THE MARITIME CARRIER'S LIABILITY
UNDER THE HAGUE RULES,
VISBY RULES AND
HAMBURG RULES

A thesis submitted for the degree

of Ph.D.

by

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To:

The spirits who gave me life,

My Wife

My three Sons.

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CONTENTS

ABBREVIATIONS

A.C.	-	Law Reports, Appeal Cases
AfS.	-	Arkiv for Sjørett
All E.R.	-	The All England Law Reports.
A.M.C.	-	American Maritime Cases
D.M.F.	-	Droit Maritime Francais.
E.T.L.	-	European Transport Law.
I.C.L.Q.	-	International and Comparative Law Quarterly.
IJJ	-	The Iraqi Juridical Journal
J.B.L.	-	The Journal of Business Law.
JICCD	-	The Journal of Iraqi Cassation Court Decisions.
JMLC	-	Journal of Maritime Law and Commerce
K.B.	-	Law Reports, King's Bench.
Ld. Raym.	-	Lord Raymond
LL.L. Rep.	-	Lloyd's List Law Reports
Lloyd's Rep.	-	Lloyd's Law Reports.
LMCLQ	-	Lloyd's Maritime and Commercial Law Quarterly
L.R.Ex.	-	Law Reports Exchequer.
L.T.	-	Law Times.
Q.B.	-	Law Reports, Queen's Bench
R.	-	Rettie's Court of Session Cases.
S.C.	-	Court of Session.
S.L.T.	-	Scot's Law Times.
T.L.R.	-	Times Law Reports.
Tul. L.R.	-	Tulane Law Review
U.S.	-	United States Supreme Court Reports
W.L.R.	-	Weekly Law Reports.

INTRODUCTION

In the past two decades many sectors of the marine transport industry have been subject to rapid technological and organisational change.

The most important technical development in shipping during the past two decades was, of course, the use of containerization in maritime transport. Container ships differ from conventional vessels in the hull design and structure and are equipped with special devices and appliances providing high efficiency of handling.

Undoubtedly, the container system has brought many advantages to the transport of goods by sea. One of the most important advantages of this system is the reduction of the total costs of the transport. On the other hand, goods shipped in containers do not require the amount and quality of protective packing applied to non-containerized shipments.

Another benefit of the container revolution is that the reduction of thefts and physical damages occur during the transportation of the goods.

The second technical development in shipping which must be considered is the introduction of computers and the improvement of ship-shore communications via maritime satellites.

It can be seen that, until the early part of the 19th century, any ship was operated by her master, it was he who found the cargo, negotiated freight rates, decided its route, the place of maintenance, and the number of the crew. No more than a handful of people were employed in the head offices of shipping companies at that time and shipbrokers did not exist.

However, with the introduction of the electric telegraph and radio, the role of the master diminished and most of his authorities were transferred to the shipowner. Under the new system of shipping management the shipowner through the head office of the company could communicate with his ships and give his orders.

It is convenient here to mention that the amount of goods increased rapidly during the last three decades as shown in the table below:(1)

Dray cargo carried by sea (in million metric tons)

1850	50
1900	200
1950	300
1960	550
1970	1,240
1980	1,820

It is to be noted that most of these goods were carried on terms set out in bills of lading.

The bill of lading is 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. When the bill of lading came into general use as a receipt for goods and a document of title, carriers began to insert on it various exception clauses to diminish their liability. That was the result of the 19th century freedom to contract for the shipment of goods.

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(1) Quoted by J.B. Yolland, Development of shipping and world trade, published in Sharja Arab Maritime Transport Academy Course in Shipping, January, 1982 p.1

But this situation was considered unsatisfactory because it removed any incentive to take care of the goods. Therefore the International Law Association held a conference in September, 1921 to standardize the rules which govern the contractual relationships between the carrier and cargo interests. The conference produced the Hague Rules 1921. These rules were slightly amended in the Brussels Conference of October, 1923, and as a result, the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading (commonly known as the Hague Rules) was signed on August 25, 1924.

The Hague Rules represented a change in the relationship of the parties to the contract of carriage, and in general beneffited the cargo interests. Meanwhile they gave the carrier some valuable exemptions from liability in certain circumstances. Under these rules the carrier was exempted from liability for the fault or neglect of his servants in the navigation or management of the ship (nautical fault) as well as in cases of fire. It should be borne in mind that, although the Hague Rules did not apply to charter - parties, their provisions could be incorporated in charter-party by the so called "Paramount Clause".

The Hague Rules which represented a historical compromise between the carrier and cargo interests have ruledthe subject of maritime transport more than half a century. However, the years which had intervened since 1924 had brought a number of new commercial and technical problems to which those rules provided no answer. These defects and many otheres led to the signing of the Protocal of February 23, 1963 (commonly known as the Visby Rules) to amend the Hague Rules. · These rules came into force for the ten signatory nations in June, 1977.

It should be mentioned that the amendments contained in the Visby Rules were few and most of them were not very important.

In regard to the limitation of liability the Visby Rules added a new system based on weight to the per package or unit system. They also abandoned the pound sterling as a unit of account and used the franc to avoid fluctuations in currencies. Under the auspices of the United Nations the efforts were resumed again to establish a new rules to replace the Hague Rules. The result of these efforts was the adoption of the "United Nations Convention on the Carriage of Goods by Sea" (commonly known as the Hamburg Rules) in a conference held in Hamburg from 6 - 31 March, 1978.

In respect of the carrier's liability the Hamburg Rules made some radical changes in the international maritime law.

It will be then necessary to consider the main feature of the carrier's liability under the Hague Rules, Visby Rules and Hamburg Rules. Thus, this study is divided into five chapters:

Chapter One - A historical survey of the carrier's liability.

Chapter Two - The basis of the carrier's liability.

Chapter Three- Scope of application of the Rules.

Chapter Four - The limitation of the carrier's liability.

Chapter Five - Problems of enforcing the carrier's responsibility.

CHAPTER ONE

A historical survey of the carrier's liability

A historical survey of the relationship between carriers and shipper show that a great deal of struggle has taken place as regards the damage sustained by goods in the course of sea carriage.

In order to follow the evolution of what we now know as "The Hamburg Rules" it is necessary for us to leave the year 1978 and go back to the early history of carriage of goods by sea to make a historical survey. Thus, this study is devided into three sections:

1. The situation before the Hague Rules.
2. The ratification of Brussels Convention and the reforms brought about by the 1968 protocol.
3. The ratification of the "United Nations Convention of the Carriage of Goods by Sea, 1978".

SECTION ONE

The situation before the Hague Rules

The Superior ease and even safety of water carriage made it the chief way, in the early history of the carriage of goods all over the world. Accordingly, from the earliest times "legal" problems arose out of this carriage.(1)

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(1) See Grant Gilmore and Charles Black, The Law of Admiralty, 2nd ed., New York, 1975. p.3.

This bring to attention the fact that both commerical shipping and its law, are very old, and the roots of the maritime law, began in the Mediterranean port towns.(1) In the early stages of carriage of goods by sea, the cargo owners used to accompany their goods through the voyage to look after the cargo. But sometimes the shipowner shares with the merchants in the ownership of the cargo., So he has a direct interest to take care of the cargo through the voyage.(2) The contract of carriage of goods through this period was often a mere oral agreement between the cargo-owner and the carrier.(3) The sea trade became less activity during the Dark Ages after the liquidation of Roman power. But it is flourished again with the rise of the great Italian trading City - States. Through this period special courts in Mediterranean port-towns were established to settle the disputes arising among the merchants. The desire of the merchants for settled guidence led to the recording of these judgements, and to the codification of the customs by which the merchants considered themselves bound.(4)

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(1) See Gilmore and Black, op. cit., p.4; See also Taha, Principles of maritime law, Alexandria, 1974, p.17; See also H. Garry Knight, The law of the Sea; Cases, documents, and readings parts 1 -3, Washington, 1976, p.5.

(2) See 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 S. Makalady, Leyden, 1978, p.251

(3) See S. Mankabady, The Brussels Bills of Lading Convention: Deficiencies and Suggested Reforms, a thesis for Ph.D degree, London University 1970 (hereinafter referred to as Mankabady The Brussels Convention) p.7.

(4) See Gilmour and Black, op.cit., pp.3-5.

In the northern Italian cities a new system started to be recognised around the 13th Century. That system was the Ship's clerk required to keep a book containing the details of the cargo and its ownership without mention of weight.(1) The goods which were carried were packed in various kinds of boxes, bags, barrels and baskets.(2)

The ship's clerk who was normally the first officer, used to issue an extract from this book to the cargo-owner. This document was really nothing more than a receipt for the goods.(3) Later, the terms of the carriage of the goods, and the exceptions were introduced by the carrier into this document, without any legislative restrictions. So the carriers used these exceptions to escape their liability (which will be discussed in detail) for damage sustained by the goods.(4) This was as a result of the principle of the freedom of the contract applied at that period.(5)

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(1) See Mankabady, The Brussels Convention, p.7.

(2) See M. Bayard Crutcher, The Ocean bill of lading, Tul. L.R. (1971) 45, p. 697 at p. 700.

(3) See W.E. Astle, Shipowner's cargo liabilities and immunities, London 1967, p.4.

(4) See Williams, op.cit., p.251.

(5) It is conventient here to mention that the imbalance between the parties of the contract and the abuse of the freedom of the contract are still existed nowadays under the general law of contract. In his comment on this point Walker said:-
"Agreement between the parties or CONSENSUS IN IDEM is the basis of contractual obligation, but increasingly in modern practice one party has little or no freedom to negotiate the terms of the agreement but must accept whatever terms the other part party offers, or do without the contract".
See D. Walker, the law of contracts and related obligations in Scotland, London, 1979, p.11; See also Schroeder Music Publishing Co. Ltd. v. MacLay (1974) 3 ALL ER. p. 616; See also George Mitchell Ltd. v. Finney Lock Seeds Ltd. (1983) 1 ALL ER. p. 108.

In the process of time this receipt developed into a document called bill of lading, which performed almost the same functions of the bill of lading as they are known today.(1)

The concept of the liability of the carrier by water under the common law through this period dating from Roman Law was as follows:

In the absence of a special contract, the common carrier of goods by reward(2) is absolutely liable for all damage sustained by the goods while they remain in his custody as a carrier, unless the damage was occassioned by the act of Gods, the Queen's enemies, the public authority, the fault of the shipper, or the inherent nature of the thing shipped.(3)

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(1) See Mankabady, The Brussels Convention, p.8.

(2) A common carrier by reward is one who is engaged in the trade of carrying goods as a regular business, and who offers his ship as a general ship for the transit of the goods of any shipper. See per Lord Travner in John Muir Wood and Co. v. G. and J. Burns (1893) 2o R., 602 at p.614. See also Scrutton, On charter-parties and bills of lading, 18th ed., London, 1974, p.198;See also Carver, Carriage by Sea, 12th ed. Vol.1, London, 1982, p.5., Jasper Ridley, The Carriage of goods by Land, Sea and Air, 4th ed. London, 1975, p.79; See also D. Barry Kirkham, The Common Law Liability of a Public Carrier by Sea (1976) 1 LMCLQ, p.282.

(3) See Narmada Mitrasen Agrawal, History of the Merchant Shipping Acts, a thesis submitted to the University of London, for the degree of M. phil. 1969, p.150; See also Ridley, p.81; See also Kirkham, op.cit., p.283.

When the bill of lading came into general use as a receipt for goods and as a document of title, carriers, in order to diminish their strict liability, began to insert on this document various exception clauses of liability.(1) During the nineteenth century, the aggregate of such exceptions to be found in the bill of lading was very large. These exceptions may be looked on as contractual additions to the common-law exceptions. Consequently, the exceptions were enlarged to read "the act of God, the king's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation of whatsoever nature and kindsoever excepted".(2) These exceptions have been still further extended until, as has been said "there seems to be no other obligation on the shipowner than to receive the freight".(3) Undoubtedly, these exceptions had a direct impact on the value of the bill of lading as a document of title, so the result of this was a lack of uniformity, and the deminished security of these documents for the transaction.(4)

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(1) See Gilmor and Black, op.cit., p.140.

(2) See Scrutton, op.cit., p.208.

(3) Ibid, p.208.

(4) See Astle, op.cit., p.4.

Moreover, in the 19th century, freedom to contract for the carriage of goods had became freedom for powerful carriers to impose unfair terms on the shippers who are in a weak position.(1) This was the position in all the trading states.

THE UNITED KINGDOM

In England:

Under the English law apart from express contract, the common carrier is with certain exceptions, absolutely liable for the safety of the goods while they remain in his custody as a carrier and an insurer of those goods. The master himself was liable in the same measure.(2) It has been said in this context that:

"It is interesting to note,..... that the high degree of responsibility imposed upon carriers of goods in England was developed by judges at a time when carters, lightermen, and hoymen were fellows of a low sort and, the gentry and judges felt they ought to be impressed with a duty to furnish service and do it properly and be restrained from conniving with thieves".(3)

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(1) See Malcolm Alistair Clarke, Aspect of the Hague Rules, a comparative study in English and French law, Hague, 1976. p.3; See also Alasdair Finnie, The search for uniformity and certainty in carriage of goods by sea, a thesis for M. Phil degree, University of Southampton, 1972, p.79.

(2) See Carver, vol. 1., p.6; M.B. Crutcher, op.cit., p.701; See also Agrawal, op.cit., p.150.

(3) Quoted from M.B. Crutcher, op. cit., p.702.

In the case of Coggs v. Bernard, Lord Holet said:

"The law charges this person thus intrusted to carry goods, against all events but act of God, and of the enemies of the king, for though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable".(1)

On the other hand, the English law until 1921 left the carriers and shippers free to make their contracts in any form they pleased, treating the parties as equals in a presumed process of bargaining, leading up to the shipment of the goods.(2) But in 1921 there was a change of policy. It had became recognised that the equality in bargaining power between carriers and shippers was unrealistic in the case of bills of lading, because the shipper had no opportunity to discuss with the carrier the terms of the contract which usually dictated by the carrier, either he accepted the contract with it's terms, or his cargo were not carried at all.(3)

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(1) $(1703)_2$ Ld. Raym. 909, at pra. 918.

(2) See Michael J. Mustill, Carriage of Goods by Sea Act 1971, A.F.S. Vol. ii, Oslo, 1972, p.684; See also Mankabady, The Brussels Convention, p.11.

(3) See Mustill, op. cit., p.684. It is convenient here to mention that until 1921 U.K. has largest fleet in the world and having correspondingly powerful shipowning Loby. See Diamond, The Hague - Visby Rules $(1978)_2$ LMCLQ p.225, at p. 227 (hereinafter referred to as Diamond, The Hague-Visby Rules).

This imbalance in the bargaining powers of the carrier and the shipper had given the carriers an opportunity to insert a wide variety of unreasonable exceptions of liability,or to limit his liability for loss of or damage to the goods to the value of the vessel and her freight for the voyage.(1) The British courts upheld the validity of these exceptions provided that they should expressly be stated in the bill of lading in clear words.(2) The editors of Scrutton said: "Exceptions are so numerous that an exhaustive enumeration is impossible".(3), but they gave a list containing a large number of exceptions which they believed to be a tolerably comprehensive list of exceptions which had come before the English courts.(4) The English courts used many methods to mitigate the harshness of these exceptions. For example, sometimes restrict its application to cases where the carrier did not unjustifiably deviate from the agreed or customary route of the voyage.(5)

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(1) See Abdul Baki. A. Falih, The Statutory limitation of the maritime carrier's liability under the Hague Rules, Visby Rules and Hamburg Rules, a thesis submitted for Ph.D degree University of Glasgow, 1980; p.5; See also Crutcher, op.cit., p.702.

(2) See Nelson Line v Nelson (1908) .A.C. p.16 at p.19; See also Carver, vol. 1., p.4; See also Gilmore and Black op. cit., p.142., See also Falih, op.cit., p.5.

(3) See Scrutton, op.cit., p.208.

(4) Ibid., p.208

(5) See David M. Sassoon and John C. Cunningham, Unjustifiable Devation and the Hamburg Rules, published in the Hamburg Rules on the carriage of goods by Sea, edited by S. Mankabady, Leyden, 1978, p.167.

The pressures of the efforts of the cargo interests which resulted in enacting the American Harter Act 1893, began to take place in the United Kingdom in spite of its tradition favouring freedom of contract, and its distaste for legislative interference with the commercial bargains.(1) From about 1921, therefore, it became the objective of the U.K. government to introduce uniform legislation on the subject of bills of lading throughout the Empire.(2) Accordingly, the carriage of Goods by Sea Act 1924 was enacted on the basis of the 1923 draft convention of certain rules relating to bill of lading.(3) Parliament did not wait even for the signature of the final version of the convention during August 1924 thus U.K. became the first of the many countries to give legislative force to this convention.(4)

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(1) Mustill, op.cit., p.685.

(2) See Diamond, The Hague - Visby Rules, p.227.

(3) Hereinafter referred to as Hague Rules.

(4) See Mustill, op. cit., p.685.

In Scotland

Under the Scot's law, the liability of the carrier is governed by the edict nautae caupones stabularii. "The rule of the edict is, that the persons comprehended under it being once chargeable with goods, they must answer for their restitution in the same condition, unless the goods have perished or suffered injury by the King's enemies or inevitable physical accident".(1) It is to be noted that under Scot's law the exceptions of liability in the carriage of goods under the bill of lading are similar to those under charter - party which include, the act of God and the King's enemies, the dangers and accidents of the sea, rivers, and navigation; the restraints and detention of Kings, princes, rulers and republics; and all and every other unavoidable dangers and accidents.(2)

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(1) Quoted from Bell, Commentaries on the law of Scotland, 7th ed., Vol. I Edinburgh, 1870, p.606; See also D.M. Walker, principles of Scottish private law, 3rd ed., Vol. I., Oxford 1983, p.323.
It is worthy of note here that, although Scots law based on Roman Praetor's Edict and English law based on Custom of the Realm the practition result is very similar. See A.R.G. McMillan, Scottish Maritime Practice, Edinburgh, 1926. p.160.

(2) Stevenson v. Likly, (1824), 35. 291; See also Bell, op.cit., p.606.

The United States

Prior to 1892, the common law also made the common carrier of goods liable to the cargo owner on an absolute basis for damage or loss, with the exceptions of loss or damage caused by an act of God or the public enemy, fault of the shipper, or by the inherent vice of the goods. This was summarized by an American court as follows:

"A carrier of goods by water like a carrier by land is an insurer, and though no actual blame is imputable to it, is absolutely liable, in the absence of a special contract limiting its liability, for all damages sustained by the goods intrusted to its care unless the damage is occasioned by the act of God, the public enemy, the public authority, the fault of the shipper, or the inherent nature of the thing shipped".(1)

It seems quite clear that all the shipper had to do to make his case was to prove that the goods were delivered in bad condition or non-delivery. If the carrier could not show that one of the "exceptions" shown above was the cause, of the loss or damage, he had to pay(2) for his liability outside these exceptions, that of a warranter of safe arrival, and fault was immaterial.(3)

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(1) Quoted from Judge Haight, The speaker's papers for the Bill of Lading Convention Conference organised by Lloyd's of London Press, New York 1978, p.I; See also John D. Kimball Shipowner's liability and the proposed revision of the Hague Rules, 7JMLC, 1975, p.220.

(2) See Gilmor and Black, op.cit., p.140.

(3) See ibid., p.140.

However, by the late 1800's it has been established that the carrier would be held liable for loss of or damage to cargo only if the cargo owner could prove negligence on his part in performing his duty to use care with respect to the cargo or to use due diligence to make the ship seaworthy. Moreover, it became the practice of carriers to stipulate that they should not be liable for the consequences of his employees or agents, including the master and crew of the vessel.(1)

Reference might with advantage be made here to the case of Clark v. Barnwell.(2) In this case it was held:

"For, as masters and owners, like other common carriers, may be answerable for the goods, although no actual blame is imputable to them, and unless they bring the case within the exception, in considering whether they are chargeable for a particular loss, the question is, not whether the loss happened by reason of the negligence of the person employed in the conveyance of goods, but whether it was occassioned by any of those causes, which either according to the general rules of law or the particular stipulations of the parties afford an excuse for non-performance of the contract. After the damage to the goods, therefore, has been established, the burden lies upon the respondent to show, that it was occassioned by one of the perils from which they were excepted by the bill of lading, and even when the evidence has been thus given bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shipper to show that, it might have been avoided by the excuse of reasonable skill and attention on the part of the persons employed in the conveyance of the goods, for, then, it is not deemed to be in the sense of the law, such a loss as will exempted the carrier from liability but rather a loss occassioned by his negligence and inattention to his duty".

(1) See kimball, op. cit., p.221

(2) 53U.S.(12How) 272,279-280(185);quoted from Kimball,op.cit.,p.221.

As has already been mentioned when the bill of lading came into general use as a receipt for goods and as a document of title, the carrier began to insert on this document various exceptions clauses of liability and began to limit his liability for loss of or damage to the goods caused by casualties occuring without his personal fault.(1)

Most of the American courts considered the negligence clauses invalid. The United States Supreme Court had declared it's objection to some outrageous clauses whereby carriers sought to exempt themselves from their own negligence.(2) The position of United States Supreme Court, no doubt is true, since the United States was not at that time a shipping country, to safeguard the interest of the shippers. But the American government felt that this judicial support was not enough to encourage the growth of shipping industry and to curb indiscriminate self-exculpation by carriers who abused freedom of contracting by virtue of their stronger bargaining power. The first legislation enacted in the United States was the Fire Statute, which enacted in 1851. This statute gave the common carrier a limited exception for losses by fire unless caused by the neglect of the carrier.(3)

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(1) See Supra, p.7; See also Crutcher, op.cit., p.707.

(2) See Liverpool and great Western Steam Co. v. Pheonix Ins. Co., (1889) 129 U.S.397; See also Joseph C. Sweeney, Review of the Hamburg Conference, published in the Speaker's papers forthe Bill of lading Convention Conference, organised by Lloyd's of London Press, p.2 (hereinafter referred to as Sweeney, review); See also Mankabady, The Brussels Convention, p.11.

(3) See John C. Moore, The Hamburg Rules (1978) 10 JMLC, p.I.

In February 1893 the Harter Act was enacted. This act did represent a compromise between shippers and carriers interests. So the Harter Act made the first important changes in the common law duties, rights and liabilities of the carriers of goods by sea.(1)

The essence of this compromise lay in the imposition of the carrier's non-delegable duty to exercise due diligence to make his vessel seawothy.(2) On the other hand, the Act relieved him from liability resulting from enumerated causes, notably negligent management and navigation of vessel if due diligence was exercised to make the vessel seaworthy.(3) Moreover, the Harter Act required the carrier to issue a bill of lading showing the marks necessary for identification, the number of packages or quantity of the goods ,and the apparent order of goods received for transportation.(4)

The Harter Act was followed by the Australian Sea Carriage of Goods Act 1904 and the Canadian Water Carriage of Goods Act 1910.(5) It may be worthy of note that,the Harter Act is still regarded as a remarkable statute in the field of shipping law.(6)

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(1) See Crutcher, op.cit., p.710; See also Sweeney, Review, p.3; See also Kimball, op.cit., p.222.

(2) See Section 3 of the Harter Act.

(3) See Haight, op.cit., p.3; See also Kimball op.cit., p.222.

(4) See Section 4 of the Harter Act.

(5) See Sweeney, Review, p.3; See also Mustill op.cit., p.685. It is convenient here to mention that the self governing dominions, who did not have a strong shipowing lobby, had been quick to follow the lead given by the United States. See Diamond, The Hague-Visby Rules, p.227; See also M.J. Shah The revision of the Hague Rules on bills of lading within U.N. System key issues, published in the Hamburg Rules on the carriage of Goods by Sea, edited by S. Mankabady, Leyden, 1978, p.3.

(6) See Diamond, The Hague - Visby Rules, p.226.

SECTION TWO

The ratification of Brussels Convention and the reforms brought about by the 1968 Protocol

The ratification of Brussels Convention:

With the growth of international trade, accelerated by the development of steamships, uniformity was very much needed as a basis for bills of lading. Accordingly, many efforts prior to the ratification of Brussels Convention had been made to achieve a uniformity of the Rules governing bills of lading.

The beginning of international uniformity of this subject are found in the negotiation between cargo owners and carriers in England.(1) In October 1865 a conference was held in Sheffield for this purpose followed by another conference held in London.(2) There was a series of such conferences, the London Conference, August, 1879, the Berne Conference, August 1880, the Cologne Conference, August, 1881.(3) In 1882 a conference was held in Liverpool to discuss a suggestion under the title "The common form of bill of lading" relieving the carrier from liability for negligent of his employees in addition to the exception of the common law "Act of God, public enemy, the fault of the shipper and the inherent nature of the thing shipped". But this proposal was met with serious opposition from many interested bodies.(4)

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(1) See Moore, op.cit., p.1.

(2) This conference was made up of delegates from Lloyd's Salvage Association, the Sunderland Shipowners Association, The Chamber of Commerce of Liverpool and other interested in the field of maritime law. See Mankabady, The Brussels Convention, p.16; See also Falih, op.cit., p.7.

(3) See Mankabady, The Brussels Convention, p.17.

(4) See Falih, op.cit., p.7; See also Moore, op.cit., p.1.

This proposal was discussed again in a conference held in Hamburg 1885. After a long discussion the conference introduces some changes to the proposal. Again this proposal was opposed by the shipowners. Another series of conferences were held to discuss the terms of the bill of lading; London, July, 1887, Genoa, October, 1892 and London, October, 1893. After the successful conclusion of the new international rules on Collision Damages and Salvage in 1910 the Comité Maritime International (C.M.I.),(1) prepared to make new international rules which would regulate the ocean bill of lading.(2) The efforts were suspended during the First World War 1914-1918 which caused great losses to international shipping because of submarine warfare blockades and nationalizations.(3) After the war,efforts were resumed. The International Law Association met on May 1921 at Portsmouth and set up a maritime law committee to consider the rules on bills of lading.(4)

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(1) The C.M.I. was founded in 1897 as an outgrowth of the International Law Association for maritime specialists: lawyers, shipowners, shippers and underwriters. See Joseph C. Sweeney, The UNCITRAL Draft Convention Carriage of Goods by Sea (part 1), (1975) LMCLQ, p.69. (hereinafter cited as Sweeney, part 1).

(2) See Sweeney, Review, p.3; See also Moore, op.cit., p.2.

(3) See Abdul Rahman Salim, The exception clauses of liability according to the bills of lading convention, a thesis for Ph.D degree, Cario University, 1956, p.69.

(4) See Astle, op.cit., p.5; See also Moore, op.cit., p.2.

This committee held its first meeting in London in May, 1921 and proposed a draft of set of rules governing the liability of the carrier, these rules based on the compromises contained in the United States Harter Act.(1)

At the Hague conference of September, 1921 the international law association selected a small executive committee. This committee drew up the agreement known as the Hague Rules, intended for voluntary adoption by carriers in their bills of lading.(2) These rules were adopted under the name of the "Hague Rules 1921". The aim of the rules was to achieve international uniformity in bill of lading contracts by adopting a set of rules of a fair and equitable character. But following the meeting at the Hague, it was soon apparent that the realization of general uniformity by voluntary adoption was unlikely.(3) The rules were further discussed by the International Law Association at Buenos Aires in October 1922 and by the Comité Maritime International at London Conference shortly afterwards. The later conference found that the rules could form the basis of international convention after introducing slight amendment. The Diplomatic Conference which was held in Brussels in October, 1922 appointed a committee to study these amendments. This committee met in October, 1923 at Brussels and fulfilled these amendments.(4)

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(1) See Sweeney, Review, p.3; See also Haight, op.cit., p.3.

(2) See Clark, op.cit., p.5.

(3) See Astle, op.cit., p.5.

(4) See Falih, op .cit., p.9.

At Brussels conference of October, 1923 the said committee submitted a draft convention.(1) This draft was adopted as a convention by the Brussels conference on 25th August, 1924.(2) Article 11 of the convention states: "After an interval of not more than two years from the day on which the convention is signed, the Belgian Goernment shall place itself in communication with the Governments of the high contracting parties which have declared themselves prepared to ratify the convention, with a view to deciding whether it shall be put into force. The ratifications shall be deposited at Brussels at a date to be fixed by agreement among the said governments. The first deposit of ratifications shall be recorded in a proces-verbal signed by the representatives of the powers which take part therein and by the Belgian Minister for Foreign Affairs. The subsequent deposits of ratifications shall be made by means of a written notification addressed to the Belgian Government and accompanied by the instrument of ratification....." The convention has been ratified by more than sixty states and imitated in many others.(3)

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(1) The differences between the draft of the convention and the Hague Rules 1921 are:
1) The draft of the convention contain the "Gold Clause", whereas the Hague Rules did not include this clause.
2) Article 1(e) of the Hague Rules 1921 provides that the "Carriage of goods covers the period from the time when the goods are received on the ship's tackle" whereas article 1(e) of the draft of the convention provides that "Carriage of goods covers the period from the time when the goods are loaded on to the time when they are discharged from the ship". See Astle, op.cit., p.51.

(2) Herinafter called "The Hague Rules". The convention is known as the "Hague Rules" because the debates leading to the construction of the rules took place at the Hague in Belgium. See Mankabady, The Brussels Convention, p.30; See also James J. Donovon, Existing problems under the Hague Rules and the need for changes in U.S. Legislation, published in the Speaker's papers, p.1.

(3) See N.R. McGilchrist, The New Hague Rules, (1974) 3 KMCLQ, p.255.

As has already been mentioned U.K. and the commonwealth were the first nations to introduce legislative measures to bring the Rules into legal effects, and on January 1st, 1925 the British Carriage of Goods by Sea Act 1924 came into effect.(1) It should be borne in mind that the convention did not come into force until 1931, one year after the deposit of ratification by the United Kingdom, Spain, Belgium and Hungary.(2) The United States adopted the Hague Rules in 1936 by passing the Carriage of Goods by Sea Act (COGSA). Thereafter other maritime states like the Scandinavian countries completed the ratification process.

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(1) See Astle, op.cit., p.5; See also Diamond, Hague-Visby Rules, p.226.

(2) See Sweeney, Review, p.3.

(3) Paragraph 2 of the protocol attached to the Hague Convention provides:
"The high contracting parties may give effect to this convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under this convention". This paragraph gives the contracting states option of either adopting the rules of the convention or incorporating these rules in municipal legislations. Some of the contracting states like France and Italy were adopted the Rules, but others like the U.K. and the U.S.A. were passed municipal legislations which incorporated the Rules. See S. Mankabady, Interpretation of the Hague Rules (1974) LIMCLQ, p.125; See Sweeney, Review, p.3; See also Astle, op.cit., p.5.

The Situation under the Hague Rules

The Hague Rules have been successful in dealing with the following points:

1) The Hague Rules have redressed the traditional imbalance which had formerly existed as between carrier and cargo owner. In place of the wide exceptions clauses which exempting the carrier from loss or damage sustained by the cargo. The rules imposed upon him a duty to use due care to put his vessel in good condition for the voyage and to care properly for the goods entrusted into his custody.(1)

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.(2)

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 later".(3)

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(1) See Diamond, The Hague - Visby Rules, p.226.

(2) See Sassoon and Cunningham, op.cit., p.167.

(3) See per Viscount Simonds in Riverston Meat Co., Ltd. v. Lancashire Shipping Co. (1961) A.C. p.807 at p.836.

3) The Hague Rules have proven successful in their principal objective of regulating and standardising the contractual relationship between the carrier and cargo interests by controlling the bill of lading terms, and this undoubtedly is very important to the speedy conduct of commerce and settlement of claims.(1)

4) The Hague Rules encourage quick settlement of disputes by stating 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.(2)

The general scheme of the convention is as follows:

1) The carrier is 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 cool chambers, and all other part of the ship in which goods are, carried ,fit and safe for their reception, carriage and preservation".(3) The carrier was also responsible to properly and carefully load, handle, stow, carry, keep, care fore ,and discharge the goods carried.(4)

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(1) See Donovan, op.cit., p.1; See also Mankabady, The Brussels Convention, p.45.

(2) See article 3(6) of the Hague Rules.

(3) See article 3(1)

(4) See article 3(2)

2) Under article 4(2) the carrier was exempted from liability for loss or damage arising or resulting from a considerable catalogue of occurrence. The catalogue includes 17 ex emptions.(1)

3) The responsibility of the carrier for goods under these rules cover the period from the time when the goods are loaded on to the time they are discharged from the ship.(2)

4) In the event where the carrier accepts liability and the nature and value of the goods are not declared and insert in the bill of lading, the rules entitle him to limit his liability in an amount not to exceed 100 pounds sterling per package or unite.(3)

5) According to article 10, the convention should apply to all bills of lading issued in any of the contracting states. In spite of establishing solutions to the interests of shippers and carriers ,and standardizing the responsibilities and liabilities of carriers at an international level. The years which had intervented since 1924 had th rown up many defects in the Hague Rules and also a number of new problems to which the rules provided no answer, these defects are:

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(1) See article 4 (2)

(2) See article I (e)

(3) See article 4 (5) of the Hague Rules.

1) The Hague Rules retained the important carriers exception from liability, and particularly those relating to negligence in management and navigation, fire and perils of the sea. Moreover, even if the carrier accepts responsibility his liability was limited to £100 per package or unit . For this reason the Hague Rules were considered unduly favourable to shipowners interests.(1)

2) Some contracting countries when introduced the Rules in their domestic legislations, ignored article 10 of the rules. For example ,the United States made its legislation applicable to outward and inward bills of lading.(2) But U.K. made its act applies only to outward bills of lading only. This thing will lead to many problems by reason of a possible conflict of laws, especially when no clause showing the law govern the contract was inserted in the bill of lading.(3) For example the legislation of the port of lading may provide that all bills of lading issued shall be subject to its version, at the same time the act of the port of discharge may also provide that these bills of lading subject to its version. This position, however in no way resembles the unification the rules aimed at.(4)

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(1) See Shah, op.cit., p.4; See also Diamond,The Division of liability as between ship and cargo (insofar as it affects cargo insurance) under the New Rules proposed by UNCITRAL, (1977), LMCLQ, p.39 at p.40 (hereinafter cited as Diamond, The Division of libility).

(2) See section 13 of the Carriage of Goods by Sea Act 1936.

(3) See Vita Food products v. Unus Shipping Co. (1939) A.C. 277.

(4) See Astle, op.cit., p.8; See also Lankabady, The Brussels Convention, p.44.

3) Some of the provisions of the Rules are uncertain and ambiguous. For example ,article 3(4) of the Hague Rules had provided that a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described. But what was to happen when the bill of lading was negotiated to a third party who was a bona fide holder. There is no answer in the Hague Rules for this question.(1)

4) As a result of inflation, the limitation of the carriers liability of £100 per package or unit was no longer adequate, because inflation had eroded the value of £100, differential rates of inflation had created international disparities, with a potential conflict of law problems.(2)

5) The technological developments had increased the size of packages from those which could be manhandled by one man to a big containers, but the Hague Rules did not deal with the new phenomena of containerization. On the other hand the rules for unit limitation of liability which depended on shipments in boxes or bags appropriate for the traditional ships only. Thus the question of what was and what was not a package or unite for the limitation of the shipowners liability had created confusion in the decisions of the courts in the different countries.(3)

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(1) See Diamond, The Hague - Visby Rules, p.230.

(2) See Moore, op.cit., p.3.

(3) See Moore, op.cit., p.3.

6) The technology of shipping and communications, nautical education and transportation have advanced so considerably since 1924. For example, the through transport revolution introduced a concept of "door to door" carriage and delivery of goods from consignee to consignee which made a big reduction in the operations of transferring and handling the goods through the voyage.(1)

7) In the case of Riverston Meat Co. v. Lancashire Shipping Co.(2) the House of Lords held that the negligence of the fitter was lack of due diligence for which the shipowners was responsible. This decision was regarded by shipowners as an almost return to the situation which existed before the ratification of the convention.

8) The third world nations have declared that the Hague rules were not of their making but were imposed upon them before they had gained their independence by the colonial countries as another tool of economic exploitation.(3)

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(1) See Finnie, op.cit., p.3.

(2) (1961) A.C. 807.

(3) Great Britain, France and Portugal had ratified the convention on behalf of their colonies, and passed legislations applied the Hague rules in these colonies. British legislations had been enacted between 1926 and 1928 applied the Hague rules on the carriage of goods by sea in British colonies. French legislation passed in 1936 and modelled on the Hague rules applied to France, Algeria and the French colonies. Portuguese legislation passed in 1950 applied the Hague rules to bills of lading issued in any Portuguese colonies. See Diamond, The Hague- Visby rules, p.226.

It was urged by these countries that they were entitled to a share in the formulation of those laws which should govern their maritime affairs. The third world nations also believe that the Hague Rules impair the balance of payments position of the Third world nations in favour of the developed countries so as to insure continued poverty of these countries.(1)

This standpoint was supported by the 1970 study of bill of lading clauses performed by the United Nations conference on Trade and Development (UNCTAD)(2) which concluded that the Hague Rules benefitted the developed carriers nations at the expense of the developing cargo nations, because the allocation of risks of loss and damage in these rules is already slanted too much in favour of shipowning nations. So these tules created manifest inequities for the third world nations. With the growth in influence of the third world nations, governments began to move through the intergovernmental organisations within the United Nations family, to formulate a new maritime law that suits their own aspirations.(3)

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(1) See Sweeney, Review, p.5.

(2) See the UNCTAD Secretoriat report on bills of lading dated 14th December, 1970 (TD/B/C.4/ISL/6). It is convenient here to mention that the UNCTAD, established in 1964, is an organisation in which all the members of the United Nations are entitled to participate. It was originated according to the demands of the developing countries for greater share in the riches of the industrial world, as quaranted by the United Nation Charter. At first United Nations Conference on Trade and Development in Geneva 23rd March to 16th June, 1964 an important principle was layed down as follows:
"All countries should co-operate in devising measures to help developing countries to build up maritime and other means of transport for their economic development, to ensure the unhindered use of international transport facilities, the improvement of terms of freight and insurance for the developing countries, and to promote tourism in these countries in order to increase their earnings and reduce their expenditure on invisible trade". See Yearbook of United Nations 1964, p.623; See also Sweeney, Review, p.5.

(3) See McGilchrist, op.cit., p.257.

9) There had been a number of attempts made by cargo owners to get round the limitations and exceptions contained in the bill of lading by suing the servants or agents of the carrier (i.e. master, a member of the crew, stevedore) in tort.(1)

The reforms brought about by the 1968 Protocol

The dissatisfaction of the traditional maritime states and the newly independent states of the developing world in Asia and Africa with the Hague Rules led to proposed changes by the Comité Maritime International (CMI). The CMI held various conference to introduce certain revisions to the Hague Rules. At the Antwerp in 1947 a sub-committee was appointed to consider article 10 of the Hague Rules; at Naples in 1951 the conference discussed the revision of the "gold clause". In May, 1959 the CMI at its XXIV plenary conference held at Rijeka, Yogoslavia instructed the sub-committee(2) to study other amendments to the rules.

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(1) Midland Silicones v. Scrutton (1962) A.C. 446; $(1961)_2$ Lloyd's Rep, 365.

(2) The sub-committee members were maritime law specialists, many of them being active in marine insurance from the following countries: Belgium, France, Germany, Great Britain, Greece, Netherlands, Italy, Norway, Sweden, The United States and Yogoslavia. See CMI Stockholm Conference 1963, pp. 72-73; See also Mankabady, The Brussels Convention, p.52; See also Moore, op.cit., p.3.

The sub-committee met under the chairmanship of Mr. Kaj Pineus of Sweden and established its study through questionnaires circulated to all the national associations eliciting their views and comments in writing. After receiving those views and comments, it held a meeting on 4th and 5th November, 1960 in London and 27th and 28th October, 1961 in Paris to discuss thcse views and comments.

Two important different opinions toward the amendment of the rules, was laid down. The first opposed attempts to amend the rules, because this amendments might lead to a general change in the whole basis of the compromise reached in 1924. The second opinion was in favour of amending the appropriate provisions of the rules.

After discussing these two opinions, the sub-committee favoured the second opinion and decided that the appropriate provisions should be amended.(1)

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(1) See Mankabady, The Brussels Convention, p.56;
See also Diamond, The Hague-Visby Rules, p.228;
See also Moore, op.cit., p.1.

Finally, the sub-committee issued its report on 30th March, 1962 contained a limited number of amendments and suggested that these might be embodied in an additional protocol to the 1924 convention, so as not to upset the general scheme of the Hague Rules. It was agreed that these amendments should be known as the "Visby Rules", and the whole rules would become known as the "Hague-Visby Rules". The conference of CMI held at Stockholm in June, 1963 and discussed the report of the sub-committee. The Belgium Government then convened the XII Maritime Diplomatic Conference in response to a request from CMI. Representatives of 47 nations attend,(1) and 18 other nations sent observers(2) and many international organisations participated.(3)

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(1) The countries which attended the conference were: Algeria, Argentina, Belgium, Bulgaria, Cameroon, Canada, China,(Republic of); Congon (Kinshasa); Denmark, Ecuador, Finaldn, France, Germany,(Federal Rep.), Ghana, Great Britian, Greece, India, Iraq, Ireland, Italy, Japan, Korea,(Republic of), Lebanon, Liberia, Mauritania, Monaco, Morocco, Netherlands, Nicarague, Nigeria, Norway, Paraquay, Peru, Phillippines, Poland, South Africa, (Republic of), Spain, Sweden, Switzerland, Thailand, Togo, United Arab Republic, United States of America, U.S.S.R.,Uruguay, Vatican City and Yogoslavia. See conference Diplomatique de Droit Maritime, Douzierne, Session. (2e phase) 1968 pp.9-26. (hereinafter called "Report of 1968 conference"). See also Mankabady, The Brussels Convention, p.58.

(2) The countries which attended by observers were: Austria, Brazil, Chile, Colombia, Costa Rica, Cuba, Iceland, Indonesia, Israel, Ivory Coast, Madagascar, Pakistan, Panama, Saudi Arabia,Senegal, Sudan, Turkey and Venezuela. See report of 1968 conference, pp. 27-29.

(3) The non-governmental organizations which represented by observers were:
1) Association International de Dispackeurs Europeans;
2) Chambre de Commerce International;
3) Confederation International des Syndicates Libres;
4) International Air Transportation (I.A.T.A.);
5) International Chamber of Shipping;
6) International Law Association; and
7) Union International de la Navigation Fluviale.
See Mankabady, The Brussels Convention, p.58.

The conference discussed the draft prepared by the CMI in two phases:

The first from 16th - 27th May, 1967, in this phase the conference adopted article 1,3,4 of the protocol. In the se second phase which sat from 19 to 23rd February, 1968, the conference adopted article 2 paragraph 1, article 5 and the final clauses.

The Brussels protocol of amendments to the Hague Rules was finally signed on February 23rd, 1968.(1)

The 1968 protocol was opened for signature to the states which had ratified or adhered to the convention before the 23rd February, 1968 (the date of the signature) and the states which were represented at the twelfth session (1967-1968) of the Diplomatic Conference of Maritime Law.(2)

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(1) Hereinafter called "The Visby Rules". The protocol is known as the "Visby Rules" because the protocol amendments to the Hague Rules were signed in Visby (or Wisby) the capital of the Swedish Island and administrative district of Gotland in the Baltic Sea. The sub-committee of the CMI reported on March, 1962 that: "The members were much attracted by a proposal that should the 'positive recommendations' be adopted..... at the 1963 conference it might be possible for the Chairman of the CMI, the Secretaries General and those members of the CMI who so desire to take the plane from Stockholm to the Island of Gottland in the Baltic (a trip of one hour) and Sign the recommendation in the old and beautiful city of Visby. The recommentations would then be known as the Visby Rules, thus forgoing a link with the Visby Sea Law of Mediaeval times. Perhaps the sense of tradition to which this name appeals might make the innovation of the sub-committee easier to accept. The whole set of rules in respect of bills of lading sponsored by the CMI might in this way become known as the Hague"Visby Rules". Quoted from Diamond, The Hague"Visby Rules, p.225.

(2) See Article 10 of the protocol.

Since the 1968 protocol is an integral part of the 1924 convention, ratification of this protocol by any states which is not a party to the convention shall have the effect of accession to the convention.(1) The 1968 protocol has stated, that the members of the United Nations or members of the specialized agencies of the United Nations are allowed to accede to this protocol.(2) Finally, the Visby Rules went into effect on June, 23rd 1977, when there had been a total of 10 ratifications and accessions.(3)

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(1) See article 11 of the protocol.

(2) See article 12 of the protocol.

(3) Article 13 of the 1968 protocol provides: "1. This protocol shall come into force three months after the date of the deposit of ten instruments of ratification or accession of which at least five shall have been deposited by states that have each a tonnage equal or superior to one million gross tons of tonnage.
2. For each state which ratifies this protocol or accedes thereto after the date of deposit of the instrument of ratification or accession determining the coming into force such as is stipulated in paragraph (1) of this article, this protocol shall come into force three months after the deposit of its instrument of ratification or accession".
The Visby Rules are now signed by the following states: Denmark, Ecuador, France, Lebanon, Norway, Singapore, Sweden, Switzerland, Syrian, Arab Republic, and the United Kingdom. The German Democratic Republic, Yugoslavia, Poland and Argentina without ratifying or acceding to the protocol, have incorporated its rules into their national law. In the United Kingdom the Visby Rules were incorporated in the Carriage of Goods by Sea Act 1971, which came into force on 23rd June, 1977.
It would be appropriate to mention that the conflict of laws, will continue until all states which have been acceded to or ratified the Hague rules 1924, become contracting states to the Visby Rules 1968. As for example, when the bill of lading is issued in contracting state to the Visby Rules 1968 but the voyage is to a country still applying the 1924 Rules to inward shipments.
See Mankabady, Comments on the Hamburg Rules, published in the Hamburg Rules on the Carriage of Goods by Sea, edited by S. Mankabady, Leyden, 1978, p.27 at p.34 (hereinafter cited as Mankabady, The Hamburg Rules).

The most obvious differences between the Hague Rules 1924, and the Hague-Visby Rules are as follows:

1. In article 4(5) of the Hague Rules 1924, the limit of liability becomes 10,000 gold francs (instead of 100 pounds sterling) per package or 30 gold francs per kilo of gross weight of the goods lost or damaged, which is the higher.(1)

Namely, the cargo owner can recover either on a fixed amount per package or unit, or on an amount per kilo of the goods damaged or lost, whichever is the higher.

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(1) See artucke 2 para (a) of the 1968 protocol.
In the first phase of the Diplomatic Conference on Maritime Law held in Brussels from 16th - 27th May, 1967 the discussion centred on the question whether the "per package or unit" limit of the Hague Rules was still appropriate. The Norwegian delegation laid down a point of view, supported by the U.S. delegation, that the whole balance of the 1924 compromise had been upset, for many reasons and he submitted that "the limitation system embodied in article 4(5) of the convention has outlived its usefulness and should now go. It is proposed that it be replaced by the simple weight unit limitation system already adopted in the international conventions for the Carriage of Goods by Rail (CIM), by Road (CMR) and by Air (Warsaw)". This proposal caused a deep controversy between the delegations, and in order to allow time for further study it was suggested by the British delegation that, the conference should be adjourned to the following year.
In the second phase of the conference from 19th to 23rd February the delegations adopted the compromise mentioned in article 2 of 1968 protocol.
See Conference Diplomatique de Droit Maritime, Douzieme Session (i.e. phase), Bruxells, 1967, pp.678-681 (hereinafter called "Report of 1967 conference"); See also Diamond, The Hague-Visby Rules, p.232; See also Yoram Shacher, Containers in the law of carriage of goods, a thesis for Ph.D degree University of Oxford, 1976, p.183. See Yoram Shacher, op.cit., p.182.

2. The Visby Rules introduced a special rule for the purpose of dealing with containers. Article 2 para c of the 1968 protocol provided that 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. If the bill of lading does not show how many seperate packages there are ,then each article of transport is a package or unit.(1)

3. In addition to article 4 of the Hague Rules it is provided that the defences and limits of liability shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be found in contract or in tort, and a servant or agent of the carrier is also entitled to the defences and limits. But these defences and limits are not available to the servant or agent of the carrier ,if it is proved that the damage resulted from his intentional act or omission or acted recklessly with knowledge that damage would probably result.(2)

4. The protocol is wider than the Hague Rules, because it applies 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 the port of loading is in a contracting state, whether or not there is a relevant clause in the bill of lading incorporating the Hague - Visby Rules. (b) there is an agreement to this effect.(3)

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(1) See Shacher, op.cit., p.162.

(2) See article 3 of the 1968 protocol.

(3) See article 5 of the 1968 Protocol.

Moreover, the protocol permitted the contracting states to apply the rules of this convention to other voyages not included in these two cases, so it is possible that some contract states will apply the rules to all inward voyages.

5. The Hague - Visby Rules specifically allow the time limit of one year for suit to be extended if the parties so agree after the cause of action has arisen.(1) The Hague - Visby rules came under severe criticism from most of the developing countries as they felt that their interests were not taken into account. Accordingly, the secretariat of UNCTAD published in 1970, a detailed study about the Hague - Visby Rules.(2)

In its report the secretariat concluded that a revision for the Hague - Visby Rules should be made for many reasons, these reasons were identified as follows:

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

(b) The continued retention in bills of lading 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;

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(1) See article 1 of the 1968 Protocol.

(2) See UNCTAD Report dated 14 December, 1970, TD/B/C.4/ISL/6.

(c) 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 excuse 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 abysmally low unit limitation of liability;

(g) Manifestly unfair jurisdiction and arbitration clauses;

(h) The insufficient legal protection for cargoes with special characteristics that require special stowage, adequate ventilation, etc.,and cargoes requiring deck shipment;

(i) Clauses which apparently 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 apparently 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".(1)

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(1) Quoted from Shah, op.cit., p.8.

The protocol was ratified by few countries[1] because it seemed to other countries, even the traditional maritime countries that the Visby Rules had missed a golden opportunity to conduct a comprehensive revision of the Hague Rules so as to bring them up to date.[2]

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(1) See Supra p.35.

(2) See Diamond, a legal analysis of the Hamburg Rules, part I, published in the Hamburg Rules, A one-day seminar organised by Lloyd's of London Press Ltd. September, 1978, p.2. (hereinafter cited as Diamond, A legal analysis).

SECTION THREE

The ratification of the Hamburg Rules

At about the same time as the Brussels protocol of amendment was signed in 1968 the United Nations began to extend its activities into maritime law.(1)

The question of revising the Hague Rules was laid down at the second conference of the UNCTAD at New Delhi, in February, 1968.(2) This conference adopted many important resolutions relating to shipping, among which was a resolution for the creation of Working Group on International Shipping Legislation. The UNCTAD Working Group was established in 1969.(3) In December 1969 UNCTAD Working Group decided to include in its working programme as a first priority topic a study on bills of lading, this study should be finished prior to the February, 1971 meeting of the Working Group. The secretariat of UNCTAD published, in 1970, a detailed study containing a number of proposals for the revision of the Hague - Visby Rules.(4)

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(1) It was considered at that time (1968) innovative for the United Nations to deal with a subject which for years had been done in professional maritime law associations such as the International Maritime Committee (CMI). See Shah op.cit., p.9.

(2) See UNCTAD report (committee of shipping) TD/B/C.4/ISL/19, para. I.

(3) See Yearbook of the United Nations, 1963, Vol. 23, p.776; See also Sweeney, part I, p.76.

(4) See Supra, pp. 38-40.

The Working Group adopted this study and invited the United Nations Commission on International Trade Law (UNCITRAL)(1) to co-operate with UNCTAD to examine the defects and the amendments to the Hague - Visby Rules. UNCITRAL accepted this invitation of UNCTAD and established the Working Group on an International Shipping Legislation to take care of the matter.(2) Subsequently, the UNCITRAL Working Group took up the task proposed by the UNCTAD resolution.

This resolution was based on a report by the UNCTAD secretariat that had noted basic weaknesses in the Hague Rules and indicated the need for a revision of the Convention.(3)

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(1) The United Nations commission on International Trade Law (UNCITRAL) was established by the General Assembly on 17th December, 1966 to promote the progressive haramonization and unification of international trade law. At the beginning the UNCITRAL devoted most of its meeting to the establishment of its programme of work; this called for the selection of priority topics and methods of work. During the debate, the Commission considered suggestions for work on substantial number of subjects,and decided to give priority to the following three subjects: International Sale of Goods, International payments and International commercial arbitration. At the second session of UNCITRAL held in Geneva Switzerland from 3rd to 31st March, 1969, the subject of International shipping legislation was added to UNCTAD's priority subjects. The United Nations secretary - General invited all United Nations member states as well as organizations specialized in the field of international trade law to provide this organization with comments and suggestions which might be helpful to the commission in carrying out its task. See Yearbook of the United Nations 1968, Vol. 22, p.887; See also Sweeney, part I, p.77.

(2) The original Working Group on International Legislation on shipping was composed of only seven members, and in the fourth session of UNCITRAL increased to twenty one members. The following states were members of the Working Group for all sessions: Argentina, Australia, Belguim, Brazel, Chile, Egypt, France, Ghana, Hungary, India, Japan, Nigeria, Norway, Poland, Singapore, Tanzania,U.S.S.R., United Kingdom, U.S.A. and Zaire. Spain attended the third, fourth and fifth sessions but was replaced by the Federal Republic of Germany for the sixth, seventh and eighth sessions. See Yearbook of the United Nations 1967, p.770; See also U.N. Doc. Series A/CN-9/ numbers 63,74,76, 88,96 and 105; See also Sweeney, Review, p.7.

(3) See Kimball, op.cit.,p.234; See also McGilchrist, op.cit., p.258

In pursuing that task the UNCITRAL Working Group 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 revisions and amplifications:

(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 trans - shipments; (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) deviation, seaworthiness and unit limitation of, liability".(1)

This working group thereafter held six important sessions through the period from January, 1972 to February, 1975 during which the draft convention was prepared. After three substantive meetings held in 1972 - 1973 there was a one year hiatus before the work resumed. In February, 1974 a special meeting was held, in October, 1974 and February, 1975 two sessions were held to complete all the issues shifted to the Working Group.(2) Subsequently, the working Group of UNCITRAL finalized a draft convention in February, 1975.(3)

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(1) See TD/B/C.4/86; TD/B/C.5/ISL/8 Annexe 1; See also Mankabady, The Hamburg Rules, p.31.

(2) See Sweeney, The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part 3), (1975), LMCLQ, p.487 (hereinafter cired as Sweeney, part 3).

(3) See Diamond, A Legal analysis. p.3.

This draft was considered by governments; international organizations and UNCTAD which reviewed this draft and its secretariat prepared commentaries on it. The UNCITRAL amended its draft and approved it in May, 1976.(1) At the session of July, 1976,UNCTAD gave a final approval to the draft convention.(2) The draft convention was considered and debated again in the sixth (legal) committee of the General Assembly of the United Nations in November, 1976. At its thirty first annual session in New York the General Assembly adopted a resolution(3) to conven a conference of plenipotentiaries to consider the draft convention. The secretary general of the United Nations received and accepted an invitation from the Government of the Federal Republic of Germany that the conference be convened at Hamburg.

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(1) See Robert Cleton, The special features arising from the Hamburg Diplomatic conference, published in the Hamburg Rules, A one day seminar organized by Lloyd's London Press Ltd. on September, 1978, p.2; See also Sweeney, Review, p.7.

(2) UNCTAD considered the new draft convention as a new compromise which should achieve a better balance between the interest of the developing cargo nations as users of shipping services and the interest of the carriers nations. See William Tetley, Identity of the carrier - The Hague Rules, Visby Rules, UNCITRAL, (1977)1 LMCLQ, p.530 (hereinafter cited as Tetley, Identity of the carrier).

(3) Resolution 31/100 of 15th December, 1976; See also Mankabady, The Hamburg Rules, p.32; Chorly and Giles, Shipping Law, 7th ed. London, 1980, p.248; See also Sweeney, The UNCITRAL draft convention on carriage of goods by sea (part 5), (1976) 8 LMCLQ, p. 167. (hereinafter cited as Sweeney, part 5).

The United Nations conference on the Carriage of Goods by Sea was held at Hamburg, Federal Repblic of Germany, from 6th - 31st March, 1978. It was the first United Nations conference to be held in Federal Republic of Germany. Seventy eight states were represented at the conference as follows: Algeria, Argertina, Australia, Austria, Bangladesh, Belgium, Bolivia, Brazil, Bulgaria, Byelorussian, Soviat Socialist Republic, Canada, Chile, Colombia, Cuba, Czechoslovakia, Democratic Yemen, Denmark, Ecuador, Egypt, Finland, France, Gabon, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Holy See, Honduras, Haungary, India, Indonesia, Iran, Iraq, Ireland, Italy, Ivory Coast, Jamaica, Japan, Kenya, Kuwait, Liberia, Madagascar, Malysia, Mauritius, Mexico, Netherlands, Nigeria, Norway, Oman, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Senegal, Sierra Leone, Singapore, Spain, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Turkey, Ugand, Ukranian Soviat Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Cameroon, United Republic of Tanzania, United States of America, Venezuela, Yugoslavia, and Zaire. One state, Guatemala sent an observer to the conference.(1)

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(1) See the United Nations conference on the carriage of Goods by Sea, Hamburg (A/CONF. 89/13, 30th March, 1978).

The following inter-governmental and non-governmental organizations were represented by observers at the conference:

Specialized agencies:

International Monetary Fund, and Inter-governmental maritime consultative organization. United Nations Bodies; United Nations conference on Trade and Development, and Economic Commission for Africa. Other inter-governmental organizations; Caribbean community and common market, Central office for International Railway Transport, Council of Europe and organization for Economic Co-operation and development; Non-governmental organizations; Baltic and International Maritime conference; International chamber of commerce, International chamber of shipping, international maritime committee, International shipowners Association, International Union of Marine Insurance, and Latin American Association of Shipowners.(1)

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(1) See United Nations conference (A/CONF. 89/13, 30th March, 1978).

Dr. Rolf Herber of the Ministry of Justice of the Federal Republic of Germany was elected as the president of the conference. The conference also elected the representatives of the following states as vice-presidents:

Algeria, Argentina, Australia, Belgium, Canada, Cuba, Denmark, Ecuador, German Democratic Republic, Greece, Indonesia, Iraq, Italy, Nigeria, Pakistan, Philippines, Poland, Senegal, Turkey, Uganda, Union of Soviet Socialist Republics and Venezuela. The following committees were set up by the conference:(1)

General Committee:

Chairman:	The President of the Conference.
Members:	The president and vice-presidents of the conference, and the Chairman of the first and of the second committee.

First Committee:

Chairman:	Professor Mohsen Chafik (Egypt)
Vice Chairman:	S. Suchorzewaski (Poland)
Rapporteur:	Mr. D.M. Low (Canada)

The conference assigned to this committee all the substantive legal issues ofrthe convention.(2)

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(1) See United Nations Conference (A/CONF. 89/13, 30th March, 1978).

(2) See Moore, op.cit., p.5.

Second Committee:

Chairman: Mr. D. Popov, Counsellor of the Foreign Ministry of Bulgaria.

Vice-Chairman: Mr. Th. J.A.M. De Bruijn (Netherlands)

Rapporteur: Mr. N. Gueiros (Brazil)

This committee deals with the technical provisions regarding entry into force, the relationship between the new convention and the Hague/Visby Rules.(1)

Drafting Committee:

Chairman: Dr. R.K. Dixit, Head of the Delegation of India.(2)

Members: Argentina, Australia, Ecuador, France, German Democratic Republic, Hungary, India, Iraq, Japan, Kenya, Norway, Peru, Sierra, Leone, Singapore, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania and United States of America.

Credentials Committee;

Chairman: Mrs. Heliliab Haji Yusof (Malaysia)

Members: Bangladesh, Canada, Czechoslovakia, Ecudor, Madagascar, Malaysia, Nigeria, Syrian Arab Republic and United States of America.(3)

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(1) See Moore, op.cit., p.5.

(2) See Sweeney, Review, p.7; See also Cleton op.cit., p.2.

(3) See United Nations conference (A/CONF. 89/13, 30th March, 1978).

At UNCTAD there are three block groupings: 1) the so called group of 77, composed of the developing countries (Asian, African, and Latin American states plus Yugoslavia)., 2) the B. group including the Western countries (OECD) and others e.g. U.S.A., Japan, Australia; 3) the D. group containing the socialist countries (members of COMECON).

This division means that there are common political interests within each group and that each group is able to make a common viewpoint on the issues under discussion.(1)

But at the Hamburg conference the three groups were divided among themselves on the main issues of the convention, some of them favoured shipowner interests and the others favoured cargo owing interests.(2) In the group B, the following states supported shipowner viewpoint and opposed any radical change in the Hague-Visby Rules: Belgium, Federal Republic of Germany, Greece, Ireland, Italy, Japan, Netherlands, Portugal, Turkey and the United Kingdom. The Scandinavian attitutde varied from issue to issue. These countries supported the UNCITRAL proposal for making a radical change in the Hague-Visby Rules and on the other hand they opposed the UNCITRAL proposal for article 8 (breakability of limitation) and took in that respect the same view as the supporters of the Hague - Visby Rules.(3)

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(1) See Cleton, op.cit., p.2.

(2) See Tetley, The Hamburg Rules - A commentary,(1979)1 LMCLQ p.I at p.4. (hereinafter cited as Tetley, A Commentary).

(3) See Cleton, op.cit., p.3.; See also Sweeney, Review, p.8.

The cargo owners viewpoints were supported by Australia, Canada, France and the United States. Moreover, Australia, Canada and U.S.A. took the most radical position especially with regard to limitation figures.

D. group (socialist countries) had been split up into two divisions: U.S.S.R., Poland and Bulgaria were supporting shipowner viewpoints, while Hungary, Czechoslavakia and the German Democratic Republic were supporting cargo owners viewpoints.

In the group of 77 countries like Argentina, Indonesia, South Korea, Liberia, Peru, Venezuela and Yugoslavia were supporting many shipowner viewpoints. Accordingly, these countries had opposed the deletion of the exception of liability for nautical errors. But Ecuador, India, Mexico, Pakistan and Philippines had supported the cargo owners viewpoints.

Some 200 amendments were discussed in Hamburg Conference, in March, 1978 the UNCITRAL draft was slightly ameneded and the convention on Carriage of Goods by Sea (known as the Hamburg Rules) was approved by a vote of 67 in favour, 0 against and 4 obstentions (Canada, Greece, Liberia and Switzerland).(1)

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(1) See Moore, op.cit., p.5.; See also Mankabady, The Hamburg Rules, p.32.

This convention will come into force on the first day of the month following the expiration of one year from the date of deposit of the 20th instrument of ratification.(1)

The Hamburg convention is divided into the following parts:(2)

Part I. General provisions;

Part 2. Liability of the carrier;

Part 3. Liability of the shipper ;

Part 4. Transport of documents;

Part 5. Claims and actions;and

Part 6. Supplementary provisions.

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(1) See article 30, para. I of the Hamburg Rules. As far as this writer is aware this convention has not entered into force yet. The following fifteen states signed the new convention at Hamburg, Brazil, Chile, Ecuador, Egypt, Federal Republic of Germany, Ghana, The Holy See, Madagascar, Mexico, Panama, Portugal, Senegal, Singapore, Venezuela and Zaire.
It must be mentioned that,article 30 does not require any qualification such as a tonnage qualification as regards the states who are entitled to bring the convention into force. So any twenty states can bring the Hamburg Rules into force. See Diamond, A legal Analysis, p.6.

(2) It is convenient here to mention that the Hague convention has failed to supply titles to any of its articles.

After having made a historical survey of the birth of the Hamburg Rules ,it is important to mention ,in brief ,the most important issues involved.

Under the New Convention the shipowner's defences of negligent management and navigation are jettisoned. However ,the representatives of cargo marine insurers and carriers from a few countries with large fleet in developed countries had criticised the deletion of the exceptions for negligence in management and navigation. They alleged that any remove to any of the major exceptions, would substantially alter the present balance of risk allocation and the result of this deletion would be the imposition of higher freight to account for higher liability insurance costs.(1)

The International Chamber of shipping affirmed this point of view as follows: "The proposed revision will have effect in a number of spheres:

A - Economic.

What is proposed is a substantial extension of the liability of the carrier which in effect means a shift from the cargo underwriter to the liability insurer of the carrier. The cost yardstick must be borne in mind when examining the effect of the shift as well as the effect of such a shift on world insurance arrangements. Placing a high liability on the carrier will increase the carrier's costs and ultimately freight rates. It is quite clear from all the studies that have been undertaken that no commensurate decrease in cargo insurance costs can be expected.(2)

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(1) See Shah, op.cit., p.10; See also Tetley, a commentary, p.5; See also Finnie, op.cit., p.83.

(2) Quoted from William, op.cit., p.259.

Article 5(1)[1] of the Hamburg Rules also shows that all the catalogue of defences in article 4 of the Hague Rules has gone, and the carrier becomes liable for loss, damage or delay, unless he can prove that he, his servants or agents have taken "all measures that could reasonably be required to avoid the occurance and its consequences".[2] As to the term of "reasonably" Judge Haight said:[3] "I am stuck, however by the dramatic appearance of that hero maritime law. The Hamburg Rules might well be sub-titled: "The Reasonable Man puts to Sea". The vision of the future is that, in an infinite variety of situations, the carriers liability for cargo damage or loss will be determined by the question of whether or not the shipowner, master, officers, crew or agents acted "reasonably". While I constantly instructed juries to emulate him, I have never met the reasonable man.....My prediction is that the application of this particular principle will substantially increase litigation". On the other hand, the Hague Rules used terms well-known to the maritime law such as "seaworthiness", "perils of the sea". But these terms have disappeared under the Hamburg Rules.[4]

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(1) This article was adopted at the fourth session of the working group held in Geneva from 25th September to 6th October, 1972,and approved at the eighth session. See U.N. Doc A/CN 9/74 at 10-11 (1972); See also Kimball, op.cit., p.233.

(2) See article 5 para I of the Hamburg Rules.

(3) See Haight, op.cit., p.4.

(4) See Diamond, A legal analysis part I, p.7.

The carriers' liability under the Hamburg Rules "is based on the principle of presumed fault or neglect", to induce the carriers to keep their standard of care at the optimum level."(1) The limitation of liability under the Hamburg Rules is considerably changed,in respect of amounts and the circumstances under which the carrier may be lose his right to limit liability.(2) These are the most important issues which form with the "Common Understanding" attached with the convention the heart of the Hamburg Rules.(3)

Other changes deserve mentioning are:-

The scope of the convention is extended to cover the whole 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.(4)

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(1) See Annex I I to the Hamburg Convention; See also United Nations Commission on International Trade Law, Yearbook, Vol. 3, 1972, p.292. See also James Wong Kong Kee, liability for damage caused to goods in transit by defective packing, a thesis for M. Phil degree, University of Southampton, 1974, p.154.

(2) See articles 6 and 8 of the Hamburg Rules; See Also Y. Shachar op.cit., p.185.

(3) These subjects were discussed together by a committee consisting of representatives of developing countries (Argentina, Ecuador, Ghana, India, Mexico, Philippines and Uganda), 4 from Western countries (Netherlands, Norway, United Kingdom, United States) and 3 from Socialist countries (Czechoslovakia, Poland and U.S.S.R.) under the chairmanship of Dr. Shafik (Egypt), See Moore, op.cit., p.6.

(4) See article 4 of the Hamburg Rules.

As regards the contents of the bill of lading: Art 15(1) (a) requires the insertion of both the number of packages and the weight of the goods. Art 15(1) (c) requires a statement as to the principal place of business of the carrier. Art 15 (1)(f) requires statement as to the date on which the goods were taken even by the carrier at the port of loading. Art 10 (1) solves the problem of the identity of the carrier and the owner or charterer, by the concept of the "actual carrier". The carrier is responsible for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.(1) Art 19 permits the giving of notice of apparent loss or damage by the consignee on the working day after delivery of the goods. Finally, it is important to mention that art 23 para 3 provides that any bill of lading or any other document evidencing the contract of carriage must contain a statement that the carriage is subject to the provisions of the convention. This article means that the effect of the Hamburg Rules will spread far beyond those states which ratified the convention, because the terms of bills of lading issued in those states and containing the Hamburg Rules will apply in other countries.(2) The convention was made in single original of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

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(1) See Tetley, Identity of the carrier, p.530.

(2) See Diamond, Alegal analysis, part I, p.6.

CONCLUSION

I do think, the application of the Hamburg Rules, if enacted, would cause considerable confusion at the initial stages in the decisions of the courts. Because, over the past years a substantial number of legal decisions have been given over the meaning of the Hague Rules, by the courts of many countries in the world. Subsequently, most of the defects of the Hague Rules have been settled through the continued work of clarification made by the jurisprudence which has been mindful of the need of uniformity in interpretation.

All these things will be upset by the new convention, but to my mind this is no reason for not changing the law if such change would eventually in favour of the sea transportation and simplify the system of the carrier's liability.

Maritime law must change for it is compelled to change owing to a need for harmonizer with laws regulating other methods of transportation (road, rail and air), and to response to technological developments. Moreover, the application of the Hamburg Rules would resolve many existing problems, the courts, for example, can stop worrying about whether a container is a package. On the other hand, the Hamburg Convention, in our opinion, has been achieved a very important political objective, by giving the countries of the Third World, through the committee which drafted the Rules, good opportunity of participation in the formulation of maritime law.

CHAPTER TWO

Basis of Liability

For the holder of the bill of lading to make his case, he has only to prove the loss, shortage or damage of the cargo.

On the other hand, when the bill of lading came into use as a receipt for cargo and as a document of title, carriers began to use the bills exceptions clauses, stipulating that they should not be liable to the holders of the bill of lading for damage or loss of goods suffered in certain ways or from certain causes.

Moreover, nothing in the Hague Rules prevents the carrier from entering into any a greement, as to his responsibility for the loss or damage to the cargo.

Therefore,this chapter will be divided in three sections:

1. Establishment of the carrier's liability.
2. The Burden of proof
3. The immunities of the carrier.

SECTION ONE

"Establishment of the Carrier's Liability"

This section deals with two important points:

1. Establishment of the carrier's liability under the Hague Rules and some Local Laws.
2. Establishment of the carrier's liability under the Hamburg Rules.

1. Establishment of the carrier's liability under The Hague Rules

It is convenient here to observe that the Hague Rules and most of the local laws placed upon the carrier's shoulders some important

obligations, of which breach of any will give rise to the liability of the carrier unless he brings himself within one of the exemption clauses. These obligations are:

1. exercise due diligence to make the vessel seaworthy.
2. load the cargo properly and carefully.
3. stow the cargo properly and carefully.
4. discharge the cargo properly and carefully.

1 - Due diligence to make the vessel seaworthy

It can be seen that the fundamental feature of the Hague Rules are the provisions establishing the basis of the carrier's liability for loss or damage. And the first of the carrier's major obligation under the Hague Rules. This is "to exercise due diligence to make the ship seaworthy". However, this term did not spring into existence in 1924 but it was borrowed from the language which had been conventionally used by the carriers in their bills of lading, and from earlier legislation like Harter Act 1893 and Canadian Act of 1904.(1)

In this connection reference can be made to the Riverston Meat Company Pty Ltd. v. Lancashire Shipping Company Ltd (The "Muncaster Castle"),(2) in which the House of Lords was held that the words "exercise due diligence to make the ship seaworthy" in the Hague Rules were adopted from the American Hart Act, 1893, and

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(1) See Antony Diamond, The division of liability as between ship and cargo, under the new rules proposed by Uncitral, $(1977)_1$ LMCLQ, p.47 (hereinafter cited as Diamond, New Rules); See also N.R. McGilchrist, op.cit., p.255; See also Dewey R. Villareal, The concept of due diligence in maritime law $(1970)_2$ JMLC, p.763; See also F.J.J. Cadwalladar, Seaworthiness - An exercise of due diligence, published in the Speaker's papers for the bill of lading conventions conference, organized by Lloyd's of London Press in New York, November, 1978. p.2. (hereinafter cited as Cadwalladar, Seaworthiness).

(2) $(1961)_1$ Lloyd's Rep. 57.

similar British Commonwealth statutes; that those words should be given the meaning attributed to them prior to the Hague Rules. Consequently, the situation under the Hague Rules has not been changed substantially. Article 3 (1) of the Hague Rules provides: "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 cool chambers;

and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation". From this provision one can gather that the carrier is bound to exercise due diligence to make the vessel in all respects seaworthy. Thus the cargo owner can collect from the carrier if damage to his goods is attributable to lack of due diligence in providing a seaworthy vessel.(1) But what does the term seaworthiness mean. In principle, seaworthiness is a relative term. It is a relative term because the understanding of the meaning of this word is dependent upon the context in which it is used. For example, seaworthiness with regard to personal injury claims, has no relation to the ordinary concept of the word, namely matters affecting satisfactory condition of the hull, the competency of the personnel and machinery.(2) The observations of Lord Justice Morris in Muncaster Castle are of particular interest. He said:(3) "In each particular set of circumstances, it will be a question of fact as to what steps and measures a carrier should take in order to exercise due care and diligence to make his ship seaworthy: it will be a further question of fact as to whether he has done all that he should". Therefore, the meaning of this term differs from

(1) See Gilmor and Black, op.cit., p.159

(2) See W.E. Astle, op.cit., p.52; See also Waddle v. Wallsend Shipping Company Ltd. $(1952)_2$ Lloyd's Rep. 105.

(3) $(1959)_2$ Lloyd's Rep. 553 at p. 565.

case to case, "no ship need be fit to carry any cargo whatsoever to any part of the world".(1) The concept is said to be relative to the adventure, in particular to the contemplated goods, to the weather by which the carriage will be affected to, the contemplated voyage - crossing the Atlantic Ocean calls for stronger equipment than sailing across the English Channel(2)- and to the state of knowledge and scientific progress at the time of contract.(3) Thus, 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".(4) It should be mentioned that the duty to supply a seaworthy ship does not mean that the carrier should provide a perfect vessel. But what is meant by seaworthiness is that the vessel "must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it".(5) Cadwallder, therefore, is quite right when he argued that a carrier exercises due diligence when he pays "all that attention to his duties to provide a seaworthy ship as is properly to be expected of a carrier of goods by sea".(6) It is to be noted that the

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(1) See Clark , op.cit., p.125.

(2) See Chorly and Giles, op.cit., p.132; See also Scrutton, op.cit., p.81.

(3) See Clark, op.cit., p.125; See also per Lord Sumner in Bradley v. Federal S.N. Co. (1926) 137 L.T. 268 "relative among other things, to the state of knowledge and the standards prevailing at the material time".

(4) See Tetley, Marine cargo claims, 2nd ed., Toronto, 1978, p.157 (hereinafter cited as Tetley, Marine).

(5) See Carver, Vol. 1., p.115; See also Cadwallader, Seaworthiness, p.2; See also (The "Gundulic") (1981)$_2$ Lloyd's Rep. 4181.

(6) See Cadwallader, Seaworthiness, p.3.

absolute warranty of seaworthiness under the common law, was heavier than the duty to exercise due diligence required under the Hague Rules. This point can be best summed up in the words of Lord Keith of Avonholm in Muncaster Castle, where he said:(1) "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, in the strict sense, in work done on his ship, that is to say, defects not due to any negligent workmanship of repairers or others employed by the repairers and, as I see it, against defects making for unseaowrthiness 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".

It is clear enough that article 3 r.1 of the Hague Rules placed upon the carrier the duty of exercising due diligence to make the ship seaworthy before and at the beginning of the voyage,(2) namely before the goods are actually loaded on the vessel, until the vessel has started the intended voyage. It is also clear that the liability

(1) $(1961)_1$ Lloyd's Rep. 57, at p. 87; See also Russel W. Pritchett, The implied warranty of seaworthiness in time policies; the American view $(1983)_2$ LMCLQ, p.195.

(2) Most of the Arab writers in the field of maritime law have interpreted article 3 r. 1 of the Hague Rules as below: "The carrier shall be bound before or at the beginning of the voyage.....". This interpretation leads to an inescapable conclusion that if the shipowner has rendered a seaworthy ship before the beginning of the voyage, he will be discharged from liability even if the vessel became unseaworthy at the commencement of the voyage. This interpretation with respect, is unsound. It is against the ultimate purpose of article 3 r 1 of the Hague Rules which imposes definite obligation on the part of the carrier to make the vessel seaworthy at the beginning of the voyage. See Maki, Al-Wasit in the Kuwaitian maritime law, Vol.2, Kuwait, 1975, p.204 (hereinafter cited as Maki, Al-Wasit); Awad, The maritime law, Cairo, 1970, p.735. See opposite of this view Taha, op.cit., p.293; See also Al-Sharkawi, The maritime law, Cairo, 1978, p.295.

of the carrier is involved immediately before the voyage has commenced, and it is not sufficient that the ship is seaworthy at one time before the beginning of the voyage, if she becomes unfit at the commencement of the voyage.(1) Moreoever, diligence must be exercised before commencement of each leg of a voyage in stages.(2) The case of Maxine Footwear Co. Ltd. v Canadian Government Merchant Marine Ltd,(3) is good evidence of the effect of the term "before and at the beginning of the voyage". This case was concerned with damage to goods caused by fire occuring before the vessel left the port and after the goods were loaded on the vessel. It was held that the words "before and at the beginning of the voyage" meant the period from at least the beginning of the loading until the vessel started on her voyage. But what is the situation if the ship was seaworthy when she sailed, but because of some reasons she could not perform her voyage safely? I am personally of the belief that the carrier would be relieved from liability if he succeeded in proving that he had exercised due diligence to make the ship seaworthy before and at the commencement of the voyage. In this connection reference can be made to the "Hellenic Dolphin",(4) in which it was held that the incursion of seawater through an undetected defect in the vessels basic plating was a classic case of damage by perils of the sea on which the carrier could rely unless the cargo owner proved that the vessel was unseaworthy when she started its voyage. It must ,however, be said that seaworthiness includes

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(1) See Clark, op.cit., p.127.

(2) See Dewey, op.cit., p.768.

(3) (1959)2 Lloyd's Rep. 105.

(4) (1978)2 Lloyd's Rep. 336; See als the "Friso" (1980)1Lloyd's Rep. 469.

different things for example:

(a) Personnel:

In exercising due diligence the owner must supply a crew adequate in number and they have to be experienced and trained in the operation of the ship.(1) The officers must be familiar with the particular care needed by the cargo contemplated. Accordingly, if the owner has appointed a master and crew from a class of men having adequate experience and proper licenses - unless further inquiry would disclose defects in fitness, due diligence has been exercised.(2)

An interesting case concerning this point was that of Makedonia,(3) it was held in this case that the ship was unseaworthy because the ship's engineers were inefficient at commencement of the voyage, and the shipowners had failed to exercise due diligence before and at the beginning of the voyage properly to man their vessel. However, the carrier may engage independent contractors to make the ship seaworthy. The question is whether the carrier will be liable for the negligence of the independent contractors? A case illustrative this point very well is that of "Muncaster Castle",(4) in which the House of Lords was held that the words "exercise due diligence to make the ship seaworthy" in the Hague Rules were adopted from the American Harter Act, 1893,and similar British Commonwealth statutes that those words should be given the meaning attributed to them prior to the Hague Rules; that, accordingly, a carrier was responsible to the cargo - owner unless due diligence in the work had been shown by every person to whom any part of the necessary work had been entrusted, no matter whether

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(1) See Tetley, Marine, p.161.

(2) See Dewey, op.cit., p.763.

(3) (1962) 1 Lloyd's Rep. 316, at pp. 334-338.

(4) (1961) 1 Lloyd's Rep. 57.

he was the carrier's servant, agent, or independent contractor. This decision made it quite clear that the carrier is liable for damage caused by the negligence of independent contractors employed by him, even though he did not possess sufficient experience to exercise any control upon them.(1)

(b) The Hull:

The integrity of the hull is a very important condition for seaworthiness. The wasting of shell plates through the passage of time has often produced leakage and consequent cargo damage, accordingly tests of each rivet by hammering or otherwise, drydocking are required from time to time.(2) Furthermore,in Tattersall v. The National S.S. Co.(3), Cattle were shipped under a bill of lading which provided that the carriers were not to be liable for disease or mortality. The ship had not been properly disinfected before the cattle were received on board, with the result that they contracted foot and mouth disease. It was held that the omission to disinfect the ship constitued a lack of seaworthiness.

(c) Machinery:

The ship should have fit propulsion machinery with sufficient fuel, and refrigeration and ventilation machinery in good order. Failure to supply the ship with these things,is a failure to use due diligence to make the ship seaworthy.

(d) Cargo and Stowage:

The shipowner must also apply due diligence to make the vessel seaworthy with respect to the stowage of cargo. Unseaworthiness may

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(1) See J.F. Wilson,Basic carrier liability and the right of limitation, published in the Hamberg Rules on the Carriage of Goods by Sea, edited by S. Mankabady, Leyden, 1978, p.137, at p.140.

(2) See Dewey, op.cit., p.770; See also (The "Tolmidis") (1983) 1 Lloyd's Rep. 530.

(3) (1884) 12 Q.B. 297; See also Payne and Ivamy's,Carriage of Goods by Sea, 10th ed.,London, 1976, p.84.

be used not only by a faulty vessel itself, which we have already discussed but also by the manner in which the cargo is stowed.(1) The carrier must take account of the nature and characteristics of the goods offered for shipment in planning the voyage, and the holds must be cleaned in preparation for the receipt of cargo. The due diligence also requires attention to the balance of the vessel, and must not allow the ship to be overloaded.(2) An interesting case that can be cited in connection with the question of stowage and seaworthiness was that of Kapittoff v. Wilson,(3) which concerned iron armour plates stowed in the ship broke loose from the ship which in consequence was lost, the court found that the ship was unseaworthy as regards the manner of the stowing, because she was not fit to encounter the ordinary perils. It should be borne in mind that due diligence must be exercised not only to provide a vessel fit to undertake a voyage, but also fit to carry the goods safely to their destination.(4) Accordingly, questions of unseaworthiness will arise if the cargo already stowed in the vessel's hold is of such a nature as will readily damage cargo which is subsequently loaded therein. The observations of Scrutton, L.J. in the case of Paterson Zochonis v. Elder are of particular interest. He said:(5) "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

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(1) See Giles, op.cit., p.139.

(2) See Dewey, op.cit., p.774.

(3) $(1876)_1$ Q.B. 377; See also The "Friso" $(1980)_1$ Lloyd's Rep. 469.

(4) See Astel, op.cit., p.59.

(5) (1923)1 K.B. 420, at p.438.

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". One last point which deserves notice is that the ship may sometimes be inspected by responsible persons, such as a Lloyd's surveyors and they grant the ship certificate of seaworthiness, the question is whether this certificate is sufficient to prove that the carrier complys with his obligation to exercise due diligence to make the vessel seaworthy. It seems to me that this certificate is not decisive proof that the carrier exercised due diligence to make the ship seaworthy. Consequently, this certificate loses its efficacy if the adversary succeeds in establishing the unseaworthiness of the ship.

This was made clear in the case of Charles Goodfellow Lumber Sales Ltd. v. Verreault, Havington,(1) which came before the Canadian courts, it was held that production of the certificate of seaworthiness was not sufficient to dsicharge the statutory onus of proof that due diligence was exercised to make the ship seaworthy.

In the United States the situation is the same. In Artemis Maritime Co. v. S.W. Sugar Co.,(2) which came before the United States Court of Appeals, it was held that neither visual inspection of the hull and machinery, nor diligence in the acquisition of seaworthiness certificates was considered conclusive. All the surrounding facts and circumstances had to be considered. It is convenient here to mention that the British Maritime Law Association suggested an amendment to article 3 r. 1 of the Hague Rules at the CMI Stockholm Conference in 1963. Although the conference adopted this proposal after considerable debate and recommended it to the Diplomatic Conference on Maritime Law, the latter did not agree to it.(3) This

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(1) (1971)$_1$ Lloyd's Rep. 185.

(2) (1951 A.M.C. 1833.

(3) See Astel, op.cit., p.55; See also Mankabady, The Brussels Convention, p.136.

proposal was that the following proviso should be added to rule 1: "Provided that if in circumstances in which it is proper to employ an independent contractor (including a classification society), the carrier has taken care to appoint one of repute as regards competence, the carrier shall not be deemed to have failed to exercise due diligence solely by reason of an act or omission on the part of such an independent contractor, his servants or agents (including any independent sub-contractor, and his servants or agents) in respect of the construction, repair or maintenance of the ship or any part thereof or of her equipment. Nothing contained in this proviso shall absolve the carrier from taking such precautions by way of supervision or inspection as may be reasonable in relation to any work carried out by such an independent contractor aforesaid".

It should be mentioned that the British Maritime Law Association proposed this amendment, because the British shipowners believed that the House of Lord's interpretation of the phrase "due diligence" in "Muncaster Castle" (Supra) had placed heavy responsibility on the shipowner. The delegations who spoke against the British proposal said that the problem was a domestic one concerning this country and to a lesser extent the United States. But the British delegation explained that the proposal aimed not to help the British Shipowners solely but the shipowners from other countries who might become subject to the English law. The CMI conference accepted the proposal by a majority vote, but the Diplomatic conference, did not approve the CMI's proposal.(1)
Accordingly, there are no provisions carried out by Visby Rules 1968 in relation to seaworthiness.

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(1) See Mankabadi, the Brussels, p.147.

Seaworthiness under the Iraqi law.

1. Ottoman law of maritime commerce;[1] under the ottoman law of maritime commerce the carrier's obligation to provide a seaworthy ship is a strict obligation and is not modified by "due diligence".[2] By this fact the Iraqi provision differs from that of the Hague Rules which modified this obligation by "due diligence".[3] In this case the carrier cannot discharge responsibility by the fact that he has exercised due diligence to make the vessel seaworthy. However, he can escape liability if he proves that the loss or damage to cargo has resulted from a foreign cause for which he is not liable.[4]

2. Draft of the new Iraqi Maritime Law: The position regarding the obligation of the carrier to render a seaworthy vessel is different. The new rules are identical with those of the Hague Rules.[5] Thus, the Iraqi legislature in this point has not followed the approach of the Ottoman legislation.

2. Load the cargo properly and carefully.[6]

After having provided a vessel seaworthy in the broadest sense, the carrier may still be held liable for fault in loading, if the goods are subsequently damaged.[7] Undoubtedly, the carrier is liable

(1) This law which in force in Iraq was enacted in 1863 when Iraq was colonized by Ottoman Empire. This law has become, from the standpoint of the contemporary development of maritime trade, out of date. Therefore, Iraqi Government works very hard nowadays in order to create a draft for a new maritime law.

(2) See Taha, op.cit., p.256; See opposite of this view Al-Sharkawi, op. cit., p.296.

(3) See article 19 of Ottoman Law of Maritime Commerce; See also Maki, Al-Wasit, p.205.

(4) Unfortunately, this writer has not found any reported Iraqi cases relating to this question.

(5) See article 179(1) of the Draft of the new Iraqi Maritime Law.

(6) Article 3(2) of the Hague Rules provides: "Subject to the provisions of article 4, the carrier shall properly and carefully load.....".

(7) See Gilmore and Black, op.cit., p.132.

for a fault in loading without saying that where the carrier himself or through his servants or agents acts[1] carelessly in performing this duty, he is responsible for all goods which have been delivered to him, or to his authorised servants for the purpose of being carried. It is to be noted that the duty of the carrier to properly and carefully load is very broad. It means that the carrier is to see that cargo is loaded safely and in a manner so that it can be found for quick and safe discharge. In International Packers Ltd. v. Ocean Steamship Company Ltd. (supra), the vessel left the port without having secured the hatch locking bars, the trapaulins were stripped from N.2 hatch and the cargo was damaged. According to the advice of the surveyor, the damaged cargo was discharged and sold in its damaged state. There was another cargo in the hold which consisted of canned meat with canary seed. This cargo was not discharged from the hold of the ship. This however, proved to be a miscalculation on the part of the surveyor, because the canary seed had been very badly wetted and thereafter heated on the voyage to such an extent to liquefy the contents of the canned meat causing it be discharged in a damaged condition. It was held that there was a failure of the ship under article 3(2) of the Hague Rules to care for the cargo and that the carrier was responsible for the damage sustained by the canned meat.

When loading begins:

There has been considerable dispute as to the moment the goods are loaded on the vessel under the Hague Rules. It should be mentioned that under article 3(2) of the Hague Rules the carrier is responsable

(1) In International Packers Ltd. v. Ocean Steamship Co. Ltd. (1955) 2 LL.L Rep. 218 it was held that the duty of care of cargo under art 3(2) of the Hague Rules was non-delegable and that the carrier was liable for the damage to the cargo even though he acted on what turned out to be wrong advice given by his surveyor; See also Gorly and Giles, op.cit., p.145.

for the operation of loading, and his responsibility commences from the time the goods are received into the tackle for lifting on board the ship and does not cease until the goods are released from the discharging tackle,(1) namely the responsibility of the carrier for the operation of loading continued "from tackle to tackle". This has meant that when the tackle of the ship is used, loading begins when the tackle is holding the cargo. When shore tackle is used the loading begins when the cargo crosses the ship's rail, but if the shore tackle had been used and the carrier in the contract had undertaken to load, then loading begins when the tackle is holding the cargo.(2) This question of when loading under the Hague Rules begins was discussed in great detail in Pyrene Company Limited v. Scindia Steam Navigation Co.,(3) which concerned the damage to a fire tender which was dropped whilst being lifted by the ship's tackle, and damaged before crossing the ships rail, the shipper made a claim against the ship owners in tort for full cost of repair. It was held that the Hague Rules were not meant to apply to a period of time, but to a contract of carriage,(4) including loading and discharging,and the rights and immunities of the carrier were extended tothe whole of that period, including that part of the loading operation before the goods had crossed the ship's rail, hence the carrier was permitted to benefit by the per package limitation. During the course of the judgement delivered in this case, it was said that the phrase "shall properly and carefully load"(5)

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(1) See Astle, op.cit., p.80; See also Williams, op.cit., p.254.

(2) See Tetley, Marine, p.286.

(3) $(1954)_1$ Lloyd's Rep. 321.

(4) The reference to "when the goods are loaded on" in Art 1(e) of the Hague Rules which states "Carriage of Goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship".

(5) See Art 3(2) of the Hague Rules.

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. Devlin J. Said: "The former interpretation perhaps fits the language more closely, but the latter may be more consistent with the object of the Rules". In that context his Lordship also said: "The extent to which the carrier has to undertake the loading of the vessel may depend not only upon different systems of law but upon the custom and practice of the port and the nature of the cargo. It is difficult to beliye that the Rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging,so that both operations are naturally included in those covered by the contract of carriage".(1)

It must be mentioned that in the absence of an express stipulation or custom of the port of loading to the contrary, it is the duty of the shipper to bring the goods alongside the ship at his own expenses, and to take a receipt from the person authorised to receive the goods, and the ship bears the expenses and risks of putting them on board.(2)

But if the goods have to be taken to the ship in lighters, the commencement of the carrier's liability depends on whether the carrier owns or controls the lighters. When the carrier does not have control of lighters, cargo is not considered as delivered until the tackle of the vessel is hooked onto cargo. In the United States it was held that the carrier was responsible for cargo lost when a lighter capsized alongside. The court went on to say: "The barge

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(1) (1954)1 Lloyd's Rep, p.321 at p.328.
(2) See Carver, part 1, p.265: See also Ridly, op. cit., p.116.

and its contents had come within the actual control of the carrier at its terminal. Furthermore, additional evidence of a delivery includes acceptance of the scow's papers and direction of a scow to 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".(1)

One gathers from these judgements that it is not necessary the cargo should have actually arrived on board for the commencement of the carrier's liability. It starts when the cargo has been delivered into the carrier's custody for the purpose of being carried.(2) Undoubtedly, the carrier is obliged to load the cargo on board, but he is not liable for the damages if the shipper undertakes to load his cargo. However, the carrier is responsible to third parties if a shipper caused damage to other cargo while loading his own cargo. It is convenient here to mention that in the United States the Harter Act 1893 operates from the time of the discharge of the goods from the ship until the goods have been delivered to the consignee or a warehouse. This act has also been held to apply to the movement of the goods on the dock prior to being received into the ship's tackle.(3) This was made clear in the case of Firston International v. Isthmain Limes Limes,(4) in which it was held that since the damage occured on the dock, the claimant's rights against the carrier governed by the provisions of the Harter Act. However, under this act the carrier is permitted to introduce non-responsibility clauses before loading and after discharge if such clauses are reasonable.(5) In Quaker Oats Co. v. United Co.(6) the loading on board was delayed because of a strike

(1) The Scow Stuweld (1968) A.M.C. 2064 at p.2073.

(2) The delivery must be to a person authorised to recived the cargo. See Carver, part 1, p.265.

(3) See Astel, op.cit., p.288.

(4) (1964) A.M.C. 1284.

(5) See Section 1 of the Harter Act.

(6) (1956) A.M.C. 791.

at the port at which the cargo was received. The bill of lading contained a clause relieving the carrier from damage caused by labour disturbances. This clause was held to be valid under the Harter Act, and therefore the carrier was not responsible for the damage to the cargo. It is to be noted that the position is the same under the Carriage of Goods by Sea Act 1936 (Cogsa), which gave effect to the Hague Rules. The responsibility of the carrier under this Act depends on whether the goods have been delivered into the carriers custody for the purpose of being carried, But it must be mentioned that the position under this Act is somewhat complicated, because in spite of the passing of this act, the Harter Act was not abolished, but was merely supplanted in the time when the goods are loaded on until they are discharged from the ship. In connection with the care of the goods prior to the loading on the board of the vessel, reference might with advantage be made here to the case of the Yoro,(1) which concerned a number of lighters that had been secured alongside the vessel, and loading into the vessel from those lighters, had been commenced. A heavy squall developed, causing one lighter to sink and the cargo in the others be suffered damage by water. It was held that the craft was under the control of the vessel, and the carrier was responsible for the damages to the cargo.

Under the Iraqi Law

The Iraqi maritime law (Ottoman law), has not ruled on the obligation of the carrier to load the cargo on board, the question, therefore, is governed by the Iraqi law of Commerce 1970 and the agreements of the parties themselves.(2)

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(1) (1952) A.M.C. 1094.

(2) Article 2 of the Iraqi Law od Commerce 1970 provides: "1. The special agreement between the parties to the contract must be applied on commercial matters. If there be no special agreement, the following rules must be applied: - the provisions of this law or other laws concerning the commercial matters; the rules of commercial custom. The private or local commercial custom outweights the public commercial custom; 2. If there be no commercial custom the provisions of the Iraqi Civil Code must be applied; 3. The special agreement and the rules of commercial custom can be applied only if they are in harmony with the imperative legal provisions".

Article 261(1) of the Iraqi law provides that, in the absence of an express stipulation to the contrary, it is the duty of the carrier to receive and load the cargo on board. The same result was reached by the Iraqi Cassation Court. It was held by this court that it was the duty of the carrier to load and discharge goods, because these two operations were covered by the contract of carriage of goods by sea.(1)

Stow properly and carefully

Closely connected with the question of loading is that of stowage the cargo. After receiving the cargo over the ships rail or otherwise as customary or provided by the contract, it becomes the carriers duty to stow it. As a matter of fact, it seems to me that this question is perhaps the most important duty placed on the carriers shoulders, which may give rise to many problems. However, it is intended here to discuss this duty under the Hague Rules. The carrier's responsibility for proper stowage is set out in article 3(2) of the Hague Rules which reads: "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". Undoubtedly, the duty of stowage lies on the shoulder of the carrier by article 3(2) above mentioned. The order of stowing the cargo in the ship is arranged by the master of the ship or his representative, and he has a full knowledge of safe stowage. In Heinz Horn - Marie Horn(2), it was held that the captain of the vessel occupies a dual role with regard to such decisions. He acts for the shipowner, where his stowage decisions are made with regard to the seaworthiness and safety of the vessel;

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(1) 1974 IJJ, 3rd year, p.82.

(2) (1970)1 Lloyd's Rep. 191.

he acts for the cargo owner where his decisions do not affect the seaworthiness or safety of the vessel, but affect the safety of the cargo only. It must be mentioned that the master ought to be a competent stevedore, and he must observe that the stowage was done properly.(1) However, when the order of stowage is taken by the master, many points must be borne in his mind. First the cargo must be stowed in the reverse order to that in which the goods are to be taken out.(2) Second, it is the master's duty to see that the heavy cargoes are not stowed over light cargoes, also to observe that the types of cargo which would be liable to cause damage to other cargo should be stowed in a manner which prevents damage to the other cargo in the same compartment. And it is the master's responsibility to observe that the stevedore carries out these things properly.(3) In Edouard Malerne v. SS Leerdan, it was held that the possibility of leakage of wet cargo (oil and turpentine) must be anticipated and the cargo, if properly stowed, must be so stowed that when leakage occurs, damage will not occur to other cargo, where oil is stowed near dry cargo and therefore leaks and damages the dry cargo, this fact in and of itself creats an inference of bad stowage.(4) If the carrier chooses to carry a number of different types of cargo together, he does so at his own risk and he is liable for the damage they may cause to each other, though he may have taken a proper way of stowing them.(5)

However, the carrier is relieved from liability, if he has adopted the customary method of stowage for the cargo. For example, in the case of the Silversandal,(6) bales of rubber were stowed high in tiers,

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(1) See Carver's Carriage by Sea, Vol. 2, 13rd ed, London, 1982, p.821.

(2) For example, a ship going for three ports, namely A,B and C consecutively, the cargo must be stowed in the order of C,B and A. Cargo for port C first, cargo for port B second and cargo for port A at last. See Edward F. Stevendon's shipping practices, London, 1979, p.103.

(3) See Stevenson, p.103.

(4) (1956) A.M.C. 1977 at p.1981.

(5) See Carver, Vol.2, p.827.

(6) (1940) A.M.C. p.731.

and this caused crushing of some bales. The crushed bales could not fit into the slicing machines. It was held that they had been stowed in the customary way and that the shipowners were not thereof liable. However, it is not defence to stow according to custom if that custom is improper. This was made evident in the case of the Can Co-operative Wheat Producer v. Paterson SS Ltd.[1], which concerned shipment of grain. The grain loaded in bulk without shifting boards in accordance with the practice of Great Lakes in the previous 20 years. It was held that there was no due diligence to provide a seaworthy ship. References should also be made to an American case, namely Aunt Mid Inc v. Fjell Oranje Lines[2], which came before the U.S. Court of Appeals. It was held that the carrier responsible for damage to a cargo of cabbages which had been stowed in a ventilated rather than a refrigerated hold in order to save freight costs, contrary to the advice of shippers agent and contrary to the practice of the trade. It must be mentioned that the shipper should give the carrier full information for cargo requiring special care or involves unusual danger, because the carrier puts in his mind that the normal cargo does not require special information.[3] Undoubtedly, the master or the carrier is empowered to refuse any cargo which has a distinct danger or bad smell, or to refuse any package which has been suspected of containing dangerous goods and he requested that it be opened to ascertain that fact. If dangerous goods have been brought abroad the vessel without being marked or without notice being given, the master or the carriermay give the order to throw the cargo from the ship.[4] In Carver[5], it is pointed out that the mere ignorance of

(1) 49 Ll.L. Rep. 421.

(2) (1972) A.M.C. 677.

(3) See Tetley, Marine, p.265.

(4) See Stevens, op.cit., p.105.

(5) See Carver, part 2, p.827.

the effect of stowing particular kinds of goods together will not make the carrier liable, unless as a competent person he must reasonably be expected to know.

The case of Ohrloff v. Briscal[1] is a very good illustrative example of this point of view. This case concerned seventy casks of olive-oil stowed in the same hold with some rags and wool which having heated caused damage to the olive-oil. Improper stowage was held to be the cause of the damage, and the carrier responsible for the loss. This decision was reversed by the Privy Council. In this case Turner L.J. said: "Nothwithstanding the evidence of the notoriety at Liverpool of the deleterious consequences of the collocation of casks of oil with rags and wool, or other matters tending to generate heat, we do not believe that either the shipper 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".

It seems quite clear that the carriers duty to stow cargo set out in article 3(2) is a strict obligation, and must be exercised throughout the whole voyage. An interesting case concerning the standard of care required in the stowage was that of Silversandal, in which it was held that;[2] "In carriage of goods, the trade must always come to some accommodation between ideal perfection of

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

(2) (1940) A.M.C. 731 at p. 734.

stowage and entire disregard of the safety of the goods; when it has done so, that becomes the standard for that kind of goods. Ordinarily it will not certainly prevent any damage, and both sides know that the goods will be somewhat exposed; but if the shipper wishes more, he must provide for it particularly".

It has already been mentioned that the faulty stowage which endangers the vessel may amount to unseaworthiness or in other words, unseaworthiness may be caused not only by faulty construction or the bad condition of the machinery of the vessel, but also by the bad stowage even though such stowage may not affect the safety of the vessel itself. For example, a cargo already has stowed may make the hold of the ship unfit for the stowage of another particular kind of cargo. On the other hand, the bad stowage may endanger the stability of the vessel, which would definitely make the vessel unseaworthy.(1)

In fact, it is outside the scope of this chapter to examine in detail this point, which will be examined in chapter three of this thesis. However, it should be mentioned here that in most cases it is very difficult to determine whether a particular type of stowage amounts to unseaworthiness or not.

Finally, it should be remembered that the stowage is the responsibility of the carrier, and he cannot avoid the responsibility for bad stowage by employing an independent contractor to perform this duty.(2) Moreover, if the carrier inserts a clause in the bill of lading to relieve himself from the responsibility for bad stowage, this clause would be invalid under article 3(8) of the Hague Rules.

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(1) See Astel, op.cit., p.59.

(2) See Giles, op.cit., p.141.

In Canadian Transport co. v. Court Line,(1) Lord Wright said: "In modern times the work of stowage is generally delegated to stevedores, but that does not generally relieve the shipowners of their duty, even though the stevedores under the charter-party to be appointed by the charterers, unless there are special provisions which either expressly or inferentially have the effect". However, the carrier may be relieved of liability in virtue of article 4 (2) (1) of the Hague Rules if he proves that the method of the stowage has been directed by the shipper. But mere fact that the shipper knew how the goods being shipped, and assented to what was done, will not necessarily relieve the carrier of responsibility.(2) But it must be mentioned that this thing does not apply to the stability of the ship, because the master must be the supreme authority in this case, and as such he is alone responsible for this matter.(3) It is convenient here to mention that where the bill of lading if silent as to the place of stowage, the cargo must be stowed under deck, or in the ordinary proper carrying space of the ship.(4) It is to be noted, however, 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) of the Hague Rules.

Discharge properly and carefully

This brings us to the end of the voyage, and the ship now arrived at the port of destination which stated in the bill of lading.

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(1) (1940) A.C. 934 at p.943.

(2) See Carver, part 2, p.834.

(3) See Tetley, Marine, p.264.

(4) See Carver, part 2, p.858; See also Scrutton, op.cit., p.164.

On the whole, where goods are shipped in a general ship, the port at which they are to be discharged is nearly always named in the bill of lading. If this port is unsafe, the ship must proceed as near to the port as she may go with safety (in the absent of any express agreement to the contrary).(1) But sometimes it is difficult to determine long in advance the berth where discharge is to take place. Accordingly, a difficult question may arise as to who has the right o naming the discharging berth. It is outside the scope of this work to deal with the elaborate controversy arising out of this point. It is sufficient here to mention that in the case of a general ship, this right is vested in the master, but this right may be limited by a custom of the port.(2) At any rate, this work will deal with this problem under the Hague Rules. As has already been mentioned, article 3(2) of the Hague Rules states expressly that the carrier shall properly and carefully discharge the goods carried. And article 1(b) and 1(e) taken together, state that the contract of carriage of goods "cover the period from the time when the goods are loaded on to the time they are discharged from the ship".

From a strict reading of these articles it would appear that the rules do not apply after discharge. We have already seen that the Hague Rules apply more to the contract of carriage than to a period of time.(3) Moreover, most bills of lading contain special conditions to cover the periods prior to loading and subsequent to discharge. An interesting case concerning this question was that of Goodwin Ferreira and Co. Ltd., v. Lamport and Holt Limited.(4)

(1) Per Sankey, J., in Hall Brothers v. Paul Ltd., (1914), 11 L.T. p.812. "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"; See also Jasper Ridely, op.cit., p.120. Often times the clause "Or so near thereto as she may safely get" used after the name of the port of discharge. This clause is also used even the port is not named. See Payne and Ivanny's op.cit., p.126.

(2) See Scrutton, op.cit., p.290; See also Giles, op.cit., p.233.

(3) See Pyrene Co. v. Scindia Steam Navigation (Supra).

(4) 34 Ll.L. Rep. 192.

In this case, a consignment of yarn had been discharged from the vessel into a craft alongside the vessel. During the discharge operation into the craft, a piece of machinery felt from the sling causing damage to the lighter and the yarn. It was held that the carriers obligation to discharge carefully under the Hague Rules did not complete with the release of the goods from the ships tackle while goods were being discharged into a lighter and the lighter had not been completely stowed. Another case of interest in this connection was that Falconbridge Nickel Mines v. Chimo Shipping,(1) in which it was held that the discharge into a barge alongside the ship was considered as part of the discharging operation, and the obligation to take the cargo ashore was part of the contract. It is apparent from these two cases, that whilst the operation of discharge is still going into craft, discharge within the meaning of the Hague Rules is not completed.

It is convenient here to mention that the Goodwin Ferreira & Co. Ltd. v. Lamport & Holt(2) case has given the guiding light to the American courts on this problem.

Significant example of this trend is provided by the well known case Hoegh v. Green Truck Sales(3) in which it was held that, for the purposes of the U.S. Carriage of Goods by Sea Act 1936, to which the relevant bills of lading were subject, cargo could not be treated as "discharged" when still in the process of being unloaded from the vessel into lighters. Discharge was not complete as soon as each case was lifted from the hold of the vessel. That the vessels own equipment was not being used did not alter the possition.

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(1) (1973)$_2$ Lloyd's Rep. 469.

(2) 34 Ll. L.R. 192; (1929) 45 T.L.R. 521.

(3) (1962) A.M.C. 431.

It should be borne in mind, however, that when Carriage of Goods by sea Act 1936 ceases upon the completion of discharge, the Harter Act immediately applies to the movement of the cargo until "proper delivery" has been effected.(1) Accordingly, non-responsibility clauses after discharge but before proper delivery are invalid under the Harter Act.(2) This is clearly witnessed by the Crystal v. Cunard S.S. Co.,(3) case in which it was held that every clause in a bill of lading relieving the carrier of responsibility in the delivery from the ship's deck was void under the Harter Act.

Finally, it must be mentioned that the duty of the carrier to discharge the cargo "properly and carefully" under article 3(2) of the Hague Rules is a strict obligation and it is not sufficient to exercise due diligence.

2. Establishment of the carriers liability under the Hamburg Rules.

The Working Group on Merchant Shipping Legislation of UNCITRAL had devoted the session, held in February, 1972 to a preliminary consideration of the basic rules governing responsibility of the carrier. 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 priniciple of carrier liability 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 be separately elaborated together with a separate consideration of the exceptions to liability.(4) The basis for discussion in the Drafting Group was paragraph 269 of the Secretariat Report (A/CN.9/63/Add.1) of December 3rd, 1971, which was redrafted as paragraph 42 of

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(1) See Astle, op.cit., p.290.

(2) See Section 1 of the Harter Act.

(3) (1965) A.M.C. 39.

(4) See Sweeney, part 1, p.102.

the Working paper prepared by the Secretariat for the September meeting (A/CN.9/W.G.111/WP.6 of 31 Aug, 72).[1] After lengthy and heated discussions, the majority of the members Working Group reached an agreement at the fourth session[2] on the principles that should be incorporated in a set of rules[3] that would gocern the responsibility of the carrier for damage or loss of cargo and which would replace article 3(1), and 4(1), (2) of the Hague Rules.[4] The general rules now found in article 5 of the Covention which states:

"1. 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".[5]

It is obvious that the basis of liability under the UNCITRAL Rules is affirmative in nature, and based on fault or negligence. This test means that if goods are short delivery or are delivered damaged then you first look to see whether the loss or damage was

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(1) See the Report of the third session U.N. Doc. series A/CN.g number 63.

(2) It was held in Geneva from 25 Sept. to 6 Oct. 1972.

(3) The text was prepared by a drafting party composed of representatives from Argentina, Egypt, France, India, Japan, Nigeria, Norway, Spain, United Republic of Tanzania, United Kingdom, U.S.S.R. and United States. This session adopted the following working basis; 1. retention of the principle of the Hague Rules that the responsibility of the carrier should be based on fault; 2. Simplification and strengthing of the above principle by removing or modifying the exception 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. See Cleton, op.cit., p.5.

(4) See Kimball, op.cit., p.233.

(5) It is convenient to mention here that article 5(1) of the Hamburg Rules is patterned broadley, on article 18(1) of the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air of 1929 as amended by the Hague protocol 1955. See Shah, op.cit., p.7.

caused by an occurrence which took place while the goods were in the carriers custody. If it did, you then ask whether the "occurrance" was due to the fault of he shipowner or his servants or agents. If there is fault, there is liability and if there is no fault, there is no liability.(1)

Thus,the new Rules does not seek to introduce a "strict" or "absolute" system of the carriers liability under which the carrier is liable for all loss or damage which happen to the cargo whilst in his custody.(2)

It is clear that the system of liability under the UNCITRAL Rules which based exclusively on fault is generally the same under the Hague Rules. The fundamental difference between the two systems lies in the varying ways in which the "fault" principle is applied in each.(3) Accordinlgly, the basic duties of the carrier set forth in articles 3(1) and (2) of the Hague Rules, would remain in effect under article 5(1) of the Hamburg Rules as part of the carriers overall responsibility to perform all of his obligations under the contract of carriage with due care. But the new convention states a general rule based the presumption of fault in the event of loss or damage.(4) For example, the first of the shipowners major obligations under the Hague Rules, is the exercise of due diligence to make the ship seaworthy. We have already seen that according to this obligation, the carrier is liable not only for negligence committed by himself or by his

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(1) See Diamond, The division of liability, p.45

(2) See William, op.cit., p.252.

(3) See Williams, op.cit., p.252.

(4) See the annex of the Hamburg Rules (common understanding adopted by the United Nations Conference on the Carriage of Goods by Sea); See also John Crump, The influence of the Hamburg Rules on average adjustment, published in Hamburg Rules, A one day seminar organised by Lloyd's of London, Press Ltd, London, 1978, p.1.

servants or employees, but also responsible for the negligence of independent contractors such as surveyors and ship repairers. This was made very clear in the decision of the House of Lords in 1961 in the Muncaster Castle (Supra). Article 5(1) of the Hamburg Rules intended to achieve the same result by providing that the shipowner 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.(1) But 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 states that: "The carrier is liable for loss resulting from loss of or damage to the goods, ... unless the carrier proves that he, his servants or agents took all measures that could resonably be required to avoid the occurrence and its consequences".

It is believed by the draftsmen of the Hamburg Rules that this provision will remove some of the incongruities and inconsistencies arising from the ambiguous wording used by the Hague Rules.(2) For instance, the obligation of the carrier to provide a seaworthy ship under the Hague Rules was limited to a duty to exercise "due diligence" before and at the beginning of the voyage. This was construed as meaning that the carrier would commit no breach of this obligation by allowing the ship to become unseaworthy during the voyage.(3) Therefore, the carriers duty to provide a seaworthy ship under the Hamburg Rules is to be judged on the same basis as his duty to ward the cargo and both obligations are to run throughout the period of carriage.(4)

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(1) See Diamond, New Rules, p.47; See also Giles, op.cit., p.249.

(2) See Wilson, op.cit., p.102.

(3) See article 3(1) of the Hague Rules; See also McGilchrist, op.cit., p.258.

(4) See Wilson, op.cit., p.141.

It should be mentioned, however, that when we contrast the wording used in paragraph 1 of article 5 of the Hamburg Rules with the wording used in the case of fire (paragraph 4 of the same article) which refers to "fault or neglect" it would be open to the court to give somewhat different meaning to the words used in paragraph 1. This will lead to some uncertainty about the basis of the liability, namely, whether this wording creates a liability based on fault or whether it is intended to be strict liability.(1)

It is obvious that paragraph 1 of article 5 of the Hamburg Rules contains a rule of liability for fault. However, one must admit that such a rule, combined with a reversal of burden of proof, can be very near to a rule of strict liability.(2) It seems essential here to make it clear that paragraph 1 of article 5 contains two stages for the carrier's liability. The first stage is to prove that the "occurrence" which caused the damage took place while the goods were in the carrier's hand. If it did, then the second stage will come. In this stage it is allowed for the carrier to prove that he took all measures that could resonably be required to avoid the occurence and its consequences.(3) One of the most important

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(1) See 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 S. Mankabady, Leyden 1978, p.239; at p.242. It is worthy of note that during the Diplomatic Conference several delegations including the U.K. delegation, opposed the UNCITRAL text for paragraph 1 of article 5. They argued that their courts might interpret this wording as containing a rule of strict liability rather than of liability for fault. They proposed an alternative text for this paragraph which clearly expressed the fault principle. This point became one of the important issues to be discussed during the meetings of the Consultative Group. The majority, however, refused to accept any amendment to the UNCITRAL text claiming that this text was a compromise which had only been agreed upon after long debates. See Cleton, op.cit., p.5.

(2) See Cleton, op.cit., p.5.

(3) See Diamond, A legal analysis of the Hamburg Rules, p.9; See also W.R.A. Brick Reynardson, The implication on liability insurance of the Hamburg Rules, published in the Hamburg Rules, A one day seminar, p.3.

questions which arises here in connection with this point is: what is it that the carrier has to prove in order to escape liability? Does he have to show merely that the 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 by this writer that paragraph 1 of article 5 did not impose a higher duty on the shipowner than that of ordinary reasonable care. And annex 2 of this rules makes it clear that all the shipowner needs to do is to show that he took reasonable care of the goods. It is important to observe that "occurrence" must have occurred while the goods are in the shipowners charge, to oblige the shipowner to prove that he took reasonable care of the goods.(1)

However, in any system of liability based on fault or negligence, the important question is for whose fault or negligence is the defendant (the carrier) liable.(2) It is clear enough that under article 5 of the Hamburg Rules the carrier is liable for loss or damage caused by fault or neglect committed by him or his servants. Accordingly, the contracting carrier may be sued in tort either by someone who is a party to the contract of carriage or by a stranger to the contract who has an interest in goods.(3) If the contracting carrier is sued by a party to the contract of carriage the carrier could always rely upon his contractual defences in meeting the tortious claim (article 7(1)). The situation will be the same if the contracting carrier is sued in

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(1) See Diamond, part 1, p.11.

(2) See Diamond, part 1, p.12.

(3) See Gordon Pollock, A legal analysis of the Hamburg Rules published in Hamburg Rules, A one day seminar, p.8.

tort by someone who is not a party to the contract of carriage, since article 7(1) provided that the carrier shall have the benefit of the defence set out in the rules in any action against him, however brought.(1)

But the carrier is not liable in these situations:(2)

1. When a contract of carriage expressly states that a specified part of the carriage is to be performed by a named party;
2. When a contract provides that the carrier is not liable for the loss, damage or delay caused by an occurrence which takes place when the goods are in the charge of such named party;
3. If the carrier proved that the damage occurred whilst the goods are in the charge of such named person.(3)

On the other hand, under the Hamburg Rules (article 5) the carrier assumes liability for the negligence of the master and the crew as part of his overall responsibility to exercise due care to avoid loss of or damage to the cargo,(4) namely, the carrier is liable for damage caused by fault of his servants or agents. Unfortunately, there is no article in the Hamburg Rules attempted to define the meaning of "servant" and "agent". It is no much difficulty in the word "servant",(5) but it is not always easy

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(1) See Pollock, op.cit., p.8.

(2) See article 11(1) of the Hamburg Rules. It must be mentioned that this article is entitled "Through Carriage" but a careful study of this article discloses that it really means quite the opposite, that it provides exception for through carriage. It is a possible exception to article lo in respect to the carrier being responsible for the actual carrier, it also provides an exception to through carriage. See report of the UNCTAD secretaria, June 18, 1976 (TB/C.4/SL/23) at page 20; See also William Tetley, Articles 9 to 13 of the Hamburg Rules published in the Hamburg Rules on the Carriage of Goods by Sea, edited by S. Mankabady, p.197 at p.200 (hereinafter cited as Tetley, The Hamburg Rules).

(3) See R.J.L. Thomas, A legal analysis of the Hamburg Rules, published in Hamburg Rules, a one-day seminar, p.7; See also Honour, op.cit., p.2.

(4) See Kimball, op.cit., 236.

(5) The word servant refers to a person, usually employed on a regular basis and subject to the command of his employer as to the manner in which he shall do his work. See Diamond part 1, p.13.

to define the concept "agent" because it is not always easy to determine the exact role of the intermediaries and whether they acting as servants, agents or independent contractors.(1) For example a freight forwarder may act as an independent contractor,(2) or as an agent acting on behalf of the shipper, the consignee or the carrier. We have noticed before that the stevedors are the most important category in this respect. But the position of the stevedors is not obvious in most countries, and the courts adopted different solutions in this matter.(3) However, two points are to be considered in deciding whether the stevedore is a servant, an agent or an independent contractor, 1- the degree of control and supervision of his work by the principal; 2 - the work to be done, and whether it is part of the original contract(4). It should be mentioned that if the meaning of the word "servant" or"agent" is left to be decided according to the concept established under each local legal system, different interpretation would prevail, because every state will apply its own rules of vicarious liability when applying article 5 of the Hamburg Rules and that widely differing results are to be expected in different countries.(5)

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(1) See Mankabady, The Hamburg Rules, p.69.

(2) In J. Evans & Sons (Portsmouth) Ltd.v. Andrea Merzario Ltd. (1976) 2 Lloyd's Rep. 165, per L. Justice at p.168 "The defendants are not carrier.....they are forwarding contractors who arranged for the transport of goods....The work which they do is performed by them through many sub-contractors".

(3) In England in the case of Heyne v. Ocean S.S. Co. (1927) 27 T.L.R. It was held that the stevedors are the ships servants, and the shipowner or charterer, as the case may be, is vicariously liable for damage done by stevedors.

(4) See Mankabady, The Hamburg Rules, p.70.

(5) See Diamond, part 1, p.13.

One last point in this connection deserves notice that some times whole or part of the carriage is sub-contracted by the contracting carrier to another carrier termed the "actual carrier",(1) who may, or may not, be named in the bill of lading. Moreover, the bill of lading may provide that the contracting carrier shall not be liable in respect of sub-contracted carriage, or as regards such carriage, shall be deemed to be an agent.(2)

The position of the actual carrier is governed by article 10 (2) of the Hamburg Rules, which provides that all the provisions of the Rules governing the responsibility of the carrier shall also apply to the responsibility of the actual carrier. This means,of - course,that the carrier is responsibile for the acts or omission of the actual carrier and for the acts or omission of his servants or agents acting within the scope of their employment.(3) Moreover, article 10(2) gives the shipper the right to bring his claim against the actual carrier if the loss, damage or delay of the goods occured while they were,in his charge.(4) It is to be noted,however,that in most cases it is very difficult to prove that the occurrence which damaged the goods or delayed their delivery occurred whilst they were in his charge. In most cases, it will be easier to sue the carrier as well as the actual carrier.(5) It is convenient here to mention that article 5 of the Hamburg Rules has included for the first time an express provision for the recovery of damage caused by delay in delivery

(1) See article 10 of the.Hamburg Rules.

(2) See Pollock, op.cit., p.8.

(3) See Diamond, part 1, p.15; See also Tetley, The Hamburg Rules, p.199.

(4) See Mankabady, The Hamburg Rules, p.78.

(5) See Thomas, op.cit., p.7.

of the cargo. The Hague Rules contain no specific provision in this respect, therefore, article 5 may encourage claims for delay which, in the past, have not been made.(1) However, the delay of the voyage might often arise as a result of an occurence for which the carrier was expressly responsible under the Hague Rules e.g. an engine breakdown resulting from a failure to exercise due diligence to make the vessel seaworthy. Therefore, one can conclude that the absence of specific reference to liability for delay in the Hague Rules did not leave the cargo-owner unprotected.(2) In order to remove all doubts in this connection, and to bring carriage of goods by sea in line with carriage by the three other modes of international transport, the Hamburg Rules now expressly provide that the carrier will be liable for loss, damage or expense(3) resulting from delay

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(1) See Honour, op.cit., p.244; See also Sassoon and Cunningham, op.cit., p.179.

(2) See Wilson, op.cit., p.145; See also Pollock, op.cit., p.1.; It is to be noticed that the Working Group of UNCITRAL was believed that the language of article 3(2) of the Hague Rules authorised recovery for physical damages caused by delay because of the carriers obligation to ".... properly and carefully load ... Carry, and discharge the goods carried". Moreover, the report of the Working Group pointed out that recovery of the economic loss is also authorized under the Hague Rules. See report of the Working Group A/CN.9/WG.111/WP.12 (Vol.1) of 30th November, 1973; See also Report of the Working Group A/CN.9/88 of 29th March, 1974 at paragraphs 13,17; See also Sweeney, part 3, p.490.

(3) At the second reading article 5(1) of the Hamburg Rules was modified to express three types of damage resulting from breach of the carriers duty; loss, damage or expense. It was the intention that the word expense include the consequential losses to the carrier, whether from destruction damage or delay. Also the second reading inserted the requirement of a port of discharge named in the contract of Carriage as a prerequisite for delay damages. See Sweeney, part 3, p.293.

in delivery unless he can discharge the standard burden of proof that neither he nor his servants were at fault.(1)

Delay(2) in delivery is defined by article 5(2) of the Hamburg Rules as occuring when the goods have not been delivered at the constractual destination within the time agreed or in the absence of such agreement "within the time which it would be reasonable to require of a diligent carrier, having regard to circumstances of the case.

However, article 5(2) contains no guidance for some important questions which arise under this article. First question concerns the meaning of " a diligent carrier". Does it mean a carrier who is personally diligent or does it mean a carrier who is not only personally diligent but is employed diligent servants and agents?(3) And the second question is what is to be the measure of damages in cases of delay? Obviously the words "loss or damage" cover physical damage to the goods caused by delay. However, it is not clear whether these words also cover loss of value through

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(1) See article 19 of the Warsaw Convention 1929 which provides that "The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods". See similar provisions in article 17(i) of the CMR(road) Convention 1959, and article 27(i) of the (rail) Convention, 1962; See also Wilson, op.cit., 145; See also Sweeney, part 3, p.490.

(2) It is convenient here to mention that under the normal cargo insurance policy, "delay" is not one of the insured perils Per se; in fact it is specifically excluded as such in the standard "All Risks" wording. And most cargo underwriters believe that as a result of making the carrier liable for delay, the insurance premium will be increased on cargo. See William, op.cit., p.258; See also A.E. Mann, Summing up on how the Hamburg Rules are likely to affect cargo underwriting published in Hamburg Rules, A one day seminar.,p.2.

(3) See Pollock, op.cit., p.3.

delay.(1) Paragraph 3 of article 5 is designed to obviate some problems which might arise in situation if the goods have not been delivered within the estimated time. This paragraph enables the consignee to recover for loss of the goods if they have not been delivered within 60 consecutive days following the expiry time for delivery, and without waiting for conclusive evidence for the loss.(2)

Finally, it should be noticed that article 5(3) gives rise to some considerable problems. The first remarkable feature to notice is that this clause can operate even where the carrier has been guilty of no fault whatsoever. For example, if the carrier and the shipper have agreed on a time for delivery, and the vessel is delayed through no fault of carrier for over 60 days beyond the agreed period, then the cargo-owner is entitled to deem the goods to have been lost.(3) Moreover, at the end of 60 days period the place of the goods may be known. The question then how does the claiment treat the goods as lost? does he abandon them to the carrier or to the cargo insurer if the later has settled a claim

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(1) The fundamental rule of compensation is that a party should be restored to the same position as he would be in if the contract had been fulfilled and not broken. In England the House of Lords held that the words "loss or damage" cover the difference between the market price of the goods at the date of arrival and the value at the date when they should have arrived. See Czarnikow v. Koufos (The Heron II) (1969) 1 A.C. 350; See also Mankabadi, The Hamburg Rules, p.52; See also McGilchrist, op.cit., p.259.

(2) This provision is similar to article 20 of the CMR Convention and article 30 of the CIM Convention.

(3) See Pollock, op.cit., p.l., It is convenient here to mention that there were differing views in the UNCITRAL working group 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. See report of the Working Group of the seventh session (A/CN19/88) at para 28 and 25; See also Sweeney, Part 3 p.494

for non-delivery.(1) On the other hand, in order to minimize the risk of this happening, all carriers will be very well advised never to agree to any realistic delivery period.(2)

SECTION TWO

The burden of Proof

It does not admit of doubt that the position of the burden of proof is a basic element in the fixing of rights with respect to any legal claim.

The Hague Rules set out in clear language the burdens of cargo-owner and carrier with respect to proving or disproving the carriers' liability for loss or damage suffered by the cargo-owner.

Where these rules are not clear enough, judicial interpretation has filled some of the gaps as to who bears the burden of proof at a given point in the litigation of a claim for loss or damage.

The UNCITRAL Working Group has proposed that these burden of proof rules be changed and that the carrier bears the burden of disproving his liability under almost all circumstances. Therefore, this section will be divided in two points:

1. The burden of proof under the Hague Rules.
2. The burden of proof under the Hamburg Rules.

1 - The burden of Proof under The Hague Rules.

It should benoticed that, the onus of proof is not set out in the Hague Rules. Yet certain references are to be found in

(1) See Diamond, New Rules, p.50; See also William, op.cit., p.258

(2) See Pollock, op.cit., p.5.

particular articles where the burden of proof is prescribed but these articles do not consitute a general theory for the burden of proof.(1)

However, it is a general rule of law that whoever relies on a certain fact must prove its existence. Accordingly, when the goods do not arrive, or arrived in a damaged condition, the cargo-owner must make a prima facie case against the carrier by showing that the goods were not turned out in as good condition as when delivered by him.(2) The observation of Vicount Sumner in Gosse Millard Ltd., v. Van Government Merchant Marine Ltd.,(3) are of particular interest. He said: "As the cargo in question was shipped in good order and condition and was delivered damaged, in a manner which was preventible and ought not to have been allowed to occur, there was sufficient evidence of a breach by the carrier of his obligation under Art III, r.2, of the Act 1924, to shift to him the onus of bringing the cause of the damage specifically within Art IV so as to obtain the relief for which it provides. At trial Wright, J. also said: "The words 'properly discharge' in Art III, r.2, mean I think 'deliver from the ship's tackle in the same apparent order and condition as on shipment', unless the carrier can excuse himself under Art IV.

Hence the carrier's failure so to deliver must constitute a prima facie breach of his obligation casting on him the onus to excuse that breach".(4) Moreover, in the case of George E. Pickett,(5)

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(1) See Tetley, Marine, p.47.

(2) In practive, it is generally accepted that delivery without any objection from the party who authorised to received the cargo is prima facie evidence of the completion of the contract as required by the rules. Whereas discharge under reserve is prima facie evidence of the contrary. See Astel, op.cit., p.11.

(3) (1929) A.C. 233 at p.234.

(4) $(1927)_2$ K.B. 432 at p.434.

(5) (1948) A.M.C. 453.

which came, before the American Courts, it was held that the carrier was responsible for the unexplained damage despite the facts that the vessel was new and in a good condition, the shipment was stowed perfectly, and the hold was in good condition.

On the other hand, in the case of Chung Hwa Steel Products and Trading Company Limited v. Glen Line Limited(1) when cases containing wool gabardin did not arrive, and 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 board ship, equally it was not impossible that they were pilfered while on rail or in the dock shed).

Once the damage has been established, the onus of proof is shifted, and the carrier has to prove that the loss or damage falls under one of the exceptions established by the law or by the contract of affreightment.(2)

Moreover, in order to seek the protection of the immunities conferred upon the carrier by the rules, the onus is upon the carrier to show that neither his actual fault or privity, nor the fault or neglect of the carrier's agents or servants, contributed to the loss or damage.(3) For example, the carrier cannot rely on the "excepted perils" if he has not carried out his obligation

(1) $(1935)_{51}$ Ll. L.R. 248.

(2) The "Bulkness" $(1979)_{2}$ Lloyd's Rep 39; See also Gilmor and Black, op.cit., p.184; See also Kimball, op.cit., p.225.

(3) See article 4.2(q) of the Hague Rules. As has already been mentioned the words "agents and servants" in this sub-rule includes servants of an independent stevedore. See Owners of Cargo of City of Baroda v. Hall Line Ltd. (1926) 42 T.L.R. 717; See also Astle, op.cit., p.131.

under article 3 r.1 to exercise due diligence to make the vessel seaworthy.(1) On the other hand, if the carrier initially fails to prove that the damage resulted from one of the excepted causes under article 4 of the Hague Rules, he can still be exonerated from liability by proving the exercise of due diligence in making the ship seaworthy and in caring for the cargo.(2)

It should be pointed out that so long as the carrier showed that there was no negligence, he needs not go the length of proving the exact cause of the damage.(3) Also it is important to observe that, the onus of proof does not mean providing all the circumstances which could explain an obscure situation, but means making proof to a reasonable degree.(4) This was made clear in the case of City of Baroda v. Hall Line(5) in which it was held that the onus on a person relying on an exception relieving him from liability did not go so far as to make him prove all the circumstances which could explain an obscure situation, but he must affirmatively prove that he was not negligent.

Finally, under the Hague Rules it is well established that if the fault of the carrier combined with an article 4 (2) exception, to cause damage to the cargo, for example, one constituting initial unseaworthiness caused by a failure to exercise due diligence, and the other constitute of negligent navigation, the carrier is 100 per cent liable for the loss or damage, and the

(1) See Pany and Ivany's, op.cit., p.175.

(2) See Kimball, op.cit., p.225

(3) Contrast Astle, op.cit., p.81; "It must, therefore follow that in order to prove that such loss or damage did arise without any fault on the part of the carrier, or his agents or servants, the actual cause of the damage must be shown..."

(4) See Tetley, Marine, op.cit., p.51.

(5) $(1926)_{42}$ T.L.R. 717; 25 Ll.L.R. 439.

exception will not exonerate the carrier.(1) But it should be pointed out that when the carrier successfully proves that the loss or damage was caused by the exception, the burden passes to the cargo owner to prove that the concurrent cause of the loss or damage was the fault of the carrier.(2)

However, there was a different situation where there were not two co-operation causes of the whole loss or damage, but some cargo were damaged by e.g. unseaworthiness which the shipowner was liable under the Hague Rules, and other damage caused by an excepted peril e.g. a latent defect in the ship. Here, the carrier will be liable for that proportion of the loss which is attributable to his fault, provided that the amount of this loss can be identified.(3) And if the carrier proves due diligence to make the ship seaworthy, then he will be entirely exonerated.(4) But, in case of doubt whether damage to a cargo caused by an excepted peril, or by the fault of the carrier,the carrier relying on the exception has had to prove that the excepted peril caused the damage.(5)

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(1) Per Lord Wright in Smith, Hogg and Company Limited v. Black Sea and Blatic General Insurance Co. Ltd. (1940) A.C. p.997 at p.1005 "....If her unfitness becomes a real cause of loss or damage to the cargo, the shipowner is responsible, although other causes from whose effect he is excused either at common law or express contract have contributed to the loss"; See also Monarch Steam Co. Ltd. v. Karlshamus Oljefabriker (1949) A.C. 196.

(2) See Gilmor and Black, op.cit., p.163; See also Carver, part 1, p.132.

(3) Per Viscount Sumner in Gosse Millerd Ltd. v. Canadian Government Merchant Marine (1929) A.C. p.223 at p.241 "....it is incumbent on the shipowner,on whom the whole burden of proving this defence falls, to show how much damage was done in the subsequent operations,because it is only in respect of them that he can claim protection. This he has failed to do, and in Consequence he has failed to show to what extent in money his prima facie liability for the whole damage ought to be reduced".

(4) See Clarke, op.cit., p.189.

(5) See Carver, part 1, p.132.

2. The burden of Proof under The Hamburg Rules

We have already seen that the Hague Rules dealt specifically with the question of burden of proof in only a few limited situation, with the result that the courts have frequently reached conflicting conclusions in interpreting their provisions on this issue. However, the general rule appears to be that, if the cargo-owner proves damage or loss, the carrier then has the onus of bringing himself within one of the exceptions, while if he seeks the protection of the latent defects exception he must first establish that such defect were not discoverable by due diligence.(1)

The Hamburg Rules seek to remove this confusion by presuming fault in all cases of loss or damage to cargo and so imposing a uniform burden of proof on the carrier.(2) As has already been 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.(3) But he can escape liability if he proves that "he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences". In other words, he can escape liability if he proves that neither he nor his servents or agents caused the loss or damage by their fault or neglect.(4) Annex 2 of the Hamburg Rules which contains the "common understanding" made this point very clear. It states; "It is the common understanding that the liability of the carrier under this convention based on the principle

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(1) See Wilson, op.cit., p.141.

(2) See article 5(1) of the Hamburg Rules.

(3) See Giles, op.cit., p.249.

(4) See Cleton, op.cit., p.5; See also McGilchrist, op.cit., p.259.

of presumed fault or neglect....". This Annex points in favour of the solution that the burden usually rests on the carrier.(1) On the other hand, the occurrence needs 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.(2) Undoubtedly, the intent of the draftsmen of the Convention is that the cargo owner would make out a prima facie case against the carrier by showing that the goods were not turned out in as good condition as when they delivered to the custody of the carrier. Once the cargo-owner had made out a prima facie case, the carrier then required to prove that the cause of the loss or damage was not an act of negligence for which he is responsible.(3) Accordingly, the burden of proof, which is against the carrier, shall be reversed if, 1- the carrier proves that the loss or damage caused by special instructions given by the shipper and 2 - the loss or damage could in the circumstances of the case, be attributed to the "special risks".(4) The carrier, of course, has many arguments at his disposal, technical details of the weather condition, navigational problems from other ship, and other aspects relative to sea perils which prevented the effectiveness of his "reasonable measure".(5) It is clear enough, that the

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(1) See Diamond, part 1, p.10.

(2) See Mankabady, The Hamburg Rules, p.55.

(3) See Kimball, op.cit., p.239.

(4) See Pollock, op.cit., p.8; See also John Crump, op.cit., p.1.

(5) See Williams, op.cit., p.256.

burden on the shipowners is ma terially increased under the Hamburg Rules, and it is represents a movement towards the imposition of strict liability on the carrier.(1) This change was justified on the ground that the carrier should bear the burden of proof as to matters occuring while the cargo is in his possession, since the carrier is the party most likely to have knowledge of what caused the loss or damage. Moreover, it is believed by the Working Group that this change will make the carrier raise the standard of care for cargo.(2) However, it is not easy for the carrier in some cases to prove that the relevant "occurrence" did not occur while the goods were in his charge. For example, where fresh fruit or vegetable have arrived in a mouldy condition. The consignee says that the occurrence which caused this was that the goods were badly stowed or improperly ventilated, and the carrier retorts that the only relevant occurrence was inherent vice of the goods. However, the short delivery or delivery in a damaged condition constitute of itself a prima facie evidence that the relevant occurrence had occurred while the goods where in the shipowners charge. So now the important question is, what is it that the carrier has to prove in order to escape liability? Does he have to show merely that the reasonable carrier 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 totally impracticable to take further steps in this respect.(3) As has

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(1) See Reynardson, op.cit., p.3.

(2) See UNICTRAL yearbook vol. 3 1972, p.302;303, para 269; See also Kimball, op.cit., p.228; See also Cleton, op.cit., p.5.

(3) See Diamond, part 1, p.11.

already been mentioned, article 5(1) provides that the carrier should prove that "he, his servents or agents took all measures that could reasonably be required". But it should be mentioned that the term "reasonable measures" is unlimited.term. However, it seems plain that the standard of these measures is an objective one, or as it is commonly said of the "prudent owner".(1) Accordingly, in determining the reasonable measures ,regard must be given to the courts which would be pursued by a prudent carrier in the circumstances of the case.(2) But it must be observed that, the carrier, in attempting to prove that he, his servants or agents took all measures that could reasonably be required, would educe evidence on the old familiar exceptions provided for in article 4(2) of the Hague Rules, e.g. perils of the sea, fire, latent defect,etc."(T)hen many of the very exceptions which have been deleted would be reintroduced by case - law through the back door, as it were, and a position close to one of status quo vis-a-vis the Hague Rules would be reached".(3) Only in the case of fire, the burden of proving fault or neglect on the part of the carrier and his servants or agents is placed on the claimant. This, then is another change which the Hamburg Rules brought. Under article 5(4)(4) of the Hamburg Rules, 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

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(1) See Mankabady, The Hamburg Rules, p.56.

(2) See Mankabady, The Hamburg Rules, p.56.

(3) Quoted from Shah, op.cit., p.19; See also Document TD/B/C.4./148, para. 19 of the UNCTAD Working Group.

(4) With regard to paragraph 4 of article 5 the developing countries argued that it is unjust to put the entire burden of proof on the claimant. See UNCITRAL yearbook vol. 3 1972, para, 269, p.304; See also Cleton, op.cit., p.5.

in not taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.(1)

On the other hand, article 5.4(b) of the Hamburg Rules provides that either party may require a survey to be made, and a copy of the surveyor's report shall be made available to both parties.

However, in our opinion, it is unjust to make the shipowner win the action simply, because the cargo-owner has become unable to present the necessary evidence of negligence, inspite of the carriers failure to give detailed evidence as to the cause of the outbreak of the fire. But it can be said that this is a concession given by the UNCITRAL Working Group to shipowners in exchange for their non-exemption from liability for negligent navigation.(2)

Finally, it must be mentioned that some problems could arise where fault of the carrier combined with another cause to produce loss or damage. And in some cases, carrier negligence might be the operative cause of the loss, while in others it might only have been an aggravating factor. It has already been mentioned that, under the Hague Rules, if there are two combined causes of damage, one for which the carrier would be responsible under the provisions of the Rules, and one for which he would be granted exception from liability, the carrier is 100 per cent liable for the loss or damage and the exception will not exonerate the carrier. Under the Hamburg Rules, where the carriers fault or negligence concurs with another cause to produce loss or damage, the carrier shall only be liable for that portion of the loss or damage attributable to his fault or negligence, provided he can establish

(1) See Wilson, op.cit., p.142.

(2) See Diamond, part 1, p.12.

the proportion of the loss attributable to other factors.(1) Therefore, the carrier will be liable for the entire loss if he failed to establish that proportion.

SECTION THREE

The immunities of the carrier

Under the Hague Rules:

Article 4(2) of the Hague Rules set forth a list of causes for which the carrier shall not be liable.(2) It is outside the scope of this work to examine in detail these exceptions. It is sufficient here to show the most important exceptions. These exceptions are: 1 - error in navigation or management, 2 - fire.

. I - Error in navigation or management of the ship: One of the most important of the exculpatory exceptions upon which the carrier can rely is error in the navigation or the management of the ship. But it is also the exception which provides the most difficult problems of interpretation.(3) As Giles said: "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".(4) Many actions which might be spoken of as fault or error in management or even in navigation might equally will be viewed as failures in

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(1) See article 5(7) of the Hamburg Rules; See also Williams, op.cit., p.257; See also Grump, op.cit., p.2.

(2) This list specifies 17 causes, including a "cach-all" provision.

(3) See Tetley, Marine, p.171.

(4) See Giles, op.cit., p.149.

the duty to use due care with respect to the cargo.[1] As a matter of fact, the error in the navigation of the ship or in its management is an error primarily affecting the ship. So it 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 venture generally".[2]

The most useful guide as to the proper interpretation of this article[3] is the case of Gosse Millerd Ltd. v. Canadian Government Merchant Marine Ltd.[4] which concerned a vessel with a cargo of tinplates on board, which had sustained damage during the voyage. While the repairs were being executed, workmen had frequently to be in and out of the hold were the tinplates were stored and the hatches in consequence were often left open. Owing to the negligence of the shipowner's servants the hatch were not protected when rain was falling. Greer L.J. said in the cited case: "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 towards the ship, but only negligent failure to use the apparatus of the ship for the protection of the cargo the ship is not so relieved".[5]

This ruling was reversed by the Court of Appeal. But the House of Lords upheld Greer L.J. (reversing the court of Appeal) declaring that: 1 - the carrier, having failed properly and

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(1) See Grant and Black, op.cit., p.156.

(2) Quoted from Tetley, op.cit., p.171

(3) Article 4. 2(a) of the Hague Rules.

(4) (1927) 29 Ll.L. Rep. 190.

(5) Ibid., at p.200.

carefully to carry, keeps and care for the tinplates as required by the Carriage of Goods by Sea Act, 1924 article 3(2); 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.(1) Another case of interest in this connection, was that of Foreman and Ellams Ltd. v. Federal Steam Navigation Co. Ltd.(2) in which Wright, J. said: "I do not think that the scope of Art IV., r. 2(2), is as wide as the defendants contend, or is so wide as to cover negligence in the due performance of the obligation to care for the refrigerated cargo by keeping down the temperatures in the hold by means of the refrigerating machinery. A negligence or exception clause in a statute, as in a contract, ought think to be strictly construed. The words of Art IV r.2 (a), appear to be connected with matters directly affecting the ship as a ship and not with matters affecting exclusively, or even primarily, the cargo, even though such latter matters involve the user of parts of the ship. The word "navigation" is clearly only applicable to the ship as such, and I think the more general word "management" should be read as ejusdem generis and the word "ship" should receive the same connotaion with each of the substantives on which it is dependent, the word "management" covering many acts directly affecting the ship which could not well be covered by "Navigation". The words of the exception are not "in the navigation or in the management of the ship or in the management of any part of the ship necessary for the proper and due care of the cargo"., nor

(1) See (1927) 29 Ll.L. Rep. 190 at p.196.

(2) $(1928)_2$ K.B. 424.

are the words, to put if differently, "in the management of the cargo by the use of the ships parts or appliances".(1)

2 - Fire:(2)

Under the Hague Rules, carrier by sea is not respsonsible for any loss of or damage to goods by reason of fire on board,(3) if the loss or damage happens without his actual fault or privity.(4) Accordingly, if the carrier seeks to rely upon this protection, the onus is upon him to prove that the loss or damage was happened without his fault or privity.(5) It must be mentioned that, the exception from fire under the Hague Rules is conditional upon the fulfilment of the obligation of seaworthiness.(6) This was made clear in the case of Maxine Footwear v. Canadian Government Merchant Marine,(7) in which it was held that it was the negligence of the shipsowners servants which caused the fire, which was in fact a failure

(1) Ibid., at p.438; See also Leesh River v. Brithish India Steam Navigation Co. (1966)$_1$ Lloyd's Rep. 450 in appeal (1966)$_2$ Lloyd's Rep. 193; See also "The Frances Salman" (1975)$_2$ Lloyd's Rep. 355.

(2) In the Hauge Conference of 1921 the draft of the Convention did not include fire among the exceptions. But the American delegation in the diplomatic commission of 1923 proposed inserting the fire exception among the list of the exceptions. This proposal met with approval in the commission, and the amended text appeared in the Convention. See Mankabady, The Brussels Convention, p.202.

(3) See Article 4 (2) (b) of the Hague Rules. It is convenient here to mention that in the CMI Stockholm Conference in 1963 some delegations suggested omitting the words "unless caused by the actual fault or privity of the carrier" After discussing this proposal the conference refused any amendment to article 4(2)(b). See Mankabady, The Brussels, p.202.

(4) See Scrutton, op.cit., p.236.

(5) See Astle, op.cit., p.141.

(6) Contrast, Scrutton, op.cit., p.236; See also Grant and Black, op.cit., p.161.

(7) (1959) A.C. 589; See also Astle, op.cit., p. 143.

to exercise due diligence and that article 3(1) of the Hague Rules which requires that the carrier shall exercise due diligence to make the ship seaworthy before and at the commencement of the voyage, was an overriding obligation and that the exception in respect of fire could not be relied upon. But, if a fire result from spontaneous combustion, due to the dangerous condition of the goods, of which the carrier could reasonably know, the carrier will be protected by the exception of fire.(1)

However, in the case of Tempus Shipping Co. v. Louis Dreyfus,(2) it was held that an exception of "Fire" by itself would not be an apt term to cover loss caused by heat short of actual ignition.

Finally, it is important to observe that, damage through fire includes damage by water used to put out the fire.(3)

Under the Hamburg Rules:

Article 5 of the Hamburg Rules, designed to expand the liability of the carrier to encompass of loss for which he is presently not responsible under the Hague Rules. As has already been mentioned, the Hague Rules set forth a list of causes for which the carrier shall not be responsible. The most important change that would result from adoption of the Hamburg Rules is that the entire Hague Rules "catalogue"(4) of the carriers exceptions has been dropped. As a matter of fact, the whole list of the exceptions in the Hague Rules can be said to be causes for loss or damage to cargo for which the carrier cannot be blamed,(5) or to borrow the term used in The Marine Sulphur Queen,(6) the "uncontrollable

(1) See article 4.2(i) of the Hague Rules.
(2) (1930)$_1$ K.B. 699; See also Carver, part 1, p.156.
(3) See Mankabady, The Hamburg Rules, p.65.
(4) See article 4.2.(a) - (q) of the Hamburg Rules.
(5) See Mankabady, The Hamburg Rules, p.53.
(6) (1970)2 Lloyd's Rep. 285.

causes". In other words this catalogue of exceptions does not constitute independent significance outside the general rule that the carrier would be held responsible only where he is at fault.

Finally, the Working Group concluded that these exceptions were not satisfactory, as they did not describe all the circumstances that might arise in which the carrier would be at fault, and therefore, had produced uncertainty and unnecessary litigation.(1) Accordingly, it should be beneficial from legal standpoint in removing unnecessary and uncertainty surrounding the definition and extent of such exceptions.(2) There is,however, in the Hague Rules,an exceptional situation where the shipowner is protected from liability for loss or damage caused by the negligence of his own servants "in the navigation or in the management of the ship".(3) Undoubtedly, this is the most important exception from the carriers point of view since it either effectively exempts the carrier from liability in large number of cases involving loss or damage to cargo, or it at least enables the carrier in the majority of these case to obtain a favourably compromising settlement. Cargo interests had contended that it was invidious that a carrier,in complete control of vessel and cargo, should exclude such liability which was basic to the contract of carriage.(4) But the carriers alleged that,any change in these exceptions would substantialy alter the present balance of risk allocation, and the result would be the imposition of higher

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(1) See report of UNCITRAL Working Group on its fourth(special) session, note 103, Supra p.59; See also Kimball, op.cit., p.237.

(2) See Wilson, op.cit., p.140.

(3) See article 4.2(4) of the Hague Rules; Williams, op.cit., p.25; See also McGilchrist, op.cit., p.259.

(4) See Wilson, op.cit., p.140.

freights to account for higher liability insurance costs.(1)

However, in the course of the UNCTAD and UNCITRAL's debates, there has been a great deal of controversary as to whether the exception of the negligence in navigation or management of the ship should be retained.

It is believed by UNCTAD and UNCITRAL that the exceptions of negligent navigation and negligent management of the ship are something of an anachronism. And the historical justification for these odd defences has been explained as follows:

"In the nineteenth century, the era in which the principles behind the 1924 Rules were maturing, shipowner and vessel were often out of contract for long periods. In such circumstances, and with navigation dependent on fine judgement rather than technology, a sea voyage was a common venture and risks were shared between ship and cargo. The special defences to protect the carrier from liability in a catastrophic situation were therefore not necessarily to be regarded as unreasonable".(2)

On the other hand, under the Hague Rules, the line between what might be considered to be fault in the management of the vessel and failure to exercise proper care with respect to the cargo is

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(1) The report of the UNCITRAL Working Group states: "It was recalled that similar fears had been expressed in connection with increased respsonsibility of air carriers, but that these fears did not materialize. Techniques distributing risks through insurance have been thoroughly developed and the insurance industry was competitive. Consequently, the ocean carriers and the insurers of the carriers and cargo would be able to cope with changes in the rules governing carrier liability". See report of the UNCITRAL Working Group on the work of its Fourth Session (A/CN.9/74), para. 22.

(2) Quoted from McGilchrist, op.cit., p.259.

a fine one.(1) For example , you first have to find out whether the relevant negligence occured before or after the voyage began. If it occured before the voyage, then it constitutes negligence in making the ship seaworthy and the owner is liable. If it occured after the commencement of the voyage ,it is necessary to find out whether the negligence occured in the context of looking after the cargo.(2)

The Working Group concluded that an unnecessary source of litigation can be avoided, by eliminating the carriers exoneration for negligence of the master or crew.(3)

Finally, the carriers exception from liability for loss caused by an error in navigation or management of the ship was eliminated, and this represents a definite shift in risk from cargo to ship. Under article 5 of the Hamburg Rules, the carrier would assume liability for the negligence of the master and the crew as part of his overall responsibility to exercise due care to avoid loss of or damage to the cargo.(4)

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(1) See Gilmor and Black, op.cit., p.135.

(2) See Diamond, New Rules, p.48.

(3) It may be worthy of note that most nations were favoured the deletion of the nautical fault defence. These nations were: Australia, Brazil, Chile, Egypt, France, Ghana, India, Nigera, Norway, Singapore, Spain, Tanzania and United States. And only a small minority of maritime states had expressed itself in favour of reintroduction of the exoneration for nautical fault, these nations were: Belgium Japan, Poland, U.S.S.R. and United Kingdom. As a matter of fact, the position of the maritime countries with regard to reintroduction of the exoneration of carrie's liability for nautical fault, was very weak. It was known that a number of Latin American countries and other belonging to group of 77 sympathized in this respect with the minority view, but during the negotiations they kept silent, probably because they did not wish to deviat from the group of 77 openly. See UNCITRAL yearbook, vol. 3, 1972, para 269; See also Sweeney, part I, p.111; See also McGilchrist, op.cit., p.259; See also James J. Donovan, The position of the maritime law association of the United States and view from United States, published in the Hamburg Rules a one day seminar, p.1.(hereinafter cited as Donovan, The position of the maritime law).

(4) See Giles, op.cit., p.249.

The second change related to the "catalogue" of the carrier's exceptions is that, under the Hague Rules the carrier is protected from liability arising from fire unless caused by the actual fault or privity of the carrier.(1) This exception is amended by the Hamburg Rules. The carrier under the Hamburg Rules is liable for loss or damage caused by fire if the claimant proves that the fire arose from fault or negligence on the part of the carrier, or his servants or agents.(2) However, it is believed by this writer that, this is not an important change, for two reasons: First, the fire on board ship is very often found to have been caused by initial unseaworthiness. If this is so, then the carrier is not protected under the Hague Rules unless he exercised due diligence to make the ship seaworthy. Secondly, under the Hamburg Rules, the onus of proof is put upon the claimant , namely the defence of fire ceases to be a defence if the cargo can establish negligence of carrier or his servants or agents, not only in respect of the outbreak of the fire, but also in respect of "measures that could reasonably be required to avoid the occurrence and its consequences".(3) But in practice, many claimants will be unable to adduce the necessary evidence of negligence.(4) Now we turn to a question which deserves at least passing notice and it is closely connected with those so far discussed in this work, that of saving life and property. Under the Hague Rules, the carrier escapes liability if loss or damage is

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(1) See article 4. 2(b), of the Hague Rules.

(2) See article 5.4.a(i) of the Hamburg Rules.

(3) See Giles, op.cit., p.249.

(4) See Diamond, part I, p.12; See also Williams, op.cit., p.257.

caused by measures to save or attempting to save life or property at sea.(1) The position is nearly the same under the Hamburg Rules. During the discussion in the meeting of the UNCITRAL Working Group(2) there is no real objection against continuing the carrier's exemption from liability for loss or damage resulting from deviation to save life(3) at sea.(4) But, there was less support for the extension of protection to cover deviation to save property. Such exception was criticised on the ground that it permitted a carrier to gain substantial profit, often to the detriment of the cargo carried on his own ship.(5) Undoubtedly, the word reasonable is only used in respect of saving property. And whether a deviation is reasonable or not is a question of fact which must be decided by the court in the light of the surrounding circumstances, but some countries had found it necessary to impose legislative restrictions when implementing the Rules.(6) Article 23 of the Hamburg Rules provides that any stipulation in a contract of carriage by sea, or in any other document evidencing the contract of carriage by sea shall be null and void to extent that it derogates, directly or indirectly, from the provisions of the Hamburg Rules, Moreover, contracts of carriage are required to contain a statement that the carriage is subject to the provisions of this convention which nullify any stipulation derogating there from to the detriment of the shipper or the consignee. This article also provides that

(1) See article 4.2(1) of the Hague Rules; See also David and John, op.cit., p.179.

(2) See Fourth (special) Seassion Report, note 103, Supra, p.59; See also Wilson, op.cit., p.143; See also Sweeney, part I, p.105.

(3) It seems to me, this word means human life.

(4) See article 5 r.6 of the Hamburg Rules. It should be borne in mind that, this rule intended to deal with the situation where there has been some negligence on the part of the carrier since otherwise the carrier would be protected by article 5 r.1 and there would be no need for rule 6, See Diamond, part I, p.17.

(5) See Wilson, op.cit., p.143.

(6) e.g. United States Carriage of Goods by Sea Act 1936.

where a cargo claimant has incurred loss, damage or delay as a result of a stipulation which is null, or as a result of the omission of the statement, the carrier shall pay him full compensation for any loss of or damage.(1) It does not admit of doubt that, the historical exceptions of the carriers liability, including inherent vice of the goods, act of God, fault of the shipper or his agents, and all other causes beyond the control of the carrier and his agents and servants, if shown by the carrier to be the cause of the loss, would still exonerate shipowner from liability under the ~~Hague~~ Hamburg Rules.

CONCLUSION

We are now in a position to look in per spective at the basis of liability proposed by UNCITRAL and to see to what extent this system of liability has changed from that set out in the Hague Rules.

What we found is that there is a major change, namely the exception of negligent navigation has been abolished. The second important change in that the new system of the carriers liability has been based on the presumed fault, which removed the confusion found in the Hague Rules, by imposing uniform burden of proof. In addition we have found some changes in the exceptions relating to fire and saving life or property.

In the light of this, I think that if these rules were put into effect they would make an important change in the field of maritime law.

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(1) See article 23(3) of the Hamburg Rules.

CHAPTER THREE

Scope of Application of the Rules

The scope of the Hague Rules is limited by the following rules:

a) The rules apply from the time when the goods are loaded until the time they are discharged from the ship.

b) The rules apply only to contracts of carriage covered by a bill of lading or any similar document of title, and any bill of lading or any similar document of title issued under a charter - party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

c) The rules apply to all bills of lading issued in any of the contracting States.

d) The rules do not apply to the carriage of live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

The 1968 Protocol which amended the Hague Rules brought certain changes to the scope of the Rules. Moreover, the Hamburg Rules brought radical changes in that connection.

Therefore this chapter will deal with the following points:

1) The period of the carriers liability.

2) The documents governed by the Rules.

3) The voyages governed by the Rules.

4) The position of deck cargo and live animals.

SECTION ONE

The period of the carrier's liability

Under the Hague Rules

The Brussels Convention of 1924 adopted a narrow concept of the period of carriers liability by limiting it to the "maritime stage" in which the goods are exposed to navigation risks, and that the rights and liabilities outside this period should be governed by the law of the country in which these operations were performed.(1)

Article 1(e) of the Hague Rules provides: " "Carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship". This article must be read in conjunction with the Article 2(2) which provides that the shipowners is responsible for the operation of "loading" and "discharge". It seems clear from the above provisions that the period of the carrier's liability commences from the moment the goods are received into the ship's tackle for lifting, and not from the moment the goods are actually loaded on to the ship,(3) and ceases at the moment the goods are released from the discharging ship's tackle. This is better known as "tackle to

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(1) See Leopold Peyrefitte, The period of maritime transport, Comments on Article 4 of the Hamburg Rules, published in the Hamburg Rules, edited by Samir Mankabady, p.125; See also Mankabady, The Brussels Convention, p.98.

(2) Article 2 of the Hague Rules provides: "Subject to provisions of article 6, under every contract of carriage of goods by sea, the carrier,in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilites and liabilities and entitled to the rights and immunities hereinafter set forth".

(3) See Astle, op.cit., p.47; See also Williams, op.cit., p.254.

tackle".(1) But when shore tackle is used the carrier's liability commences when the cargo crosses the ship's rail. In the case of Pyrene Co. v. Scindia Steam Navigation Co., referred to earlier when a fire tender was damaged due to being dropped from the ship's tackle before being loaded on board. It was held that the Hague Rules applied.(2)

This regime would create serious problems, when the carrier accepted the goods before loading them on the ship and keeps them after discharge. On the other hand, in some ports the domestic laws require goods to pass through the hands of port authorities who accept no responsibility for the goods whatsoever. Moreover, the carrier may land goods at a port where he has no company facilities.(3) Who bears the risk of loss for this period. It is unfair to say that the carrier will not be responsible for damage on the wharf even if no one is in a better position than he to guard against damage.(4) In order to get over those problems, the courts in some countries have shown a tendency to extend the coverage of the Hague Rules before loading and after discharge.

In a case came before the Swedish Supreme Court in 1951, concerned linoleum rolls, damaged after discharge, when piled on top of one another instead of being placed upright according

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(1) The original text of the Brussels Convention defines the period of carriage as being "from tackle to tackle" but in London Conference of 1922 the delegations agreed to modify the text in order to apply to all kinds of goods e.g. grain and oil which cannot be handled by tackle. See Mankabady, The Brussels Convention, p.98; See also Maki, op.cit., p.194.

(2) See Supra, p.

(3) See N.R. McGilchrist, op.cit., p.262.

(4) Ibid., at p.261.

to instructions. It was held that the Hague Rules applied. The court commented that, though the damage did not occur in the discharge operation itself - if taken in a restricted sense - but happened in direct connection with the landing of the cargo.(1) Moreover, some writers(2) suggested that shippers should make stipulations in the contract of carriage to cover the periods before shipment and after discharge, if the goods are to be in the hands of the carrier during these times. This, in our opinion, is true, but it is not easy for the shipper to compel the carrier to accept such stipulations.

In the lighterage operations, the commencement of the carriers' liability depends on whether the carrier owns or controls the lighters. In short, where the lighterage operation is considered as part of loading, it is covered by the Rules, otherwise is regarded outside the scope of the Rules.

An interesting Scottish case concerning the lighterage operation, was that of Aberdeen Grit Company Limited v. Ellerman's Wilson Line Limited(3), which came before the Scottish Courts, and arose out of damage caused to bags of grit contracted to be carried by the defenders from Aberdeen to Boston in America. The goods were delivered to the defendant's agents in Aberdeen and were carried to Newcastle into a lighter. In the course of their removal from the lighter into the vessel at Newcastle they were negligently exposed to wet weather, and the result was that

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(1) N.J.A. 1951 -130. Quoted from Jan Ramberg, The law of Carriage of goods - Attempts at harmonization, 1974, E.T.L. Vol. 19, p.20.

(2) See Lillie, op.cit., p.146.

(3) 1933 S.L.T. p.2.

the carrier was responsible for this damage. Lord Fleming, speaking for the court said: "It is admitted in the present case that the damage suffered by the goods took place in the course of transit from Aberdeen to Newcastle, and the defenders who, as I hold, undertook to carry the goods from Aberdeen to Boston are Prime facia liable for this damage ..... The lighterage was just part of the transit of the goods from Aberdeen to Boston, and the lighterman falls to be regarded as the agent of the defenders".(1)

In the case of grain loaded on board the ship by means of sucking or liquid as wine or oil transferred through flexible pipes. The French Courts considered that the carriers responsibility commences when the liquid or the grain has been entered the flexible pipes of the ship which are connected with the shore installations. Consequently, the carrier will be responsible in the case of a leak or escape of oil from the pipes.(2) Therefore, the question of the commencement of the carrier's liability should be considered in relation to the particular circumstances of each case.

It seems quite clear that, the mandatory cover of the Hague Rules is very narrow, it is covers the "maritime stage" only, the other stages of carriage of goods governed by the other rules i.e. the commercial laws.(3) As to the reasons

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(1) See p.3.

(2) Montepellier 19 March 1952; D.M.F. (1962), 665; Cass, 2nd April, 1963; See also Mankabady, the Brussels Convention, p.105; See also Maki, op.cit., 196.

(3) See Kurt Grönfors, the concept of delay in transportation law, 1974, E.T.L. Vol, 19, p.400 at p.408; See also J.W. Richardson, The Hague-Visby Rules - A carriers view, published in the Hague-Visby Rules - a one day seminar, p.2, at p.3; See also Donovan, op.cit., p.6.

for limiting the Rules to the maritime stage, Mankabady concluded that "The reasons appear to be that:

a) risks at sea are greater than on land, and the principles should consequently differ;

b) since procedures for handling cargo sometimes differ in various countries, it seems best to leave the period before shipment and after discharge to the jurisdiction of each contracting stage;

c) carriers are opposed to any attempt to extend their liabilities to events over which they have not control (i.e. those occuring after discharge and before delivery to the consignee)".(1)

However, limiting the Rules to the maritime stage is against the doctrine of the unity of the contract of transport which starts with taking over the goods by the carrier and ends by delivery of the goods to the consignee.(2)

Moreover, the limited period of the carriers liability gave rise to many problems and uncertainties, especially in the LASH (Lighter Abroad Ship) and in the carriage of containers system.

The LASH (Lighter Abroad Ship) system which is used, for example, in the U.S.A. consists of a mothership and a fleet of barges. One of the advantages of this kind of transport is to load the cargo in barges travelling through rivers and lakes to reach the port of loading or the port of discharge and return back

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(1) See Mankabady, The Brussels Convention, p.101.

(2) See Taha, op.cit., p.287.

to the mothership. The barges are then loaded on board the mothership.(1) In the carriage of containers the carrier receives the goods at the place of the shipper or in his warehouse to check them by his servants and pack them in the container and seal it before transfer to the ship. Under such methods of transport it will be difficult to determine when the goods are loaded.

As has already been mentioned, the carriers liability ceases from the moment the goods are released from the discharging ships tackle. However, the position in the lighterage operations seems to be somewhat different.

The British Courts ruled that the Rules still continue to apply to the goods, even if they have already been discharged into lighter, and released from the ship's tackle. In Goodwin Ferreira v. Lamport and Holt (Supra), it was held that discharge into a ligher has not been completed until all the cargo has been discharged. Roche, J. said: "In my judgement, the discharge of these goods was not finsihed when they were put into a ligher when other goods were being discharged into the same lighter to make up the lighter load which was to start for the shore. When it is contemplated that these goods are to form the lighter load with other goods the discharge of the goods themselves within the meaning of the Act is, in my judgement going on so long as other goods are being raised into and stowed into the lighter alongside or on top of them".

Furthermore, the Hague Rules granted complete freedom of contract prior to loading and subsequent to discharge Article 7 of the Hague Rules provides: "Nothing herein contained shall

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(1) See Leopold Peyrefitte, op.cit., 132; See also Chorly and Giles, op.cit., p.194.

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".

At the Conference of the Comité Maritime International held in Stockholm in 1963, delegations from some countries(1) proposed extending the period of the carriers liability to cover the period during which the carrier is in charge of the goods. So they proposed to introduce some amendments to Article 1(e) and Article 7 of the Hague Rules. The French delegation to the conference said: "The division into three parts of the contracts of carriage by sea (before loading, during carriage by sea and after discharge), with different law applying to each part, creates sometimes inextricable difficulties in determining the extent of the carriers liability in pleas at the courts and the time limit to be applied, especially when the exact spot at which the damage occurred is impossible to ascertain. The French Maritime Law Association feels that it would be of great assistance to users and to carriers, if the convention could be applied to the contract of carriage as a whole, i.e. from the time the goods have been received into the carriers charge to the time they are delivered to the consignee".(2)

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(1) e.g. Italy, Norway and France. See Comite Maritime International. Stockholm Conference, 1963, pp.88.,89; See also Mankabady, The Brussels Convention, p.109.

(2) CMI Stockholm Conference, pp.149,150.

But many delegations opposed any amendment to Article 1(e) and Article 7 of the Hague Rules.

Accordingly the CMI Stockholm Conference did not recommend any amendment in this connection.(1) The last point to be considered here is the period of the carriers liability under the Iraqi Law.

As a matter of fact, the Iraqi maritime law (the Ottoman Law of Maritime Commerce, enacted in 1863), has not ruled on the period of the carriers' liability. The question therefore is governed by the Iraqi Law of Commerce, 1970. According to article 274(1) of this Law the responsibility of the carrier for the goods commences from the time he has taken over the goods, until the time he has delivered the goods.(2) As we shall see later this situation is very similar to that under Article 4 of the Hamburg Rules.

Under the Hamburg Rules.

The Working Group considered the period of the carriers responsibility on the basis of the Report of the Secretary General(3) and established two points.

1) The New Rules should be extended to govern the entire period during which the carrier was actually in charge of goods.

2) The period of responsibility under the New Rules should not begin prior to carriers custody at port of loading and should

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(1) The British delegation to CMI-Stockholm Conference stated that the British Maritime Law Association did not favour any amendment, but it is desirable in the interest of international uniformity to introduce some suitable amendments. See CMI Stockholm Conference 1963, p.114; See also Mankabady, The Brussels Convention, p.111.

(2) As has been mentioned Iraq has neither ratified nor acceded to the Brussels Convention 1924 (Hague Rules).

not continue beyond port of discharge.(1)

However, it would be very difficult to put these two points in a text governs the carriers responsibility, which would satisfy all the members of the Working Group.

After long debates, the Drafting party,(2) reached agreement about the formula of Article 4 of the New Rules which governs the carriers responsibility.

Article 4 of the Hamburg Rules which is designed to replace Article 1(e) of the Hague Rules abandoned the so-called "tackle to tackle" regime(3) to widen the scope of the application of the Rules to govern the different operations which are deemed to be necessary for the carriage of goods by sea.(4) Paragraph 1 of Article 4 of the Hamburg Rules states: "The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is incharge of the goods at the port of

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(1) See Sweeney, part 1, p.78.

(2) It held its meeting under the chairmanship of Prof Erling Selving of Oslo Univetsity, Chairman of the Norwegian delegation, and the membership of the following States: Argentina, Egypt, France, India, Japan, Nigeria, Norway, Spain, Tanzania, U.K. U.S.S.R., and the United States. See "Responsibility of Ocean Carriers for Cargo; bills of lading" Doc. No. A/CN/9/63/Add.1.

(3) The U.K., Japan, Greece and other carrier states preferred no change to the "tackle to tackle" regime. Japan suggested that the period of the carriers responsibility should be left to private agreements between carrier and shipper, so that account could be taken of the circumstances peculiar to each port. The U.K. noted that any revision of the Hague Rules should not increase the overall costs of world trade, in particular by increasing loss of cargo through lack of adequate care. See Sweeney, part 1, p.82.

(4) See Peyrefitte, op.cit., 126; See also Carey, will the Hamburg Rules prove to be a lawyer's Bonanza - From the Cargo plaintiffs point of view. The speakers papers p.9; See also Diamond, division of liability, p.49; See also Williams, op.cit., p.254.

loading, during the carriage and at the port of discharge".(1)

It seems quite clear that the Hamburg Rules, by Article 4, now have a much broader scope of application than the Hague Rules.(2) Paragraph 1 of Article 4 above links the carriers responsibility, to the taking charge of the goods. Once the carrier takes charge of the goods, he will be responsible for the goods, because when the carrier takes charge of the goods the goods will be away from the shippers supervision and only the carrier can exercise effective supervision and control over the goods.(3) Therefore, the supervision and the control are very important elements in taking charge of the goods. It is worth pointing out that the place of taking charge according to Article 4(1) of the Hamburg Rules is limited to the port of loading.

However, Article 23(2) of the Hamburg Rules permits the carrier to extend the period during which he is incharge of the goods, to include some operations take place outside the port of loading.(4) ON the other hand, Article 4(2) of the Hamburg Rules states that the carriers responsibility starts with taking over the goods by the carrier at the port of loading and ends by delivery of the goods to the consignee at the port of discharge.

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(1) It is convenient to mention here that the period of the carriers responsibility under the Hamburg Rules has been brought more in line with American law in the Harter Act. See Sweeney, Review, p.18; See also Tetley, The Hamburg Rules, a commentary, p.7.

(2) See Williams, op.cit., p.254.

(3) See Mankabady, The Hamburg Rules, p.50; See also Pollock, op.cit., p.6.

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

Taking over the goods by the Carrier

The Hamburg Convention does not define the words "has taken over the goods". However, this term indicates the legal act by which the carrier receives the goods for carriage. This usually happens when the bill of lading is issued.(1) However, the carrier may take over the goods before issuing the bill of lading. In this case, it would be wise for the shipper to ask for a delivery receipt showing the exact date of taking over the goods.(2) However, taking over the goods is a question of fact, not law which can be proved by all means.

It is interesting to note that, the taking over the goods usually carries out by the carriers servants and agents and not by the carrier personally. The carrier may take over the goods from the shipper personally, or a person acting on his behalf such as the freight forwarder, or port authority.(3)

It appears on the other hand, that the carrier has the right to check the contents of the consignment before taking charge of the goods, because he cannot be forced to accept goods without any knowledge of their quality. Therefore, taking over the goods commences from the moment the carrier exercises or he

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(1) Article 14(1) of the Hamburg Rules provides: "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.

(2) See Peyrefitte, op.cit., p.130.

(3) Paragraph 2 of article 4 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 from
(1) the shipper, or a person acting on his behalf; or
(11) an authority or other third party to whom pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment".

is able to exercise his right of checking the cargo.

Undoubtedly, all the operations after taking over the goods, such as loading operations, are part of the contract of carriage.

It is clear enough that the purpose of the Hamburg Rules by linking the carriers' responsibility to the taking charge of the goods is to get over the problems existed under the Hague Rules especially in some types of transport e.g., lighterage, operations, carriage of containers, bulk cargo, carriage of barges.

Lighterage operations:

As has already been mentioned, the question of the carriers' liability, in the lighterage operation under the Hague Rules depends on whether the carrier owns or controls the lighters. Under the Hamburg Rules the solution is different. It depends on the question, where the carrier can exercise his right of checking the goods? If he has the right to check the goods on the quay the taking charge occurs in this place and the lighterage operation considered part of the contract of carriage. But if the goods carried by an independent contractor to the ship, taking charge occurs on board the ship.(1)

Carriage of containers:

Usually, the carrier takes charge of the container at the shippers premises, where he can check the contents of the container and collects it. In other words, taking charge of the container usually occurs at an inland place and not at the quay. So when a

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(1) See Pollock, op.cit., p.6.

container is damaged while it is carriedefrom the shippers premises to the port of loading, such damage will be governed by the Hamburg Rules.(1)

Bulk Cargo:

In the case of bulk cargo loaded on board the ship by flexible pipes, the taking charge of cargo commences when the flexible pipes of the ship are connected with the shore installations, because at this point the carrier can control the quantities of the cargo. Consequently, the carrier will be responsible in case of a leak or escape of oil from the flexible pipes.(2)

Carriage of barges:

The taking charge of the goods in the barge carrying system (LASH) occurs when the goods are loaded in the barges. Consequently, the damage sustains the goods while it is carried through inland waterway to the ship, will be subject to the Rules, because the inland waterway would be considered as part of the contract of carriage.(3) Finally, it should be mentioned that, article 23/1(4) of the Hamburg Rules which has a compulsory character, prohibits

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(1) See Maki, op.cit., p.196.

(2) See Peyrefitte, op.cit., 132.

(3) Article 23(1) provides: "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. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a port. A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, is null and void".

any clause which derogate directly or indirectly, from the provisions of the Convention. Thus, if the clause is regarded as a clause limiting the scope of the carrier's liability in a way different from that under the convention, it would be null and void.

Delivery of the goods

Under the Hague Rules:

It is to be noted that Article 3(2) of the Hague Rules which outlines the carriers obligations does not refer to delivery of the goods, but this term used in Article 3(6)[1] of the Hague Rules. Accordingly, the contract of the carriage of the goods which evidenced by the bill of lading may stipulate certain conditions which control the carriers responsibility after discharge.[2]

In Regina v Montreal Shipping Co.[3] it was held that the contracting parties are at liberty to stipulate any special terms and conditions they please as to the manner of discharging the cargo. Therefore, when there is dispute on the question of delivery if the contracting parties have not defined in the contract the time which it has been mutually agreed that proper delivery will be effected, the courts will need to place their own interpretation upon whether or not, proper delivery has been effected, and this must needs be decided in accordance with the circumstance of each

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(1) Article 3(6) of the Hague Rules provides: "Unless notice of loss or damage and the general nature of such loss or damage at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading".

(2) See Tetley, Marine, p.287.

(3) (1956) EX C.R. 280; quoted from Tetley, Marine, p.287.

individual case.(1) In Leather's Best Inc. v. The "Mormaclyner"(2) goods were lost on a pier, It was held that the delivery had not yet occurred, although the goods had been lifted off the ship, because the normal time for the consignee to pick the goods up had not yet expired.

Undoubtedly, where the port of discharge, at which delivery is to be made, is named in the bill of lading or otherwise agreed in the contract, the carrier must deliver the goods at this port. But in case of the carrier is unable to discharge the goods at the agreed port, the carrier has the right to discharge the cargo at the nearest safe port.(3) It is the duty of the master to deliver the goods to the consignee or his agents.(4) And if the bill of lading has been properly assigned the master must deliver the goods to the holder of the bill.

In the case of Sze - Hai Tong Bank v. Rambler Cycle Co. Ltd.,(4) which concerned a consignment of bicycle parts, covered by a bill of lading providing that goods were to be delivered at Singapore "Unto order or his or their assigns". The goods were discharged into the Singapore Harbour, and delivered without production of the bill of loading.

A claim was thereafter made against the shipowners for breach of contract of carriage. The case reached the Privy Council who

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(1) $(1970)_1$ Lloyd's Rep. 527; $(1971)_2$ Lloyd's Rep, 476.

(2) See Jasper, op.cit., p.120; See also Stevens and Borriers, op.cit., p.355.

(3) If the custom of the port recognises another mode of delivery personal delivery is not important. See Ivanny, op.cit., p.132.

(4) See $(1959)_2$ Ll.L Rep. 114.

held that the shipowners were liable, because they delivered the goods without production of the bills of lading. Lord Denning said, in this case, that; "It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading to the person entitled under the bill of lading. In this case it was "Unto order or his or their assigns", that is to say, to the order of the Rambler Cycle Company, Ltd., if they had not assigned the bill of lading or to their assigns, if they had. The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them".(1)

It seems quite clear that, there is no rule of law making it obligatory on the master to notify the arrival of the ship . of the cargo, unless custom or a term in the contract introduces such a duty in an individual case.(2) The reason for this rule is that the bills of lading may have been assigned during the voyage, and the master may not know, who is entitled to thecargo.

However, Tetley says: "The carrier must notify the consignee so that the consignee may pick up his goods. The notice should be specific and should stipulate the wharf or pier where the goods are to be found and exactly when they will be available sending a vague notice of arrival before the vessel arrives is not sufficient".(3)

This view cannot, with respect, be accepted as a dogmatic view, because there is not any apparent indication in Article 3(6) of the Hague Rules for this obligation, and it is inconceivable that this

(1) Ibid., p.120.

(2) See Carver, Vol 2, p.1095; Giles, op.cit., p.237; See also Ivamy, op.cit., p.137.

(3) Tetley, Marine, p.286.

Article has meant that. However, in practice the master enters the ships name at the Custom House, or make such other public notification of her arrival at the port.(1)

Under the Hamburg Rules:

The regime of the carriers liability under the Hamburg Rules covers the period from the time when the carrier takes over the goods at the place of departure, until the goods are delivered to the consignee at the place of final destination.(2)

Therefore, all the operations before delivery are considered to be part of the performance of the contract.(3)

It must be mentioned that, principles concerning the delivery are similar to those applied to the take-over the goods by the carrier. Namely, in lighterage operation delivery occurs at the place, the consignee or his representative can check the goods after discharge.(4) However, the solution here depends on the circumstances.(5)

For the carriage of containers, delivery occurs, at the place,

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(1) See Carver, Vol 2, p.1095.

(2) Paragraph 2 of article 4 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
.....
(b) Until the time he has delivery 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 carrier, by placing them 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; or
(iii) by handing over the goods to an authority or other third party to whom, pursuant to law or egulations applicable at the port of discharge, the goods must be handed over". See also Carey, op.cit., 9.

(3) See Peyrefitte, op.cit., p.133; See also Kurt Gronfors, op.cit., p.408.

(4) The right of checking the goods by the consignee or his representative before delivery, is similar to the right given to the carrier when he takes over the goods. So, in order to claim compensation, the consignee must prove that the damage existed before delivery.

(5) See Peyrefitte, op.cit., 132.

the consignee can check the contents of the container.
In the case of bulk cargo, the delivery occurs when the flexible pipes of the ship are connected with shore instalations.
In the case of barge carrying system (LASH), delivery occurs at the port of discharge.

If the consignee does not receive the goods, for any reason, the carrier cannot wait for an unlimited period, but the goods deemed to be delivered by placing them 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.(1)

At any rate, as pointed out previously, delivery of the goods without any objection from the consignee or his representative to receive the goods is Prima facie evidence of the completion of the contract as required by the Rules.(2)

SECTION TWO

The documents governed by the Rules.

1. Under the Hague Rules:

The general principle of application of the Hague Rules is that they apply to contracts of carriage covered by a bill of lading or to bills of lading issued under a charter party but negotiated to a third party.

Article I(b) of the Hague Rules provides:
" "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so

(1) See Article 4 para 2(b) of the Hamburg Rules; See also Giles, op.cit., p.239.

(2) See also Astile, op.cit., p.11.

far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same".

Article 5 paragraph 2 provides:

"The provisions of this convention shall not be applicable to charter-parties, but if bills of lading are issued in the case of a ship under a charter-party they shall comply with the terms of this convention".

Thus, it will be useful, in this section, to examine the two following points:

1. The contract of carriage covered by a bill of lading.
2. The bill of lading issued under a charter-party.

The contract of carriage covered by a bill of lading

The Hague Rules apply to all contracts of carriage of goods by sea covered by a bill of lading or any similar document of title. This means that there must be a contract of carriage for the Rules to apply.(1)

This was made very clear in the case of Somner Corp. v. Panama,(2) in which the shipper had undertaken to do construction work for the carrier who had agreed to transport the shippers construction equipment free of charge to the site. The American Courts held that the Hague Rules did not apply because the real

(1) See Carver, Vol. 1, Para 361.

(2) (1972) A.M.C. 453.

contract was not a contract of carriage of goods.

Another American case with considerable bearing on this subject is that of Miss Vally Barge Line v. T.L. James & Co.,[1] in which it was held that a contract made by a common carrier by water to transport a barge supplied with contents was not a contract of of goods but a contract of towage.

It should be mentioned that the Hague Rules make no distinction between common carriage and private,[2] and apply to both when such kinds of carriage covered by a bill of lading or similar document of title.[3]

At this point it is necessary to point out that the bill of lading is not itself the contract of carriage between the shipowner and the shipper, but it is usually the best evidence of the contract of carriage.[4]

This was made evident in the case of the "Ardennes",[5] in which it was alleged that there was an oral promise by the ships agent that the ship would proceed direct from Carthagena to London. A received for shipment bill of lading was issued by shipowner containing clause that:

"The owners are to be at liberty to carry the said goods to their

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(1) (1957) A.M.C. 1647.

(2) "Private carriage is usually, but not necessarily, by charter-party and takes place when a special contract is entered into for the carriage of particular goods. 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 whips ply an advertised route, seaon after seaon)". Quoted from Tetley, Marine, p.4.

(3) See Hugh Mack & Co. v. Burns & Laird Lines Ltd. 77 Ll.L. Rep. 277 at p.383; See also (1972) A.M.C. 1573.

(4) Ridley, op.cit., p.103; See also Lillie, op.cit., p.135; See also D.M. Day, The law of International trade, London, 1981, p.12.

(5) (1950), 84 Ll. L. Rep. 340.

port of destination, by the above or other steamer, or steamers ship or ships or railway, either belonging to themselves or to other persons, proceeding by any route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination, and so tranship or land and store the the goods either on shore or a float and reship and forward the same at the owner's expense but at marchant's risk".

The ship sailed from Carthagena and when in the Bay of Biscay received a wireless message directing her to go to Antwerp, with the result that the vessel arrived late at London, causing the receiver to pay increased import duty and suffer a loss of market.

It was held that a bill of lading was not itself the contract bet ween the shipowner and the shipper of goods, thought it provided excellent evidence of its term, and that evidence was admissible of the promise by the ships agent that the ship would proceed to London (further, that that promise amounted to a warranty).(1)

This point of view has been confirmed by the decision given in the case of the Anticostic Shipping Co. v. Viaterur St. Amand(2) where Lord Clyde siad:

"A bill of lading is not itself a contract of affreightment or carriage. The contract of affreightment or carriage must be precedent to, or at any rate independent, of, the more fact of the shipment of the goods. The bill of lading may be, and often in practice is, given after shipment in exchange for the mates receipt, or even after the vessel has sailed. Nevertheless, it vouches and identifies the conditions of the pre-existing or independent contract, whose terms normally follow the custom of merchants in the particular trade in the course of which the shipment takes place. In this way

(1) Ibid., at p.340.

(2) (1959)$_1$ Ll.L. Rep. 352.

the bill of lading covers the contract of affreightment or carriage made between the shipper and the shipowner..... ....Contracts of affreightment are often made by the signature of a simple freight note or some similar mercantile writing and may even be made without writing at all; and, in those case the conditions of the contract are accepted as being those which, in the particular trade, are subsequently incorporated in the bill of lading usual in that trade, that is to say, in the bill which at or after shipment of the goods, the shipper becomes entitled to demand from the master or shipowner. In such cases, the contract of affreightment is truly covered by the bill although not necessarily issued contemporaneously with the conclusion of the contract".(1)

It is worth pointing out that, the definition of "Contract of carriage" which mentioned in Article 1(b) of the Hague Rules cannot include only contracts under which a bill of lading has actually been issued, because by Article 3(3)(2) of the Hague Rules, after receiving the goods the shipper becomes entitled to demand from the master or shipowner a bill of lading, and if the Rules do not apply unless a bill of lading has already been issued

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(1) Ibid. at p.354.

(2) Article 3(3) of the Hague Rules provides:
"After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:
(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods states, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a matter as should ordinarily remain legible until the end of the voyage.
(b) Either, the numner of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.
(c) The apparent order and condition of the goods".

that provision is meaningless.(1)

This is the view expressed by Lord Chief Justic Andrews in the case of Hague Mach & Co.Ltd. v. Burns & Laird Lines Ltd.(2) when he said:

"The words "covered by a bill of lading" are not free from ambiguity, and the difficulty in construing them is increased by reference to Art III, r3, under which an obligation is place upon the carrier, on demand of the shipper, to issue a bill of lading in a certain form, for, if there be no "contract of carriage" and therefore no "carrier" until the issue of a bill of lading, r3 becomes unmeaning. The only way of overcoming this difficulty which presents itself is by giving a wide interpretation to the word "covered" so as not necessarily to imply the actual prior issue of such a bill but to include also a case in which the right to a bill of lading exists, as, for example by well-established custom of the trade".

Accordingly the Hague Rules apply to contract of carriage of goods whether or not a bill of lading has been issued, if one was intended.

This was also made evident in the case of the Pyren Co. v. Scindia Steam Navigation Co.,(3) previously mentioned where Devlin J. said:

"In my judgement, 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, that 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

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(1) See Carver, Vol. 1, p.361.

(2) (1944) 77 Ll.L Rep. p.377 at p.383.

(3) $(1954)_1$ Lloyd's Rep. 321 at p.329, $(1954)_2$ Q.B. 402.

the Rules apply".

Another case that support this point of view was that of Anoticosti Shipping Co. v. Viateur St. Amand[1](Supra), which came before the Supreme Court of Canada. In this case, a bill of lading, in standard form was filled in by the shipowners shipping clerk, but it was not issued. The cargo was damaged during the course of transportation. It was held that both the shipowners and the cargo owner contemplated that the carriage would be performed in accordance with the shipowners regular practice; that it was the regular practice for shipowner to issue bills of lading and if the cargo owner did not see fit to demand a bill of lading, as by article 3(3), he had a right to do, it could not affect what, on both sides, was contemplated, and that, therefore, the contract of carriage was "covered" by a bill of lading.

It is, of course, obvious that where no bill of lading was issued but neither was one contemplated then the Hague Rules do not apply.[2]

It remains to be mentioned that, the Hague Rules did not provide a definition of "a bill of lading".[3]

Article 3(3) describes what it should contain, and article

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(1) $(1959)_1$ Ll.L. Rep. 352.

(2) $(1967)_2$ EX. C.R. 234., cited by Tetley, Marine, p.7.

(3) It is worth mentioning here that, there are many types of bills of lading e.g. through bill of lading; direct bill of lading, open bill of lading (giving no indication of the name of the consignee); shipped bill of lading and received for shipment bill of lading.
See Mankabady, comments on the Hamburg Rules, p.40.

3(7)[1] describes shipped bills of lading.

Sassoon[2] defines the bill of lading as follows:

"A bill of lading is a document which is signed by the shipowner or his agent acknowledging that goods have been shipped on board a particular vessel which is bound for a particular destination and stating the terms on which the goods so received are to be carried".

However, it is generally accepted that a bill of lading serves three purposes: It is a receipt for goods, signed by the master or other duly authorized person on behalf of the carriers, it is represents the contract of carriage and it is a document of title to the goods described therein.[3]

In addition to contracts covered by a bill of lading, which have already discussed, the Hague Rules apply to a "similar document of title", in so far as such document relates to the carriage of goods by sea.[4]

It may be asked, what is the meaning of the words "similar

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(1) Article 3(7) of the Hague Rules provides:
"After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, providing that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as aginst the issue of the "shipped" bill of lading, but at the option of the carrier such document of title my be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in S3 of Article 3, shall for the pourpose of this Article be deemed a "shipped" bill of lading".

(2) See David M. Sassoon, British Shipping Laws, Vol. 5, London, 1975, para, 72.

(3) See Justice Bes, Chartering and Shipping terms, Vol 1, 9th ed. London, 1975, p.110; See also Mankabady, comments on the Hamburg Rules, p.41; See also "Maurice Desgagnes" (1977), Lloyd's Rep, p. 290, at p.293.

(4) See Mustill, op.cit., p.695.

document of title"? The Hague Rules did not provide a definition for this term.

However, Andrews L.J. in his judgement in the case of Hugh Mack & Co. Ltd. v. Burns & Laird Lines Limited,(1) (Supra) tried to shed light upon this term when he said:
"I shall not purpot to give an exhaustive definition; but the term doubtless includes what is known as a "received for shipment" bill of lading - a document issued before shipment as distinguished from a bill of lading properly so called which is not signed or delivered until after shipment has taken place.

Suffice it, however, for me to say that in my opinion the phrase does not include a mere receipt such as was given by the shipowner to the shipper in this case".

In Kum and Another v. Wah Tat Bank Ltd.(2) the W. Bank financied T. Ltd's shipments of rubber from Sarawak to Singapore against T. Ltd's bills of exchange and mate's receipts which were issued by charterer of the vessel. The mate's receipts stated that the goods were consigned to O. Bank as agents for W. Bank. The goods were released by the charterer without production of the mates receipts to T. Ltd., at Singapore, against indemnities signed by T. Ltd. The bank claimed against the charterer and shipowner, for conversion of the goods, contending that the mate's receipt were equivalent to bills of lading. It was held that a trade custom could create a document of title to goods so that the transfer of the document operated to pass the property in the goods; that the bank had proved that, in trade between Sarawak

(1) (1944) 77 Ll.L Rep. p.377 at p.383.

(2) (1971)$_1$ Lloyd's Rep. p.439.

and Singapore, mate's receipts were universally adopted as documents of title in the same way as bills of lading.

From these two cases one can conclude that the mate's receipt is not, normally, a document of title, but the custom of trade can make it a document of title, providing it names the consignee and is not marked "not negotiable".(1)

Another case of interest concerning the words "similar document of title" is the American case "The Toledo"(2) which concerned dock receipts which provided:

"The goods are accepted for shipment subject to provisions of companys usual bill of lading as revised to date".

The usual bills of lading invoked the Hague Rules and the court held that, the document was governed by the Rules.

However, in the case of High Mack & Co. Ltd. v. Burns & Laird Lines Ltd. (Supra), which concerned a damage to goods shipped under a non-negotiable receipt instead of bill of lading. It was held that, the Rules did not apply.

This was the situation also in the Scottish case Associated Herring Merchants v. Reitsma,(3) which concerned a shortage to cargo shipped in two stages. A bill of lading was issued in respect of the cargo loaded at the first stage, but none was issued for the cargo loaded at the second stage, the only document produced in respect of it being a manifest of the cargo loaded there. It was held by the Scottish Courts that the Rules did not apply to the last document. It is neither a receipt for the cargo nor an authority to deliver to anyone bearing only to be a statement of what was shipped at the second stage.

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(1) See Giles, op.cit., p.178; See also Day, op.cit., p.21; See also Samir Al-Sharkawi, the Maritime Law, Cairo, 1978, p.289.

(2) (1939) A.M.C. p.1300; See also Tetley, Marine, p.8.

(3) 1958 S.L.T. p.57; See also Harland & Wolff v. Burns & laird Lines 1931 S.C. 722.

These two cases, made it quite clear that, the Rules do not apply to a non-negotiable receipt marked as such. But what is the situation if a non-negotiable receipt has been issued, but the shipper still has the right to demand a bill of lading according to the contract of the carriage? In such a case, although the shipper has received a non-negotiable receipt, the Rules will be applied as long as it was intended that a bill of lading would be issued.(1) However, in order to avoid the Rules by virtue of Art 6:(2)

1) the carriage must be under a non-negotiable receipt marked as such; and

2) the carriage must be of particular goods; and

3) the carriage must not be on an ordinary commercial shipment.(3)

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(1) Section 1(b) of the Carriage of Goods by Sea Act 1971 provides: "Without prejudice to Article X(c) of the Rules, the Rules shall have the force of law in relation to - (b) 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 sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading". See also Diamond, The Hague-Visby Rules, p.25; See also Mustill, op.cit., p.696.

(2) 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 by at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier in respect of such goods, or his obligations as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants 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 perfoemed are such as reasonably to justify a special agreement".

(3) See Tetley, Marine, p.9; See also Astle, op.cit., p.185.

The bill of lading issued under a charter-party

It should be borne in mind that charter-parties according to Article 1(b) and 5 of the Hague Rules mentioned earlier fall outside the scope of the Rules. 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.

But as we shall see later the status of a bill of lading where the vessel is chartered, depends on whether the charterer is the holder of the bill or not.

Under the charter-party the operative document between the charterer and the shipowner is the charterparty, and the bill of lading issued to the charterer generally acts as a receipt when it is in the hand of the charterer.(1) In other words, when the bill of lading is still in the hand of the charterer, there is no "contract of carriage" within the meaning of Article 1(b) of the Rules, and therefore, the shipowner is not within the meaning of Article 1(a) of the Rules.(2)

In North American Steel Products Corporation and others v. The "Andros Mentor" and others,(3) which came before the American Courts, bills of lading were issued under a charter-party but they had never been negotiated, therefore it was held that the plaintiffs reliance on COGSA was misplaced because the bills of lading in the possession of the charterer, so they were merely receipts and the rights and

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(1) See Scrutton, op.cit., p.406; See also Gow, op.cit., p.499; See also D.M. Day, op.cit., p.13.

(2) Article 1(a) of the Hague Rules proviedes:
" "Carrier" includes the owner or the charter who enters into a contract of carriage with a shipper".

(3) (1969) A.M.C. 1482; $(1970)_1$ Lloyd's Rep. 145.

liabilities of the parties were governed by the terms of the voyage charter - party.

Undoubtedly, the Rules will not apply as long as the bill of lading issued to the charter-party remains merely a receipt, but when the bill is negotiated to a third person 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.(1)

This situation was summarized by Astel as follows: "If the charterer be the shipper also, the charter-party governs his rights, but when the goods are transferred by endorsment of the bill of lading the rights of the endorsee or holder of the bill will be governed by the bill of lading".(2)

In the Norce (Dodds Shipping Ltd. v. Karoli Lumber Co.,(3) a bill of lading was issued under a charter-party and negotiated to a third person, it was held that the holder of the bill was not a party to the charterparty and could sue on the bill of lading. In consequence, the carrier was obliged to exercise due diligence to make the vessel seawothy in virtue of COGSA, which applied.

Carver believes that when a bill of lading issued under a charter-party is transferred to a third person, a new contract appears to spring up between the shipowner and the third party.(4)

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(1) See Mankabady, The Brussels Convention, p.75; See also John Bassindale, Bills of lading for goods on chartered b vessels, theses presented to Birmingham University, for LL.M. degree 1976, p.4.

(2) See Astle, op.cit., p.41.

(3) (1968) A.M.C. 1524.

(4) See Carver, part 1, para 253; See also F.J.J. Cadwallader, Incorporating Charterparty clauses into bills of lading, published in the Speakers papers for the bill of lading conventions conference organised by Lloyd's of London Press November, 1978, p.1.

This seems manifestly clear when he says:

"A new contract then appears to spring up between the carrier and the consignee or indorsee on the terms of the bill of lading, and, in general the consignee then acquires the right to claim for breaches of that contract before, as well as after, the transfer of the bill, and the provisions of the bill must be considered to relate back, and apply to what has been done in regard to the shipment, even before it was originally issued".

Some support is given to this view by the decision in Monarch Steamship Co.Ltd. v. Karlshamus Oljefabriken (A/B), when Lord Porter said:(1)

"To some extent this attitude involves acceptance of the view that the taking of a bill of lading by the charterer of a ship confers no immediate rights upon him under the bill of lading, but gives him an incohate right, by indorsing the bill of lading to a third party, to make it an effective document from the beginning of the voyage so as to enable the indorsee to sue upon it for any breaches of contract committed during the voyage but before its transfer to him".

Scrutton also points out that when a bill of lading issued under a charter-party is transferred to a third person the bill of lading will become the operative document between the shipowner and the holder of the bill of lading and the Rules will apply to such a bill of lading with the result that any term in it which is in conflict with Article 3(8)(2) of the Rules will be render

(1) (1949) A.C. p.196 at p.218.

(2) 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".

null and void.(1) This was the situation in Temperely Steam Shipping Co. v. Smyth & Co.(2) where Collins M.R. said: "The broad distinction between the position of a charterer, who ships and takes a bill of lading, and an ordinary holder of a bill of lading is, I think, that in the former case there is the underlying contract of the charterparty which remains until it is cancelled, and taking a bill of lading does not cancel it in whole or in part unless it can be inferred from the inconsistency of the terms of the two documents that it was intended to do so. On the other hand, in the case of the holder of the bill of lading who is not the charterer there is no presumption that the contract in any terms but those of the bill of lading, and, if the bill of lading purports to import the charterparty, the presumption is that it incorporates only those clauses which relate to the conditions to be performed by the receiver of the goods".

We have seen that the Rules do not apply as long as the bill of lading issued to the charter-party remains in the hand of the charterer, but when the bill is negotiated to a third person the Rules apply to the bill of loading. 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

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(1) See Scrutton, op.cit., p.407. Fore more details as to difficulties arising from issuing a bill of lading under a charterparty, See John Bassindale, op.cit., pp.87-99; Gadwallader, Incorporating charterparty clauses into bills of lading, p.4; See also Mankabady, Reference to charter - parties in bills of lading. (1974) LMCLQ, p.53, (hereinafter cited as Mankabady, charter-parties); See also The Angeliki $(1973)_2$ Lloyd's Rep. 226.

(2) $(1905)_2$ K.B. p.791 at p.801.

enacted by that act,[1] e.g. Section 3 of the British Act 1924; Section 13 of the American Act 1936 and Section 4 of the Canadian Act, this express statement called paramount clause.

The paramount clause which appeared in the Anglo-Saxon Petroleum Co. Ltd. v. Adamastos Shipping Co. Ltd.[2] is a good example for the normal paramount clause, this clause reads as follows:

"This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea A ct 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 no further".

As was pointed out by Scrutton, this clause by its terms will invalidate all charterparty clauses which are in conflict with Article 3(8) of the Hague Rules.

On the other hand, the Court of Appeal in Great Britian point out in Anglo-Saxon Petroleum Co. v. Adamastos Shipping Co. (Supra) that the paramount clause should be properly drafted to be upheld by the courts.

It should be mentioned that the incorporation of the Rules into the charterparty must be by express terms.[3] In the Marine Sulphur Queen,[4] the United States Court of appeals held that:

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(1) See T.M.C. Asser, Choice of law in bills of lading. $(1973)_5$ JMLC, p.388.

(2) $(1957)_1$ Lloyd's Rep. 271

(3) See Tetley, Marine, p.21.

(4) $(1973)_1$ Lloyd's Rep. 88, at p.97.

"This mere similarity of rather common phrases does not invoke the entirety of COGSA including its burden of proof rules, ... While para 28, captioned "Limitation of liability", does provide that the owner shall have all "priviliges, 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". In consequence the general exception clauses and the terms of the charterparty applied.

Undoubtedly, where the charterer negotiates bills of lading to a third party who endorses them back to the charterer, the bills of lading are mere receipts.(1)

It is submitted, however, that if the bill of lading does not contain a paramount clause, the Rules still apply. This seems fairly clear from the Rules themselves and found some support in the case of Kwei Tek Chao v. British Traders & Shipper,(2) which concerned a forgery in a bill of lading. In this case Devlin. J, ruled that a forgery did not nullify a bill of lading. If the forgery corrupted the whole instrument, then the instrument was destroyed; but if it corrupted merely a limb then the instrument remained a live.

2. Under the Hamburg Rules

As has already been mentioned, Article 1(b) of the Hague Rules limiting the applicability of the Rules to the contract of carriage

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(1) See President of India v. Metcalfe Shipping Co. Ltd. $(1969)_2$ Lloyd's Rep. 476; See Tetley, Marine, p.20.

(2) $(1954)_2$ Q.B. 459; $(1954)_1$ Lloyd's Rep. 16; See also Walker, Principles, p.836.

covered by a bill of lading or to bills of lading issued under a charter party but negotiated to a third party. This is because, in the early part of this century the bill of lading was the unique shipping document. This view is confirmed by Sweeney where he says:(1)
"The Hague Rules had been prepared at a time when international trade involving ocean transport was financed solely through documentry 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 rules do not provide suitable solutions to the problems raised by the use of new types of documents used in modern liner trade e.g. waybills and computerised documents, thus creating a need for harmonizing the rules of maritime law with the new types of documents.(2)

The UNCTAD Working Group held its first session in Geneva from 1-12th December, 1969, and, at its ninth meeting, decided to discuss bills of lading in its programme.(3)

The Working Group suggested that the Secretariat of UNCTAD should make a study on bills of lading to be submitted to the next session of the Working Group.(4) According to this demand the

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(1) See Sweeney, The UNCITRAL Draft Convention of Carriage of Goods by Sea, part 3, (1975)$_7$ JMLC, p.487, at p.495. (hereinafter cited as Sweeney, part 3).

(2) See Erling Selving, the Hamburg Rules, the Hague Rules and Marine insurance practice, (1981)$_3$ JMLC, p.299 at p.303.

(3) See the Report of the Working Group on International Shipping Legislation its first sesstion held at the Palais des Nations, Geneva, from 1-12 December, 1969, UNCTAD Doc. TDB/289, TD/B/C. 14/64, TD/B/C.4 ISL/4, para 17.

(4) See UNCTAD Doc TDB/289, TD/B/C.14/64, TD/B/C.4/SL/4, para.27; See also Gabriel M. Wilner, Survey of the Activities of UNCTAD and UNCITRAL in the field of International Legislation on Shipping (1971)$_3$ JMLC, p.129, at p.138.

UNCTAD Secretariat prepared a report entitled "Bills of lading". This report presented to the UNCTAD Working Group in its second session held in Geneva from 15-26th February, 1971. In this session the Working Group adopted a Resolution(1) to expand the coverage of the new Rules to the various types of informal documents usein maritime transport. Undoubtedly, this expansion will remove the problem which exists under the Hague Rules that it is not clear whether these rules apply to liner waybills and other similar computerised documents if these are non-negotiable and do not expressly incorporate the rules.(2)

However, this idea was critised strongly by Latin American delegates, because they believe that expansion will weaken the traditional bill of lading as the principle documentation in ocean

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(1) 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".
See UNCTAD Doc TD/B/C.4/86, TD/B/C.4/ISL/8, paras. 1-81;
See Wilner, op.cit., p.140.

(2) See Antony Diamond, The division of liability as between ship and cargo, p.49;
See also McGilchrist, op.cit., p.262.

transport.(1)

During the heated debates on the scope of the new rules, many proposals were presented by different countries,(2) Lastly, they agreed that the new rules should apply to all contracts of carriage of goods by sea, all types of maritime transport and all types of document use in maritime transport. As to charter parties, there was agreement that the new rules should not be applicable, however, where a bill of lading is issued pursuant to a charterparty, the rules will apply to the contractual relation between the carrier and the cargo owner under a bill of lading who was not himself the charterer.(3)

These principles now found in Articles 2 and 18 of the Hamburg Rules.

Article 2 of the Rules provides:

"1 - The provisions of this convention are applicable to all

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(1) Brazil, Hungary and some other countries supported the idea that the new convention should be given the broadest possible scope.
The report of 1970 of the United Kingdom Committee for simplification of International Trade Procedures (Sitpro), states (at p.50) that: "Many British importers and brokers, especially of raw materials such as timber and wool, or bulk foodstuffs such as wheat or cocoa, still rely upon the bill of lading as a document of title in order to buy and sell cargo whilst it is on the high seas. Despite diminishing transport times it is likely that demands in such trades for the bill of lading as a negotiable document of title will continue".
See Mankabady, Comments on the Hamburg Rules, p.90.

(2) The U.K. presented a draft proposal 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 otherwuse 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". This proposal faced strong opposition from Australia and Argentina.

(3) See Sweeney, part 3, p.500; See also Mankabady, Comments on the Hamburg Rules, p.4[illegible].

contracts of carriage by sea between two different states .....

3. The provisions of this convention are not applicable to charter-parties. However, where a bill of lading is issued pursuant to 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.

4. If a contract provides for future carriage of goods in a serious 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 paragraph 3 of this Article apply".

And Article 18[1] 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".

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. He suggested the following definition: "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 another

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(1) It is convenient here to mention that during the drafting stages of the Hamburg Convention, there was considerable discussion on this Article, some delegates suggested alternative proposals but these proposals were rejected, and others suggested that this article should be deleted altogether.
See C.W.H. Goldie,Documentation - the writing on he bill articles 15 to 18 of the Hamburg Rules, published in the Hamburg Rules on the carriage of goods by sea, edited by Mankabady, p.218.

where the goods are to be delivered".(1)

This definition became paragraph 6 of article 1 of the Hamburg Rules which states:

" "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".

It is clear enough that the Hamburg Rules, by Arts 2 and 18 now have a much broader and clearer scope of application than the Hague Rules.

Article 2(1) also made 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 reproduced by computer or other electronic devices.(2)

On the other hand, under the Hamburg Rules there is no room for the espcial exceptions which are described in Article 6 of the Hague Rules as extradordinary shipment not met in the ordinary course of trade where a non-negotiable receipt is issued,(3) because Article 29 of the Hamburg Rules prohibited all reservations.(4)

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(1) See Report of the Seventh Session, U.N. Doc. A/CN.9/96 of 18 November, 1974, paras, 99-103 at 33; See also Sweeney, the UNCTIRAL Draft Convention on Carriage of Goods by Sea (part IV) (1975), JMLC, p.615 at p.632(hereinafter cited as Sweeney, part 4).

(2) See Mankabady, Commonts on the Hamburg Rules, p.44.

(3) See Tetley, The Hamburg Rules, A Commentary, p.7.

(4) Article 29 of the Hamburg Rules provides:
"No reservations may be made to this Convention".

The Fourth Session of UNCITRAL which met in Geneva from 29 March to 20 April, 1971, considered the recommendations made by its Working Group. In this session a great deal of discussion was given to the term of "bills of lading". Some representatives considered that the use of the term "bills of lading" might give rise to a misunderstanding, and various substitution terms were suggested, such as, "Bills of lading with respect to transport by sea", "Ocean bills of lading", "Contracts of international transport of goods by sea". However, most representatives were prefered to retain the term "bills of lading", because the substitusion terms could lead to confusion, therefore it was agreed to retain the term "bills of lading".(1)

As has already been mentioned, the Hague Rules did not provide a definition of "a bill of lading", and article 3 of the Hague Rules deals with the contents of the bill of lading without defining it. In order to avoid this defect the Secretary General, in his Fourth Report,(2) suggested two alternative definitions to the bill of lading as follows:

Draft provision A-1

" "Bill of lading" means a document which evidences (the receipt of goods and) a con rac: for their carriage and by which a carrier

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(1) See Report of the United Nations Commission on International Trade law on the Work of its fourth session, Official Records of the General Assembly, twenty-sixth session, Supplement No. 17 para, 18, U.N. Doc. A/84/7; See also Wilner, op.cit., p.141.

(2) See 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. 1 and 11) of 13 August, 1974), Paras 4-13 at 8-12; See also Sweeney, part 4, p.632.

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".

After long debates the following definition of bill of lading (which became paragraph 7 of article 1) was approved:

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

Finally, it should be mentioned that when the bill of lading stipulates that the goods will be carrier through a series of shipments during an agreed period, each shipment will be governed by the Hamburg Rules.(1)

SECTION THREE

The voyages governed by the Rules Under the Hague Rules.

It was intended by the signatures to the Brussels Convention

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(1) See Article 2(4) of the Hamburg Rules.

of 1924 (The Hague Rules) that the Rules would apply to all bills of lading anywhere in the world, to unify the law applicable to the carrier of goods by sea under bills of lading and thereby to eliminate the need for choice of law. But as we have already mentioned, some countries have neither signed the Convention nor adopted the Rules in any form. Other nations, have adopted a modified version of the Hague Rules, with the result that the scope of the domestic Hague Rules differs from state to state.(1) Consequently, a number of what may be called conflict of law problems had arisen under the Hague Rules.

Article 10 of the Hague Rules provides:

"The provision of this Convention shall apply to all bills of lading issued in any of the contracting states".

In order to get a proper conception of the voyages governed by the Hague Rules, it will be necessary to discuss this question under the law of different countries e.g. United Kingdom, United States.

In the United Kingdom.

Under the Carriage of Goods by Sea Act 1924;

As has already been mentioned, the United Kingdom gave effect to the Hague Rules by the Carriage of Goods by Sea Act 1924, which designed to cover shipments from Great Britain and Northern Ireland. Section 1 of this Act states:

"Subject to the provisions of this Act, the Rules shall have effect

(1) For more details as to the Hague Rules and conflict of laws See 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, p.221 at p.227.

in relation to and in connection with the 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 and Northern Ireland".

This section limited the operation of the Hague Rules by applying them only to outward voyages, and thus receives a scope narrower than that sought for it by article 10 of the Hague Rules, because this means that the British Carriage of Goods by Sea Act applies only to bills of lading issued in the United Kingdom,(1) whereas article 10 of the Hague Rules requires that it be applied to bills of lading issued in any of the contracting states.(2)

However, problems may arise in relation to transhipment of the goods in the course of the voyage. It is outside the scope of this work to discuss in detail these problems. It is sufficient here to mention that, section 1 mentioned above covers all shipments of goods from Great Britain, under through bills of lading in which the carrier assumes responsibility throughout the transit even after shipment at some port in the course of the voyage whether inside or outside Great Britain.(3) However, if the bill of lading is not a through document, and provides that the carriers responsibility will ceases at the port of transhipment, and thereafter shall act solely as agent, this voyage should be split into two stages and each stage looked

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(1) The country of issue of the bill of lading is most often the country of shipment. See Scrutton, op.cit., p.404.

(2) See Malcolm Clark, op.cit., p.18; See also Asser, op.cit., p.360.

(3) It should be noted that, the phrase "from any port in Great Britain" mentioned in section 1 governs carriage of goods by sea" and not "ships carrying goods". Because if the latter construction is the correct the Rules might not apply to goods shipped from a United Kingdom port once they had been transhipped at a foreign port. See Carver, Vol.1, para,245; See also Scrutton, op.cit., p.410.

at separately to see wither it forms a voyage outside Great Britain.(1) It is worth pointing out that, all national reference rules are one-sided in that they refer only to their domestic Hague Rules legislation and never to foreign law, and this is a remarkable difference between the national Hague Rules statutes and the Convention Rules.(2)

On the other hand, the British Carriage of Goods by Sea Act provides in section 3 that;

"Every bill of lading, or similar document of title issued 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".

In his comment on the above section Clarke said:(3)

"It was believed that by requiring such a statement, known as a Paramount Clause, foreign courts confronted with bills of lading issued in the United Kingdom would be compelled to apply the British COGSA, not as the proper law, but as part of the terms of the contract". In this connection he said again:(4)

"But when such a bill of lading comes before a foreign court it is difficult to see how section 3 can be any more effective than 1; the foreign carrier is as free to ignore section 3 as the foreign court, in deciding the law to be applied, is free to ignore section11. The act offers no sanction for disregard of section 3."

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(1) See Mustill, op.cit., p.695.

(2) See Asser, op.cit., p.360; See also D.C. Jackson, op.cit., p.221.

(3) See Clarke, op.cit., p.19.

(4) See p.20.

Frome this comment one can conclude that the failure to in insert the paramount clause does not, render the bill of lading void. In other words, the statutory paramount provision fulfills no useful function.(1)

In fact, this seems manifestly clear from section 3 itself and was so declared in Kwei Tek Chao v. British Trades and Shippers (Supra).

However, the difficulty arises when the carrier inserts in the bill of lading a clause for the selection of a proper law other than that of the port of shipment.

Reference here should be made to an important case, namely The Torni,(2) which concerned the damage and short delivery in consignments of oranges shipped from Jaffa in Patesline to Hull in the United Kingdom, under a bill of lading issued in Jaffa. Palestine had adopted the Hague Rules in an Ordinance. Provision 4 of the Ordinance reads:

"Every bill of lading, or similar document of title, issued in Palestine 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 Ordinance, and shall be deemed to have effect subject thereto, nothwithstanding the omission of such express statement".

The Plaintiffs alleged that the damage was due to the unseaworthiness of the vessel due to the defendants failure to exercise due diligence to comply with the provisions of the

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(1) For that reason this provision has been omitted from the British COGSA of 1971. As Asser, op.cit., p.389.

(2) 41 Ll.L Rep. 174.

Government of Palestine Carriage of Goods by Sea Ordinance. The defendant denied that the bill of lading was subject to the provisions of the Government of Palestine Carriage of Goods by Sea Ordinance, because the bill of lading contained the following provision:

"This bill of lading whereever signed, is to be construed in accordance with English Law". The bill of lading also contained the following clause:

"Nothing herein shall operate to deprive the carriers of any statutory protection from or limitation of liability to which they would have been entitled in the absence of the above provisions - the above provisions being intended to be in addition to and not in substitution for such statutory protection and limitation". The defendants then denied breach of contract and relied on the exceptions contained in the bill of lading as relieving them from responsibility for loss arising from unseaworthiness of the ship. It was held by the Court of Appeal that the bill of lading was governed by the Palestine Carriage of Goods by Sea Ordinance and that the laws of Palestine could not be evaded by an illegal declaration that the bill of lading was to be construed according to English law. Langton J. speaking for the court said:(1)

"I incline rather strongly to the belief that ..... so far as the Hague Rules are concerned, they have no longer any right to an opinion or intention. But, if I am wrong in this view, I hold that in view of the facts that these goods were shipped by a

regular service from Palestine bearing a name taken from a Palestine port, that the shippers were presumably residents in Palestine, that the bills of lading were issued in Palestine, and that the law of Palestine has dealt quite recently and quite concisely with this express point concerning bills of lading, the intention of the parties must be taken to be that they contracted upon the footing that the law of Palestine should apply to the contract".

This ruling was given in 1932 and held good until 1939, when an appeal in Vita Food Products v. Unus Shipping Company(1) was heard before the Privy Council. This case concerned damage sustained to a cargo of herrings shipped from Newfoundland to New York. Section 3 of the Newfoundland Carriage of Goods by Sea Act 1932 provides:

"Every bill of lading, or similar document of title, issued in this Dominion 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".

The bill of lading did not contain the required Paramount Clause, but contained wide exception clauses not permissible by the Act, and also a statement that the contract should be governed by English law. The shipowners, in defending the Action brought by the cargo owners, maintained that the English law did not apply to the contract and that they were exempted from liability under

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(1) 36 Ll.L Rep. 21; (1939) A.C. 277.

the terms and conditions as set out in the bill of lading contract. The Privy Council held that the paramount clause required by section 3 was directory and not mandatory. Accordingly the omission of the clause paramount did not make the bill of lading on illegal document in whole or in part either within or outside Newfoundland.

The Privy Council then decided that the applicable law was not the Newfoundland Act, but the law of England for which the parties had expressly contracted.

With respect to the decision of the Court of Appeal in The Torni, Lord Wright said:(1)

"With the greatest respect to the Court of Appeal their Lordships are of opinion that the decision is contrary to the principles on which they have proceeded in the previous part of this judgement and that it cannot be supported.

The Palestine Ordinance so far as appears, did not anymore than the Newfoundland Act make the contract illegal so as to nulify the contract. There was no sufficient ground for refusing to give effect to the express or implied intention of the parties that the proper or substantive law of the contact, that is the law by which it was to be enforced and governed, should be English law. To do so is to contravene the fundamental principle of the English rule of conflict of laws that intention is the general test of what law is to apply. The effect of the judgement seems to be to read the bill of lading as if it expressly provided that it was to be governed by the law of Palestine".

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(1) Ibid. at p.32.

However this ruling met with hard criticisms. Tetley points out:(1) "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:(2) "In the Vita Food case the interests of international maritime commerce as expressed in the Convention was sacrificed without justification on that score to very liberal choice of law principle".

It must be mentioned that, the conflict between the Vita Food decision and the Torni still existed, and the English courts have not yet found occasion to establish a better balanced conflicts norm for foreign Hague Rules cases.(3)

Lastly, it is worth noticing that the United Kingdom GOGSA 1924 applies to all costal voyages within the U.K. when the contract contained in or evidenced by the bill of lading.

In High Mack & Co.Ltd. v. Burns & Laird Lines Ltd.(4) the goods were shipped under a non-negotiable receipt. It was held by the Northern Ireland Court of Appeal that the operation of the Rules contained in the schedule to the Act was confined to the carriage of goods under a bill of lading or similar document of title and did not apply to the coasting trade in so far as such trade was carried on with non-negotiable receipt instead of bills of lading.

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(1) See Tetley, Marine , ed. 1965, p.274.

(2) See Asser, op.c it., p.375.

(3) See Mankabady, The Brussels Convention, p.82; See also Asser, op.cit., p.375.

(4) 77 Ll.L Rep. 377.

In the United States

Under the American COGSA 1936 which gave effect to the Hague Rules, all voyages, with respect to shipments to or from ports of the United States whether the bill was issued in the United States or abroad, will be governed by the American Law.(1) Namely, the American law applies to inward and outward voyages.(2)

In Schroeder Bros Inc. v. The Saturina(3) which concered a shipment from Italian ports to New York in an Italian ship, it was held that the United States COGSA was applied.

Undoubtedly, many problems will arise in this connection, by reason of a conflict of laws. For example, the legislation of the country of the port of loading may provide that the bill of lading issued in this country shall be subject to its version of the Rules, and at the same time, the legislation of the country of the port of discharge may also provide that this bill shall be subject to its version of the Rules.(4) Such a situation was arose in Steel Inventor,(5) which came before the American Courts. In this case the bill of lading bearing a condition that the bill of lading subject to the terms of the Indian Carriage of Goods by Sea Act, at the same time, the American Act also provided that the terms of its enactment should apply, because the port of discharge being the United States. It was held that the bill of lading was subject to the term of the American Act. But the real problem was that whereas the American Act limited the carrier's liability in $ 500, per package the Indian Act limited this

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(1) See Gilmore and Black, op.cit., p.130; See also Beare, op.cit., p.3.

(2) Article 13 of the American GOGSA 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".

(3) (1955) A.M.C. 1935.

(4) See Astle, op.cit., p.8.

(5) (1941) A.M.C. 169.

liability in £100.

In regard to the paramount clause, section 13 of the (American) Carriage of Goods by Sea Act 1936, also provide that every bill of lading issued in the United States should contain a paramount clause.

However, the failure to insert the paramount clause does not, render the bill of lading void, and COGSA still applies.(1)

In Shackman v. Cunard White Star(2), it was held that the (American) Carriage of Goods by Sea Act, is part of the terms of every outward bill of lading, even if not incorporated by express reference, and that a paramount clause is evidence that the carrier is not surrendering rights or accepting increased liabilities.

It must be mentioned that, Section 13(3) of (American)COGSA also states that the United States Act can apply, by express statement in the bill of lading or the similar document of title, to inland carriage of goods.

Under the Visby Rules.

As we have mentioned earlier, a number of what may be called

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(1) It has been suggested that, the carrier who omitted to insert a paramount clause in the bill of lading, might be deprived of the protection of the Act and of his bill of lading contract which rendered illegal by this omission, and the carrier of the goos will be governed by the common law. But the American legislature did not take up this suggestion. See Gilmore and Black, op.cit., p.185.

(2) (1940) A.M.C. 971.

(3) Paragraph 3 of section 13 of the (American) Carriage of Goods by Sea Act provides:
"Nothing in this Act shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possession, and any other port of the United States or its possession, Provided however, that any bill of lading or similar document of title which is evidence of a contract for carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this Act, shall be subject hereto as fully as if subject hereto by the express provisions of this Act".; See also Gilmore and Black, op.cit., p.148.

conflict of law problems had arisen under the Hague Rules. Moreover, the decision of the Privy Council in Vita Food Products v. Unus Shipping Company, casts doubt on the mandatory nature of the Rules.(1) The solution adopted by C.M.I. Stockholm Conference in 1959, and reiterated in 1963, was that the Rules should apply to both inward and outward shipments to or from any state which was party to the convention.(2) This solution, undoubtedly, will widen the scope of the Rules by increasing the number of the voyages subject to the Rules.(3) In 1968, this solution was replaced by Article 5(4) of the Protocol which designed to amend Article 10 of the 1924 Convention.

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(1) See Mankabady, The Brussels Convention, p.83.

(2) See CMI Stockholm Conference, 1963, p.101.

(3) See Diamond, The Hague-Visby Rules, p.230; See also Mustill, op.cit., p.694.

(4) Article 5 of the 1968 Protocol 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 ississued in a Contracting State, or
b) the carriage is from a part 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".

New Article 10 of the Visby Rules applies the Hague/ Visby Rules to the following types of voyages:

1) If the bill of lading is issued in a contracting state (Art 10 (a)). It does not matter whether the destination is in a contracting state.

2) If the carriage is from a port in a contracting state, irrespective of whether the destination is in a contracting state, (art 10(b)).

It should be noted that, in the two cases mentioned above the Hague/Visby Rules will apply, whether or not there is a relevant clause in the bill of lading incorporating the Hague/ Visby Rules. In other words, in these case, the paramount clause, is no longer necessary to apply the Hague/Visby Rules, because they apply by force of law.(1)

3) If the contract contained in 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 (Art 10(c)). Thus, carriage from or to nations which have not adopted the Visby Rules would be covered by the Hague/Visby Rules if the bill of lading so declared.(2)

In addition to the three types of voyages mentioned above to which the compulsory provision of the protocol apply, contracting States are authorised to apply the Rules to voyages not included in the protocol.(3)

The United Kingdom by the Carriage of Goods by Sea Act, 1971 has applied the Hague/Visby Rules to two other types of

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(1) See Tetley, Marine, p.15.

(2) See D.M. Day, op.cit., p.12; See also Beare, op.cit., p.4; See also Mustill, op.cit., p.692.

(3) See Article 5 of the 1968 Protocol.

voyages not covered by the protocol, as follows:

1) Section 1(3) of the Carriage of Goods by Sea Act provides: "Without prejudice to subsection (2) above, the said provision 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 meaning of Article X of the Rules".

It should be borne in mind that, according to Article 5 of the 1968 protocol amended Article 10 of the 1924 Convention, the Hague/Visby Rules are no longer apply to the carriage of goods by sea unless the ports of loading and discharge are in two different States.

Consequently, the practical effect of Section 1(3) of the Carriage of Goods by Sea Act 1971, is to apply the Hague/Visby Rules to all voyages where the port of shipment and the port of discharge are both within the territories of Great Britain and Northern Ireland.(1)

2) Section 1(6) of the Carriage of Goods by Sea Act 1971 provides: "Without prejudice to Article X(c) of the Rules shall have the force of law in relation to -

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

It seems fairly clear that Section 1(6)(a) is similar to

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(1) See Diamond, The Hague/Visby Rules, p.260; See also D.M. Day, op.cit., p.11.

Article 5(c) of the 1968 protocol, however, the practical effect of Section 1(6)(a) of the Carriage of Goods by Sea Act 1971, is to apply the principle of Article 5(c) of the 1968 protocol to the costal voyages. This position can be best summed up in the words of Diamond, where he said:(1) "Both Article X(c) and S(6)(a) set out the principle that even a voluntary paramount clause will attract the statutory application of the Rules. But S.1(b)(a) is slightly wider than Article X(c) since the former applies to all voyages while the latter applies only to international carriage".

Under the Hamburg Rules.

The test adopted by Article 10 of the Hague Rules did not provide a sufficient broad scope of application of the Rules. Article 5 of the Brussels Protocol was proposed to tackle this defect. However, the improvement brought by this article was very slight.

In order to overcome this problem the Secretariat of UNCTAD prepared two draft proposals.(2)

Draft Proposal A was similar to Article 5 of the Brussels Protocol 1968, and provided that contracting states were free to apply the rules of this convention to bills of lading not included in this proposal.

Draft Proposal B would apply the convention to all contracts of carriage by sea 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

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(1) See Diamond, The Hague/Visby Rules, p.260.

(2) See Sweeney, part 3, p.501.

optional ports of discharge provided for in 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".

Draft proposal A was supported by Japan and the United Kingdom, whereas Draft Proposal B was supported by Argentina, Australia, Belgium, Chile, Egypt, Ghana, Hungary, India, Nigerian Singapore and Tanzania.(1)

Australia proposed flexible language to authorize Contracting States to apply the Convention to coastal voyages.

The Norway delegate proposed a text, States directly that the convention shall apply to domestic transport, this proposal was supported by the Soviet Union, but the United States warned that this proposal might raise problems.(2)

Lastly, the Drafting Party proposed a new text which is now

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(1) See Sweeney, part 3, p.502.

(2) See Secretary-general Report (A/CN.9/WG111/W.p.12) at para 5; See also Sweeney, part 3, p.502.

incorporated in Article 2[1] of the Hamburg Rules.

It should be observed that, in the case of a contract of carriage of goods subject to the Hamburg Rules by virtue of provisions (a), (b), (c) or (e), the Rules apply as a matter of statute law and not of contract law, while under provision (e) of the Rules apply as a matter of contract. The importance of the distinction between those cases where the Rules apply ex proprio vigore and those where they apply as a matter of contract, lies in the fact that in case there is a conflict between a clause in the bill of lading and the Rules when applicable ex proprio vigore, the latter previal.[2]

It is clear enough that, the categories mentioned in Article 2 are so wide that the number of voyages which are subject to the Hamburg Rules by statute has sharply increased.

Article 2 also removed the distinction between inward and

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(1) Article 2 of the Hamburg Rules provides:
"1. The provisions of this convention are applicable to all contracts of carriage by sea between two different States, if:
(a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or
(b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or
(c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or
(d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or
(e) the bill of lading or other document evidencing the contract of carriage by sea 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 this Convention are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person".

(2) See Mankabady, Comments on the Hamburg Rules, p.44.

outward voyages as the Rules are applicable to both.(1)

It should be mentioned that the Hamburg Rules do not apply to the coastal trade.

Finally, Article 2 limits the application of the Rules to contracts of carriage by sea to avoid conflict with any other rules governing other types of transport, especially the proposed Convention on Multimodal Transport.

However, Diamond considered this limit as a defect in the Rules where he says:(2)

"But, as I read the rules, they do not apply at all if under the relevant contract of carriage the transit begins and ends at an inland destination. Thus, if goods are carried from one inland depot to another by a single carrier as where the carrier is a freight forwarder or container operator then the rules do not apply at all - not even to the port of the carriage which takes place by sea". It is believed by this writer that the view expressed by the above learned author is quite right, however there is no thing in the Rules prevent the contracting parties from applying the rules to the maritime stage of the carriage, by stipulating that in the contract of the carriage.

SECTION FOUR

Live animals and deck cargo

Under the Hague Rules

Live animals and deck cargo are not subject to the Hague Rules, in virtue of Article 1(c) which provides:

" "Goods" includes goods, wates, merchandise and articles of every

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(1) See Mankabady, Comments on the Hamburg Rules, p.44.

(2) See Diamond, The division of liability as between ship and cargo, p.50.

kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried".

Live animals:

As for live animals, there have been many explanations for the exclusion of the live animals from the scope of the Hague Rules. It is outside the scope of this work to deal with all these explanations. However, it is believed by this writer that the view expressed by Mankabady in this connection is quite practical. He says:(1)

" (I)t seems to me that the real reason is that carriers are unwilling to guarantee delivery of the cargo in a "live" state".

In France, an important case raised an interesting discussion on whether the exception of live animals from the scope of the Rules, includes snails and oysters shipped in boxes or not. The Commercial Court of Marseills in this case paid attention to the packages rather than their contents, and applied the Rules to those boxes.(2)

Deck cargo:(3)

It is obvious that deck cargo is exposed to greater risks than cargo stowed below deck, therefore, in the ordinary way, cargo must be stowed in the holds and other usual carrying places.(4)

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(1) See Mankabady, Comments on the Hamburg Rules, p.38.

(2) Marseilles, 9 Nov.1948, Rev.Scopel(1948), p.43. Quoted from Mankabady, Comments on the Hamburg Rules, p.38.

(3) Its is worth mentioning here that, the Hague Rules did not provide a diffinition of "deck cargo" and different opinions had been adopted in this connection. However, the criterion given by Astel to this prblem is quite practical in our opinion. He says: "A better guid would probably be the consideration as to whether covered stowage even though above the main deck, gives to the cargo the same secutiry as if it were stowed below deck, and that the damage or loss did not arise out of the particular stowage which was given, and would not have occured had the goods been stowed below the main deck". See Astle, op.cit., p.43. For the meaning of deck cargo, See also the Lossiebank(1938) A.M.C. 1033.

(4) See Carver, part 2,para,699; See also Ridley,op.cit.,p.119.

As we have seen, deck cargo falls outside the scope of the Hague Rules, and the result is that the carrier is free to insert non-responsibility clauses into the bill of lading, providing that: 1) the bill of lading on its face stipulates carriage on deck and 2) the cargo is in fact carried on deck.(1)

It is a basic principle that, when the bill of lading has no stipulation on the place of stowage, the carrier must carry the goods under-deck. If nevertheless the carrier does stow goods on deck he Prima facie commits a breach of his contractual duty.(2)

It must be borne in mind that, the United States Courts have place the carrier who is held to be liable for unjustified deck carriage, in the same situation as if the ship had unjustifiably deviated from the contractual route.

This was the situation in the Encyclopeadia Britanniea v. Hong Kong Producer,(3) where it was held by the United States Court of Appeal that, on deck carriage of goods without a notation on the bill of lading was a devation which deprived the carrier of the $ 500 per package limitation.

However, some doubt has arisen over printed clauses in bills of lading permitting deck cargo, without showing that the goods are in fact carried on-deck.

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(1) See Giles, op.cit., p.176; See Also Carver, part2, para, 699.

(2) (1969) A.M.C.1741; (1969)$_2$ Lloyd's Rep. 536; See also Jones and Guerrero v. Flying Clipper (1954) A.M.C. 259. But different view has been adopted by the Belgian Courts in the case of Rechtbanks Van Koophandel Antwerpen (1972) E.T.L. 512, where it was held that the carriage of cargo on deck without a statement on the face of the bill of lading did not deprive the carrier of the Belg. Frs. 17.500 per package or unit - only in case of fraud, limitation of liability may not be invoked by the carrier.

(3) See Tetley, Marine, p.323; See also Mankabady, The Brussels Convention, p.92; See also Scrutton, op.cit., p.419.

It is believed by this writer that the general liberty to carry on deck clause e.g. "steamer has liberty to carry goods on deck", does not exempt the carriage from the Rules or the carrier from his obligation under Article 3(2).[1] This seems manifestly clear from the Rules themselves[2] and was so declared in Svenska Traktor Aktiebolaget v. Maritime Agencies,[3] where it was held that, a mere general liberty to carry goods on deck did not amount to a statement that the goods were in fact being carried on deck, and that the goods were accordingly carried subject to the obligation imposed by Article 3(2), properly and carefully to load, handle, stow, carry, keep, care for and discharge the goods carried".

Pilcher J. said in the cited case:[4]
"Such a statement on the face of the bill of lading would serve as a notification and a warning to consignees and indorsees of the bill of lading ....., that the goods which they were to take were being shipped as deck cargo. They would thus have full knowledge of the fact, when accepting the documents and would know that the carriage of goods on deck was not subject to the Act. If, on the other hand, there was no specific agreement between the parties as to the carriage on deck, and no statement on the face of the bill of lading that goods carried on deck had in fact been so carried, the consignees or indorsees of the bill of lading would be entitled to assume that the goods were goods the carriage of which could only be performed by the shipowner subject to the obligations imposed upon him by the Act. A mere general liberty to carry

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(1) See Article 1(c) of the Hague Rules.
(2) $(1953)_2$ Lloyd's Rep. 124.
(3) Ibid. p.130.

goods on deck is not in my view a statement in the contract of carriage that the goods are in fact being carried on deck. To hold otherwise would in my view do violence to the ordinary meaning of the words of Art 1(c) of the Act".

In the United States, the American Courts seem to hold the view that, the general liberty to carry on deck clause is merely an option to carry on deck, and if the bill of lading does not bear a statement on its face, giving notice that the cargo is on deck, then the option has not been exercised and the deck carriage is a fundamental breach of the contract.

This was the situation in Schooner St. Johns N.F.(1) But it seems to me that the American courts adopted a different point of view in Delawanna Inc. v. Blijdendijk(2) where it was held that, a general liberty to carry on deck clause was valid and the holder of a clear bill of lading may not complain of damage caused by the goods being stowed on deck. This decision made it quite clear that the American Courts in regard to the general liberty to carry on deck clause have reached to a different conclusion than the United Kingdom Courts.

It is to be noted that, certain kinds of cargo are frequently carried on deck for many reasons, among which the most important are that the cargo is too large to be stowed in the hold e.g. timber, railway engines and containers.(3)

The problem here "is whether a specific statement should be inserted in the bill of lading that the cargo will be carried on deck or whether the nature of the goods is in itself sufficient

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(1) See (1923) a.M.C. 1131; See also Tetley, op.cit., p.324.

(2) See (1950) A.M.C. 1235; See also Globe Solvents Co. v. California (1946) A.M.C. 674.

(3) See Giles, op.cit., p.177; See also Ridley, op.cit., p.119.

indication that they will be so carried".(1)

In Encyclopaedia Britannica, Inc. v. The "Hong Kong Producer" and Universal Marine Corporation (Supra), containers were shipped on deck of the ship, under short form bill of lading, which did not mention on-deck stowage. It was held that there was no breach of contract by defendant, because there is no agreement to carry the goods under deck. The District Judge said in the footnote of his decision:(2) "However, I note in passing that containerization has already posed difficult questions for Admiralty Courts, see, e.g. Standard Electrica S.A. V. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft, 375 F.2d 943 (2d Cir.1967) and one can be fairly certain that changes in the custom and usage of the industry will have some effect on the law in this area.

Indeed, if a finding on this issue were required in this case, I would tend to the view that defendant, through its witnesses Rand and Sember, established that in recent years there has been a growing practice of stowage of containerized cargo on whether decks of container ships and general cargo vessels".

But the court of Appeal, has rejected this rule on the ground that the carrier had failed to establish that there was

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(1) See Mankabady, op.cit., p.177; See also Ridley, op.cit., p.119. In Royal Exchange Shipping Co. v. Dixon, The Times May 19, 1885; affirmed (1886)$_{12}$ App.Cas.11., it was ruled by Brett M.R. that "a custom to carry goods on deck must, in order to give rise to an implied assent by shippers, be so general and Universal in the trade and at the port of shipment, that everybody shipping goods there must be taken to known that his goods may probably be stowed on deck". Quoted from Carver, part 2, para, 699.

(2) (1969)$_1$ Lloyd's Rep. p.421 at p.423.

a custom in shipping industry to carry containers on deck. The Circuit Judge Anderson pointed out in the footnote of his decision:

"Of course if the bill of lading specifically stipulates that there shall be under deck stowage, stipulation, and on deck stowage in such circumstances would be an unjustified deviation".[9](1)

However, it is believed by this writer that a custom of trade to carry goods on deck is not equal to a statement in the bill of lading,(2) which is still necessary by virtue of Article 1(c) of the Hague Rules which provides that the goods must be "stated as being carried on deck and are so carried". On the other hand, if the bill of lading bears a statement on its face shows that the cargo will be carried on deck, but the carrier gratuitously carries them under deck, his liability will be increased, because the Rules then do apply to the shipment.(3)

The problem arises here when, the bill of lading bears a statement on its face shows that the cargo will be carried on deck, and the carrier starts the voyage with the cargo on deck, but in the course of the voyage restows them under-deck. In this connection, I would agree with the point of view which says that the Rules would probably apply from the time the goods were restowed under-deck and not from the start of the voyage.(4)

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(1) See Encyclopaedia Britannica Inc. v. The"Hong Kong Producer and Universal Marine Corporation (1969)$_2$ Lloyd's Rep. p.536 at p.544.

(2) See Mankabady, Comments on the Hamburg Rules, p.76.

(3) See Scrutton, op.cit., p.419.

(4) See Mankabady, The Brussels Convention p.91. Contrast, Scrutton, op.cit., p.419.

It is now clear that the effect of deck carriage of goods so declared in the bill of lading, is that the Rules do not apply, and the contract will be governed by common law.(1) We have already seen that the carrier under the common law would be liable for loss or damage, unless these are caused by one of the common law exceptions already mentioned in chapter one of this thesis. In the United States the Harter Act applies to deck cargo not subject to the Hague Rules.(2)

Finally, it should be mentioned that, the Rules can be applied to deck stowage if there is an express statement in rh the bill of lading that the Rules will apply to deck stowage.(3) In the CMI Stockholm Conference, 1963 the British delegation submitted a proposal to amend the Hague Rules so as to give the Rules protection to deck cargo owners, but this proposal was rejected.(4)

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(1) See Giles, op.cit., p.177.

(2) Under the Harter Act, the carrier is still required to stow the goods properly and carefully. In Globe Solvents Co. v. SS. California (1946) A.M.C. 674 at p.680. It was held that: "The right to stow libellant's cargo on deck (by virtue of an Act of Congress and regulations issued pursuant thereto) did not relieve the respondent from the obligation to use reasonable care in reducing that risk to a minimum, which degree of care the respondent failed to exercise".

(3) See Tetley, op.cit., p.328.

(4) This proposal ran as follows:
"In respect of cargo which by the contract of carriage is stated as being carried on-deck and is so carried, all risks or loss or damage arising or resulting from perils inherent in or incident to such a carriage shall be borne by the shipper and/or consignee, but in other respects the custody and carriage of such cargo shall be governed by the terms of this Convention". See CMI Stockholm Conference, 1963, pp.118,119; See also Astle, op.cit., p.197; See also Mankabady, The Brussels Convention.. p.96.

Under the Hamburg Rules

We have already seen that the Hague Rules (art 1(c)) excluded live animals and deck-cargo from the operation of their provisions and for such goods the carrier and the shipper neither benefit by, nor are subject to, them. These types of cargo were discussed again during the third, fifth, sixth and seventh session of the Working Group. The draftsmen of the Hamburg Rules, finally, decided not to exclude these types of cargo from the operation of the Rules. The provisions of the Draft Convention respecting deck-cargo are now to be found in Article 9, and the provisions on live animals in Article 5.

Live Animals:

The Secretariat presented a proposal to remove the exclusion of live animals from the Hague Rules. This proposal was based on replies to a questionaire made by Brazil, India and Iraq.(1)

But the removal of this exclusions was opposed in the replies of Cambodia, Canada, Ceylon, Denmark, Greece, Norway, Phillippines, Poland, Saudi Arabia and Sweden.

Most of these countries believed that the removal of the exclusion alone would not properly resolve problems associated with the carriage of live animals. Egypt suggested that in the New Convention the carrier would be responsible for normal care of animals while the shippers representative would be responsible for special care.(2) On the other hand, the International Institute for the Unification of Private Law (UNIDROIT) prepared a study on this subject requested by the

(1) See Sweeney, part 1, p.92.

(2) See Sweeney, part 1, p.92.

Working Group of UNCITRAL. The study proposed three solutions.(1) The first concentrated on the inherent risks in live animals carriage, and considered valid all clauses in the bill of lading relating to the inherent risks in that type of carriage. The following clause suggested to be added to Article 3(8) of the Hague Rules:

"However, with respect to the carriage of live animals, all agreements, convenants or clauses relating to liability and compensation arising out of the risks inherent in such carriage shall be permitted in the contract of carriage".

The second was to allow the carrier to escape liability by proving that the loss or damage was caused by such inherent risks:

"With respect to live animals, the carrier shall be relieved of his responsibility where the loss or damage results, from the special risks inherent in the carriage of animals. When the carrier proves that, in the circumstances of the case, the loss or damage could be attributed to such risks, it shall be presumed that the loss or damage was so caused, unless there is conflicting proof that such risks were not the whole or partial cause of it. Furthermore, the carrier shall prove that all steps incumbent on him in the circumstances were taken and that he complied with any special instructions issued to him".

The third proposal brought live animals carriage under the rules of the draft convention. This proposal reads:

"Before live animals are taken in charge by the carrier, the shipper shall inform the carrier of the exact nature of the danger which

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(1) This report is summarized in the Report of the Sixth Session of the Working Group, paras, 107-109 at p.42-43.

they may present and indicate, if need be, the precautions to be taken. If such animals become a danger to the ship and the cargo, they may, at anytime before discharge, be landed at any place or rendered harmless or killed, without liability on the part of the carrier except to general average, if any, provided that he prove that he unsuccessfully took all measures that could reasonably be required in the circumstances of the case".

After long discussion the Chairman of the Working Group rejected the first proposal, and sent two proposals to the Drafting Party to choose one of them. In the Drafting Party the United States presented a new proposal. This proposal was supported by Belgium, Japan, France, Norway, U.K. and the U.S.S.R. The proposal was accepted by a 10 to 7 vote in the Working Group,(1) and is now incorporated in Article 5(5) of the Hamburg Rules which provides:

"With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents".

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(1) Report of the Sixth Session, para 115(a) (1) and (2) at 44-45; See also Sweeney, part 4, p.628.

It is to be noted that, the carriage of live animals is subject to the general obligations of care mentioned in Article 5(1) of the Hamburg Rules, but the Rules entitled him to exclude his liability for loss, damage, or delay caused from any special risks inherent in that kind of carriage.(1) On the other hand, where instructions for the carriage of live animals are given to the carrier, he can establish that he has complied with the instruction given to him by the shipper, and the particular loss could be attributed to such type of carriage.(2) However, the shipper in this case, can prove that all or a part of the loss or damage or delay resulted from the negligence of the carrier, his servants or agents.

Deck Cargo:

In the third session, the Working Group of UNCITRAL discussed Article 1(c) of the Hague Rules which deals with the difinition of "goods" and decided to amend this Article to reflect the following principles:(3)

1. The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper, or with statutory requirements and possibly with usage.
2. Any agreement between the carrier and the shipper to the effect that the goods can or may be carried on deck must be reflected in a statement in the bill of lading.
3. If the bill of lading does not contain the statement referred to in paragraph (2) above, it shall be presumed that the carrier

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(1) See Mankabady, Comments on the Hamburg Rules, p.57; See also Sweeney, Review, p.15; See also Pollock, op.cit., p.8.

(2) See Wilson, op.cit., p.142.

(3) UNCITRAL report A/CN.9/63 add. pp.10,11; See also Sweeney, part 1, p.91.

and shipper have not entered into such an agreement, but as against the shipper, the carrier shall be entitled to prove and invoke the true agreement. The Secretariat made, questionnaire(1) about the removal of the exclusion of deck cargo from the Hague Rules. The following countries supported the removal of this exclusion, Brazil, Hungry, Greece, India, Iraq, Nigeria, Norway, Sweden, Poland and Soviet Union.

The United Kingdom stated that, there is no reason why the shipowners should not be subject to the Rules except for damage arising from the deck carriage itself".

United States also supported the removal of this exclusion but indicated that this exclusion had aggravated problems of container transportation generally and therefore suggested many amendments to the Hague Rules, deal with these problems.(2) However, some replies did not support the removal of the exclusion of deck cargo from the Hague Rules, these replies came from, Ceylon, Canada, Cambodia, Japan, Philippines and Saudi Arabia.

In order to take account of the container revolution in ocean shipping, the Secretariat suggested the following alternative amendments to the Article 1(c) of the Hague Rules:

Article 1(c): - "Goods" includes goods, wares, merchandise and Articles of every kind whatsoever except live animals and cargo (other than freight containers) which by the contract of carriage is stated as being carried on deck and is so carried", or Article 1(c): - "Goods" includes goods, wares, merchandise and

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(1) The questionnaire and replies are contained in Doc. No. A/CN9/WG.III/WP.4/Add. 1 (Vols. I.II.III).

(2) See Sweeney, part 1. p.87.

articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried. However, "goods" shall include all freight containers, whether carried on deck or below deck".

Moreover,the Secretariat suggested another proposal to deal with the cargo stowed above the main deck but under safe cover.(1) This proposal reads:

"Cargo that is stowed above the main deck but within permanent enclosures that provide for the cargo substantially the same security as if it were stowed below deck shall not be considered to be "deck cargo" within the meaning of this Article".

These proposals were provoked long debates during the sixth session of the Working Group and during the second reading. Eventually, the following text was approved and became Article 9 of the Hamburg Rules.

Article 9 of the Hamburg Rules made it quite clear that, the carrier will be in breach of the contract if the goods are carried on deck.(2)

But Article 9(1)(3) entitled the carrier to carry on deck if there is an agreement, usage of trade or statutory rules. Where there is a agreement with the shipper, to carry goods on-deck, the carrier must insert in the bill of lading or other documnet evidencing

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(1) See Sweeney, part 1, p.85.

(2) It is convenient here to mention that Article 9 of the Hamubrg Rules did not provide a difinition to deck cargo. See D.M. Sassoon and J.C. Cunningham, Unjustifiable Deviation and the Hamburg Rules, published in the Hamburg Rules on the carriage of goods by sea, p.182; See also Tetley, Article 9 to 13 of the Hamburg Rules, p.198.

(3) Article 9(1) of the Hamburg Rules provides: "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".

the contract of carriage a statment to that effect.

It should be noted that Article 9 and Article 15(m)(1)[1] of the Hamburg Rules do not require a statement that the goods are actually carried on deck, but they stated that, if the carrier and the shipper have agreed that the goods shall or may be carried on deck, a statement to that effect should be inserted in the bill of lading.[2]

In the absence of such a statement the carrier has the burden of proof that an agreement has been entered into; 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.[3] By Article 9(3)[4] the sanctions in any event for carrying on deck contrary to Article 9(1) and 9(2) is that the carrier is liable for loss, damage or delay resulting solely from the carriage on deck, and the extent of his liability is to be determined in accordance with the provisions of Article 6 of Article 8 of the Hamburg Rules, as the case may be. It should be mentioned that Article 9(3) mentionedabove, deals only with the carriers liability for on-deck carriage where no custom

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(1) Article 15(1) of the Hamburg Rules provides:
"The bill of lading must include, inter a lia, the following particulars: .....
(m) the statement, if applicable, that the goods shall or may be carried on deck".

(2) See Moore, op.cit., p.9.

(3) See Article 9(2) of the Hamburg Rules; See also J.P. Honour, The P & I Clubs and the New United Nations Convention on the carriage of goods by sea 1978, published in Hamburg Rules on the carriage of goods by sea, edited by Mankabady, p.247 .

(4) See Article 9(3) of the Hamburg Rules; See also Tetley, Article 9 to 13 of the Hamburg Rules, p.199.

statute or agreement to do so.[1] It seems to me that the Phrase "nothwithstanding the provisions of paragraph 1 of Article 5" used in this article means that the carrier will be held liable for loss, damage or delay resulting solely from the carriage on-deck, even if he shows that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. Article 9(4)[2] of the Hamburg Rules deals with the carriers liability for on-deck carriage where an "express" agreement to carry under deck is violated by the carrier.[3]

Finally, it should be noted that the term "express agreement" used in Article 9(4) is narrower than the term "agreement" mentioned in Article 9(1), because the second term, includes in our opinion, every statement or a clause in the bill of lading shows that the goods shall or may be carried on deck.[4]

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(1) See Sassoon and Cunningham, op.cit., p.182.

(2) Article 9(4) of the Hamburg Rules provides:
"Carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of article 8".

(3) See Pollock, op.cit., p.7.

(4) See Tetley, Article 9 to 13 of the Hamburg Rules, p.198.

CONCLUSION

It seems quite clear that the Hamburg Rules, by Article 2 and 4, now have a much broader and clearer scope of application than the Hague Rules or the Visby Rules.

According to Article 2(1) the Hamburg Ruless apply to all documents used in maritime transport, whereas, Article 1(b) of the Hague Rules limiting the applicability of the Rules to the contract of carriage covered by a bill of lading or similar document of title. On the other hand, the number of voyages which are governed by the Hamburg Rules are sharply increased.

Moreover, Article 4 of the Hamburg Rules which designed to replace Article 1(e) of the Hague Rules, abandoned the so-called "tackle to tackle" regime to widen the scope of the application of the Rules to cover 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. This is undoubtedly an advance over the Hague Rules.

The draftsment of the Hamburg Rules showed another progress, when they expanded the operation of the provisions of the Hamburg Rules to govern the carriage of the live animals, which were excluded entirely from the operation of the Hague Rules.

Finally, it is to be noted that Article 9 of the Hamburg Rules has done nothing to clarify the meaning of the deck-cargo, but has subject such cargo to the rules with consequent liability for the carrier.

Accordingly, the position of the cargo owner under the Hague Rules in regard to recovery for on-deck carriage is better than his position under the Hamburg Rules.

CHAPTER FOUR

The limitation of the carrier's liability

In cases where the carrier is held liable for loss or damage to the cargo, however, the present legislation permits him to limit his overall liability to a certain monetary figure. In other words, when the extent of damage is higher than the statutorily fixed amount, the claimant will recover only the statutory limit and will have to incur a loss for anything in excess.

The purpose of this regime is to retain a proper balance between the rights and responsibilities of the carrier on the one hand, and the rights and responsibilities of the claimant on the other. In addition, it was felt that such protection would encourage international trading venture.(1)

The limitation of the carriers liability may be invoked in an inexhaustible variety of circumstances.

In order to get a proper conception of the limitation of the carriers liability, it will be necessary to examine the following four points:

1) The units of limitation.
2) Who may benefit by the limitation of liability.
3) The monetary limits.
4) Loss of the right to limit liability.

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(1) In the course of the 1921 Conference, Mr. Leopol Dor one of the Cargo representatives, had indicated that the purpose of the £100 per package limit was to achieve the following purposes:
1) To protect shipowners in the case of packages of unexpectedly high value.
2) To prelude shipowners from inserting clauses in their bills of lading purporting to limit liability to ridiculously low figure.
See Report of the Thirtieth Conference held at the Peace Palace, the Hague, Holland, 30th August - 3rd September. (hereinafter cited as Report 1921).

SECTION ONE

The units of limitation

The limitation of the carriers liability is bases on different methods. The Hague Rules have based it on a single system, being per package or unit.(1) The Visby Rules have adopted a dual (alternative) system, being per package or unit on the one hand and per weight on the other. The dual system has been retained by the Hamburg Rules, with a small addition in regard to the non-physical damage i.e. delay in delivery.

Under the Hague Rules

Article 4(5) of the Hague Rules 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 that 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".

This provision made it quite clear that the Hague Rules have based the limitation of the carriers liability on a single system, being per package or unit.(2)

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(1) This system had been adopted by the 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. See Diamond, The Hague-Visby Rules, p.228.

(2) It is worthy of note that, the system of the units of limitation established in the original draft of article 4(5) of the Hague Rules differs from that of the present article. The original draft of article 4(5) of the Hague Rules provided:
"Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods for an amount greater than £..... per package, or £..... per cubic foot, or £..... per cwt., (as declared by the shipper shall be the least) of the goods carried, unless the nature and value of such goods have been declared by the shipper as to the nature and value of any goods declared shall be prima facie evidence, but shall not be binding or conclusive on the carrier".
Quoted from Report 1921, p.157.

However, the words per "package or unit" are not clear, and have been interpreted differently in various countries. The editors of Scrutton said that:(1)

"These words (package and units) give rise to a number of difficulties..... but surprisingly there is no direct English authority as to their meaning. Reference, has therefore been made to American, Canadian and Continental decisions where appropriate. These decisions should, however, be regarded with caution when considering how far they are applicable to the English Rules. Since they may turn in part on different consideration as to the policy of the Rules".

On the other hand, this term reflects the technology of the early twentieth century when cargo was shipped in boxes, bales and bages and is not suitable to the new types of carriage.(2)

Thus, two points call for examination:

1 - The concept of per package.

2 - The concept of per unit.

The concept of per package:

Article 4(5) of the Hague Rules has not defined what package is, and different definitions have arisen, because of change in modern transport and the advent of containers. Falih says:(3)

"..... packing methods and materials are constantly changing in according with new technology, materials, stowing, handling and transportation, as well as the availability of packaging and their

(1) See Scrutton, op.cit., pp.441-442.

(2) See Donovan, op.cit., p.3.

(3) See Falih, op.cit., p.91.

cost relative to the cost of goods. The primary function of packaging is to contain the goods, commensurate with strees and risks to be anticipated during the intended voyage".

In fact, the amount to be paid for limitation of liability depends on how the court will treat the wrapping of the goods, and whether it will consider that wrapping as a package or not.(1)

On the other hand, it is impossible to give the carrier absolute freedom to determine what is the meaning of a "package", because such freedom would allow him to contravene the provisions of the convention.(2)

In Gulf Italia Co. v. American Export Lines (SS. Exiria,)(3) it was held that:

"To allow the parties themselves to define what a "package" is would allow a lessening of liability other than by terms of the Act since a carrier could always limit its liability to $500 by merely extracting a stipulation from the shipper that everything shipped, in no matter what form, would be deemed for the purposes of limitation of liability a "package".(4)

Astle says: ".... although there is a dictionary definition of the word "package" which in effect, means that this is something which may be carried around easily, the courts are not likely to apply any such dictionary interpretation, but to regard the package in fact as a unit, or a number of units".

It is, of course, obvious that, there must be a packing to consider the item as a package. This point was aptly summed up by Goddard J. in Studebake Distributors Ltd. v. Charlton S.S. Co.,(5)

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(1) See Mankbady, The Brussels Convention, p.228.

(2) See Tetley, Marine, p.438; See also Mankabady, The Brussels Convention, p.220.

(3) (1958) A.M.C. 439.

(4) Ibid. p.442.

(5) (1938) 1 K.B. 459 at p.467.

where he said: "package must indicate something packed". In this case Goddard J. 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".(1)

Reference could also be made here to an Iraqian case, which came before the Court of Appeal, and concerned a shipment consisted of five boxes containing electrical material exported from England to Iraq. The bill of lading incorporated the British Cogsa 1924. Three boxes were delivered damaged. It was held that since the damaged boxes were three enumerated 76,77,80 each box will be considered as a package, and the carriers liability should be limited to £100 per package. This decision was affirmed by the Court of Cassation.(2)

In Hartford Fire Insurance Co. v. Pacific Far East Line Inc,(3) a large electrical transformer attached by bolts to a wooden skid, but was not otherwise boxed or crated. It was held by the Northern District Court of California that the transformer was a "package". But the Court of Appeals, rejected this decision and held that the transformer was not a "package".

However, it may be difficult to determine how much packing or covering of the goods is required to justify the conclusion that the goods in question constitute a package.(4)

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(1) Ibid. at p.

(2) 1972 JICCD. Vol 6, p.448 at p.452, See also Falih, op.cit., p.122.

(3) (1974)$_1$ Lloyd's Rep. 359.

(4) See S. Mankabady, the limitiation of carriers liability, Journal of Arab Maritime Transport Academy (semi-annual) Vol. 2, No. 2, January 1977, p.31. (hereinafter cited as Mankabady, The Limitation).

In Companhia Hidro Electric v. SS Loide Honduras,[1] it was held by the American Courts that, ".... packing for protection, whether complete or partial, should be considered as constituting a package within section 4(5) of Cogsa.[2] It is also necessary to be mentioned that, the mere size does not prevent a thing from being a package.[3] Thus, a railway wagon with wooden sides but without a top, containing different types of goods, has been held to be a "package" within the meaning of the carriers Act 1830, which contain provisions analogous to Article 4(5) of the Hague Rules.[4] In this case Cleasby, B. says: "It would be absurb to say that the wagon was too large to be a package plainly, size cannot be a criterion".[5]

In this connection reference can also be made to Studebaker Distributor Ltd. v. Charlton S.S. Co. (supra) where Goddard J. says: "The only case that I have been able to find that assists, though perhaps not much is Whaite v. Lancashire & Yorkshire R Y Co. There the plaintiff put picture into a wagon with sides but not top, and loaded it on a railway truck, and the Court held that the wagon was a parcel or package within the carriers Act, as the goods were packed in the wagon. It seems to me that the primary object of this clause is to protect a shipowner against receiving an article of considerable value so covered as to prevent him from seeing what it is, this being at least one of the objects of the carriers act, and in Whait's case Bramwell B. stressed that though the railway company could see that there were pictures in

(1) (1974) A.M.C. 350.

(2) Ibid., p.354.

(3) See Scrutton, op.cit., p.442.

(4) Whaite v. Lancashire & Yorkshire RY CO. (1874(L.R.9

(5) Ibid., at p.70.

the wagon, they could not see their exact character, as this was concealed by the plaintiff's mode of packing".(1)

In the United States the American Courts also held that the size or weight of the goods has no effect on the determination of whether the cargo in question constitute pages or not.

In Mitsubishi International Corp. v. Palmetto State,(2) the Court of Appeals held that a roll of steel weighing 32½ tons in a wooden case was a package and $500 only was awarded. Moore, J. said in the cited case: "an article is 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".(3)

Now, in the light of the foregoing facts, one can conclude that the term packing implies any type of cargo to which some degree of packing has been applied, to hold and to protect the cargo during the transport and it belongs to the cargo-owner as part of the cargo.(4)

The concept of per unit:(5)

The definition of a unit under the Hague Rules is the source of considerable controversy. Is it a "shipping unit" i.e. the physical unit as received by the carrier from the shipper or a "freight unit" i e., the unit of measurement applied to calculate the freight?

If it means a shipping unit then an unboxed car, a bale, a

(1) (1938)$_1$ K.B. 459, at p.467.

(2) (1963) A.M.C. p.958.

(3) Ibid, p.961.

(4) See Mankabady, The limitation, p.30: See also Diamond, The Hague/Visby Rules, p.240.

(5) The term "unit" was introduced into the Hague Rules by the Maritime Law Committee without the matter being discussed by the Assembly of the International Law Association. This introduction was justified that there are goods that cannot be classified under the concept of "package". See Franco Bonelli, Limitation of liability of the carrier: Present regulation and prospects of reform, published in Studies on the revision of the Brussels Convention on bill of lading, edited by Francesco Berlingieri, Genoa, 1974, p.169.

barrel, a sack, etc. would be considered as a unit. So if the shipping unit solution is adopted, it is not easy to see why the Hague Rules treat "packages" as an alternative to "unit", since "shipping unit" would include a package. Moreover, the concept of the "shipping unit" unlike the "freight unit", is not at all appropriate when applied to bulk cargo.(1) On the other hand, if the term "unit" means a freight unit then the number of units will be determined according to the weight or volume of the goods which is usually measured in tons or cubic feet.(2)

Different interpretation could produce markedly different limitation amounts, because the maximum liability calculated on the number of packages or shipping unit of the goods would differ from that calculated on the number of freight units, the later normally being the greater number.(3) Thus, the question now; have the writers and courts succeeded in giving an exact meaning of the term "unit"?

Tetley admits that, it is a difficult task to give a specific definition to the term unit under the Hague Rules, but he believes that the only logical meaning for this term is the freight unit.(4) He says:

"It is submitted that a "unit" in the Hague Rules means a "freight unit" and not an unpacked object for the following reasons:

1) The American Cogsa reads "per package lawful money of the United States, or in case of goods not shipped in packages per customary freight unit.....". This is very much clearer than

(1) See Scrutton, op.cit., p.442.
(2) See Mankabady, The limitation,p.30.
(3) See Wilson, op.cit., p.146.
(4) See Tetley, Marine, p.438.

the Brussels Convention of 1924. It is noteworthy that the addition by the United States Congress was intended to clarify rather than to change the sense of the Brussels Convention.

2) If the meaning of a unit was to be unpacked object, then only the word "unit" would havebeen sufficient. In other words "unit" is not merely an unpacked object but a packed one as well.

3) The unpacked object in the Rules is described as a "piece" in Art 3(3)(b) "the number of packages or pieces". If an unpacked object were intended in art 4(5) then "piece" would have been the word used rather than "unit". Unit is not a "piece" in consequence.

4) Unit as a "freight unit" makes sense for bulk cargo. Unit as an unpacked object makes no sense for bulk cargo, tallow, wheat, oil, liquid, chemicals, etc. It is in fact difficult to argue that unit in respect to bulk cargo is anything else than a freight unit or shipping unit".(1)

This meaning has been adopted by the American Courts since the use of language in the American COGSA of 1936 is basically different from that of the Hague Rules.(2) In most cases, therefore, the carriers liability under the American COGSA of

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(1) Ibid., p.438.

(2) Article 5 of the COGSA of 1936 provides that the limit may be applied "per package" or "in case of goods not shipped in packages, per customary freigh unit".
The U.S. Department of State memorandum of June, 5,1937, described the various differences in wording between Cogsa of 1936, and the Hague Rules. It stated: "The foregoing differences from the Convention, made in the Carriage of Goods by Sea Act, are intended primarily (1) to clarify provisions in the Convention which may be of uncertain meaning thereby avoiding expensive litigation in the United States for purposes of interpretation and (2) to co-ordinate the Carriage of Goods by Sea Act with other legislation of the United States. See the memorandum, in Tetley, Marine,p.543.

1936 is significantly greater than it would be under, say English Law.(1)

In Hardford Fire Insurance Co. v. Pacific Far East Line Inc. (Supra), the Court of Appeal held that the carriers liability should be measured according to the number of customary freight units.

But what does the phrase "customary freight unit", mean? The answer for this question is found in Freedman and Stater v. Tofevo.(2) In this case the court was held that:

"The use of the word "customary" in the phrase "customary freight unit" which appears in the limitation of liability statute suggest that freight unit should be one that is well known in the shipping industry or at least one known to the immediate parties".(3)

Another case illustrative of this point is that of Brazil Oiticia v. M/S Bill,(4) in which it was held by the District Court of Maryland that, "generally in marine contracts, the word "freight" is used to denote remuneration or reward of carriage of goods by ship rather than the goods themselves"(5). The limitation in this case was, therefore, $500 per, 1,000 kg, because, 1,000 was the unit on which the freight was adjusted.

This meaning - freight unit - has been rejected by some writers in favour of the "shipping unit". Inthat context

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(1) See Mankabady, Limitation p.32.

(2) (1963) A.M.C. p.1525.

(3) Ibid at p.1538; See also Mankabady, The limitation, p.32.

(4) (1944) A.M.C. p.883.

(5) Ibid, at. p. 887.

Temperley said:

"(T)he natural interpretation of the word "unit" in the phrase "package or unit"appears to be that it has been added in order to cover parts of a cargo in general way similar to a package, but not strictly included in that term, which properly implies something packed up or made up for portability".(1) The English Courts also incline to read "unit" as meaning a "shipping unit".

The Canadian Courts(2) have reached the same conclusion in Falconbridge Nickel Mines v. Chimo Shipping,(3) where Mr. Justice Ritchie said:

"The meaning of the word "unit" as it occurs in the phrase 'package or unit' in r.5 has given me very great difficulty but I am now satisfied that no substantial assistance can be obtained from the U.S. cases because of the clear difference in the wording of the Rule and such authorities as exist in this country and in England appear to me to bear out the statement of Mr. Justice Rand that the words in this context means a shipping unit that is a unit of goods".(4)

I, myself, incline to the view that the term "unit" should be read as "shipping unit", because as Falih said: (T)he reasons behind the adoption of the word "unit" was not to impose an enormous liability on the part of the carrier more than that existent under per package limitation, but to extend the provision to cover goods not shipping in packages".

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(1) See Temperley, Carriage of Goods by Sea Act 1924, London, 1927, p.79.

(2) Studebaker Distributors Ltd. v. Charlton S.S. Co. Ltd. (Supra), See also Scrutton, op.cit., p.443.

(3) $(1973)_2$ Lloyd's Rep. p.469.

(4) See Falih, op.cit., p.143.

We must now turn to a point which is very close to the question of what constitutes a package or unit, that of palletization and containerization.

In Standard Electrica S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellscaft,(1) the American Court of Appeals, second Circuit, decided that a pallet consolidating six cardboard cartons of electrical equipment was a single "package" for limitation purposes. In this case the court also said that the drafters of the Hague Rules 1924 and COGSA 1936 might not have foreseen the pallet problem arising in the context of limitation.

This case is, however, to be distinguished from the ruling of the Federal Court of Canada in the case of International Factory Sales Service v. The Aleksandr Serafimovich,(2) where the bill of lading described the shipment as "3 pallets (150 cartons)". It was held that each carton, rather than the pallet, should be considered to be the package.

In recent years, palletization was used in maritime transportation, by which several cartons could be stacked on a flat wooden tray and then moved by a tiny forklift.(3) But it seems to me that the question as to what constituts a package or unit, has received much attention in the courts since the introduction of containerization in the carriage of goods by sea.

In fact, the effect of the container revolution on limitation of carriers liability has been greater than its effect

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(1) $(1967)_2$ Lloyd's Rep. 193; See also Donovan, op.cit., p.3.

(2) $(1975)_2$ Lloyd's Rep. 346.

(3) See Simon, op.cit., p.511.

on any other legal maritime subject which has been influenced by this revolution.(1)

A container is a cargo handling device which could be carried by whatever means of transport to its ultimate destination. Most containers are supply by the carriers, but sometimes shippers use containers belonging to freight forwarders.(2)

Undoubtedly, the container system has brought many advantages to the transport of goods by sea. One of the important advantages of the container revolution is the reduction of the total costs of the transport. Containerization has brought about a drastic reduction in the labour-handling costs absorbed by goods in transit.(3)

On the other hand, goods shipped in containers do not require the amount and quality of protective packing applied to non-containerised shipments.(4)

Another benefit of the container revolution is that, the reduction of thefts and physical damages occur during the transportation of the goods.

However, despite the above mentioned advantages resulting from the use of containers, the container revolution has created several legal problems.(5)

(1) See Yoram-Containers, p.152.

(2) See Mankabady, The limitation, p.31; See also Carl E. McDowel Containerization: Comments on Insurance and Liability, 3 JMLC, 1972, p.503.

(3) See Ibrahim Maki, The Transportation system by Containers, ist ed., Kuwait, 1975, p.31(hereinafter cited as Maki,Containers; See also Falih, op.cit., p.158; See also McDowel, op.cit., p.503.

(4) See Shachar, Containers, p.165; See also Mankabady, The Limitation, p.31; See also Maki, Containers, p.30.

(5) For more details as to these problems, See Maki, Containers, p.32.

These problems have brought about a general decline in the value of bills of lading as receipts for the goods they represent.(1)

The particular problem arises, where containers are involved, is the per package limitation. Under the Hague Rules, it is not clear whether a container containing several cartons is one package or several for the purpose of the Rule.

The problem is further complicated because both shippers and carriers have unfortunately hoped to obtain terms favourable to themselves without taking positive steps provided for by the Rules, i.e. the proper description on the bill of lading, the declaration of value.(2)

The solution adopted by the courts to solve this problem is to interpret each case according to its facts in the light of the law as it now reads.(3)

In fact, considerable ingenuity has been exercised, particularly by the American courts, to give a reasonable answer for every individual case.

It would seem from a review of the available cases that the courts, in order to determine whether the container is a package or not, have applied various tests, these tests are:

1 - "The intention of the parties"test.

2 - "Functional economic" test.

3 - "Single Shipper package" test.

1 - <u>"The intention of the parties" test</u>

According to this test, in order to determine whether the

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(1) See Yorman Shacher, The Container Bill of lading as a receipt, 10 JMLC, 1978, p.30, at p.77(hereinafter cited as, Shacher, Container Bill of lading).

(2) See Tetley, Marine, p.311.

(3) See Article 4(5) of the Hague Rules.

containers or its contents constitute a package, one should look to the intention of the shipper and the carrier in the bill of lading.

The intention of the parties could be ascertained from a number of factors such as the description of the goods in the bill of lading, the part each played in the loading process or any previous dealing between the parties.(1)

In this connection Tetley says:(2) ".....in deciding what is the package or unit one must look to the intention of the parties and the prime test is what is state on the bill of lading".

It is to be noted that Article 3(3)(b) of the Hague Rules made it quite clear that the shipper has the right to declare the number of packages or pieces on the bill of lading, and the carrier for his part, is not obliged to accept any declaration he either suspects or cannot check.

Thus, if the bill of lading used the wording " container said to contain 99 bales of leather", in such a case, the number of the bales inside the container should be regarded as packages. But if the bill of lading used the wording "1 container said to contain machinery" the container here would be deemed as one package.(3)

In other words, if the bill of lading mentions each container as one package, the limitation would apply to the container, but when the number of cartons or bales etc. within

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(1) See Mankabady, The limitation, p.33; See also Shacher, Containers, p.182.

(2) See Tetley, Marine, p.312.

(3) See Scrutton, op.cit., p.443; See also Wilson, op.cit., p.147; See also Donovan, op.cit., p.4.

the container is shown in the bill of lading, the limitation should apply to this number.(1)

In Leather's Best Inc. v. S.S. Mormachlyn,(2) the container was owned by the carrier and delivered to the shipper to load the bales in the container by his employees and under the supervision of the carriers agent, the truck driver. The driver gave the shipper a receipt indicating the number of bales loaded.(3) The bill of lading used the wording "1 container S.T.C. 99 bales of leather". The Court of Appeal held that the individual bales of leather were the package and not the metal container which was used for the carriers convenience in handling and stowage of the cargo.

It would be appropriate to mention here that the enumeration of the bales in the bill of lading means that the carrier has been informed of the number of such bales, and is, therefore, is no disadvantage as far as the liability limiation is concerned, in comparison with conventional carriers.(4)

Some support is given to this test - "the intention of the parties" test - by the decision in J.A. Jonston Company Ltd. v. The ship "Lindefjell" and Sealion Navigation Co. S.A. and Concordic Line,(5) where Collier,J. says:

"Where the shipper knows his goods are to be shipped by container

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(1) See Mankabady, The limitation, p.33.

(2) $(1971)_2$ Lloyd's Rep. 476.

(3) The letters S.T.C. mean "said to contain".

(4) See Shachar, Containers, p.171.

(5) $(1973)_2$ Lloyd's Rep. 253, at p.258.

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 that description and that count, then in my opinion, the parties intended that the number of packages for pusposes of limitation of liability should be the number of cartons specified.....".

But as we said earlier, if the bill of lading only mentions the container, then the container is the package for limitation purposes.

In Royal Typewriter Co. v. M/V Kulmerland,(1) the bill of lading stated "1 container said to contain machinery", without any reference to the numbers of cartons of adding machines. The adding machine were packed in 350 cartons, and stowed by the shipper's forwarder in a metal container bearing the number 89. It was held by the Court of Appeals that, the carrier was entitled to limit his liability to $500 for the theft of 350 packages of adding machines from the container because the container and its contents constituted a single package. In rendering judgement, the court discussed and distinguised the Leather's Best case on the ground that the bales there would have been shipped individually rather than in the container.(2)

By the same reasoning the same court held in Rosenbruch v. Amer-Export Isbrandtsen Lines,(3) that the carrier was entitled to limit his liability to $500 for the loss of a container owned by the carrier, packed by the forwarder with the household goods of a single shipper and described as "1 container" in the bill of lading.

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(1) $(1973)_1$ Lloyd's Rep. 318.

(2) Ibid, p.322.

(3) $(1974)_1$ Lloyd's Rep. 119.

Now in the light of the foregoing facts, one can conclude that, if the carrier has a full knowledge about the contents of the container, each inner package should be considered as one package, for the liability limitation purpose, and there is no need to search for the intention of the parties.

But when there is no such knowledge, and the only information concerning the number of packages is supplied by the shipper, then the intention of the parties should be ascertained by this information.(1)

"Functional economic" test

It is to be noted that the American Court of Appeals in Royal Typewriter v. M.V. Kulmerland (Supra), has formulated what came to be known as the "functional economic" test, when she said:

"The statutory purposes here leads us to suggest what for want of a better term we will call the functional economics tests. In this regard, the first question in any container case is whether the contents of the container could have feasibly been shipped overseas in the individual packages or cartons in which they were packed by the shipper.....".(2) The court went on to point out that, the "functional package unit" test 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".(3)

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(1) See Shachar, Containers, 182.

(2) (1973)$_1$ Lloyd's Rep. 428 at p.431.

(3) Ibid, at p.432.

In respect to the cartons of the adding machines, the Court concluded that the adding machine could not feasibly have been shipped in those individual cartons prior to the use of a container. Therefore, the court held that the container itself was the "package" for limitation purposes and not each carton.

However, an important point should be noted here that, the bill of lading in this case used the wording "1 container said to contain machinery" without any reference to the number of cartons of adding machines.

This means that if the bill of lading had read "1 container S.T.C. 350 individual cardboard cartons", the single container would not have been considered the package, despite the functional package test.(1)

It is difficult to see how the "functional package" test could work in practice, what is important is to find out the intention of the parties.(2)

The American Court of Appeals, however, confirmed this test in Comeco Inc. v. American Legion,(3) Wilffred Feinberg Ct. J., (concurring) said in the cited case:

"There are many problems arising out of the "package" test announced in Royal Typewriter Co. v. M.V. Kulmerland..... . However, we are bound by it for the present, and in this case the result reached is clearly equitable".(4)

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(1) See Tetley, Marine, p.313.

(2) See Mankabady, The limitation, p.33. For more criticisms for this test see also "Aegis Spirit" $(1977)_1$ Lloyd's Rep. 93.

(3) $(1975)_1$ Lloyd's Rep. 295.

(4) Ibid, at p.304.

3 - "Single shipper package" test

This test asks by whom and for whose benefit were the goods packed in the container, in order to determine whether the container or its contents constitute a package. If the container contains goods of a single shipper and has been sealed and packed by this shipper, the container will be deemed as a "package".(1)

This is illustrated by the decision of the District Court, Southern District of New York, in Rosenbruch v. American Export Isbrandtsen Lines Inc,(2) where the court said:

"(I)t is only where the shipper packs the container or requests the carrier to do so that it becomes necessary to consider whether or not there was a "single package" under S.4(5). The carrier cannot unilaterally limit its liability by taking bales delivered to it by a shipper and, on its own initiative, containerize them..... Given these circumstances, however, predictability can obtain".(3) In this case the goods were shipped by a single shipper and the bill of lading indicated under the column entitled "No of Con or other PKGS", the figure "1" and the words "shippers load and count", therefore the court concluded that, the container was a package for limitation purposes.

Under the Hague/Visby Rules

It is to be noted that, since the issuing of the Hague Rules - more than 58 years ago, many new problems have arisen

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(1) See Falih, op.cit., p.174; See also Wilson, op.cit., p.147.

(2) (1974)$_1$ Lloyd's Rep. 119.

(3) Ibid, at p.121.

and those Rules do not provide solutions to them. This reason and many other promoted the Comite Maritime International (CMI) to contemplate introducing some important amendments to the Hague Rules in order to bring them up to date. In fact many conferences had been held for this reason.(1)

The sub-committee of the CMI in the Stockholm Conference held in June 9, 1963, examined six possible solutions relating to the units of limitation, these solutions were:(2)
1) Only package as a basic unit and also a subsidiary freight unit to cover bulk cargoes: 2) only freight unit; 3) the actual freight unit as a basic unit and also a subsidiary customary freight unit in lump sum cases; 4) only shipping unit; 5) only a trade unit and 6) only weight - volume unit i.e. the limit should apply to a certain rate per ton or per 40 cubic feet, whichever produces the higher limitation figure.

After a deep discussion of each of these different solutions, the sub-committee concluded that the "package or unit" is the best, and need not be defined.(3)

The sub-committee, therefore retained the "package or unit" and suggested to raise the amount of the maximum to be equivalent to 10,000 poincare francs per package or unit.

In May, 1967, the Diplomatic Conference on Maritime Law was held to discuss this subject. In this conference it was suggested by some delegates to replace the "package or unit" system with a system based on weight unit which already adopted

(1) See Falih, op.cit., p.32.

(2) See CMI Stockholm Conference, 1963, p.81; See also Mankabady, The Brussels Convention, p.236.

(3) See Mankabady, The Brussels, p.237.

in the international convention for the carriage of goods by rail (CMI), by road (CMR) and by air (WARSAW).(1) Other delegates, doubted the suitability of this system to goods of low weight and high value. Many compromise suggestions were laid down as well.(2)

These various suggestions led to a serious confusion within the conference due to the divergence of the points of view. As a result of that position, the British delgation suggested postponing the subject to the second phase of the conference.(3)

In its second meeting which held in Brussels in February, 1968, the Diplomatic Conference of Maritime Law, adopted a "mixed or alternative system". This new system has a dual limit basis, either a fixed amount per package or unit, or an amount per kilo of the goods damaged or lost, whichever is the higher.(4) It is submitted that, the per package or unit limit is intended to apply to light valuable cargo, while the per kilo limit is intended to apply to heavy cargo.(5)

The British delegation also favoured the alternative units of limitation for the following reasons:

"We consider that the present limitation by package or unit is inappropriate to our container traffic and causes considerable and difficulties.....it follows, therefore, that a per kilo

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(1) See Diamond, The Hague/Visby Rules, p.232.

(2) See Shacher, Containers, p.183.

(3) See Diamond, The Hague/Visby Rules, p.232; See also John L. De Gurse, The "Container Clause" in Article 4(5) of the 1968 Protocol to the Hague Rules 2 JMLC, 1970, 131, at p.138.

(4) See Mankabady, The Brussels Convention, p.237.

(5) See UNCTAD'S Report on Bill of Lading, TD/B/C.4/ISL/6, p.105.

basis is the best way to deal with this particular problem.

However, the per kilo basis has two disadvantages, firstly it is not really appropriate for small packs of a reasonably high value. Secondly, it gives rise to practical administrative difficulties".(1)

The proposal of the alternative units of limitation, after the acceptance of the Diplomatic Conference, became as the sub-paragraph (a) of paragraph 1 of Article 2 of the 1968 Protocol which reads:

"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".

The Danish delegation on behalf of the Federal Republic of Germany, Japan, the Netherlands and Denmark suggested a ceiling of 200,000 Francs per package or unit to the carriers total liability.(2) He proposed inserting in the above sub-paragraph after the word "damaged" the words "up to, but not exceeding a maximum of Frances 200,000 per package or unit".(3)

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(1) See The Brussels Conference, 1968, p.44.

(2) The Danish delegation explained to the conference the reason for this proposal he said: "This ceiling was in fact divided into two parts, oneebeing an absolute ceiling of 200,000 Francs per unit or package, the other being a kind of movable ceiling, namely in the form of the value of the goods carried". See the Brussels Conference, 1968, p.215.

(3) Ibid. p.215.

This proposal was rejected by the Conference, the British delegate in his opposition to this proposal indicated that: "The philosophy of this clause (the container 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 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 quality".(1)

In fact, the conference rejected the proposed ceiling, because it would be source of complication on one hand, and the parties to the contract of carriage, according to paragraph 1(g)(2) of article 2 of the protocol, can fix a higher limit than as provided for in article 2(a), on the other hand.(3)

It is to be noted that, the alternative units of limitation

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(1) See The Brussels Conference, 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".

(3) See Falih, op.cit., p.39; See also Mankabady, The Brussels Convention, p.339.

system did not give a reasonable solution to the container problem. For instance, when packages were shipped in one container, the carrier would, on a unit basis, be less liable than if those packages were shipped individually.

Therefore, a container clause was presented to the Diplomatic Conference.

The British delegate explained this clause when he said: "What the old Hague Rules did not deal with was the big unit, That might be either a big machine, like a locomotive, or a large-machine, or it might be now the big package - what we have called the container, pallet or other article of transport to consolidate goods ..... obviously if a package, of that size, the container, is going to be considered as a package or unit for liability, a figure of 10,000 francs is inappropriate. It was because of the problem of the big container, which is itself a package, that it became necessary, it was thought at our conference in May, that some provisions should be made to deal with the big package, the package which today may run to 30 or 40 tons, and within a few years may be much larger than that". (1)

The delegation then went on to say:

"The problem is where you have a container which contains inside it other traditional packages or units, is the liability going to be calculated upon the container as the package, which would almost certainly involve the weight basis, or is it to be calculated on the individual packages within the container as if they were stowed in the traditional way in the hold?

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(1) See Brussels Conference, 1968, pp.116-117.

Now the answer to that is a very simple one. 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 package 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 separated 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 liability the maximum liability, may itself be higher".(1)

However, some delegations opposed the container clause. The Irish delegation in its opposition to this clause said: "..... we suggest the way in which this problem ought to be faced is not by amending the Hague Rules which govern ordinary carriage by sea but that when the new convention upon which the Comite Maritime International is now working in respect of carriage by container or combined transport is finally adopted it will provide a solution to this problem, and so we ought to wait until this time for the solution of this problem".(2)

Finally, the container clause was adopted by the conference and sub-paragraph (c) of paragraph 1 of article 2 was introduced.(3)

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(1) Ibid, pp.117-118.

(2) Ibid, pp.42-43.

(3) Sub-paragraph (c) of paragraph 1 of article 2 provides: "Where a container, applet 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 a foresaid such article of transport shall be considered the package or unit".

It is to be noted that, the Diplomatic Conference on Maritime Law, produced significant amendments to article 4(5) of the Hague Rules, these amendments are:

1) The "package or unit" limitation fixed in Gold poincare Francs, which in 1968 at least had a stable value, and raised to 10,000F.(1)

2) The addition of the new alternative standard of limitation 30 F per kilo of gross weight - which clearly improved the position of the cargo owner since he is now free to choose the higher of the two figures produced by the application of the two alternative test.(2) The alternative standard also made it quite clear that, the term unit under the Hague/Visby Rules means an unpacked object and not a freight unit.(3)

Consequently, alternative system has removed all doubts about the meaning of the unit which have been existed under the Hague Rules.

3) The addition of the new container clause, which specifically solved the problem of whether the container is a package for limitation purpose, which has been existed under the Hague Rules,

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(1) See Tetley, Marine, p.444; See also Moore, op.cit., p.4.

(2) If the weight of the lost package or unit was not more than 333.3 kilos, Diamond suggested that the limit would be that of per package or unit i.e. 10,000 Francs. In Support this view he said:
"The overall intention of this provision is reasonably clear. In the case of relatively small packages or units, the 10,000 francs limit will apply, since the weight alternative will result in a lower limit. But a moment's calculation will show if "the goods lost or damage" weight more than 333.3 kilo then the weight alternative will produce a higher limit. Accordingly, the general rule is that if a package or unit weights 333.3 kilos or less, then the limits is 10,000 Francs irrespective of whether all the goods were lost or damaged or only some of them". See Diamond, The Hague/Visby Rules, p.240; See also Wilson, op.cit., p.147; See also Donovan, op.cit., p.8.

(3) See Maskill, op.cit., p.3; See also Mustle, op.cit., p.698.

by stating that the number of packages or units enumerated in the bill of lading as being packed within the container will be the limitation units.(1) Consequently, there are three possibilities for calculating the maxiumum limit:

1) If the bill of lading does not enumerate the contents of the container e.g. "1 container containing machinery", the container with it's contents is a package or unit.

2) If the bill of lading enumerates the contents of the container individually, e.g. "1 container containing 100 cases of machinery ", the container is not a package but each of the 100 cases is a package or a unit.

3) If the bill of lading enumerates certain packages or units plus general cargo included in the container, e.g. "1 container containing 12 cases of machinary and general merchandise", each of the 12 cases is a package or unit and the container with the remaining goods is another package or unit.(2) This seems clear from the words "as far as these packages or units are concerned".

It seems also clear that, the legislature of the Hague/ Visby Rules in sub-paragraph (c) has adopted the "intention of the parties" test, in order to determine whether the container with its contents is a package or not.

However, despite the fact that, such paragraph (c) has solved the problem of whether the container is a package for limitation purpose, it raises some difficult questions, by using

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(1) See Donovan, op.cit., p.1.

(2) See Mankabady, The Brussels Convention, p.246; See also Diamond, The Hague/Visby Rules, p.242.

ambigous expressions i.e. "similar article of transport", "used to consolidate goods", which, to my mind, need to be clear.(1) In the United Kingdom, the wording of sub-paragraph (c) has been cited literally in the British Cogsa 1971.(2)

In America, the American Courts still applying the American Cogsa 1936 in regard to the container - package question, because the United States has not ratified the Brussels Protocol of 1968.

In Iraq the container - package question does not give rise to any problem, because article 280(3) of the Iraqi law based the limitation of liability on a lump-sum and not on per "package or unit" concept, on one hand, and Iraq has not ratified the Brussels Protocol of 1968, on the other hand.

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(1) In his comment on sub-paragraph (c), Scrutton says:
"The difficulties which the Court may in due course have to consider include the following
1 - What articles of transport are "similar to" containers and pallets?
2- What precisely is meant by "used to consolidate goods?
3 - In what circumstances is the number of packs "enumerated in the bill of lading as packed" in the container?".
See Scrutton, op.cit., p.463. For more details as to these points see Diamond, The Hague/Visby Rules, p.242; Mustil, op.cit, p.699; Maskill, op.cit., p.3; See also Falih, op.cit., pp.186-187.

(2) See Article IV, Rule 5(c) of the Carriage of Goods by Sea Act, 1971.

(3) Article 280(1) of the Iraq law provides that:
"The carrier is entitled:
A - To limited his liability for the total or partial loss of the thing or damage to it provided that the amount agreed upon shall not be less than one third of what the carrier is bound to pay in the absence of any stipulation.
Any stipulation less than the amount mentioned above shall be increased;
B - To exonerate himself, entirely or in part, from the liability for delay".

Under the Hamburg Rules

It is believed by the carriers and shippers that, the package limitation under the Hague Rules is unsatisfactory and that it needs to be revised or replaced. Therefore a large part of the work of the fifth session of the Working Group has been specified to discuss this subject. The discussion of the Working Group centered on what other tests could be accepted for the limitation of liability.

Two points of view had been arisen in this session, the first one preferred a unit of limitation based on the weight only, as found in the Warsaw Convention (air) 1929, the CMI Convention (rail) 1962, and the CMR Convention (road) 1956; the second preferred the dual system which adopted by the Protocol of 1968.(1)

The delegations who supported the weight as a unique unit of limitation based their argument on the "simplicity of administration, the ambiguities and resulting friction in any "package" system of limitation and the necessity to accomodate intermodal carriage systems in the future".(2)

The British delegate favoured the weight system, but he indicated that such a system could present difficulties in case of high value high weight goods,(3) as well as the difficulty of establishing weight in partial loss or broken package cases.

Most delegations favoured the dual system embodied in the

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(1) See Diamond, The Division of liability as between ship and cargo, p.50; See also Mankabady, Comment on the Hamburg Rules, p.62; See also Wilson, op.cit., p.147.

(2) See Sweeney, Article 6 of the Hamburg Rules, p.155; See also U.N. Doc. A/CN.9/76 (1973).

(3) For instance, a parcel weighing 100 kilograms would be compensated, if limitation were calculated according to weight, with no more than 3,000 poincare franc whereas, if limitation were calculated on the unit basis, compensation could amount to as much as 10,000 poincare francs. See Bonelli, op.cit., p.197.

Protocol of 1968, because of its benefits for the owners of high value light weight cargo.

The U.S.S.R. Delegation described the dual system as a flexible approach to the carrier's liability.(1)

In spite of the fact that, the majority of the re presentatives supported the dual system, there had been no clear division as to the preferred choice among alternative one ("package or in the case of goods not shipper in packages, per freight unit"); Alternative Two A (" per package or other shipping unit") or Alternative Two B (per shipping unit"). Accordingly, the entire subject was referrred to the Drafting Committee.(2)

After a long discussion the drafting group submitted the following language to the eighthsession of the Commission which was accepted by the Commission at its ninth session as Article 6 of the draft Convention:

"1(a) The liability of the carrier for loss of or damage to goods according to the provision of article 5 shall be limited to an amount equivalent to ( ) units of accout per package or other shipping unit or ( ) units of account per kilogram of gross weight of the goods lost or damaged, which ever is the higher.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed ( ) the freight (payable for the goods delayed) (payable under the contract of the carriage).

(c) In no case shall the aggregate liability of the carrier, under both sub-paragraph (a) and (b) of this paragraph, exceed the

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(1) See Sweeney, Article 6 of the Hamburg Rules, p.156.

(2) Ibid., p.156.

limitation which would be established under sub-paragraph (a) of this paragraph for total loss of the goods with respect to which such liability was increased.....".

The Conference which held at Hamburg in the Federal Republic of Germany in March 1978, under the auspices of the United Nations had adopted the above text after slight alterations made by the Chairman of the First Committee.(1)

However, Article 6(1) of the Hamburg Rules provides:

"(a) The liability of the carrier for loss resulting from loss of 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 unit or 2.5 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 is limited to an amount equivalent to two and half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea.

(c) In no case shall the aggregate liability of the carrier, under both sub-paragraph (a) and (b) of this paragraph, exceed the limitation which would be established under sub-paragraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred". It is obvious that, the limits of liability under the above article is based on dual system, namely,

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(1) See the report of the First Committee, United Nations Conference on the Carriage of Goods by Sea, A/CONF-89/10, p.45.

per package, shipping unit,[1] or weight, whichever is the higher. Where the weight is unknown, the package or unit will be the only applicable test.[2]

Under this Article also, the conflict between shipping and freight units is resolved by a clear statement that the unit at issue is a "package or other shipping unit".[3]

It is to be noted that, Article 6(1)(b) 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.[4]

In fact, this provision is necessary as long as article 5 of the Hamburg Rules has expressly extended the carriers liability to cover loss or damage resulting from delay in delivery.[5]

It must be mentioned, however, that a delay may cause physical damage to the cargo, so the question now is, whether this damage would be governed by Article 6(1)(b), the special delay damage figure or by the general unit limitation of liability figure found in Article 6(1)(a).

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(1) It is interesting to observe that, most importnat difference between this system and the dual system used in Visby Rules lays in the fact that the Drafting Committee had substituted the term "unit" with "other shipping unit". See Bonelli, op.cit., p.195.

(2) See Mankabady, Comments on the Hamburg Rules, p.62; See Edwin Garery, Will the Hamburg Rules. The Speaker's papers for the Bill of lading Conventions Conference, organised by Lloyd's of London Press, p.6.

(3) See Wilson, op.cit., p.147; See also Bonelli, op.cit., p.197.

(4) The U.K. and U.S.S.R. delegations proposed a limit of the freight on the goods delayed. U.S. and Norway delegations proposed the freight on he entire contract. Mexico proposed three times the freight on the goods delayed, Poland proposed twice the freight on the goods delayed but not to exceed the total contract price. After a long discussion the Committee decided that, the new limit for delay damages would be two and a half times the freight on the goods delayed but not to exceed the total contract. See Sweeney, Article 6 of the Hamburg Rules, p.165; See also Pollock, op.cit., p.5.

(5) See Falih, op.cit., p.52.

This question, in fact, has already been raised by Professor Sweeney, The United States Representative, at the Package Deal Committee meeting.(1)

Professor Selvig the Norwegian Representative indicated that physical damage was clearly covered by article 6(1)(a) and not by 6(1)(b).

No contrary view was given at the Committee meeting. Accordingly, Professor Sweeney indicated that he would make an oral representation to that effect at the Plenary Session of the Conference to become part of the official documents. The Statement was made as follows:(2)

"At the discussion on delay damages in Chairman Chafik's Consultative Group, 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 in that Group that the expression in Art. 5(1).

"The carrier shall be liable 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 Art 6(1)(a) applying the unit limit of 2.5 S.D.R. per kilo and 835

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(1) See Sweeney, Article 6 of the Hamburg Rules, p.161.

(2) Ibid. p.162.

S.D.R. per package apply to physical deterioration of the cargo caused by delay".

As to the goods shipped in containers, the Drafting Committee, after a long debate,adopted the following, which became as Article 6(2) of the Hamburg Rules:(1)

"For the purpose of calculating which amount is the higher in accordance with paragraph 1, the following rules shall apply:

a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading as packed in such article of transport shall be deemed packages or shipping units.

Except as aforesaid, the goods in such article of transport shall be deemed one shipping unit.

b) In cases where the article of transport itself has been lost or damaged, that article of transport shall, when not owned or otherwise supplied by the carrier, be considered one seperate unit".

This Article is identical with article 2(c) of the Visby Rules mentioned earlier.(2) Both the Visby Rules and the Hamburg Rules state that, if the contents of the container or pallet are not seperately listed then the container or the pallet together with its contents should be considered as a single shipping unit. If, on the other hand, the bill of lading

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(1) See Article 6(2) of the Hamburg Rules.

(2) See Supra, p.44.

enumerates the number of packages, then each package should be considered as a separate unit.(1)

However, UNCITRAL Group improved on the Visby Rules amendments by suggesting that, when the container or pallet itself is lost or damaged, it should be considered as a seperate unit for limitation purposes provided that it is not owned or supplied by the carrier.(2)

SECTION TWO

Who may benefit by the limitation of liability

Under the Hague Rules

As has already been seen, article 4(5) of the Hague Rules states expressly that the carrier and the ship are entitled to invoke the benefit of the limitation of liability.

It is outside the scope of this work to deal with the elaborate arguments about the meaning of the carrier and the ship. It is sufficient here to mention that the carrier's term "includes the owner or the charterer who enters into a contract of carriage with a shipper".(3) Whereas ship "means any vessel used for the carriage of goods by sea".(4)

However, in the course of performance of the contract of carriage, the carrier has to employ different servants or agents. But it is to be noted that, the carrier's servants or agents have no contractual relation with the cargo owners because they are not parties to the contract of carriage. The question, therefore, is whether these servants or agents are entitled to limit their

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(1) See Diamond, The Division of liability, p.50.

(2) See sub-paragraph (b) of article 6(2) of the Hamburg Rules; See also Wilson, op.cit., p.48; See also Shacher, Containers, 187.

(3) See Article 1(a) of the Hague Rules.

(4) See article 1(d) of the Hague Rules.

liability or not?

Unfortunately, article 4(5) gives no clear answer for this question. It seems therefore to be a question of a statutory and a contractual interpretation.(1)

In fact, much effort has been made to prevent claimants from getting round the limitation and exceptions contained in the contract of carriage by suing servants or agents of the carrier in tort. The big difficulty facing them in their work consists, indeed, in the general rule found in the law of contract that a contract can neither benefit nor bind anyone except the parties thereto.(2) This principle can be best summed up in the words of Lord Viscount Haldane L.C. in Dunlop Pnuematic Type Co. v. Seffridge(3) where he says:

"In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quasitum tertio arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam".

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(1) See Filikos Shipping Corporation of Monrovia v. Shipmair B.V. (1981)$_2$ Lloyd's Rep, p.555; See also Falih, op.cit., p.223; See also Donovan, existing problems, p.7.

(2) See Falih, op.cit., p.227; See also Pollock, op.cit., p.9; See also Kurt Gronfors, Non-Contractual claims under the Hamburg Rules, published in Hamburg Rules, edited by Mankabady, p.189.

(3) (1915) A.C. 847 at p.853.

This doctrine also applied in Alder v. Dickson[1] (The Himalaya), where Mrs. Alder took suit against Captain Dickson, the master of P & O passenger ship, the Himalaya. Mrs Alder had been injured when a gangway fell, throwing her 16 feet to the quay below. The passenger ticket contained a non-responsibility clause benefiting the carrier and so she took suit, in tort, against the master. It was held that, the passenger ticket did not expressly or by implication benefit servants or agents and thus Dickson was held liable in tort. Jenkins L.J. in this case said:

"The exempting provisions in terms apply only to the liability of the company (the shipowner), without any reference to the liability of servants of the company for the consequences of their own tortious act..... But as it is, not only are the companies servants not parties to the contract bu the contract does not even mention their liability.[2]

In American the Supreme Court of the United States,[3] refused to extend the $500 per package limitation to stevedore who had been employed by the carrier, on the ground that he was not a party to the contract of carriage. In its comment on the Hague Rules text, the court states:

"The debates and committee Reports in the Senate and the House upon the bill that became the carriage of Goods by Sea Act likewise do not mention stevedores or agents.

There is, thus, nothing in the language, the legislative history or environment of the Act that expressly or impliedly

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(1) $(1955)_1$ Q.B. 158; $(1954)_2$ Lloyd's Rep. 267.

(2) $(1955)_1$ Q.B. 158, at p.186.

(3) See Herd v. Krawill Machinery Corp. (1959) A.M.C. 879.

indicates any intention of Congress to regulate stevedores or other agents of a carrier, or to limit the amount of their liability for damages caused by their negligence. Yet Congress, while limiting the amount of liability of, "the carrier (and) the ship", did not even refer to stevedores or agents of a carrier".(1)

The doctrine of privity of contract was strongly upheld in Midland Silicones v. Scruttons.(2) This case arose when a drum of chemical was dropped and damaged by stevedores who were moving it to a shed after discharge from a vessel. The stevedors sought to limit their liability to £500 in accordance with provisions of the bill of lading, and U.S. Carriage of Goods by Sea Act.

The House of Lords held that the stevedores were not entitled to rely on the limitation of liability contained in the bill of lading, on the ground that: neither the words of the American Cogsa nor of the bills of lading relating to the meaning of the words "carrier" so extended its meaning as to include stevedors, the carrier did not contract as agents for the stevedores, and there was no ground for implying a contract between cargo owners and stevedors.

It should be mentioned, however, that the House of Lords in its decision in Alder v. Dickson (Supra), held that, in the carriage of passengers as well as the carriage of goods, the law permitted a carrier to stipulate not only for himself, but also

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(1) $(1961)_2$ Lloyd's Rep. 365; See also Ivamy, op.cit., p.169.

(2) See Supra, p.62; See also Elder Dempster v. Paterson Zochonis, (1924) A.C. 522, in which the House of Lords permitted a clause in a bill of lading signed for by the charterers to benefit the shipowners.

for those whom he engaged to carry out the contract. This stipulation might be express or implied.(1)

This decision, in fact, opened the door to the so-called "Himalya" clauses, which designed to bring all servants and agents under the protective umbrella of the carrier.(2)

This clause may read as follows:(3)

"It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of this Bill of lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part will acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liabiltiy, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause, the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents

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(1) See Kurt, Gronfors, op.cit., 189; See also Donovan, op.cit., p.7.

(2) It is worthy of not that, there are more model provisions of Himalaya clauses than the ones here cited, and there are also slight variations in these models as far as details are concerned. See Kurt Gronfors, op.cit., p.190; See also Tetley, Marine, p.373.

from time to time (including independent contractors as aforesaid) and all such persons shall, to this extent, be or be deemed to be parties to the contract in or evidence by this Bill of Lading".(1)

In the Eurymedon case (supra), the carriers received on board their vessel at Liverpool an expensive drilling machine for shipment to Wellington, New Zealand. The stevedores dropped the machine during discharge causing £80 worth of damage.

The consignee brought an action against the stevedores alleging negligence. The bill of lading incorporated the Carriage of Goods by Sea Act, 1924, and the "Himalaya" clause.

The Privy Council held (three judges to two) that, the stevedores could take the benefit of the time limitation provisions in the bill of lading. Lord Wilberforce speaking for the court said:

"In the opinion of their Lordships, to give the appellant (the Stevedor) the benefit of the exceptions and limitations contained in the bill of lading is to give effect to the clear intentions of a commercial document, and can be given within existing principles. They see no reason to strain the law or the facts in order to defeat these intentions. It should not be overlooked that the effect of denying validity to the clause would be to encourage actions against servants, agents and independent contractors in order to get round exemptions (which

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(1) This clause was incorporated in the bill of lading in the Eurymedon Case (1974), ALL. E.R. 1015; See also L.J. Kovats, who is to pay for the stevedore's negligence, (1942), LMCIQ. 121.

are almost invariable and often compulsory) accepted by shippers against carriers, the existence, and presumed efficacy, of which is reflected in the rates of freight".(1)

In his comment on the Himalaya clause, Tetley says: "To some the clause is heresy; to other genius. To me the Himalaya clause is an ingenious short-term solution to a difficult problem. It is a solution which raises infinitely more problems than it solves.

The basic problem is to find a way to allow third parties who are neither agents nor servants to limit their liability specifically to find way to allow stevedores who are not agents or servants of the carrier or of the cargo owner to benefit under the law".(2) In that context Tetley also says: "The benefit to commerce of allowing stevedors and terminal operators to completely limit their liability is often put forward by supporters of the Himalaya clause. Such reasoning, however, ignores the fact that in the commercial world it is preferable for persons who cause damage to cargo to be held responsible for that damage. Otherwise they will continue to be negligent and will do nothing to alter their practices".(3)

In the United States, it seems to me, the American Courts took a more positive position in this connection. In Serra Inc. v. S.S. Francesco,(4) the U.S. court of Appeal has permitted the carrier and the charterer to rely on the per-package limitation of liability, but not the stevedore.

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(1) See the Eurymedon Case (1974)$_1$ ALL.E.R. 1015, at p.1021.

(2) See Tetley, Marine, p.375.

(3) Ibid, p.374.

(4) (1965) A.M.C. 2029.

However, in Carle & Montainaril Inc. v. Amer EX. Isbrandtsen Lines Inc.(1) the same court has permitted the stevedore to benefit by the per package limitation, as the bill of lading clearly expressed the intention to benefit the stevedore. Furthermore, In Grace Line In. v. Todd Shipyards Corp.(2) the U.S. Court of Appeal, has permitted the draydock owner to relay on the Himalaya clause to limit his liability to $500 per package.

In Canada the Canadian Courts have held that the stevedore could rely on the Himalaya clause to limit his liability(3). However, the Federal Court of Appeal of Ottawa held that, the Himalaya clause does not have the effect of relieving the terminal operator of liability for negligence.(4)

In Scotland, as far as this writer is aware, there does not appear any reported case dealing with the Himalaya clauses. This means that, this question should be determined according to the general rules, after taking into account the surrounding circumstances of each case.(5)

It is outside the scope of this work to deal fully with the construction of these rules, it is sufficient here to mention according to these rules - that, if there is a provision in the bill of lading extending the benefit of limitation of liability to the servants or agents of the carrier, those servants or agents can rely on this provision.(6)

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(1) $(1968)_1$ Lloyd's Rep. 260.

(2) $(1975)_1$ Lloyd's Rep. 276.

(3) See the "Federal Schedule $(1978)_1$ Lloyd's Rep. 285.

(4) $(1982)_4$ E.T.L. P.431.

(5) See Falih, op.cit., p.240.

(6) See Stair, The Institutions of the Law of Scotland, 4th ed., Edinburgh, p.110; See also A.R.G. McMillan, Scottish Maritime practice, Edinburgh, 1926, p.291.

In Iraq, unfortunately, the law of commerce is silent on the question. The general rule in relation to this question found in article 152 of the Iraqi Civil Code, 1951. This article made it clear that, the servants or agents of the carrier are entitled to invoke the limitation of liability, if there is an express stipulation in the contract of carriage.(1)

Under the Visby Rules.

In 1963, at the meeting of the CMI Stockholm Conference, it was suggested that there should be an extention to the Hague Rules to cover the servants or agents of the carrier, as follows:

1) The defences and limits of liability specified in the Hague Rules should apply to any action against the carrier whether the action be found in contract or in tort.

2) If such an action is brought against a servant or agent of the carrier, these persons should be entitled to avail themselves of the defences and limits of laibility which the carrier is entitled to invoke under this Rules.(2)

However, during the meeting of the Conference, there was a heated controversy about the inclusion or exclusion of independent contractors from those who were to be protected by the carrier's umbrella.(3)

Some delegations favoured the exclusion of independent contractors on the following ground:

"In their view a contractor who is independent of the carrier

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(1) See clause 1(a) of the bill of lading of the Iraqi Enterprise for Maritime Transport.

(2) See Mankabady, the Brussels Convention, p.275; See also Astle, op.cit., p.79.

(3) See Gronfors, op.cit., p.193.

should not, by mere fact that he performs duties which might have been performed by the carrier himself, become entitled to avail himself of the limitation and exceptions of the Convention. A distinction should be drawn between, on the one hand, the carrier, his servants or agents and, on the other, the independent contractor. The servants and agents should be protected for social reasons and should have the benefits of the Convention whereas, in the view of the minority, these reasons do not apply to the independent contractor who should thus not have this benefit."(1)

The Diplomatic Conference of 1968 finally approved the CIM's text which included the independent contractors from the protection of the defences and limits of liability.

This text became as Article 3 of the protocol of 1968, it is provides:

"Between Article 4 and 5 of the Convention shall be inserted the following Article 4

1. The defences and limits of liability provided for in this convention shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be found in contract or in tort.

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

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(1) Quoted from Kurt Gronfors, why not Independent Contractors (1964) J.B.L., p.26 (hereinafter as Gronfors, why not Independent Contractors).

himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

3. The aggregate of the amount recoverable from the carrier, and such servant and agents, shall in no case exceed the limit provided for in this Convention.

4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this Article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result".

This paragraph made it clear that, the master and crew and any other servants or agents of the carrier are entitled to limit their liability, for all damages resulted from their negligence, or omission, if these damages occured during the period of the Rules, i.e. tackle to tackle, whether the action is brought in contract or in tort.

In regard to the stevedores, they are also entitled to limit their liability if they are controlled by the carrier who is responsible for them.(1)

Under the Hamburg Rules.

Article 7 of the Hamburg Rules stipulates that, the servant or agent of the carrier, is entitled to limit his liability if, he proved that he was acting within the scope of his employment, whether the action is brought in contract or in tort. This article also has omitted the exception as to the independent contractor.(2) It provides:

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(1) See Tetley, Marine, p.387; See also J.W. Richardson, The Hague - Visby Rules - A carrier view, published in the Speaker's papers for the Bill of lading Conventions Conference, organised by Lloyd's of London Press, p.8.

(2) See Gronfors, op.cit., p.194.

"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 found in contract, in tort or otherwise.

2. If such an action is brought against a servant or agent of the carrier, 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.

3. Except as provided in art. 8, the aggregate of the amount recoverable from the carrier and from any person referred to in para. 2 of this article shall not exceed the limits of liability for in this Convention".

SECTION THREE

The Monetary Limits.

Under the Hague Rules

The monetary limit under the Hague Rules was fixed at £100 or an amount equivalent to £100 in gold.(1) The gold pound sterling was taken as a convenient medium for stabilizing any unit of currency, so the purpose of this clause was to impose the same charge on the carriers in different countries.(2)

Article 9 of the Hague Rules provides:

"The monetary units mentioned in this convention are to be taken to be gold value.

Those contracting states in which the pound sterling is

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(1) That is to say the gold content of a hundred sovereigns See Campos v. Kentucky & India Railroad Co. (1962) 2 Q.B. 172; See also Scrutton, op.cit., p.441.

(2) See Mankabady, The limitation, p.33.

not a monetary unit, reserve to themselves the right of translating the sums indicated in this convention in terms of pound sterling into terms of their own monetary system in round figures.

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".

However, this article does not specify the weight and fineness of gold represented by the pound sterling.(1)

Undoubtedly, the pound sterling at present-day values has not the same parity of the pound sterling in 1924. In other words the £100 in 1982 money is worth only about £10.22 in 1924 money.(2)

It was intended by expressing limitation amount in terms of gold to protect the holder of the bill of lading against the devaluation of the local currencies if the limit was expressed in terms of one of these currencies, but unfortunatly gold has been subjected to remarkable changes in real value almost from 1924 on, therefore many countries, adopted the per-package limitation in local currency in their statutes.(3)

Other countries like Finland and Sweden took a different approach, their laws provide gold value only for claimants whose country of domicile provided gold value for their claimant.

The gold clause was not respected even in the United Kingdom itself. The pound sterling is not convertible into

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(1) The Warsaw Convention of 1929 relating to Carriage of Goods by Air has solved this problem by stating in article 22 that: "The sums mentioned above shall be deemed to refer to the French franc consisting of sixty five and a half milligrammes of gold millesimal fineness nine hundred".

(2) See Mankabady, The Brussels Convention, p.230.

(3) See Falih, op.cit., p.287; See also Tetley, Marine, p.444; see also Moore, op.cit., p.3.

into gold, and consequently it has not the same value as the pound sterling in 1924.(1)

In Feist v. Societe Intercommunal Belge,(2) a Belgian Company issued in September 1928 bonds providing for payment of principal and interest of certain sums expressed as "pounds sterling in gold coin of the United Kingdom or equal to the standard of weight fineness existing on September 1st, 1928". The court upheld the gold clause by deciding that it should be construed as an obligation to pay on the due dates such a sum in sterling as represented the gold value of the nominal amount of each payment, this gold value to be ascertained in accordance with the standard of weight and fineness existing on September 1st, 1928. The pound sterling was at that date worth 123-27447 grams of millesimal fineness 916.66. Such a payment was considered to be legal as it was not payment in gold.

As a result of the worldwide economic changes of the past fifty years, the limitation amount has been devalued in all currencies, but to varying degrees.(3)

On 1st August, 1950, an agreement between some carriers and cargo owner interests in the United Kingdom was reached under the auspices of the British Maritime Law Association to raise the liability of the carriers to £200 sterling lawful money of the United Kingdom. However, this agreement binds only the parties to it, and has no effect on a third party.(4)

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(1) See Falih, op.cit., p.289; See also Astle, op.cit., p.179.

(2) (1934)A.C. 161.

(3) See Selvige, The Hamburg Rules, the Hague Rules and Marine insurance practice (1981) 3 JMLC, p.299; See also Donovan, op.cit., p.4.

(4) See Mankabady, The Brussels Convention, p.232.

In Pyrene Co. v. Scindia Navigation Co.[1] Devlin J. referred to this agreement when he said:

"The defendants (the carriers) admit liability but claim that the amount is limited under article 4, rules 5, of the Hague Rules. The limit stated in that rule is £100, but this is subject to article 9 which prescribed 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 Associations Agreement of August 1, 1950, which fixed the limit at £200." [2]

The Gold Clause agreement was amended on the 1st July, 1977 to reflect the changes occasioned by the U.K.'s ratification of the 1968 Protocol (The Visby Rules). For contracts dated on and after 1st July, 1977, the Gold Clause agreement provides a limit of £400 per package or unit of cargo.[3]

However, in recent years, the fluctuation of currencies in varied proportion, has created a big doubt as to the suitability of gold as a basis in calculating the amount of the carrier's liability. Furthermore, the difference between the official value of the gold and the free market value, made it difficult to convert an amount expressed in gold into another currency.[4]

It is to be noted that, paragraph 2 of article 9 of the Hague Rules gave contracting states, other than those who used sterling

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(1) $(1954)_2$ Q.B. 402.

(2) Ibid, at p.413.

(3) Sea Bear, op.cit., p.3; See also Donovan, Existing problems, p.5.

(4) See Mankabady, The limitation, p.34.

as a unit of currency, a liberty or option to convert the sterling amount into local currency.

Most the contracting states took advantage of this article and provided in their municipal legislation an amount representing what was the equivalent of the sterling amount at the time of passing their legislation.(1)

The United States, in its Carriage of Goods by Sea Act, 1936 introduced a limit of $500 per package or, in case of goods not shipped in package, per customary freight unit.(2)

Unfortunately, this article does not state what exchange date applied if the national law is silent.

This was interpreted to mean that the conversion could be done at anytime and did not need to be up-dated. The result was that instead of a uniform limit common to all Hague Rules countries, there had grown-up a wide variety of different limits.(3)

Paragraph 3 of article 9 allows the national laws to reserve for debtors the right to discharge their debts in national currency at the rate of exchange ruling on the day of the arrival of the ship at the port of discharge.

However, the courts in various contracting states are divided in their opinion on when to apply the date of conversion. Should it be at:

1. The date of the breach of the contract;
2. The date of the arrival of the ship at the port of discharge;
3. The date of the commencement of the proceeding; or
4. The date of the payment.

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(1) Ibid, p.33.

(2) See Section 4(5) of the American Cogsa, 1936; See also Mankabady, The limitation, p.34.

(3) See Diamond, The Hague-Visby Rules, p.229; See also Tetley, Marine, p.444.

In England, the date of the breach of the contract was accepted by the British courts as a proper date of conversion.

In Di Ferdinando v. Simon, Smith & Co. Ltd. Bankes L.J. said:(1) "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 decision found some support in Havana Railways case, where Viscount Simonds says:(2)

"It is established by authority binding on this House that 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".

However, in Miliangos v. Frank (Textiles) Ltd.(3) the House of Lords by majority of 4 to 1 (Lord Simon of Glaisdale dissenting), has abandoned the breach-date idea, and adopted the date of payment as a proper date of conversion, Lord Wilberforce in his justification for this decision said:(4)

"The situation as regards currency stability has substantially changed even since 1961. Instead of the main world currencies being fixed and fairly stable in value, subject to the risk of periodic re - or de - valuations, many of them are now "floating" i.e., they have no fixed change value even from day to day. This means that, instead of a situation in which changes of relative

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(1) (1920)$_3$ K.B. 409 at p.412; See also per Scrutton, L.J. Ibid, at pp.414-415.

(2) (1961) A.C. 1007 at p.1043; See also Madeleine Vionnet et Cie v. Wills (1940)$_1$ K.B. 72.

(3) (1976)$_1$ Lloyd's Rep. 201.

(4) Ibid, p.206.

value occurred between the "breach date" and the date of judgement or payment being the exception, so that a rule which did not provide for this case could be generally fair, this situation is now the rule. So the search for a formula to deal with it becomes urgent in the interest of justice".

The examination of the Scottish cases, shows that, there have been different points of views in regard to the relevant time of conversion of a foreign currency into sterling. In Hyslops v. Gorden,(1) it was held that, the date of raising the action is the proper date of conversion.

Whereas in Macfie's Judicial Factor v. Macfie,(2) it was held that, the date on which the debt became payable is the proper date of conversion and not the date of decree.

In Commerzban Aktiengesellschaft v. Large,(3) an action for payment in German deutschmarks was brought by a West German bank against a British national resident in Scotland in respect of a loan account contracted between the parties when the defender was resident in West Germany. The question in that case was whether by the law of Scotland the foreign creditor may claim payment ofthe amount of the debt owing to him expressed in foreign currency. The court held that, 1 - it was competent for a foreign creditor who is entitled to payment of a debt due in a foreign currency, when suing in Scotland to conclude Primo Loco for payment in the currency of account in his contract with the debtor; 2 - where it was necessary to convert the foreign

(1) (1824) 2 Sh. App. 451.

(2) (1932) S.L.T. 460; See also A.E. Anton, Private International Law, A treatise from the standpoint of Scots Law, Edinburgh, 1967, p.231; See also D.M. Walker, The Law of Civil Remedies in Scotland, Edinburgh, 1974, p.34.

(3) (1977) S.L.T. 219.

currency into sterling the date of conversion should be the latest practicable date; 3 - conversion at the date of extract was procedurally acceptable.

As in Scotland, there are also different decisions in the United States as to the date of conversion. The date of the commencement of the proceeding was accepted by the Supreme Court of the United States as a proper date of conversion.(1) But in another case,(2) the District Courts of the United States accepted the date of the breach as a proper date of conversion rather than the date of the commencement of the proceeding.

It remains to be mentioned that any clause reducing the pre-package limitation to less than £100 sterling would be null as being contrary to article 3(8) of the Hague Rules which 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 in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability".

Sub-paragraph 3 of article 4(5) of the Hague Rules also provides that:

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(1) Die Deutsche Bank v. Humphrey, 272 U.S. 517 (1926).

(2) Phillip Holzman A.G. v. S.S. Hellenic Sunbean, (1977) A.M.C. 1731.

"By agreement between the carrier, aster or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed,provided that such maximum shall not be less than the figure above named".

In Foy and Gibson Pty. Ltd. v. Holyman & Son Pty. Ltd.(1) clause 14 of the bill of lading provides inter alia that: "(a) It is mutally agreed that the value of each package or parcel receipted for as above does not exceed the sum of £5 (unless otherwise stated herein) on which basis the rate of freight is adjusted".

It was held that the clause in question was null and void as contrary to article 4(5) of the Hague Rules.

In Crystal v. Cunard SS Co.(2) the U.S. Court of Appeals held that a clause limiting liability to £20 per package was null and void.

But a different manner has been adopted in Iraq to deal with this point. Paragraph 1 of article 280 of the Iraqi Law of Commerce 1970 states that any stipulation of limitation less than the fixed limit (one third of what he is bound to pay in the absence of any stipulation of limitation) should be increased.

Under the Visby Rules.

We have already seen that the Hague Rules limit of £100 sterling did not succeed in practice in achieving any of the establishing the limit of the carrier's liability. Namely,

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(1) $(1946)_{79}$ Ll.L Rep. 339.

(2) (1965) A.M.C. 39.

1) uniformity; 2) certainty; 3) stability and 4) the maximum degree of protection against currency inflation.(1)

The Visby Rules have attempted to achieve these objectives by using the Peincare franc as the unit of account for computing the carrier's limitation.(2)

The Brussels Protocol of 1968 fixed the limiation at 10,000 francs per package or unit or 30 francs per kilo of gross weight of the goods damage or lost.(3)

Article 2(d) of the 1968 Protocol defines the franc as follows:

"A franc means a unit consisting of 65.6 milligrammes of gold of millesimal fineness 900". This is the Poincare gold franc first defined by the French law of June 25, 1928 when Ryamond Poincare, who stablized French currency, was Prime Minister of France.(4)

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(1) See Diamond, The Hague - Visby Rules, p.237.

(2) The Canadian delegation to the Brussels Conference state: "We regard the purpose of the Conference as dictated by three circumstances: first of all, the changes in rpice level since 1924. In Canada, the wholesale price level has approximately doubled during this period. Secondly, to revert to an international trade, notably, containers". See the Brussels Conference, 1968, pp.45,46; See also Mankabady, The Brussels Convention, p.240; See also Diamond, The Hague-Visby Rules, p.237.

(3) Article 2(a) of the 1968 protocol provides: "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 damge 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".

(4) It is worthy of note that, the Poincare franc is used in many Conventions, i.e. the International Convention for the Unification of Certain Rules relating to the Carriage of Passengers by Sea of 1961; the Convention on the Liability of Operators of Nuclear Ships of 1962; and the Convention for the Unification of Certain Rules Relating to the International Carriage by Air signed at Warsaw on Oct. 12, 1929. See L. Bristow, Gold franc Replacement of unit account, (1978)$_1$ LMCLQ, 31..

The main purpose of establishing a limitation of liability in terms of gold franc can best be summed up in the words of Tetley. He said:(1)

"The Visby use of the Poincare gold franc was expected to have two useful and necessary effects. Firstly, because the limitation was identical for all contracting states and because gold would have an international market price the value would universal.

Secondly, gold would not fluctuate erratically but would be stable and would only rise and fall realistically with inflation or deflation".

However, many events had occurred in the pra ctice of the international monetary system which in term affected the gold franc stability.(2)

The result has been "not only a variety of different limits in different countries but also uncertainty in applying the limit and a steady diminution of the real value of the limit in all countries."(3)

Because of problems of balance of gold value, currencies have been devalued and governments have given "official" values to gold so that a two-tier system of valuing gold emerged - the free market value and the official national values.(4) The two-tier system has given rise to the problem of which price of gold is referred to in a number of international conventions using the gold franc as a unit of account.(5)

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(1) See Tetley, Marine, p.448.

(2) For more details as to these events See Falih, op.cit., pp.317-319.

(3) See Diamond, The Hague-Visby Rules, p.237.

(4) See Tetley, Marine, p.448.

(5) See Falih, op.cit., p.320.

In Hornline A.G. v. Societe National Petrole Aquitaine,[1] it was held by the Supreme Court of the Netherlands that, the conversion rate of the gold franc, under the Brussels Convention on shipowner's limitation of liability, shall be calculated on the basis of the official value of the currency in relation to the Poincare gold unit, and not on that of the free market. In the U.K. the government followed the way of specifying by orders the sums to be taken as the sterling equivalent of the amount expressed in gold francs.[2]

Regarding the date of conversion, the sub-committee of the CMI examined theses dates: 1) the date the amount becomes due; 2) the date of judgement; 3) the date of payment, but it found that a solution acceptable to all systems was impossible, and the date of conversion was left to national law to decide.[3]

Article 2(d) of 1968 Protocol 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".

Falih criticised this solution sharply. He says:[4]
"This solution is certainly unsound. It is plainly against the stablility of the limitation amount and is wholly irreconcilable with the objective of uniformity that the fixing of a limitation of liability in terms of gold francs is intended to achieve. If the date of conversion is not fixed the amount of limitation will differ from on contracting state to another". Thus, it can be said that, neither the Hague Rules nor the Visby Rules have

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(1) (1972) E.T.L. p.333.

(2) The Order in Council made on 20th June, 1977 in respect of COGSA 1971 gives the equivalent of £447.81 per package of £1.34 per kilo. Whereas the Order in Council made on 17th December, 1976 gives figures in proportion to £468.70 and £1.40. See J.W. Richardson, op.cit., p.6.

(3) See CMI Stockholm Conference, 1963, pp.80,81; See also Mankabady, The Brussels Convention, p.240; See also Astle, op.cit., p.180.

(4) See Falih, op.cit., p.322.

succeeded in achieving the four objectives mentioned earlier.[1]

Under the Hamburg Rules.

In the UNCITRAL's discussions it was agreed that the new limit of liability should not be as low as the Hague Rules level so as to cause an inbalance and thus substantially undermine the effect of the other principal rules governing liability in the new convention.

Equally, it should not be set at too high a level for the same reason.[2] Several speakers supported the idea of updating the 1968 Brussels Protocol limitations to take account of inflation between 1968 and 1978. Some delegations had suggested no limitation at all, while other delegations favoured the SDR as a unit of limitation.[3]

Under the Hamburg Rules, the limits of liability are calculated no .longer in gold francs, but in units of account, equal to Special Drawing Rights (SDR) as defined by the Intrnational Monetary Fund.[4]

Article 26 of the Hamburg Rules provides:

"1. The unit of account referred to in article 6 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in Article 6 are to be converted into the national currency of s state according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the special Drawing Right of a contracting

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(1) See Supra, p.78.

(2) See Shah, op.cit., p.23.

(3) See Sweeney, Article 6 of the Hamburg Rules, p.162; See also Moore, op.cit., p.7.

(4) See Gorley and Giles, op.cit., p.250; See also Les ward, The SDR in transport liability Conventions; some clarification $(1981)_1$ JMLC, p.2.

state which is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency in terms of the Special Drawing Right of a contracting State which is not a member of the International Monetary Fund is to be calculated in a manner determined by that State.

2. Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, or at the time of ratification, acceptance, approval or accession or at anytime thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as:

12,500 monetary units per package or other shipping unit or 375 monetary units per kilogramme of gross weight of the goods.

3. The monetary unit referred to in paragraph 2 of this article corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amounts referred to in paragraph 2 into the national currency is to be made according to the law of the state concerned.

4. The calculation mentioned in the last sentence of paragraph 1 and the conversion mentioned in paragraph 3 of this article is to be made in such a manner as to express in the national currency of the contracting states as far as possible the same real value

for the amounts in article 6 as is expressed there in units of account.

Contracting States must communicate to the depositary the manner of calculation pursuant to paragraph 1 of this Article, or the result of the conversion mentioned in paragraph 3 of this Article, as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this article and whenever there is a change in the manner of such calculation or in the result of such conversion".

It should eb borne in mind that, the S.D.R. Does not circulate as currency but its value calculates in accordance with IMF rules and published daily in the financial press in most places.(1)

The S.D.R. is the modern limitation formula. It represents trade-weight basket of currencies of 16 countries which are members of the I.M.F. and are responsible for at least 1. . of the world commerce.(2) If one or two of these strong currencies decline in value the other should increase in value so that the S.D.R. itself would not vary greatly. The S.D.R. is in use for all signatories to the International Monetary Fund (I.M.F.) agreement.(3)

According to Article 6 of the Hamburg Rules, monetary limits of liability for loss or damage to goods were fixed at 835 S.D.R's

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(1) See Bristow, op.cit., p.34; Sweeney, article 6 of the Hamburg Rules, p.152; See also Moore, p.7.

(2) See N.M. Matte, The Most Recent of the Warsaw Convention: The Montreal Protocol of 1975,1976 E.T.L.p.837; See also Ward, op.cit., p.3; See also Stephen A. Silard, Carriage of the SDR by Sea, the Unit of Account of the Hamburg Rules, 10, JMLC, p.1978, p.13.

(3) See Sweeney, Review, p.13.

per package or shipping unit, or 2.5 S.D.R.'s per kilo, whichever is the higher.(1) These limits have been estimated at some 25./. above the Visby Rules.(2) For delay in delivery of goods liability was limited to $2\frac{1}{2}$ times the freight payable under the contract of carriage.(3)

Article 26 provides that, where states are members of the I.M.F., the conversion of S.D.R. units into the appropriate national currency will be in accordance with the rules of the fund but, where they are not members, the method of calculation will be determined by the state itself.(4) Article 26 also adopts a formula to permit non-members States, e.g., the Soviet Union and the States associated with it in COMECON, who are not members of the I.M.F. and whose law does not permit the application of the S.D.R. to fix the unit of account in terms of gold francs.(5)

This article, in fact, creates two kinds of units of account; The first is being the S.D.R. and the second is being the Poincare franc.(6)

As regards the date of conversion, article 26(1) provides that, the conversion from the S.D.R. to national currency will take place as of the date of the judgement unless the parties agree otherwise.

Article 33 of the Hamburg Rules states that where there has been an important change in the real amount specified in article 6 and paragraph 2 of article 26, a conference to revise the unit

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(1) See Article 6(1)(a) of the Hamburg Rules.

(2) See Shah, op.cit., p.23.

(3) See Article 6(1)(b) of the Hamburg Rules.

(4) See Wilson, op.cit., p.148.

(5) See Sweeney, Review, p.13; See also Matte, op.cit., pp.839-840.

(6) See Falih, op.cit., p.330.

limitation can be called on the demand of one-fourth of the contracting States. But any decision by the conference to introduce important change must be taken by a two-thirds majority of the participating states.

SECTION FOUR

Loss of the right to limit liability

Under the Hague Rules

Under Article 4(5) of the Hague Rules, the limitation of liability can be avoided, if the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading.(1)

However, the practice showed that shippers rarely mention the real value of the goods in the bills of lading. The reason for not mentioning the real value of the goods in the bill of lading, lies in the fact that the carrier increases the freight to a disproportinate amount once the value of the goods has been declared.(2)

In the Hague Conference 1921, Mr. Dor said: "What happens is this, that the shippers very often do not declare the value, because they are afraid of paying the customs or afraid of paying taxes; for a good many reasons they do not declare, the value; and what you want to do away with is the fact, in bills of lading where no value is declared, that the shipowner is able to limit his liability to 10 francs per package".(3) As a result of this practice by the carriers, they have successfully avoided

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(1) See also Article 2(a) of the Visby Rules.

(2) See Mankabady, The limitation, p.34.

(3) See the Hague Conference 1921, Report 1921, p.201.

any increase in their liability above the amount stipulated in the Rules".(1)

Whatever arguments may be advanced as to the declaration of value, article 4(5) of the Hague Rules, does not indicate that for the privilege of declaring the value the shipper must pay an extra freight rate.(2)

However, according to article 4(5), the declaration must meet some formal requirements e.g. must be expressed, must be before shipment and must be inserted in the bill of lading.

The declaration must be expressed so as to enable the carrier to recognize the nature of the goods, and then to take a special measure for its safe carriage.

In Foy and Gibson Pty. Ltd. v. Holyman & Sons Pty. Ltd., Latham, Ch.J., said:(3)

"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".

But, it should be mentioned that, the declaration of value of goods cannot be effective unless it has been inserted in the bill of lading.

This is illustrated by Machinon J., in Pendle and Rivet Ltd. v. Ellerman Lines Ltd. where he said:(4)

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(1) See Mankabady, The limitation p.30.

(2) See Falih, op.cit., p.396.

(3) (1946) 79 Ll.L. Rep. 339 at p.341.

(4) (1927) 33 Com Cas. 70 at pp.78-79.

"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 weighed 3 cwt.

1 gr. 13 lb. that it contained wool and silk as well as woolen 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 anything about the value of the goods. Therefore, though the plaintiffs did declare the value of the goods before shipment, that was not inserted in the bill of lading; and in those circumstances only one of the conditions on which the defendan could be liable for more than £100 was fulfilled".

The same result was reached by the Iraqi Casation Court, where it was held that the declaration of the value of the goods in the seller's invoice was not sufficient to deprive the shipowner from invoking the limitation of liability.(1)

Furthermore, it is not enough for the purpose of avoiding the limitation of liability to declare the nature and value of the goods expressly in the bill of lading,(2) but that declaration must be before shipment.(3)

It remains to be mentioned that, if the nature or value of the goods has been knowingly(4) misstated by the shipper in the bill

(1) 1972 JICCD, p.448.
(2) See Falih, op.cit., p.402.
(3) For the meaning of the term "before shipment", see Chapter three of this thesis.
(4) It is convenient here to mention that, the phrase "Knowingly misstated" was deeply discussed in the Hague Conference 1921. In this conference Sir Hill said:
"If the value is incorrectly stated, but honestly, mistakenly, stated, then the cargo owner can claim the real value against (the carrier) up to the limit. He does not claim beyond the limit, whatever is the real value of the goods. He cannot get above the limit".
See the Hague Conference 1921, Report 1921, p.166.

lading, this misstatement is sufficient to bring article 4(5) into operation.(1)

We have seen that Article 4(5) of the Hague Rules entitles the carrier to limit his liability "in any event" for loss or damage to the goods or in connection with goods in an amount exceeding £100 per package or unit, or the equivalent to that sum in other currency. But the question which may arise here is whether the statutory limit mentioned above is available to the carrier in the event of damage cause by his wilful misconduct or gross negligence which constitutes a fundamental breach of the contract of carriage.

The answer of this question may be found in the decision of the American and English Courts which concentrated on, the deviation problem, as a fundamental breach of a contract.

Carver, relying on Stage Line v. Foscolo Mango, Seems to have reached the conclusion that, once the carrier commits an unjustifiable deviation he will not be entitled to invoke the protections of the Rules including the limitation of liability. He says:(2)

"It is clear from Stage Line v. Foscolo Mango(3) that the Rules have not altered the principle that an unjustifiable deviation deprives a ship of the protection of exceptions from liability, or indeed affected in any way the pre-existing position as to the effect of deviation. In this respect the exceptions in Art.

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(1) Sub-paragraph 4 of article 4(5) of the Hague Rules provides: "Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading".
See also Article 2(h) of the Visby Rules.

(2) See Carver, Vol.1, p.258; See also Scrutton, op.cit., p.440.; See also Selvig, The Hamburg Rules, p.321. But a different view has been adopted by Wilson, who believes that the phrase "in any event" entitles the carrier to limits his liability for any type of damage to the cargo, even that arising from unseaworthiness or deviation. See Wilson, op.cit., p.149.

(3) (1932) A.C. 328.

IV, r.2, and, indeed the whole of the Rules, must be regarded as part of the contract which is abrogated by the deviation. For, by Art II, the provisions of the Rules apply only under a contract of carriage covered by a bill of lading or similar document of title; if that contract goes, so go the Rules with it". The same result was reached by the American courts in Lafcono Case,(1) which concerned a stowage on deck without coverage, contrary to the agreement between the shipper and carrier. It was held that the carrier was deprived of the benefit of limitation of liability on the ground that he committed a fundamental breach of the contract of carriage by failing to cover the cargo.

On the basis of the foregoing arguments it may be concluded that, the carrier - irrespective of whether this be a company(2) or an individual - is not entitled to invoke the limitation granted to him under article 4 r.5 of the Hague Rules in all cases where the loss or damage is caused by a wilful misconduct or gross negligence committed by him or his servants or agents.(3)

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(1) (1946) A.M.C. 903; See also Siderurgica v. North Empress (1977) A.M.C. 1140; See also Falih, op.cit., p.431. In the Alaska Marue, (1931) A.M.C. p.528, Augustus N. Hand Ct. J. said "The general rule undoubtedly is that, if the shipowner commits a breach of the contract of affreightment which goes to the essence of the contract, he is not entitled after such breach to invoke the provisions of the contract which are in favour". Ibid. at p.531.

(2) In The "Marion" case (1982) 2 Lloyd's Rep, p.52, it was held that, "actual fault" of a corporation meant a fault of a member of the board of directors unless there was some other person who had authority co-ordinate with the board of directors given to him under the articles of association and appointed by a general meeting of the company.

(3) See Bonelli, op.cit., p.181.

In reaching this conclusion, Bonelli gave the following justifications:(1)

a) The limitation of liability of the carrier constitutes an exception to the ordinary rule of law whereby the defaulting party must fully compensate the damage. Since this is a norm that derogates from a general principle, on the one hand it is to be interpreted in a restrictive sense, and on the other the cases in which the privilege is to be held non-applicable must be interpreted in a wider sense.

b) It is appropriate that the liability for damage rests with the person who has control over the conditions of risk since, in this way such person can take the measures necessary to reduce the possibility of the occurrence of the damage. Consequently, it is preferable that the risk of wilful misconduct being committed on the part of the servants or agents of the carrier should rest with this latter since he alone - and certainly not the cargo owners - can take effective steps towards preventing wilful misconduct (for example, by means of a more careful selection of his servants or agents, through establishment of adequate controls, etc.)".

In Iraq, the Iraqi Law of Commerce, 1970 states that, the carrier is not entitled to invoke the limitation of liability, if it is proved that he or his servants or agents committed a wilful misconduct or gross negligence.(2)

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(1) Ibid, at p.189.

(2) See the explanatory Memorandum, attached to the Iraqi Law of Commerce 1970, paragraph 7(4); See also Falih, op.cit., p.449.

Article 251 of the Iraqi Law of Commerce, defines misconduct and gross negligence as follows:

"1. In the matters of carriage of goods wilful misconduct means every act or omission committed by the carrier or his auxiliaries with intent to cause damage;

2. Gross negligence means every act or omission committed recklessly by the carrier or his auxiliaries with knowledge that damage would probably result".

It seems fairly clear, therefore, that, the guiding test of "wilful misconduct" is the "intent to cause damage", while the guiding test of the gross negligence is the recklessness made with knowledge that the damage would probably result.(1)

Under the Visby Rules and Hamburg Rules

Article 2(e) of the Visby Rules, which is similar to article 8(1) of the Hamburg Rules, denies the carrier the right to limit his liability for any loss, damage or delay which result from an act or omission of the carrier "done with intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result".

A similar provision deprives a servant or agent of the carrier from invoking the limitation clause to cover his personal liability, where he has displayed a similar intent or recklessness.(2)

The Working Group of UNCITRAL was adopted the following formula: "The carrier shall not be entitled to the benefit of the limitation of liability provided for in para. 1 of article A if it is proved that the damage was caused by wilful misconduct of the carrier, or

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(1) Ibid, p.28.

(2) See Article 3(4) of the Visby Rules and Article 8(2) of the Hamburg Rules.

of any of his servants or agents acting within the scope of their employment.

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 wilful misconduct on his part". The essential difference between the UNCITRAL proposal and the text of article 2(e) of the Visby Rules, is that, the UNCITRAL proposal states that the carrier is not entitled to the benefit of the limitation of liadbility if the loss or damage is caused by "wilful misconduct" of the carrier or his servants or agents; while article 2(e) of the Visby Rules provides that limitation cannot be invoked if the damage is caused by an act or omission of the carrier "done with intent to cause damage, or recklessly and with knowledge that damage would probably result".(1)

This proposal had strongly been opposed by several delegations in the Hamburg Conference the result of which was the modification of that text.(2)

The U.S.S.R. delegation supported the idea of making the carrier, his servants, or agents liable for intentional damage, but they opposed the concept of damage caused recklessly.(3)

But the American delegation indicated 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

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(1) See Bonelli, op.cit., p.205.

(2) See Article 8 of the Hamburg Rules; See also Wilson, op.cit., p.150.

(3) See Sweeney, part 2, p.338; See also Mankabady, Comments on The Hamburg Rules, p.71.

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 (Traspass De Bonis Asportatis) which would permit punitive damages and relaxed rules of consequential damages rather than to place any reliance on the Hague Rules".(1)

After considerable discussion and lenghty debate, a provision on this issue was adopted. Article 8 of the Hamburg Rules provides:

"1. The carrier is not entitled to the benefit of the limitation of liability provided for in Article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission 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. Nothwithstanding the provisions of paragraph 2 of article 7, a servant or agent of the carrier shall not be entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay or recklessly

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(1) See Sweeney, part 2, p.338.

and with knowledge that such loss, damage or delay would probably result".

Turning to the language of the relevant provisions, the first problem is to decide precisely what is meant by "done with intent to cause damage, or recklessly and with knowledge that damage would probably result".

It seems to me that, the expression "intent to cause damage" presents no difficulty of interpretation and it appears with actual recognition by the insured himself that a damage exists, not caring wither or not is is averted".

Professor Walker(1) 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".

In this context Diamond also says:
"I therefore suggest that "recklessly" involves either (i) a high 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",(2) to demand that the carrier has a subjective intention to do wrong.(3)

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(1) See Walker, The law of Delict in Scotland, 2nd ed. Edinburgh, 1981, p.43. (hereinafter cited as Walker, Delict).

(2) See Diamond, The Hague-Visby Rules, p.246.
In Compania Maritima San Basilio v. Oceans (1976)$_s$ Lloyd's Rep. 171, Lord Denning, M.R. 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'".

(3) See Diamond, The Hague-Visby Rules, p.244; See also Pollock, op.cit., p.3; See also Carey, op.cit., p.7.

In other words, a "guilty mind" must be proven in this case.(1)

As well as the word "recklessly" construes as requiring a subjective realization by the carrier that something is being done wrongly, together with an indifference as to the consequences. It has been described as "deliberately reunning an unjustified risk".(2)

The word "recklessly" can best be illustrated by the words of Diplock, L.J. in Frazer v. Furman where he said:(3)

"(I)t is not enough that the employer's omission to take any particular precautions to avoid accidents should be negligent, it must be at least reckless, that is to say, made.

It is to be noted that, both categories of misconduct - (intended to cause damage an recklessly with knowledge that such loss or damage would probably result) - are included within the definition of "wilful misconduct used in Warsaw Convention.(4)

The observations of Barry, J. in the case of Horabin v. BOAC(5) are of particular interest. He said, that wilful misconduct was "wholly different in kind from mere negligence ..... however gross that negligence may be".

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(1) See Falih, op.cit., p.454; See also Sasson and Cunningham, op.cit., p.180.

(2) Reed v. London and Rochester Trading Co. $(1954)_2$ Lloyd's Rep, 463; See also Mustill, op.cit., p.700.

(3) $(1967)_2$ Lloyd's Rep, 1, at p.12; See also Lane v. Spratt, $(1970)_2$ Q.B. 480.

(4) Article 25 of the Warsaw Convention states: "(1) The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default or his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.
(2) Similarly the carrier shall not be entitled to avail himself of the said provisions if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment".

(5) $(1952)_2$ ALL. ER. 1016.

He went on to say that for such misconduct to become wilful it must be shown that "the person who did the act knew at the time that he was doing something wrong and he did it notwithstanding, or, alternatively, that he did it quite recklessly, not caring whether he was doing the right thing or the wrong thing, quite regardless of the effects of what he was doing on the safety of the aircraft and of the passengers for which and for whom he was responsible.

That is something quite different from negligence or carelessness or error of judgement, or even incompetence, where the wrongful intention is absent".(1)

In Rustenberg v. Pan American World Airways Inc. Ackner J. said:(2)

"It is common ground that "wilful misconduct goes far beyond any negligence, even gross or culpable negligence, and involves a person doing or omitting to do that which is not only negligent but which he knows and appreciates is wrong, and is done or omitted regardless of the consequences, not caring what the result of his carelessness may be.....".

It would seem from an appraisal of the foregoing cases that, "wilful misconduct" requires: 1) Knowledge of performing, or intent to perform, an illegitimate act; and 2) indifference to the consequences of such behaviour.(3)

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(1) Ibid, at p.1020.

(2) (1977)$_1$ Lloyd's Rep. 564 at p.569.

(3) See Bonelli, op.cit., p.207.

Finally, it remains to be mentioned that, article 8 of the Hamburg Rules which is similar to article 2(e) of the Visby Rules covers all types of fundamental breach of the contract of carriage such as, failure to provide covered storage,(1) unjustifiable deviation ordered recklessly by the carrier, servants or agents.(2)

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(1) Captain v. Far Eastern S.S. Co. (1979)$_1$ Lloyd's Rep, p.595.;

(2) See Mankabady, Comments on the Hamburg Rules, p.75;
See Diamond, The Hague - Visby Rules, p.246.
Contrast Scrutton, op.cit., p.464; Mustil, op.cit., p.701.

CONCLUSION

The purpose of the limitation liability is to retain a proper balance between the conflicting interest of carriers and shippers.

The single system limitation has created considerable difficulties units of limitation.

The Visby Rules have radically change the units of limitation be adopting a dual (alternative) system. In spite of this radical change the words "package" and "units" remained without any clarification under Visby Rules.

But the situation under the Hamburg Rules became a bit better by using the term "shipping unit".

Moreover, the carrier under the three sets of rules, is not bound to mention the weight in the bill of lading, and this adds more difficulties. Therefore, I would agree with the suggestion made by Falih, that a passage should be added to Article 2(a) of the Visby Rules and Article 6 of the Hamburg Rules stating that if the weight is unknown in the bill of lading, only the limitation per package or other shipping unit can be applied.

It is to be noted that, the present limit of the carrier liability is very low especially when it is compared with the limit in air transport, therefore we believe that the Hamburg Rules will bring major changes to this issue by adopting the S.D.R.

As has been mentioned previously, the courts in different countries have adopted different dates for conversion.

The date of payment, from my point of view, is most favourable under the commercial realities of inflation and floating currencies.

It is to be noted that the Visby Rules and the Hamburg Rules, by extending the limitation of liability to cover the carrier's servants or agents, have brought a logical solution to the problems existed under the Hague Rules. We have seen that, the limitation of liability can be avoided, under the Hague and 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 does no longer exist under the Hamburg Rules. I am personaly of the belief that there is no rational reason for this omission.

CHAPTER FIVE

Problems of enforcing the Carrier's Responsibility

After delivery, the consignee is obliged to inspect the goods and if they are in a bad condition, to specify by writing on the receipt or anything else, the nature of the loss or damage. The consignee is also obliged to institute his action in respect of this loss or damage in the right court and within a limited time.

However, there are some substantial differences between the Hague Rules, Visby Rules and Hamburg Rules in respect of the notice of loss or damage, the time in which a claim can be brought, and the jurisdiction in which a claim can be made.

Some light,therefore, will be thrown on the following points:

1. Notice of loss or damage;
2. Limitation of actions;
3. Jurisdiction clauses.

Each of these points will be dealt with in a separate section.

SECTION ONE

Notice of loss or damage

Under the Hague Rules and Visby Rules.

Article 3(6) of the Hague Rules provides that upon delivery from the carrier, the consignee or his agent is obliged to inspect the goods and, if there was an apparent loss or damage, a 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, then the consignee must give notice within three

days.[1] Article 3(6) of the Hague Rules runs as follows:

"Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be Prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

If the loss or damage is not apparent, the notice must be given within three days of the delivery of the goods".

From the foregoing article it is clear that the notice of loss or damage should be given, not at time of discharge, but at the time of the removal of the goods into the custody of the person entitled to delivery.[2]

The same result was reached by the West German Courts in Bundesgerichtshof,[3] where it was held:

"When, in the absence of the consignee at the time of unloading, the Bill of Lading permits the shipowner to remit the cargo to the occupier of a wharf, it is only the taking of delivery of the goods by the consignee which constitutes the 'Handing over of the goods' and the time at which a protest can subsequently be made for apparent damage".

In Belgium the Belgian Court of Cassation held that,[4]

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(1) It is convenient here to mention that the Warsaw Convention (Art 13, r.3) and the Road Transport Convention (CMR), (art 30), define the time limit for the notice by seven days, and this period undoubtedly more reasonable than the three-day time limit under the Hague Rules, because the three-day period is not sufficient in practice for the discovery of non-apparent damage.

(2) See Scrutton, op.cit., p.428; See also Ivamy, op.cit., p.143.

(3) 1966. E.T.L. p.542.

(4) Otraco v. S.A. Belgamar, 1966 E.T.L. p.551.

reservation can be validly found up to the time of the removal of the goods by the holder of a Bill of Lading which may take place several weeks after the unloading.

It is to be mentioned that the notice of loss or damage must be in writing in the form of a registered letter, a bad order receipt or a telegram.(1)

The Cour D'Appel De Beyrouth(2) held that written reservations made by the Port Company when the goods were put into their warehouse shall suffice to upset the presumption of delivery in proper form, on condition that the goods were transfered immediately to the warehouses on discharge.

It should be pointed out, howdver, that the Hague Rules do not provide for any specific form of notice.(3)

Another point which is of great importance is the fact that the sanction for not giving notice at the time of the removal of the goods, when the loss or damage is apparent or written three days when it is not apparent, is that the burden of proving that the condition of the goods at the time of delivery was not the same as when the bill of lading was issued shifts from the carrier to the consignee.(4) In other words, the failure to give notice does not operate as a forfeiture of the claim but is merely a prima facie obstacle.(5)

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(1) See Ibrahim Maki, The action of the responsibility against the carrier, in the carriage of goods vy sea, Cairo, 1973, p.137 (hereinafter cited as Maki, The action of the responsibility); See also Taha, op.cit., p.319; See also Gordon J. Barrie, op.cit., p.361; It is worthy of note that the American Cogsa 1936 added additional paragraph to article 3(6) of the Hague Rules to clarify the Rules. This paragraph reads:
"Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof".

(2) Caledonian In Co. Ltd. v. Compagnie du Port 1972 E.T.L. p.313

(3) Linder and Co. v. Farley and Feary (1938) A.M.C. 805.

(4) See Mankabady, Comments on the Hamburg Rules, p.93.

(5) See Carey, op.cit., p.9; See also Maki, the action of the responsibility, p.342.

In The Southern Cross,[1] which concerned a consignment of unboxed vehicles which was shipped from New York to Montevideo with the qualification "uncrated and at owner's risk", it was held that failure to give notice before removal of merchandise was Prima facie evidence of delivery of the goods as described in the bill of lading, but that presumption could be rebutted. In Scrutton[2] it is pointed out that: "The first paragraph of Rule 6 appears to have no legal effect. Whether notice is given or not, the onus of proving loss or damage will be upon the person asserting it. It was apparently intended, when the clause was first introduced, that the effect of giving notice should be to place the burden of disproving loss or damage on the carrier, which the present Rule certainly does not. Assuming, however, that the Rule has any effect, it should be observed that, though the notice must be given to the carrier or his agent at the port of discharge, the goods apparently need not be removed into the receiver's custody there, e.g.,in the case of a contract of through carriage where, after the discharge from the ship, the final stage is by railway or by lighters up a river or canal. If by the time the goods have been removed into the custody of the person entitled to delivery the ship has sailed and has no agent at the port of discharge, it is a little difficult to see how this provision will be complied with.

Possibly the agent employed for the ship will be held to continue to be agent for the purpose of receiving notice.

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(1) (1940) A.M.C. 59.

(2) See Scrutton, op.cit., p.428.

No provision appears to be made for total loss of the goods where there can be no 'removal'".

Carver supported Scrutton's opinion that the notice is of little value because the consignee has the burden of proof in any event.(1)

But Tetley criticises this point of view on yet another ground. He says:(2)

"It is true that the consignee has the burden of proving that damage took place in the hands of the carrier, but if notice of loss has been given, the consignee has made Prima facie proof of the condition of the goods at discharge.

Thus, the notice as set out in the Rules can be valuable to the consignee".

Article 3(6) of the Hague Rules also leads us to a conclusion that failure to give notice does not affect the right of the shipper to bring suit within one year.(3)

Thus, clauses in a bill of lading calling for a written notice of claim, otherwise suit is barred, are not valid under the Hague Rules.(4)

In Elser Inc. v. Internat Harvester,(5) the notice of claim was not given within the thirty days as required by the bill of lading, but proceedings were commenced within one year. It was held that under the American COGSA 1936 the failure to give timely notice of loss did not prejudice the shipper's right to bring

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(1) See Carver, Vol. 1, para. 274.

(2) See Tetley, Marine, p.428.

(3) This is illustrated by paragraph 6 of article 3(6) of the American Cogsa 1936 which reads:
"Provided, that if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after delivery of the goods or the date when the goods should have been delivered".
See also The Southern Cross (1940) A.M.C. 59.

(4) See Tetley, Marine, p.429.

(5) (1955) A.M.C. 1929.

proceedings within one year, and it was also held that the clause in the bill of lading was in conflict with the provisions of COGSA, and therefore null and void.

Finally, it is important to observe that under the Hague Rules the notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection by the parties.(1)

In Iraq:

Under article 282 of the Iraqi Maritime Law the (Ottoman Law of Maritime Commerce), the time limit for giving notice for both apparent and non apparent loss or damage is two days after the removal of the goods. In the CMI Stockholm Conference, some delegations proposed some amendments to Article 3(6) of the Hague Rules, but all these proposals were rejected by the Conference.(2)

Under the Hamburg Rules

The Eighth Session of the Working Group was devoted to discussion of the subject of the notice of loss.

In this session the majority were in favour of the retention of the notice of loss provision of the Hague Rules and that the notice should be in writing. It was also emphasized at this session that a distinction should be made between loss or damage which was apparent and loss which was non-apparent.(3)

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(1) See article 3(6) of the Hague Rules.

(2) The Norwegian delegation proposed the following text: "Any liability of the carrier under these Rules shall cease unless notice of the claim has been given to the carrier or his agents without undue delay, but no notice shall be required if it is proved that the carrier or anyone for whose acts he is responsible acted recklessly or without intent". See CMI-Stockholm Conference, 196 , p.111; See also Mankabady, The Brussels Convention, p.182.

(3) See Sweeney, part V, p.174.

Respecting apparent loss, the requirement in the Hague Rules concerning the time of giving notice (before or at the time of the removal of the goods) is changed to "not later than the day after the day when the goods were handed over to the consignee".

Where the loss or damage is non-apparent, the Hague Rules allow three days for the notice to be given. As mentioned at the beginning of this section the three day period was not sufficient in practice for the discovery of non-apparent damage. Accordingly, it was decided to adopt a period of ten consecutive days regardless of holidays.(1)

However, the UNCITRAL Plenary Session, by a vote of 13 to 7 with 3 abstentions decided to extend the period to fifteen consecutive days.(2) This period is considered sufficient to discover the non-apparent damage.

Regarding loss or damage caused by delay, the notice of loss is a precondition to recovery, that is, failure of the consignee to give the notice of delay in writing within 60 consecutive days from delivery to the consignee will bar the claim.(3)

Eventually, the following provision was adopted and became as Article 19 of the Hamburg Rules:

"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 carrier not later than the working day after the day when the goods were handed over to the consignee, such handing over is

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(1) See Mankabady, Comments on the Hamburg Rules, p.94.

(2) See Sweeney, Part V, p.174.

(3) See Tetley, The Hamburg Rules - A Commentary, p.14.

Prima facie evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition.

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 15 consecutive days after the day when the goods were handed over to the consignee.

3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

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

5. No compensation shall be payable for loss resulting from delay in delivery unless a notice has been given in writing to the carrier within 60 consecutive days after the day when the goods were handed to the consignee.

6. If the goods have been delivered by an actual carrier, any notice given under this article to him shall have the same effect as if it had been given to the carrier, and any notice given to the carrier shall have effect as if given to such actual carrier".

It is to be noted that article 19(1) mentioned above insists that a notice may be given not at time of delivery for apparent damage - as was the situation under the Hague Rules - but within the working day after the day when the goods were handed over to the consignee. But the sanction for not giving notice of the specific time is still the same, that such removal or handing over

is Prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

However, the sanction will be different in the case of a claim for loss resulting from delay, where no compensation will be payable unless the carrier is given notice of that claim within 60 consecutive days after the day when the goods were handed over to the consignee.(1) This paragraph also insists that the notice should be given by the consignee. But does that mean that the trucker has no right to give notice for the consignee or that bad order receipts given by stevedores or agents are no longer valid?(2) The Hamburg Rules, in fact, give no answer for these questions.

However, one can say that the new Rules, in respect to notice of loss, added some new things to the Hague Rules.

SECTION TWO

Limitation of actions

Under the Hague Rules

The time limit for the claimant to bring suit under the Hague Rules is one year. Article 3(6) fourth paragraph provides: "In any event the carrier and the ship 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".

The aim of the one year provision is to speed up the settlement of claims, because it is in the interest of the carrier to settle

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(1) See paragraph 5 of article 19 of the Hamburg Rules; See also Thomas, op.cit., p.8.

(2) See Tetley, The Hamburg Rules - A Commentary, p.13.

the disputes in a short time.(1) This provision also intended to prevent carriers from reducing the time limit into a very short period e.g. two months as was done before the Hague Rules.(2)

It should be borne in mind that the time limit begins to run from delivery and not from discharge.(3) However, the question as to when the goods have been delivered by the carrier raises many problems.(4) In this respect Astel says:(5) "The question as to when the goods have been delivered by the sea carrier is not easy of resolution because, both in the Courts of this country, and in the United States, it has been held that the Act still continues to apply to the goods, even if they have already been discharged into lighter, and released from the ship's tackle. For example, if such goods are damaged by other goods which are dropped on to them by the negligence of the shipowner, then there seems to be no question but that the Rules contained in the schedule to the Act will still apply.

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(1) See Mankabady, The Brussels Convention, p.185. Cargo interests found the one-year limit insufficient for bringing the case before the court, therefore the British Maritime Law Association agreement (the Gold Clause Agreement) extended this period. Clause 4 of this agreement runs as follows:
"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) 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 the period of twelve months or(b) there has been undue delay on the part of consignees, receivers or underwriters in obtaining the relevant information and formulating the claim".

(2) See Tetley, Marine, p.331.

(3) See Astel, op.cit., p.311.

(4) For more details as to these problems, See Chapter three of this thesis.

(5) See Astel, op.cit., p.112.

However, for the purpose of commencing proceedings it should be assumed that the twelve month's time limit will commence to run from the time the goods cross the ship's rail and are landed into craft or on quay". In that context Tetley also says:(1)

"The use of the word "delivery" must, therefore, be considered as deliberate and as having a different meaning from "discharge". "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 the consignee's agent".

In American Hoesch In and Riblet Products Inc. v. Steam Ship Aubade E.T.C. and Maritime Commercial Corp Inc,(2) the U.S. District Court, (District of South Carolina), 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 cited case:(3)

" 'Delivery' is a concept which has been subject of considerable litigation in several areas of the law. It appears from the discussion of it considered by the court that delivery implies mutual acts of the carrier and the consignees. It is a more

(1) See Tetley, Marine, p.331.

(2) $(1971)_2$ Lloyd's Rep. 423.

(3) Ibid, at p.425.

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 of the cargo is not delivery".

Another case of interest was that of the "Beltana",(1) in which the Supreme Court of Western Australia held that delivery was made either when goods were landed on wharf and freed from ship's tackles, or, at the latest when goods were placed in the premise of the plaintiff's agent and became available to the consignee.

Another case of interest concerning another aspect of the matter is the American case C. Tennant, Sons & Co. v. Norddeutscher Lloyds(2) which concerned a shipment of steel pipes shipped from London to New Orleans, the bill of lading providing for direct overside discharge and stowage in barge at New Orleans. The vessel arrived at New Orleans on February 2nd, 1962, and discharged the cargo into barge for transportation up river to Chicago. The Cargo arrived Chicago on March 6th, 1962 in a damaged condition. The proceedings were commenced on February 20th, 1963. It was held that the claim was timebarred, because the time limitation was commenced from the date of discharge of the goods into the barges.

It should be noted that, in case of subsequent deliveries, the time begins to run from the date of the delivery of the last item of the cargo.(3)

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(1) (1967)$_1$ Lloyd's Rep. 531.

(2) (1964) A.M.C. 754.

(3) See Ungar v. SS Urola (1946) A.M.C. 1663.

In Loeb v. SS Washington Mail,[1] the ship had discharged her cargo on October 8, 1951. The consignee received the first part of his cargo on October, 11th, 1951 and sorting of all the cargo discharged from the vessel continued until October 31st, 1951 when he received the second part of his cargo. It was held that the suit will be valid until October 31st, 1952.

When there is no delivery, the time begins from the date when the goods should have been delivered. In Western Gear Corp. v. States Marine Lines Inc,[2] a machine shipped from Seattle to New Orleans was damaged when washed overboard. It was thereafter repaired and shipped on a different ship under a new bill of lading and ultimately delivered. It was held that suit insistuted within a year from actual delivery but 16 months after it should have been delivered was barred by the one-year limitation under Cogsa.

Another case of interest came before the U.S. Courts, was that of Consol Distilled Prod v. Cunard SS. Co.,[3] which concerned a consignment of wine shipped from France to Chicago. The ship was obliged to discharge its shipment in New York on November 22nd, 1965 because of bad weather conditions. Truckers carried the wine to Chicago between December 8th, 1965 and February 10th 1966. The suit was brought on January 25th, 1968. It was held that the suit was time barred. It would be appropriate to mention here that the one year delay for suit does not apply where the goods were never loaded on board.[4]

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(1) (1957) A.M.C. 267.

(2) (1966) A.M.C. 1969.

(3) (1968) A.M.C. 1758.

(4) Ins. Co. of N.A. v. SS. Exminster (1955) A.M.C. 739.

We have already noticed that,[1] it is the duty of the master to deliver the goods to the consignee named in the bill of lading or his agent, or to the first person who presents a properly endorsed bill of lading, provided the master has no notice of dealing with other bills of the same set.[2]

The question here is: does the one year time limit apply when the carrier has delivered the cargo to a wrong person? In the United States, the one year time limit applies to wrong delivery. In Commodity Service Corp. v. Furness Withy & Co.[3] Goods were delivered to the "notify party" on the bill of lading, 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. The Court ruled that wrong delivery is to be treated as non-delivery and that therefore the claim in this case was time-barred. The same result was reached by the English Courts in the case Anglo-Saxon Petroleum Co.Ltd. v. Adamastos S. Co.Ltd.,[4] where it was held that the expression "loss or damage" in Article 3(6)(4) of the Hague Rules covers the liability for wrong delivery even though the goods had suffered no physical loss or damage, and consequently the one year time limit was applied.

In Australia, the situation seems to be different on this point. In Salmond and Spaggon v. Joint Cargo Services "The New

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(1) See Chapter three of this thesis, p.

(2) See Glyn v. East and West India Dock Co. (1882), App. Cas 591; See also Ivamy, op.cit.,p.131; See also Gordon J. Barrie, op.cit., p.355.

(3) (1964) A.M.C. 760.

(4) (1957)$_1$ Lloyd's Rep. 79; See also Birch Reynardon, op.cit., p.2.

York Star",[1] the New South Wales Court of Appeal held that the defendant was in breach of his duty not to delivery goods, except in exchange for the shipping documents, and since this was a fundamental breach of contract he could not rely on the benefit of the Rules.

It must be borne in mind, however, that in case of intentional wrong delivery, the carrier could not have the benefit of the one-year period for suit.[2]

In this respect Tetley says:[3]
"It is submitted that a fundamental breach of the contract depends on the intention of the person who violates the contract. If the breach is intentional, the person violating the contract may lose his rights both under the contract and the Rules".

However, it is to be noted that the American courts have adopted two different views in regard to the effect of the unjustifiable deviation on the one-year time limit. Some courts follow the rule that unjustifiable deviation deprives the carrier of the protection of the time limitation provision.[4] In other jurisductions, however, the one-year limitation for suit has been applied regardless of unjustifiable deviation.[5]

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(1) $(1977)_1$ Lloyd's Rep. 445.

(2) Spurling v. Bradshawe $(1956)_1$ .W.L.R. 461.

(3) Tetley, Marine, p.335.

(4) Insurance Co. of North American v. SS Exminster, 127 F. Supp. 541 (S.D.N.Y. 1954).

(5) Singer Hosiery Mills v. Cunard White Star Ltd. 102, N.Y.S. 2d. 762 (1951). These two cases are cited by Sassoon and Cunningham, op.cit., p.175.

Some efforts to distinguish the effects of unjustifiable deviation on the one-year time limit, on the one hand, and on the per package limitation on the other, have also been made. These efforts, finally, reached to the following conclusion. "....regardless of whether the bill of lading was nullified and the carrier became a quasi-insurer with respect to the amount of liability, the limitation period would still be binding except where prejudice as a result of the deviation can be claimed".(1)

I believed that this point should be clarified for the purpose of uniformity.

It is convenient here to mention that, suit must be brought propoerly in the proper jurisdiction; otherwise it will be barred.(2) Ivanny in his comment on this point says:(3) "The words 'unless suit is brought within one year' mean 'unless the suit before the Court is brought within one year' They do not mean 'unless suit is brought anywhere within one year'".

Thus, in Compania Colombiana de Seguros v. Pacific Steam Navigation Co.,(4) a cargo of electric cables loaded on the defendants vessel was insured by the plaintiffs for a voyage from Liverpool to Buenaventura, 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 insurers brought an action in the supreme Court of New York during the time limit, but it was dismissed for lack of jurisdiction. The insurers thereafter brought the Action

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(1) See Sassoon and Cunningham op.cit., p.176; See also Richardson, op.cit., p.4.

(2) See Gordon J. Barrie, op.cit., 361.

(3) See Ivamy, op.cit., p.142.

(4) $(1963)_2$ Lloyd's Rep. 479.

in the United Kingdom, but it was too late. It was held that the action was time-barred under Article 3(6). The fact that the New York proceedings were brought within the period of one year was immaterial. Roskill J, speaking for the court said: "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 had to determine is whether the action before the court, and not some other action, has been instituted within the relevant limitation period".(1)

In this context a question might come to mind: If the goods have been transhipped, is the first carrier required to bring his recourse action against the second carrier within the one year limit or not?

Here the British and American jurisprudence are opposed. In Great Britain the recourse claim should be brought within the year. This was made clear in the case of Henriksens Rederi A/S v. TH.Z. Rolimpex,(the "Brede"),(2) where it was held that the one-year period of limitation provided for by Art 3(6) of the Hague Rules, applied to a counter-claim, and if a cross-claim was pleaded as a set-off, there was no basis for enabling a mere device of pleading to circumvent the period of limitation, and the set-off was time-barred.

This judgement was upheld in appeal by Denning M.R., Cairns Roskill L.JJ.,(3) Denning M.R., speaking for the court said:

(1) Ibid., p.496.

(2) $(1972)_2$ Lloyd's Rep. 511.

(3) $(1973)_2$ Lloyd's Rep. 333.

"In my opinion, therefore, the shipowners are entitled to the freight on the cargo delivered: and the charterers are barred from claiming for the cargo short delivered or damaged. That claim should, under the Hague Rules, have been brought by suit within one year. Not having been so brought, it is time barred".(1)

The observation of Mankabady on this decision are of particular interest. He said:(2)
"If the recourse action should be brought within the year and the loss or damage to the goods has occured while they were in the hands of a second carrier who performed part of the transport, the first carrier will not be able to recover the sum paid from his quarantor because his claim will probably become time barred".

In the United States, the situation to be different on this point. In Peurto Madrin S.A. v. Esso Standard Oil Co.(3) It was held that the on-year time limit does not apply to a claim of one carrier against a second carrier. It would be appropriate to mention that the one year time limit applies to actions which result from a contract of carriage by sea, therefore actions against third person, will not be covered by the one year time limit.(4)

Undoubtedly, this principle does not apply to charterer, if the cargo claimant sues the charterer as a carrier under a bill of lading.(5)

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(1) Ibid, at p.338.

(2) See Mankabady, Brussels Convention, p.191.

(3) (1962) A.M.C. 147.

(4) See D/S A/S Idaho v. Peninsulor and Oriental Steam Navigation Co. (The "Strathnewton") (1983), p.219; See also Mankabady, Comments on the Hamburg Rules, p.95.

(5) Cities Services Oil Co. v. U.S.A. (1953) A.M.C. 1424; See also Tetley, Marine, p.336.

However, the one year time limit does not cover the carrier's action against the shipper for payment of freight or for damage sustained by the ship.(1)

Another point which is of great importance is the fact that the arbitration clause included in the bill of lading does not change the principle of the commencement of the time limit. In the "Merak",(2) a cargo owned by the plaintiffs was shipped under a bill of lading subject to the Hague Rules, and was discharged on 21st November, 1961, in a damaged condition. The bill of lading contained a clause known as the arbitration(3) clause. The clause provided inter alia: "All claims must be made in writing and the claimant's arbitrator must be appointed within twelve months of the date of final discharge otherwise the claim shall be deemed waived and absolutely barred".

A writ was issued within the time provided in art. 3(6) of the Hague Rules but was not served until some time later.

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(1) American Union Transport Inc. v. U.S.A. (1976) A.M.C. 1480.

(2) $(1964)_2$ Lloyd's Rep. 527; $(1965)_1$ ALL. E.R. 230.

(3) It may be of interest to mention here that in the United Kingdom the law governing arbitration clause problems and other related matters is contained in the Arbitration Act, 1950. Section 32 of this Act provides:
"....'arbiration agreement' means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not".
For more details as to the arbitration clauses see Russell on the Law of Arbitration, 18th ed. by Antony Walter, London 1970; See also William H. Gill, The Law of Arbiration, 2nd ed, London, 1975; See also David McIntosh, The practice of maritime arbitrations in London, recent developments in the Law $(1983)_2$ LIMCLQ, p.235.

Meanwhile the shipowners refused to accept liability stating that the claim was time barred, as an arbitrator[1] should have been nominated within the period required in the arbitration clause. It was held that the action must be stayed. The arbitration clause was effective, and since the matter had not been referred to arbitration within 12 months, the plaintiffs were without a remedy. The word "suit" in article 3(6), included the commencement of arbitration proceedings. This ruling was upheld in the Court of Appeal. Lord Justice Russell said[2] in the cited case:

"If this be right there can be no repugnancy between the present arbitration clause and the relevant legislation referred to in the paramount clause. If 'suit is brought' refers only to the initiation of proceedings in a court of law the argument based on repugnancy is this: that the Hague Rules confer immunity on the shipowner only if such proccedings are not initiated within one year, but the application of the arbitration clause has conferred immunity notwithstanding such proceedings were in fact initiated within the year, since those proceedings have been stayed because of the arbitration clause at a time when it is too late to invoke the latter. In short, the arbitration clause has

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(1) It is convenient here to mention that an arbitrator is sometimes called "commercial man" which means "a member of the London Maritime Arbitrators Association practising as a full time marine arbitrator".
See Pando Compania Naviera S.A. v. Filmo S.A.S. (1975)$_1$ Lloyd's Rep. 560; See also Serigo M. Carbone and Riccardo Luzzatto, Arbitration and Carriage by Sea, published in Studies on the Revision of the Brussels Convention on Bill of Lading, Genoa, 1974, p.365.

(2) (1964)$_2$ Lloyd's Rep. 527, at p.5.

deprived the owner of the goods of a right to enforce the contract which, though not of course positively conferred by the Hague Rules, existed under that code. I think that there is considerable force in that argument. But it tends to confirm me in my view of the proper construction of 'suit is brought' as envisage and including the initiation of arbitration: for otherwise (the argument suggests) the Carriage of Goods by Sea Act, 1924, would at the least severly hamper the introduction of enforceable arbitration clauses in a field in which those concerned regard them as desirable".

It must be borne in mind, however, that any clause calling for arbitration in less than 12 months would be invalid under the Hague Rules, because it is in conflict with art 3(6) which provides a year's delay for suit.(1)

This was made clear in The Ion(2) where the bill of lading stated: "Any claim must be made in writing and Claimant's Arbitrator appointed within three months of 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 art 3(6) of the Hague Rules. Another case of interest was that of Denny Motte and Dickinson Ltd. v. Lynn Shipping Co.,(3) in which the bill of lading stated:

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(1) See Sergio and Luzzatto, op.cit., p.367; See also F.J.J. Cadwallader, Incorporating Charterparty Clauses into Bills of Lading, published in the Speaker's papers for the Bill of Lading Convention's Conference which was organized by Lloyd's of London Press, 1978, p.8. (hereinafter cited as, Cadwallader, Charterparty clauses).

(2) $(1971)_1$ Lloyd's Rep. 51.

(3) $(1963)_1$ Lloyd's Rep. 339.

"All claims must be made in writing and the Claimant's Arbitrator must be appointed within twelve months of the date of final discharge otherwise the claim shall be deemed waived and absolutely barred". It was held that the arbitration clause was valid, because the carrier's rights and immunities under the Hague Rules were unchanged.

In this respect it is also necessary to point out that the arbitration clause, like any clause, should only be valid against parties to the contract in which the clause is to be found.

In The Phonizen[1] a voyage, charterparty contained an arbitration clause. Bills of lading issued to the charterer, stated that "freight should be payable, as per Charter Party, and; All the terms, conditions, liberties, and exceptions of the Charter Party are herewith incorporated". It was held that the arbitration clause did not apply to subsequent bill of lading holder. McNair J. said "..... Court could not accept defendant's submission that, where the charterer was also the shipper, the wide words of incorporation used in this case were apt to incorporate into the bill of lading the arbitration clause even in respect of a dispute between the shipowner and a subsequent holders of the bill of lading".

In the United States, the situation seems to be different on this point. In Son Shipping Co. v. De Foss and Tanghe,[2] it was held that where an arbitration clause was incorporated in a

(1) (1966)$_1$ Lloyd's Rep. 150.

(2) (1952) A.M.C. 1903; See also David M. Sasson, Liability for the International Carriage of Goods by Sea, Land, and Air, Some Comparison (1971)$_3$ JMLC, p.796.

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.

Finally, it is to be noted that the one-year time limit could be extended by express agreement of the parties.(1)

In the "Clifford Marsh",(2) 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 were 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. The defendants granted him an extension up to and including April, 21st, 1981.

It was held that there could be no doubt that the cargo owners would have issued the writ within the period of one year after the delivery of the goods if the defendants had not agreed to extend the limitation period. It was also held that where there was an extension "up to and including April, 21st, 1981" which was a Sunday then suit on the following Monday was timely.

Another case of interest here was that of United Fruit v. Folger,(3) where it was held that after timely presentation of a claim for cargo damage, the one-year time limit , may be waived by the carrier, however, where an extension of only 60

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(1) Article 3(6) third paragraph of the U.K. Carriage of Goods by Sea Act 1971 provides:
"Subject to paragraph 6 bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen".

(2) (1982)$_2$ Lloyd's Rep. 251.

(3) (1959) A.M.C. 224.

days has been agreed to, a suit must be brought within the additional 60 day period.

The same principles as to the waiver of the one-year delay for suit applies when a charterer is involved.(1) In the "Italian",(2) the shipowner chartered his vessel to E. Line. Under the terms of charter defendant was entitled to be indemnified by the charterer against cargo claims arising during use of ship under charter. Cargo was discharged at Piraeus, on September 19th, 1964. On September 3rd, 1965, plaintiffs gave defendant (the shipowner) notice of claim for short delivery and damage and asked for extension of time for six months. On September 14th, 1965, at plaintiffs request, the charterer extended time limit of one year under Hague Rules to two years. Motion was made by the defendant shipowner to set aside the writ on the ground that the delay for suit which had been extended by the time charterers had been exceeded. This motion was dismissed by the Court. Mr. Justice Brandon said(3) in the cited case:

"It is not an accident that the defendant referred the plaintiffs to the time charterers in the way he did in the letter which I have read. The reason is that under the terms of the time charter-party the defendant is entitled to be indemnified, in most cases, at any rate, against cargoowners, claims arising during the use of the ship under the charter-party, and the result of that is that, if the claim is a good one, the burden of it will ultimately fall upon the time charterers even though at first

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(1) See Tetley, Marine, p.342.

(2) $(1969)_1$ Lloyd's Rep. 11.

(3) Ibid, p.16.

it will fall upon the defendant. In those circumstances it is perfectly reasonable for the defendant to say to a claimant; 'You go and deal with the person who will ultimately pay', and that, it seems to me, is what happened in this case. Following that, the person who ultimately has to pay grants a succession of extension to the plaintiffs and then later, when the plaintiffs, because they have, from a legal point of view, to sue the defendant, he turns round and says; 'Although the extensions were granted by the people to whom I told you to present your claim, you are not claiming on me'. I am bound to say that I do not regard that sort of conduct as commercially attractive. I do not think that any Court, in exercising its discretion in a matter like this, can overlook the commercial realities of the matter".

It is worthy of note here that in the United States, negotiations between the carrier and the claimant are considered to waive the one-year time limit.

In Buxton v. Rederi[1] suit was held valid although brought after the one year time limit, as active negotiation had been conducted and the suit was promptly taken after the claim had been finally rejected by the carrier.

In Iraq:

The time bar in Iraq defined by the Iraqi Maritime Law as follows:

1) The time limit for the claimant to bring suit for apparent loss or damage is 31 days after the receiving of the notice of loss or damage, in cases where no notice has been made, it would

(1) (1939) A.M.C. 815.

be after the date of the removal of the goods.(1)

2) The time limit for the claimant to bring suit for undelivered goods is one year after the day on which the goods should have been delivered.(2)

It is very difficult to me to understand the reason behind this big difference between these two claims in respect of the period of limitation.

Under the Visby Rules.

The sub-committee of the CMI discussed the following points:(3)

1) the time limit for wrong delivery;
2) the time for recourse action; and
3) protection of the time limit.

On the first point it proposed to add to the fourth paragraph of article 3(6) the underlined words so as to read as follows:(4)

"In any event the carrier and the ship 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; provided that in the event of delivery of the goods to a person not entitled to them the above period of one year shall be extended to two years from the date of the bill of lading".

The CMI Stockholm Conference in 1963 did not approve this proposal.

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(1) See article 282 of the Iraqi Maritime Law.

(2) See article 278 of the Iraqi Maritime Law; See also the decision of the Iraqi Court of Cassation No.: 234 dated 18th December, 1977.

(3) See Mankabady, The Brussels Convention, p.188.

(4) See CMI- Stockholm Conference, 1963, p.78.

On the second point, the time limit for recourse action, the CMI Stockholm Conference in 1963 adopted the following text,(1) and is now found in article 3(6) bis of the 1968 Protocol:

"An action for indemnity against a third person may be brought even after the 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".

On the third point, the protection of the time limit, the CMI - Stockholm Conference in 1936 adopted the following text,(2) and is now found in article 1(2) of the 1968 Protocol:

"Subject to paragraph 6 bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen".

From the foregoing it can be seen that the Visby Rules brought some important amendments to Article 3(6) of the Hague Rules. These amendments are:

1) The word "whatsoever" has been added to article 3(6) sub-para. 4. Presumably the reason is that the parties to the 1968 Protocol intended to apply the one-year time limit to cases of devations, delivery of goods without production of bills of lading and wilful

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(1) See CMI-Stockholm Conference, 1963, p.549.

(2) Ibid, p.547.

recklessness.(1)

If the interpretation suggested above is confirmed, this will be of considerable benefit to carriers interests.

In their comment on the term "whatsoever", Sassoon and Cunningham 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".(2)

However, it is believed by this writer that the word "whatsoever" is not clear enough to remove the controversy as to whether the one-year time limit covers the fundamental breach of the contract or not.

2) The New Rules used the phrase "in respect of the goods" to described the connection between the loss or damage and the goods. But, as Mustill pointed out,(3) the English Courts have interpreted the words "loss or damage" in such a wide sense that the alteration has made little or no difference to the legal position.(4)

3) Article 3(6) third sub-paragraph of the New Rules provides that the parties may extend the period of the one year time limit after the cause of action has arisen. However, this sub-paragraph does not affect the position under the British Hague Rules Agreement 1977 (Gold Clause Agreement), which extends the delay

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(1) See etley, Marine, p.346; See also Richardson, op.cit., p.4.

(2) See Sassoon and Cunningham, op.cit., p.175; See also John Kooyman, Cargo Claims recoversies, published in the Hague-Visby Rules and the Carriage of Goods by Sea Act, 1971, A one-day semin r organised by Lloyd's of London Press Ltd., 1978, p.4.

(3) See Mustill, op.cit., pp.706-707.

(4) Adamstons Shipping Co. v. Anglo-Saxon Petroleum Co. (1959) A.C. 133; See also Rento v. Palmyra (1957) A.C. 149.

to bring suit to two years.(1)

4) Article 3(6) bis of the Visby Rules, which is entirely new, provides that the one-year time limit shall not apply to an action for indemnity against a third person. This action can be brought within anytime 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". For example in England, the time limit for bringing actions in relation to the carriage of goods by sea is six years, so the claimant has the right to bring his action within the six-year period.(2)

The point which may give rise to different interpretation under this article; is the phrase "has settled the claim". Does it refer to the agreement which has to settle the dispute or to the time when the lclaimant has actually paid the money? It is believed by this writer that the term settlement, refers to the time when an agreement has been reached to settle the dispute.(3)

Before turning to deal with the limitation of actions under the Hamburg Rules, it is worthwhile to mention that Visby Rules extended the one-year time limit to be applied to servants or agents of the carrier.

Article 4 bis (2) of the Visby Rules provides:

"If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor),

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(1) See Mustill, op.cit., p.707; See also Brich Reynardson, op.cit., p.4.

(2) See Maskell, op.cit., p.5.

(3) See Tetley, Marine, p.346; Contrast Maskell, op.cit., p.5.

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".

Under the Hamburg Rules.

Like the Hague Rules the Hamburg Rules contain a "statute of limitations" on suits against the carrier. There was extensive and heated debate in the drafting of the New Rules about whether the time limit should be one year or two years. U.S., U.S.S.R., Japan, France, Poland, Belgium, Brazil, Argentina, and U.K. favoured the one-year time bar, while Australia, Nigeria, Singapore, Norway, India and Hungary favoured the two-year time bar.

Accordinly the entire topic was referred to the Drafting Party.(1) The Drafting Party reheard all of the foregoing arguments and prepared the following provision:

"1. The carrier shall be discharged from all liability whatsoever relating to carrier under this Convention unless legal or arbitral proceedings are initiated within (one year) (two years).

a) in the case of partial loss of or damage to the goods, or delay from the last day on which the carrier has delivered any of the goods covered by the contract.

b) in all other cases, from the (ninetieth.) day after the time the carrier has taken over the goods, or if he has not done so, the time the contract was made.

2. The day on which the period of limitation begins to run shall

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(1) See Sweeney, The Unictral Draft Convention on Carriage of Goods by Sea (1975), JMLC, p.327, at p.348.

not be included in the period.

3. The period of limitation may be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen. The declaration or agreement shall be in writing.

4. An action for indemnity against a third person may be brought even after the expiration of the period of limitation 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 not be less than (ninety days) 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".

In the result an important change had been made by extended the period to two years.

Article 20(1) of the Hamburg Rules provides:

"Any action relating to carriage of goods under this Convention is time-barred[1] if judicial or arbitral proceedings have not been instituted within a period of two years".

Undoubtedly, the extention of the time limit from one year to two years brings a great advantage to shippers because, this extension gives the claimant an additional time to decide whether or not to sue the carrier.[2] However, it seems to me that the observation of Tetley[3] in respect of the extension of the time limit is of particular interest. He said:

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(1) It is worthy of note that the Norwegian proposal for a new terminology to substitute "ist time-barred" for "shall be discharged from all liability" was accepted after a lenghty debate. See Sweeney, part V, p.191.

(2) See Honour, op.cit., p.248; See also Diamond, The Division of liability as between ship and cargo, p.51.

(3) See Tetley, The Hamburg Rules - A commentary, p.14.

"Is the extra year really necessary? Does it not cause shippers to prolong bringing claims? It would have been better to have a provision along the lines of the British Hague Rules Agreement 1977 whereby the delay had to be extended for an additional year if a claim was filed within the year".

It has been clear from the above paragraph that the arbitration is also covered by the word "suit". This is, in my opinion, logical since the Hamburg Rules in article 22(1) allow arbitration as a means for settling disputes.(2) It is to be noted that article 20(1) covers actions instituted by the carriers as well as by the cargo interests, because the phrase "any action relating to carriages of goods" clearly refers to actions instituted by the carrier against shipper in respect of freight or damage results from dangerous cargo.(3) On the other hand, this phrase covers all actions against the carrier relating to carriage of goods whether they are based on contract, tort or otherwise.(4)

As for general average, article 24(2)(5) of the Hamburg Rules expressly provides that the provisions relating to the time bar in

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(1) Article 22(1) of the Hamburg Rules provides:
"Subject to the provisions of this article, parties may provide by agreemetn evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration".

(2) See Mankabady, Comments on the Hamburg Rules, p.97; See also Tetley, The Hamburg Rules - Good, Bad and Indifferent, published in the Speaker's Papers for the Bill of Lading Conventions Conference, organized by Lloyd's of London Press, 1978, p.4. (hereinafter cited as Tetley, The Hamburg Rules, good and bad).

(3) See Thomas, op.cit., p.8; See also Sweeney, part V, p.191.

(4) 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 delay in delivery whether the action is found in contract, in tort or otherwise".

(5) See article 24(2) of the Hamburg Rules.

article 20 do not apply to claims in general average.

There is also a special provision as in the Hague-Visby Rules allowing additional time for recourse actions beyond the limitation period.

Article 20(5) of the Hamburg Rules provides:
"An action for indemnity by a person held liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraph is 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 limitation period also applies to servent or agent of the carrier if he proves that he acted within the scope of his employment.(1)

Article 8(1)(2) of the Hamburg Rules made it quite clear that the time limit will still be applicable in case the loss, damage or delay in delivery resulted from an intentional or a reckless act. The only sanction, in this case, is that the carrier loses the benefit of liability provided for in article 6 of the Hamburg Rules.

Finally, it should be mentioned that the time limit can be extended by the defendant by a declaration in writing to the claimant. 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

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(1) See article 7(2) of the Hamburg Rules.

(2) See article 8(1) of the Hamburg Rules.

in writing to the claimant. This period may be further extended by another declaration or declarations".

SECTION THREE

Jurisdiction Clause

Many bills of lading contain clauses which order that suit, if taken, must be brought in a particular country or before a particular court, but these clauses do not determine which laws shall apply to the dispute. Some light, therefore, will be thrown on the jurisdiction clause from the following aspects:

1. Under the Hague Rules.
2. Under the Visby Rules.
3. Under the Hamburg Rules.

Under the Hague Rules.

It is to be noted that the Hague Rules contain no provisions explicitly regulating the jurisdiction clauses, nor do they contain any guidance as to the validity of such clauses. Therefore, considerable divergencies and serious difficulties emerged among the various legislations in regard to recognition of the validity of these clauses.(1)

The Australian Carriage of Goods by Sea Act, 1924, holds null and void and of no effect, any clause purporting to oust or lessen the jurisdiction of the courts of Australia or of a state

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(1) See Sergio M. Carbone and Fausto Pocar, Conflicts of jurisdiction and Carriage by Sea, published in Studies on the Revision of the Brussels Convention on Bills of Lading, edited Francesco Berlingieu, Genoa, 1974, p.321; See also Beare, op.cit., p.5.

in Australia.(1)

Whereas the Canadian Act 1936 contains no prohibition against jurisdiction clauses, and this indicates that such clauses are not contrary to this Act.(2)

However, most bills of lading contain jurisdiction clauses which take different forms to suit the carrier's interests.(3)

It must, however, be said that, if the effect of the jurisdiction clause is to transfer the dispute to a country which has neither adopted nor incorporated the Hague Rules, the clause may be considered null and void, because it is contrary to article 3(8) of the Hague Rules.(4)

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(1) Section 9 of the Australian Carriage of Goods by Sea Act provides:
"(1) All parties to any bill of lading or document relating to the Carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a state in respect of the bill of lading or document, shall be illegal, null and void, and of no effect".
(2) Any stipulation or agreement whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a state in respect of any bill of lading or document relating to the Carriage of goods from any place outside Australia shall be illegal, null and void, and of no effect".

(2) See Tetley, Marine, p.390.

(3) In The Eleftheria (1969), Lloyd's Rep. 237, for instance, the bill of lading contains the following form:
"Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein".

(4) See The "Morviken" (1983) 1. p.1. It is convenient here to mention that the principal argument against the validity of the jurisdiction clause is that the jurisdiction clause has the effect of lessening the carrier's liability, and is therefore null and void. See Sweeney, part I, p.94; See also Carbone and Luggato, op.cit., p.365.

In Indussa Corp. v. SS. Ranborg, after referring to article 3(8) of the American Cogsa, Circuit Judge Friendly said:(1)

"We think that Congress meant to invalidate any contractual provision in a bill of lading for a shipment to or from the United States that would prevent cargo able to obtain jurisdiction over a carrier in an American court from having that court entertain the suit and apply the sunstantive rules Congress had prescribed".

In this connection reference, can also be made to the Northern Assurance Co.Ltd. v. Caspain Career(2) case in which 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.

It is submitted, nevertheless, that in order to honour the jurisdiction clause, it should be clear and precise.

In Dundee Ltd. v. Gilman & Co. (Australia) Pty.Ltd.,(3) it was held that the decision that 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. However, the basic principle in accepting or refusing jurisdiction is that it will be "reasonable" for the parties to litigate in the jurisdiction.(4) Whether a jurisdiction clause is reasonable or not is a question of fact for the court which must be decided in the light of all the circumstances of the case. For example, in

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(1) $(1967)_2$ Lloyd's Rep. 101 at p.105.

(2) (1977) A.M.C. 421.

(3) $(1968)_2$ Lloyd's Rep. 394

(4) See Tetley, Marine, 396; See also Carbone and Pocar, op.cit., p.321.

Nieto v. SS. Tinnum,[1] cargo was shipped from Mexico to Cuba on a West German vessel, and the suit was instituted in New York. The bill of lading contains a jurisdiction clause provides that all disputes should be decided according to the German law in Hamburg. It was held that the clause was reasonable because:

1) No factor connected the dispute with the United States.

2) The parties agreed to German law in Hamburg.

3) There was no allegation that Hamburg would not provide a fair hearing.

4) There was no conclusive proof that Hamburg would be more expensive than New York.

In Great Britain[2] the courts normally recognize the jurisdiction clause, if this clause seems convenient and reasonable.[3]

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(1) (1958)A.M.C. 2555.

(2) A choice of forum clause first came before an English Court in 1796. This was the case of Gienar v. Meyer (1796)$_2$ H. Bl.603. It was a seaman's action for his wages. The defence was that the seaman had agreed to be bound by the adjudication of the courts of Holland.
Both parties were Dutch and the agreement had been made in Holland. The court upheld the defence and decided that it was more reasonable to send the parties to their own country to pursue the remedy.
Quoted from Stephen M. Denning,Choice of Forum clauses in Bills of Lading (1970)$_2$ JMLC. p.17.
It is worthy of note, that, according to the administration of Justice Act, 1956, the High Court of Justice has Admiralty jurisdiction over "any claim for loss of or damage to goods carried in a ship" and over "any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship". See Adminstration of Justice Act, 1965, S.I.(g)(h).

(3) For more details as to the jurisdiction clauses under the English law, see Cowen and Da Costa, The Contractual Forum: Situation in England and the British Commonwealth (1964) 13 A.J.C.L., p.179; See also A. Johnson, The efficacy of choice of jurisdiction clauses in international contracts in England and Australian law (1970) 19 I.C.L.Q. p.541; See also Stephen M. Denning, op.cit., p.17.

Thus, in Maharani Woollen Mills Co. v. Anchor Line[1] goods were shipped from Liverpool to Bombay. The consignees had complained of the condition of the goods on arrival and had been paid by the underwriters. 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 action in Bombay, the underwriters brought action in England. It was held that the jurisdiction clause which provides that the action must be brought at Bombay's Courts is not in conflict with art 3(8) of the Hague Rules, since it in no way diminishes the liability of the carrier. Scrutton L.J. said, in this case, that:

"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".

Another case worthy of mention was that of the Eleftheria (Supra), which concerned cargo shipped from Greece to Great Britain. The bill of lading provided for the application of the Hague Rules as enacted in the country of shipment, and also contained a clause that any dispute shall be decided in the country where the carrier has his principal place of business. It was held that the dispute should be decided by Greek Court, under the Greek Law. Mr. Justice Brandon said[2] in the cited case:

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(1) (1927) 29 Ll.L. Rep. 169; See also The Fehmarn (1957)$_1$ W.L.R. 815.

(2) (1969)$_1$ Lloyd's Rep. 237 at p.242.

"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 defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction; is not bound to grant a study but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plantiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise may be properly regarded: (a) In what country the evidence to the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trail as between the English and foreign courts: (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects: (c) With what country either party is connected, and how closely; (d) Whether the defendants geneuinely desire trail in the foreign country, or are only seeking procedural advantages; (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 to enforce any judegement obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trail".

It is to be noted that, Mr. Justice Brandon in his speech made it quite clear that the burden of proving the reasonableness of the

jurisdiction clause is on the plaintiff. This was also made clear in The "Makefjell",[1] which came before the Court of Appeal, and arose out of the loss in a shipment of cases of frozen bakery products which had been shipped from Toronto to London, the bill of lading provided that:

".... any claim against the carrier ..... shall be decided at the principal place of business of the carrier and in accordance with the law of that place.....". The principal place of the carrier's business was located in Oslo, but the plaintiffs brought the action in England. The defendants objected on the grounds that the bill of lading provided that claims should be decided in Oslo. It was held that the action should be decided by the Norwegian Courts in accordance with the Norwegian law, because the plaintiffs had failed to show sufficiently strong reason why they should not be held to their contract.

In the United States, the situation to be slightly different on this point. As was pointed out by Carbone and Pocar,[2] the ".... American legislation shows a traditional reluctance to recognizing the efficacy of clauses that in some way might prove biased in favour of the party to the contract who enjoys greater bargaining powers. The approach to the problem, however, is not that of refusing recognition of the freedom of the parties to a contract of carriage of goods by sea to designate a forum abroad (as that which is exclusively competent in the settlement of disputes) in derogation of American jurisdiction. It is instead a matter of ensuring that there effectively existed mutual willingness of the

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(1) $(1976)_2$ Lloyd's Rep. 29.

(2) See Carbone and Pocar, op.cit., p.327.

parties in regard to the point in question; and furthermore of ensuring that such decision did not result (at least usually) from unequal bargaining positions respectively of the shipper and of the carrier at the time when the contract is entered into; and, lastly, that the choice arrived at did not alter in favour of the carrier the rules which otherwise would have been compulsory applicable".

However, a study of some decisions of the American courts shows the path that has been followed by these courts to deal with this point.

In the past, the American courts rejected any type of jurisdiction clause contained in bills of lading, which deprived the American courts of their jurisdiction.(1)

Some years later, the American courts began to recognize the jurisdiction clauses whenever they were "reasonable".

Significant example of this trend is provided by the well-known case Muller v. Swedish American Lines Ltd.(2) which concerned cargo shipped on a Swedish ship from Sweden to Philadelphia to be delivered to American consignee. A clause in the bill of lading provided for the settlement of all disputes in Sweden, under Swedish law. It was held that courts should enforce a forum clause in an international contract unless it is unreasonable or prohibited by statute. The court pointed out that "..... if Congress had intended to invalidate such agreements, it would have done so in a forthright manner, as was done in the Canadian Act of 1910".

The court also pointed out that the burden of proving that the

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(1) See Wood and Salick Inc. v. Cpmpanie Generale Transatlantique, 43 F.2nd. 941, 942 (2d Cir. 1930). Quoted by Mankabady, Comments on the Hamburg Rules, p.101.

(2) (1955) A.M.C. 1687.

clause is unreasonable is on the plaintiffs, and since the plaintiff received contract consideration for the agreement to litigate all claims in the stipulated forum, "mere inconvenience or additional expense is not the test of unreasonableness. The plaintiff cannot prevail in derogation of the forum clause if the stipulated forum is available and render substantial justice to him".(1)

In Zapata Off-Shore Company v. The "Bremen" and Underweser Reederei G.M.B.H. (The "Charparral"),(2) the plaintiff American owners of the vessel "Chararral" entered into a towage contract with the defentdant German owners of the tug Bremen for the Chaparral to be towed from Venice, Louisiana, to Ravenna, Italy. The contract contained a jurisdiction clause which stated that any dispute arising under it must be litigated before the High Court of Justice in London. The plaintiffs commenced an action in the U.S. District Court against the defendents claiming damages. The defendants then brought an action against the plaintiffs in the High Court in London, claiming money due under the towage contract and damages for breach of contract. The plaintiffs contended that the High Court had not jurisdiction, but both the American and British Courts were held that the dispute should be decided by English court.

It is to be noted that the "reasonableness" test has been accepted by the majority of the courts which recently have considered forum clauses, and most of the legal scholars who have written on the problem because this test has these advantages:

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(1) Ibid, p.1687.

(2) $(1971)_2$ Lloyd's Rep. 348; $(1972)_2$ Lloyds Rep. 315.

"(1) it vitiates the legal fiction of ouster; (2) it reinforces the principle of party autonomy; and (3) it gives discretion to the trial judge who may weigh all the equities. Since the Muller test is basically one of discretion, there is always the danger of a buse, especially from jurists who which to assure to parties who reside within their jurisdiction an open court. On balance, however, the Muller test is sound, and it is difficult to imagine any court long rejecting a criterion which is universally referred to as the "reasonablesness" test".(1)

In Iraq

Article 37 of the Iraqi procedural law gives the plaintiff the option to institute his action in the courts of one of the following places:

1. The habitual residence of the defendant; or
2. The principle place of the defendant's business, or the place of any branch or agency through which the defendant runs his business; or
3. The place where the contract was made or executed; or
4. Any additional place designated for that purpose in the contract.

Under the Visby Rules.

It is to be noted that the jurisdiction problems remained unresolved under the Visby Rules because the delegations to CMI Stockholm Conference held in 1963, refused to recommend any provision on jurisdiction.(2)

Under the Hamburg Rules.

As had already been mentioned, the jurisdiction clause is not

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(1) See Zapata Off-Shore Company v. The Bremen and Unterweser Reederei G.M.B.H. (1971)$_2$ Lloyd's Rep. p.348; at p.351.

(2) See the Report of the CMI Stockholm Conference 1963, pp.152, 159; See also Mankabady, Comments on the Hamburg Rules, p.98.

directly regulated in the Hague Rules, and an extensive practice has grown up over the years for the question of jurisdiction of courts to be determined by a clause in the bill of lading.(1)

The third session of the Working Group of UNCITRAL was devoted to consider the jurisdiction clause problems. The Secretariat Report to this Session offered four basic approaches:(2)

1) No provision on jurisdiction, in accordance with the existing Rules;

2) A provision prohibiting all forum selection clauses;

3) A provision prohibiting those forum selection clauses which evidence abuse of economic power or the use of unfair means;

4) A provision specifying several alternative places before which a claim may be brought. This approach has been adopted by other international transport conventions, e.g. the Warsaw Convention, the road and rail Conventions, and the Passenger Luggage Convention.

Because of the adoption of the fourth approach, the Secretariat had prepared draft proposal A, as follows:(3)

"A. In legal proceeding arising out of the contract of carriage the plaintiff, at its option, may bring an action.

1. In a state within whose territory is situated:

a) the principal place of business of the carrier or the carrier's branch or agency through which the contract of carriage was made; or

b) the domicile or permanent place of residence of the plaintiff if the defendant has a place of bussiness in that State; or

c) the place where the goods were delivered to the carrier; or

d) the place designated for delivery totthe consignee; or

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(1) See Sweeney, Part 1, p.84.

(2) See UNCITRAL report on its third session, A/CN.9/63/Add.1. of 17th March, 1972 and A/CN.9/63 of 29th February, 1972.

(3) See Sweeney, part 1. p.95.

2. In a contracting state or place designated in the contract of carriage.

B. No legal proceedings arising out of the contract of carriage may be brought in place not specified in paragraph Above.

C. Notwithstanding the provisions of paragraph A and B above, an agreement made by the parties after a claim under the contract of carriage has arisen, which designates the place where the claimant may bring an action,shall be effective".

A substantial number of delegates were in favour of this proposal e.g. United Kingdom, France, Brazil, Chile, Egypt, Japan, Nigeria, Ghana, Belgium and Soviet Union.

The United States,(1) Australian, Argentian and some other delegates were against this proposal.

A few delegates suggested that this provision should appear in a seperate protocol because some countries would prefer to adopt the New convention without a provision on jurisdcition.(2)

After a long argument, the jurisdiction provision was adopted, and now incorporated in article 21 of the Hamburg Convention(3) which provides that the plaintiff, at his option, may bring an action in the courts of one of the following places: 1) the place of the carrier's business; 2) the place where the contract was made; 3) the port of loading; 4) the port of discharge; or 5) the agreed place in the contract.

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(1) United States also suggested that the word "Plaintiff" should be applicable only to shippers and consignees whenever there interests may appear. See UNCITRAL report on its third session A/CN.9/63 of 29th February, 1972, p.17.

(2) See Mankabady, Comments on the Hamburg Rules, p.104.

(3) See article 21 of the Hamburg Rules.

It is intended by the insertion of such a provision to prevent the carrier interest from imposing its choice of forum on the cargo interest.(1)

At the conclusion of the third session, preliminary consideration was given to the problem of arbitration clauses, but final decisions were not taken until the fourth session when article 22 of the Draft Convention was adopted.(2)

Paragraph 3 of article 22 of the Hamburg Rules provides that the plaintiff may institute arbitration proceedings in a state within whose territory is situated 1) the principal place of business of the defendant or, in the absence thereof, the ordinary residence of the defendant; or 2) the place where the contract was made, provided the defendant has there a place of business, branch or agency through which the contract was made; or 3) the port of loading or the port of discharge. It is then added that the plaintiff may institute arbitration proceedings in any other place designated in the arbitration clause or the agreement.

It is to be noted that these places, apart from the place of arrest, are identical with those where legal proceedings may be brought.(3)

Paragraph 4 of article 22 expressly provides that if there is an arbitration clause in the Bill of lading, the arbitrators must

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(1) However, the insertion of article 21 and 22 in the Hamburg Rules was justified by Shah as follows: "The thrust of article 21 and 22 in the Convention is basically to permit claimants to bring legal actions, including arbitration proceedings, in various Venues relevant to the contract of carriage". See Shah, op.cit., p.25; See also Jackson, op.cit., p.229.

(2) See Sweeney, part 1, p.102; See also BCarbone and Pocar, op.cit., p.351.

(3) See Jackson, op.cit., p.230.

apply the Hamburg Rules, otherwise the clause will be null and void.(1)

In this connection it is to be stressed that according to article 22(2), arbitration clauses in charterparties have no effect against a bill of lading holder unless the bill of lading contains a special provision.(2)

It should be mentioned that paragraph 1 of article 21 of the Hamburg Rules is open to some objection. One of the objections is that the place 'where the contract was made' and 'the port of loading' in fact are usually the same place because the bill of lading is normally issued at the port of loading, therefore (b) is not needed.(3)

Carbone and Luzzatto 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, on yet another ground. They said:(4)

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(1) This paragraph was debated extensively during the third session of the Working Group of UNCITRAL. Some delegates wished to preserve the right to have arbitration clauses which provided that the arbitrator could decide exaequo et bono without regard to law. But eventually the delegates agreed that even in arbitration the Hamburg Rules must be applied. See Thomas, op.cit., p.10.

(2) See Tetley, The Hamburg Rules, good and bad, p.4.

(3) See Mankabady, Comments on the Hamburg Rules, p.105.

(4) See Carbone and Luzzatto, op.cit., p.385.

"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 juridical 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.

It is clear then that to adopt a concept such as that of the place where the contract is made without giving a precise definition of it on a conventional basis means, in reality, to base oneself on a wholy indeterminate concept, likely to assume varying interpretation according to the viewpoint of the persons concerned, and therefore quite unsuitable as to the foundation of a uniform regulation". Another ambiguous phrase is the words "place of business, branch or agency" in paragraph (b) which may be open to very different interpretations.(1)

It is believed by this writer, however, that the insertion of the port of discharge in paragraph (c) of article 21, as an optional place for instituting the action, would improve the position of shippers, and particularly those from developing countries, because it is easier to the shipper, for many reasons, to institute the action in the port of discharge.

Paragraph 2 of article 21 in fact adds an entirely new location for submitting jurisdiction, that of the place where the

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(1) See Mankabady, Comments on the Hamburg Rules, p.105.

vessel has been arrested.[1] This paragraph also shows the elements of the arrest jurisdiction.

"First, it is confined to arrest in a contracting State. Secondly, the arrest must be valid according to the law of that State and international law. Thirdly, the arrest may be of the carrying vessel or any other vessel of the same ownership. Fourthly, the claimant must move the action - at his choice - to one of the other permitted jurisdictions at the petition of the defendant.

Finally, the defendant must lodge such security as the court at the place of arrest decides."[2]

In addition to the places mentioned in paragraphs (1) and (2) of article 21, an agreement can be made between the parties to the contract of carriage to institute the action in any other place.[3]

I am personally of the belief that, there is no need to paragraph 5 of article 21 because paragraph 1(d) already covers this point.

Finally, it must be mentioned that the New Rules require that a court exercising jurisdiction under article 21 must be competent according to its own law.[4]

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(1) Some delegations opposed the insertion of this paragraph because it might give rise to difficulties for states parties to the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships, 1952. But it was introduced according to the insistence of the United States and its supporters. See UNCITRAL Report on its third session, A/CN.9/63/Add.1 of 17th March, 1972, p.18.

(2) See Jackson, op.cit., p.234; See also Thomas, op.cit., p.9.

(3) Article 21(5) of the Hamburg Rules provides:
"Nothwithstanding the provisions of the preceding paragraph, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an action, is effective".

(4) See article 21(1) of the Hamburg Rules.

CONCLUSION

It is to be noted that the Hamburg Rules, in respect to notice of apparent loss, brought very little change to the Hague Rules. But the New Rules brought a substantial change by extending the Hague Rules delay of three days to 15 days in respect to hidden damage. It seems to me this period is sufficient to discover the non-apparent damage. However, the sanction for not giving notice at the specific time is still the same.

Article 20(1) of the Hamburg Rules extended the on-year time limit to two years, and this is in our opinion, another concession to cargo interests.

Finally, it should be mentioned that the absence of a provision on jurisdiction in the Hague Rules has not really caused any great confusion in the United Kingdom and America, because the courts in these countries have adopted practical criteria in accepting or refusing jurisdiction clauses.

However, the situation became better under the Hamburg Rules than it was under the Hague Rules, because under the New Rules the plaintiff has the right to bring his action in the courts of six different places.

FINAL CONCLUSION

It is to be noted that the amend ments brought by the Visby Rules in respect to the carrier's liability were very few and not very significant. They made some adjustment of the limit of liability in light of changes in monetary values and new transportation system, but otherwise only minor changes were made. Therefore the Hamburg Rules were intended to bring radical changes in the international maritime law.

A comparison between the three sets of rules as to the carrier's liability reveals that the Hamburg Rules (though they have not solved all the problems) have achieved better solutions than their predecessors because they are:

1) Governing all documents used in maritime transport.

2) Extending their scope to cover a large number of voyages.

3) Deserting the so-called "tackle to tackle" regime.

4) Expanding the operation of their provisions to cover the carriage of the live animals, which was excluded entirely from the operation of the Hague Rules.

5) Making the carrier liable for the physical damage as well as to non-physical damage caused through delay.

6) Replacing the list of the seventeen exceptions under the Hague Rules by four exceptions.

7) Adopting a more stable unit of account for limitation of liability, namely the SDR instead of gold.

8) Clarifying the meaning of the word "unit" by using the term "shipping unit".

9) Extending the three-day delay for notice of loss or damage to fifteen days in respect of unapparent damage.

10) Extending the one-year time limit for action of loss or damage to two years.

11) Giving the plaintiff the right to bring his action to the courts of six different places.

It is worthy of note that under the Hamburg Rules the undertaking of due diligence to provide a seaworthy ship has been replaced by the term "reason able measures" and it should be exercised at all times. This, in our opinion, is reasonable and realistic in a modern sea transport.

In respect to the other questions of the carrier's liability, the solutions adopted by the Hamburg Rules are almost identical with those set out in the two other sets, for instance, the liability of the carrier under the Hamburg Rules is still based on the principle of fault or neglect. As to the container question, the Hamburg Rules, like the Visby Rules, adopted a dual per kilo/ per package limitation and each object in the container would be considered as one package if those objects were listed on the bill of lading. But the Hamburg Rules have gone a bit further than the Visby Rules by stipulating that the container itself is considered as a package if it is supplied by the shipper. This is undoubtedly an advance over the Visby Rules. It must be mentioned that claims in tort against the carrier or his servants or agents, previously used as a means to get unlimited compensation by avoiding the rules are now subject to the Hamburg Rules.

The Hamburg Rules also make it clear that arbitration proceedings are equivalent to suit in respect to time bar.

We have already seen that the Hague Rules were the result of a compromise between the interests of the carriers and the shippers. But the balance created by that compromise is substantially changed in favour of the shipper under the Hamburg Rules.

However, the application of the Hamburg Rules, if enacted, would

cause considerable confusion at the initial stages in the decisions of the courts. This confusion comes from the fact that the present legal regime is based on the Hague Rules and by now has become nearly 60 years old. Subsequently, most of the problems of this regime have been settled through the decisions of the courts in different parts of the world. But, this point, in our opinion, does not constitute an obstacle to change the present regime if such change will eventually be in favour of sea transport.

APPENDIX I

INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW RELATING TO BILLS OF LADING, SIGNED AT BRUSSELS ON AUGUST 15, 1924.

ARTICLE I

In this convention the following words are employed, with the meanings set out below:

(a) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) "Contract of Carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such a bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) "Goods" includes goods, wares, merchandise and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) "Ship" means any vessel used for the carriage of goods by sea.

(e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

ARTICLE 2

Subject to the provisions of Article 6, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

ARTICLE 3

1. 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 cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. 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.

3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things -

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(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.

(c) The apparent order and condition of the goods.

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonsable means of checking.

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(a), (b) and (c).

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection.

In any event the carrier and the ship 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.

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.

7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article 3, shall for the purpose of this article be deemed to constitute a "shipped" bill of lading.

8. Any clause, covenent, 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 in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

ARTICLE 4

1. Neither the carrier not the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are

carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of article 3. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

2. 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 servants 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.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therfrom.

5. 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 that 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.

This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier not the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any

place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

ARTICLE 5

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under this convention, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper. The provisions of this convention shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty they shall comply with the terms of this convention. Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

ARTICLE 6

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 agreement in any terms to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of

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.

ARTICLE 7

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.

ARTICLE 8

The provisions of this convention shall not affect the rigths and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of seagoing vessels.

ARTICLE 9

The monetary units mentioned in this convention are to be taken to be gold value.

Those contracting states in which the pound sterling is not a monetary unit reserve to themselves the right of translating the sums indicated in this convention in terms of pound sterling into terms of their own monetary system in round figures.

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.

ARTICLE 10

The provisions of this convention shall apply to all bills of lading issued in any of the contracting States.

ARTICLE 11

After an interval of not more than two years from the day on which the convention is signed the Belgian Government shall place itself in communication with the Governments of the high contracting parties which have declared themselves prepared to

ratify the convention, with a view to deciding whether it shall be put into force. The ratifications shall be deposited at Brussels at a date to be fixed by agreement among the said Governments. The first deposit of ratifications shall be recorded in a proces-verbal signed by the representatives of the Powers which take part therin and by the Belgian Minister for Foreign Affairs.

The subsequent deposit of ratifications ahll be made by means of a written notification, addressed to the Belgian Government and accompanied by the instrument of ratification.

A duly certified copy of the proces-verbal relating to the first deposit of ratifications, of the notifications referred to in the previous paragraph, and also of the instruments of ratification accompanying them, shall be immediately sent by the Belgian Government through the diplomatic channel to the Powers who have signed this convention or who have acceded to it. In the cases contemplated in the preceding paragraph, the said Government shall inform them at the same time of the date on which it received the notification.

ARTICLE 12

Non-signatory States may accede to the present convention whether or not they have been represented at the International Conference at Brussels.

A state which desires to accede shall notify its intention in writing to the Belgian Government, forwarding to it the document of accession, which shall be deposited in the archives of the said Government.

The Belgian Government shall immediately forward to all States which have signed or acceded to the convention a duly certified copy of the notification and of the act of accession, mentioning the date on which it received the notification.

ARTICLE 13

The high contracting parties may at the time of signature, ratification or accession declare that their acceptance of the present convention does not include any or all of the self-governing dominions, or of the colonies, overseas possessions, protectorates or territories under their sovereignty or authority, and they may subsequently accede separately on behalf of any self-governing dominion, colony, overseas possession, protectorate or territory excluded in their declaration. They may also denounce the convention separately in accordance with its provisions in respect of any self-governing dominion, or any colony, overseas possession, protectorate or territory under their sovereignty or authority.

ARTICLE 14

The present convention shal take effect, in the case of the States which have taken part in the first deposit of ratifications, one year after the date of the protocol recording such deposit. As respects the States which ratify subsequently or which accede, and also in cases in which the convention is subsequently put into effect in accordance with Article 13, it shall take effect six months after the notifications specified in paragraph 2 of Article 11 and paragraph 2 of Article 12 have been received by the Belgian Government.

ARTICLE 15

In the event of one of the contracting States wishing to denounce the present convention, the denunciation shall be notified in writing to the Belgian Government, which shall immediately communicate a duly certified copy of the notification to all the other States, informing them of the date on which it was received.

The denunciation shall only operate in respect of the State which made the notification, and on the expiry of one year after the notification has reached the Belgian Government.

ARTICLE 16

Any one of the contracting States shall have the right to call for a fresh conference with a view to considering possible amendments.

A State which would exercise this right should notify its intention to the other States through the Belgian Government, which would make arrangements for convening the Conference.

APPENDIX II

"Protocol"
to amend
the International Convention
for the Unification
of Certain Rules of Law Relating to Bills of Lading"

Signed at Brussels, on 23rd February, 1968.

The Contracting Parties,

Considering that it is desirable to amend the International Convention for the Unification of certain rules of law relating to bills of lading, signed at Brussels on 25th August, 1924,

Have agreed as follows:

ARTICLE I

1. In Article 3, paragraph 4 shall be added:
"However, proof to the contrary shall not be admissible when the Bill of Lading has been transferred to a third party acting in good faith".

2. In Article 3, paragraph 6, sub-paragraph 3 shall be replaced by:
"Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen".

3. In Article 3, after paragraph 6 shall be added the following paragraph 6bis:
"An action for indemnity against a third person may be brought even after the 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".

ARTICLE 2

Article 4, paragraph 5 shall be deleted and replaced by the following:

"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.

b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.

The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

c) 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.

d) A franc means a unit consisting of 65.6 milligrammes of gold of millesimal fineness 900'. The date of conversion of the sum awarded into national currencies shall be governed by the law of the Court seized of the case.

e) Neither the carrier not the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

f) The declaration mentioned in sub-paragraph a) of this paragraph, if embodied in the bill of lading, shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

g) 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.

h) Neither the carrier not the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading".

ARTICLE 3

Between Articles 4 and 5 of the Convention shall be inserted the following Article 4bis:

"1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract of in tort.

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.

3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in this Convention.

4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this Article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result".

ARTICLE 4

Article 9 of the Convention shall be replaced by the following:

"This Convention shall not affect the provisions of any international Convention or national law governing liability for nuclear damage".

ARTICLE 5

Article 10 of the Convention shall be replaced by the following:

"The provisions of the 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 ississued 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 of 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 Conventnion 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".

ARTICLE 6

As between the Parties to this Protocol the Convention and the Protocol shall be read and interpreted together as one single instrument.

A Party to this Protocol shall have no duty to apply the provisions of this Protocol to Bills of Lading issued in a State which is a Party to the Convention but which is not a party to this Protocol.

ARTICLE 7

As between the Parties to this Protocol, denunciation by any of them of the Convention in accordance with article 15 thereof, shall not be construed in any way as a denunciation of the Convention as amended by this Protocol.

ARTICLE 8

Any dispute between two or more Contracting Parties concerning the interpretation or application of the Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

ARTICLE 9

1. Each Contracting Party may at the time of signature or ratification of this Protocol or accession thereto, declare that it does not consider itself bound by Article 8 of this Protocol. The other Contracting Parties shall not be bound by this Article with respect to any Contracting Party having made such a reservation.

2. Any Contracting Party having made a reservation in accordance with paragraph 1 may at any time withdraw this reservation by notification to the Belgian Government.

ARTICLE 10

This Protocol shall be open for signature by the States which have ratified the Convention or which have adhered thereto before the 23rd February, 1968, and by any State represented at the Twelfth session (1967-1968) of the Diplomatic Conference on Maritime Law.

ARTICLE 11.

1. This Protocol shall be ratified.

2. Ratification of this Protocol by any State which is not a party to the Convention shall have the effect of accession to the Convention.

3. The instruments of ratification shall be deposited with the Belgian Government.

ARTICLE 12

1. States, Members of the United Nations or Members of the specialized agencies of the United Nations, not represented at the twelfth session of the Diplomatic Conference on Maritime Law, may accede to this Protocol.

2. Accession to this Protocol shall have the effect of accession to the Convention.

3. The instruments of accession shall be deposited with the Belgian Government.

ARTICLE 13

1. This protocol shall come into force three months after the date of the deposit of ten instruments of ratification or accession, of which at least five shall have been deposited by States that have each a tonnage equal or superior to one million gross tons of tonnage.

2. For each State which ratifies this Protocol or accedes thereto after the date of deposit of the instrument of ratification or accession determining the coming into force such as is stipulated in S 1 of this Article, this Protocol shall come into force three months after the deposit of its instrument of ratification or accession.

ARTICLE 14

1. Any Contracting State may denounce this Protocol by notification to the Belgian Government.

2. This denunciation shall have the effect of denunciation of the Convention.

3. The denunciation shall take effect one year after the date on which the notification has been received by the Belgian Government.

ARTICLE 15

1. Any Contracting State may at the time of signature, ratification or accession,
or at any time thereafter declare by written notification to the Belgian Government which among the territoreies under its sovereignty or for whose international relations it is responsible, are those to which the present Protocol applies.

The Protocol shall three months after the date of the receipt of such notification by the Belgian Goernment extend to the territories named therein, but not before the date of the coming into force of the Protocol in respect of such State.

2. This extension also shall apply to the Convention if the latter is not yet applicable to those territories.

3. Any Contracting State which has made a declaration under 1 of this Article may at any time thereafter declare by notification given to the Belgian Government that the Protocol shall cease to extend to such territory. This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian Government; it also shall apply to the Convention.

ARTICLE 16

The Contracting Parties may give effect to this Protocol either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under this Protocol.

ARTICLE 17

The Belgian Government shall notify the States represented at the twelfth session (1967-1968) of the Diplomatic Conference on Maritime Law, the acceding States to this Protocol, and the State Parties to the Convention, of the following:

1. The signatures, ratifications and accessions received in accordance with Articles 10, 11 and 12.

2. The date on which the present Protocol will come into force in accordance with Article 13.

3. The notifications with regard to the territorial application in accordance with Article 15.

4. The denunciations received in accordance with Article 14.

In witness whereof the undersigned Plenipotentiaries, duly authorised, have signed this Protocol.

Done at Brussels, this 23rd day of February, 1968 in the French and English languages, both texts being equally authentic, in a single copy, which shall remain deposited in the archives of the Belgian Government, which shall issue certified copies".

APPENDIX III

UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS OF SEA , 1978.

Preamble.

THE STATES PARTIES TO THIS CONVENTION,

HAVING RECOGNIZED the desirability of determining by agreement certain rules relating to the carriage of goods by sea,

HAVE DECIDED to conclude a Convention for this purpose and have thereto agreed as follows:

PART I. GENERAL PROVISIONS

Article I. Definitions

In this Convention:

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 the 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.

3. "Shipper" means any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage of sea.

4. "Consignee" means the person entitled to take delivery of the goods.

5. "Goods" includes live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they

are packed, "goods" includes such article of transport or packaging if supplied by the shipper.

6. "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 purposes of this Convention only in so far as it relates to the carriage by sea.

7. "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 delivery the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

8. "Writing" includes, inter alia, telegram and telex.

Article 2. Scope of application

1. The provisions of this Convention are applicable to all contracts of carriage by sea between two different States, if:

(a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or

(b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or

(c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such is located in a Contracting State, or

(d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or

(e) the bill of lading or other document evidencing the contract of carriage by sea 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 this Convention are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.

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.

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 paragraph 3 of this article apply.

ARTICLE 3. INTERPRETATION OF THE CONVENTION

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.

PART II. LIABILITY OF THE CARRIER

Article 4. Period of responsibility

1. 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.

2. 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 from:

(i) the shipper, 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 port of loading, the goods must be handed over for shipment;

(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 carrier, by placing them 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; or

(iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.

3. In paragraphs 1 and 2 of this article, reference to the carrier or to the consignee means, in addition to the carrier or the consignee, the servants or agents, respectively of the carrier or the consignee.

Article 5. Basis of Liability

1. The carrier is liable for loss resulting from loss of of damage to the goods, as well as from delay in delivery, if the occurrance 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 occurance and its consequences.

2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea 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 carrier, having regard to the circumstances of the case.

3. The person entitled to make a claim for the loss of goods may treat the goods as lost if they have not been delivered as required by article 4 within 60 consecutive days following the expiry of time for delivery according to paragraph 2 of this article.

4. (a) The carrier is liable

(i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;

(ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents, in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.

(b) In case of fire on board the ship affecting the goods, if the claimant or the carrier so desires, a survey in accordance with shipping practices must be held into the cause and circumstances of the fire, and a copy of the surveyor's report shall be made available on demand to the carrier and the claimant.

5. With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the

circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.

6. The carrier is not liable, except in general average, where loss, damage,or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.

7. Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage,or delay in delivery the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.

Article 6. Limits of liability

1. (a) The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of acccount per package or other shipping unit of 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 is limited to 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 of goods by sea.

(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

2. 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 used 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 are deemed one shipping unit.

(b) In cases where the article of transport itself has been lost or damage, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.

3. Unit of account means the unit of account mentioned in article 26.

4. By agreement between the carrier and the shipper limits of liability exceeding those provided for in paragraph 1 may be fixed.

Article 7. Application to non-contractural claims

1. 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.

2. If such an action is brought against a servant or agent of the carrier, 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.

3. Except as provided in article 8, the aggregate of the amounts recoverable from the carrier and from any persons referrred to in paragraph 2 of this article shall not exceed the limits of liability provided for in this Convention.

Article 8. Loss of right to limit responsibility

1. The carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intentto cause such lossda mage or delay, or recklessly and with knowledge that such loss, damage of delay would propably result.

2. Notwithstanding the provisions of paragraph 2 of article 7, a servant or agent of the carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, 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.

Article 9. Deck Cargo

1. The carrier is entitled to carry the goods on deck 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.

2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier must insert in the bill of lading or other document evidencing the contract of ca carriage by sea a statement to that effect. In the absence of such a statement the carrier has the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier is not entitled to invoke such an agreement against a third party, including a consignee, who has acquired the bill of lading in good faith.

3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article or where the carrier may not under paragraph 2 of this article invoke an agreement for carriage on deck, the carrier, notwithstanding the provisions of paragraph 1 of article 5, is liable for loss of or damage to the goods, as well as for delay in delivery, resulting solely from the carriage on deck, and the extent of his liability is to be determined in accordance with the provisions of article 6 or article 8 of this Convention, as the case may be.

4. Carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of article 8.

Article 10. Liability of the carrier and actual carrier

1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liability under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is

responsible, inrrelation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.

2. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of paragraph 2 of article 8 apply if an action is brought against a servant or agent of the actual carrier.

3. Any special agreement under which the carrier assumes obligations not imposed by this Convention or waives rights conferred by this Convention affects the actual carrier only if agreed to by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement.

4. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.

5. The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability provided for in this Convention.

6. Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier.

Article 11. Through carriage

1. Notwithstanding the provisions of paragraph 1 of article 10, where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named person other than the carrier, the contract may also provide that the carrier is not liable for loss,

damage or delay in delivery caused by an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage. Nevertheless, any stipulation limiting or excluding such liability is without effect if no judicial proceedings can be instituted against the actual carrier in a court competent under paragraph 1 or 2 or article 21. The burden of providing that any loss, damage or delay in delivery has been caused by such an occurence rests upon the carrier.

2. The actual carrier is responsible in accordance with the provisions of paragraph 2 of article 10 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge.

PART III. LIABILITY OF THE SHIPPER

Article 12. General rule

The shipper is not liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor is any servant or agent of the shipper liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part.

Article 13. Special rules on dangerous goods

1. The shipper must mark or label in a suitable manner dangerous goods as dangerous.

2. Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper must inform him of the damgerous character of the goods, and, if necessary, of the precautions to be taken. If the shipper fails to do so and

such carrier or actual carrier does not otherwise have knowledge of their dangerous character:

(a) the shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and

(b) the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

3. The provisions of paragraph 2 of this article may not be invoked by any person if during the carriage he has taken the goods in his charge without knowledge of their dangerous character.

4. If, in cases where the provisions of paragraph 2, sub-paragraph (b) of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 5.

PART IV. TRANSPORT DOCUMENTS

Article 14. Issue of bill of lading

1. 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.

2. The bill of lading may be signed by a person having authority from the carrier. A bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.

3. The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by

any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.

Article 15. Contents of bill of lading

1. The bill of lading must include, inter alia, the following particulars:

(a) the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

(b) the apparent condition of the goods;

(c) the name and principal place of business of the carrier;

(d) the name of the shipper;

(e) the consignee if named by the shipper;

(f) the port of loading under the contract of carriage by sean and the date on which the goods were taken over by the carrier at the port of loading;

(g) the port of discharge under the contract of carriage by sea;

(h) the number of originals of the bill of lading, if more than one;

(i) the place of issuance of the bill of lading;

(j) the signature of the carrier or a person acting on his behalf;

(k) the freight to the extent payable by the consignee or other indication that freight is payable by him;

(l) the statement referred to in paragraph 3 of article 23;

(m) the statement, if applicable, that the goods shall or may be carried on deck;

(n) the date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties; and

(o) any increased limit or limits of liability where agreed in accordance with paragraph 4 of article 6.

2. After the goods have been loaded on board, if the shipper so demands, the carrier must issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under paragraph 1 of this article, must state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any such goods, on request of the carrier, the shipper must surrender such document in exchange for a "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading.

3. The absence in the bill of lading of one or more particulars referred to in this article does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in paragraph 7 of article 1.

Article 16. Bills of lading; reservations and evidentiary effect

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person must insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.

2. If the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition.

3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:

(a) the bill of lading is prima facie evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and

(b) proof to the contrary by the carrier is not admissable if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein.

4. A bill of lading which does not, as provided in paragraph 1, subparagraph (k) of article 15, set forth the freight or otherwise indicated that freight is payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, is prima facie evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier is not admissable when the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

Article 17. Guarantees by the shipper

1. The shipper is deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper must indemnify the carrier against the loss resulting from inaccuracies

in such particulars. The shipper remains liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity in no way limits his liability under the contract of carriage by sea to any person other than the shipper.

2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss resulting from the issuange of the bill of lading by the carrier, or by a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, is void and of no effect as against any third party, including a consignee, to whom the bill of lading has been transferred.

3. Such letter of guarantee or agreement is valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referrrec to in paragraph 2 of this article, intends to defraud a third party, including a consignee, who acts in reliance on the description of the goods in the bill of lading. In the latter case, if the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier has no right of indemnity from the shipper pursuant to paragraph 1 of this article.

4. In the case of intended fraud referred to in paragraph 3 of this article the carrier is liable, without the benefit of the limitation of liability provided for in this convention, for the loss incurred by a third party, including a consignee, because he has acted in reliance on the description of the goods in the bill of lading.

Article 18. Documents other than bills of lading

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.

PART V. CLAIMS AND ACTIONS

Article 19. Notice of loss, damage or delay

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 carrier 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 carrier of the goods as described in the document of transport or, if nos cuh document has been issued, in good condition.

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 15 consecutive days after the day when the goods were handed over to the consignee.

3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

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

5. No compensation shall be payable for loss resulting from delay in delivery unless a notice has been given in writing to the carrier within 60 consecutive days after the day when the

goods were handed over to the consignee.

6. If the goods have been delivered by an actual carrier, any notice given under this article to him shall have the same effect as if it had been given to the carrier, and any notice given to the carrier shall have effect as if given to such actual carrier.

7. Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the carrier or actual carrier to the shipper not 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 of article 4, whichever is later, the failure to give such notice is 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.

8. For the purpose of this article, notice given to a person 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 is deemed to have been given to the carrier, to the actual carrier or to the shipper, respectively.

Article 20. Limitation of actions

1. Any action relating to carriage of goods under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

2. The limitation period commences on the day on which the carrier has delivered the goods or part thereof or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered.

3. The day on which the limitation period commences is not included in the period.

4. 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.

5. An action for indemnity by a person held liable may be instituted even after the expiration of the limitation period provided for 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 served with process in the action against himself.

Article 21. Jurisdiction

1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within jurisdiction of which is situated one of the following places:

(a) the principal place of 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) any additional place designated for that purpose in the contract of carriage by sea.

2. (a) Notwithstanding the preceding provisions of this article, an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendent, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the

defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.

(b) all questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of arrest.

3. No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the Contracting State for provisional or protective measure.

4. (a) Where an action has been instituted in a court competent under paragraph 1 or 2 of this article or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgement is not enforceable in the country in which new proceedings are instituted.

(b) for the purpose of this article the institution of measures with a view to obtaining enforcement of a judgement is not considered as the starting of a new action;

(c) for the purpose of this article, the removal of an action to a different court within the same country, or to a court in another country, in accordance with paragraph 2(a) of this article, is not to be considered as the starting of a new action.

5. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an action, is effective.

article 22. Arbitration

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.

2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke

such provision as against a holder having acquired the bill of lading in good faith.

3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

(a) a place in a State within whose territory is situated;

(i) the principal place of business of the defendant or, in the absence thereof, the habitual residence o of the defendant; or

(ii) the place where the ontract was made, provided that the defendant has there a place of business branch or agency through which the contract was made; or

(iii) the port of loading or the port of discharge; or

(b) any place designated for that purpose in the arbitration clause or agreement.

4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

5. The provisions of paragraphs 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.

6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.

PART VI. SUPPLEMENTARY PROVISIONS

Article 23. Contractual stipulations

1. 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 in null and void to the extent that it derogates,

directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, is null and void.

2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention.

3. Where a bill of lading or any other document evidencing a contract of carriage by sea is issued, it must contain a statement that the carriage is subject to the provisions of this Convention which mullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.

4. 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 carrier 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 carrier 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 foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.

Article 24. General average

1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage by sea or national law

regarding the adjustment of general average.

2. With the exception of article 20, the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.

Article 25. Other conventions

1. This Convention does not modify the rights or duties of the carrier, the actual carrier and their servants and agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.

2. The provisions of articles 21 and 22 of this Convention do not prevent the application of the mandatory provisions of any other multilateral convention already in force at the date of this Convention relating to matters dealt with in the said articles, provided that the dispute arises exclusively between parties having their principal place of business in States members of such other convention. However, this paragraph does not affect the application of paragraph 4 of article 22 of this Convention.

3. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) under either the Paris Convention of 29th July, 1960 on Third Part Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage; or

(b) by virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

4. No liability shall arise under the provisions of this Convention for any loss of or damage to or delay in delivery of luggage for which the carrier is responsible under any international convention or national law relating to the carriage of passengers and their luggage by sea.

5. Nothing contained in this Convention prevents a Contracting State from applying any other international convention which is already in force at the date of this Convention and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than transport by sea. This provision also applies to any subsequent revision or amendment of such international convention.

Article 26. Unit of account

1. The unit of account referred to in article 6 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 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. The values of a national currency, in terms of the Special Drawing Right of a Contracting State which is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency in terms of the Special Drawing Right of a Contracting State which is not a member of the International Monetary Fund is to be calculated in a manner determined by that State.

2. Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, or at the time of ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as: 12,500 monetary units per package or other shipping unit or 375 monetary units per kilogramme of gross weight of the goods.

3. The monetary unit referred to in paragraph 2 of this article corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amonts referred to in paragraph 2 into the national currency is to be made according to the law of the State concerned.

4. The calculation mentioned in the last sentence of paragraph 1 and the conversion mentioned in paragraph 3 of this article is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for the amounts in article 6 as is expressed there in units of account. Contracting States must communicate to the depositary the manner of calculation pursuant to paragraph 1 of this article, or the result of the conversion mention in paragraph 3 of this article, as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this article and whenever there is a change in the manner of such calculation or in the result of such conversion.

PART VII. FINAL CLAUSES

Article 27. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 28. Signature, retification, acceptance, approval, accession.

1. This Convention is open for signature by all States until 30th April, 1979 at the Headquarters of the United Nations, New York.

2. This Convention is subject to ratification, acceptance, or approval by the signatory States.

3. After 30th April, 1979, this Convention will be open for accession by all States which are not signatory States.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 29. Reservations

No reservations may be made to this Convention.

Article 30. Entry into force

1. This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the 20th instrument of ratification, acceptance, approval or accession.

2. For each State which becomes a Contracting State to this Convention after the date of the deposit of the 20th instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the

appropriate instrument on behalf of that State.

3. Each Contracting State shall apply the provisions of this Convention to contracts of carriage by sea concluded on or after the date of the entry into force of this Convention in respect to that State.

Article 31. Denunciation of other conventions

1. Upon becoming a Contracting State to this Convention, any State party to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924 (1924 Convention) muse notify the Government of Belgium as the depositary of the 1924 Convention of its denunciation of the said Convention with a declaration tha the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

2. Upon the entry into force of this Convention under paragraph 1 of article 30, the depositary of this Convention must notify the Government of Belgium as the depositary of the 1924 Convention of the date of such entry into force, and of the names of the Contracting State in respect of which the Convention has entered into force.

3. The provisions of paragraphs 1 and 2 of this article apply correspondingly in respect of States parties to the Protocol signed on 23rd February 1968 to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924.

4. Nothwithstanding article 2 of this Convention, for the purposes of paragraph 1 of this article, a Contracting State may, if it deems it desirable, defer the denunciation of the 1924 Convention and of the 1924 Convention as modified by the 1968

Protocol for a maximum period of five years from the entry into force of this Convention. It will then notify the Government of Belgium of its intention. During this transitory period, it must apply to the Contracting States this Convention to the exclusion of any other one.

Article 32. Revision and amendment

1. At the request of not less than one-third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention, is deemed to apply to the Convention as amended.

Article 33. Revision of the limitation amounts and unit of account or monetary unit.

1. Notwithstanding the provisions of article 32, a conference only for the purpose of altering the amount specified in article 6 and paragraph 2 of article 26, or of substituting either or both of the units defined in paragraphs 1 and 3 of article 26 by other units is to be convened by the depositary in accordance with paragraph 2 of this Article. An alteration of the amounts shall be made only because of a significant change in their real value.

2. A revision conference is to be covened by the depositary when not less than one-fourth of the Contracting States so request.

3. Any decision by the conference must be taken by a two-thirds majority of the participating States. The amendment is communicated by the depositary to all the Contracting States for acceptance and to all the States signatories of the Convention for information.

4. Any amendemtn adopted enters into force on the first day of the month following one year after its acceptance by two-thirds of the Contracting States. Acceptance is to be effected by the deposit of a formal instrument to that effect with the depositary.

5. After entry into force of an amendment a Contracting State which has accepted the amendment is entitled to apply the Convention as amended in its relations with Contracting States which have not within six months after the adoption of the amendment notified the depositary that they are not bound by the amendment.

6. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention, is deemed to apply to the Convention as amended.

Article 34. Denunciation

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

Done at Hamburg, this thiry first day of March one thousand nine hundred and seventy-eight, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.

COMMON UNDERSTANDING ADOPTED BY THE UNITED NATIONS CONFERENCE ON THE CARRIAGE OF GOODS BY SEA.

It is the common understanding 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 or proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule.

BIBLIOGRAPHY

Agrawal, N.M. - History of the Merchant Shipping Act, a thesis for M.Phil degree London University, 1969.

Al-Sharkawi - The Maritime Law, Cairo, 1978.

Anton, A.E. - Private International Law, A treatise from the standpoint of Scots Law, Edinburgh, 1967.

Asser, T.M.C. - Choice of Law in Bills of Lading, 5, JMLC, 1974, p.388.

Astel, W.E. - Shipowners' Cargo Liabilities and Immunities, 3rd ed., London, 1967.

Bassindale, J. - Bills of Lading for goods on chartered vessels, a thesis for LL.M. degree, Birmingham University, 1976.

Bell - Commentaries on the Law of Scotland, 17th ed., Vol. 1, Edinburgh, 1870.

Bes, J. - Chartering and Shipping terms, Vol.1, 9th ed., London, 1975.

Bonelli, F. - 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, Genoa, 1974, p.169.

Bristow, L. - Gold Franc - Replac ement of Unit of Account, (1978)$_1$ LMCLQ, p.31.

Cadwallader, F.J.J. - Seaworthiness - An exercise of due diligence, published in the Speakers' papers for the Bill of Lading Conventions Conference A one-day seminar organized by Lloyd's of London Press Ltd, New York, November, 1978.

- Incorporating Charterparty Clauses, into Bills of Lading, published in the Speakers' papers for the Bill of Lading Conventions Conference, organized by Lloyd's of London Press Ltd, November, 1978.

Carbone, S.M. and Luzzatto, R. - Arbitration and Carriage by Sea, published in studies on the revision of the Brussels Convention on Bills of Lading, edited by Francesco Berlingieri, Genoa, 1974, p.365.

Carbone, S.M. and Pocar, F. - Conflicts of Jurisdiction and Carriage by Sea, published in studies on the revision of the Brussels Convention on the Bills of Lading, edited by Francesco Berlingieri, Genoa, 1974, p.321.

Carey, E. - Will the Hamburg Rules prove to be a lawyer's Bonanza - From the cargo plaintiffs point of view, published in the Speakers' papers for the Bill of Lading Conventions Conference, November, 1978.

Carver. - Carriage by Sea, 12th ed., Vol. 1, 2, London, 1982.

Chorley and Giles - Shipping Law, 7th ed., 1980.

Clarke, M.A. - Aspects of the Hague Rules, A comparative study in English and French Law, The Hague, 1976.

Cleton, R. - The special features arising from the Hamburg Diplomatic Conference, published in the Hamburg Rules, A one-day seminar organized by Lloyd's of London Press Ltd, September, 1978.

Cowen and Dacosta. - The contractual Forum: situation in England and the British Commonwealth (1964)$_{13}$ A.J.C.L., p.179.

Crump, J. - The influence of the Hamburg Rules on Average Adjustment, published in Hamburg Rules, A one-day seminar, September, 1978.

Crutcher, M.B. - The Ocean Bill of Lading - A study in Fossilization, (1971) 45 Tul. L.R., p.697.

Day, D.M. - The law of International Trade, London, 1981.

De Gurse, J.L. - The "Container Clause " in article 4(5) of the 1968 Protocol to the Hague Rules, 2 JMLC, 1970, p.131.

Denning, S.M. - Choice of Forum Clauses in Bills of Lading, 2 JMLC, 1970, p.17.

Diamond, A. - The Hague - Vsiby Rules, (1978)$_2$ LMCLQ, p.225.

Diamond, A. (Cont) - - A legal analysis of the Hamburg Rules, part 1, published in the Hamburg Rules, A one-day seminar, September, 1978.

- The division of liability as between ship and cargo (insofar as it affects cargo insurance) under the New Rules proposed by UNCITRAL(1977)$_1$ LMCLQ, p.39.

Donovan, J. - The position of the Maritime Law Association of the United States and the view from the United States, published in the Hamubrg Rules, A one-day seminar, September, 1978.

- Existing problems under the Hague Rules and the need for changes in U.S. legislation, published in the speakers' papers for the Bill of Lading Convention Conference, November, 1978.

Falih, A.B.A. - The statutory limitation of the maritime carrier's liability under the Hague Rules, Visby Rules and Hamburg Rules, a thesis for Ph.D degree, Glasgow University, 1980.

Finnie, A. - The search for uniformity and certainty in Carriage of Goods by Sea, a thesis for M.Phil, degree, Southampton University, 1972.

Gill, W.H. - The Law of Arbitration, 2nd ed., London, 1975.

Gilmore, G. and Black, C. - The Law of Admiralty, 2nd ed., New York, 1975.

Goldie, C.W.H. - Documentation - the writing on the Bill Articles 15 to 18 of the Hamburg Rules, published in the Hamburg Rules on the Carriage of Goods by Sea, edited by S. Mankabady, Leyden, 1978. p.218.

Gronfors, K. - - Why not Independent Contractors? 1964 J.B.L., p.25.

- Non-Contractual Claims under the Hamburg Rules, published in the Hamburg Rules, edited by S. Mankabady, Leyden, 1978, p.187.

- The concept of Delay in Transportation Law, 1974, E.T.L., p.400.

Haight, J. - The speakers' papers for the Bill of Lading Conference, organized by Lloyd's of London Press, November, 1978.

Honour, J.P. - 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 S. Mankabady, Leyden, 1978, p.239.

Ivamy, E.R.H. - Carriage of Goods by Sea, 11th ed., London, 1979.

Jackson, D.C. - The Hamburg Rules and Conflict of Law, published in the Hamburg Rules on the Carriage of Goods by Sea, edited by S. Mankabady, Leyden, 1978, p.221.

Johnson, A. - The efficacy of Choice of Jurisdiction Clauses in international contracts in England and Australian Law (1970) 19, I.C.L.Q., p.541.

Kee, J.W.K. - Liability for damage cuased to goods in transit by defective packaging, thesis for M. Phil., Southampton University, 1976.

Kimball, J.D. - Shipowner's Liability and the proposed Revision of the Hague Rules, 7 JMLC, 1975, p.217.

Kinght, H.G. - The Law of the Sea, Cases, Documents and Readings, parts, 1-3, Washington, 1976.

Kirkham, D.B. - The Common Law Liability of a public carrier by Sea (1976)$_1$ LMCLQ, p.282.

Kooyman, J. - Cargo claims recoveries, published in the Hague - Visby Rules and the Carriage of Goods by Sea Act 1971, A one-day seminar, organized by Lloyd's of London Press Ltd, 1978.

Kovats, L.J. - Who is to pay for the stevedor's negligence (1942)$_2$ LMCLQ, p.121.

Lillie, J.A. - The Mercantile Law of Scotland, 6th ed., Edinburgh, 1965.

McIntosh, D. - The Practice of Maritime Arbitration in London, recent developments in the law (1983)$_2$ LMCLQ, p.235.

Maki, I. - - Al-Wasit in the Kuwaitian Maritime Law, Vol.2, Kuwait, 1975.

- The Transportation System by Containers, 1st ed., Kuwait, 1975.

Mankabady, S. - - The Brussels Bills of Lading Convention: Deficiencies and suggested Reforms, a thesis for Ph.D. degree, London University, 1970.

- The limitation of the Carrier's Liability, Journal of Arab Maritime Transport Academy (Semi-Annual), Vol. 2, No. 2, January, 1977, p.31.

- Comments on the Hamburg Rules, published in the Hamburg Rules on the Carriage of Goods by Sea, edited by S. Mankabady, Leyden, 1978, p.27.

- Interpretation of the Hague Rules $(1974)_2$ LMCLQ, p.125.

Mann, A.E. - Summing up on how the Hamburg Rules are libkely to affect cargo underwriting, published in the Hamburg Rules, A one-day seminar, 1978.

McDoweel, C.E. - Containerization: Comments on Insurance and Liability, 3 JMLC, 1972, p.503.

McGilchrist, N.R. - Carriage by Air, Wilful Misconduct and the Warsaw Convention $(1977)_4$ LMCLQ, 539.

McMillan, A.R.G. - Scottish Maritime Practice, Edinburgh and Glasgow, 1926.

Moore, J.C. - The Hamburg Rules, 10 JMLC, 1978, p.1.

Mustill, M. - Carriage of Goods by Sea Act 1971, A.F.S., Vol. ii, issue 415, Oslo, 1972, p.684.

Peyrefitte, L. - The period of Maritime Transport, Comments on Article 4 of the Hamburg Rules, published in the Hamburg Rules, edited by S. Mankabady, Leyden, 1978, p.125.

Pollock, G. - A legal analysis of the Hamburg Rules, published in Hamburg Rules, A one-day seminar, 1978.

Pritchett, R.W. - The implied Warranty of Seaworthiness in time policies: The American View $(1983)_2$ LMCLQ, p.195.

Ramberg, J. - The Law of Carriage of Goods - Attempts at harmonization, 1974, E.T.L., p.20.

Reynardson, W.R.A.B. - The implication on Liability insurance of the Hamburg Rules, published in the Hamburg Rules, A one-day seminar, 1978

Richardson, J.W. - The Hague - Visby Rules - A carriers view, published in the Hague-Visby Rules, A one-day seminar, 1978.

Ridly, J. - The Carriage of Goods by Land, Sea and Air, 4th ed., London, 1975.

Righetti, G. - From radical revolution to questionable reformation (1977)$_1$ LMCLQ, p.192.

Salim, A.R. - The exception Clauses of Liability according to the Bills of Lading Convention, a thesis for Ph.D. degree, Cairo University, 1956.

Sassoon, D.M. - -Liability for the International Carriage of Goods by Sea, Land and Air: Some Comparisons, 3 JMLC, 1972, p. 759.

- British Shipping Laws, Vol. 5, London, 1975.

Sassoon D.M. and Cunningham, J.C. - Unjustifiable Deviation and the Hamburg Rules, published in the Hamburg Rules on the Carriage of Goods by Sea, edited by S. Mankabady, Leyden, 1978, p.167.

Scrutton - On Charterparties and Bills of Lading, 18th ed., London, 1974.

Selvig, E. - The Hamburg Rules, The Hague Rules and Marine Insurance Practice, 3 JMLC, 1981, p.299.

Shacher, Y. - - The Container Bill of Lading as a receipt, 10 JMLC, 1978, p.39.

- Containers in the Law of Carriage of Goods, a thesis for Ph.D. degree University of Oxford, 1976.

Shah, M.J. - The Revision of the Hague Rules on Bills of Lading within the UN System - Kee issues - published in Hamburg Rules on the Carriage of Goods by Sea, edited by S.Mankabady, Leyden, 1978, p.23.

Stair - The Institutions of the Law of Scotland, 4th ed., Edinburgh.

Stevensons, E.F. - Shipping Practices, London, 1979.

Sweeney, J.C. - - The UNCITRAL Draft Convention on Carriage of Goods by Sea, Parts, 1,2,3,4 and 5; 7 JMLC, 1975, p.69; 7 JMLC, 1976, p.327; 7 JMLC, 1976, p.487; 7 JMLC, 1976, p.615; 8 JMLC, 1976, p.167, respectively.

- Review of the Hamburg Conference, published in the speakers' papers for the Bill of Lading Conventions Conference, A One-day seminar, 1978.

Taha, M.K. - Principles of Maritime Law, Alexandria, 1974.

Temperley - Carriage of Goods by Sea Act, 1924, London, 1927.

Tetley, W. - - Marine Cargo Claims, 2nd ed., Toronto, 1978.

- The Hamburg Rules- A commentary (1979)$_1$ LMCLQ, p.1.

- Identity of the carrier, The Hague Rules, Visby Rules, UNCITRAL (1977)$_1$ LMCLQ, p.530.

- Articles 9 to 13 of the Hamburg Rules, published in the Hamburg Rules on the Carriage of Goods by Sea, edited by S. Mankabady, Leyden, 1978, p.197.

Tetley, W. (Cont) - - The Hamburg Rules - Good, Bad and Indifferent, published in the Speakers' papers for the Bill of Lading Conventions Conference, 1978.

Thomas, R.J.L. - A legal analysis of the Hamburg Rules, published in Hamburg Rules, A one-day seminar, 1978.

Villareal, D.R. - The concept of Due Diligence in Maritime Law $(1970)_2$ JMLC, p.763.

Walker, D.M. - - The Law of Civil Remedies in Scotland, Edinburgh, 1974.
- The Law of Delict in Scotland, 2nd, ed., Edinburgh, 1981.
- Principles of Scottish Private Law, 3rd ed., Oxford, 1983.
- The Law of Contracts and Related Obligations in Scotland, London, 1979.

Ward, L. - The SDR in Transport Liability Conventions, some clarification 1 JMLC, 1981, p.2.

Williams, B.K. - The consequences of the Hamburg Rules on Insurance, published in the Hamburg Rules on the Carriage of Goods by Sea, edited by S. Mankabady, Leyden, 1978, p.251.

Wilson, J.F. - Basic Carrier Liability and the Right of Limitation, published in The Hamburg Rules on the Carriage of Goods by Sea, edited by S. Mankabady, Leyden, 1978, p.137.

Reports and Documents

Conference Diplomatique de Droit Maritime, Deuzieme Session (1e Phase), Bruxelles, 1967.

Conference Diplomatique de Droit Maritime, Deuzieme Session , (2e Phase), Bruxelles, 1968.

U.N. Conference on the Carriage of Goods by Sea, Hamburg (A/Conf. 89/13, 30 March 1978).

U.N. Doc. Series A/CN.9/Numbers 63, 74,76,88,96 and 105.

UNCTAD Secretarial Report on Bill of Lading, dated 14 December, 1970, (TD/B/C.4/ISL/6).

UNCTAD Report (Committee of Shipping), TD/B/C.4/ISL/19, part 1.

Yearbook of the U.N., 1963, 1964, 1967, 1973.