation of the carrier's liability.

The new alternative standard limitation, the per kilo of gross weight, has clearly improved the position of the cargo-owner since he was now allowed to claim the higher of the two figures produced by the application of the two alternative tests. However, despite the change made by the Visby Rules to the Hague Rules, the terms 'package or unit' had remained unclarified. As an improvement, the Hamburg Rules have removed the uncertainty caused by the term 'unit' under the Hague/Visby Rules by using the term 'shipping unit'.

Furthermore, the addition of the new sub-paragraph (c) in the Visby Rules (container clause) has solved some, although not all, of the problems generated by containerized transport, already existing under the Hague Rules. The Hamburg Rules in turn resolve the problems arising from containerization more comprehensively than the Hague/Visby Rules.

By adopting the SDR (like the Visby Protocol 1979) as a unit of account, the Hamburg Rules achieve the maximum possible uniformity with respect to the value of the limits of liability, because determining the exact limitation amount through the conversion of gold francs into national

currency is very difficult when there is no longer a fixed relationship between national currencies and gold. The Hamburg Rules moreover establish a uniform rule as to the time when the conversion into national currencies is to be made. That time is either the date of judgement or the date agreed by the parties. The establishment of this rule clarifies a question which has frequently arisen under the Hague/Visby Rules and to which differing solutions have been applied. However, I am inclined to the view that the date of payment rule as a date of conversion is more sensible when responding to the aims of conversion by avoiding the fluctuations of exchange rates.

It is to be noted that the Visby Rules and the Hamburg Rules, by extending the limitation to cover the carrier's servants or agents, where it can be established that the loss was due to an intentional act or omission of the person concerned (they will be liable to the full extent of the loss), have brought a solution to a problem existing under the Hague Rules. It should also be noted that no limitation of liability is allowed with respect to the loss, damage or delay caused by an act or omission, if the person seeking to rely on a limitation can be found to be responsible for intent to cause loss, damage or delay, or act recklessly and with knowledge that such a result would occur.

Lastly, as already mentioned, the limitation of liability can be avoided under the Hague/Visby Rules, if the nature and value of the goods have been declared by the

shipper before shipment and inserted in the bill of lading. This rule is removed by the Hamburg Rules. In my opinion, there is no rational reason for this removal.

## Chapter Four

### Procedures of Action for Lost or Damaged Cargo

The procedures of claims and actions are very significant for the court in doing justice to the parties. Once the cargo claimant has made his claim to the court, in order to satisfy the conditions precedent of action, he must: 1) prove that the notice of loss or damage has been given to the carrier or his agent, before or at the time of the removal of the goods, or not later than the day when the goods were handed over to the consignee, or within specified days in case the loss or damage is not apparent<sup>1</sup>; 2) prove that the suit has been brought and instituted within a specific period after delivery of the goods, or the date when the goods should have been delivered<sup>2</sup>; and, 3) satisfy himself that the court which hears a particular case is the right court and the action can be brought within its jurisdiction<sup>3</sup>. These formal conditions are explained below as follows:

- 4.1 Notice of loss, damage and delay in delivery.
- 4.2 Time limitation for suit.
- 4.3 Jurisdiction clauses.

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<sup>1</sup>- Article 3(6) of the Hague Rules and Article 19 (1,2,4,5) of the Hamburg Rules.  
<sup>2</sup>- Article 3(6) of the Hague Rules and Article 20 (1,2) of the Hamburg Rules.  
<sup>3</sup>- Article 21 of the Hamburg Rules.

#### 4.1 Notice of loss, damage and delay in delivery.

##### 4.1.1 Under the Hague/Visby Rules

Article 3(6) of the Hague Rules states that if the loss or damage to the goods at the port of discharge is apparent, notice of claim should be given to the carrier or his agent before or at the time of the removal of the goods. If the loss or damage is not apparent, notice of claim should be given within three days of their removal into the custody of the person entitled to delivery, and if this is not done, the removal of the goods "shall be prima facie evidence of delivery by the carrier of the goods as described in the bill of lading". In other words, uncomplaining removal is prima facie evidence that the goods were received in good order.

These points may seem clear. Article 3(6) of the Hague Rules has however explained them in order to emphasise the basic duty of the carrier to deliver the goods which were in his charge in the same apparent good order and condition as he received them at the port of loading.<sup>1</sup> Consequently, the purpose of the notice requirements under the Hague Rules and COGSA is that:

1. Notice given to the carrier by the consignee, or any person authorised by him means that the goods have suffered loss or damage.

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<sup>1</sup>- Astle, pp.109-110.

2. The carrier is allowed to investigate the claim while he has access to the facts concerning the goods and all the evidence is still available to him in order to defend himself against groundless or exaggerated claims.<sup>1</sup>

It is to be mentioned that the notice of loss or damage to the goods must be given to the carrier in writing and must disclose the general nature of such loss or damage before or at the time of the removal of the goods into the custody of the person entitled to delivery.<sup>2</sup>

The United States COGSA added an additional useful paragraph to the Rules, intending to clarify them as follows:

"Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof".

This allows us to conclude that there are some forms other than written notice considered as an equivalent to written notice, namely:

1. The issue of a qualified receipt at the time of discharge, i.e. bad order receipt, or out-turn report and short-landing certificate for the goods.<sup>3</sup>
2. Joint survey or inspection by the contracting parties or their agents.<sup>4</sup>

However, turning now to the effect or sanction of the failure to give notice, we may ask whether the failure to

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1- George F. Wood, Damages in cargo cases, (1971)45 Tul L.R.p.952, hereinafter cited as "Wood"; Miami Structural Iron Corp V. Cie Belge de T.M, 224 F.2d 566 (1955).

2- Article 3(6) of the Hague Rules.

3- Astle, p.111.

4- Article 3(6) of the Hague Rules.

give notice can operate as a forfeiture of the claim or is merely a prima facie obstacle. We can infer from Article 3(6) of the Hague Rules that the failure to give notice does not affect the right of the parties to bring a suit within one year.<sup>1</sup> Various authors have expressed their viewpoints in referring to such a sanction or effect. Scrutton<sup>2</sup> believes that the notice of loss or damage seems to have no effect:

"The first paragraph of Rule 6 appears to have no effect. Whether notice is given or not, the onus of proving loss or damage will lie upon the person asserting it".

Carver<sup>3</sup> supports Scrutton's viewpoint by saying:

"The first paragraph of this rule appears to have little, if any, meaning, as the burden of proving loss or damage is on the consignee in any event".

However, Tetley<sup>4</sup> says that the notice of loss or damage is set out in the Hague Rules as prima facie evidence of the condition of the goods at discharge can be valuable to the consignee.

On the other hand, Article 3(6) of the United States COGSA, intended to clarify the Hague Rules, has added the following paragraph:

"Provided, that if a notice of loss or damage, either apparent or concealed, is not given as provided for

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1- Wood, p.953.

2- Scrutton, 19th ed, p.440

3- Carver, par.524 at p.370.

4- Tetley, 3rd ed, p.872.

in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered".<sup>1</sup>

Then, what is the legal effect of a notice of claim clause which purports to bar the suit in case a notice was not given in a specific time? These clauses are not valid under the Hague Rules because the failure to give notice does not affect the right of the consignee, or his agent, to bring suit within one year, and such a clause would be in violation of Article 3(8) of the Hague Rules, where it is provided that any clause intending to relieve the carrier or the ship from liability arising from negligence, fault or failure in the duties and obligations provided in the Rules or lessen such liability other than as provided in this convention, shall be null and void and of no effect.<sup>2</sup>

#### 4.1.2 Under the Hamburg Rules

The Hamburg Rules, in respect of notice of loss, damage or delay in delivery, have added some new elements to the Hague Rules. The Eighth Session of the Working Group and

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1- Article 3(6) of United States COGSA.

2- Tetley, 3rd ed, p.873; Coventry Sheppard & Co. V. Larrinaga Steamship Co. Ltd, (1942) 73 Ll. L.R. 256; Elser, Inc V. International Harvester, (1955) A.M.C. 1929; Nashiwa et al V. Matson Navigation, (1954) A.M.C. 610, where it is stated: "The failure to give notice of loss within three days after delivery, as set out in the bill of lading, does not bar the suit, despite the provisions of the bill of lading. Such provisions are null and void of s.1303 (8) of COGSA".

the UNCITRAL plenary session was devoted to discussion in respect of "notice of loss". There were contradictory versions of what is the sanction for a failure to give the required written notice.<sup>1</sup>

The United States' viewpoint was very clear that the failure to give such notice is not considered as a time bar. Germany favoured retention of the "notice of loss" provision of the Hague Rules as a precondition to stating a claim, while the United Kingdom favoured the retention of the "notice of loss" provision of the Hague Rules, but as a "disciplinary measure".<sup>2</sup> At this session there was also emphasis that a distinction should be made between loss or damage which was apparent and loss which was non-apparent, as well as the notice of loss provision in respect of delay.<sup>3</sup> Eventually, Article 19 of the Hamburg Rules was adopted. In what follows below the provisions of this Article are discussed in comparison with the Hague Rules concerning notice of loss or damage to goods. The notice of loss or damage must be given to the carrier in writing, but the period for giving notice has been enlarged by the Hamburg Rules.

Concerning apparent loss or damage, the required time for the written notice, relating to the general nature of such loss or damage, is to be given not later than the

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1- Sweeney, part V. p.173.

2- Ibid.

3- Ibid at p.174.

working day after the day when the goods were handed over to the consignee.<sup>1</sup>

Where the loss or damage is not apparent, the notice in writing must be given within fifteen consecutive days, regardless of holidays, after the day when the goods were handed over to the consignee.<sup>2</sup> This period, is preferable to that under the Hague Rules, because, in practice, it is considered more sufficient to discover non-apparent damage.

However, in the case of loss or damage to the goods caused by delay, the notice must be given in writing to the carrier within sixty consecutive days after the day when the goods were handed over to the consignee.<sup>3</sup>

These notices of loss, damage or delay in delivery must be given by the consignee to the carrier, actual carrier, shipper or any person who is acting on the carrier's or the actual carrier's behalf, including the master or the officer in charge of the ship, or to a person acting on the shipper's behalf. If given in such a way it is deemed to have been given to the carrier, to the actual carrier or to the shipper, respectively.<sup>4</sup>

On the other hand, in the event that the goods caused damage to the ship, then such notice must be given in writing by the carrier or actual carrier to the shipper

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1- Article 19(1) of the Hamburg Rules; cf. the Hague Rules (before or at the time of the removal of the goods).

2- Article 19(2) of the Hamburg Rules; The Hague Rules allow three days for the notice to be given; Sweeney, part V, p.174; Mankabady, p.94.

3- Article 19(5) of the Hamburg Rules.

4- Article 19(8) of the Hamburg Rules.

not later than ninety consecutive days after the occurrence of such loss or damage or after the delivery of the goods, whichever is later.<sup>1</sup>

However, failure to give notice concerning loss or damage to the goods, does not affect the right of the consignee to bring suit against the carrier and it concerns only the question of quality of the evidence.<sup>2</sup> Such failure is deemed prima facie evidence that the carrier has delivered the goods as described in the bill of lading or, has delivered them in good condition, if no such bill of lading has been issued.<sup>3</sup>

With respect to the failure of the carrier to give notice of loss or damage to the ship caused by the goods, such failure is considered prima facie evidence that the carrier, or the actual carrier, has sustained no loss or damage due to the fault or neglect of the shipper, his servants or agents.<sup>4</sup> However, failure of the consignee to give notice of loss or damage to the carrier resulting from delay in delivery is considered as a precondition to recovery, because no compensation shall be payable for delay in delivery and it will bar the claim.<sup>5</sup>

It is to be mentioned that Article 19(3) of the Hamburg Rules contains the same rule as Article 3(6) third

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1- Article 19(7) of the Hamburg Rules.

2- Sweeney, part V. p.173.

3- Article 19(1) of the Hamburg Rules.

4- Article 19(7) of the Hamburg Rules.

5- Article 19(5) of the Hamburg Rules; D.E.Murray, *The Hamburg Rules: A comparative analysis*, (1980)12 *Lawyer of the Americas* (U.S.A.), p.80, hereinafter cited as "Murray"; Sweeney, part V, p.174; Mankabady, p.94.

paragraph of the Hague Rules, that notice in writing need not be given where the state of the goods has been the subject of joint survey or inspection by the parties, because such a survey or inspection is deemed an equivalent to such notice. Moreover, Article 19(4) of the Hamburg Rules binds the carrier and the consignee to give all reasonable facilities to each other for inspecting and tallying the goods.

Lastly, despite the changes that have been brought about by the Hamburg Rules to the Hague Rules, it is noticeable that the Hamburg Rules are more restrictive than the Hague Rules in that they oblige the consignee to give notice, whereas the Hague Rules do not specify who must give such notice. Does it mean that the consignee's agent has no right to give notice or such notice would be no longer valid? Why is it not sufficient that notice be given as under the Hague Rules? The Hamburg Rules, in fact, give no answer to this question. In my opinion, therefore, the draftsmen of the Hamburg Rules should clarify this situation, by adding the phrase underlined below to the provision of Article 19(1) of the Hamburg Rules: (unless notice of loss or damage,[...], is given [...] by the consignee or any person authorised by him) in order to overcome the uncertainty and the ambiguity.

#### **4.2 Time Limitation for Suit**

The general principles of the time limitation within which an action may be brought have been characterized as

related to a period of time, that is as a procedural matter not covered by substantive rules. When a claimant institutes an action after the expiry of a period of limitation, only the contractual remedy will be barred without extinguishing the right. That means that a claim could be revived by an acknowledgement or payment made after the expiry of the limitation period of a particular action.<sup>1</sup> The contracting parties, then, may agree to extend the time limitation provided by the Rules. I will, therefore, discuss the time limitation for suit as follows:

4.2.1 Under the Hague Rules and Visby Rules.

4.2.2 Under the Hamburg Rules.

**4.2.1 Under the Hague Rules and Visby Rules.**

The Hague Rules provide that the time limitation for suit for loss or damage to the goods is one year.<sup>2</sup> Article 3(6) of the Hague/Visby Rules provides that the period of limitation commences within one year from delivery of the goods (if damaged) or from the date when the goods should have been delivered (if lost). Then, the

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<sup>1</sup>- P.A. Stone, Time limitation in the English conflict of laws, (1985)4 LMCLQ, pp.497, 500, hereinafter cited as "Stone"; Guest, A.G., Anson's Law of Contract, (1979), p.588, Oxford, hereinafter cited as "Anson's Law of Contract".

<sup>2</sup>- Article 3(6) of the Hague Rules (Unchanged by the Visby Rules).

claimant must bring his suit within one year subject to the Rules.<sup>1</sup>

It should be noted that the time limitation for suit begins to run from delivery, or the date when the goods should have been delivered and not from discharge.<sup>2</sup> It becomes important, therefore to know what constitutes delivery for operating the time limitation for suit; and what is the difference between delivery and discharge?

Since the Rules use the word "delivery", there is no doubt that delivery is what in fact the Rules refer to, to let the time period begin running.<sup>3</sup> However, disputes may arise in determining the meaning of the word "delivery".<sup>4</sup> Tetley,<sup>5</sup> has defined "delivery" as follows:

"'Delivery' would seem to mean the moment when the consignee named in the bill of lading receives the goods. This would normally mean upon delivery by the stevedore or terminal agent to the consignee or to the consignee's agent"<sup>6</sup>

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- 1- The aim of the one year provision was to speed up the settlement of claims, and to prevent the carrier from reducing the time limit into short period by means of a clause in the bill of lading. Tetley, 3rd ed, p.671; Nea Agrex SA V. Baltic shipping Co. Ltd, [1976]2 All E.R, 842.
  - 2- Mankabady, p.94.
  - 3- American Hoesch Inc. V. "Aubade", [1971]2 Lloyd's Rep. 423 [U.S. Dis. Ct, Dis of south Carolina (Charleston Division)].
  - 4- David M. Walker, The Oxford Companion to Law, 1980, pp.349, 362, hereinafter cited as "Walker, The Oxford Companion to Law", where he defines the word "delivery" and "discharge".
  - 5- Tetley, 2nd ed, p.331.
  - 6- Centerchem Products V. A/S Rederiet Adjell et Al, (1972) A.M.C. 373 at pp.374-375, where proper delivery is defined as follows: "It has been established that proper delivery occurs when a carrier (1) separates goods from the general bulk of the cargo; (2) designate them; and (3) gives due notice to the consignee of the time and place of their deposit, and a reasonable time for their removal".

In American Hoesch, Inc V. Aubade,<sup>1</sup> the U.S. Dis, Ct, (Dis of South Carolina) it was held that the word 'delivery' was not synonymous with 'discharge', for 'delivery' denoted a two-party transaction in which the consignee would have an opportunity to observe defects, whereas 'discharge' need only involve the carrier, and there might or might not be an opportunity for the consignee to discover the damage at that point; only at delivery must there be such an opportunity. Hemphill, D.J., said in the above cited case:<sup>2</sup>

"'Delivery' is a concept which has been subject of considerable litigation in several areas of the law [...] delivery implies mutual acts of the carrier and the consignee. It is a more inclusive term than 'unloading', implying acceptance or agreement to accept by or, at least communication to, the consignee; if not actual passing of possession to the consignee, coupled with relinquishment of possession or control by the carrier. The mere discharge is not delivery".

Another case of interest was that of the "Beltana"<sup>3</sup>, where it was held that delivery was made for purposes of Article 3(6) either when the goods were landed on the wharf and freed from the ship's tackles, or at least, when

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<sup>1</sup>- [1971]2 Lloyd's Rep. 423; The "Straat Cumberland", [1973]2 Lloyd's Rep. 492.

<sup>2</sup>- Ibid, at p.425; compare, Lord Wright, in, Gosse Millard V. Canadian Government Merchant Marine, (1927)28 Ll. L. Rep. 88 at p.103, where he said: "The word 'discharge' is used, I think in place of the word 'deliver' because the period of responsibility to which the Act and Rules apply (Art 1(e)), ends when they are discharged from the ship. The word 'properly discharge' I think means, deliver from the ship's tackle in the same apparent order and condition".

<sup>3</sup>- [1967]1 Lloyd's Rep. 531 (Supreme Court of Western Australia); C. Tennant, Sons & Co. V. Norddeutscher Lloyd's, (1964) A.M.C. 754.

they were placed in premises of the plaintiff's agent and immediately became available to the consignee.<sup>1</sup>

The word 'delivery' then must be considered as having a different meaning from 'discharge',<sup>2</sup> which is used in Articles 1(e) and 3(2) of the Hague Rules in explaining the period of the carrier's responsibility and the basis of his liability.<sup>3</sup> On the other hand, the word 'delivery' is used in Article 3(6) concerning 'notice of loss and time for suit' without referring to the word 'discharge'.

One can conclude then that the failure to mention 'discharge' in Article 3(6) of the Hague Rules was deliberate and must be considered as an essential factor in interpreting the word 'delivery'.<sup>4</sup>

It is noteworthy that, in case of a series of deliveries, the time limit begins to run from the date of the delivery of the last item of the cargo. In Loeb V. S.S. Washington Mail,<sup>5</sup> the ship had discharged her cargo on October 8, 1951. The consignee received some of his cargo on October 11th, 1951. Some of its cargo was however missing, and sorting of all the cargo discharged from the vessel continued until October 31st, 1951 when

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1- Ibid, at pp.540-1 (Nevile, J.).

2- Tetley, 3rd ed. p.671.

3- See chapter two of this thesis, (2.1.1 at p.63).

4- Tetley, 3rd ed, p.569; It seems that the word 'delivery' has been deliberately selected instead of 'discharge' on the part of the draftsmen of the Rules and presumably at least some form of constructive delivery to the consignee or his authorised agent will be required before time will commence to run; Wilson, p.196.

5- (1957) A.M.C. 267; Ungar V. S.S.Urola, (1946) A.M.C. 1663, the one year delay to sue for a loss of cargo was held to begin when the last item of a large cargo was delivered; The "Beltana", [1967] 1 LLOYD'S REP. 531.

the last cargo was delivered to the consignee. It was held that the suit would be valid until October 31st, 1952.

In respect of non-delivery, the time limitation for suit, as expressly set out under the Hague Rules, begins to run from the date when the goods should have been delivered.<sup>1</sup> In Western Gear Corp V. States Marine Lines Inc,<sup>2</sup> a machine shipped from Seattle to New Orleans was damaged when washed overboard. It was subsequently repaired and shipped on a different ship under a new bill of lading and ultimately delivered. The U.S. Court of Appeals held that suit instituted within a year from actual delivery but 16 months after it should have been delivered was barred by the one-year limitation under COGSA.

Furthermore, the question may arise whether the one-year time limit for suit provided in Article 3(6) of the Hague Rules would apply when the carrier has delivered the goods to a wrong person not entitled to them; i.e. is a misdelivery made? In Anglo-Saxon Petroleum & Co.Ltd V. Adamastos S.S.Co.Ltd,<sup>3</sup> the court stated that wrong delivery will be considered as non-delivery and consequently the one-year limit applies.

Another case of interest was that of Commodity Service Corp. V. Furness Withy & Co.<sup>4</sup> The action was against the

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1- Article 3(6) of the Hague Rules.

2- (1966) A.M.C. 1969 (9 Cir. Ct), 362 F.2d 328; American Export Isbrandtsen V. Joe Lopez, (1976) 11 E.T.L. 665.

3- [1957]1 Lloyd's Rep. 79.

4- (1964) A.M.C. 760.

shipowner for wrong delivery of cargo, the goods being delivered to a 'notify party' without production of the bill of lading. The shipper, who still held the bill of lading, filed a claim against the shipowner. The shipowner contended that the claim was time-barred because the action was commenced nine days after the expiry of the limitation period. It was held that wrong delivery is to be treated in the same manner as non-delivery and that the claim was time-barred.

One can conclude that misdelivery (or wrong delivery) of the goods is to be treated in the same way as non-delivery. Then the one year time bar applies also where the carrier misdelivered the goods, therefore the proceedings in the action must be brought within one year from the date when the goods should have been delivered. Otherwise, the claim will be time barred.<sup>1</sup> However, if the misdelivery was intentional, then there was a fraud, and it is submitted a fundamental breach of contract.<sup>2</sup> In consequence, the carrier is deprived of the benefit of the one year period for suit, under the Hague Rules. Under Hague/Visby Rules, as discussed below, the limitation

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1- Ibid; The Captain Gregos, (1989) 2 Lloyd's Rep. 63 at 69, (1990)1 Lloyd's Rep.310; Astle, pp.113-114; Wood, 956.

2- Commodity Service Corp, V. Furness Withy & Co, (1964) A.M.C. 760; The New York Star, [1977]1 Lloyd's Rep, 445; Spurling Ltd, V. Bradshaw, [1956]1 W.L.R. 461; In this respect, Tetley, 2nd ed, p.335, said: "It is submitted that a fundamental breach of contract depends on the intention of the person who violates the contract. If breach is intentional, the person violating the contract may lose his rights both under the contract and the Rules".

period of one year will apply, for the benefit of the carrier, even in this case.

It is convenient here to mention that suit must be brought properly in the relevant jurisdiction; otherwise it will be barred. Thus the phrase "unless suit is brought" in Article 3(6) means "unless the suit before the court is brought within one year". It does not mean "unless suit is brought anywhere within one year".<sup>1</sup> That means that the action must be brought in the jurisdiction in which the dispute is ultimately decided.<sup>2</sup> Thus, such action will be time-barred, if the proceedings are not instituted before the proper jurisdiction and are brought in another jurisdiction within the period of limitation. In Compania Colombiana De Seguros V. Pacific Steam Navigation Co.,<sup>3</sup> a cargo of electric cables loaded on the defendant's vessel was insured by the plaintiffs for a voyage from Liverpool to Buenaventura, Colombia, and was delivered in a damaged condition on 12th December, 1954. The plaintiffs indemnified the cargo owners, who assigned to them their rights to sue the defendants. The plaintiffs brought an action in the Supreme Court of New York on 2nd November, 1955, but it was dismissed for lack of jurisdiction. The plaintiffs thereafter brought the action in an English court on 7th January, 1960, but it was too late. It was held that the action was time-barred

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1- Compania Colombiana De Seguros V. Pacific Steam Navigation Co, [1965]1 Q.B. 101 at p.130; Payne & Ivamy, p.162.

2- Scrutton, 19th ed, p.441; Halsbury's Shipping & Navigation, p.535, para.773, footnote 1; The Merak, [1965]1 All E.R. 230.

3- [1963]2 Lloyd's Rep.479.

under Article 3(6). The fact that the New York proceedings were brought within the period of one year was immaterial. Roskill, J,<sup>1</sup> makes that quite clear:

"I think the true proposition in English law is that where in an action in the English Courts the plaintiff seeks relief and the defendant pleads limitation, the issue which an English court has to determine is whether the action before the court, and not some other action, has been instituted within the relevant limitation period".

It is important to note that an arbitration clause<sup>2</sup> contained in the bill of lading does not affect the time limit, and in such a case the principles of the period of limitation should be applied, because the situation does not amount to a waiver of the time limit.<sup>3</sup> Therefore, if an arbitration clause intends to limit the period of limitation to less than one year, such a clause would be invalid, because it would be in conflict with Article 3(6) of the Hague Rules by lessening the time limitation for suit. This was made clear in The Ion,<sup>4</sup> where the bill of lading stated: "Any claim must be made in writing and claimant's arbitrator appointed within three months of

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1- Ibid at p.496.

2- The Hague Rules and the Visby Rules are silent as to arbitration clauses, because arbitration is a procedural matter subject to national law. Nevertheless the Rules do stipulate in Article 3(8) of the Hague Rules that no clause may lessen the responsibilities of the carrier, and Article 3(6) that the carrier "...shall be discharged from all liability...unless suit is brought within one year...". These two Articles are relevant in any consideration of the application of arbitration clauses. Tetley, 3rd ed, p.589.

3- Scrutton, 19th ed, p.441; Mankabady, p.95; Denny Mott & Dickson, Ltd, V. Lynn Shipping Co. Ltd, [1963]1 Lloyd's Rep.339; The Merak [1964]2 Lloyd's Rep. 527.

4- [1971]1 Lloyd's Rep. 541.

final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred". It was held that the part of the arbitration clause concerning the time limit was void, because it was in conflict with Article 3(6) of the Hague Rules.

The term 'suit' in Article 3(6) of the Hague Rules thus includes the commencement of arbitration proceedings. That means, the arbitration proceedings must be brought within one year of delivery or the date when the goods should have been delivered.<sup>1</sup>

It is noteworthy that the words "all liability whatsoever" in Article 3(6) of the Hague/Visby Rules replace the words "all liability in respect of loss or damage" in Article 3(6) of the Hague Rules. Namely, the words "in respect of loss or damage" are discarded, and the word "whatsoever" is added.<sup>2</sup> This alteration makes it clear that the time limit (one year) applies even to cases where the carrier commits a deviation or to the type of

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<sup>1</sup>- The Merak, [1964]2 Lloyd's Rep. 527, in referring to the words in Article 3(6) "unless suit is brought within one year after delivery..." Sellers, L.J. said at p.532 "In their context I think the words mean "unless proceedings are brought within one year, and that the commencement of arbitration proceedings would meet the requirement"; The Agios Lazaros, [1976] 2 Lloyd's Rep.47 at p.51; compare, Son Shipping Co. V. De Foss & Tanghe, (1952) A.M.C. 1931, where it is stated: "Where an arbitration clause was incorporated in a bill of lading, there was no time bar because arbitration is not within the term 'suit' as used in Article 3(6) of the American Act".

<sup>2</sup>- Article 3(6) sub-par.4 of the Hague/Visby Rules provides: "...the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods;" In their comment on the word "whatsoever", Sassoon and Cunningham, p.175, said: "The addition of the word "whatsoever" was presumably designed to prevent the limitation from being abrogated through carrier misconduct such as unjustifiable deviation, and would have been redundant if the limitation applied 'in any event' and regardless of the carrier's fault".

misconduct referred to in Article 4(5)(e) of the Hague/Visby Rules.<sup>1</sup> In other words, this word covers not only the normal claim for loss or damage to cargo, but also extends even to claims arising from a fundamental breach of contract by the carrier, or where he has committed a deviation,<sup>2</sup> or from the type of misconduct provided in Article 4(5)(e) of the Hague/Visby Rules,<sup>3</sup> (probably including fraud). This view is justified on the grounds that the word is expressly given "the force of law".<sup>4</sup> This word "whatsoever" would seem to give the carrier the considerable benefit of one year time bar in all cases covered by the Hague/Visby Rules.

As to the extension of the time limit, it is to be noted that the one year delay for suit can be waived or extended by written consent between the parties.<sup>5</sup> This is

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- 1- It is believed that one of the main purposes for introducing the word "whatsoever" in the Visby Rules was to make the time limit apply where the goods had been delivered without production of bills of lading, so as to enable banks and other parties issuing letters of indemnity to regard themselves as discharged from liability after one year; Diamond, 1978, p.256; Scrutton, 19th ed, p.441, Footnote.32; Carver, p.370, par.523, footnote, 47; The Chanda, [1989]2 Lloyd's Rep 494 at p.504; The Captain Gregos, [1989] 2 Lloyd's Rep.63 at p.69; [1990]1 Lloyd's Rep. 310 at p.311.
  - 2- The Antares (Nos.1&2)[1987]1 Lloyd's Rep.424 at p.430 (C.A.), upholding The Antares (No.2)[1986]2 Lloyd's Rep.633 at p.637; The Chanda, [1989]2 Lloyd's Rep.494 at p.504; The Captain Gregos [1989] 2 Lloyd's Rep. 63 at 69.
  - 3- See chapter three of this thesis, (3.3.2 at p.196).
  - 4- The Antares, (Nos.1&2)[1987]1 Lloyd's Rep. 424.
  - 5- The British Maritime Law Association Agreement (The Gold Clause Agreement), 1977, extends the time limitation to two years. Clause 4 (of the Gold Clause Agreement) provides: "The shipowners will, upon the request of any party representing the cargo (whether made before or after the expiry of the period of twelve months after the delivery of the goods or the date when the goods should have been delivered as laid down by the Hague Rules, or the Hague/Visby Rules, extend the time for bringing suit for a further twelve months unless (a) notice of the claim with the best particulars available has not been given within

a common practice in most jurisdictions because it benefits both the carrier and the claimant. Namely, it may avoid the suit and allows time for possible settlement of the claim. In Clifford Maersk,<sup>1</sup> the cargo-owners alleged that when the cargo was delivered to them in Amsterdam it was damaged. In July, 1980, investigation into the cause of the damage was still proceeding and since the time limit under the Hague Rules would soon have expired, the cargo-owners applied for an extension of the limitation period. It was held that where there was an extension "up to and including April 21st, 1981", which was a Sunday, then the suit on the following Monday was timely.<sup>2</sup>

If the extension is given for a certain time, then the suit must be brought by the end of the extension or another extension must be obtained by the contracting parties.<sup>3</sup> Therefore a mere request for extension of the time limitation without express agreement by another party does not constitute a waiver. Thus, in Schwabach Coffee Co V. S.S.Suriname<sup>4</sup>, it was held "knowledge of the pending

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the period of twelve months, or (b) there has been undue delay on the part of consignee, receivers or underwriters in obtaining the relevant information and formulating the claim".

- 1- [1982]2 Lloyd's Rep. 251; United Fruit, Co. V. Folger, (1959) A.M.C. 2224, where it was held that after timely limit, may be waived by the carrier; however, where an extension of only 60 days has been agreed to, a suit must be brought within the additional 60 days period; Aron & Co. V. Sterling Navigation, Co, (1976) A.M.C. 311; Buxton V. Rederi, (1939) A.M.C. 815.
- 2- The same principles of extension applies as to the waiver of the one year delay for suit when a charterer is involved; The Italian, [1969]1 Lloyd's Rep.11 at p.16 (Brandon.J).
- 3- Wood, p.957.
- 4- (1967) A.M.C.604 at p.605.

claim and failure to answer a written request for an extension of time to file suit [...] did not constitute a waiver by the carrier of the one-year limitation provision of COGSA".

Article 1(2) of the Visby Rules permits the parties to extend the time limitation for suit "if the parties so agree after the cause of action has arisen".

We can conclude that the contracting parties might effectively extend the period of limitation, whether prior to or after the cause of action has arisen, by inserting an express provision in the bill of lading, or depending upon the provision of the Visby Rules in the case of the extension being made after the cause of action has arisen.<sup>1</sup>

The one year time limit for suit does not apply however to an indemnity claim against a third party. Then, what is the time-bar for an indemnity claim against a third party?

Article 3(6)bis of the Visby Rules, which is entirely new, provides:

"An action for indemnity against a third person may be brought even after expiration of the year provided for in the preceding paragraph, if brought within the time allowed by the law of the court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself".

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<sup>1</sup>- Compania Colombiana De Seguros V. Pacific Steam Navigation, Co., [1965] 1 Q.B. 101; F.J.J. Cadwallader, 'COGSA 1971', (1972) 35 M.L.R.p.70, hereinafter cited as "Cadwallader, COGSA 1971"; Mustill, p.707.

We can find out from the above provision that such an indemnity action may be commenced even after expiration of the time limitation (one year), if it is brought before the proper court within the time allowed by the law of the court seized of such an action.<sup>1</sup> Then the time allowed under the Visby Rules must not be less than three months. That means the three months period in Article 3(6) bis of the Visby Rules is therefore the minimum and not the maximum time to be allowed for taking the indemnity action.<sup>2</sup> This extension of the time limit concerning the recourse action has generated some controversies about the phrase "has settled the claim". Does it refer to the agreement which is to settle the dispute or to the time when the claimant has actually paid the money? It has been submitted that "the carrier 'has settled the claim' when he has made a binding agreement for compromise, even if he has not yet made payment".<sup>3</sup>

Furthermore, the words "time allowed by the law of the court seized of the case" presumably means the general period of limitation prescribed by the local law for bringing an action in relation to the carriage of goods by sea.<sup>4</sup> Thus in English law a six years delay applies to a

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1- Cadwallader, COGSA 1971, p.70; Astle, p.195; The Vechscroon, [1982]1 Lloyd's Rep.301.

2- The Xingcheng, [1987]2 Lloyd's Rep.210; The Andros, [1987]1 W.L.R.1213 at p.1219.

3- Scrutton, 19th ed, 422; Mustill, p.707; Carver, p.370; compare, J. Maskell, "The Influence of the New Rules on contracts of carriage", published in the Hague/Visby Rules and The Carriage of Goods by Sea Act, 1971, London, 1977, p.5, hereinafter cited as "Maskell", where he said: "I myself feel that actual payment will have to be made before the time limit commences".

4- Mustill, p.707.

suit concerning a recourse action. When the party is claiming indemnity against a third person, then the claimant must bring the action within six years, or even more if the law of the forum so provides.<sup>1</sup>

Lastly, it is worthwhile to mention that the Visby Rules have extended the one year time limit to be applied to servants or agents of the carrier. In other words, the Visby Rules have extended the defences given to the carrier to cover his servants or agents by providing that (Article 4 bis (2):

"If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this convention".

Accordingly, the servants or agents of the carrier will protect themselves by the Visby Rules defences when such rules are incorporated specifically within a contract. Otherwise, where the Rules are not incorporated in a contract, the voyage will not be subject to the Visby Rules and the servants or agents therefore will not receive the protection.<sup>2</sup> The same result is reached if it is proved that the carrier's servants or agents acted with intent to cause damage or acted recklessly. Then they will lose the benefits of this Article (4 bis) by virtue of Article 4 bis (4) which refers to the defences under this

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1- The Xingcheng, [1987]2 Lloyd's Rep.210 at p.214; Bosma V. Larsen, [1966] 1 Lloyd's Rep.22.

2- Maskell, p.5.

convention. Thus, the servants or agents lose not only the benefit of the time limitation for suit, but all defences under the convention including the limitation of liability and the exceptions set out in the Rules.<sup>1</sup> The carrier, however, only loses the limitation per package or kilo provided under Article 4(5)(e) of the Hague/Visby Rules and not the benefit of the one year delay for suit.<sup>2</sup>

#### 4.2.2 Under the Hamburg Rules.

The Hamburg Rules, compared with the Hague/Visby Rules, brought fundamental changes in the provisions concerning the time-limitation for suit.

The one year limitation period for suit under the Hague/Visby Rules is extended to two years<sup>3</sup> by virtue of Article 20(1) of the Hamburg Rules as follows:

"Any action relating to carriage of goods under this convention is time-barred if judicial or arbitral

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- 1- Halsbury's Shipping & Navigation, p.549, par.787; Tetley, 3rd ed, p.675; Maskell, p.5.
  - 2- Tetley, 3rd ed, p.675.
  - 3- There was extensive debate at the "UNCITRAL" conference in drafting of the New Rules, about whether the time limit should be one year or two years. At the conclusion of the Plenary Discussion, nine States favoured the one year time bar (U.S., U.S.S.R., Japan, France, Poland, Belgium, Brazil, Argentina and U.K.) while six States favoured the two years provision (Australia, Nigeria, Singapore, Norway, India and Hungary). Accordingly the entire topic was referred to the Drafting party. See, Sweeney, part.II. pp.348-349; UNICTRAL, Report "Fifth session, 1973, p.24, par.68, Doc. (A/CN.9/WG.III/WP.10 (Vol.III)); UN. Doc. A/CN.9/76/Add.1, part two, International Legislation on shipping, 1973, p.193, par. 68, hereinafter cited as "Doc.A/CN.9/76/Add.1, part two".

proceedings have not been instituted within a period of two years".

We can find out from the above provision that the Hamburg Rules have clarified the ambiguities which arose under the Hague/Visby Rules concerning arbitration clauses, by providing that the limitation period covers both judicial and arbitral proceedings. It is to be noted that Article 20(1) of the Hamburg Rules has also removed the doubt created by the Hague/Visby Rules concerning the time-bar when it refers to "Any action relating to carriage of goods". This phrase covers actions instituted by the carrier and by the cargo interests, because it clearly refers to actions by the carrier against the shipper in respect of dangerous goods or freight.<sup>1</sup> On the other hand, this phrase covers all actions against the carrier concerning the carriage of goods whether they are based on contract, tort or otherwise.<sup>2</sup>

Furthermore, Article 20(2) of the Hamburg Rules has pointed out the commencement of the time limitation for suit and has removed the disputes which arose under the Hague/Visby Rules by explaining the day or the date of the goods delivery or when they should have been delivered, by providing that:

"The limitation period commences on the day on which the carrier has delivered the goods or part thereof

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<sup>1</sup>- Thomas, p.8.

<sup>2</sup>- Article 7(1) of the Hamburg Rules provides: "The defences and limits of liability provided for in this convention apply in any action against the carrier in respect of loss or damage to the goods covered by the contract of carriage by sea, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise".

or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered"

The Hamburg Rules have also clarified in more detail as to which day is included in the limitation period and which one is not, when it is stated that the first day of the commencement of the time-bar is not included, but the last day of the period is counted.<sup>1</sup>

In respect of the extension of the limitation period, the Hamburg Rules make it clear that the limitation period may be extended during the commencement of the time-bar by a declaration in writing to the claimant.<sup>2</sup>

The Hamburg Rules have followed the Hague/Visby Rules by providing a special provision for recourse actions by allowing the claimant to institute his action even after the expiration of the time limit (two years), if instituted within the time allowed by the law of the state where proceedings are instituted. However, it specifies a minimum extension of 90 days commencing from the day on which the party instituting such action for indemnity "has settled the claim or has been served with process in the action against himself".<sup>3</sup>

It can be concluded, then, that the extension of time limit from one year to two years as well as the provisions

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1- Article 20(3) of the Hamburg Rules provides: "The day on which the limitation period commences is not included in the period".

2- Article 20(4) of the Hamburg Rules provides:  
"The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations".

3- Article 20(5) of the Hamburg Rules.

relating to recourse actions are a great advantage to the claimants, because they will have the effect of increasing the shipowner's liability as, in some substantial cases, claims are apt to end after one year, whereas if the limit is two years, the claimants have additional time to decide whether or not to sue the carrier.

Lastly, it is to be noted that the servants or agents of the carrier are entitled to avail themselves of the defences and limits of liability which the carrier is entitled to invoke under this convention. Thus, the time limitation for suit applies to servants or agents of the carrier if they prove that they acted within the scope of their employment,<sup>1</sup> even though they acted intentionally or recklessly and with knowledge that such loss, damage or delay in delivery would probably result.<sup>2</sup>

#### **4.3 Jurisdiction Clauses**

A Jurisdiction clause is a clause relating to the place or the country and the court where proceedings may be started by the claimant. This clause, however, does not determine which laws shall apply to a particular dispute. It may be a factor in deciding that question in case of doubt. Therefore, with this point in mind, the jurisdiction clause should be examined under:

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1- Article 7(2) of the Hamburg Rules.

2- Article 8 of the Hamburg Rules.

4.3.1 The Hague/Visby Rules and,

4.3.2 The Hamburg Rules

#### 4.3.1 Under the Hague/Visby Rules

It is to be noted that neither the Hague Rules nor the Visby Rules contain express provisions regulating jurisdiction clauses for the handling of claims. Most bills of lading contain a jurisdiction clause intended to seek an advantage from local laws, or to facilitate the handling and defence of claims by the carrier.<sup>1</sup>

Many courts, when dealing with a jurisdiction clause, prefer to refer to it as staying an action rather than dismissing it. This is because the time limit for suit may expire under the court to which jurisdiction is transferred as otherwise the court may refuse to hear such a case.<sup>2</sup>

The question, then, is what is the criterion for the court to determine the validity of a jurisdiction clause? There are a number of criteria applied by the courts in considering the validity of a jurisdiction clause. Most courts endeavour to base the exercise of their discretion

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1- Beare, p.5; Mankabady, p.98.

2- The Fehmarn, [1957]2 Lloyd's Rep.551; [1957]1 W.L.R.815; Tetley, 2nd ed, p.322; Astle, p.315.

on the criterion of "reasonableness" in order to accept or refuse a jurisdiction clause.<sup>1</sup>

What however, constitutes reasonableness? There are many factors constituting a reasonable jurisdiction clause. These factors may be deduced from the agreement of the contracting parties, if there is no allegation that the court, to which jurisdiction is transferred, would not provide a fair trial,<sup>2</sup> or the defendants were in that country and discussion had taken place there.<sup>3</sup> Mere inconvenience or additional expense is not the test of unreasonableness.<sup>4</sup> The court will thus enforce the jurisdiction clause unless the plaintiff can clearly show that enforcement would be unreasonable or unjust or that the clause is invalid.<sup>5</sup> In many countries, the effectiveness of jurisdiction clauses is at the court's discretion. Many factors can thereby be considered. Brandon, J, in, The Eleftheria,<sup>6</sup> has made this quite clear where he said:

"The principles established by the authorities can, I think be summarised as follows:

1. Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendant apply for a stay, the English court, assuming the claim to be otherwise within the

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1- Tetley, 3rd ed, p.792.

2- Nieto V. Tinnun, (1959) A.M.C.2555.

3- The Vestris, (1932) 43 Ll. L. Rep. 86.

4- Muller V. Swedish American Lines Ltd, (1955) A.M.C. 1687.

5- Zapata Off-shore V. The "Bremen" & Unterweser Reederei G.M.B.H., [1972] 2 Lloyd's Rep. 315 (U.S. Sup. Ct.).

6- [1969]1 Lloyd's Rep.237 at p.242.

jurisdiction; is not bound to grant a stay but has a discretion whether to do so or not.<sup>1</sup>

2. The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.<sup>2</sup>
3. The burden of proving such strong cause is on the plaintiffs.<sup>3</sup>
4. In exercising its discretion the court should take into account all the circumstances of the particular case.<sup>4</sup>
5. In particular, but without prejudice to (4), the following matters, where they arise may be properly regarded:
  - a. In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts;<sup>5</sup>
  - b. Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects;<sup>6</sup>
  - c. With what country either party is connected, and how closely;<sup>7</sup>
  - d. Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages;<sup>8</sup>
  - e. Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would (i) be deprived of security for that claim; (ii) be unable

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1- The Sennar, (No. 2)[1984]2 Lloyd's Rep. 143 at p.154.

2- The Biskra, [1983]2 Lloyd's Rep. 59; The Frank Pais, [1986]1 Lloyd's Rep.529.

3- The Fehmarn, [1957]1 Lloyd's Rep. 511 at p.514; [1957]2 Lloyd's Rep.551.

4- The Frank Pais, [1986]1 Lloyd's Rep.529.

5- The El Amria, [1981]2 Lloyd's Rep.119 at p.125.

6- The Vishva Prabha, [1979]2 Lloyd's Rep. 287 at p.288; The El Amria, [1981]2 Lloyd's Rep.119 at p.127.

7- The Kislovodsk, [1980]1 Lloyd's Rep. 183 at p.185; The El Amria, [1981]2 Lloyd's Rep. 119 at p.125.

8- The Traugutt, [1985]1 Lloyd's Rep.76 at p.79; The Pia Vesta, [1984]1 Lloyd's Rep, 169 at p.172.

to enforce any judgment obtained; (iii) be faced with a time-bar<sup>1</sup> not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial".<sup>2</sup>

It can, however be said that the criterion of the reasonableness test gives prima facie validity to a foreign jurisdiction clause and thus places the burden of proof on the person disputing its applicability to a case.<sup>3</sup> This indicates that the question of reasonableness is a question of fact for the court to decide in the light of all the circumstances of the case.<sup>4</sup>

It should be noted that the jurisdiction clause must be clear and precise to be applicable. This allows the case law of some countries to hold that a jurisdiction clause is null and void if its ambiguity does not permit the parties to ascertain which court is the proper one.<sup>5</sup>

A change in the jurisdiction clause should not, however, cause the parties to lose rights which they have already acquired in the original court, e.g. there was no real prejudice to suit in England, while the delay for

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1- The Blue Wave, [1982]1 Lloyd's Rep.151; The Sennar, [1984]2 Lloyd's Rep. 119 at p.128.

2- The El Amria, [1981]2 Lloyd's Rep. 119 at p.128; It is to be mentioned that these principles were restated and elaborated on by Brandon, J, in The El Amria, [1981]2 Lloyd's Rep. 119 at pp.123-124.

3- Muller V. Swedish American Lines Ltd, (1955) A.M.C. 1687; Mankabady, p.102.

4- The Eleftheria, [1969]1 Lloyd's Rep.237.

5- Dunbee Ltd V. Gilman & Co. (Australia) Pty, Ltd, [1968]2 Lloyd's Rep.394 (Australia Supreme Court of New south Wales, Court of Appeal), where it is stated: "The law of a particular country was the proper law of the contract did not mean that there had been a submission to the jurisdiction of the courts of that country"; The Media, (1931)41 Ll. L.Rep. 80 at p.82; Tetley, 3rd ed, p.816.

suit in Poland had expired.<sup>1</sup> Such an inconvenience may emerge from contravening Article 3(8) of the Hague Rules by relieving the carrier from obligations or duties or lessening such liability provided for in these Rules. That is to say, if the effect of the jurisdiction clause is to enable the transfer of the case or dispute to a country which has neither adopted nor incorporated the Hague Rules, then such a clause will be null and void, because it is contrary to Article 3(8) of the Hague Rules.<sup>2</sup> If the clause does not have that effect, then it cannot be successfully attacked as being contrary to Article 3(8). In Maharani Woollen Mills Co V. Anchor Line,<sup>3</sup> goods were shipped from Liverpool to Bombay. The consignee had complained of the condition of the goods on arrival and had been paid by the underwriter. The bill of lading provided that in the first instance any dispute must be tried at the port of destination of the goods according to British law; but instead of bringing the action in Bombay, the underwriters brought the action in England. It was held that the jurisdiction clause which provided that the action must be brought at Bombay's

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1- The Adolf Warski, [1976]1 Lloyd's Rep. 107 at p.114, where Brandon, J, states: "It would often be reasonable, unless real prejudice to the defendant is clearly proved to make such enforcement subject to a condition that the defendant should waive reliance on the time bar if he can lawfully do so; or alternatively, if such waiver is not permissible, to refuse a stay".

2- The Morviken, [1983]1 Lloyd's Rep.1; It is convenient here to mention that the principal argument against their validity is that the jurisdiction clause has the effect of lessening the carrier's liability, and is therefore null and void. Sweeney, part 1, p.94; Cf. The Benarty, [1984]2 Lloyd's Rep. 244 (C.A.)

3- (1927)29 Ll. L.Rep.169; The Eleftheria, [1969]1 Lloyd's Rep.237.

courts did not conflict with Article 3(8) of the Hague Rules, since it in no way diminished the liability of the carrier. Scrutton, L.J., in this case, made this point quite clear when he said:

"Now the liability of the carrier appears to me to remain exactly the same under the clause. The only difference is a question of procedure - where shall the law be enforced? - and I do not read any clause as to procedure as lessening liability".

The decisions in the U.K. and the U.S. concerning the validity of jurisdiction clauses have reached the same conclusions, but on different grounds.<sup>1</sup>

In the U.K., when the jurisdiction clause provides that disputes should be settled in the U.K., then such a clause is considered valid.<sup>2</sup> On the other hand, when the jurisdiction transfers the disputes to a foreign court, then such clauses would be applied according to considerations of the "convenience" and their "reasonableness" under the circumstances of the particular case.<sup>3</sup> In the U.S., the American courts, in the past rejected any type of jurisdiction clause in a bill of lading which displaced the jurisdiction of the United

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1- Beare, p.5, where he states: "Similar attitudes and tests are adopted in the English and Canadian courts, although the impression seems to be that the courts in the United States are less likely to stay an action".

2- Mankabady, p.99.

3- The Adolf Warski, [1976]2 Lloyd's Rep. 241 at p.242, where it is stated: "Although the court might be more willing to grant a stay where a clause was reasonable than where it was not".; The Eleftheria, [1969]1 Lloyd's Rep.237; The Makefjell, [1976]2 Lloyd's Rep.29.

States' courts.<sup>1</sup> This attitude has been changed by the American courts, by granting exclusive jurisdiction to foreign courts on the basis of "reasonableness"<sup>2</sup> and "convenience".<sup>3</sup>

Lastly, it is to be noted that convenience<sup>4</sup>, sometimes described as reasonableness<sup>5</sup>, is the criterion in respect of deciding a plea forum non conveniens. In The Spiliada,<sup>6</sup> the House of Lords found that it was wiser to avoid the use of the word "convenience" and refer rather to the appropriate forum. The burden of proof is then on the plaintiff to show that the forum is the most appropriate, whereas in the forum non conveniens<sup>7</sup> cases that burden

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- 1- Wood & Salick Inc V. Companie Generale Transatlantique, 43F. ed, pp.941-942 (2nd Cir. 1930); Carbon Black Export Inc V. The S.S. Monrosa, 254 F.2d, 297 (5th Cir. 1958); Mankabady, p.101.
  - 2- Muller V. Swedish American Lines Ltd, (1955) A.M.C. 1687; Kraner V. Pennsylvania Rail Co, 174 F.2d.2556 (2d Cir. 1949); Zapata off-shore company V. The "Bremen" & Unterweser Reederei G.M.B.H. (The Chapparral), [1971]2 Lloyd's Rep.348 at p.351. (U.S. Sup. Ct).
  - 3- Indussa Corp V. Ramborg, [1967]2 Lloyd's Rep. 101 (U.S. Ct. of App); Northern Assurance Co. Ltd V. M.V. Caspian Career, (1977) A.M.C., 421, where it was held that a clause, requiring disputes to be settled in The Tokyo District Court was invalid under Section 3(8) of the United States Carriage of Goods by Sea Act, 1936, since the clause "lessens the carrier's liability"; Sergio Carbone & Fausto Pocar, Conflicts of Jurisdictions, Carriage by Sea and Uniform Law, published in the Studies on the Revision of the Brussels Convention on Bills of Lading, Università Di Genova, Facoltà Di Economia E Commercio, 1974, p.331, hereinafter cited as "Carbone & Pocar"; Beare, p.5.
  - 4- The Spiliada, [1987]1 Lloyd's Rep.1.
  - 5- Muller V. Swedish American Lines Ltd, (1955) A.M.C. 1687 at p.1689.
  - 6- [1987]1 Lloyd's Rep.1 at p.9.
  - 7- Lord Goff, in The Spiliada, [1987]1 Lloyd's Rep. 1 at p.10, formulated an authoritative approach to forum non conveniens. He stated: "The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of

rests on the defendant by showing that the forum is not appropriate.<sup>1</sup>

#### 4.3.2 Under the Hamburg Rules

As already mentioned above, the Hague/Visby Rules contain no provisions for a jurisdiction clause.

The Working Group of UNCITRAL considered various viewpoints concerning the subject of jurisdiction in cargo damage disputes. The first view was that no provision at all on jurisdiction should be added to the Rules. The second view supported an opposite approach which held that all foreign jurisdiction clauses should be considered null and void. The third approach was in favour of the insertion of a provision in the Rules, to govern the jurisdiction clause in the light of general criteria emerging from the extensive practice over the question of jurisdiction clauses under the Hague/Visby Rules, (in the absence of a specific provision regulating such a clause and equally in the absence of any guidance giving validity to the clause). The fourth approach supported the trend calling for a provision, by which a claim may be brought, specifying several alternative places.<sup>2</sup>

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justice"; Therefore, it only required the adoption of the principles which are set down by Lord Brandon in The Eleftheria, [1969]1 Lloyd's Rep.237 at p.242, and restated in The El Amria, [1981]2 Lloyd's Rep.119 at pp.123-124 (C.A.).

1- The Spiliada [1987]1 Lloyd's Rep.1 at p.13

2- Sweeney, part I, p.94; Mankabady, p.104.

These various views were discussed and debated by the Working Group, and the text in Article 21 of the Draft convention was adopted by the Hamburg Rules which provides that the plaintiff<sup>1</sup> or the claimant, at his option, may bring an action in any court of the following places:

- a: The principal place of the business or, in the absence thereof, the habitual residence of the defendant; or
- b. The place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
- c. The port of loading or the port of discharge; or
- d. The agreed or designated place in the contract of carriage by sea.<sup>2</sup>
- e. The place where the vessel has been arrested.<sup>3</sup>

The plaintiff or the claimant has broadly the same choice of forum in case of arbitral proceedings.<sup>4</sup>

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<sup>1</sup>- Sweeney, part I, pp.100-101, where he states; "The United States also opposed the use of the word 'plaintiff' as inappropriate in the context of the purpose for which these rules were being drafted. "Plaintiff" would mean either the cargo interest or the carrier interest, whereas the true purpose of the provision was to replace choice of law and choice of forum clauses in bills of lading limiting the effective remedies for the cargo interest".

<sup>2</sup>- Article 21(1) of the Hamburg Rules.

<sup>3</sup>- Article 21(2) of the Hamburg Rules; Some delegates opposed the provision of the in rem jurisdiction. For instance, France, believed the in rem problem to be solved by the 1952 C.M.1 Convention on the Arrest of Vessels "International Convention for the unification of certain Rules Relating to the Arrest of Seagoing Ships, May 10, 1952". Also, Norway objected to any in rem attachment at places other than the states listed in Sub-paragraph 1(a), (c) and (d) of the proposal A. Sweeney, part.I, pp.97-98; UNCITRAL Report on its third session, A/CN.9/63/Add.1 of 17th March 1972, p.18; Mankabady, p.105; It is to be noted that the Hague/Visby Rules do not contain rules on Arrest of the Vessel.

<sup>4</sup>- Article 22(3) of the Hamburg Rules.

Respecting judicial or arbitral proceedings, the contracting parties may agree upon the bringing of an action in a place other than one of those mentioned above when they so agree after the dispute has arisen.<sup>1</sup>

As already mentioned, the action may be brought at a place where the vessel has been arrested.<sup>2</sup> However, to protect the defendant, the claimant must remove the action to one of the jurisdictions mentioned in Article 21(1) of the Hamburg Rules if the defendant so requests; but prior to the removal of the action the defendant must furnish security sufficient to ensure payment of any judgment awarded to the claimant.<sup>3</sup> The sufficiency of the security will be determined by the court at the place of arrest.<sup>4</sup> If, however, the defendant does not ask for removal of the action, the court in the place of arrest will remain competent.

It is to be noted that Article 21(3)and(4) provides additional procedural provisions supplementing the jurisdictional rules in Article 21(1)and(2). Article 21(3) makes it clear that the jurisdictions mentioned in Article 21(1)and(2)are exclusive: the claimant may not bring a claim in any other jurisdiction. However, courts of a non-contracting State cannot be bound by this rule

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1- Article 21(5) of the Hamburg Rules; Waldron, p.317; Tetley, The Hamburg Rules, p.8; Murray, p.81.

2- Article 21(2)(a) of the Hamburg Rules.

3- Ibid.

4- Article 21(2)(b) of the Hamburg Rules.

except by virtue of the statement contained in the bill of lading pursuant to Article 23(3) of the Hamburg Rules.<sup>1</sup>

Article 21(4)(a) prohibits a new action on the same grounds between the same parties where a suit has been instituted in a competent court under Article 21 (1,2) of the Hamburg Rules, or where a judgment has been delivered by such a court, unless the judgment is not enforceable in the country where the new claim has been brought. Moreover, there are two procedures that are not to be considered as starting of a new action: first, institution of measures with a view to obtaining enforcement of the earlier judgment; second, the removal of a case to a different court in the same country or to a court in another country in accordance with Article 21(2)(a).<sup>2</sup>

It should be mentioned that Article 21(1) of the Hamburg Rules has been criticized. For instance, "the place where the contract was made" and "the port of loading" in fact are usually indicated as the same place because the bill of lading is normally issued at the port of loading, therefore paragraph (b) of Article 21 is not needed.<sup>3</sup>

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- 1- Article 23(3) of the Hamburg Rules provides: "Where a bill of lading or any other document evidencing a contract of carriage by sea is issued, it must contain a statement that carriage is subject to the provisions of this convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee".
  - 2- Article 21(4)(b,c) of the Hamburg Rules.
  - 3- Mankabady, p.105; Sergio M. Carbone & Riccardo Luzzatto, *Arbitration clauses, Carriage by Sea and Uniform Law*, published in *The Studies on the Revision of the Brussels Convention on Bills of Lading, 1974*, p.385, hereinafter cited as "Carbone & Luzzatto", where they criticize paragraph (b) of Article 21 of the Hamburg Rules which gives the plaintiff the option to institute the action in the place where the contract was made,

Lastly, it must be noted that the Rules require that a court which exercises jurisdiction under Article 21 of the Hamburg Rules must be competent according to its national law. Thus, although there is nothing in the Hamburg Rules explicitly referring to the rule of forum non conveniens, a court competent within the meaning of Article 21 can exercise its discretion to refuse to hear a case on that ground.<sup>1</sup> The contracting parties themselves also have a right to choose one or more forums, as an additional option to the choice of forum indicated in the Rules. But a competent or proper forum must be selected according to the principle of reasonableness and subordinated to a condition of equality of the parties.<sup>2</sup>

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but on another ground by saying that: "As a matter of fact it is well known that the principles adopted in various national legal systems with a view to determining the moment and place of making contracts vary considerably under many aspects in accordance with more general concepts of the theory of juridicial negotiation. And it is equally well known how divergent may be the solutions accepted by various national legal systems as to determination of fundamental norms whereby the place of concluding a contract is to be ascertained".

1- Jackson, p.230.

2- Carbone & Pocaré, p.339.

### Concluding Remarks

It is to be noted that the Hamburg Rules have generated a substantial impact on the procedure of the action for lost or damaged cargo in many respects.

1. The period for giving notice has been extended from 3 days, as provided in the Hague/Visby Rules, to 15 days in case of latent damage. This period is considered sufficient to discover non-apparent damage.
2. The sanction for not giving notice is still the same, which does not affect the right of the contracting parties to bring suit against the carrier within the time limit for suit in the Rules. The effect of not giving such written notice is considered prima facie evidence of discharging the goods carried in sound condition as stated in the bill of lading.
3. The time limit for suit has been extended from one year to two years. This time limit covers both judicial and arbitral proceedings during the two years under the Hamburg Rules. The expansion to two years, clearly, will have the effect of increasing the shipowner's liability. On the other hand, it gives a great advantage to shippers and cargo interest because it gives the claimants additional time in which to decide whether or not to sue the carrier. It also will increase the frequency of claims and, consequently, the costs of shipowners.

4. It should be mentioned that, owing to the absence of a provision on jurisdiction in the Hague/Visby Rules, the courts of most countries, in exercising their discretion, may accept or refuse jurisdiction according to Article 3(8) of the Hague Rules. However, the situation of jurisdiction has become much better under the Hamburg Rules than under the Hague Rules as the Hamburg Rules provide for several alternative places where action may be brought, including arbitration proceedings. These provisions aim to achieve a balance between the carrier and the cargo interests by allowing the shipper or the cargo-owner to bring his action in any court provided by the Hamburg Rules as the proper forum for such action.

## Chapter Five

### **The Liability of the Multimodal Transport Operator for Loss of or Damage to the Goods under the 1980 United Nations Multimodal Transport of Goods Convention**

The crux of the Multimodal Transport Convention (MTC) and indeed the most sensitive and contentious element of any international convention on the carriage of goods is the liability regime. The MTC consists of eight parts. One of the most important parts of the Convention is part 3, i.e. "liability of the multimodal transport operator (MTO)". In this part some points are of a high degree of importance. This chapter will, therefore, conduct the discussion under the following headings:

#### **5.1 The background of the Convention**

The carriage of goods by a combination of two or more modes of transport in succession is a common phenomenon in international trade. Each mode of transport has its own physical characteristics and commercial requirements and these to a large extent are reflected in the nature of the legal regime<sup>1</sup> on a national, or international level

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<sup>1</sup>- The legal rules governing the different modes of transport are as follows:

1. The Warsaw Convention 1929 (Air), which was amended by the 1955 Hague Protocol and the 1961 Guadalajara Convention and the Montreal Protocol No.4 (1975).
2. The CIM Convention 1933 (Rail) which was revised in 1952, 1961 and 1970.
3. The CMR Convention 1956 (Road).
4. The Hague Rules 1924 (Sea) which was amended by the 1968 Brussels Protocol. The Hamburg Rules 1978 are intended to replace the Hague Rules.

governing the contractual relationship between the consignor and the consignee of cargo and the carrier; the documentation to be issued and used; and more importantly, the liability of the carrier for the loss of, or damage to goods entrusted in his care for transportation. Consequently, when cargo is transferred from one mode of transport to another mode, most often it is also transferred to a different legal regime.<sup>1</sup> However, some of the conventions contain provisions which extend the application of the Convention to combined transport.<sup>2</sup> In such a case combined transport is considered as a subsidiary to the carriage in question. When more than one transport document is issued, it is necessary to find out where and when the loss, damage or delay has occurred in order to apply the rules contained in the transport document. But often difficulties arise in establishing the time and the cause of loss or damage to the goods. Hence there is a need for a more equitable solution to the problem. Moreover, among the important features of the past three decades or more, is the fact that the development of technology and the creation of

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<sup>1</sup>- Eugene A. Massey, prospects for a New International legal Regime: A Critical Look at the TCM, (1972) 3.JMLC p.726, hereinafter cited as "Massey".

<sup>2</sup>- E.g. The Hamburg Rules, Article 1, pars 1 and 6; The Warsaw Convention Article 1, pars. 1 and 2 and Article 31, par.1; The Guadalajara amendment Article 1, pars. (b) and (c) and Article 11; The CMR Convention Article 1(1), Article 2 and Article 3; The CIM Article 1(1) and Article 2; See the proposals submitted to the first committee of the diplomatic conference on a Multimodal Convention by the United Kingdom delegation in document TD/MT/CONF/C.1/CRP.1 and TD/MT/CONF/C.1/CRP.2 and Add.1 contained in UNCTAD document TD/MT/CONF/17/Add.1 Report of the United Nations Conference on a Convention on International Multimodal Transport Vol.II, part One. (1979) pp.16-23.

container transport after World War II changed transportation methods and caused an increasing use of intermodal containers by the later 1950s.<sup>1</sup> In other words, the history of the increase of multimodal transport of goods, particularly its international form, dates back to the birth of the methods of integration and consolidation of goods for carriage such as containerization and palletization.<sup>2</sup> The use of containers and pallets has led to an integration between the methods of transport.<sup>3</sup> This is because multimodal transport of goods is to a very large extent based on container transport.

Thus, during the last three decades international multimodal transport of goods has, because of the suitability of container method of carrying cargo in multimodal transport, grown so much that it can be said that the history of multimodal transport of goods has during this period been tied to the history of container transport.<sup>4</sup> Also computers are now widely used to monitor the movement of goods in air and sea transport and transport documents are increasingly being simplified to

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1- W. Driscoll & Paul B. Larsen, *The Convention on International Multimodal Transport of Goods*, (1982) 57 Tul.L.R.p.195, hereinafter cited as "Driscoll & Larsen".

2- P.G. Fitzpatrick, *combined transport and the CMR convention*, [1968] J.B.L. p.314, hereinafter cited as "Fitzpatrick".

3- S. Mankabady, *The Multimodal Transport of Goods Convention: A challenge to Unimodal Transport Conventions*, (1983) 32 ICLQ p.137, hereinafter cited as "Mankabady, *The Multimodal Transport of Goods Convention*".

4- Driscoll & Larsen, p.195.

facilitate fast movement of goods. Furthermore, the existing international infrastructure is not fully adapted to the requirements of international multimodal transport of goods. As a result, there arose a serious need for the creation of a Convention on multimodal transport contracts to bring certainty in this area of transportation, and therefore, to facilitate trade by removing any impediments slowing down the growth of multimodal transport.<sup>1</sup> Consequent on these developments the United Nations Conference on Trade and Development (UNCTAD) adopted, on 24 May 1980, the United Nations Convention on International Multimodal Transport of Goods.<sup>2</sup> Obviously, the objective of this Convention was to create a uniform multimodal transport document and to dispel the wide disparity in the contractual terms adopted by different operators. It sets out in great detail the multimodal transport operator's liability including his liability limitation for loss or damage to goods.

The work on a Convention for multimodal transport of goods, theoretical more than practical, has a long history going back to the 1930s.<sup>3</sup> The subject received full attention following the increased use of containers in trade between developing and developed countries. The original project was based upon the need for a multimodal

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1- Kurosh Nasserri, *The Multimodal Convention*, (1988)19 JMLC, p.234, hereinafter cited as "Nasserri".

2- It is not yet in force; hereinafter cited as IMTC, or the MTC.

3- Report of United Nations Conference on Convention on International Multimodal Transport, TD/MT/CONF/12/Add.1, 1980, part Two, p.1, hereinafter cited as "TD/MT/CONF/12/Add.1, part Two".

instrument which would address the question of liability for the loss of or damage to goods occurring during multimodal transport and to standardize other aspects of multimodal transport.<sup>1</sup> Two non-governmental organizations each prepared texts for a Convention,<sup>2</sup> subsequently merged, at the initiative of the Economic Commission for Europe (ECE), into one text known as a draft Convention on International Combined Transport of Goods or TCM draft Convention.<sup>3</sup> The TCM Convention is directly linked to the existing unimodal conventions because it attempted to place an umbrella of uniformity over the existing conventions governing liability.<sup>4</sup> The TCM draft Convention attempted to set out some voluntarily applicable common rules dealing with liability and documentation aspects of contracts for multimodal transportation in order to fill the gaps in existing

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1- William J. Driscoll, *The Convention on International Multimodal Transport: A Status Report*, (1978) 9 JMLC p.441, hereinafter cited as "Driscoll".

2- These are the draft conventions prepared in the 1960s by the International Institute for the Unification of Private Law (UNIDROIT) which produced a draft convention where the emphasis was on the system of liability in multimodal transport, and the Comité Maritime International (CMI) which had focussed on the Hague Rules, when it decided to prepare rules on multimodal transport emphasising on documentation aspects and loss or damage problem when the place of loss or damage can not be known. The CMI draft, known as the "Tokyo Rules". See, Driscoll, p.442; Massey, p.727; Mankabady, *The Multimodal Transport of Goods Convention*, p.121.

3- The TCM draft convention was presented and adopted at the fourth meeting of the ECE and Intergovernmental Maritime Consultative Organization (IMCO), held in London in November 1971; the initials "TCM" represents the French title of the Convention "Transport Combiné de Marchandises".

4- For more details regarding the preparation of the TCM draft convention, see Massey, p.727; S. Mankabady, *Some Legal Aspects of the carriage of goods by container*, (1974) 23 ICLQ p.329, hereinafter cited as "Mankabady, Some legal aspects of the carriage of goods by container"; Driscoll, p.727.

conventions on carriage of goods and to establish single responsibility and a through transportation document under which the created Combined Transport Operator (CTO) is responsible for the whole multimodal journey.<sup>1</sup> The TCM Convention, however, failed. Several factors contributed to its failure; these are: 1) the lack of support by the United States and some other countries demanding that several aspects of international combined transportation including the economic and social implications must, with special respect to the needs and requirements of developing countries, be fully studied before the Convention be concluded;<sup>2</sup> 2) the work on the multimodal transport convention already started by UNCTAD<sup>3</sup> and the prevailing view within UNCTAD was that it was premature to adopt a multimodal Convention on the basis of the TCM draft.<sup>4</sup>

During the initial UNCTAD deliberation, it became clear that the TCM draft Convention would not be used as the

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1- Massey, p.730; Driscoll, p.447.

2- The developed countries sought (1) to limit the coverage of the convention to ensure the continued validity of existing "unimodal" national laws and international conventions, and (2) to minimize obligations to be imposed on carriers. In contrast, the developing countries sought (1) to maximize the protection of the shipper, and (2) to make increased developing country participation in the business (and insurance) of intermodal transportation mandatory. Thus, it can be said that international convention has a political background. This can be seen in its preamble. See, Driscoll & Larsen, p.193; Driscoll, pp.449-452; Erling Selvig, The Background to the Convention, published in One-day Seminar, Southampton University, 12 Sep. 1980, pp.A3,A9, hereinafter cited as "Selvig, The Background to the Convention"; Erik Chrispeels, The United Nations Convention on International Multimodal Transport of Goods: A Background Note, (1980) 15 E.T.L., p.361, hereinafter cited as "Chrispeels".

3- TD/MT/CONF/12/Add.1.p.2.

4- Selvig, The background to the convention, p.A9.

basis for discussion,<sup>1</sup> and the drafting of a multimodal convention was therefore commenced. Thus, in a worldwide container conference, sponsored by the U.N. and the Intergovernmental Maritime Consultative Organization (IMCO) held in Geneva in November 1972, it was recommended that UNCTAD should carry out further studies on several aspects of multimodal transport and provide a draft convention on it. When the UN/IMCO recommendations were endorsed by the Economic and Social Council of the UN (ECOSOC) the whole matter of a multimodal transport convention was entrusted to UNCTAD. In order to prepare the draft Convention the Trade and Development Board (TDB) of UNCTAD, which already had done some work on sea transport regulations, decided to extend its activities into other modes of transport too. To this end, the TDB of UNCTAD established the Intergovernmental Preparatory Group (IPG) in 1973. After six years, in March 1979, the IPG completed a draft convention on international multimodal transport of goods.<sup>2</sup> On May 24, 1980, a diplomatic conference held in Geneva adopted the

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<sup>1</sup>- The major substantive issues in the renewed drafting effort were those pertaining to the weaknesses of the TCM draft convention, namely, 1) the scope of the convention, 2) the liability regime, 3) documentary simplification, and 4) preservation of the existing unimodal conventions. See Driscoll, p.447.

<sup>2</sup>- For more details, see Preparation and Adoption, U.N.Doc.TD/MT/CONF/6 (1979) at p.15; UN Conference on a Convention on International Multimodal Transport. Report of Intergovernmental Preparatory Group, part One - Draft Convention on International Multimodal Transport, U.N.Doc.TD.MT/CONF/1, TD/B/AC.15/56 (1979), hereinafter cited as "IPG Draft Convention, Part One", and Part Two - Report of the International Preparatory Group on its Sixth Session, U.N.Doc. TD/MT/CONF/1/ Add.1, TD/B/AC.15/56/Add.1(1979), hereinafter cited as "IPG Sixth Session";

Convention on Multimodal Transport of Goods by consensus of 81 States.<sup>1</sup> This Convention will become applicable to international multimodal transport of contracts when 30 states become contracting parties to it.<sup>2</sup>

It is important to note that during the period in which the draft of the multimodal convention was under discussion and negotiation, the International Chamber of Commerce (I.C.C.) published its Uniform Rules for a Combined Transport Document in 1973 because it was very concerned with the commercial problems of combined transport and felt that such publication was essential. The revised form of the Rules was then published by the I.C.C. in 1975. These Rules were based on the principles contained in the TCM Convention.<sup>3</sup> In other words, the I.C.C. Rules operate under a network liability system for determining the CTO's liability, i.e. if the mode of

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<sup>1</sup>- Before the final adoption of the convention there was a diplomatic conference which was convened by the UN in Geneva in November 1979 and was resumed in May 1980. See, the UN Conference on an International Multimodal Transport, Report of the UN Conference, Part one - Draft Convention on International Multimodal Transport, U.N. Doc. TD/MT/CONF/12 (1980), hereinafter cited as "UN draft Convention Part One", and Part two - Report of the First Session of the UN Conference, UN.Doc.TD/MT/CONF/12/Add.1 (1980), hereinafter cited as "UN Session, part two"; UNCTAD, Report of the UN Conference on International Multimodal Transport on its Resumed Session, U.N. Doc. TD/MT/CONF/16/Add.1 (1980), hereinafter cited as "Resumed Session".

<sup>2</sup>- Article 36 of the IMTC.

<sup>3</sup>- The I.C.C. Rules which are a voluntary code for a combined transport contract and have no statutory force are operated by incorporating into a contract made by the consignor and the combined transport operator (CTO) and evidenced by the combined transport document. For more details concerning the I.C.C. Rules see, Mankabady, The multimodal transport of goods convention, p.122; Driscoll & Larsen, p.199; Chorley & Giles, 8th ed, p.271.

transport where the loss or damage occurred is known, the appropriate international convention or national law particular for that mode which is of mandatory character applies to determine the CTO's liability.<sup>1</sup> However, the UNCTAD and the I.C.C. subsequently created a working group which drafted a new set of rules for multimodal documents intended to replace the existing I.C.C. Rules. The new rules, called the UNCTAD/I.C.C. Rules on Multimodal Transport Documents were finalized in April 1991 for entry into force by the end of 1991. From then on commercial parties would be free to use the new rules if they so wish. Although the new rules, (UNCTAD/I.C.C. Rules) are based on the existing unimodal liability regimes, they facilitate multimodal transport. However, when the MT Convention enters into force, the UNCTAD/I.C.C. Rules on Multimodal Transport Document can be removed.<sup>2</sup>

Lastly, it can, therefore, be concluded that the background of the multimodal transport convention on which the convention is based is threefold: 1) the unimodal transport of goods conventions, such as the Hague Rules, CMR and the Hamburg Rules; 2) the previous efforts done in order to prepare the Convention, such as TCM draft

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<sup>1</sup>- Rule 13 of the I.C.C. Rules; see also, F.J.J. Cadwallader, Uniformity in the Regulation of Combined Transport, (1974) J.B.L.p.198, hereinafter cited as "Cadwallader"; B.S.Wheble, The International Chamber of Commerce Uniform Rules for a Combined Transport Document, (1976) L.M.C.L.Q. p.146, hereinafter cited as "Wheble".

<sup>2</sup>- UNCTAD, The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention, Doc.TD/B/C.4/315/Rev.1.p.28 (1991), hereinafter cited as "UNCTAD TD/B/C.4/315/Rev.1"; ICC, Doc. No. 321-34/1 Rev.2. (1991), p.10, hereinafter cited as "ICC Doc. No.321-34/1 Rev.2".

Convention, I.C.C. Rules; and 3) political efforts (developed and developing countries). It is noteworthy that while the provisions of the multimodal convention are broadly in line with the regime established by the Hamburg Rules,<sup>1</sup> it also draws heavily on the TCM draft and the I.C.C. Rules. Therefore, it is fair to state that without the earlier negotiation on the Hamburg Rules and the I.C.C. Rules, agreement on the MT Convention would have been much more difficult to achieve.<sup>2</sup> In this connection it has been said that the Convention "is interesting and important not only for the principles it establishes, but also for its symbolic significance to the developing countries, irrespective of how soon it may come into force".<sup>3</sup>

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1- The MT Convention is, to a large extent, based on and strongly influenced by the Hamburg Rules. Firstly, because many of the participants involved in the work on the multimodal transport convention were the same participants in the work on the Hamburg Rules who had their main background in shipping law and policy so that they considered the problems of multimodal transport mainly from the point of view of shipping, although the multimodal transport convention covers all types of multimodal carriage; Secondly, the Hamburg Rules were used by all groups involved in the work on the multimodal convention as a model for the MT convention whether from the view of subject matters or of substance and drafting of the various provisions of the Hamburg Rules; thirdly, the Hamburg Rules brought the international law on carriage by sea closer to the international conventions governing carriage by the other modes of transport and, therefore, became a relevant law to be considered as a base for the MT Convention by the IPG. See Selvig, The background to the convention, pp.A9, A12, A13.

2- UNCTAD, TD/B/C.4/315/Rev.1, p.24.

3- W.J. Driscoll, "The world's first international multimodal transport convention", Transcript of seminars on international intermodal cargo liability, Course VI, Shippers National Freight Claim Council, Fordham University, School of Law and Golden Gate University, San Francisco, September 1980, p.174, hereinafter cited as "Driscoll, The world's first International MT Convention".

## 5.2 The aim and importance of the multimodal transport of goods

Since the concept of the multimodal transport of goods is based on the integration of different modes of transport by the use of a container system, the most important aim of multimodal transport of goods is to facilitate the movement of goods by reducing the total costs of transport and the time which is necessary for the performance of carriage and reducing losses, damage and the danger of theft or pilferage, and therefore to obtain maximum economic benefits.<sup>1</sup> This will, undoubtedly, have an important effect on international trade in goods. Thus, under multimodal transport the goods are carried from origin to destination under a single contract, instead of making a separate contract (as in segmented transport of goods) for each mode of transport which involves high contracting and documentation costs.<sup>2</sup> And so multimodal transport has the effect that contracting and documentation costs are reduced. Furthermore, under multimodal transport of goods the shipper deals with one carrier (the MTO with whom he has a multimodal transport contract) rather than several different carriers. If

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<sup>1</sup>- UNCTAD, *Multimodal Transport and Containerization*, TD/B/C.4/238, 1982, p.7, par.10, hereinafter cited as UNCTAD, TD/B/C.4/238".  
Le T. Thuong & Frederick M Collison, *In search of a coherent policy on International Intermodal Transportation*, (1985) 16 J.M.L.C., p.397, hereinafter cited as "Thuong & Collison";  
Mankabady, *Some legal aspects of the carriage of goods by container*, p.317.

<sup>2</sup>- Driscoll & Larsen, p.204; Gerald H. Ullman, *Combined Transport to and from the United States*, (1976) L.M.C.L.Q, p.157, hereinafter cited as "Ullman".

there is any loss of or damage to goods, the shipper would have direct recourse against the MTO, and it would not be necessary for him to show at which state of transport the loss or damage occurred and which carrier was responsible.<sup>1</sup> Thus, the other costs which are necessary to unimodal transport will be reduced or eliminated.<sup>2</sup> Moreover, the multimodal transport of goods, through the coordinated operations of the multimodal operator, either accelerates the speed of the loading and unloading operation of the containers or reduces the time when the containers are awaiting a transport vehicle at the loading points. Owing to multimodal transport, the time of loading and unloading and waiting of the container will be considerably reduced (e.g. to some hours rather than days or weeks).<sup>3</sup> It is, therefore, important that we have container operators encouraged to invest in the business of multimodal transport.<sup>4</sup>

In conclusion, the traditional transport system involves breaks or discontinuations which cause high transportation costs, while a multimodal transport operator can offer, through the use of containers, a coordinated transport service which is less discontinuous and is more direct than the traditional international

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<sup>1</sup>- In unimodal transport each unimodal carrier is only responsible for the performance of the service relative to his own specific leg of the journey; UNCTAD, TD/B/C.4/238, p.7; Driscoll & Larsen, p.204.

<sup>2</sup>- Thuong, p.397.

<sup>3</sup>- J.E. Bannister, Containerization and marine insurance, (1974)5 J.M.L.C.p.470, hereinafter cited as "Bannister".

<sup>4</sup>- Dale E. Taylor, Problems underwriters encounter when insuring cargo, (1971)45 Tul.L.R.p.1008, hereinafter cited as "Taylor".

transport system; i.e. an international multimodal transport operator would be able to offer shippers cheaper multimodal services than would modal carriers. These savings in transportation costs between the origin and destination are a main factor which has invited carriers to invest in the business of multimodal transport.

Accordingly, the importance of multimodal transport arises because of its aim, its benefits and its effects on international trade. It will, therefore, affect the economic situation of countries as foreign trade is of economic importance for almost all countries. Some countries may rely partly on foreign trade while for other countries, foreign trade may be of vital importance. They should, therefore, try to keep and continue their foreign trade. One of the important factors for keeping and continuing foreign trade is the existence of a transportation<sup>1</sup> system supporting it. Otherwise, in the case of lack of such a transportation system, foreign trade may be faced with difficulties which will cause economic difficulties. It can, therefore, be said that international multimodal transport system stimulates foreign trade and has a very good effect on the economic

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<sup>1</sup>- David C. Oliver, A Framework for an International Multimodal Transportation based upon the concept of the world ocean, I.C.C. Prac's, J. vol.50 (1983) pp.198, 201, hereinafter cited as "Oliver", when he said:"The importance of transportation has long been recognised as a vital element in a healthy economy". He then referred to the importance of container transport system and stated that "containerized transportation can be most effective when integrated into the 'land-bridge' or 'mini-bridge' system".

situation of countries in so far as the export and import of goods is concerned.

### **5.3. Scope of Application of the Convention and its Mandatory Effect**

Article 2 of the multimodal transport convention makes the scope of application of the Convention clear. The international element which is required for the Convention to apply appears from the requirement that the multimodal transport must proceed between two different States. It is enough that either the place for taking in charge of goods by the MTO according to multimodal transport contract or, alternatively, the place for delivery is located in a contracting state. Article 2 provides:

"The provisions of this Convention shall apply to all contracts of multimodal transport between places in two States, if:

- a) The place for the taking in charge of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State, or
- b) The place for delivery of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State".

It should be noted that only one of these two States needs to be a Contracting State. The purpose, therefore,

of requiring only one state and not both to be a Contracting State is to widen and secure the scope of application of the Convention.<sup>1</sup>

As seen, multimodal transport requires to be treated as international when it proceeds between two different States. The question now is: what does international multimodal transport mean for the purpose of the Convention? This, along with other expressions, has been defined in Article 1 of the Convention. So, to be more accurate, it can be said that the Convention applies to every contract for international multimodal transport which can be included in the definitions mentioned in Article 1. Subject to Article 1(3) of the Convention "multimodal transport contract" means a contract whereby a MTO undertakes, against payment of freight, to perform or to procure the performance of international multimodal transport. The MTO is defined as any person who on his own behalf, or through another person acting on his behalf, concludes a multimodal transport contract not as an agent but as a principal, and assumes responsibility for the performance of the contract.<sup>2</sup> "International multimodal transport", therefore, means "the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the

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<sup>1</sup>- Wei Jia Ju, UN Multimodal Transport Convention, (1981) J.W.T.L.p.288, hereinafter cited as "Wei Jia Ju".

<sup>2</sup>- Article 1(2) of the IMTC.

multimodal transport operator to a place designated for delivery situated in a different country".<sup>1</sup>

Therefore, for the purposes of the Convention, international multimodal transport must contain the following important elements, (otherwise it is not considered as international multimodal transport to which the Convention applies).

1. There must be at least two different modes of transport;
2. The transport must proceed between two different countries;
3. The transport must be performed on the basis of multimodal transport contract, i.e. there must be a multimodal transport contract covering at least two of the modes to be used.

Thus, if the international transport is on the basis of a unimodal contract so that the operations of pick-up and delivery of the goods are carried out by a mode different from that of international transport in the performance of that unimodal transport contract, that kind of transport, although apparently in form of international multimodal transport, is not international multimodal transport as defined by Article 1(1)<sup>2</sup> and the Convention does not apply

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<sup>1</sup>- Article 1(1) of the IMTC.

<sup>2</sup>- The second sentence of Article 1(1) of the IMTC provides: "The operations of pick-up and delivery of goods carried out in the performance of a unimodal transport contract, as defined in such contract, shall not be considered as international multimodal transport".

to such a contract.<sup>1</sup> The Convention, also, does not apply to the following situations which fall outside its scope of application:

1. A contract for international multimodal transport carried out within one country.<sup>2</sup>
2. A contract for international multimodal transport carried out between two different States of which neither is a contracting party to the Convention.<sup>3</sup>
3. A gratuitous contract for international multimodal transport since there must be a payment of freight.<sup>4</sup>
4. A contract for international multimodal transport if the carrier does not assume responsibility for the performance of the contract since such a carrier is not a multimodal transport operator as defined in Article 1(2) and therefore such international multimodal transport is not such as defined in Article 1(1). For instance, a shipping line issuing a through bill of lading or combined transport document disclaiming liability for the on-carriage is not a multimodal transport operator as defined in Article 1(2).<sup>5</sup>

Some points need to be clarified. First, there is a distinction between the words "mode" and "means" of transport. Sea, air and inland (rail-road) are

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<sup>1</sup>- There is a general rule, that where services provided can naturally be considered to be part of a unimodal service, the convention shall not be applicable. See, Selvig, The background to the convention, p.A4.

<sup>2</sup>- Article 1(1) of the IMTC.

<sup>3</sup>- Article 2 of the IMTC.

<sup>4</sup>- Article 1(3) of the IMTC.

<sup>5</sup>- Article 1(2) and 1(1) of the IMTC.

traditionally considered as "modes" of transport, whereas the methods or arrangements which are used for transport such as container or pallet are considered as "means" of transport.<sup>1</sup> A second point is whether a pipeline is a mode or a means of transport. For example, suppose oil is conveyed from an inland point of country A to a seaport through a pipeline and then is carried by a ship to country B, the question is whether this transport is unimodal or multimodal transport. In the writer's view, a pipeline is a mode of transport and, therefore, such transport is a case of multimodal transport.<sup>2</sup> A third point is whether a LASH (Lighter Aboard Ship) system<sup>3</sup> could be considered as unimodal or multimodal transport. The answer depends on whether the barges, which are lifted out of the ship and continue the voyage through rivers and lakes to the inland points, are regarded as part of the ship and the inland voyage is regarded as incidental to the sea voyage or not. If the barges are regarded as part of the ship and their voyage is, therefore, incidental to the sea voyage, the transport will be unimodal transport; otherwise it will be regarded as multimodal transport.<sup>4</sup>

It should be noted that the multimodal transport convention applies only to the relationship between the

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1- Mankabady, The multimodal transport of goods convention, p.125.

2- Ibid.

3- In LASH system the ship does not enter into rivers and lakes, but the barges which had been lifted into the ship are lifted out of the ship and continue the voyage through rivers and lakes.

4- Mankabady, The multimodal transport of goods convention, p.125.

MTO and the consignor,<sup>1</sup> i.e. the parties to a multimodal transport contract.<sup>2</sup> It does not, therefore, apply to the relationship between the MTO and the sub-carrier employed by him under a separate contract in order to perform a particular stage of the multimodal transport. Nor does it apply to the relationship between the consignor and the sub-carriers employed by the MTO.<sup>3</sup> These relationships are governed either by international Convention or by national law whichever may be applicable to the particular contract between the MTO and the sub-carrier.<sup>4</sup>

As has already been mentioned, there must be a multimodal transport contract for the Convention to apply. Also the application of the Convention to a multimodal transport contract is mandatory.<sup>5</sup> This means that no clause or stipulation of the multimodal transport contract can contract out of or derogate from the convention's provisions particularly to the detriment of the shipper. This principle is provided for in Article 3(1) of the

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1- Article 1(5) of the IMTC provides: " 'consignor' means any person by whom or in whose name or on whose behalf a multimodal transport contract has been concluded with the multimodal transport operator, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the multimodal transport operator in relation to the multimodal transport contract."

2- Anthony Diamond, Legal Aspects of the Convention, One day Seminar, Southampton University, 12 September, 1980, p.C8, hereinafter cited as "Diamond, Legal Aspects of the Convention"; Driscoll & Larsen, p.210; Selvig, the background to the convention, p.A4.

3- Selvig, The background to the convention, pp.A4-5.

4- Ibid, p.A4; Driscoll & Larsen, p.210.

5- It is to be mentioned that international conventions governing each specific mode of transport generally apply mandatorily, depriving the parties of freedom of contract. This makes any stipulation derogation from such mandatory provisions null and void.

multimodal Convention.<sup>1</sup> Therefore, any stipulation which contracts out of or derogates, directly or indirectly, from the provisions of the Convention is null and void. This invalidity applies only to such a stipulation and not to the contract as a whole.<sup>2</sup> However, there is an exception to the principle of the mandatory application of the Convention. E.g., if a clause in a contract increases the liability of the MTO under the Convention, such a clause, although it derogates from Article 28(1), is valid provided that it is inserted with the agreement of the consignor.<sup>3</sup> But if a clause of a contract decreases the liability of the MTO under the Convention, i.e. if the clause is to the detriment of the consignor, it is null and void even if it is with the agreement of the consignor because it derogates downwardly from the MTO's liability provisions of the convention. This is because the multimodal convention, in order to prevent such clauses, goes further than Article 28(1) and (2) and provides other mandatory provisions in Article 28(3) and (4), that "the multimodal transport document shall contain a statement

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<sup>1</sup>- Article 3(1) of the IMTC provides: "When a multimodal transport contract has been concluded which according to article 2 shall be governed by this convention, the provisions of this convention shall be mandatorily applicable to such contract."

<sup>2</sup>- Article 28(1) of the IMTC provides: "Any stipulation in a multimodal transport contract or multimodal transport document shall be null and void to the extent that it derogates, directly or indirectly, from the provisions of this convention. The nullity of such a stipulation shall not affect the validity of other provisions of the contract or document of which it forms a part..."

<sup>3</sup>- Article 28(2) of the IMTC provides: "Notwithstanding the provisions of paragraph 1 of this article, the multimodal transport operator may, with agreement of the consignor, increase his responsibilities and obligations under this convention".

that the international multimodal transport is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the consignor or consignee";<sup>1</sup> and if the claimant has incurred a loss as a result of the lack of such a statement in the multimodal transport document, the MTO must pay compensation to him.<sup>2</sup>

It is to be noted that during the discussions on the Convention some countries were of the view that the multimodal transport convention should have had optional application<sup>3</sup> and not mandatory application, in order to ensure the continued application of the ICC Rules and other standard conditions for the multimodal transport currently used, and in the meantime there would be an opportunity for the multimodal convention, which was a new and untried regime, to be experimented with.<sup>4</sup> This view

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<sup>1</sup>- Article 28(3) of the IMTC.

<sup>2</sup>- Article 28(4) of the IMTC provides: "Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 3 of this article, the multimodal transport operator must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this convention for any loss of or damage to the goods as well as for delay in delivery. The multimodal transport operator must, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted".

<sup>3</sup>- Such as the U.K.; UNCTAD, Report of the UN Conference on International Multimodal Transport on its resumed session, UN. Doc. TD/MT/CONF/16/Add.1, p.6, (1980), hereinafter cited as "UNCTAD, TD/MT/CONF/16/Add.1".

<sup>4</sup>- UNCTAD, TD/MT/CONF/16/Add.1; Driscoll & Larsen, p.240; Selvig, The background to the Convention, p.A19.

was not accepted and the Convention will be (once in force) of mandatory application first because the major negotiation Groups<sup>1</sup> on the multimodal transport convention in UNCTAD favoured mandatory application of the convention;<sup>2</sup> secondly, Article 3 of the multimodal convention makes it clear that the application of the convention to multimodal transport contract is mandatory; thirdly, Article 3(2) which provides "nothing in this Convention shall affect the right of the consignor to choose between multimodal transport and segmented transport" does not imply the optional application of the Convention. Rather it states that the consignor has the option<sup>3</sup> to determine the type of transport, i.e. unimodal transport or multimodal transport. That is to say, Article 3(2) clearly reminds the parties of the fact that they can choose between unimodal and multimodal transport. So, if they do not want to be involved in the mandatory character of the multimodal transport convention, they can

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1- The Groups were: 1) The Group of 77 (Developing Countries), 2) Group D (Socialist Bloc and the People's Republic of China 'PRC'), and 3) Group B (Developed Countries). All Group of 77 and D and even some States in Group B favoured the mandatory character of the convention. See Driscoll & Larsen, p.240.

2- UNCTAD, TD/MT/CONF/16/Add.1

3- Although Article 3(2) does not expressly state that the carrier's right of choosing between the multimodal transport and segmented transport, undoubtedly, it is also the right of the carrier to decide between multimodal transport and segmented transport unless the national law regulation provides otherwise. Thus, if the carrier acts as a common carrier who includes multimodal transport services as well as unimodal services he does not have the right of choosing between multimodal and unimodal transport but he has the duty to accept whatever the consignor might prefer. But if he does not offer multimodal transport services (only unimodal transport services), he need not accept the consignor's demand for a multimodal transport contract. See, Selvig, the background to the convention, p.A19; UNCTAD, TD/B/C.4./315/Rev.1, p.158.

instead choose segmented transport and enter into several unimodal transport contracts (one contract for each mode of transport) to which the Convention does not apply. Instead the relevant unimodal convention applies to each mode of transport. Thus, once the parties choose the type of transport and enter into a contract, whether unimodal or multimodal transport, their option has, in fact, been exercised. If they enter into a multimodal transport contract, then the multimodal convention will apply to it as mandatory.<sup>1</sup>

One can, therefore, conclude that the multimodal transport Convention is mandatory in respect of its application to an international multimodal transport contract, but it is optional in the sense that the choice of the mode of transport is preserved. It only applies when the choice is made in favour of multimodal transport (as defined), but when that choice is made it applies on a mandatory basis.

#### **5.4. The Liability of the MTO for Loss of or Damage to**

##### **Goods under the MT Convention**

As has already been mentioned, Part 3 of the MT Convention is the most important part as it is concerned with the MTO's liability. It is submitted that this part, (the MTO's liability) is the core of this Convention. Therefore, the following important points of this Part 3 need to be carefully discussed.

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<sup>1</sup>- Selvig, The background to the convention, p.A19.

#### 5.4.1. The system of liability under the MT Convention

The important point in multimodal transport is whether the loss of or damage to goods which occurs during the multimodal transport is localized (often called "known") or non-localized (often called "unknown" or "concealed"). It is localized when the place of loss or damage is known and can be attributed to a particular mode of the multimodal transport, otherwise it is non-localized loss or damage.<sup>1</sup> Any system of liability for multimodal transport should, therefore, be apt to cover both localized and non-localized loss or damage.

The liability system which was established by the Multimodal Transport Convention is neither the uniform liability system, nor the network liability system.<sup>2</sup> It is called a "modified network liability system"<sup>3</sup>. This was a compromise solution to reconcile those favouring the network system and those favouring the uniform system of liability for the MT Convention.<sup>4</sup>

Under the uniform system of liability, the liability regime (the basis of liability and limits of liability) of

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<sup>1</sup>- Jan Ramberg, *The Implications of new transport technologies*, (1980) 15 E.T.L. p.130, hereinafter cited as "Ramberg".

<sup>2</sup>- There were two alternative solutions to the MT Convention's liability system problem in front of those who negotiated it.

<sup>3</sup>- Driscoll & Larsen, p.210; Selvig, *The background to the Convention*, p.A14.

<sup>4</sup>- Jérôme Racine, *International Multimodal Transport. A Legal Labyrinth*, published in the *Essays in Air Law*, Edited by Arnold Kean, 1982, p.225, hereinafter cited as "Racine".

the MTO is the same, whether or not the loss or damage is localized to a particular mode of transport. In other words, the uniform system regulates the liability of the MTO uniformly throughout the entire multimodal transport irrespective of the particular liability regimes governing different modes of transportation. This system has the apparent advantage of simplifying the legal situation, and is more in keeping with the concept of multimodal transport as being separate from the unimodal systems of transport already available. However, the disadvantage of this system is that it does not allow for recourse action between the MTO and the sub-contractors for which the different systems of the multimodal chain must be used.<sup>1</sup>

Under the network system of liability, if the place of loss or damage is unknown the basis and limits of liability of the MTO cannot be determined as under that system it is essential to determine the place of loss or damage. On that depends which unimodal liability regime applies. Thus any liability for non-localized damage or loss must be specifically created and imposed on the MTO by Convention provisions which go beyond the network system. This is a problem with the network system. In other words, it does not apply to non-localized or concealed loss or damage without specific extensions.

Another criticism of this system is that its adoption would only have required the multimodal Convention to incorporate within itself numerous and different unimodal

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<sup>1</sup>- Ibid, p.226.

liability regimes.<sup>1</sup> Under the network system, if the loss or damage is localized to a particular stage of multimodal transport, the basis and limits of liability of the MTO will be the same as those of the liability regime applicable to unimodal carriers in that particular mode of transport. For example, if the damage is localized to the air leg, then the MTO's liability will be determined according to the provisions of the Warsaw Convention. Essentially the network liability system preserves and safeguards the various liability regimes established by the different unimodal transport conventions. The network system was used in the ICC Uniform Rules for a Combined Transport Document and is also utilised in current commercial practice.<sup>2</sup>

According to the liability system adopted in the MT Convention - the modified network liability system<sup>3</sup> - the basis of liability of the MTO is determined uniformly for the entire course of the multimodal transport whether the loss or damage is localized or non-localized.<sup>4</sup> Thus, in the case of localized loss or damage, the basis of liability of the MTO, unlike the network liability system

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1- Selvig, The background to the Convention, p.A14.

2- R. Vogel, Multimodal Transport: Impact on Developing Countries, 6, Ocean Yearbook, 1986, p.146, hereinafter cited as "Vogel".

3- The UNCTAD Secretariate in its report TD/B/AC.15/29 of 14 September 1977 was in favour of the two systems. The report states at p.25 par. 70 that "It would, on the other hand, be possible to stipulate in the proposed MT Convention that the network liability rule will apply only if the loss, damage or delay can be attributed to one unimodal carrier and that the MTO sui generis liability rules will apply if the loss or damage can be attributed to more than one unimodal carrier".

4- Article 16 of the IMTC.

is established by the Convention itself and has nothing to do with the liability regimes established by the different unimodal transport conventions. However, regarding the limits of liability of the MTO the network principle is applicable,<sup>1</sup> that is, the Convention is confined to determining the MTO's liability limits in cases of non-localized loss or damage, and in cases of localized loss or damage the MTO's liability limits will be the same as the liability limits mentioned in the relevant unimodal transport Convention or mandatory national law. However, if in such a case of localized loss or damage the MTO's liability limit under the relevant unimodal transport Convention or mandatory law is lower than his liability limit under Article 18 of the MT Convention, then it will be the latter which applies to determine the MTO's liability limit.<sup>2</sup>

It can, therefore, be concluded that under the "modified network" liability system which was adopted for the MT Convention, the basis of liability of the MTO will be determined uniformly according to the rules contained in Article 16 of the MT Convention, while the network liability system will apply, in respect of limits of liability, in case of localized loss or damage.<sup>3</sup> In all other instances the uniform limits of liability provided for in Article 18 will apply.

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1- Ibid, Article 19 of the IMTC.

2- Ibid.

3- Article 19 of the IMTC.

Lastly, it is to be noted that the developing countries rejected the network liability system because it would preserve the Hague/Visby system.<sup>1</sup> They favoured the modified network liability system. The pro-network liability system countries accepted the modified network liability system because the MT Convention guaranteed that the unimodal transport conventions would apply whenever by their own terms they would apply.<sup>2</sup> An example of this is Article 30(4) of the MT Convention under which it is accepted that carriage of goods under the CMR and CIM conventions shall not be considered multimodal carriage under the MT Convention to the extent that States Parties are bound by those Conventions.

#### **5.4.2. The Basis of the MTO and the Period of Responsibility under the MT Convention**

As has already been mentioned the MT Convention provides a uniform basis of liability. If loss or damage results, or delay in delivery occurs to the goods, whether localized or non-localized, the basis of liability is that the MTO is presumed to be at fault or in neglect, and he is liable for the loss resulting therefrom. In other words, the MT Convention system is based on the principle of presumed fault or negligence of the MTO. However, this presumption may be rebutted by the MTO, i.e. the burden of

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<sup>1</sup>- Selvig, The background to the Convention, p.A16.

<sup>2</sup>- Driscoll & Larsen, p.233.

proof is placed on him to prove that he has not been at fault once the consignor has established loss, damage or delay. Therefore, if the occurrence causing the loss or damage to the goods happens while the MTO is in charge of the goods, he is liable for it - whether it is localized or non-localized loss or damage - unless he proves that 1) he, his servants or agents or any other person referred to in Article 15 have not been at fault in causing the loss or damage, i.e. he proves that they all took all measures that could reasonably be required to avoid the occurrence and its consequences; or 2) the consignor or consignee caused the loss or damage.<sup>1</sup>

This principle of presumed fault or negligence follows the pattern established by the Hamburg Rules. As already stated, the Hamburg Rules, including their principle of the presumed fault or negligence of the carrier, was used as a model for the MT Convention.<sup>2</sup> Article 16 of the MT Convention which contains the main rule on liability, creates the uniform basis of liability. This is of considerable importance when the loss or damage occurs during a sea leg to which the Hague/Visby Rules would otherwise apply because the basis of liability in the Hague/Visby Rules<sup>3</sup>, unlike the Hamburg Rules, the Warsaw Convention and the Rail and Road Conventions<sup>4</sup>, differs

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1- Articles 16 and 17 of the IMT Convention.

2- Selvig, The background to the Convention, p.A13.

3- Under the Hague/Visby Rules there are many exceptions of liability. Also the liability limit is very low.

4- Selvig, The background to the Convention, p.A16.

from that under the MT Convention. Article 16(1) of the MT Convention provides:

"The multimodal transport operator shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Article 14, unless the multimodal transport operator proves that he, his servants or agents or any other person referred to in Article 15 took all measures that could reasonably be required to avoid the occurrence and its consequences".<sup>1</sup>

The question here is: what measures could be required "to avoid the occurrence and its consequences"? The test is, the standard of care which could be expected of a diligent MTO.<sup>2</sup> In other words, regard must be given to the course which would be pursued by a prudent operator in the circumstances of the case.<sup>3</sup> Furthermore, as science advances and new knowledge and methods are available, the standard required will become higher so that more will be expected from operators. The reasonable measures can be delegated to the operator's servants or agents.

It has been said that Article 16(1) introduces a two-fold test to the liability regime.<sup>4</sup> First, one has to ask: Did the occurrence which caused the loss or damage occur while the goods were in the operator's charge? If

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<sup>1</sup>- This Article is similar to Article 5 of the Hamburg Rules and Article 18 (1) of the Warsaw Convention.

<sup>2</sup>- UNCTAD, TD/B/C.4/315/Rev.1, p.172.

<sup>3</sup>- Mankabady, p.56.

<sup>4</sup>- Diamond, Legal Aspects of the Convention, p.C19.

it did, then the second limb of the test comes into play. That is, the operator is liable unless he can prove that he and those for whom he is responsible took all measures that could reasonably be required to avoid the occurrence and its consequences.

Further, the preamble of the MT Convention also makes it clear that the MTO's liability "should be based on the principle of presumed fault or neglect".<sup>1</sup>

It is to be noted that, as in the Hamburg Rules, the MT Convention defines delay in delivery in the following words:

"Delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent multimodal transport operator, having regard to the circumstances of the case".<sup>2</sup>

Thus, delay in delivery could occur in two situations:

- a) The parties might have agreed that the goods will be delivered within a time expressly agreed upon (so-called "time guaranteed transport"); or
- b) The delivery time might exceed the time which it would be reasonable to require of a diligent MTO.

However, when applying this test of reasonableness, regard should be had to the "circumstances of the case". This means that the MTO would avoid liability if he took all reasonable measures to ensure timely arrival of the goods. In other words, the same test which is set out in

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<sup>1</sup>- Paragraph (d) of the second part of the IMT Convention.

<sup>2</sup>- Article 16(2) of the IMTC; Article 5(2) of the Hamburg Rules.

Article 16(1) would have to be met. On the other hand, paragraph (3) of Article 16 enables the claimant to treat the goods as lost, if the goods have not been delivered within 90 consecutive days following the date of delivery determined according to paragraph (2) of this Article. Here the question may arise whether the claimant has the option to treat the goods as lost, if a delay exceeding the time permitted under Article 16(3) takes place, although they obviously exist, but in the wrong place. For example, a case may be considered of a stranding of a ship for which the operator is responsible under both paragraphs (1) and (2) of Article 16. As a result of the stranding, the ship must be taken to a port of refuge for provisional repairs. The question, it is submitted, should be answered in the affirmative, if the MTO had not been diligent in avoiding the stranding. If so, he must answer for any subsequent delay, including the risk that the claimant could choose to treat the goods as lost according to paragraph 3 of Article 16.<sup>1</sup>

Regarding the period of the MTO's responsibility, the principle adopted by the MT Convention is that the MTO is responsible during the whole period while the goods are in his charge. This period of responsibility begins from the time the MTO takes the goods in his charge until the time of their delivery, i.e. throughout the multimodal transport of the goods whether the MTO himself performs all modes of the transport or just performs part of the

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<sup>1</sup>- UNCTAD, TD/B/C.4/315/Rev.1, p.174.

transport and sub-contracts the rest to unimodal carriers, or sub-contracts to unimodal carriers the whole transport. This period was agreed by all the negotiating groups on the MT Convention<sup>1</sup> and was reflected in Article 14 of the Convention. Article 14(1) provides: "The responsibility of the multimodal transport operator for the goods under this convention covers the period from the time he takes the goods in his charge to the time of their delivery."<sup>2</sup>

Although the main principle expressed in para.(1) of Article 14 seems to be clear enough, there might be some practical difficulties in determining the period of responsibility, since the goods are often taken in charge by the MTO from a person other than the consignor himself, e.g. the consignor's servant or agent, and also the goods are often delivered by the MTO to a person other than the consignee. Therefore, the important questions are: from whom should the MTO take the goods into his charge? To whom should the goods be delivered? In order to determine the period during which the MTO is in charge of, and responsible for, the goods, the above questions need to be answered. The determination of this period is very

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<sup>1</sup>- Driscoll & Larsen, p.230.

<sup>2</sup>- This Article is similar to Article 4 of the Hamburg Rules. The only difference is the words "multimodal transport operator" have been substituted for the word "carrier", and the words "at the port of loading, during the carriage and at the port of discharge" have also been omitted in the MT Convention because the aim is to extend the place of taking charge of the goods by the MTO beyond the port area to an inland point which accords with the objective of the door-to-door service of the new transport technologies. Another reason is that by omitting the words "port of loading or discharge" the draftsmen of the MT Convention wanted to avoid any conflict with the Hamburg Rules. They also wanted to let it be known that the MT Convention is distinct and separate from the Hamburg Rules; Mankabady, p.51.

important because the liability of the MTO for loss of, damage to or delay in delivery of the goods depends, as will be seen, on the period of responsibility of the MTO, i.e. if the occurrence causing the loss, damage or delay happens between the time the goods are taken in the MTO's charge and the time they are delivered (during the period of responsibility), the MTO is liable, no matter in which mode of the transport the loss or damage occurs. On the other hand, loss or damage to the goods which occurs before or after the fixed period will not be the MTO's responsibility. In other words, if the loss, damage or delay occurs while the goods are in the custody of a person acting on behalf of the consignor or consignee, or in the custody of an authority to whom the goods must legally be handed over by the consignor for transport at the place of taking the goods in charge or by the MTO for delivery at the place of delivery, the MTO is not liable because it happened outside the period of his responsibility. The above points are covered by Article 14(2) of the MT Convention which provides:

"For the purpose of this Article, the multimodal transport operator is deemed to be in charge of the goods:

- a) from the time he has taken over the goods from:
  - (i) the consignor or a person acting on his behalf; or
  - (ii) an authority or other third party to whom, pursuant to law or regulations applicable at the place of taking in charge, the goods must be handed over for transport;
- b) until the time he has delivered the goods:
  - (i) by handing over the goods to the consignee; or

- (ii) in cases where the consignee does not receive the goods from the multimodal transport operator, by placing them at the disposal of the consignee in accordance with the multimodal transport contract or with the law or with the usage of the particular trade applicable at the place of delivery; or
- (iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the place of delivery, the goods must be handed over".

It is important to mention that there is no need for the MTO himself to take over or deliver the goods personally. It is sufficient that the MTO takes over or delivers the goods through his servants or agents or any other person whose services he makes use of for the performance of the multimodal transport contract, because the MTO's acts in Article 14(1) and (2) include acts of those persons; on the other hand, it is possible that the MTO takes over the goods from the consignor's servant or agent.<sup>1</sup> Thus, for instance, when the MTO takes over the goods from the consignor's servant or agent, he will be in charge of the goods from that time and his period of responsibility starts. Similarly if the MTO delivers the goods to a person appointed by the consignee in the multimodal transport contract by placing them in a certain location,

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<sup>1</sup>- Article 14 (3) of the MT Convention provides: "In paragraphs 1 and 2 of this article, reference to the multimodal transport operator shall include his servants or agents or any other person of whose services he makes use for the performance of the multimodal transport contract, and reference to the consignor or consignee shall include their servants or agents"; See also UNCTAD, TD/B/C.4/315/Rev.1, p.169; Driscoll & Larsen, p.230.

then his period of responsibility would have come to an end.<sup>1</sup>

It is noteworthy that during that period only the MTO is responsible for the goods against the consignor because it is only the consignor and the MTO who are the parties to the multimodal transport contract, and, as stated, the MT Convention determines only the relationship between the MTO and the consignor. The MT Convention, in fact, simplifies the situation, particularly for the shipper, because he, instead of dealing with many sub-carriers, with their different periods of responsibility, deals only with the MTO with one period of responsibility. Furthermore, it is important here to address the question, for whose acts or omissions the MTO is liable? Just for his own acts or omissions, or for somebody else's acts or omissions as well? As stated, reference to the MTO in paras. (1) and (2) of Article 14 of the MT Convention includes his servants or agents or any other person whose services he makes use of for the performance of the multimodal transport contract.<sup>2</sup> This means that the acts or omissions of the MTO's servants or agents or of any such person referred to in Article 14(3) are included in, and imputed to the MTO. This is made clear by Article 15 of the MT Convention which expresses the fundamental principle that the MTO is liable for acts or omissions of his own servants or agents or of "any other person of

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1. UNCTAD, TD/B/C.4/315/Rev.1, p.170; Driscoll & Larsen, p.230.

2. Article 14(3) of the IMTC.

whose services he makes use for the performance of the multimodal transport contract".<sup>1</sup> However, his liability is subject to the condition that the servants or agents must be acting within the scope of their employment,<sup>2</sup> or any such person referred to in Article 14(3) has acted in the performance of the multimodal transport contract.

Thus, Article 15 of the MT Convention provides:

"..., the multimodal transport operator shall be liable for the acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the multimodal transport contract, when such person is acting in the performance of the contract, as if such acts and omissions were his own".

It is suggested that this Article is an improvement on the Hamburg Rules text.<sup>3</sup> It attempts to give an answer to the question "for whose fault or negligence is the

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<sup>1</sup>- Article 15 of the IMTC.

<sup>2</sup>- It is argued that the words "acting within the scope of their employment or of the contract" have considerably cut down the impact of Articles 14 and 16 as it reduces the circumstances in which shippers may look to the MTO in the case of loss or damage. See M. Booker, *The effect of the multimodal convention on international shippers*, published in one-day seminar, Southampton University, 12 September 1980, p.E.3, hereinafter cited as "Booker"; There is a wealth of authority in the U.K. on the application of this phrase in other areas of law especially vicarious liability of an employer for his employee's actions. A full discussion of these cases is outwith the scope of this thesis. The effect on the MTO's liability will depend on how widely the phrase is construed. There has been a general tendency to apply the phrase fairly widely, e.g. Rose v. Plenty [1976]1 W.L.R. 141; the general principle has recently been stated thus: "An employee is acting in the course of his employment when he is doing what he is employed to do..., or anything which is reasonably incidental to his employment". Per Lord Goff of Chieveley in Smith V. Stages [1989]1 All ER.833 at p.836.

<sup>3</sup>- Diamond, *Legal aspects of the Convention*, p.C20; UNCTAD, TD/B/C.4/315/Rev.1, p.89

operator liable?" This question was left unanswered in the Hamburg Rules.<sup>1</sup>

It can thus be concluded that under the MT Convention the MTO is not only liable for his own acts and omissions in the performance of the multimodal transport contract, but also he may be liable for acts or omissions of a person other than himself, i.e. his servants, agents or any such person as is referred to in Article 15. His liability for these persons' acts or omissions is, however, subject to Article 21 relating to loss of the right to limit liability which will be discussed below.

Lastly, as to the burden of proof, it is important to note that the MT Convention does not adopt the extraordinary provision of the Hamburg Rules (Article 5(4)) that where loss or damage is caused by fire, the burden of proving negligence falls on the cargo claimant. The MT Convention seeks to remove this confusion by presuming fault in all cases of loss or damage to the goods and so imposing a uniform burden of proof falling on the MTO. Contrary to the Hamburg Rules, the MT Convention thus does not incorporate the Hamburg Rules' revised burden of proof on fire, contained in Article 5(4) of the Hamburg Rules. So, there is no fire exemption in the MT Convention. This means, there is only one type of burden

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<sup>1</sup>- According to Article 15 of the IMTC, the operator is liable for three classes of persons, namely, (1) servants, (2) agents, and (3) any other person of whose services he makes use for the performance of the multimodal transport contract. The Hamburg Rules merely refer to "servants or agents" and appears to leave the precise content of these expressions to be determined at a national level.

of proof within the MT Convention, which must be considered to be an advantage.

#### **5.4.3 The Limitation of the MTO's Liability under the IMTC**

All modern international transport conventions contain provisions for the limitation of the carrier's liability. This is first, because the carrier is enabled to know the extent of his liability for cargo loss or damage and can obtain an insurance policy based on that liability. Secondly, the underlying theory is that the carrier, who has no exact knowledge of the value of the goods he receives, should not be held liable in excess of their normal value. If the cargo owner wants a higher limit he must make a declaration of value and, in most cases pay an extra amount in addition to the freight.<sup>1</sup>

##### **5.4.3.1 The MTO's Liability Limit in Case of Non-localized or of Localized Loss or Damage to Goods.**

When the point in time at which the loss of or damage to the goods occurred is not known, and the MTO is liable under Article 16 of the MT Convention, i.e. it is proved that the loss or damage occurred during his period of responsibility, and he fails to prove that loss or damage was not the result of his failure to take all measures that could reasonably be required to avoid the occurrence causing the loss or damage, and he is not deprived of the right to limit liability, his liability is limited to a

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<sup>1</sup>- Jan Ramberg, The law of carriage of goods: Attempts at Harmonization, (1974)9 E.T.L.p.16, hereinafter cited as "Ramberg, the law of carriage of goods".

certain amount. It is determined subject to Article 18 of the MT Convention regardless of the stage at which the loss occurred. Accordingly, the calculation of the MTO's liability limitation amount depends on whether or not the multimodal transport includes a sea, or an inland waterways leg. Article 18, in fact, contains a two-tier method of calculation for determining the amount of the MTO's liability limitation which works either when the multimodal transport includes a sea or inland waterways leg of transport, or when it does not include such a leg of transport.

**1. The MTO's Liability Limit in Case of Non-localized Loss or Damage if a Sea Leg of Transport is included in the Multimodal Transport.**

In this situation the MT Convention did not choose an average between the limitation amounts used in the various international unimodal transport conventions, but chose to limit it to the amount applicable under the Hamburg Rules. The reason for this choice was that when a sea leg is included in multimodal transport it is almost always the major leg.<sup>1</sup> Therefore, the MTO's liability limit is, as under the Hamburg Rules<sup>2</sup>, based on either "per package or other shipping unit" or "the gross weight" of the goods lost or damaged, whichever is the higher. However, the

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<sup>1</sup>- Driscoll & Larsen, p. 237.

<sup>2</sup>- Article 6(1) of the Hamburg Rules.

limitation amount under the MT Convention is approximately ten per cent higher than that under the Hamburg Rules.<sup>1</sup> This dual formulation is provided in Article 18(1)<sup>2</sup> of the MT Convention under which the MTO's liability does not exceed 920 units of account<sup>3</sup> per package or other shipping unit, or 2.75 units of account<sup>4</sup> per Kg of gross weight of the goods lost or damaged. Of these the higher one will constitute the liability of the MTO and the claimant may choose whichever is more favourable for him. The reasons for choosing the "per package or other shipping unit" as a base for the calculation of the MTO's liability limit were that it was much more favourable than "per kilo" base for the consignor whenever there is light weight cargo, and that it applied traditionally to carriage of goods by sea.<sup>5</sup> So, for packages weighing less than 54 kilos, it is higher than both the Warsaw and CIM Conventions limit, and for packages under 110 kilos it is higher than the CMR Convention's limit.<sup>6</sup>

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1- It is also estimated as forty percent higher than under the Hague/Visby Rules; see Matthew Marshall, Insurance and the multimodal Convention, One day seminar, Southampton University, 12 September, 1980, p.D6, hereinafter cited as "Marshall".

2- Article 18(1) of the MT Convention provides:  
 "When the multimodal transport operator is liable for loss resulting from loss of or damage to the goods according to article 16, his liability shall be limited to an amount not exceeding 920 units of account per package or other shipping unit or 2.25 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher".

3- Under the Hamburg Rules it is 835 units of account per package or other shipping unit, and under the Hague/Visby Rules it is 666.67 per package or unit.

4- Under the Hamburg Rules it is 2.50 units of account, under the Hague/Visby Rules it is 2 SDR's per kilo, under the Warsaw Convention it is 17 SDR's per kilo, under the CMR it is 8.33 SDR's per kilo, and under the CIM it is 16 $\frac{2}{3}$  SDR's per kilo.

5- UNCTAD, TD/B/C.4/315.Rev.1, p.176.

6- Diamond, Legal aspects of the Convention, p.C23.

When the MTO's liability is calculated upon the per kilo limitation, a question which may arise is whether when only part of a package is lost or damaged, the MTO's liability limit should be calculated on the basis of the weight of such lost or damaged part or of the weight of the whole package of which the part is lost or damaged. It seems that the per kilo limitation should not be computed on the whole package but only on the weight of the part lost or damaged because Article 18 (1) implies that the base of such calculation is the gross weight of the goods lost or damaged. However, if the lost or damaged part is regarded as having a functional relationship to the remaining undamaged units, as for instance in the case of loss of or damage to the engine of a car, it might be reasonable to take the weight of the whole package into account in calculating the per kilo limitation.<sup>1</sup>

The dual formulation of "per package" and "per kilo" would cause the same problems in relation to container-package as in the Hague Rules. In order to resolve this problem the MT Convention has followed the Visby Rules and Hamburg Rules. It provides that if the packages or other shipping units inside the container or similar article of transport are enumerated in the multimodal transport document, then those numbers are deemed to be the number of packages or other shipping units; otherwise, if they are not enumerated, the goods inside the article of

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<sup>1</sup>- UNCTAD, TD/B/C.4/315.Rev.1, p.177.

transport are deemed to be one shipping unit for the purpose of the calculation of the higher limitation amount.<sup>1</sup> Therefore, in order to determine the higher amount in the case of goods carried in a container, it is necessary to find out whether or not the package or other shipping units inside the container have been enumerated in the multimodal transport document.

The MT Convention also provides that the article of transport itself is to be considered as one shipping unit in case of loss or damage to it if it is not owned or supplied by the MTO.<sup>2</sup> In other words, if the container is not owned or supplied by the MTO, it would be considered as one shipping unit in case of loss or damage to it. Thus, paragraph 2 of Article 18 applies a unified rule for the calculation of the amount of liability without taking into account the fundamental differences between the case of the full container load (FCL) and the less than full container load (LCL). In the case of FCL, usually an empty container is delivered to the shipper's premises where he loads the cargo and from there the container is collected by, or delivered to, the operator, while, in the case of LCL, the cargo which belongs to several shippers is delivered to the operator or the forwarding agent at the container base. The operator or the forwarding agent will then pack the goods into the container. The difference is that, in the FCL the shipper undertakes the

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<sup>1</sup>- Article 18(2)(a) of the IMTC.

<sup>2</sup>- Article 18(2)(b) of the IMTC.

"stuffing" of the container which will not be opened before arrival at its destination, while in the LCL the damage to the cargo could be caused by various reasons.<sup>1</sup>

**2. The MTO's Liability Limit in Case of Non-localized Loss or Damage if no Sea Leg of Transport is included in the Multimodal Transport.**

Unlike the situation when a sea leg is involved, the MT Convention chooses the amount applicable under the CMR convention. Therefore, the MTO's limit is based only on the gross weight of the goods lost or damaged. So, whenever no sea leg is involved in the multimodal transport, as evidenced by the multimodal transport contract, the liability limit provided for in Article 18(1) and (2) will not apply but Article 18(3) will. This is based on a single formulation for the calculation of the MTO's liability limit, i.e. per kg limitation with a higher amount, that is, up to 8.33<sup>2</sup> units of account per kg of gross weight of the goods lost or damaged. Paragraph 3 of Article 18 was in fact inserted in the MT Convention to reduce or remove the possibility of a conflict between the MT Convention and the existing unimodal conventions, because if this paragraph had been omitted, as suggested and favoured by the negotiating groups of 77, D and the PRC, there would have been a

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<sup>1</sup>- Mankabady, *The Multimodal Transport of Goods Convention*, p.130.

<sup>2</sup>- This limitation amount being identical to that in the CMR Convention.

conflict between the MT Convention's liability limit and the air, land and road transport conventions.<sup>1</sup> Article 18(3) of the MT Convention provides:

"Notwithstanding the provisions of paragraphs 1 and 2 of this Article, if the international multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the multimodal transport operator shall be limited to an amount not exceeding 8.33 units of account per kilogramme of gross weight of the goods lost or damaged."

This paragraph may produce a higher limit than para.1 of the same article for very heavy packages (packages weighing more than 110.5 kg), but normally (for packages weighing less than 110.5 kg) it produces a lower limit than Article 18(1). Thus when multimodal transport involves a sea leg, the limitation amount may be higher than when it does not. So, the MT Convention seems to put an end to the tradition that lower recoveries are made for transport by sea than for other modes of carriage.<sup>2</sup>

It can, therefore, be concluded that if there is non-localized loss or damage in multimodal transport involving a sea leg, Article 18(1) applies, but if such loss or damage does not involve a sea leg Article 18(3) applies to calculate the amount of the MTO's liability.

It should be noted that this kind of calculation of the amount of the MTO's liability limit also applies whenever the loss or damage can be localized to a particular mode

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<sup>1</sup>- Mankabady, *The multimodal Transport of Goods Convention*, p.131; Driscoll & Larsen, p.237.

<sup>2</sup>- Diamond, *Legal aspects of the convention*, p.C23.

of transport, but the MTO's liability limit under the modal convention or mandatory national law relevant to that mode is lower than that under the MT Convention.<sup>1</sup> For instance, if the multimodal transport involves a sea leg and the loss or damage occurs during the sea transport, the MTO's liability is determined according to Hague/Visby Rules limits, but since his liability under the Hague/Visby Rules is lower than that under the MT Convention, it is the MT Convention's liability limit of Article 18 which determines his liability limit for the localized loss or damage. The reason for it is that since Article 19 of the MT Convention only refers to a higher limit, it is not likely to be relevant for determining the MTO's liability in case of loss or damage localized to the sea leg.<sup>2</sup>

Article 19 deals with the localized loss or damage to goods. If the loss or damage can be localized and attributed to one stage of multimodal transport and the MTO is, in accordance with Article 16, liable, the provisions of Article 19 are applied by the provisions of the relevant unimodal transport convention, or by mandatory national law<sup>3</sup> applicable to that mode of transport, if the limits of liability under it are higher

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1- Article 19 of the IMTC.

2- Selvig, The background to the Convention, p.A15.

3- The mandatory national law was included in Article 19 of the IMTC, because of the persistence of the U.S., and the reluctance of other countries who wanted to make the Convention more attractive to the U.S; see Driscoll & Larsen, p.236.

than those provided in Article 18.<sup>1</sup> This is because of the modified network liability system upon which Article 19 has been based. Article 19 provides:

"When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law provides a higher limit of liability than the limit that would follow from application of paragraphs 1 to 3 of Article 18, then the limit of the multimodal transport operator's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law."

The reason for these provisions is that if the MT Convention accepted a lower limit of liability than that under the unimodal transport conventions, the consignor or consignee would, in such a case, have the possibility of recovering an amount up to the higher limit of liability applicable to the sub-contractor by a direct action against him.<sup>2</sup> Article 19 places the claimant in the same position as he would have been if he had concluded the contract directly with a unimodal carrier.<sup>3</sup> This could be the case with respect to air or rail carriage to which they apply, because they are the only two unimodal conventions which provide a higher liability limit than that under the MT Convention.

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<sup>1</sup>- Diamond, Legal aspects of the Convention, p.C24; Selvig, The background to the Convention, p.A15.

<sup>2</sup>- UNCTAD, TD/B/C.4/315. Rev.1, p.179.

<sup>3</sup>- Ibid, p.180.

However, Article 19 may give rise to some difficulties of interpretation. One may say that Article 19 should be interpreted in a manner which gives effect to its obvious purpose from its literal wording, i.e. applicable international conventions or mandatory national laws, if they provide for a higher liability limit than the MT Convention and are taken into account in order to remove the possibility of conflict between them and the MT Convention. Article 19 may also be interpreted to the effect that it is illogical to admit that international conventions and mandatory laws for unimodal transport of goods can be applicable to the multimodal transport contract because the MT Convention is based on the notion of a multimodal transport contract in principle independent from unimodal transport contracts and cannot, therefore, be applied by unimodal convention or mandatory national law. It seems that the former interpretation is correct because with the acceptance of the latter one Article 19, which has in some circumstances followed the unimodal conventions liability limits (network limits of liability), becomes redundant, and as a result the MT Convention, which is based on the modified network liability system, is put in question. If the second interpretation is accepted, it would be illogical for the MT Convention to accept the "network liability system" (even if modified) in any form.<sup>1</sup>

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<sup>1</sup>- Ibid.

In conclusion, in case of localized loss or damage, the MTO's liability limit is determined either by a unimodal transport convention or mandatory law, or by the MT Convention, depending on which one has the higher limit.

#### 5.4.3.2 Loss of the Right to Limit Liability

It has already been mentioned that if the MTO is liable for loss or damage to the goods, he will be entitled to limit his liability subject to Article 18 of the MT Convention. However, his right to limit liability may be lost if he caused the loss, damage or delay in delivery by an "intentional or reckless"<sup>1</sup> act or omission and with knowledge that such act or omission would probably result in the loss, damage or delay in delivery. Similarly, if the action is brought against a servant or agent of the MTO who was acting within the scope of his employment, or against a person of whose services the MTO made use for the performance of the multimodal transport contract, acting in the performance of the contract (like a subcontractor)<sup>2</sup>, each of them then has the right to limit his liability.<sup>3</sup> However, they will lose the right under the

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<sup>1</sup>- These expressions were already explained in chapter three of this thesis, (3.3.2 at p.196).

<sup>2</sup>- Driscoll & Larsen, p.231.

<sup>3</sup>- Article 20(2) of the IMTC provides:

"If an action in respect of loss resulting from loss of or damage to the goods or from delay in delivery is brought against the servant or agents of the multimodal transport operator, if such servant or agent proves that he acted within the scope of his employment, or against any other person of whose services he

same rules which apply to the MTO himself. These principles, respecting the loss of the right to limit liability, are enacted in Article 21 of the MT Convention which provides:

- "1. The multimodal transport operator is not entitled to the benefit of the limitation of liability provided for in this convention if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the multimodal transport operator done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.
2. Notwithstanding paragraph 2 of Article 20, a servant or agent of the multimodal transport operator or other person of whose services he makes use for the performance of the multimodal transport contract is not entitled to the benefit of the limitation of liability provided for in this convention if it is proved that the loss, damage or delay in delivery resulted from an act of omission of such servant, agent or other person, done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result."

A difficult problem may arise when the loss or damage is caused by the intentional or reckless acts or omissions of the MTO's servant or agent or of a person of whose services the MTO uses for the performance of the contract, but the action is brought against the MTO. If the MTO,

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makes use for the performance of the multimodal transport contract, if such other person proves that he acted within the performance of the contract, the servant or agent or such other person shall be entitled to avail himself of the defences and limits of liability which the multimodal transport operator is entitled to invoke under this Convention."

under Articles 15 and 16 of the MT Convention, is liable for such loss or damage, does he lose the right to limit his liability or is he entitled to that limitation? Article 15 of the MT Convention makes the MTO liable for acts or omissions of his servants or agents or of such person referred to in Article 14(3) but subject to Article 21. Article 15 provides: "Subject to Article 21, the multimodal transport operator shall be liable for the acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the multimodal transport contract, when such person is acting in the performance of the contract, as if such acts and omissions were his own".

It has been noted that the relationship between Article 15 and 21 is not clearly expressed in their language, and there is therefore an argument that if deliberate or reckless loss or damage was caused by the MTO's servant, agent or a person whose services the MTO uses in the performance of the multimodal transport contract, and an action is brought against him, he will lose the right to limit his liability, whereas if the action is brought against the MTO, the MTO will probably, under Articles 15 and 21, not lose the right to limit his liability because it probably cannot be proved that loss, damage or delay results from an act or omission of the MTO himself done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or

delay would probably result and, therefore, the deliberate or reckless loss, damage or delay cannot be imputed to the MTO.<sup>1</sup>

It seems that this reasoning is not correct, however, and that in a case like this also the MTO will lose the right to limit liability. This is, first, because, according to the express provisions of Article 15, the MTO's liability for the acts or omissions of his servants, agents or of other person referred to in Article 14(3) is subject to Article 21. This liability of the MTO (i.e. the liability under Article 15) is not limited if such act or omission is intentional, or reckless with knowledge that such loss, damage or delay would probably result. Secondly, the sentence "as if such acts or omissions were his own" of Article 15 implies that the actions of such other persons can be imputed to the MTO. Thirdly, it is not easy to observe the distinction between acts or omissions attributable to his servant, agent or to such other person because the MTO's liability, according to Article 15, includes the vicarious liability for his servants, agents or for such other persons.<sup>2</sup> Fourthly, during the MTO's period of responsibility the MTO's acts or omissions include the acts or omissions of his servants, agents or of any such other persons;<sup>3</sup> there is no reason why deliberate or reckless acts or omissions of such persons which cause the loss or damage are not

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1- Driscoll & Larsen, p.231.

2- UNCTAD, TD/B/C.4/315.Rev.1, p.183.

3- Article 14(3) of the IMTC.

included in the MTO's acts or omissions. Therefore, if a deliberate or reckless act or omission of such persons causes loss or damage, not only is the MTO liable, under Article 15, for such act or omission, but he also loses the right to limit his liability under Articles 15 and 21.

It is to be noted that the MTO is only liable for his servants' or agents' acts or omissions if they act within the scope of their employment, and is only liable for the acts or omissions of the other person referred to in Article 14(3) if he acts in the performance of the multimodal transport contract.

However, this uncertainty in Articles 15 and 21 could be resolved either by the courts or by the clarification in later protocols to the MT Convention.

## **5.5 Procedures of Action for Lost or Damaged Cargo under the IMT Convention**

As already mentioned, the procedures relating to claims and actions are very significant in doing justice to the parties. The following points, therefore, need to be discussed.

### **5.5.1 Notice of loss, damage or delay in delivery**

In considering the question of notice for loss, damage or delay, it is necessary to discuss such items as the nature of the notice; the length of time for the period of notice and whether there should be different lengths of

time for apparent and non-apparent loss or damage and delay; when to commence the running of the period of notice; and who is entitled to give notice of loss or damage. As will be seen, all of these elements came up for consideration during the discussion of Article 24 of the MT Convention.

This Article follows Article 19 of the Hamburg Rules as a guide. The notice of loss or damage must be given in writing and should indicate the nature of the loss or damage in general terms.

A distinction must, therefore, be made between two cases, that is, where the loss or damage is apparent and where it is not. In the former case, if the loss or damage occurs during the MTO's period of responsibility, the consignee must notify the MTO within one day. In other words, where the loss or damage is apparent, the consignee must give the notice in writing to the MTO forthwith, not later than the working day after the day of delivery of the goods, whereas in the latter case, if the loss or damage is non-apparent, notice should be given in writing to the MTO within six consecutive days of delivery of the goods. This short period is deemed necessary. It enables the MTO (but not in case of apparent loss or damage) to give notice to the underlying carrier under all unimodal transport conventions except the Hague/Visby Rules which contain a three days notice period.<sup>1</sup> In other

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<sup>1</sup>- The time limits for non-apparent loss or damage under the Hamburg Rules is 15 days (Art.19(2)), 14 days under the Warsaw Convention as amended by the Hague Protocol, 1955 (Art 26(2)), 7 days under

words, the time limit in the case of non-apparent<sup>1</sup> loss or damage is less generous than that under the unimodal conventions with the exception of the Hague/Visby Rules and has clearly been selected to protect and allow recourse by the MTO against the sub-contractors. This explanation helps us to understand a provision which strongly favours the interests of the MTO over those of the shipper in a convention which generally favours the shipper's interests.<sup>2</sup>

However, if the consignee fails to notify the MTO within these periods, this failure is prima facie evidence of delivery by the MTO of the goods as described in the MT document. These principles are enacted in Article 24(1) and (2) of the MT Convention which provides:

"1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the multimodal transport operator not later than the working day after the day when the goods were handed over to the consignee, such handing over is prima facie evidence of the delivery by the multimodal transport operator of the goods as described in the multimodal transport document.

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the CMR Convention (Art 30(1)), and 7 days under the CIM Convention (Art 46(2)(d.i)). See also, Driscoll & Larsen, p.229; Gerald F FitzGerald, *The United Nations Convention on the International Multimodal Transport of Goods*, 5 *Annals of Air & Space L.* (1980), p.46, hereinafter cited as "FitzGerald, 5 *Annals of Air & space L.*".

<sup>1</sup>- It has been noted that non-apparent loss or damage "is one of the crucial issues. For goods consolidated in containers, it is not until the containers are opened that the damage or loss can be ascertained, and it usually takes considerable time to ascertain the damage sustained. This is especially true when there is a great bulk shipment to unload". See, Wei Jia Ju, p.292.

<sup>2</sup>- Booker, p.E5.

2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this Article apply correspondingly if notice in writing is not given within six consecutive days after the day when the goods were handed over to the consignee."

Regarding loss or damage resulting from delay in delivery, the MT Convention has adopted the Hamburg Rules time limits for giving notice of claims for delay in delivery, that is, a notice in writing to the MTO is required within sixty consecutive days<sup>1</sup> after the day of delivery of the goods; but, if this stipulation has not been observed by the consignee, no compensation shall be payable for such loss or damage.<sup>2</sup> This period, however, is counted either from the time when the goods were delivered to the consignee or, if no such transfer has taken place, from the time when the consignee has been notified that the goods have been placed at his disposal<sup>3</sup> or have been delivered to a particular authority or other third party.<sup>4</sup> In fact, this is the most important provision in Article

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1- 60 days under the Hamburg Rules, 21 days under the CMR Convention, 60 days under the CIM Convention, and 21 days under the Warsaw Convention; it has been pointed out that "unfortunately, the 60-day period (under the MT Convention) effectively precludes the MTO from giving notice in time to permit a recourse action by the MTO against an underlying carrier where the underlying carriage is subject to one of the model conventions". See, Driscoll & Larsen, p.229; FitzGerald, 5 annals of Air & Space L, p.71.

2- Article 24(5) of the IMTC provides:  
 "No compensation shall be payable for loss resulting from delay in delivery unless notice has been given in writing to the multimodal transport operator within 60 consecutive days after the day when the goods were delivered by handing over to the consignee or when the consignee has been notified that the goods have been delivered in accordance with paragraph 2(b)(ii) or (iii) of Article 14."

3- Ibid; Article 14(b)(ii) of the IMTC.

4- Ibid; Article 14(b)(iii) of the IMTC.

24, since a consignee's failure to observe the other notice requirements only results in prima facie evidence that no loss or damage has occurred engaging the liability of the MTO.<sup>1</sup>

Furthermore, other questions of notice periods may also arise. If the loss or damage occurs while the goods are in the possession of the MTO, and such loss or damage is caused due to the fault or neglect of the consignor, his servants or agents (e.g. dangerous cargo inflicting damage on the MTO's property), is the MTO entitled to notify the consignor of that loss or damage? If so, what is the length of time for the notice period, and when does it start to run? To answer these questions, it is necessary to note that Article 22 of the MT Convention makes it clear that the consignor shall be liable for loss sustained by the MTO if such loss or damage is caused by the fault or neglect of the consignor, his servants or agents.<sup>2</sup>

Where the MTO wishes to claim for such loss or damage against the consignor, he is required to notify him in writing. Such notice shall be given not later than 90 consecutive days after the occurrence of such loss or damage or after delivery of the goods. However failure to

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<sup>1</sup>- UNCTAD, TD/B/C.4/315/Rev.1, p.189.

<sup>2</sup>- Article 22 of the IMTC provides:

"The consignor shall be liable for loss sustained by the multimodal transport operator if such loss is caused by the fault or neglect of the consignor, his servants or agents when such servants or agents are acting within the scope of their employment. Any servant or agent of the consignor shall be liable for such loss if the loss is caused by fault or neglect on his part."

give such timely notice by the MTO is prima facie evidence that he has sustained no loss or damage due to the fault or neglect of the consignor, his servants or agents.<sup>1</sup>

It is important to mention that Article 22 of the MT Convention does not provide for presumed liability of the consignor; it merely states that the consignor shall be liable for loss sustained by the MTO if such loss is caused by the fault or neglect of the consignor, his servants or agents. This means that the onus would, in any event, be on the MTO to prove that he had sustained the loss or damage due to the fault or neglect of the consignor, his servants or agents.

It is to be noted that the notice periods mentioned in paras. 2, 5 and 6 of Article 24 are consecutive and not interrupted by holidays. However, if the period expires on a day which is not a working day at the place of delivery of the goods, then it is extended to the next working day according to para.7 of Article 24 which provides:

"If any of the notice periods provided for in paragraphs 2, 5 and 6 of this Article terminates on a day which is not a working day at the place of delivery, such period shall be extended until the next working day."

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<sup>1</sup>- Article 24(6) of the IMTC provides:

"Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the multimodal transport operator to the consignor no later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2(b) of Article 14, whichever is later, the failure to give such notice is prima facie evidence that the multimodal transport operator has sustained no loss or damage due to the fault or neglect of the consignor, his servants or agents."

Thus, paragraph 7 of this Article is useful because the word "days" in the mentioned paragraphs of the same Article is preceded by the adjective "consecutive", and, without it, a non-working day would otherwise have to be taken into account in computing a notice period that ended on that day.<sup>1</sup>

The notice mentioned in this Article can, however, be given not only to the MTO or the consignor himself, but it may also be given to other persons authorized to receive notice on their behalf, including persons whose services are utilized at the point of delivery of the goods.<sup>2</sup>

Lastly, it is worthy of note that no notice is needed where there has been a joint survey or inspection by the parties.<sup>3</sup> Therefore, the MTO and the consignee shall give each other all reasonable facilities for inspecting and tallying the goods.<sup>4</sup>

#### **5.5.2 Limitation of Actions**

As under the Hamburg Rules, the MT Convention sets the limitation period for action (both for judicial and arbitral proceedings) at two years.<sup>5</sup>

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<sup>1</sup>- Gerald F FitzGerald, The Provisions governing notice of loss, damage or delay and limitation of actions in the United Nations Convention on International Multimodal Transport of Goods, 8 Annals of Air & Space Law, (1983) p.48, hereinafter cited as "FitzGerald, 8 Annals of Air & Space Law."

<sup>2</sup>- Article 24(8) of the IMTC.

<sup>3</sup>- Article 24(3) of the IMTC.

<sup>4</sup>- Article 24(4) of the IMTC.

<sup>5</sup>- Article 25(1) of the IMTC; Article 19(1) of the Hamburg Rules.

It should be noted that the "action" must relate to international multimodal transport as defined by the Convention<sup>1</sup>; otherwise the action falls outside the two-year time-bar provision. This means that, if the MT Convention does not apply, the action may come under another legal regime providing for a different period.

The period during which an action may, therefore, be brought against the MTO depends on whether or not a notice of claim, in writing, has been given to him within a certain time. In other words, it should be observed that in order to preserve the claim, notification in writing is required describing the nature and main particulars of the claim. Such notification has to be given within six months.<sup>2</sup> Thus, if the shipper or consignee gives the MTO a written notice of claim describing the nature and main particulars of his claim within six months after the day on which the goods have been or should have been delivered, he is allowed to bring action within two years commencing on the day on which the goods have been or should have been delivered.<sup>3</sup> If, however, the claimant fails to bring his action within a two-year period, his claim relating to the international multimodal transport will be time-barred. In other words, the time limit for bringing actions against the MTO is two years provided that the claimant gives notice within six months. The reason for giving a notice of claim to the MTO within six

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1- Article 25(1) of the IMTC.

2- Ibid.

3- Article 25(2) of the IMTC.

months is so that the MTO, who quite frequently has subcontracts with unimodal carriers, has enough time to bring a recourse action against the unimodal carrier during whose leg of carriage the loss or damage occurred. Otherwise, if the time for giving the notice were greater, the MTO's recourse action, which is likely to be governed by a unimodal convention, might be time-barred and, therefore, the MTO might lose the opportunity to claim indemnification from his sub-contractor since the time-bar under some unimodal transport conventions is very short.<sup>1</sup> Article 25(1) of the MT Convention provides:

"Any action relating to international multimodal transport under this convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. However, if notification in writing, stating the nature and main particulars of the claim, has not been given within six months after the day when the goods were delivered or, where the goods have not been delivered, after the day on which they should have been delivered, the action shall be time-barred at the expiry of this period."

If, therefore, the shipper or consignee fails to give the MTO a written notice of claim within six months, he is not allowed to bring his action afterwards, i.e. his action will be time-barred after the six months has expired.<sup>2</sup> Thus, depending on the situation, the time-bar

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<sup>1</sup>- The time limits for bringing actions against modal carriers under the Hague/Visby Rules, CMR and CIM Conventions are one year. It is two years under the Warsaw Convention.

<sup>2</sup>- Article 25(1) of the IMTC.

under the MT Convention is either six months or two years commencing from the day after the day on which the goods have been or should have been delivered. However, the parties may agree to extend the limitation period but this must be done by an agreement in writing. In other words, the MTO or his representative may extend the time limitation period by a written statement during the running of the limitation period.<sup>1</sup>

Furthermore, the MT Convention attempts to provide for recourse actions by the MTO. Accordingly, the MTO may bring a recourse action for indemnity even after the expiration of the limitation period established under the MT Convention, provided that the other international convention does not bar such an action and provided that the indemnity action is instituted within the time limits found under local law. It should also be observed that the additional period for recourse action is not less than ninety days. This period commences either when the MTO exercising his right of recourse has settled the claim or has been sued. Article 25(4) of the MT Convention provides:

"provided that the provisions of another applicable international convention are not to the contrary, a recourse action for indemnity by a person held liable under this convention may be instituted even after the expiration of the limitation period provided for

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<sup>1</sup>- Article 25(3) of the IMT Convention provides:  
"The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations."

in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted; however, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself."

It is to be noted that the words "under this Convention" are aimed to ensure that this paragraph would not deal with a recourse action by a consignor against the MTO, i.e., in the case where the consignor had been sued by the consignee, for late delivery or short delivery, and then took a recourse action against the MTO.<sup>1</sup> It should also be observed that the MT Convention does not extend limitation periods which may apply according to other applicable unimodal conventions.<sup>2</sup> There are, however, certain limitations found in para. 4 of this Article; these are:

1. the recourse action may be brought but only provided that the provisions of another applicable international convention are not to the contrary.
2. the recourse action of the MTO against the underlying carrier may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs of this Article, only if instituted with the time allowed by the law of the State where the proceedings are instituted, it being thereby understood that the minimum time is ninety

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<sup>1</sup>- FitzGerald, 8 Annals of Air & Space Law, p.56.

<sup>2</sup>- UNCTAD, TD/B/C.4/315/Rev.1, p.192.

days as specified in this paragraph. If there is no international convention to the contrary, the national law may or may not prove to be flexible depending upon the law of the court seized of the case.

3. the question of when the expiration of the limitation period, which is one of prescription (i.e. the period can be interrupted or suspended), takes place would have to be considered. It is very difficult to predict what fate will await an MTO in any particular country because of the varying approaches of courts to the problem of limitation periods in an international convention.

These remarks which are meant to be indicative, have been made in order to point out that para.4 of Article 25 would have to be examined in each particular case with respect to the specific underlying convention and the law of the State where the proceedings are instituted.<sup>1</sup>

Therefore, the best safeguard for the MTO is the provision in the second sentence of Article 25(1) whereby an action is time-barred unless notification of claim has been given before the expiration of the specified six months' period. So, if the MTO receives a timely notification from the claimant, he would, given the existence of limitation periods to which he is subject in

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<sup>1</sup>- FitzGerald, 8 Annals of Air & Space Law, p.56; UNCTAD, preparation of a preliminary draft of a convention on International Multimodal Transport, TD/B/AC.15/29, (14 September 1977), pp.38-46, hereinafter cited as "UNCTAD, TD/B/AC.15/29."

instituting recourse actions, have an incentive to take an early decision on whether or not to reject the claim. This would also shorten the period of uncertainty for the claimant. Moreover, the early settlement of the claim would give the MTO time to institute an action for indemnity against the underlying carrier. Similarly, early rejection of the claim might move the claimant to institute an action quickly against the MTO.<sup>1</sup>

### 5.5.3 Jurisdiction Clauses

The jurisdiction provisions of the MT Convention correspond to those of the Hamburg Rules. In other words, the provisions on jurisdiction under the MT Convention<sup>2</sup> are derived from Article 21 of the Hamburg Rules.

The MT Convention allows the claimant, at his option, to bring his action in a court that is competent according to the law of the forum state and whose territorial jurisdiction encompasses either<sup>3</sup>:

- a) the defendant's principal place of business or habitual residence; or
- b) the place where the multimodal transport contract was made; or
- c) the place where the MTO took charge of or delivered the goods; or

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1- FitzGerald, 8 annals of Air & Space Law, p.57.

2- Article 26 of the IMTC.

3- Article 26(1) of the IMTC.

d) any other place agreed by the parties and designated in the multimodal transport contract and in the multimodal transport document.<sup>1</sup>

Although the claimant is restricted to the options mentioned above, he can take legal steps in relation to protective or interim measures in other places so long as they are taken in a Contracting State<sup>2</sup>, for example, seizure of property belonging to the defendant.

Furthermore, the parties are free, after the claim has arisen, to agree on another place for the institution of an action than those provided for in paragraph 1 of Article 26.<sup>3</sup> Such agreements may be useful to the parties and each would presumably only agree if it was in his best interest.

Lastly, in order to prevent multiple actions in different places, Article 26(4)(a) provides that no new action can be instituted between the same parties on the same grounds, where an action has already been instituted or where judgement in such an action has been delivered. However, as has been said, if a judgement in the first action is unenforceable in a particular country, new proceedings might be started elsewhere. Article 26(4)(b) clarifies that it is not considered a new action when

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<sup>1</sup>- Article 27 of the IMTC made similar provisions regarding the place of arbitration.

<sup>2</sup>- Article 26(2) of the IMTC provides:  
"No judicial proceedings relating to international multimodal transport under this Convention may be instituted in a place not specified in paragraph 1 of this article. The provisions of this article do not constitute an obstacle to the jurisdiction of the Contracting State for provisional or protective measures."

<sup>3</sup>- Article 26(3) of the IMTC.

measures are taken to obtain enforcement of a judgement or when an action in the same country is removed from one court to another.<sup>1</sup>

#### **5.6 The problem of conflict between the multimodal transport convention and the existing unimodal Conventions; the solution to avoid the conflict**

With the coming into force of the multimodal transport convention, a problem which may arise is that of conflict between the multimodal transport Convention and the unimodal conventions. This problem arises if the MTO's liability for localized loss or damage is also governed by the relevant unimodal convention.<sup>2</sup> The conflict problem results, in fact, from the differing liability regimes of the multimodal transport convention and the unimodal conventions.

This conflict problem is particularly evident if we accept that the multimodal transport contract can be split up into several unimodal transport contracts since each unimodal transport contract will be for one segment of the

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<sup>1</sup>- Article 26(4) of the IMT Convention provides:

"(a) Where an action has been instituted in accordance with the provisions of this article or where judgement in such an action has been delivered, no new action shall be instituted between the same parties on the same grounds unless the judgement in the first action is not enforceable in the country in which the new proceedings are instituted;

(b) for the purpose of this article neither the institution of measures to obtain enforcement of a judgement nor the removal of an action to a different court within the same country shall be considered as the starting of a new action."

<sup>2</sup>- It was argued, in particular by the United Kingdom delegation, that the conventions governing sea, air, road and rail all applied to multimodal transactions and that there was therefore conflict. See D.C. Jackson, Conflict of Conventions, One-day seminar, Southampton University, 12 September 1980, p.G3, hereinafter cited as "Jackson, Conflict of Conventions".

unimodal transport to which both the multimodal transport convention and a unimodal convention relevant to that segment apply. However, as already submitted, the multimodal transport contract is a single contract concluded between the consignor and the MTO as a principal taking responsibility for the performance of the multimodal transport contract. It has a nature completely different from that of unimodal transport contracts since the parties have reached an agreement on that contract (multimodal transport contract) as a whole and not on any particular unimodal contract. If it is, by construction, split up into several unimodal transport contracts, it is impossible and unjustifiable to say that the agreement of the original parties is still available on the split contracts because, as stated, the parties had already reached their agreement on a single contract of multimodal transport. Thus, it is illogical that a multimodal transport contract, which should be regarded as a whole and is, in fact, a new type of contract, can be split up into several unimodal contracts.

It seems that, even if it is accepted that the multimodal transport contract is a new and distinct type of contract which can not be split up into several unimodal contracts, (which is the prevailing view<sup>1</sup>), the

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<sup>1</sup>- Professor Selvig points out that the prevailing view during discussions at UNCTAD was that the multimodal contract is a new and distinct type of contract which must be distinguished from the various contracts for unimodal carriage. He argues that: "it is not justified by construction to split up the multimodal contract into several unimodal contracts, one for each of the segments of the multimodal carriage. Hence, as long as the

conflict problem is still present. The problem arises with the sea and air unimodal conventions rather than with the road and rail conventions (CMR and CIM). This is because the CMR and CIM Conventions apply, as argued, neither to the multimodal transport contract nor to, respectively, the road or rail legs of the multimodal transport performed under a multimodal transport contract. Article 30(4) of the MT Convention expressly provides that the carriage of goods under Article 2 of the CMR or CIM is not considered multimodal transport governed by the MT Convention. However, some may conclude from Article 30(4) that there would have been conflict between the MT Convention and the CMR and CIM but for Article 30(4). Paragraph 4 of this Article appears to be intended to prevent the conflict; but, more accurately, Article 30(4) is not intended to prevent a conflict, since there is not, as argued, any; but rather to prevent any interpretation which poses a conflict.

As to the sea conventions - the Hague Rules and Visby Rules - the conflict problem becomes more complicated since, apart from the limitation amount, the basis of liability under the Hague/Visby Rules and MT Convention is

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unimodal conventions apply only to contracts for carriage by a particular mode of transport, the multimodal contract falls outside their scope, and a new multimodal convention does not conflict with the existing unimodal conventions." See UNCTAD Doc.TB/MT/CONF/12 Add.1 Annex IV, p.15; This view has also been mentioned in a number of background papers to the convention such as ICAO document 9096-LC/171, documents pp.96-106 which is a memorandum dealing with the Warsaw Convention submitted in 1974 to the legal committee of ICAO by the Norwegian Delegation; others include Professor Jackson's paper submitted to the IPG in UNCTAD document TD/B/AC.15/53 (1979).

not the same. A MTO who is liable under the MT Convention for sea loss or damage, may not be liable under the Hague/Visby Rules. In addition the MTO's liability limit under the Hague/Visby Rules is always lower than that under the MT Convention, and Article 19 of the MT Convention has, therefore, no effect to remove or reduce this conflict between the limitation amounts.

Conflict may also arise between the MT Convention and the Hamburg Rules because Article 1(6) of the Hamburg Rules, which provides "a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea...in so far as it relates to the carriage by sea," is so broad that it may be interpreted to include multimodal transport contracts. Accordingly, if the relevant States are parties to both conventions, then both conventions will apply as between the goods owner and the MTO to regulate the sea portion of the carriage.<sup>1</sup> However, since the basis of liability under the MT Convention and the Hamburg Rules are the same, the result of applying the two conventions will be, except as to the limitation amount, the same.

In order to avoid the problem of conflict, which may cause a great deal of litigation, the MT Convention attempts to resolve this issue in a number of ways by adopting the following provisions:

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<sup>1</sup>- Similar conflict is likely to arise between the amended Warsaw Convention (Articles 1 and 31 of the Warsaw Convention, 1929 and Articles 1 and 2 of the Guadalajara Convention, 1961) and the MT Convention; Diamond, Legal Aspects of the Convention, p.C8.

1. The provisions of para.1 of Article 1 have the effect that the operations of pick-up and delivery of goods carried out in the performance of a unimodal transport contract would not be considered as an international multimodal transport as defined in the convention. This provision was intended particularly to exclude air carriers' operations, usually coupled with pick-up and delivery operations done by a mode other than air, from being multimodal transport. In other words, this provision avoids the possibility of converting what are essentially unimodal transports into multimodal transports, thereby preventing conflict particularly in connection with air carriage.
2. As already mentioned, in respect of the MTO's liability for non-localized loss or damage, Article 18(3) has made a distinction between when the multimodal transport does not involve a sea or inland waterways leg and when it does. It has determined a higher limit when no sea or inland waterways leg is included in the multimodal transport. This was intended to remove or reduce the possibility of the conflict between the MT Convention's limit and that of the existing unimodal conventions.
3. Article 19 of the MT Convention has employed the applicable unimodal conventions and mandatory national laws to determine the MTO's liability for localized loss or damage. Although this would prevent the problem of conflict in some cases, i.e. when the limit

under the unimodal convention is higher than that under the MT Convention, the problem may appear in some other cases, i.e. when the limit under the unimodal convention is lower than that under the MT Convention.

4. Article 30(4) attempts to show that under the respective Article 2 of both the CMR (1956) and CIM (1970) the carriage of goods is not the same as multimodal transport within the meaning of Article 1(1) of the MT Convention. They should not be interpreted as meaning the same so as to create a conflict between the CMR or CIM on the one hand, and the MT Convention on the other. Article 30(4), in fact, prevents any interpretation which causes the problem. It provides:  
"Carriage of goods such as carriage of goods in accordance with the Geneva Convention of 19 May 1956 or the Contract for the International Carriage of Goods by Road in Article 2, or the Berne Convention of 7 February 1970 concerning the Carriage of Goods by Rail, Article 2, shall not for States Parties to Conventions governing such carriage be considered as international multimodal transport within the meaning of Article 1, paragraph 1, of this Convention, in so far as such States are bound to apply the provisions of such Conventions to such carriage of goods."
5. It has been said that Article 38 of the MT Convention is intended to avoid any remaining conflict of conventions, and is an escape route for those who

believe there may be a conflict of conventions.<sup>1</sup> This Article provides:

"If, according to Articles 26 or 27, judicial or arbitral proceedings are brought in a Contracting State in a case relating to international multimodal transport subject to this Convention which takes place between two States of which only one is a Contracting State, and if both these States are at the time of entry into force of this Convention equally bound by another international convention, the court or arbitral tribunal may, in accordance with the obligations under such convention, give effect to the provisions thereof."

Consequently, this Article does not apply if the multimodal transport takes place between two States which are both parties to the MT Convention.

However, this Article, it is suggested, is fraught with great uncertainty. The conflict is apparently to be resolved "in accordance with the obligations under such convention." Are such obligations to be determined according to principles of public international law? Article 38 appears to exist at the level of state obligations rather than of a level for resolving problems of private law. The decision as to which convention would ultimately apply will rest on the particular jurisdiction where the action is brought and this would encourage forum shopping.

Another difficulty is generated by Article 38 requiring that "other convention" binds the two states "at the time

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<sup>1</sup>- Jackson, Conflict of Conventions, p.68.

of entry into force of this convention." It would not apparently apply if the other Convention binds the two States at a later time. It is in any case rather anomalous that one convention should depend for its application in a State on whether another convention is in force in another State. Finally, a point of construction matters. The use of the word "may" in Article 38 ("the court...may...give effect to the provisions thereof") seems to indicate that the court enjoys a discretion whether or not to give effect to such provisions. Surely a conflict of conventions situation cannot be resolved by granting such a discretion. The word "may" it is suggested, should be read as "must."<sup>1</sup>

Such uncertainty may mean that courts will have to grapple with it to unfold its true meaning. This may result in a variety of interpretations which would defeat the principle of uniformity that the convention sets out to achieve. Perhaps the scope of its application could be properly defined by the national legislatures after it has been ratified; but if the domestic law of a State (that is a party to two conflicting conventions) provides that the operator's obligation shall be determined by the IMT Convention, then there may well be a derogation from the earlier convention, and the State will be in breach of its public international law obligations.<sup>2</sup>

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<sup>1</sup>- It is possible that the MT Convention uses "may" because of the difficulties arising from the conflicts rules of the forum; Diamond, Legal aspects of the Convention, p.C14.

<sup>2</sup>- Ibid.

However, in spite of the MT Convention solutions, the problem of conflict may still, as we have seen, remain in some cases. It has been suggested that one way to avoid conflict would have been for the MT Convention to require that the modes of transport should not be stated in the multimodal transport document. The unimodal conventions should be applicable to contracts of carriage by a specific mode of transport while the MT Convention would be applicable to contracts of carriage not specifying the modes of transport.<sup>1</sup> The idea is that the emphasis on the multimodal transport should be to carry the goods, without involving a number of contracting carriers whether linked together by forwarding agents or not, from the shipper's to the receiver's premises.<sup>2</sup>

There is another possible approach to the conflict issue. In my opinion, the limitation of liability for loss, damage or delay (per package or other shipping units or per kg) should be slightly increased, to the highest provided by the unimodal conventions e.g. Warsaw and CIM Conventions. In addition, as far as the goods are carried multimodally under a single contract (MT contract), then the MT Convention should be applicable to contracts of carriage whether or not the modes of transport are specified. Thus, we need not look at which limit is the higher under the applicable unimodal conventions or mandatory national laws, and also, whether or not the

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<sup>1</sup>- Mankabady, *The Multimodal Transport of Goods Convention*, p.140;  
Ramberg, *The Law of Carriage of Goods*, p.34.

<sup>2</sup>- Ramberg, *The Law of Carriage of Goods*, p.34.

international multimodal transport has included the carriage of goods by sea or inland waterways. Such a proposal, I think, will ease the applicability of the MT Convention whether the loss or damage is localized (no matter if such loss or damage has occurred during the sea, air, rail or road transport) or non-localized. In addition, it will be much fairer and more just for the MTOs, shippers, consignors, consignees and the other parties who are involved in international multimodal transport. It will produce a much clearer and simpler régime of rights and duties. It will more accurately reflect a truly multimodal situation. It is unduly complicated to involve the unimodal conventions so much. This, it is submitted, partially defeats the whole rationale of a multimodal convention by producing the conflict problems just discussed.

### Concluding Remarks

We may, therefore, conclude that the MT Convention has the advantage of being limited and specific in scope. The Convention applies only to international multimodal transport as defined. Its application is also restricted to the effect that it applies only to a single multimodal transport contract in which it governs only the relationship between the MTO and the consignor.

As in the Hamburg Rules, the liability of the MTO according to this convention is based on the principle of fault or neglect. It has also made possible a simplification of the liability regime because it became unnecessary to retain the catalogue of exceptions and certain other provisions specifying the duties of the MTO like those contained in the Hague/Visby Rules. This principle is, while different from the Hague/Visby Rules, close to the basis of liability provided for in the conventions for carriage by air, road and rail. Consequently, the MT Convention has imposed on the MTO a uniform burden of proof in all cases (no exceptions) of loss or damage to cargo. This must be considered an advantage in removing the confusion concerning the burden of proof under the unimodal conventions (e.g. Hague/Visby Rules and Hamburg Rules). Furthermore, under the MT Convention, the MTO's period of responsibility becomes more apparent when one realises the complex role of the MTO in the multimodal transport operations when employing

the services of different modes of transport to perform the multimodal transport contract. Thus, the period of responsibility has been extended to cover the entire period (throughout the multimodal transport) while the goods are in his charge. Clearly, there are advantages in imposing a liability which is uniform throughout the carriage, rather than one which varies with each leg. This certainly is an attraction to shippers in dealing with only one person (MTO) contractually, instead of dealing with many sub-carriers with their different periods of responsibility. It can, therefore, be said that the Convention brings the legal regime into line with current commercial practice.

The MT Convention clarifies the situation in relation to limits of liability of the MTO, by providing certain provisions which should be applied in case of localized and non-localized loss or damage to the goods, as well as when the multimodal transport involves a sea leg and when it does not. Further, although the Convention does not remove the diversity created by the international unimodal Conventions or national law, it provides a "floor" which uniformly applies in the absence of any higher limit. It is very important to note, however, that even though the limit of the unimodal convention or national law will apply to the MTO, the MT Convention's presumed liability regime will continue to apply to the MTO. It should also be noted that under this convention, both the MTO and his servants or agents lose the benefit of the limitation of

liability if it is proved that the loss, damage or delay was caused by the deliberate act of such a person, with the intent to cause damage or recklessly causing any possible damage that might result.

In relation to claims and actions, the MT Convention establishes a six consecutive days period of notice for non-apparent damage, and sixty consecutive days in case of delay. On limitation of actions, the Convention operates with a two-tier system, six months for written notice and two years for the action itself. It has been said that "This is of great benefit to cargo assureds because it gives them a better opportunity to fulfil one of the basic conditions of their insurance policy in safeguarding their rights. But relationships between different time bars can only be satisfactorily resolved for the MTO through individual arrangements with subcontractors."<sup>1</sup> As to jurisdiction, the MT Convention gives the claimant more than four options of places in which to institute proceedings. In brief, the Convention simplifies claim proceedings, i.e. the claimant claims in all cases against the MTO. This considerably reduces the administrative cost of handling claimants' claims.

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<sup>1</sup>- Marshall, p.D7.

### Final Conclusions

The Hague Rules keep the liability of the carrier on a low level. Its amendments have made some adjustments directed particularly to the limit of liability with due regard to the considerably increased value of cargoes and the wide usage of containers. Accordingly, the amendments have been few and not very significant in so far as the carrier's liability was concerned.

It is submitted that the Hague Rules did not meet the most elementary standards of legal technique, readability and good statutory language, whereas, the Hamburg Rules reach much higher standards than their predecessors and are built on realities in modern shipping. Thus they are in harmony with the needs of modern trade. The Hamburg Rules are intended to introduce radical changes in international maritime law. Their form and structure are markedly different from those of the Hague Rules. As a consequence, the Hamburg Rules would, when compared with the Hague/Visby Rules as to the carrier's liability, seem to achieve (though they have not solved all the problems) better solutions by clarifying and amplifying in various respects the regulation of carriage by sea, in that they:

1. Govern all documents used in maritime transport. It is possible to use transport documents other than bills of lading.
2. Extend their scope to cover a large number of voyages.

3. Expand the scope of the carrier's liability to cover the entire period during which the carrier is in charge of the goods, or to cover the carriage of live animals and the stowage of the goods on deck whether such liability emerges from physical or non-physical damage such as in the case of delay in delivery of the goods carried. The period of responsibility under the Hague/Visby Rules is shorter and is limited from tackle-to-tackle period only and the carrier's liability is excluded from applying to the carriage of live animals or the stowing of the goods on deck. It can therefore be said that the period of responsibility under the Hamburg Rules is wider and clearer than that under the Hague/Visby Rules and thus gives greater protection to the shipper.
4. Create a new system for the carrier's immunities rather than the catalogue of the seventeen exceptions provided by the Hague Rules.
5. Clarify the meaning of the word "unit" by using the terms "shipping unit."
6. Adopt a dual per kilo/per package limit as the Visby Rules do. Also, they do clarify when a container becomes a "package", with much the same result already achieved under the Visby Rules. Nevertheless, the Hamburg Rules have gone a little further than the Visby Rules by providing a useful stipulation that the container itself is to be considered as a package if supplied by the shipper.

7. Extend the period of notice in respect of non-apparent damage from three days to fifteen days.
8. Extend the time limit for action of loss or damage to two years, since the one-year period in the Hague Rules very often turned out to be short in practice. Thus, the two-years period is considered as a safeguard for the shipper's interests.
9. Give the claimant the right to institute his action before the competent courts of six different places, whereas, under the Hague Rules there is no provision concerning a jurisdiction clause for handling the claims. Thus, the Hamburg Rules, in terms of jurisdiction, have brought a flexibility and certainty to the claimant in his choice of court, as well as fairness and clarity to an unsettled, unpredictable area of international commercial relations. Furthermore, the Hamburg Rules also make it clear that arbitration proceedings are equivalent to suit in respect of time bar.

It is worthy of note that the obligation of the carrier in exercising due diligence which is restricted under the Hague Rules to providing a seaworthy ship, has been replaced by term of "reasonable measures" and that an implicit undertaking should be exercised throughout the period of carriage. This is, in our opinion, more practical and realistic in modern sea transport.

In respect of other questions concerning the carrier's liability, the solutions adopted by the Hamburg Rules are almost the same as under the Hague/Visby Rules; for instance, the liability of the carrier under the Hamburg Rules is still based on the principle of presumed fault or neglect and not of strict liability. However, as a result, the Hamburg Rules have the advantage of fitting much better into the overall framework of transport law conventions. This will facilitate the resolution of problems arising in connection with multimodal transport.

As we have already seen, even the Hague Rules included a compromise between the interests of the carriers and the shippers, involving both the developed and developing countries; but the balance is substantially changed in favour of shippers rather than carriers under the Hamburg Rules.

Hence, the liability regime under the Hamburg Rules provides, from a practical point of view, more than under the Hague Rules, a more solid basis for the settlement of cargo claims and enforcement of the cargo liabilities imposed on the carrier. As already discussed, it gives clear solutions to the main questions relating to the liability of the carrier for cargo losses. There is good reason, therefore, to be inclined toward the attitude which intends to increase the level of the carrier's liability, leading to a higher standard of care and decreasing the incidence of cargo damage, that is more predictably than the Hague/Visby Rules do in reducing

litigation and the expense of claims settlement, reducing also overall insurance costs.

Lastly, it is to be noted that the Hamburg Rules nowadays are perhaps the most important reforms in shipping law. While not entirely agreeing with certain provisions, it can be said that the Hamburg Rules represent a valuable contribution to the law of maritime transport when compared with the Hague/Visby Rules. They should as such be considered as a definite improvement both in substance and form. However, a vital body of Hague case-law will remain useful, as decisions on whether or not the carrier exercised due care of the cargo, as contrasted with fault or neglect.

In respect of the liability regime under the MT Convention, it is to be first of all mentioned that the principles governing the unimodal conventions are to a great extent different from each other, e.g. these conventions establish different rules of liability and different limits of liability for each segment of the multimodal transport. These differences make it very difficult to obtain an efficient and reasonable "synchronization" of these rules in multimodal transport contracts. Thus, under the present regime it is impossible to predict before the commencement of carriage which limit will be applicable in the event of loss or damage. These uncertainties are certainly impediments to the growth of multimodal transport and, in turn, international trade. The unimodal conventions are, therefore, inconvenient for

the multimodal transport of goods. It is difficult and complex to bring multimodal transport contracts under the network liability system which preserves the unimodal transportation systems. This results in unpredictability. This was why a set of rules suitable for multimodal transport of goods was required.

Under the MT Convention these problems will, at least to some extent, be solved because the Convention's modified network liability system has, to a large extent, taken account of the uniform liability system to solve the problems. In other words, the MT Convention helps to resolve several fundamental legal uncertainties in the area of liability in so far as the multimodal transport is concerned. This Convention has been made in a much broader field. It establishes, as already seen, several principles which are quite clearly expressed, such as the new basis of liability, the period of responsibility, the relative stability of the limitation of liability, and the stipulation regarding claims and actions.

The main purpose of the MT Convention is to establish for the international multimodal transport of goods, a liability regime applicable to the relations between the MTO and the consignors/consignees. Hence, the MTO's relations with consignors and consignees of multimodal shipments are governed by the liability regime of the MT Convention and not by the respective liability regimes applicable to underlying carriers used by the MTO.

The major achievement of this Convention is that it divides intermodal carriage into two levels of legal relationships: one between the shipper and the MTO, the other between the MTO and the underlying carrier. As a result, the unimodal liability regime remains unaffected, as it still governs the relationship between the MTO and the underlying carrier, while the relationship between the MTO and the shipper is significantly simplified and modernized. So, under this Convention, multimodal transport is governed by a single contract (m.t. contract), and the consignor or shipper deals only with the MTO who organizes the entire transport operation from "door-to-door". The multimodal transport contract/document, the freight rate, and insurance cover the entire multimodal transport journey. The MTO makes all arrangements with other carriers and all persons necessary to the multimodal transport of goods. He assumes liability for the performance of the multimodal transport and for the delivery of the goods according to the terms of his contract with the consignor. Accordingly, the MTO is liable for loss or damage to goods occurring at any time between taking charge of the goods and delivery, regardless of which mode of transportation is involved at the time of loss - no matter whether it is localized or non-localized. The MTO's liability provisions for non-localized loss or damage have, like other provisions of the Convention, mandatory character and cannot be contracted out of. This will remove a

defect of the present regime and effect uniformity regarding the MTO's liability for non-localized loss or damage in different multimodal transport documents. In this respect the MT Convention has even made a distinction between cases when the multimodal transport involves a sea leg and when it does not, so as to remove or reduce any probable conflict between its limit and the existing unimodal Conventions' limits. It establishes several limits on the liability of the MTO according to two criteria, by applying Article 18(1) in case of non-localized loss or damage when the multimodal transport involves a sea leg and Article 18(3) when it does not; and Article 19 in case of localized loss or damage depending on which has the higher limit. The general effect of the MT Convention, therefore, is to increase the level of carriers' liabilities.

The coming into force of the MT Convention, seemingly, will create a semblance of order out of the present chaos of liability systems now in force and thus achieve a measure of uniformity in the field of multimodal transport liability. The MT Convention represents a major step forward for all shippers, it gives them guarantees for 1) transit times and frequency of transport facilities; 2) through responsibility for the goods by one operator; 3) transport costs for shipments during longer periods of time. They will be better protected under this Convention than according to current practices based on the existing liability regime(s), because the carrier will no longer

have many exemptions allowed such as under the Hague/Visby Rules system; in addition, limits of liability will be equal to or higher than those now available. Furthermore, the MT Convention would expedite settlements because the law governing such settlements would be known. In concealed loss or damage situations, interested parties would no longer be able to escape responsibility by claiming that the applicable law was unknown. It would also expedite settlements because only one person, the MTO, would be responsible for the whole movement of the goods. In addition, the MT Convention would enable the exporters and importers to plan sales and purchases more efficiently, because they would be able to pass the responsibility of transportation to the MTO, who could be more easily reached than various carriers scattered throughout the world. Insurance underwriters could also benefit from the new coverage that would be required by the MTO's.

Lastly, one may ask: if the MT Convention has important economic effects in international carriage of goods, why has it not yet come into force? As has already been mentioned, the MT Convention was drafted under the auspices of UNCTAD and its provisions are broadly in line with the regime established by the Hamburg Rules. Both Conventions, it is to be noted, are related to carriage of goods by sea, the Hamburg Rules directly, and the MT Convention indirectly, whenever a sea leg is included in multimodal transport. The general scheme of liability is

similar. There is a direct relationship between the limits of liability. Also, there is a connection relating to claims and actions. Further, both of them reflect an attempt to establish a fair balance of interests between developed and developing countries. Accordingly, it is believed by some that the ratification process of the MT Convention will be accelerated once the Hamburg Rules have entered into force. In other words, the MT Convention cannot become a reality unless and until the Hamburg Rules come into force, since this would create a big gap between the liability of the MTO and that of the subcontracting sea carrier who would be liable only under the Hague/Visby Rules. Others believe that the reason for not considering the IMTC in the near future is that its economic benefits may not be significant.

However, despite the criticism (like those concerning other unimodal Conventions) faced by the MT Convention and the existence of different views, the usefulness of the Convention is much the same (or more) as that of any other international transport Convention. However, its significant effects to some extent cannot be as yet precisely determined until it is applied. Our view, then, is that, now, with the Hamburg Rules having come into force internationally on November 1, 1992, and, with the worldwide "container revolution" and the international commerce and technology developments in international carriage of goods, it can be expected, with the need felt for an international Convention governing multimodal

transportation, that the MT Convention will come into force some time in the future. This will have important effects on the commerce of all nations, including those not enthusiastic about its provisions, as well as those that favour it. Furthermore, it will provide a useful basis for interchange of experiences and opinions across borders. In the words of Tetley, "The Multimodal Convention of 1980 is an intelligent answer to most of the problems of combined carriage."<sup>1</sup>

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<sup>1</sup>- Tetley, 3rd ed, p.937.

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