THE CARRIER'S LIABILITY UNDER INTERNATIONAL MARITIME CONVENTIONS (THE HAGUE, HAGUE-VISBY AND HAMBURG RULES)

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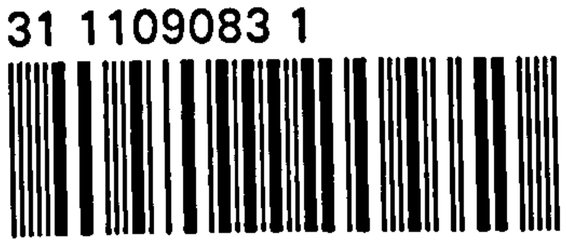

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ABSTRACT

The research centres on the sea carrier's liability for loss of or damage to goods under convention based regimes. The unification, clarification and simplification of national laws regulating maritime trade have always been targets of lawyers and business people who would like to be aware of their possible legal risks in their contracts performed by sea. With these aim, three conventions were prepared: the Hague, Hague-Visby and Hamburg Rules. They with different texts and legislative styles have become the main reason for lack of uniformity in the field of the carriage of goods by sea today. In this thesis, what requirements were made them necessary are explained, and if there were any needs for other conventions is answered.

The carrier's liabilities under the three Conventions are also identified, evaluated and compared. The conditions of such liabilities and exemption therefrom are determined. Whether the Rules cause any uncertainty and need clarifications, and whether they keep up with the technological and economic developments in the world are investigated.

After all these studies it is concluded that there are no substantial differences between the Hague and Hamburg liability regimes except the archaic nautical fault and fire exemptions, and that the latter, which contain all the amendments of the Visby and SDR Protocols, were more clearly drafted by taking the needs of modern trade into consideration and have brought the regime into line with other Conventions relating to other modes of transport. It should, therefore, be the convention on carriage by sea.

Nevertheless, it is also found that the Hamburg Rules needs some clarification to minor extent, and some amendments thereto are suggested in the thesis. With this strength, especially Articles 5 and 6 of the Hamburg Rules are revised as requiring from the carrier to prove the exempted occurrence which caused the loss and to exercise the degree of care expected from the prudent carrier to avoid the occurrence and its consequences, as amending the burden of proving the fault of the carrier, his servants or agents in favour of the cargo interest, and as changing the limitation measures and unit of accounts.

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ABBREVIATIONS

-A-

a	accession
AC	Law Reports, Appeal Cases (Decisions of House of Lords and Privy Council from 1891)
Adm. Ct.	Admiralty Court
Adm. Div.	Admiralty Division
AJCL	American Journal of Comparative Law
All ER	All England Law Reports
ALR	Australian Law Reports
Ank.Bar.Der.	Ankara Barosu Dergisi
AMC	American Maritime Cases (Maritime law decisions of the US federal and state courts since 1923)
Am.L.R.	American Law Review
Ank.Huk.Fak.Der.	Ankara Hukuk Fakültesi Dergisi
App. Cas.	Law Reports, Appeal Cases (Decisions of House of Lords and Privy Council from 1875 to 1890)
Arab L.Q.	Arab Law Quarterly
Arb.	Arbitration
Arb.J.	Arbitration Journal
ARCLN	Association for the Reform and Codification of the Law of Nations
Asp. MLC	Aspinall Maritime Law Cases
ARCLN	Association for the Reform and Codification of the Law of Nations
Aust.	Australia
Austl.Bus.L.Rev.	Australian Business Law Review
Austl.L.J.	Australian Law Journal
AÜSBFD	Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi

-B-

Batider	Banka ve Ticaret Hukuku Dergisi
BC	British Colombia
Bel.	Belgium
BIMCO	Baltic and International Maritime Conference
Bing.	Law Reports, Bingham (from 1822 to 1834)
BL	Business Lawyer
BLD	Bangladesh Law Decisions

-C-

CA	Court of Appeal
Can.	Canada
Can.B.J.	Canadian Bar Journal
CC	Commercial Court
cf.	*confer*, compare
Ch.D.	Law Reports, Chancery Division (from 1876 to 1890)
CIF	Cost-Insurance-Freight
Cir.	Circuit of the Court of Appeal
CLR	Commonwealth Law Reports (from 1903)
CMI	International Convention concerning the Carriage of Goods by Rail
CMR	Convention on the Contract for the International Carriage of Goods by Road 1956
COGSA	Carriage of Goods by Sea Act
COGWA	Carriage of Goods by Water Act
Colum.J.Transnat'l L.	Columbia Journal of Transnational Law

Com. Cas.	Commercial Cases (from 1895-1941)
CPD	Law Reports, Common Pleas Division (from 1875 to 1880)
CS	Contracting State to any international convention
CS's	Contracting States to any international convention
Ct. of Sess.	Court of Session
Cumb.L.Rev.	Cumberland Law Review
Current Legal Probs.	Current Legal Problems
	-D-
Dalhousie L.J.	Dalhousie Law Journal
Denver J.Int'l.L&Pol'y	Denver Journal of International Law and Policy
Dir.Mar.	Il Dritto Marittimo
Div. Ct.	Divisional Court
dn.	decision number
Doc.	Document
	-E-
E	Esas
ED	East District
ed.	edited by
EIMTL	European Institute of Maritime and Transport Law
ER	England Reports
ETL	European Transport Law
et seq.	*et sequentes*, and following paragraphs
Ex.C.R.	Exchequer Courts Reports (Decisions of Canadian Adm. Ct. from 1875 to 1970)
Ex.Ct.	Exchequer Court
	-F-
F	Federal Reporter (Decisions of the US Circuit and District Court from 1880 to October 1924)
F 2d	Federal Reporter 2 (Decisions of the US District Court from 1924 to 1933, decisions of the US CA from 1924 to the present)
FAS	Free alongside Ship
FC	Federal Court Reports, Hull PQ, Canada (Decisions of the Canadian Federal Court from 1971)
FC	Federal Court
FIATA	International Federation of Freight Forwarders Associations
FOB	Free on Board
Fordham Int'l. L.J.	Fordham International Law Journal
Fr.	France
F Supp.	Federal Supplement
	-G-
GC	Guadalajara Convention 1961
Geo.Wash.J.Int'l.L.&Econ.	George Washington Journal of International Law & Economics
Ger.	Germany
Golden Gate U.L.Rev.	Golden Gate University Law Review
Gr.	Greece
GC	Guadalajara Convention 1961
	-H-
Harv.L.Rev.	Harvard Law Review
Hastings L.J.	Hastings Law Journal
HC	High Court
HD	Hukuk Dairesi

HGK	Hukuk Genel Kurulu
HK	Hong Kong
HL	House of Lords
	-I-
ibid.	*ibidem,* at the same location
ICC	International Chamber of Commerce
ICCL	International Congress of Comparative Law
ICLQ	International and Comparative Law Quarterly
ILA	International Law Association
ILM	International Legal Materials
IMC	International Maritime Committee
IMF	International Monetary Fund
Ind.	India
INSA	International Shipowners' Association
Int'l. Mar.L.	International Maritime Law
Ir.	Iraq
It.	Italy
Is.	Issue
Is.	Israeli
	-İ-
İç.Bir.Kar.	İçtihadı Birleştirme Kararı
İst.Bar.Der.	İstanbul Barosu Dergisi
İst.Huk.Fak.Mec.	İstanbul Hukuk Fakültesi Mecmuası
	-J-
Jap.	Japan
JBL	Journal of Business Law
J.Cont.L.	Journal of Contract Law
J.Ind.L.Inst.	Journal of the Indian Law Institute
JLC	Journal of Law and Commerce
Jl.CCD	Journal of Iraqi Cassation Court Decisions
JMLC	Journal of Maritime Law and Commerce
JWTL	Journal of World Trade Law
	-K-
K	Karar
KB	King's Bench (Law Reports)
	-L-
LC	landlocked country
Ld. Raym.	Raymond (from 1694 to 1732)
LJ	Law Journal Reports
Ll.L.R.	Lloyd's List Law Reports (from 1919 to 1950)
Lloyd's Rep.	Lloyd's Reports (from 1951)
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
La.L.Rev.	Lousiana Law Review
LQR	Law Quarterly Review
LRHL	Law Reports, House of Lords (from 1865-1875)
LT	Law Times Reports (from 1859 to1947)
	-M-
Mal.	Malaysia
M&CL Ct.	Mayor's and City of London Court
Malaya L.R.	Malaya Law Review
Mar.L.Ass.Aust&NZ.J.	Maritime Law Association of Australia and New Zealand Journal

Mar.Law.	Maritime Lawyer
McGill L.J.	McGill Law Journal
Melb.U.L.Rev.	Melbourne University Law Review
MLJ	Malaysia Law Journal
MLR	Modern Law Review
Monash L.Rev.	Monash Law Review
MTC	Multimodal Transport Convention 1980
	-N-
n.	footnote
Net.	Netherlands
NI	Northern Ireland
NL	national law
NR	National Reporter (Decisions of the Canadian SC and FC)
NSW	New South Wales
NSWLR	New South Wales Law Reports (from 1880)
Nw.J.Int'l.L.&Bus.	Northwestern Journal of International Law and Business
NZ	New Zealand
NZLJ	New Zealand Law Journal
NZLR	New Zealand Law Reports (from 1883)
	-O-
OIC	Oceans Institute of Canada
Org.	Organised
	-P-
p.	page(s)
P	Probate Cases (from 1891 to 1971)
P	partly incorporated into national legislation
Pace L.Rev.	Pace Law Review
Pak.	Pakistan
P&I	Protection and Indemnity Club
PC	Judicial Committee of Privy Council
Pc.L.J.	Pacific Law Journal
PGF	Poincare Gold Franc
Phil.	Philippines
Pol.	Poland
prgf.	paragraph(s)
	-Q-
QB	Queen's Bench (Law Reports) (from 1841)
QBD	Queen's Bench Division (Law Reports) (from 1876-1890)
	-R-
r	ratification
Rutgers Camden L.J.	Rutgers Camden Law Journal
	-S-
S	signatory country
SC	Supreme Court
SC	Session Cases, Scotland (from 1906)
SCR	Supreme Court Reports, Ottowa, Canada (Decisions of the Canadian Supreme Court)
SDR	Special Drawing Rights
SDRP	SDR Protocol 1979
Sin.	Singapore
Sing.L.R.	Singapore Law Review

Sing.Rep.	Singapore Reports
SLR	Singapore Law Review
Sol. J.	Solicitor's Journal (from 1857)
St John's L.Rev.	St John's Law Review
Sw.	Sweden
Sydney L.R.	Sydney Law Review
	-T-
TBMM	Türkiye Büyük Millet Meclisi
TD	Ticaret Dairesi
Tex.L.Rev.	Texas Law Review
TİK	Türkiye İçtihadı Birleştirme Kararları
TLR	Times Law Reports (from 1884 to 1952)
trans.	translated
Tr.	Turkey
Tu.	Tunisia
Tul.L.Rev.	Tulane Law Review
Tul.Mar.L.J.	Tulane Maritime Law Journal
	-U-
UCP	ICC Uniform Customs and Practice for Documentary Credits
U.Det.L.J.	University of Detroit Law Journal
UK	United Kingdom
U. Miami L.Rev.	University of Miami Law Review
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	United Nations International Institute for the Unification of Private Law
UPC	ICC Uniform Customs and Practice for Documentary Credits
US	United States
US	US Supreme Court Decisions
USA	United States of America
U. San Francisco Mar.L.J.	University of San Francisco Maritime Law Journal
	-V-
Vict.U.Wellington L.R.	Victoria University Wellington Law Review
Virginia J.Int'l.L.	Virginia Journal of International Law
VLR	Victoria Law Reports (from 1875)
Vol.	Volume
VP	Visby Protocol 1968
	-W-
Wash.&Lee L.Rev.	Washington and Lee Law Review
Wash.L.Rev.	Washington Law Review
W. Aus.	West Australia
Wm&Mary L.Rev.	William and Mary Law Review
WLR	Weekly Law Reports (from 1953)
	-Y-
Y	Year
YAR	York-Antwerp Rules
YKD	Yargıtay Kararları Dergisi

INTRODUCTION

I. SUBJECT MATTER AND AIM

The title of this thesis is «*The Carrier's Liability for Loss of or Damage to Goods under International Maritime Conventions (The Hague, Hague-Visby and Hamburg Rules).*»

The carrier who assumes an obligation to carry cargo from one place to another by sea is one of the most important players in maritime trade. When goods have been delivered to him, cargo interests lose physical control over them, and only the carrier is in a position to prevent loss of or damage to them while in his custody. It is, therefore, fair to shift liability for breach of the contract of carriage onto the carrier, and it is important to ascertain the fair conditions, extent and measure of this liability so as to achieve a uniform liability regime.

The carriage of goods by sea usually falls within the scope of more than one domestic law. The ship whereby cargo is transported from or to different countries cannot be made subject to different legal systems conflicting with each other. Merchants who sell or buy goods carried by sea in international trade, who give credit on them or who insure them would like to be aware of possible legal risks. Otherwise, costs to trade and, consequently, freight, interest and profit rates cannot be calculated, which would be harmful to international commerce.

To unify conflicting maritime transport regimes and to protect holders of bills of lading from widespread exemption clauses, the Hague Rules were passed in 1924. These were ratified in the UK by the COGSA1924. The Hague Rules were amended by the Visby Protocol in 1968 in order to keep in step with developments in shipping technique and economic changes, without altering the basic features of the Hague Rules. The Hague Rules, as amended by the Protocol, are known as the Hague-Visby Rules. The UK ratified them by the COGSA 1971, which repealed and replaced the COGSA 1924.

However, developing countries became unhappy with the Hague and Hague-Visby Rules because they did not feel part of these Conventions. They (representing mainly cargo interests) objected to the wide protection granted to the carrier by the statutory exemption clauses. The result was the Hamburg Rules, which were intended to replace the Hague and Hague-Visby Rules. The Hamburg Rules with their own liability regime

came into effect in November 1992. Although the role of the Contracting States to the Hamburg Rules is limited in maritime trade, this does not change the fact that they are statutorily applicable as a third Convention.

Even though all the three Conventions may be said to have taken the requirements and needs of maritime commerce into account during their preparation, today there are two main liability regimes (the Hague and Hague-Visby Rules and the Hamburg Rules) in operation in international carriage of goods by sea (together with some national laws which either have no similarity with these International Conventions or carry some of their features) at the same time. All these regimes seem to differ from each other in all aspects. This is so because the Hague and Hague-Visby Rules were drafted in the Anglo-American legislative style while the Hamburg Rules were prepared in a continental legislative tradition. Many lawyers and merchants have criticised the Conventions for their style which they have not been accustomed as if these variances in the style had created fundamental discrepancies.

It would not be right to support any system without examining the Rules individually and considering the following questions:

(1) Have the Hague and Hague-Visby Rules failed to clarify contracting parties' legal positions and to keep up with the requirements of maritime commerce? If not, there is no necessity to amend the system which has successfully applied for more than 70 years; if so,

(2) Is there any need for another Convention like the Hamburg Rules? If not, the Hague and Hague-Visby Rules may be amended only to a minor extent; if so,

(3) Have the Hamburg Rules succeeded in unifying liability regimes? If not, either a fourth convention may be adopted, or the Hamburg Rules may be changed to a minor extent. If so, the Hamburg Rules should be the Convention of carriage by sea.

To sum up, the main purposes of the thesis are to identify and evaluate the carrier's liability for loss of or damage to goods under the Hague and Hague-Visby Rules, compared with the Hamburg Rules, and finally to suggest an appropriate uniform regime that should govern the international sea carrier's liability.

II. SCOPE AND STRUCTURE

It is not possible, at least for the author, to deal with all the aspects of the carriage of goods. Accordingly, the framework of this research is limited in the following respects:

First, the thesis focuses on liability principles which should be uniformly accepted or rejected for legal reasons. Of course, without examining the economic and public policy effects of the Rules on related parties, the question as to which provisions are the best in public interests cannot be answered. On this account, although the issue is approached from the legal perspective, the economic and public policy influences of the legal regime are considered (particularly in the second and third chapters) to the extent of the availability of the relevant data.

Second, the subject-matter is related to *legal aspects of international carriage of goods by sea.* However, the liability regimes in other international transport modes such as air and land are briefly referred to make a comparison and to see whether any lessons can be learnt therefrom on the unification and harmonisation of liability rules in carriage by sea.

Third, the research centres around the issues on convention based private law practised by states. Some national (particularly Australian, Canadian, English, French, German, Turkish and US) laws have therefore been taken into account only to show the domestic application of, to briefly compare them with and to fill the gaps in convention based regimes. Insofar as a Contracting State's law (e.g. UK COGSA 1971) is the same as a convention, no reference is made thereto.

Fourth, not all convention based rules are of interest to this research. Its scope is limited to those of the *Hague, Hague-Visby* and *Hamburg Rules*. Other conventions on, for example, the limitation of liability, collision, arrest of seagoing ships, jurisdiction and the enforcement of civil judgements, arbitration, navigation, sale of goods, etc. will be cited if necessary.

Finally, only the *carrier's liability* under *the contract of carriage of goods by sea* falls within the coverage of the research. Other types of liabilities and contracts are not taken into consideration. However, if there is a law imposing on a person other than the

carrier the same liability as the carrier's contractual liability, or on the carrier another kind of liability which could affect his contractual liability, these liabilities are explained (mainly in the third and fifth chapters). Since insurance contracts compensate the cargo interest or the carrier for loss they suffer due to breach of the contract of carriage, their effects on the latter contract are also discussed (particularly in the third chapter).

In short, the scope of the investigation is the carrier's liability under the contract of carriage of goods by sea regulated by international maritime conventions (the Hague, Hague-Visby and Hamburg Rules). This coverage is divided into four major parts and twelve chapters.

The first part, consisting of three chapters, outlines preliminary issues to the carrier's liability. The first chapter attempts to explain the historical development of the carrier's liability. The second chapter examines the Hague, Hague-Visby and Hamburg Rules themselves, while the third chapter lays down the basis of liability.

The second part, containing five chapters, enumerates the conditions of the carrier's liability. The fourth chapter defines the contract of carriage of goods by sea and examines its general nature, elements and relations with other associated contracts and documents. The liable party is identified in the fifth chapter. The sixth and seventh chapters focus on the carriage obligation and its breach by the carrier while goods are in his custody. Loss resulting from breach of carriage obligation is considered in the eight chapter.

The third part, containing two chapters, itemises the conditions of the carrier's exemption from liability. It commences with the ninth chapter that centres on exempted incident while the tenth chapter demonstrates the proximate causal relation between such an incident and loss suffered by the cargo interest.

Finally, the fourth part, consisting of two chapters, explains the limitation of carrier's liability. Accordingly, the eleventh and twelve chapters concentrate on the limitation of damages and of the period for action respectively.

III.APPROACH AND METHODOLOGY

Since the Author was educated under a continental law system, the approach taken and methodology used in this work could be unfamiliar to those of a strong common law background. However, the difference in the style of writing is expected not to create so many difficulties in the understanding of this thesis.

During the study of the carrier's liability, inductive and deductive methodologies are followed. In the preliminary part an inductive methodology is employed with the aim of showing the factors in and reasons for the preparation of the Rules relating to such liability. The following theoretical parts uses the deductive method to determine the present conditions, which are required for the application of liability and exemption rules and their satisfactory and unsatisfactory components. These parts are divided with respect to the distribution of burdens of proof on contracting parties.

The subjects of this work are construed by having in mind all the relevant circumstances existing today and at the time of the drafting of the Rules, including the interests of all parties. In interpreting the three Conventions attention is also paid to their international character and to the need to promote uniformity. National laws are comparatively analysed without considering any single law as conclusive.

The research is principally library based and analyses the topic through the examination of various sources, such as international conventions, national statutes, court decisions, model contracts, reports, books and articles.

PART I

PRELIMINARIES TO THE CARRIER'S LIABILITY

Chapter One

HISTORICAL DEVELOPMENT OF THE CARRIER'S LIABILITY

The present rules relating to the carrier's liability did not appear suddenly. They have a history. They are the fruits on trees planted a long time ago. In order to understand what requirements made them necessary and what needs they answered, they should be historically analysed. With this aim in mind, this chapter attempts to explain the historical development of the carrier's liability from past to present. It starts with Roman, civil and common law rules concerning the carrier's strict liability. The study then considers the displacement of these legal provisions by contractual exemptions and the reaction against those contracts by the US Harter Act 1893 and its offshoots, namely, the Hague, Hague-Visby and Hamburg Rules.

I. THE CARRIER'S LIABILITY UNDER ROMAN LAW

Maritime law, like other branches of law, has been affected by technological and economic advancement. In the beginning, carriage was conducted by wooden, sailing and even rowing ships which were extremely vulnerable to maritime risks and perils. As commercial relationships had not yet developed, cargo owners bought or hired a vessel to carry their goods to a very short destination. They made either a sale contract (*emptio venditio*) or hire contract (*locotio condictio rei*)[1], and travelled on their ships to protect their properties against thieves and pirates[2]. Then, they offered and sold merchandises at ports of arrival. For that reason, there was no need for the issuance of a custody receipt or a document of title, and any loss or damage in transit was endured by them.

With time, as a result of the expansion of the Roman Empire and its ports in the eleventh century, overseas trade grew, and the possibility of the transport of goods by the merchant himself who took orders from different places was removed. On balance, cargo owners tended to stay in their places of business and delivered their merchandises

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1 Thomas,J.A.C.: Textbook of Roman Law, Amsterdam-New York-Oxford 1976, p.293, 299.

2 Mankabady,S.: Comments on the Hamburg Rules, in Mankabady,S. (ed.): the Hamburg Rules on the Carriage of Goods by Sea, Leyden-Boston 1978, p.28 (to be cited thereinafter as "Comments") / Kalpsüz,T.: Deniz Ticareti Hukuku, Vol.I, Gemi, Ankara 1971, p.10 (to be cited thereinafter as "Gemi").

to the carrier/master, who then undertook to carry them by assigning the use of all or part of his own vessel to cargo owners under the contract of carriage by chartered ship (*locatio mercium vehendarum*). The legal nature of the contract was *locotio condictio operis faciendi* as the carrier placed out the job to be done[3]. After that, the master issued a bill attached to the charterparty, containing the shipment and the name of its owner, to the shipper as a custody receipt[4].

In early Roman law, the carrier was liable only for *custodia*. Later, praetors introduced *receptum nautarum* which made the carrier strictly liable for loss of or damage to goods notwithstanding his own *dolus* or *culpa* except *force majeure*, and allowed cargo owners to bring a praetorian action (*actio de recepto*) against him. For compensation, the carrier had to have breached the contract of carriage concluded before a praetor to guarantee the delivery of goods in good condition. The contracting parties were, however, entitled to release the carrier from liability[5]. The carrier was also made liable by *praetorian delictal actions* for the acts of his servants or agents provided that he had been at fault in the choice of his assistants. In the period of Iustinianus, this liability was replaced by strict liability with the quasi- delicts[6].

Following the weakening, and finally the collapse of the Roman Empire, commercial confidence was lost, and the *locotio condictio rei* regained credibility. Cargo owners carried their goods by hiring ships and acted as shipowners again.

II. THE CARRIER'S LIABILITY UNDER CIVIL LAW

By the sixteenth century, as a result of the adoption of the fault principle, the carrier's contractual liability in civil law was turned from strict liability to liability based on

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[3] Lee,R.W.: Lee,R.W.: An Introduction to Roman-Dutch Law, 5th ed., 1953 Oxford, p.320; Nicholas,B.: An Introduction to Roman Law, Oxford 1975, p.183; Prichard,A.M.: Leage's Roman Private Law founded on the Institutes of Gaius and Justinian, 3rd ed., London 1961, p.363.

[4] Secretariat of UNCTAD, Report of Bills of Lading, Doc. TD/B/C4/ISL/6, p.12, n.61 (to be cited thereinafter as "Report of Bills of Lading") - Astle,W.E.: Legal Developments in Maritime Commerce, London 1983, p.61; Benneth,W.P.: The History and Present Position of the Bill of Lading as a Document of Title to Goods, Cambridge 1914, p.7; Knauth,A.: The American Law of Ocean Bills of Lading, 4th ed., Baltimore 1953, p.115 (to be cited thereinafter as "Ocean").

[5] Berger,A.: Encyclopaedic Dictionary of Roman Law, 1953, p.669 / Karadeniz,Ö.: Iustinianus Zamanına Kadar Roma'da İş İlişkileri, Ankara 1976, p.186; Umur,Z.: Roma Hukuku Lûgatı, İstanbul 1983, p.180.

[6] Kaser,M. (trans. by Dannenbring,R.): Roman Private Law, 2nd ed., (Romisches Privatrecht, 6th ed.), London 1968, p.198.

presumed fault, and he was exempted from liability for sea perils[7]. Unless the carrier proved that there had been no fault on his part, he would have to make good loss. His liability was, therefore, severe but not as much as under Roman law. The carrier was also liable for his servants' or agents' act breaching the contract of carriage irrespective of his own personal fault as in the period of Iustinianus. This general pattern of civil law formed the basis for future legislation in continental countries[8]. Even English Admiralty courts were indirectly influenced thereby and made their decisions on similar basis[9].

During the Crusades, trade between Northern Europe and the Mediterranean countries grew, and the contract of carriage by chartered ship (*locatio mercium vehendarum*) reappeared. The bill as a receipt started to identify the consignee and granted a right to the master to deliver goods to him. However, the bill was just an appendage of the charterparty and still conferred no immunity beyond those therein[10].

With the seventeenth century, the master began to insert into the bill some clauses relating to the conditions of carriage, such as the payment of freight, the name of the ship, the date of sailing and the nature of cargo. Then, the bill bound the master/carrier to deliver cargo to the consignee pursuant to itself and gained its second function (i.e., evidence of the contract of carriage)[11].

Later, the bill represented goods and obliged the master/carrier to hand them over only in return for the original which, thereby, achieved its last function (i.e., a document

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7 Holdsworth,W.: A History of English Law, Vol.V, 3rd ed., London 1945, p.100 (to be cited thereinafter as "History V"); De Wit,R.: Multimodal Transport, London 1995, p.33 (to be cited thereinafter as "Multimodal Transport").

8 See Article 103 of the French Commercial Codes 1808 and 1874, Article 606 of the German Commercial Code in 1897 Articles 1147 and 1148 of the Old Belgian Civil Code and Articles 1280 and 1281 of the Old Dutch Civil Code.

9 Gorton,L.: The Concept of the Common Carrier in Anglo-American Law, Gothenburg 1971, p.94 (to be cited thereinafter as "Common Carrier").

10 Kozolchyk,B.: Evoluation and Present State of the Ocean Bill of Lading from a Banking Law Perspective, 23 JMLC 161 (1992), p.164 (to be cited thereinafter as "Bill of Lading").

11 Malynes,G.: Consuetudo vel Lex Mercatoria, 1629, p.97 (cited in Kozolchyk,B.: Bill of Lading, p.165.); Murray,D.E.: History and Development of the Bill of Lading, 37 U. Miami L.R. 689 (1983), p.691, n.7; Savary,J.: Le Parfait Negociant 1742, p.655 (cited in Kozolchyk,B.: Bill of Lading, p.167.). In, for example, 1681 Article IX, Title I, Book II of the Marine Ordinances of Louis the XIV expressly obliged the master to hand over goods according to the bill.

of title) and became independent of the charterparty[12]. At this point the bill came to be known as a *master's* bill of lading in some countries despite its non-negotiable nature.

III. THE CARRIER'S LIABILITY AT COMMON LAW

By the late seventeenth century, English shipowners' share in maritime transport increased. Goods were mostly carried by their ships which were slow, small and frequently foundered under sea perils. Hence, common law became important as disputes relating to the contract of carriage were settled by common law courts, whose jurisdictions had been extended to cover maritime litigation[13].

These courts, by adopting the common carrier's liability by land as the origin of the custom at common law[14], obliged carriers to deliver goods in the same state as that in which they had received them, and imposed strict liability on all of them regardless of whether they were common carriers or not[15]. Thus, the carrier was put in the insurer's place[16], and the principle of *Receptum Nautarum* in Roman law was implicitly followed[17]. Nevertheless, as distinct from Roman law, the carrier's liability stemmed from breach of the bailment relation depending on status (his actual possession of goods) rather than a contract despite the fact that the scope of the possessory relation could be drawn in the contract[18]. Further, no distinction was made between the carrier's

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12 Malynes,G.: Consuetudo vel Lex Mercatoria, 1629, p.97 (cited in Kozolchyk,B.: Bill of Lading, p.165.); Savary,J.: Le Parfait Negociant 1742, p.656 (cited in Kozolchyk,B.: Bill of Lading, p.169.).

13 Gorton,L.: Common Carrier, p.94; Holdsworth,W.: History (V), p.102.

14 *Morse v. Slue* (1671) 1 Vent. 190; *Coggs v. Bernard* (1703) 2 Lord Raym. 909; *Riley v. Horn* (1828) 5 Bing. 217 - Fletcher,E.: The Carrier's Liability, London 1932, p.xiii; Holdsworth,W.: History (V), p.102, 153.

15 At maritime law, there is no good reason for distinguishing between common carrier, who is a person not having any right to refuse to carry goods, and private carrier, who is one reserving the right to accept cargo interests' offer, because both of them are a carrier undertaking to transport cargo by sea, and this separation belongs to land transport rather than sea carriage: *Blommer Chocolate Co. v. Nosira Sharon Ltd.* 776 F Supp. 760 (SD NY 1991) - Gorton,L.: Common Carrier, p.92.

16 *Paterson SS v. Canadian Co-operative Wheat Producers* [1934] AC 538, 544; *Siohn v. Hagland* [1976] 2 Lloyd's Rep. 428 - Secretariat of UNCTAD, Report of Bills of Lading, Doc. TD/B/C4/ISL/6, p.11 (to be cited thereinafter as "Report of Bills of Lading") Beale,J.H.: The Carrier's Liability: It's History, 11 Harv.L.Rev. 158 (1897), p.158, 168; Carver,T.G.: Carriage by Sea, 13th ed., London 1982, p.3, 20 (to be cited thereinafter as "Carriage"); Kirkham,B.: The Common Law Liability of a Public Carrier by Sea, LMCLQ 282, Feb' 76, p.282.

17 *Nugent v. Smith* (1876) 1 CPD 19, 29 - Scrutton,T.E.: Charterparties and Bills of Lading, 20th ed. by Boyd,S.C.-Burrows,A.S.-Foxton,D., London 1996, p.203 (to be cited thereinafter as "Charterparties").

18 Fifoot,C.H.S.: History and Sources of the Common Law - Tort and Contract, London 1949, p.24; Palmer,N.E.: Bailment, London 1991, p.31 (to be cited thereinafter as "Bailment").

liabilities for his own act and those of his servants or agents since the obligation to carry goods was considered non-delegable[19].

The legal nature of liability was strict, i.e., liability without fault[20]. However, in the case of certain inevitable events, the carrier had the opportunity to release himself from liability. He would not be liable for loss or damage caused by acts of God or king's enemies, inherent vice (nature), the negligence of the cargo interest, and general average sacrifice[21] on the condition that cargo interests were not able to prove that such loss or damage had been occasioned by fault, unjustifiable deviation or unseaworthiness at the beginning of the voyage[22]. This kind of strict liability was adopted by US and other Anglo-American courts as well[23].

IV. THE CARRIER'S LIABILITY UNDER THE PRINCIPLE OF «LIABILITY DUE TO WRITTEN STATEMENT»

A) GENERAL

In the first half of the eighteenth century, having no opportunity to prevent loss of or damage to goods delivered to the master, the carrier tried to escape from severe liability at common and civil law by inserting exemption clauses into the bill of lading and charterparty[24]. However, subjected to the reaction of cargo interests, he could only manage to relieve himself of liability for "the dangers of the sea".

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19 Atiyah,P.S.: Vicarious Liability in the Law of Torts, London 1967, p.361; Palmer,N.E.: Bailment, p.979.

20 Gilmore,G.-Black,C.: The Law of Admiralty, 2nd ed., New York 1975, p.5; Kahn-Freud,O.: The Law of Carriage by Inland Transport, 4th ed., London 1965, p.198; Knauth,A.W.: Ocean, p.116; Robinson,G.: Handbook of Admiralty in the United States, St Paul 1939, p.493; Zamora,S.: Carrier Liability for Damage or Loss to Cargo in International Transport, 23 AJCL 391 (1975), p.397 (to be cited thereinafter as "Liability").

21 *Nugent v. Smith* (1876) 1 CPD 19 - Wilson,J.F.: Carriage of Goods by Sea, 3rd ed., Glasgow 1998, p.245 (to be cited thereinafter as "Carriage"); Zamora,S.: Liability, p.397.

22 *James Morrison v. Shaw, Savill and Albion* [1916] 2 KB 783 - Carver,T.G.: Carriage, p.19; Miller,M.K: Cargo Legal Liabilities, 17 Cumb.L.Rev. 763 (1986-1987), p.767; Smith,K.-Keenan,D.J.: Essantials of Mercantile Law, London 1965, p.283 (to be cited thereinafter as "Mercantile").

23 *New Jersey Steam Nav. Co. v. Merchant Bank* 47 US 344 (1843); *Niagara v. Cordes* 62 US 7, 23 (1858) - Gorton,L.: Common Carrier, p.20; Knauth,A.W.: Ocean, p.116; Ramberg,J.: The Law of Carriage of Goods: Attempts at Harmonization, 17 Scandinavian Studies in Law 211 (1973), p.214.

24 Glass,D.A.-Cashmore,C.: Introduction to The Law of Carriage of Goods, London 1989, p.22 (to be cited thereinafter as "Introduction"); Todd,P.: Modern Bills of Lading, 2nd ed., 1990, p.136 (to be cited thereinafter as "Bills of Lading").

By the middle of the nineteenth century, due to the construction of better roads in Central and Mediterranean Europe, the postage period of the bill of lading by land was shortened, and the arrival of the bill of lading at the port of destination before goods became possible. Moreover, some national laws introduced the negotiable bill of lading, allowing its transfer by endorsement[25]. Thus, in exchange for the bill of lading goods could be resold many times under the overseas sale contracts, and their prices could be paid in advance.

Because of the development in world trade and technological advancement in the shipping industry owing to improved navigation instruments, more efficient steam power and steel during the nineteenth century, the shipowner's financial position improved. He could operate more than one ship from the home-port. The master signed the bill of lading on behalf of the shipowner (*shipowner's bill of lading*). As a result, the shipowner became a carrier and liable to cargo interests. Then, he began to reduce the scope of his liability further depending on his bargaining power over them[26]. In the course of time, the number of exemption clauses increased so much that he had almost no duty other than the collection of freight[27].

In that period, as contractual intentions were deemed almost sacred, the carrier was allowed to make a written statement in the contract defining his liability (the principle of liability due to a written statement), and exemption clauses were held valid in England[28] which had the world's largest fleet and in other continental countries which worried about the increasing weakness of their carriers in the international arena. Thus, liability became an exception as if the exemption had been a principle.

On the other hand, the scope of such stipulations was limited as much as possible by shifting onto the carrier the burden of proving that the amount of damage had arisen

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[25] Article 802 of the Spanish Commercial Code 1829 - *Lickbarrow v. Mason* (1794) 5 TR 683.

[26] Astle,W.E.: Bills of Lading Law (International Rules of Law Relating to Bills of Lading), London 1982, p.9 (to be cited thereinafter as "Bills of Lading") and The Hamburg Rules, London 1981, p.5 (to be cited thereinafter as "Hamburg Rules").

[27] The carrier excluded 55 incidents thanks to these clauses. For the list of exceptions see Crutcher,M.B: The Ocean Bills of Lading, 45 Tul.L.Rev. 697 (1971) (to be cited thereinafter as "Ocean"), p.720; Scrutton,T.E.: Charterparties, p.208.

[28] *Hamilton, Fraser & Co. v. Pandorf & Co.* (1887) 12 App. Cas. 518; *Westpoart Coal Co. v. McPhail* [1898] 2 QB 130; *The Torbryan* [1903] P 35.

from one of the exempted incidents[29]. However, even in that case cargo interests could prevent him from relying on any contractual clause by establishing that the damage had been actually contributed by fault[30], unjustifiable deviation[31] or unseaworthiness at the beginning of the voyage[32] unless these were themselves excluded in the contract[33].

Thereupon, the coverage of cargo insurance was extended to include the risks for which the carrier would not be liable. Similarly, shipowners/carriers established P&I clubs to defend themselves against uninsured marine cargo claims, and included P&I calls into freight[34]. P&I and cargo insurance policies then started to cover similar incidents which caused loss of or damage to goods.

B) THE CARRIER'S LIABILITY UNDER MODEL BILLS OF LADING

As the content and variety of the exemption clauses grew, the need for international uniformity became an issue. Through the efforts of the Association for the Reform and Codification of the Law of Nations[35], three model bills of lading were prepared:

1- The carrier's liability under the (Liverpool) Conference Form 1882

The first model bill of lading, known as the Conference Form, was drafted at the Association's Liverpool Conference in 1882. The aims of the Form were to standardise the bills of lading clauses and to provide a compromise between cargo and ship interests[36].

General Clause made the carrier/shipowner liable for negligence in all matters relating to the ordinary course of the voyage on the condition that damage had not been occasioned by the act of God; sea perils; fire; barratry of the master and crew, enemies,

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29 *The Glendarroch* [1894] P 226 - Payne,W.-Ivamy,H.: Payne and Ivamys' Carriage of Goods by Sea, 13th ed., London 1989, p.192 (to be cited thereinafter as "Carriage").

30 *Siordett v. Hall* (1828) 6 LJOS 137; *Notara v. Henderson* (1872) LR 7 QB 225; *The Xantha* [1886-1890] All ER 212 - Scrutton,T.E.: Charterparties, p.206.

31 *James Morrison and Co. v. Shaw, Savill and Co.* [1916] KB 783 - Wilson,J.F.: Carriage, p.263.

32 *Tattersall v. National SS Co.* (1884) 53 LJQB 332 - Bartle,R.: Introduction to Shipping Law, 2nd ed., London 1963, p.121 (to be cited thereinafter as "Introduction").

33 *The Europa* [1908] P 84 - Payne,W.-Ivamy,H.: Carriage, p.191.

34 UNCTAD Secretariat, Report of Bills of Lading, p.12 - Reynardson,W.: The History and Development of P & I Insurance: The British Scene, 43/3 Tul.L.Rev. 457, Ap'69, p.468.

35 which was founded in 1873 and adopted its current name "the International Law Association" in 1895: ILA, Report of the 17th Conference, 1895, p.282-285. Its first successful attempt was to unify the law of general average: The York-Antwerp Rules 1877.

36 ARCLN, Report of the 10th Conference, 1882, p.78 (to be cited thereinafter as "Liverpool Report").

pirates, and thieves, arrest and restraint of princes; rulers and people; collisions, stranding and other navigational accidents even when caused by the negligence, default, or error in judgement of the pilot, master, mariners, or other servants of the carrier[37]. In addition, he was obliged to exercise due diligence to provide a seaworthy ship. By Clause 3, liability was limited to £100 per package in the absence of a declaration of higher value[38].

The Form was not generally adopted owing to difficulties in reaching an agreement concerning the division of liability and exemptions, and because the obligation to exercise due diligence to make the ship seaworthy was alien to common law[39]. Yet, the New York Produce Exchange used its amended versions in 1883 and 1884[40]. Its negligence and due diligence clauses' features were incorporated into standard bills of lading by some shipping societies, such as the Mediterranean, Black Sea and Baltic steamer for the general produce and grain trades in 1885[41].

2- The carrier's liability under the Hamburg Rules of Affreightment 1885

Due to lack of success of the Conference Form, the Hamburg Rules of Affreightment were laid down in the shape of a set of rules at the Association's Hamburg Conference in 1885[42]. Rule I thereof imposed strict liability on the carrier/shipowner for unseaworthiness. He was under an obligation to ensure that his vessel was properly equipped, manned, provisioned, and fitted out in all respects seaworthy and capable of performing her intended voyage, and for stowage and right delivery of goods. He would also pay damages for faults (but not for errors in judgement) of the ship company.

In return, Rule II excluded the carrier/shipowner from liability for loss or damage arising from vis major, public enemies, civil commotions, pirates, robbers, fire,

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37 ARCLN, Liverpool Report, p.104 and Report of the 13th Conference, July 1887, p.113 (to be cited thereinafter as "London 1 Report").

38 ARCLN, Liverpool Report, p.104.

39 O'Hare,C.W.: Allocating Shipment Risks and the UNCITRAL Convention, 4 Monash L.R. 117, Dec'77, p.120 (to be cited thereinafter as "Uncitral Convention").

40 ARCLN, Report of the 15th Conference, 1892, p.87 (to be cited thereinafter as "Genoa Report"): See Charles McArthur.

41 ILA, Report of the 30th Conference, II, 1921, p.xii (to be cited thereinafter as "Hague Report"); ARCLN, Genoa Report, p.87.

42 ARCLN, Report of the 12th Conference, 1885, p.165-168 and London 1 Report, p.113.

explosion, bursting of boilers, breakage of shafts or screws, for any latent defects in hull or machinery (not resulting from want of due diligence by the owner, husband, or manager of the ship), for the cargo's decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any damage arising from the nature of goods shipped, or such defective packing as could not be noticed externally, nor for the obliteration of marks, numbers, addresses, or descriptions of goods shipped, for any damage or loss caused by accidental prolongations of the voyage, and for other accidents of the seas, unless proved that such exception came under Rule I.

Since they were thought to favour cargo interests, the Rules, apart from their format, did not interest shipping societies much except for a few German companies. They were later rescinded by the Association in 1887.

3- The carrier's liability under the London Conference Rules of Affreightment 1893

The Association continued to deal with model set of rules and appointed a committee to formulate new provisions based on the Conference Form, which had been reaffirmed in 1887[43]. Eventually, the Association accepted the London Conference Rules of Affreightment, which had been proposed by the Committee, in 1893[44].

The carrier's liability therein was laid down in line with the Conference Form and the Hamburg Rules of Affreightment. Additionally, the carrier/shipowner was made liable for loss or damage arising from any want of reasonable care and skill in the loading, stowage, or discharge of goods between the time the goods are loaded on and the moment they are discharged from the ship, and was granted liberty to deviate for the purpose of saving life or property. At the end, they failed to unify regimes governing the carrier's liability owing to shortage of support by shipowners.

V. THE CARRIER'S LIABILITY UNDER NATIONAL REACTING STATUTES

A) THE CARRIER'S LIABILITY UNDER THE US HARTER ACT 1893

The reason why the exemption clauses in bills of lading survived unfettered under the umbrella of free enterprise was due to an economic imbalance of power among ships

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[43] ARCLN, London 1 Report, p.113 *et seq*; ILA, Hague Report, p.xii.
[44] ARCLN, Report of the 16th Conference, 1893, p.92, 93.

and cargo interests in favour of the former. Although the first reactions against exemption clauses came from England, they were not effectual because of the carriers' pressure on the Parliament[45].

The situation in the USA was quite the opposite. Most of the US merchant fleet changed during the American Civil War, and US shipowners were unable to keep pace with the technological shift from wooden vessels to metal and screw ships[46]. As a result, US shippers' positions became as strong as those of the US carriers. In addition, the ocean-carrying trade from or to the USA was almost entirely in the hands of some 20 or so English liner companies. This virtual monopoly on the one hand prevented US carriers from developing and, on the other hand, granted English carriers an opportunity to insert exemption clauses in bills of lading against US shippers[47].

The US Federal Court, with the aim of protecting the US economy, ruled these clauses unenforceable and void under public policy[48]. Previously, they limited their judgements to clauses which relieved the carrier only of liability for his servants and agents' faults[49], but these decisions were later extended against all clauses which were deemed unjust and unreasonable.

English shipping companies, which were opposed to this aspect of the US public policy and its negative outcomes, started to insert English choice-of-law and choice-of-forum clauses, which enabled English courts to apply English law to bills of lading. Thereupon, English courts ruled that US public policy had no effect in England, and that, as the shipowner must have intended the exemption clauses to be valid, such

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45 See Sturley,M.F.: The History of COGSA and the Hague Rules, 22 JMLC 1-57, Ja' 91, p.10 (to be cited thereinafter as "History") for the complaint of the Glasgow Corn Trade Association to the British Prime Minister: "Bills of lading are so unreasonable and unjust in their terms as to exempt from almost every conceivable risk and responsibility".

46 Reynolds,F.M.B.: The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules, 7 Mar.L.Ass.Aust.&N.Z.J. 16 (1991), p.18 (to be cited thereinafter as "Rules").

47 *The Delaware* 161 US 459, 472 (1895) - Gilmore,G.-Black,C.: Admiralty, p.142.

48 *The Branthford City* 29 F 373 (1886); *The Energia* F 124 (1893); *The Guildhall* 58 F 796 (1893) and 64 F 867 (1894) - Maritime Law Committee on Bills of Lading of ILA, Report, 1921, in ILA, Hague Report xxxviii, p.li (to be cited thereinafter as "Report on Bills of Lading").

49 *Niagara v. Cordes* 62 US 7 (1858).

clauses were governed by English law and, therefore, valid[50]. Even in US courts, the Federal Court's view was not followed[51].

Accordingly, it was considered that the attack against English carriers' virtual monopoly in the USA depended on legislation by the US government. In response to the pressure from US shippers and carriers, the US Harter Act was passed in 1893 after many amendments and discussions in the US Senate. It was the first national statute which established a compromise between carriers' and shippers' interests by mitigating the strict nature of common law, limiting the long list of exemption clauses, and nullifying unreasonable clauses in the list[52].

Under Section 1, the carrier/shipowner's liability was made mandatory, and any clause relieving the carrier of liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to his charge would be null, void and of no effect. The main purpose of this section was to protect US carriers and shippers against English monopoly by imposing marginal liability on the carrier[53].

Nevertheless, the US Senate, worrying that this intention might have affected the balance between US carriers and shippers and weakened the opportunity of US carriers to compete with their English rivals, added some new exempted events, such as nautical fault, in Section 3 and changed the absolute duty to furnish a seaworthy ship into the obligation to exercise due diligence to make a seaworthy vessel. Thus, the compromise between the interests of two parties was achieved.

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50 *Chartered Mercantile Bank v. Netharlands India Steam Nav. Co.* (1883) 10 QB 521; *Re Missouri SS* (1889) 42 Ch.D. 321 - Sweeney,J.C.: Happy Birthday Harter, 24 JMLC 1-241, Ja' 93, p.8 (to be cited thereinafter as "Harter Act"). US courts, again, held that these clauses were against their own public policy: *The Brantford City* 28 F 373 (1886); *The Glenmavis* 69 F 472 (1895).

51 *Gleadhill v. Thompson* 56 NY 194 (1874); *Rubens v. Ludgate Hill SS Co.* 139 NY 416, 34 NE 1053 (1893) - Knauth,A.W.: Ocean, p.119.

52 *SS Willdomino v. Citro Chemical Co.* 1927 AMC 129 (1927) - Williams,B.F.: Cargo Damage at Sea: The Ship's Liability, 27 Tex.L:R. 525 (1949), p.526; Wheeler: The Harter Act, 33 ALR 801 (1899), p.801. The mandatory rules against the monopoly power of inland carrier had been legislated earlier: The UK Railway and Canal Traffic Act 1854; the US Interstate Commerce Act.

53 Green,F.: The Harter Act, Harv.L.Rev. 157 (1904), p.159; Poor,W.: American Law of Charter Parties and Ocean Bills of Lading, 5th ed., New York 1968, p.152 (to be cited thereinafter as "Charter Parties").

There was no provision concerning the limitation of indemnity, the notice of claim and the period for action. Hence, clauses reducing the amount of damages, shortening the period for filing suit, and releasing the carrier from liability unless the notice of claim was given before receiving goods, were ruled unless unreasonable[54].

The US Harter Act had influences on other national and international law. While many countries, such as Australia[55], Morocco[56] and New Zealand[57] followed the US lead, others, including Denmark, Finland, France, Iceland, the Netherlands, Norway, South Africa, Spain, and Sweden contemplated Harter-style legislation[58]. By contrast, English courts avoided enforcing the Harter Act even where the choice of the Harter Act clause was clearly written into bills of lading[59].

B) THE CARRIER'S LIABILITY UNDER THE CANADIAN WATER CARRIAGE OF GOODS ACT 1910

It was not difficult for Canada to pass an act (the Canadian Water Carriage of Goods Act) in the style of the US Harter Act in 1910 as Canadian cargo interests were in the same position as their competitors in the USA. Yet, in some respects, the Act differed from the US statute:

Firstly, to protect the carrier/shipowner against unexpectedly high-value goods in packages, and to prevent him from inserting clauses in the bill of lading to limit liability to ridiculously low quantum, under Section 8 the indemnity was limited to Canadian $100 per package unless a higher value is stated in the bill of lading or other documents. Secondly, Sections 6 and 7 expanded the exemption clauses to include latent defects, fire, any reasonable deviation, strikes and losses arising without the carrier's actual fault or privity or without the fault or neglect of his agents, servants or employees[60]. The Act with these differences drew the attentions of all cargo interests.

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54 Even a $5 agreed valuation clause was held valid under the US Harter Act: *Hugetz v. Compania Transatlantica*, 270 F 90, 91 (2nd Cir. 1920) - Sweeney,J.C.: Harter Act, p.27.

55 Sea-Carriage of Goods Act 1904.

56 Maritime Commercial Code 1919.

57 Shipping and Seamen Act 1903 and 1911.

58 ILA Maritime Law Committee, Report on Bills of Lading, p.xxxix.

59 O'Hare,C.W.: Uncitral Convention, p.120 and Cargo Dispute Resolution and the Hamburg Rules, 29 ICLQ 219 Ap/Jl'80, p.221 (to be cited thereinafter as "Hamburg Rules").

60 ILA Maritime Law Committee, Report on Bills of Lading, p.lxii.

VI. THE CARRIER'S LIABILITY UNDER INTERNATIONAL CONVENTIONS

A) THE CARRIER'S LIABILITY UNDER THE HAGUE RULES

1- The carrier's liability under the pre-Hague Rules 1921[61]

The Harter-style legislation of British dominions, such as Australia, New Zealand and Canada, led to lack of uniformity and confusion in the British Empire. Since the regulations in the dominions basically had local effect and applied only to domestic and outward shipments, inward shipments to the dominions were governed by English law favouring the carrier. The importers, relying on their politic power, forced their dominions to encourage the Imperial Government to legislate an act in the Harter-style for the whole British Empire[62].

In response to dominion reactions, the Dominions Royal Commission suggested such regulations in 1917[63]. Then, in 1921 after the First World War, the Imperial Shipping Committee (appointed by the Imperial Government in 1920 to study the Dominions' acts[64]), prepared a report recommending that there should be uniform legislation throughout the Empire in line with the Canadian Water Carriage of Goods Act 1910[65]. The Committee's Report was accepted by the Imperial Conference and all the Imperial governments agreed to introduce such enactments in their countries[66]. Later, England, considering that the agreement might cause damage to its own carriers by placing them at a disadvantage in relation to international competition[67], applied to the International Law Association (ILA) to solve this problem through an international conference[68].

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[61] The first international convention on the carrier's liability was the CMI Convention signed among the European Countries at Bern on October 14, 1890 so as to unify the national laws on the rail transport.

[62] Carver,T.G.: Carriage, p.299; O'Hare,C.W.: Hague Rules Revised: Operational Aspects, 10 Melb.U.L.Rev. 527 (1976), p.531 (to be cited thereinafter as "Hague Rules").

[63] Dominions Royal Commission, Final Report on the Natural Resources, Trade, and Legislation of Certain Portions of His Majesty's Dominions, in [1917-18] 10 Parliamentary Papers 1.

[64] Dominions Royal Commission, Report on the Limitation of Shipowners' Liability by Clauses in Bills of Lading, in [1921] 15 Parliamentary Papers 347 (to be cited thereinafter as "Report of 1921").

[65] Dominions Royal Commission, Report of 1921, p.3.

[66] Sturley,M.F.: History, p.18.

[67] Diamond,A.: The Hague-Visby Rules, 1978, LMCLQ 225 (1978) (to be cited thereinafter as "Visby Rules"); Frederick,D.C.: Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules, 22 JMLC 81, Ja' 91, p.87 (to be cited thereinafter as "Political Participation").

[68] Colinvaux,R.P.: The Carriage of Goods by Sea Act 1924, 1954, p.6 (to be cited thereinafter as "COGSA"); Dor,S.: Bills of Lading Clauses and the Brussels International Convention of 1924 (Hague Rules), 2nd ed., 1960, p.17 (to be cited thereinafter as "Hague Rules").

Between May and June 1921, the ILA's Maritime Law Committee on Bills of Lading prepared a draft similar to the Canadian Act despite objections from English carriers[69]. The draft was circulated and submitted at the ICC meeting in London in June 1921[70]. Shortly thereafter, it was ratified under the name of "the [pre-] Hague Rules 1921" at the ILA's Conference at the Hague on September 2, 1921[71].

The pre-Hague Rules 1921, like the York-Antwerp Rules 1877 and the Hamburg Rules 1885, were not binding on contracting parties. They were only composed of some clauses which were recommended to carriers to voluntarily insert into bills of lading[72]. In November 1921, the International (London) Conference of shipowners suggested them for voluntary application considering the principle of the freedom of the contract[73].

Under the pre-Hague Rules 1921, like the Canadian Act, the carrier would be liable for the fault in the handling, loading, stowage, carriage, custody, care and unloading of cargo but not in the navigation or management of the ship[74]. Yet, the Rules differed slightly from the Canadian Act in some ways:

Firstly, the Rules referred to the carrier as a person who could be liable rather than to the shipowner or charterer due to developments in maritime transport. Secondly, the maximum amount of the carrier's liability was increased from $100 to £100 per package or unit unless a higher value was stated in the bill of lading[75]. Thirdly, the period in which the carrier could be sued was extended to one year[76]. Previously, clauses requiring actions to be brought within 60 days were valid under the Canadian and US laws[77]. Fourthly, the function of the notice of loss or damage was altered. The receipt of cargo without such a notice would be only *prima facie* evidence of delivery by the carrier of goods as described in the bill of lading, but would no longer deprive cargo interests of

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69 ILA Maritime Law Committee, Report on Bills of Lading, p.xxxix, xl.
70 ILA, Hague Report, p.xxii.
71 ILA, Hague Report, p.212 - Colombos,C.J.: The International Law of the Sea, 6th ed., London 1967, p.357 (to be cited thereinafter as "International Law").
72 Knauth,A.W.: Ocean, p.126; Sweeney,J.C.: UNCITRAL and the Hamburg Rules, 22 JMLC 511, Jl/O' 91, p.517 (to be cited thereinafter as "Hamburg Rules"); Zamora,S.: Liability, p.405.
73 International Shipping Conference, Report of 1921, London, p.36-47.
74 Articles 3 (2) and 4 (2) - ILA, Hague Report, p.213-215.
75 ILA, Hague Report, p.200, 216.
76 Article 3 (7) - ILA, Hague Report, p.140-142, 258.
77 *The Sagadahoc* 291 F 920; 921, 1923 AMC 734 (1923).

their rights to sue[78]. Fifthly, the list of exemption clauses was expanded to cover some unavoidable events, such as, the arrest or restraint of princes, rulers, or people; act of war; quarantine restrictions; riots or civil commotion; insufficiency or inadequacy of marks or latent defects not discoverable by due diligence despite the fact that a number of delegations (including the German, Netherlands, Norwegian and Swedish) proposed to remove the list[79]. Last, but not least, the new rules laid down rights and obligations of both parties in contrast to the Canadian Act, which was only concerned with preventing the carrier from escaping liability. While the second, third and fourth changes were considered a significant victory for cargo interests, the fifth amendment regarding the burden of proof was deemed to favour carriers.

2- The carrier's liability under the Hague Rules 1924

It was hoped that the terms of the pre-Hague Rules 1921, like those of the York-Antwerp Rules 1877, would be taken up universally and inserted into bills of lading. However, the expectation did not materialise, and only a few carriers referred to the Rules[80]. Neither did all cargo owners and shippers take much interest in the new Rules. In fact, some institutions founded for the cargo interests' protection, such as the British National Federation of Corn Trade Association and the US Institute of American Meat Packers, complained that the Rules were unfair in requiring a written notice of loss of or damage to goods before their removal by the consignee, in limiting the carrier's liability to £100 per package, and in reducing the period for action to one year[81].

In response to English shippers' demands for the legislation agreed at the Imperial Conference, the first bill similar to the Canadian Act was prepared by the British Government[82]. Thereupon, the only opportunity left for English carriers (who lost their chance to rely on the principle of the freedom of contract) was to support international uniform rules binding both parties.

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78 Article 3 (6) - ILA, Hague Report, p.108-114, 258.
79 Article 4 (2) - ILA, Hague Report, p.153-157, 260.
80 Carver,T.G.: Carriage, p.300.
81 Sturley,M.F.: History, p.25.
82 IMC, Report of the XIII. (London) Conference, October 1922 (Bulletin no.57), p.171 (to be cited thereinafter as "London Report") and Report of the XIV. (Gothenburg) Conference, August 1923 (Bulletin no.65), p.336 (to be cited thereinafter as "Gothenburg Report").

In May 1922, in a conference arranged by the British Board of Trade, a new draft in place of the Government's bill was introduced in line with the pre-Hague Rules 1921. In the draft, the period for action was extended from one year to two years, and the burdens of proof for due diligence and lack of fault were shifted onto the carrier in favour of cargo interests[83].

After these developments, in October 1922, the London Conference of the International Maritime Committee (IMC) prepared a London Draft based on the final changes in the shape of mandatory legislation which could be accepted by a diplomatic conference[84]. On demand from the US representative, a rule prohibiting carriers from using a benefit of insurance clause to escape liability was inserted into the Draft[85].

A few days later, the London Draft was discussed in the fifth session of the Diplomatic Conference on Maritime Law in Brussels. The sub-committee appointed by the Conference amended the Draft as follows: Firstly, a distinction was made between apparent and non-apparent loss of or damage to goods, and cargo interests were given a three-day period regarding the notice of claim for non-apparent loss or damage. Secondly, in return, the period for action was reduced to one year as adopted in the pre-Hague Rules 1921. During the Conference, the work on the amended document was postponed because most delegates in Brussels had not been authorised to commit their countries to this final version of the text.

In October 1923, the sub-committee (which again met in Brussels) clarified the French and English versions of the final provisions, and examined their application. Moreover, the gold clause, providing that the monetary units were to be taken to be gold value, and that Contracting States had a right to translate £100 into their own currencies in round figures, was added into the new draft[86].

Meanwhile, on the recommendations of the Imperial Government and Parliament, the UK Carriage of Goods by Sea Act 1924 was passed in August 1924 before the

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83 IMC, London Report, p.171 and Gothenburg Report, p.342-345: See Article 3 (6); 4 (1); 4 (2) (q).
84 IMC, London Report - Colombos,C.J.: International Law, p.357.
85 Article 3 (8) - IMC, London Report, p.474.
86 Sturley,M.F.: History, p.31.

international draft was ever voted on[87]. This enactment met with objections from the Danish, Finnish, Norwegian, and Swedish governments in case British delegates might have had to defend such text and, so, their Act[88].

Finally, the rules were signed at Brussels as the "International Convention for the Unification of Certain Rules of Law relating to Bills of Lading" on August 25, 1924. The Convention, commonly known as the "Hague Rules", came into force on June 2, 1931 in certain States[89]. They were/are the first international mandatory rules creating uniform international maritime law, standardising the rights and obligations of contracting parties, and protecting the future of the bill of lading and ocean trade by establishing a balance between cargo and carrier interests.

3- The carrier's liability under the Hague - Visby Rules 1968 (The Hague Rules amended by the Visby Protocol 1968 and the SDR Protocol 1979)

In the 35 years since the Hague Rules were signed[90], new steel ships —faster and bigger— using internal combustion engines and electric motors were built in place of sailing and wooden ships; new packages, such as containers, were invented for the consolidation of goods; ocean bills of lading became more complicated; new transport documents were introduced; the importance of liner carriage increased and, inflation rose sharply[91]. During this period, it was widely recognised that the Hague Rules caused confusion and insoluble problems because of their deficient and insufficient languages[92], and could not keep up with developments in shipping and commerce, which had not been apparent during the fifth session of the Brussels Diplomatic Conference[93].

Together with the growing number of complaints, the International Maritime Committee (IMC) appointed a sub-committee to investigate the flaws in the Hague

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87 Scrutton,T.E.: Charterparties, p.405; Smith,K.-Keenan,D.J.: Mercantile, p.286.
88 Sturley,M.F.: History, p.32.
89 IMC Yearbook (1992), p.140. For the number and names of the Contracting States, look at Appendix.
90 Meanwhile, two international conventions were concluded. Firstly, the Warsaw Convention was done on October 12,1929 to deal with the problems of air transport, which was later amended by the Hague Protocol in 1955. Secondly, the CMR was signed at Geneva on May 19, 1956 to unify the national laws concerning the carriage of goods by road.
91 Crutcher,M.B.: Ocean, p.712.
92 Colinvaux,R.P.: COGSA, p.v; Diamond,A.: Visby Rules, p.227; Todd,P.: Bills of Lading, p.139.
93 Mankabady,S.: Comments, p.32; Moore,J.C.: The Hamburg Rules, 10 JMLC 1, Oc'78, p.3 (to be cited thereinafter as "Hamburg Rules").

Rules although there was an opposite opinion against any revision in the Convention[94]. In May 1959, the sub-committee prepared a report recommending some possible amendments to the appropriate provisions[95] and requested that the Plenary Conference of the IMC should express its views thereon. In September 1959, the IMC, at its Conference at Rijeka, drafted a new Article 10 and instructed its International Sub-Committee to study other amendments and adaptations to the Hague Rules[96].

The Sub-Committee discussed various subjects and made twenty-two positive suggestions to the IMC in March 1962[97]. The Report was presented to the IMC Conference at Stockholm in 1963. However, at the Conference, only the following six problems were addressed:

The first matter was what function Article 10 had. With the aim of clarifying Contracting States' legal position, it was agreed that Contracting States are obliged to apply the Hague Rules to every bill of lading for carriage between two states whatever might have been the nationality of the ship and any interested person[98].

The second question, which figure the carrier's liability was limited to in Article 4 (5), arose from the phrase in Article 9 of "the monetary units (£) ... are to be taken to be gold value", and the use of the option by Contracting States to translate £100 into their own monetary system. At the Conference, so as to avoid fluctuations in currencies, the limitation figure was changed[99].

The third problem was whether or not the carrier or his servants and agents could benefit from the protection of the Hague Rules if sued in tort. Unlike the decision in

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[94] For the opposition see Reynardson,B.: The Liability Underwriter's Point of View, in Lloyd's of London Press Ltd. (Org.): The Hague-Visby Rules and the Carriage of Goods by Sea Act, 1971, A One-Day Seminar (December 8, 1977 London), London 1977, p.1, 2.

[95] Articles 9 (2) and 10 - International Sub-Committee on Conflicts of Law of IMC, Report, May 1959, 24 IMC Conferences 134 (1959) (to be cited thereinafter as "Report, 1959").

[96] IMC, Report of the XXIV. (Rijeka) Conference, September 1959, 24 IMC Conferences 420 (1959).

[97] International Sub-Committee on Bill of Lading Clauses of IMC, Report, March 1962, 26 IMC Conferences 71 (1963), p.71 (to be cited thereinafter as "Report, 1962").

[98] Article 5; IMC, Report of the XXVI. (Stockholm) Conference, 1963, 26 IMC Conferences 1, 546 (1963), p.551 (to be cited thereinafter as "Stockholm Report").

[99] Article 2 (1) - IMC, Stockholm Report, p.549 - Diamond,A.: Visby Rules, p.229.

Midland Silicones v. Scruttons [100] which allowed cargo interests who lost their opportunity to make a claim against the carrier in contract to get round the Rules by suing the carrier's servants and agents in tort[101], it was stipulated that the remedies provided by the Rules should apply in any action against the carrier, his servants and agents in respect of loss of or damage to the goods whether the action be founded in contract or in tort[102].

It was also thought uncertain whether or not the carrier under Article 4 (1) could escape liability for loss or damage arising from unseaworthiness by selecting competent independent contractors to fulfil his obligation to use due diligence to provide a seaworthy ship. With the strength of recovering from the negative effects of *The Muncaster Castle*[103], the British delegation under pressure from carrier interests proposed that the carrier should not be liable for an independent contractor's fault so long as he had taken care in appointing the contractor[104]. The proposal was accepted at the Conference[105].

The fifth gap concerned the fate of the legal position of a bona fide holder of the bill of lading signed by the master even though goods were not actually shipped on board. For the rehabilitation of economic function of bills of lading, the carrier was not permitted to adduce evidence against the statement in the bill of lading transferred to a third party acting in good faith[106].

The sixth and final issue was whether or not the one-year time limit could be extended, and applied to recourse actions[107]. With a view to shortening discussions, it was concluded that one-year period could be extended if parties had so agreed after the cause of action had arisen; and that recourse actions could be brought even after the

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[100] [1961] 2 Lloyd's Rep. 365 - Zaphiriou,G.A.: Amending the Hague Rules, JBL 12, Ja' 71, p.14 (to be cited thereinafter as "Hague Rules").
[101] Reynolds,F.: Rules, p.20.
[102] Article 3 - IMC, Stockholm Report, p.549.
[103] [1961] 1 Lloyd's Rep. 57.
[104] British Maritime Law Association, 26 IMC Conferences 119 (1963).
[105] Article 1 (1) - IMC, Stockholm Report, p.547.
[106] Article 1 (2) - IMC, Stockholm Report, p.547.
[107] Schmitthoff,C.M.: Carriage of Goods by Sea Act 1971, JBL 191, Jl' 71, p.195 (to be cited thereinafter as "COGSA 1971").

expiration of the year if it was brought within the time (at least three months) allowed by the law of the court seized of the case[108].

Apart from the points mentioned above in the IMC Draft Protocol, the provisions concerning the carrier's liability under the Hague Rules were retained intact, and the previous balance between cargo interests and carriers was preserved[109]. The draft Protocol was discussed in the 12th session of the Diplomatic Conference on Maritime Law, convened by the Belgian Government, at Brussels in May 1967[110]. Three of the six revisions were adopted in their entirety[111]. *The Muncaster Castle* amendment could not gain consensus and faced strong opposition.

During the Conference, the Norwegian delegation proposed that "the package or unit" limitation system should have been replaced by the simple "weight" limitation method [already adopted in the international conventions for the carriage of goods by rail (CIM), by road (CMR) and by air (Warsaw Convention)] to find a new criterion applied to bulk cargo and container goods to limit indemnity. The proposed limit was 125 francs per kilogram of gross weight[112]. The Conference was postponed to allow further study of the proposal. In February 1968, the weight system was introduced as an alternative to package and unit methods, and liability limits were clearly based on gold value (PGF). In addition, under which conditions a container would be deemed package or unit was addressed. Accordingly, it was agreed that unless the number of packages or units had been enumerated in the bill of lading as packed in a container, pallet or similar article of transport, this article would be considered a package or unit.

Finally, the geographical scope of the Rules was changed so that the Rules would apply to outward shipment and to the bill of lading containing a clause paramount as well as the bill of lading issued in a Contracting State. Moreover, the right was awarded to the Contracting States to apply the Rules to inward shipments[113].

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[108] Article1 (3 and 4) - IMC, Stockholm Report, p.547, 549.
[109] Scrutton,T.E.: Charterparties, p.405.
[110] Diamond,A.: Visby Rules, p.232.
[111] 1 IMC Documentation 62 (1968).
[112] Diamond,A.: Visby Rules, p.232.
[113] Astle,W.E.: Bills of Lading, p.31; Zaphiriou,G.A.: Hague Rules, p.13.

On February 23, 1968, these revisions were ratified at Brussels under the name of "the Protocol 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"[114]. By Article VI of the Visby Protocol, this Protocol and the Hague Rules shall be read together as one single instrument. The Hague Rules as revised by the Visby Protocol, known as the Hague-Visby Rules, was brought into force on June 23, 1977 in certain States[115].

In 1979 another Diplomatic Conference was called by the Belgium Government to find a new limitation figure which was more flexible on the issue of inflation. At the Conference, the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (August 25, 1924, as amended by the Protocol of February 23, 1968)" was agreed upon in Brussels on December 21, 1979. The Protocol, known as the SDR Protocol, came into force on February 14, 1984[116]. It should be considered a part of the Hague-Visby Rules[117]. Under the Protocol, the SDR value was preferred to the gold value as a basis of limitation.

B) THE CARRIER'S LIABILITY UNDER THE HAMBURG RULES 1978

After the Second World War, economic and political conditions in the world changed sharply. Many newly independent countries in Asia and Africa emerged, and entered into international trade. Indeed, these new entrants became prolific exporters, responsible for some 65% of the shipments in maritime commerce. However, carriage itself was still in the hands of industrialised nations, which owned 93% of the mercantile fleet[118]. Therefrom, it may be said that developing countries mostly represented cargo interests in contrast to the developed states which usually associated with carriers/shipowners.

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[114] 2 IMC Documentation 4 (1968).
[115] IMC Yearbook (1992), p.148. For the number and name of the Contracting States look at Appendix.
[116] IMC Yearbook (1992), p.150.
[117] *INA v. The Atlantic Corona* 1989 AMC 875, 878 (SD NY 1989).
[118] Andreani,L.: Revision of the Hague Rules, Activities of UNCTAD and UNCITRAL and the Developing Countries, Studies on the Revision of the Brussels Convention on Bills of Lading, Genoa 1974, p.11, 21.

These developing and other cargo owner countries, believing that radical reforms would not be brought, and that the ancient liability system would be re-adopted by the IMC, became hostile to this institution. They, which could not find any opportunity to express their problems during the preparation of the previous Conventions, complained about the languages of the Hague Rules causing confusion, insufficiency in their systems, imposing unduly heavy burden of proof on the consignee, not including loss resulting from delay, protecting carriers unjustifiably, not answering to the needs of modern sea carriage and international trade, and not providing a solution for the overlap between cargo and liability insurance; between cost and safety; and between freight charges and liability[119].

Then, the Working Groups were appointed by the United Nations Conference on Trade and Development (UNCTAD)[120] and the United Nations Commission on International Trade Law (UNCITRAL)[121] to investigate the flaws in the Hague and Hague -Visby Rules.

In December 1969, the UNCTAD Working Group held its first session at Geneva to review the economic and commercial aspects of international legislation and practices in the field of bills of lading from the standpoint of their conformity with the needs of economic development in particular of the developing countries[122]. The Secretariat of UNCTAD prepared a comprehensive Report on the modern bill of lading and the need to revise the Hague Rules[123].

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[119] Basnayake,S.: Introduction: Origins of the 1978 Hamburg Rules, 27 AJCL 353-355, Spr/Summ'79, p.354; Herber,R.: The Hamburg Rules in EIMTL (ed.): The Hamburg Rules, Maklu 1994, p.33, 37 (to be cited thereinafter as "Hamburg Rules"); Shah,M.J.: The Revision of the Hague Rules on Bills of Lading within the UN System - Key Issues, in Mankabady,S. (ed.): the Hamburg Rules, Leyden-Boston 1978, p.1, 4; UNCITRAL: Revision of the Hague Rules, 5 JWTL 577 (1971), p.577 / Çağa,T.: Birleşmiş Milletler Denizde Eşya Taşıma Konferansı, 1978, Batider, 1979, Vol.2, p.323.

[120] which was set up in 1964 by the UN to formulate policies on international trade and economic development, and to consider the problems of developing countries.

[121] which was established in December 1966 by the UN to further the progressive harmonisation and unification of the law of international trade by maintaining a close collaboration with the UNCTAD.

[122] Working Group on International Shipping Legislation of UNCTAD, Report of the First Session (1969), Doc. TD/B/289, TD/B/C14/64, TD/B/C4/ISL/4, prgf.17, 27 and 31 - Berlingieri,F.: The Works of UNCTAD and UNCITRAL on the Revision of the Brussels Convention of 25 August 1924 on Bills of Lading, in Studies on the Revision of the Brussels Convention on Bills of Lading, Genoa 1974, p.11, 15.

[123] UNCTAD Secretariat, Report of Bills of Lading.

The UNCITRAL Working Group met in Geneva in March 1971 following the meeting of the second session of the UNCTAD Working Group in February 1971 to give consideration to its recommendations[124]. The Working Group proposed that: the Hague and Hague-Visby Rules should be examined with a view to revising and amplifying the Rules as appropriate; a new international convention might if appropriate be prepared for adoption under the auspices of the United Nations; and the examination should aim at the removal of such uncertainties and ambiguities as exist and at establishing a balanced allocation of risks between the cargo owner (cargo interests) and the carrier, with appropriate provisions concerning the burden of proof[125].

After four years of discussions at the UNCITRAL Working Group[126], the Working Draft was prepared in February 1975[127]. The Draft, considered and amended by the UNCTAD in July 1976[128], was criticised by several groups. Thereupon, in July 1976, the UNCITRAL modified the Draft according to these criticisms. Finally, the Diplomatic Conference was held at Hamburg in March 1978. After studying almost 200 amendments, the Draft was accepted under the name of "the Convention on the Carriage

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[124] UNCITRAL, Report of the Third Session (1970), General Assembly Doc. A/8017; 1 Yearbook of the UNCITRAL 129, 146 (1970) (United Nations, New York, 1971; Doc. A/CN9/SER. A/1970), p.146, prgf.159-162.

[125] Working Group on International Legislation on Shipping of UNCITRAL, Report of the Second Session (1971), General Assembly Doc. A/CN9/55; 2 Yearbook of the UNCITRAL 133 (1971) (United Nations, New York, 1972; Doc. A/CN9/SER.A /1971).

[126] Working Group on International Legislation on Shipping of UNCITRAL, Report of the Third Session (1972), General Assembly Doc. A/CN9/63; 3 Yearbook of the UNCITRAL 251 (1972) (United Nations, New York, 1973; Doc. A/CN9/SER.A /1972); Report of the Fourth Session (1972), General Assembly Doc. A/CN9/74; 4 Yearbook of the UNCITRAL 137 (1973) (United Nations, New York, 1974; Doc. A/CN9/SER.A /1973) (to be cited thereinafter as "Report of the Fourth Session"); Report of the Fifth Session (1973), General Assembly Doc. A/CN9/76; 4 Yearbook of the UNCITRAL 200 (1973) (United Nations, New York, 1974; Doc. A/CN9/SER.A /1973) (to be cited thereinafter as "Report of the Fifth Session"); Report of the Sixth Session (1974), General Assembly Doc. A/CN9/88; 5 Yearbook of the UNCITRAL 113 (1974) (United Nations, New York, 1975; Doc. A/CN9/SER.A /1975) (to be cited thereinafter as "Report of the Sixth Session"); Report of the Seventh Session (1974), General Assembly Doc. A/CN9/96; 6 Yearbook of the UNCITRAL 187 (1975) (United Nations, New York, 1976; Doc. A/CN9/SER.A /1976) (to be cited thereinafter as "Report of the Seventh Session").

[127] Working Group on International Legislation on Shipping of UNCITRAL, Report of the Eighth Session (1975), General Assembly Doc. A/CN9/105; 6 Yearbook of the UNCITRAL 222 (1975) (United Nations, New York, 1976; Doc. A/CN9/SER.A /1976) (to be cited thereiafter as "Report of the Eighth Session") - Sweeney,J.C.: The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part I), 7 JMLC 69, O'75, p.69 (to be cited thereinafter as "UNCITRAL I")..

[128] Working Group on International Shipping Legislation of UNCTAD, Report of Conference of the Session (1976), Doc. TD/B/C4/ISL/25.

of Goods by Sea" on March 31, 1978. The Convention, known as the Hamburg Rules 1978[129], became effective in November 1, 1992, in certain states[130].

The main feature of the Hamburg Rules was to be born of political agreement rather than the commercial compromise[131]. During the revision of the rules relating to the carrier's liability, three different groups of interest often came face to face. These were Group B (Western Europe and Others: i.e. the USA, Japan, Australia, etc. except Finland), Group D (Eastern Europe: i.e. USSR and countries which are members of COMECON) and Group C (The Group of 77) (i.e. Asia, Africa and South America including Yugoslavia). Group B normally represented carrier countries despite the fact that some of them, such as the USA and France, favoured cargo interests. Group D had similar interests to Group C due to the state capitalism although cargo interests were supported by Czechoslovakia, Hungary and the German Democratic Republic. On the other hand, the members of Group C were mainly composed of shipper countries except for Argentina, Indonesia, South Korea, Liberia, Peru and Venezuela[132]. The trade between these groups and sub-groups therein was so inflexible that when agreement was reached no one dared even insert a comma for the fear that the whole deal would be upset[133].

The Hamburg Rules unlike the Hague and Hague-Visby Rules were drafted in the continental rather than Anglo-American legislative style and did not mostly deal with the carrier's exemptions. Instead, they introduced simple liability test based on the principle of presumed fault, and abolished the long list of exemptions. Almost all the amendments in the Hague-Visby Rules 1968 were also incorporated therein. In addition, the scope of the Convention was expanded to cover inward shipments, deck cargo and

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[129] According to the recommendation under Annex III of the Hamburg Rules.

[130] For the number and name of the Contracting States look at Appendix.

[131] Chandler III,G.F.: After Reaching a Century of the Harter Act: Where Should We Go from Here?, 24 JMLC 43 - 51, Ja' 93, p.45; Frederick,D.C.: Political Participation, p.81, 105.

[132] Sweeney,J.C.: Review of the Hamburg Conference, in Lloyd's of London Press (Org.): The Speakers' Papers for the Bill of Lading Conventions Conference, New York - 29/30 November 1978, New York 1978, p.1, 8 (to be cited thereinafter as "Review") / Göğer,E.: Denizde Eşya Taşıma Konvansiyonu Hakkında Genel Bilgiler, Batider, 1980, Vol.X, Is.3, p.601, 604.

[133] US MLA, Annual Report of 1978, p.6872 - Cleton,R.: The Special Features Arising from the Hamburg Diplomatic Conference, in Lloyd's of London Press Ltd. (Org.): The Hamburg Rules, A One-Day Seminar (September 28, 1978 - London), London 1978, p.1.

live animals; the period for suit was extended to two years; the problems relating to the sub-contract of carriage were solved; wide discretionary power was given to the consignee to choose the jurisdiction; and the burden of proof was principally imposed on the carrier.

VII. THE CARRIER'S LIABILITY AT PRESENT

Since the coming into force of the Hamburg Rules, the carrier's liability has been governed by one of either the two international regimes: the Hague and Hague-Visby Rules or the Hamburg Rules. These Rules also led to domestic statutes (bills) which either have no similarity with these International Conventions or carry the features of one or more international rules at the same time (For example, the Iraqi Transport Law, the Chinese Maritime Code 1993[134]; the Scandinavian Maritime Codes 1994; the French Maritime Law Association's proposal 1994; the US Maritime Law Association's proposal 1996[135]; the Australian Carriage of Goods Act 1997[136])[137].

Thus, the need for the harmonisation of not only the national but also the international liability regimes has become necessary. With this strength, intergovernmental and non-governmental organisations, such as the IMC, UNCITRAL and EU commissions started to evaluate the three Conventions and prepared many conflicting reports[138].

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[134] Jun,W.G.: The New Chinese Law – An Overview, 7/6 P&I Int'l 14, Ju'93, p.14; Li,L.: The Maritime Code of the People's Republic of China, LMCLQ 204 (1992), p.205 (to be cited thereinafter as "China"); Zhang,L.: Shipping Law and Practice in China – Legal Analysis of the Draft Maritime Code and Maritime Jurisdiction, 14 Tul.Mar.L.J. 209, Spr'90, p.215; Zhengliang,H.-Huybrechts,M.A.: The Underlying Principles & Highlights of the Maritime Code of P.R. China, 30/3 ETL 287 (1995), p.287.

[135] Benedict,E.C.: Benedict on Admiralty, Vol. 2A, Carriage of Goods by Sea, revised 7th ed. by Sturley,M.F., New York 1998, p.2/20 (to be cited thereinafter as "Admiralty 2A"); Sturley,M.F.: Uniformity in the Law Governing the Carriage of Goods by Sea, 26/4 JMLC 553, Oc'95, p.553.

[136] Derrington,S.-White,M.: Austrian Maritime Law Update: 1996, 28/3 JMLC 449, Jl'97, p.454 (to be cited thereinafter as "Australian Maritime Law").

[137] International Sub-Committee on the Uniformity of the Law of Carriage of Goods by Sea of IMC, Report 1995, IMC Yearbook 107 (1995), p.113 - Tetley,W.: Time to Overhaul the Rules - Carriage of Goods by Sea, Seaways 21, Ap'98, p.21.

[138] UNCITRAL, Report of the Twenty-Ninth Session (1996), in IMC International Sub-Commmitte, Report 1996, p.354; International Sub-Committee on the Uniformity of the Law of Carriage of Goods by Sea of IMC, Report 1996, IMC Yearbook 343 (1996), p.343 (to be cited thereinafter as "Report 1996"); International Sub-Committee on the Regime of Carriage of Goods by Sea of IMC, Report of the First Session, November 29-30, 1995, 4 IMC News Letter 4, 1995 and IMC Yearbook 229 (1995) (to be cited thereinafter as "Report of the First Session"); International Sub-Committee on the

VIII. CONCLUSIONS

(1) The rules relating to the carrier's liability have their own history. They are the final rings of historical chain. Without analysing each ring carefully, it would be difficult to see what the rules mean and what kind of amendments they need.

(2) The liability rules are the consequences of a compromise between the principles of public policy and of liability due to written statements, and between carriers' and cargo interests' bargaining position. For that reason, the legal nature of liability has gone to and fro on the line of severe and exempted liability in the history. While under Roman law and at common law strict liability was accepted, under civil law and international private law liability was based on the carrier's presumed fault.

(3) In history shipowning countries evaded any enactment which could have restricted their carriers' rights, and reduced their opportunities of international competition while the shipper countries preferred legislation protecting their own carriers and shippers.

(4) In order to unify the rules concerning the carrier's liability, three international conventions were separately prepared. Whilst the Hague and Hague-Visby Rules are the result of commercial compromise between carriers and cargo interests, the Hamburg Rules are the work of political agreement between carrier and cargo interests countries.

(5) These three Conventions put their aims of unification of the rules into danger, and cause uncertainty in world trade as to what the carrier's liability will be under the contract of carriage of goods by sea.

Uniformity of the Law of Carriage of Goods by Sea of IMC, Report of the Second Session, March 12-13, 1996, 1 IMC News Letter 2, 1996 and IMC Yearbook 360 (1996) (to be cited thereinafter as "Report of the Second Session"); International Sub-Committee on the Uniformity of the Law of Carriage of Goods by Sea of IMC, Report of the Third Session, September 27-28, 1996, 3 IMC News Letter 1, 1996, and IMC Yearbook 384 (1996); International Sub-Committee on the Uniformity of the Law of Carriage of Goods by Sea of IMC, Report of the Fourth Session, February 27-28, 1997, IMC Yearbook 402 (1996).

Chapter Two

INTERNATIONAL RULES CONCERNING THE CARRIER'S LIABILITY

In the course of their preparation, application or interpretation, the provisions relating to the carrier's liability should be analysed very carefully because the carrier is to make payment for damages only thereunder. There is no reason for the study of the carrier's liability under the Rules if they do not intend to provide indemnity for the claimant. On that basis, this chapter examines the aims and legal nature of the Rules, their style of legislation and their scopes. Then, the effects of jurisdiction and arbitration on the operations of liability regimes are discussed.

I. AIMS OF THE RULES

A) AIMS OF THE HAGUE AND HAGUE-VISBY RULES

As a result of various and conflicting maritime laws, rules as to the carrier's liability varied from one country to another, and legal disputes were solved differently according to the chosen law and forum. For example, negligence clauses in bills of lading were held to be valid in England, but invalid in the USA. This situation created conflicts and doubt among ocean traders as to which law prevailed, and which risks were assumed by whom. The main reaction against this legal chaos came from bills of lading holders, bankers and underwriters, but not from shippers since carriers were able to reduce their P&I insurance premiums by virtue of exemption clauses, and passed these savings onto shippers in terms of cheaper freight.

During the preparations of the Hague Rules, the bill of lading played a leading role in international trade. Thanks to this document, commercial network around the world was facilitated. Vendors sold their merchandises carried on ships by transferring bills of lading ahead of goods arrival, and received the payment of price through customary documentary credit from banks.

Nevertheless, although the bill of lading governed relationships between the carrier and holder, the latter did not have any control over its terms. Similarly, the banker was a third party to the bill of lading while financing the sales under customary documentary

credit. The cargo underwriter was in the same position as the banker, and became a holder of the bill of lading in the event of using the right of recourse.

Since none of them foresaw which law would be applied to bills of lading, whether or not exemption clauses would be held valid under proper law, and how many risks would be shifted on them, they did not want to be bound by such documents[1]. As a result of this uncertainty about proper law and distribution of risks, vendees of international sale contracts, cargo underwriters and bankers could not count their expenses, and, consequently, exact prices, insurance premiums and interest rates. Thus, they respectively avoided buying and insuring goods subject to the bill of lading and giving credit in exchange therefor. Ocean trade was, thus, seriously impaired.

The rehabilitation of bills of lading which had lost its value, depended on convention based uniform rules standardising, within certain limits, rights of every holder and imposing a minimum liability, from which there was no escape, on the carrier. Hence, the primary purpose of the Hague and Hague-Visby Rules was to safeguard the holders and beneficiaries of bills of lading, and to serve the need for security in international trade by creating *convention based mandatory uniform rules*[2].

B) AIMS OF THE HAMBURG RULES

During the preparation of the Hague and Hague-Visby Rules, only commercial needs relating to the bill of lading were taken into consideration. These activities succeeded despite the fact that there was still an unsolved problem in the evidentiary function of the bill of lading. Indeed, uncertainties regarding the description of quality, condition and quantity of goods carried resulted in some damage to the negotiable character of the bill of lading. Cargo interests could not understand what were carried by ship from the terms of this document. However, these matters were minimal as the commercial practice seemed to have largely adapted itself to the situation.

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1 In 1900, underwriters complained negligence clauses of being unfair at their International Conference: See Knauth,A.W.: Ocean, p.123.

2 *The Muncaster Castle* [1961] 1 Lloyd's Rep. 57, 88 (HL); *The Strathnewton* [1983] 1 Lloyd's Rep. 219, 223 (CA) / *The Asturias*, 1941 AMC 761, 762 (SD NY 1941).

By contrast, the economic aspects of the contract of carriage had never been discussed. The questions as to whether such contract led to economic costs while fulfilling its commercial functions, and how much costs were shifted onto whom had never been answered[3].

The contract of carriage imposed economic costs such as insurance, settlement of claims and litigation (arbitration). The costs of insurance depended on the apportionment of risks between carriers and cargo interests. Had parties known their exact risks, they would have insured only those. Nonetheless, if the risks had been doubtfully allocated as under the Hague and Hague-Visby Rules, there would have been a problem of over (double)-insurance. Under the Rules, carriers were liable for loss of or damage to goods. This liability covered by P&I Insurance policy was subject to many exceptions and limitations whose scopes were equivocal. For that reason, risks falling on cargo interests were indefinite. They had to over-insure these risks lest carriers might have been liable for them.

The other economic costs were imposed by delay in settlement. Carriers had an advantage. They could use cargo interests' funds by paying less interest until the settlement was made.

Last but not least, economic costs arose out of litigation. The uncertainties and complexities in the definitions of the risks under the Hague and Hague-Visby Rules brought about more litigation (especially arbitration) and, therefore, more expenses. These additional costs were usually shifted onto cargo interests as carriers had the opportunity to choose the forum beforehand.

On balance, the lading contract and other contracts of carriage failed the test of economic efficiency in comparison with commercial efficiency to the detriment of cargo interests. This unfair economic situation in particular caused more damage to cargo interests countries, most of which were developing states than carriers/shipowners countries since there was a real income transfer.

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[3] UNCTAD Secretariat, Report of Bills of Lading, p.17, 23, 26, 27-30.

The economic efficiency of the contract of carriage depended on the convention based uniform rules allocating the risks more clearly and fairly between carriers and cargo interests. Consequently, the objective of the Hamburg Rules is to balance out costs by creating *convention based mandatory uniform rules.*

II. LEGISLATIVE STYLES OF THE RULES

The Hague and Hague-Visby Rules were drafted in the form of a model bill of lading because they historically originated from the model documents prepared by the ILA. This drafting is in compliance with the Anglo-American legislative style and doctrine of implied terms, superimposed on the contract of carriage[4]. As is the usual case with other Anglo-American statutes, Article 3 (2) by implication imposed on the carrier a basic liability to properly and carefully carry goods. It is put into a special liability provision in Article 3 (1) shifting onto the carrier a liability to exercise due diligence to provide a seaworthy ship. Accordingly, the carrier has a dual liability under the Hague Rules one of which is not subject to the other. Then these two bases of liability are made subject to so many exceptions under Article 4 (1), (2) and (4) as if the Rules were a part of a bill of lading prepared by the carrier[5]. This technique seems to appeal to the eyes of common business people and makes the understanding of the Rules easy at first sight[6]. Nevertheless it has created so many legal problems regarding their interpretation that courts have not reached uniform burden of proof principles and took the Rules away from conventions governing the other types of transports. Despite the fact that some continental countries' delegations during the Conference of the pre-Hague Rules 1921 had opposed on the ground that such legislative style did not agree with the continental method, the technique was not changed; but the Contracting States were granted a

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4 UNCITRAL: Hamburg Rules, Article by Article Comments, 27 ETL 585 (1992), p.585 (to be cited thereinafter as "Hamburg Rules") - Mustill,M.: A Legal Analysis of the Hamburg Rules, in Comité Maritime International: Colloquium on the Hamburg Rules, Vienna - 8-10 January 1979, p.29, 36 / Kalpsüz,T.: Gemi, p.64.

5 Wilson,J.F.: Basic Carrier Liability and the Right of Limitation, in Mankabady,S. (ed.): the Hamburg Rules on the Carriage of Goods by Sea, Leyden-Boston 1978, p.137 (to be cited thereinafter as "Liability").

6 For this view see Carey,J.E.: The Hamburg Rules from a Cargo Plaintiff's Point of View, in Lloyd's of London Press (Org.): The Speakers' Papers for the Bill of Lading Conventions Conference, New York - 29/30 November 1978, New York 1978, p.1, 2 (to be cited thereinafter as "Cargo Plaintiff").

compromising option to include the Rules in their legislation in a form appropriate to that legislation under the Protocol of Signature[7].

By contrast, the Hamburg Rules — like the conventions relating to other modes of transport drafted in the continental legislative style — firstly states a general rule making the carrier liable for loss and, then, provides a general exemption reducing the carrier's liability to a fault standard. Accordingly, the carrier's liability is affirmative in nature. That eases the construction of the Rules and facilitates the making of multimodal carriage contract and preparation of uniform rules applicable to such agreements.

III.LEGAL NATURE OF THE RULES

It is important to analyse the legal nature of the Rules when creating, giving effect to, applying and finally interpreting them. If this importance is denied, it may result in so many problems that their aims to unify liability regimes could be destroyed.

A) CONVENTION BASED UNIFORM RULES

The three Conventions consist of rules whose aim is to achieve international uniformity in the field of the carrier's liability[8]. Even though they may bring a model for domestic law, they contain a convention based law obligation (in Article 10 of the Hague and Hague-Visby Rules and Article 30 of the Hamburg Rules) for the Contracting States[9] to achieve their principal goal within their territories by applying their provisions *ex proprio vigore*.

In order to perform such obligation Contracting States are firstly obliged either to give them effect directly regardless of any domestic legal procedures or to pass a statute in a form appropriate thereto depending on their constitutions. This is the position taken

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[7] For the Norwegian Ministry's view see Selvig,E.: The Hamburg Rules, the Hague Rules and Marine Insurance Practice, 12 JMLC 299, Ap' 81, p.302, n.8 (to be cited thereinafter as "Marine Insurance").

[8] For discussions see Clarke,M.A.: Aspects of the Hague Rules: A Comparative Study in English and French Law, The Hague: Martinus Nijhoff, 1976, p.8 (to be cited thereinafter as "Hague Rules"); Mankabady,S.: Interpretation of the Hague Rules, LMCLQ 125 (1974), p.126 (to be cited thereinafter as "Interpretation"); Yiannopoulos,A.N.: Conflict of Laws and Unification of Law by International Convention, 21 La.L.Rev. 553 (1961), p.561, 572 (to be cited thereinafter as "Brussels Convention").

[9] which properly signed and ratified or acceded to the Hague, Hague-Visby or Hamburg Rules. Incorporation of the Rules into national law without ratification or accession does not make any country a Contracting State. See also Ying,C.A.: The Hague Rules and the Carriage of Goods by Sea Act 1972, Caveat, 17 Malaya L.R. 86 (1975), p.100.

in the Protocol of Signature of the Hague Rules[10]. Since there is no distinction made under Article 10 of the Hague Rules, both substantive and boundary rules should be put into legal effect[11]. Indeed, not only substantive stipulations, but also a boundary rule (Article 10) intends international uniformity. So unless such Article is adopted, the Contracting States will not discharge their convention based law promise. However, as opposed to the Continental view, the Anglo-American world, which considers the Rules only a model for their municipal law, deemed this Article as a stipulation imposing a duty to pass an act including only substantive provisions (Articles 1 to 8). In their opinion, Article 10 is not clear enough to impose a convention based law obligation on their countries[12]. Thus, they had given their own Hague Rules Acts priority over the Hague Rules. At that time, nobody knew the principal aim of international uniformity would be sabotaged thereby.

Indeed, the uncertainty about the scope of convention based law obligation in Article 10 has created many problems as to the operation of the Rules. While using the right awarded by the Protocol of Signature, some Contracting States made their own boundary rules dissimilar to Article 10. So the ambit and effects of the Convention and national statutes varied from one country to another. As a result, although the proper law of a forum incorporated the Hague Rules and the contract of carriage was covered by them, the Rules did not govern the contract because such law did not put the Rules into effect outside the scope of its own Hague Rules Act. This situation has given carriers an

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[10] For a similar rule, see Article 1 (1) of the CMR: Theunis,J.: International Carriage of Goods by Road (CMR), London 1987, p.13.

[11] Clarke,M.A.: Hague Rules, p.9; O'Keefe,P.J.: Contract of Carriage of Goods by Sea: International Regulation, 8 Sydney L.R. 68, Ja'77, p.71 (to be cited thereinafter as "Contract of Carriage").

[12] In *Vita Food Products Inc. v. Unus Shipping Co. Ltd.* (1939) 63 Ll.L.Rep. 21, the phrase "shall have effect" in Section 1 of the UK COGSA 1924 was not interpreted as granting the force of law to the Rules because the Parliament and the Crown did not give them statutory effect. In the same line *The Alnati* 1966 (High Council of Net.) - Colinvaux,R.P.: COGSA, p.8; O'Hare,C.W.: Hamburg Rules, p.232; Tetley,W.: Marine Cargo Claims, 3rd ed., Montreal 1988, p.6, 8 (to be cited thereinafter as "Cargo Claims"); Yiannopoulos,A.N.: Brussels Convention, p.570, 577; Bills of Lading and Conflict of Laws: Validity of "Negligence" Clauses in England, 37 U.Det.L.J. 198 (1959), p.202 (to be cited thereinafter as "England"). For an opposite view, see *The Torni* [1932] P 78, 90. By contrast, the term "effect" was considered enough to give legal effect to the Hague-Visby Rules under Singapore COGSA 1972: See *The Epar* [1985] 2 MLJ 3 - Reynolds,F.M.B.: Singapore and the Visby Rules, 6 Singapore L.R. 163 (1985), p.167 (to be cited thereinafter as "Singapore"); Rodrigo,G.: Application of the Hague-Visby Rules in Singapore: "The Epar", 27 Malaya L.R. 197 (1985), p.197.

opportunity to escape from liability under the Rules by choosing the law or forum that incorporates but does not give effect to the Rules.

In order to overcome the problem as to the meaning of Article 10 of the Hague Rules and to achieve international uniformity, Article V of the Visby Protocol expresses that each Contracting State has to apply the provisions of the Convention, without discriminating between substantive and boundary stipulations[13]. Nevertheless, the procedure on how to give the effect of law to the Hague-Visby Rules still depends on the Protocol of Signature of the Hague Rules since there is no provision replacing it[14]. As long as the Protocol permitting the Contracting States to control the Rules exists, the international uniform provisions leave the door open for municipal influence.

For that reason, the Hamburg Rules do not include any stipulations similar to such Protocol; Article 29 conversely prohibits all reservations to this Convention. Again, Article 30 puts the Convention into effect for each Contracting State automatically after its ratification, acceptance, approval or accession, and *rightly* obliges each Contracting State to operate the Convention itself rather than their national versions.

The performance of the convention based law obligation secondly depends on the interpretation of the Rules pursuant to their aims. Courts must find internationally acceptable solutions in their decisions[15]. In order to avoid interpreting of the Rules as if they were domestic law[16], this duty was clearly written out under Article 3 of the Hamburg Rules. Accordingly, this Convention shall be interpreted with regard to its international character and to the need to promote uniformity. This is in line with Article

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[13] Secretary-General, Third Report on Responsibility of Ocean Carriers for Cargo: Bills of Lading, General Assembly (1974), Doc. A/CN9/88/Add.1, 5 Yearbook of the UNCITRAL 140 (1974), p.154 (to be cited thereinafter as "Third Report") - Morris,J.H.C.: Scope of the Carriage of Goods by Sea Act 1971, 95 LQR 59, Ja'79, p.64 (to be cited thereinafter as "COGSA 1971").

[14] See also Article XVI of the Visby Protocol which grants the same option to the Contracting State.

[15] *Stag Line Ltd. v. Foscolo, Mango & Co. Ltd.* (1932) AC 328, 342, 350 (HL); *Maxine Footwear Co. v. Canadian Government Merchant Marine Ltd.* [1959] 2 Lloyd's Rep. 105, 113 (PC); *The Muncaster Castle* [1961] 1 Lloyd's Rep. 57, 88 (HL); *Buchanan & Co. v. Babco Ltd.* [1978] AC 141, 152 (HL) (under the CMR); *The Benarty* [1983] 2 Lloyd's Rep. 50, 56 / *The Asturias*, 1941 AMC 761, 762 (SD NY 1941) - Ivamy,H.: Casebook on Carriage by Sea, 6th ed., London 1985, p.97. For an opposite view, see Mankabady,S.: Interpretation, p.127, 131: According to the Author, the courts which incorporated the Rules into a municipal act shall use the methods of interpretation of municipal law.

[16] UNCITRAL: Hamburg Rules, p.593 - Simmonds,K.R.: The Interpretation of the Hamburg Convention: A Note on Article 3, in Mankabady,S. (editor): The Hamburg Rules on the Carriage of Goods by Sea, Leyden-Boston 1978, p.117.

15 of the Convention providing a Uniform Law on the Form of an International Will and Article 7 of the Convention on the Limitation Period in the International Sale of Goods.

Courts must, therefore, first ensure that legal issues would be decided in the same way by their associates. The previous decisions given by their colleagues in the same or other jurisdictions on the same legal disputes should be taken into consideration for the sake of international uniformity. Since it is difficult to access foreign and even sometimes domestic judgements and to satisfy themselves with their meaning, there is no obligation on courts to consume all decisions unless brought before them by practitioners. However, even these previous findings of other courts are to have persuasive but not binding effect; consequently, courts may deviate from them so long as they are able to explain the reasonable legal ground for the divergence. In order to give the three Conventions broader scope and thus release international carriage from the effects of national law, courts must, second, construe their stipulations as widely as covering every issue which is directly or indirectly connected to their coverage.

B) MANDATORY RULES

1- General

By *the principle of freedom of contract* parties are free to decide that the obligor shall be liable merely within the borders of agreed stipulations, and that he is otherwise not obliged to pay damages. However, the absolute nature of the principle could be restricted in order to safeguard public policy, which is the case in the carriage of goods by sea.

Indeed, carriers, on the strength of their strong economic position, used to prepare standard form contracts of carriage including some exemption clauses beforehand, and to offer them to cargo interests. Because of their financial weaknesses, cargo interests were obliged to accept carriers' conditions without discussing the terms however unreasonable and unfair they may have been.

To prevent carriers from inserting these kinds of exemption clauses into carriage contracts, consequently, to protect beneficiaries of bills of lading and to find a fair balance between rights of carriers and cargo interests, the Rules imposed on the carrier

certain minimum liability which he cannot escape from by creating *mandatory* rules as did the US Harter Act 1893[17]. Thus, the principle of the freedom of contract became an exception as if the limitation of freedom had been a rule. This solution has been adopted by the three Conventions with different purpose: to unify conflicting liability regimes.

It seems that the only solution to attain international uniformity in the field of contract of carriage of goods by sea is to make such contracts subject to mandatory rules whatever their disadvantages. Previous experiences from the pre-Hague Rules 1921 show that without such rules, carriers will abstain from incorporating international uniform stipulations into their contracts and will exonerate themselves from liability[18]. Yet, it should also be remembered that today in some cases even the carrier might be affected negatively where the cargo interest is a state or state owned company. In that event they should be protected by the law on unfair contractual terms.

2- Principle

The rules concerning the carrier's liability are laid down mandatorily under the Conventions to give them paramount effect over directory (secondary) rules, custom, usage and contractual stipulations. Indeed, Article 3 (8) of the Hague and Hague-Visby Rules invalidates any exemption contract derogating therefrom.

The *exemption contract* is a mutual agreement relieving the carrier of or lessening liability for loss of or damage to goods. This contract may be incorporated into the main contract of carriage in the form of clauses (*exemption clauses*) or attached thereto as an individual agreement. Under any circumstance, it is firmly connected to the basic contract, and its validity depends on the latter.

The terms of the exemption contract should be interpreted broadly to cover a clause or agreement *not only directly, but also indirectly* removing or restricting the carrier's liability and also his obligation to properly and carefully carry goods in his custody and

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[17] *The Torni* (1932) 43 Ll.L.R. 78, 81 - Tetley,W.: Limitation, Non-Responsibility and Disclaimer Clauses, 11 Mar.Law. 203 (1986), p.205 (to be cited thereinafter as "Limitation Clauses").

[18] For an opposite view see Ramberg,J.: Freedom of Contract in Maritime Law, LMCLQ 178 (1993), p.186: The Author suggests that the principle of freedom of contract should be given full effect in the field of the carrier's liability as did the CMI Rules for Sea Waybills and Electronic Bills of Lading, 1990 and UNCTAD/ICC Rules for Multimodal Transport Documents.

to pay damages. For example, Article 3 (8) of the Hague and Hague-Visby Rules deems a benefit of insurance in favour of the carrier or similar clause to be a clause relieving the carrier of liability[19]. Further the choice of law clauses which are designed to exonerate indirectly him from liability by choosing the law which does not give an effect to the mandatory rules should be considered as an exemption contract[20].

In order to avoid any confusion that the Rules might be contracted out, Article 23 (1) of the Hamburg Rules nullifies any stipulation, including a clause assigning benefit of insurance of goods in favour of the carrier, in a contract of carriage to the extent that it derogates, directly or indirectly, from the provisions of this Convention. This is also the case under Article 41 (1) of the CMR. Thus, not only was the scope of mandatory stipulations extended to stipulations relating to the carrier's liability, but also to the whole Convention. However, it must be remembered that the entire provisions (Articles 1-10) in the Hague and Hague-Visby Rules could in a way directly or indirectly relate to the carrier's liability.

These are all *unilateral* mandatory stipulations since their main aim is to protect cargo interests, but not carriers[21]. For that reason, Article 5 of the Hague and Hague-Visby Rules puts the carrier at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his liabilities and obligations under these Conventions, provided such surrender or increase shall be embodied in the bill issued to

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19 *The Rosetti* [1972] 2 Lloyd's Rep. 116.

20 *The Morviken* [1983] 1 Lloyd's Rep. 1, 7 (HL) / *The Steel Inventor* 1941 AMC 169, 187 (D. Md. 1940) - XIVth ICCL, General Report on the Current Developments Concerning the Form of Bills of Lading, in Yiannopoulos,A.N. (ed.): Ocean, p.3 - Myburg,P.: Current Developments Concerning the Form of Bills of Lading - New Zealand, in Yiannopoulos,A.N. (ed.): Ocean, p.237, p.244, 247 (to be cited thereinafter as "New Zealand"); Yiannopoulos,A.N.: Conflicts Problems in International Bills of Lading, 18 La.L.Rev. 609 (1958), p.618; England, p.203; Bills of Lading and the Conflict of Laws: Validity of "Negligence" Clauses in France, 6 AJCL 516 (1958), p.531; Conflict of Laws and the Brussels Convention of 1924: Validity of "Negligence" Clauses in Germany, 39 U.Det.L.J. 89 (1961), p.96 / Akıncı,S.: Deniz Ticareti Hukuku, Navlun Mukaveleleri, İstanbul 1968, p.384 (to be cited thereinafter as "Navlun Mukaveleleri") - Section 9 of the Australian Sea-Carriage of Goods Act 1924 clearly prohibited these types of provisions: *Wilson v. Compagnie des Messageries Maritimes* [1954] 2 Lloyd's Rep. 544 (Aust. Ct.); *The Amazonia* [1990] 1 Lloyd's Rep. 236 (Aust. CA). For a similar rule, see Section 11A of the New Zealand Sea Carriage of Goods Act 1940. For an opposite view see *The Benarty* [1983] 2 Lloyd's Rep. 50.

21 By contrast, Article 41 of the CMR prohibites parties from either decreasing or increasing the carrier's liabilities under this Convention because not only cargo interests, but also carriers need protection in the field of land transport: Hill,D.J.-Messent,A.D.: CMR: Contracts for the International Carriage of Goods by Road, London 1984, p.234.

the shipper. Likewise, Article 23 (2) of the Hamburg Rules entitles the carrier to increase his liabilities and obligations under the Convention, notwithstanding the provisions of paragraph 1 of this Article. In that way, Article 4 (5) of the Hague and Hague-Visby Rules and Article 6 (4) of the Hamburg Rules permits contracting parties to limit the carrier's liability as exceeding the statutory amounts of damages. Consequently, the contractual clauses referring to rules fixing the maximum amount of damages more than the Hague Rules were found valid[22].

Parties are free to negotiate the terms of exemption contract within the borders of mandatory provisions. For that reason, clauses releasing the carrier from liability for damage by decay [Article 4 (2) (m)][23]; the possible deterioration of cargo insufficiently packed [Article 4 (2) (n)][24]; and delay and default in shipment caused by labour disturbances [Article 4 (2) (j)][25] were held binding under the Hague Rules.

3- Exceptions

The mandatory stipulations shall apply *ex proprio vigore* merely within the coverage of the Conventions or their national versions. Where contracts of carriage fall outside the scope, parties are at liberty to remove or limit the carrier's liability, and any agreement so entered into have full legal effect[26].

In addition, Article 6 of the Hague and Hague-Visby Rules permits the contracting parties to enter into an exemption contract in the case of unusual carriage within the scope of the Conventions provided that no bill of lading has been or will be issued and that the terms agreed to are embodied in a non-negotiable receipt marked as such. The mandatory rules concerning the carrier's liability were created in the light of carriage which may be covered by a bill of lading. There is no reasonable ground for the protection of cargo interests against the carrier in unusual carriage covered by a non-negotiable receipt marked as such. Under this type of transport, the balance between

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22 *Daval Steel Products v. Acadia Forest* 1988 AMC 1669 (SD NY 1988); *INA v. The Atlantic Corona* 1989 AMC 875 (SD NY 1989).
23 *Pettinos v. American Export Lines* 1946 AMC 1252 (ED Pa. 1946).
24 *Cour d'Appeal d'Abidjan*, July 6 and 27, 1956, DMF 358 (1957).
25 *Quaker Oats Co. v. United Fruit Co.* 1956 AMC 791 (5 Cir. 1956).
26 *The Comninos S* [1991] 1 Lloyd's Rep. 371.

cargo interests and the carrier is weighted against the latter; and the coverage of the carrier's risks broads compared with other transport types. The carrier would avoid carrying goods, or increase the amount of freight if unusual carriage is governed by mandatory rules. Accordingly, in order to compromise between the opposite interests and the continuation of trade, it was considered necessary to leave unusual carriage covered by a non-negotiable receipt outside the mandatory scope of the Rules[27].

For the operation of this exception, there should, firstly, be *unusual* carriage, that is a commercial shipment where the character or condition of *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. Carriages of priceless antique items, works of art exhibited at a museum or nuclear waste are examples of the former situations while shipments with the aim of running a blockade, carrying scientific equipment consigned to the pole or dispatching cargo on a stranded ship are instances of the latter circumstances. The problem as to whether carriage is ordinary or unusual depends on the regional custom where the contract is made. Secondly, unusual carriage should be covered by a non-negotiable receipt marked as such (for example, a waybill).

By comparison, the Hamburg Rules do not include any provision similar to Article 6 of the Hague and Hague-Visby Rules. They thus give the Convention the broadest and clearest mandatory scope[28].

The exemption agreement should be clear enough to show that it or its particular part will be valid only outside the ambit of the Rules. Otherwise, it will be construed as void within their coverage[29].

Where the Hague Rules are incorporated into a transport bill outside their scope by a paramount clause, they are deemed to be normal clauses in a contract and have the contractual effect as distinct from the Hague-Visby and Hamburg Rules. Nevertheless, the paramount clause, by agreement, makes the Rules mandatory stipulations because

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27 Okay,S.: Deniz Ticareti Hukuku, Vol.II, 2nd ed., İstanbul 1971, p.178 (to be cited thereinafter as "Navlun Sözleşmesi").

28 Secretary-General, Third Report, p.160.

29 *Leather's Best Inc. v. S.S. Mormaclynx* [1970] 1 Lloyd's Rep. 527, 533 (ED NY 1970).

the parties' intention that the Rules prevail over other contractual clauses is clear from the literal meaning of the word "paramount" unless this purpose conflicts with other stipulations in the bill. Consequently, parties agreeing on the application of the Rules cannot in principle draw their ambit as they wish. Parties have no right to negotiate their own terms conflicting with contractual mandatory provisions[30].

4- Sanctions

Derogation from the mandatory provisions by concluding an exemption contract makes it null and void and of no effect under Article 3 (8) of the Hague and Hague-Visby Rules and Article 23 (1) of the Hamburg Rules. A nullified contract is void from the beginning and has no legal effect at all. The carrier never can rely on the exemption from liability. The sanction of nullity can *sua sponte* be taken into consideration by the court, and its application can be claimed by anyone against anybody.

As laid down under Article 23 (1) of the Hamburg Rules, the contract will be null "*to the extent*" that it derogates from the mandatory provisions (*partial nullity*)[31]. Other parts of the exemption contract still have full effect. For example, clauses relieving the carrier of liability for fault in the operation of the refrigeration apparatus[32]; any breakage[33]; damage resulting from vermin[34]; loss due to heat, or decay of bagged goods[35]; sweat, smell[36] and reducing the statutory amount of damages[37] were, therefore, held void under Article 3 (8) of the Hague and Hague-Visby Rules.

There is an argument whether or not the main contract of carriage remains valid in the event of nullity of the exemption contract. Under some national statutes[38], parties

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30 *Compagnie Beurrière et Fromagère v. Stockholms rederiaktiebolag Svea,* 1951 Nytt jurisdiskt arkiv avd. 138 - Grönfors,K.: Mandatory and Contractual Regulation of Sea Transport, JBL 46 (1961), p.50.

31 *Svenska Traktor Aktiebolaget v. Maritime Agencies* [1953] 2 Lloyd's Rep. 124, 130 (QBD): The clause providing that steamer had liberty to carry goods on deck, and that shipowners would not be liable for any loss, damage, or claim arising therefrom was separated into two parts, and only the second part in conflict with the Rules was held invalid; *The Ion* [1971] 1 Lloyd's Rep. 541 (QBD).

32 *Heinz Horn-Marie Horn* 1968 AMC 2548, 2567 (5 Cir. 1968).

33 *Norman and Burns v. Waterman S.S. Corp.* 1952 AMC 1583, 1587 (SD Alab. 1952).

34 *Macnamara & Son v. Hatteras* (1930) 38 Ll.L.R. 233.

35 *FW Prie v. SS. Mormactrade* 1970 AMC 1327, 1338 (SD NY 1970).

36 *Coventry Sheppard & Co. v. Larrinaga SS Co. Ltd.* (1942) 73 Ll.L.R. 256, 260.

37 *Pan-Am Trade & Credit Corp. v. The Campfire* (1946) 80 Ll.L.R. 26 (2 Cir. 1946); *Sanib v. United Fruits* 1947 AMC 419, 423 (SD NY 1947); *Crystal v. Cunard SS Co.* 1965 AMC 39, 44 (2 Cir. 1964).

38 Such as Article 20 of the Turkish Obligations Code 1926.

have an opportunity to nullify the whole basic contract by proving that, if they had known that the exemption contract was invalid at the beginning, they would not have concluded the main contract. Had this right been granted to the carrier, he could relieve himself from the contract of carriage, and, thus, from paying damages. This sort of result would not agree with the primary aim of the mandatory rules, that of protecting cargo interests rather than the carrier. For that reason, the nullity of the exemption contract should not have any influence on the validity of the main contract of carriage[39]. This is the position taken in Article 23 (1) of the Hamburg Rules.

In order to remove the uncertainty in the minds of cargo interests about the minimum risks assumed by carriers, Article 23 (3) of the Hamburg Rules *rightly* creates a new obligation for the carrier to insert into the contract a statement that the sea carriage is subject to the provisions of this Convention which nullifies any stipulation derogating therefrom to the detriment of the shipper or the consignee[40]. This obligation will be effective insofar as the Rules are compulsorily applicable.

Since the continued inclusion of invalid clauses into the bills of lading might mislead cargo interests by causing them to drop the pursuit of a valid clause, to prolong the trial and to encourage unnecessary litigation[41], Article 23 (4) of the Hamburg Rules imposes a new penalty on the carrier who has made an exemption contract which is null and void by virtue of the present Article, or who has omitted the statement referred to in Paragraph 3 of this Article. Consequently, the carrier shall pay damages in accordance with the provisions of this Convention for any loss of or damage to goods as well as delay in delivery. In addition, he shall contribute for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing stipulation is invoked are to be determined in accordance with the law of the State where proceedings are instituted.

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39 Akman,G.S.: Sorumsuzluk Anlaşması, Doktora Tezi, İstanbul 1976, p.109; Atabek,R.: Eşya Taşıma Hukuku, İstanbul 1960, p.253 (to be cited thereinafter as "Taşıma Hukuku"). For an opposite view, see Tetley,W.: Limitation Clauses, p.209 / Alnıak,M.İ.: Mesuliyetten Kurtulma Kayıtları, İst.Huk.Fak. Mec., Vol. XXXV, Is.1-4, 1970, p.322, 346 (to be cited thereinafter as "Kurtulma Kayıtları")..

40 UNCITRAL Working Group, Report of the Sixth Session, p.124.

41 Secretary-General, Second Report on Responsibility of Ocean Carriers for Cargo: Bills of Lading, General Assembly (1973), Doc. A/CN9/76/Add.1, 4 Yearbook of the UNCITRAL 159 (1973), part two, IV, p.4 (to be cited thereinafter as "Second Report").

5- General average

Article 5 of the Hague and Hague-Visby Rules allows the insertion in a bill of lading of any *lawful* provision regarding general average. The (New) Jason Clause is, therefore, valid unless it contravenes any law including the mandatory stipulations of the Hague and Hague-Visby Rules[42]. By comparison, clauses granting a permission to the carrier to ask for contribution when he is liable under the Rules have no effect[43].

Likewise, the Hamburg Rules do not prevent the operation of provisions not only in the contract of carriage by sea, but also in the national law, regarding the adjustment of general average. Still, the Rules relating to the carrier's liability for loss of or damage to the goods also, with the exception of Article 20, determine whether the consignee may refuse contribution in general average and the carrier' liability to indemnify the consignee in respect of any such contribution made or any salvage paid. So, where the carrier is liable under the Hamburg Rules, he cannot obtain any contribution from the consignee[44]. As a result of the widening of the carrier's liability under the Hamburg Rules, cases where he is not able to ask for security in general average exceeded those in the Hague and Hague-Visby Rules. However, the carrier may still declare general average in the case of unavoidable occurrences. Consequently, under the Hamburg Rules the general average was not abolished, but its scope was limited[45]. Before declaring general average and obtaining its security from the consignee, carriers should

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[42] *Northland Navigation Co. Ltd v. Patterson Boiler Works Ltd.*, 1985 AMC 465 (Can. FC) / *Western Canada SS Co. Ltd. v. Canadian Commercial Corp.* [1960] 2 Lloyd's Rep. 313 - Hudson,N.G.: General Average - Defences and "Due Diligence" Disputes, A New Approach Needed, LMCLQ 416 (1976), p.416. For an opposite view, see Scrutton,T.E.: Charterparties, p.456.

[43] *Gesellschaft Fur Getreidelhandel AG. v. SS Texas* [1970] 1 Lloyd's Rep. 175 (ED La. 1970); *The Hellenic Glory* [1979] 1 Lloyd's Rep. 424 (SD NY 1978).

[44] UNCITRAL Working Group, Report of the Eighth Session, p.230; UNCITRAL: Hamburg Rules, p.625 - Crump,J.: The Influence of the Hamburg Rules on Average Adjustment, in Lloyd's of London Press Ltd. (Org.): The Hamburg Rules, A One-Day Seminar (September 28, 1978 - London), London 1978, p.1 (to be cited thereinafter as "Average Adjustment"); Murray,D.E.: The Hamburg Rules: A Comparative Analysis, 12 Lawyer of the Americas 59 (1980), p.82 (to be cited thereinafter as "Hamburg Rules").

[45] Group 2 of IMC, the Report on the Basis of Liability, including Problems relating to Salvage and General Average, Colloquium on the Hamburg Rules, January 8-10, 1979 - Vienna, p.46, 47 (to be cited thereinafter as "Report on the Basis of Liability") - Ferrarini,S.: Some Thoughts on the Carrier's Liability for Negligence of the Servants in the Navigation of the Vessel and for Failure to keep the Vessel Seaworthy during the Voyage, 78 Dir.Mar. 639 (1976), p.640; Selvig,E.: Marine Insurance, p.317; Sweeney,J.C.: The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part V), 8 JMLC 167, Ja'77, p.175 (to be cited thereinafter as "UNCITRAL V").

consider their legal position more carefully under the Hamburg Rules than the Hague and Hague-Visby Rules. The extension of the carrier's liability may increase the calls of P&I Clubs playing a great role in the covering of general average contributions.

6- Effects of Contracting States' national public policies

The national public policies of Contracting States may require different regime from that supplied in the Rules. This requirement might have been put into the mandatory form of national legislation. As Contracting States are obliged to attain the international uniformity and to give cargo interests at least the same protection as provided for in the Rules, they are presumed to accept the same public policy as in the International Conventions by their ratification. They must be sure that there is no mandatory rule in their countries derogating from the primary aim of the Rules.

By comparison, if national public policy or mandatory provisions have brought more protections for the financially weak aggrieved parties or more punishments for the liable parties, they govern the carrier's liability because the Rules did not intend to show the maximum level of liability but only laid down minimum liability standards from which the carrier cannot escape. This is the position taken by Article 6 of the Hague and Hague-Visby Rules. For example, some national mandatory stipulations[46] prevents the carrier at gross fault from relying on the exemption clauses by nullifying them unlike the Hague Rules. Again, in the USA new quasi-deviation cases have been found in addition to the deviation regulated in Article 4 (4) of the Hague Rules.

IV. SCOPES OF THE RULES

A) GENERAL

The scope of the Rules is one of the topic related to the ocean carrier's liability because outside the coverage of the Rules, the carrier is subject to municipal law which could lay down a different liability regime considering domestic interests. The Rules are compulsory applicable only *within their scope* set forth under their boundary (unilateral choice of law) rules [Article 10 of the Hague and Hague-Visby Rules and Article 2 (1)

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[46] Such as § 276 of the German Civil Code 1896, Article 100 of the Swedish Obligations Code 1911 and Article 99 of the Turkish Obligations Code 1926

of the Hamburg Rules]. These binding provisions delimit the geographical ambit of the Conventions, but do not generally determine which law will apply to the contract unlike general choice of law rules[47].

Courts of Contracting States must investigate *sua sponte* whether or not the contract is within the coverage of the Rules, without regard to any proper law or choice-of-law clause[48]. With this aim in mind they are, however, to consider the facts of each case asserted by parties. Consequently, in practical sense the party seeking the application of the Rules should convince the court thereof.

B) UNDER THE HAGUE RULES

According to Article 10, the stipulations of this Convention shall apply to all bills of lading (lading contracts[49]) issued (made) *in any of* the Contracting States. The Rules shall govern the contract of carriage regardless of whether they are international or domestic because there is no provision to the contrary under this Article[50]. Nonetheless, many Contracting States refused to apply the Convention to domestic carriage so as not to be exposed to other countries' infringement on their national contracts and consequently their jurisdiction. Giving an international character to the contract and operating the Rules, their legal systems focused on the foreign destination of cargo or the nationality of parties to the contract of carriage.

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47 Asser,T.M.C.: Choice of Law in Bills of Lading, 5 JMLC 355, Ap'74, p.358, 361 (to be cited thereinafter as "Choice of Law"); Clarke,M.A.: Hague Rules, p.14, 108; Yiannopoulos,A. N.: Brussels Convention, p.585. For an opposite view, see Williams,R.: A Résumé of the Hague / Hague-Visby / Hamburg Rules, in Economic and Social Commission for Asia and the Pacific, Forth Report, p.67, 68 (to be cited thereinafter as "Rules"): According to the Author, the Hague Rules themselves have no geographic limit on their applicability.

48 *Shackman v. Cunard White Star Ltd.* 1940 AMC 971, 973 (SD NY 1940) - Diamond,A.: Visby Rules, p.225 (on the COGSA 1971); Morris,J.H.C.: COGSA 1971, p.57 (on the COGSA 1971); Tetley,W.: The Hamburg Rules - Good, Bad and Indifferent, in Lloyd's of London Press (Org.): The Speakers' Papers for the Bill of Lading Conventions Conference, New York - 29/30 November 1978, New York 1978, p.1 (to be cited thereinafter as "Good, Bad and Indifferent"). For that reason in Article 21 of the Rome Convention 1980 and the UK Contracts (Applicable Law) Act 1990 it states that "this Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party." For an opposite view see Jackson,D.C.: The Hague-Visby Rules and Forum, Arbitration and Choice of Law Clauses, LMCLQ 159 (1980), p.163 (to be cited thereinafter as "Forum"); Mann,F.A.: Uniform Laws and the Conflict of Laws, 95 LQR 346, Jl'79, p.346.

49 See Chapter Four of the meaning of lading contract.

50 UNCITRAL Working Group, Report of the Sixth Session, p.121.

Furthermore, several Contracting States seeking a criterion directly connecting their countries with carriage avoided adopting Article 10. Thereupon, some of them made the contract of carriage from their own ports subject to the Rules whereas others operated them to the carriage to or from their own ports.

As a result, nowadays this provision has almost no practical importance because the scopes of the Hague Rules Acts (especially in Anglo-American countries) are/were almost completely different from that of the Convention. Hence, the application of the Rules themselves is dependent on the paramount clause in most Contracting States[51].

B) UNDER THE HAGUE-VISBY RULES

The Visby Protocol, at the same time, both limited and extended the coverage of the Rules. The domestic carriage will no longer be subject to the Rules whose purpose is to secure international rather than national uniformity[52]. They govern the international carriage between ports in two different states whatsoever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person. Thus, the objective voyage test was preferred when determining the international character and the ambit of the Rules[53]. This is in line with Article 1 (1) of the CMR[54].

By contrast, according to Article 10 of the Hague-Visby Rules, the provisions shall apply to every bill of lading (lading contract) not only if the bill of lading (lading contract) is issued (made) in a Contracting State, but also if the carriage is from a port in a Contracting State. The reason for extending the ambit of the Rules to the contract of outbound carriage is that the former criterion (the place where the lading contract is made), despite having an appropriate relationship with the agreement of parties, does not bear an adequate connection to the performance of the contract of carriage on its own[55]. Indeed, if the lading contract was concluded in a third Country, the Rules would not govern the contract of carriage from a Contracting State[56]. Nonetheless, in practice,

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51 *The St. Joseph* (1933) 45 Ll.L.R. 180, 187.
52 UNCITRAL Working Group, Report of the Sixth Session, p.121.
53 IMC International Sub-Committee Report, 1959, p.137; Secretary-General, Third Report, p.152.
54 Theunis,J.: CMR, p.8.
55 UNCITRAL Working Group, Report of the Sixth Session, p.121.
56 IMC International Sub-Committee Report, 1959, p.136.

there would be no difference between the first and the second criteria as the lading contract is usually agreed at the port of loading.

During the 12th Session of the Diplomatic Conference on Maritime Law at Brussels in 1967-8, the proposal[57] suggesting that the inward carriage should be governed by the Rules was not accepted so that third-party States where the goods were shipped would be made subject to the substantive rules of the Convention which they did not ratify or accede to. Thus, the domestic law which leads to diversity was preferred to the uniform international stipulations although the Rules will only be applicable within the jurisdiction of a Contracting State, but not a third Country[58]. Yet, Article 10 allows Contracting States to apply these Rules to inward carriage to any Contracting States.

All these criteria, based on the destination of carriage, depend on the intended rather than the actual carriage. Hence, the Hague-Visby Rules will apply even if goods have in fact been discharged short of their destination, at a port in the country of shipment, or even if the carriage is from a port in a third-party country while they should have been consigned from a Contracting State under the contract[59].

C) UNDER THE HAMBURG RULES

The coverage of the Hamburg Rules is much wider than the Hague and Hague-Visby Rules'[60]. For their application, any geographical contact of carriage or its contract with one of the Contracting States seems to be enough. This is one of the most important advances of the Hamburg Rules. By Article 2 (1), the stipulations of this Convention are applicable to all contracts of carriage by sea if:

(a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or

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57 26 IMC Conferences 551 (1963).

58 Secretary-General, Third Report, p.155.

59 UNCITRAL Working Group, Report of the Sixth Session, p.122.

60 even than the scope of the CMR, CIM 1952 and Warsaw Convention: According to Article 1 (1) of the CMR, this Convention shall apply to the contract of international carriage from one state to another if the carriage is from or to the Contracting State. By Article 1 (1) of the CIM 1952 this Convention is applicable to carriage of goods through the territory of at least two Contracting State. Finally, for its application Article 1 of the Warsaw Convention requires that both the place of departure and place of destination be in a Contracting State.

(b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State[61], 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.

Nevertheless, Article 2 (1) and (2) limits the scope of the Rules to international carriage similar to the Hague-Visby Rules. Although there is no clear provision under Article 2, the Contracting States are, of course, free to make domestic carriage subject to the Rules.

C) ENLARGEMENT OF THE SCOPE OF THE RULES BY PARAMOUNT CLAUSES

"*Paramount clause*" is a contract expanding the ambit of the Rules or domestic statutes to cover the contract of carriage falling outside their boundaries[62]. The legal nature of the paramount clause is a contractual choice of law rule. Hence, the paramount clause and chosen foreign law are deemed to be normal clauses in a contract and have the contractual effect[63].

The operation of the Rules or their national versions outside their coverage is dependent on such a clause unless these are proper laws under the conflict rules of forum[64]. Even the Hague Rules States may avoid applying the Hague Rules or their national versions in the absence of a paramount clause if the contract does not come within the scope of their own Acts despite falling inside the ambit of the Hague Rules or their other national versions.

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61 *Tribunal de Commerce de Marseille,* January 23, 1996, Revue Scapel 51 (1996) (*The World Appolo*) / *Carte v. Sudcarcos (Tu. Trib. Prem. Ins. Tunis, 9eme Chr)* November 2, 1994, 1996 Rev. Scapel 40.

62 Selvig,E.: The Paramount Clause, 10 AJCL 205 (1961), p.206 - Tekil,F.: Deniz Yoluyla Eşya Taşımada "Paramount Clause", Sigorta Dünyası, 1970, Is.129, p.4, 22.

63 *Pannell v. US Lines* 1959 AMC 935 (2 Cir. 1959); *Commonwealth Petrochemicals v. S/S Puerto Rico* 1979 AMC 2772 (4 Cir. 1979); *Crispin Co. v. M/V Morning Park* 1985 AMC 766 (SD Tex. 1984); *Institute of London Underwriters v. Sea-Land Services Inc.* 881 F 764 (9 Cir. 1989) - Staniland,H.: The New COGSA in South Africa, LMCLQ 305 (1987), p.307 (to be cited thereinafter as "South Africa"); Wolfson,R.: The English and French Carriage of Goods by Sea Enactments, 4 ICLQ 508 (1955), p.512 (to be cited thereinafter as "Enactments").

64 Asser,T.M.C.: Choice of Law, p.384; Reynolds,F.M.B.: Singapore, p.161.

In order to foster the application of the Hague Rules' Acts outside the country of shipment, some Contracting States expressly provided that every contract of carriage inside the coverage of their national legislation shall contain a statement that it shall be subject to the Act. In the UK, such statutory clauses were considered directory, and no penalty was provided for failure to comply with them[65] while in the US and New Zealand they were regarded obligatory, and, in the event of derogation from this duty, the contract was made subject to the Rules[66].

Similarly, Article 23 (3) of the Hamburg Rules contains an obligation for the carrier to make a statement in the contract of carriage that this Convention governs the carriage. Otherwise, according to Article 23 (4) the carrier shall compensate a claimant who incurs loss as a result of the omission of that statement[67]. This is a useful provision.

The competent court will not apply the Convention or its national version *ex proprio vigore* unless its domestic law gives a legal effect to the paramount clause or chosen law, or unless its State undertakes a convention based law obligation to do so[68]. The Hague Rules has no provision as to the effect of the paramount clause. By contrast, Article 10 (c) of the Hague-Visby Rules and Article 2 (e) of the Hamburg Rules provides for the *ex proprio vigore* application of the Rules if the transport document stipulates that the Rules or legislation of any State giving force to them are to govern the contract[69]. Nonetheless, the effect of the paramount clause still depends on the law of forum in non-Contracting States[70].

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[65] Section 3 of the UK COGSA 1924: *Vita Food Products Inc. v. Unus Shipping Co. Ltd.* (1939) 63 Ll.L.Rep. 21 (PC) - Asser,T.M.C.: Choice of Law, p.388; Yiannopoulos,A.N.: England, p.201;

[66] Section 9 (2) New Zealand Sea Carriage of Goods Act and Section 3 of the US COGSA 1936: *The Steel Inventor* 1941 AMC 169, 187 (D. Md. 1940) - Yiannopoulos,A.N.: Conflict Problems, p.615.

[67] UNCITRAL: Hamburg Rules, p.624.

[68] *The Anteras* [1987] 1 Lloyd's Rep. 424 (CA) / *Kurt Orban Co. v. SS Clymenia* 1971 AMC 778 (SD NY 1970): The Court avoided operating the chosen Australian Sea-Carriage of Goods Act 1924 .

[69] Maskell,J.: The Ifluence of the New Rules on Contracts of Carriage, in Lloyd's of London Press Ltd. (Org.): The Hague-Visby Rules and the Carriage of Goods by Sea Act, 1971, A One-Day Seminar (December 8, 1977 London), London 1977, p.1; Staniland,H.: South Africa, p.307. For an opposite view, see Cadwallader,F.J.J.: COGSA 1971, p.69: The Author seems to be in the opinion that in this case the Rules shall apply by reason of agreement between parties rather than by force of statute.

[70] However, a French court applied the Hamburg Rules to which France was not a party: *Tribunal de Commerce de Marseille,* January 23, 1996, Revue Scapel 51 (1996) (*The World Appolo*).

The contractual reference to the Hague-Visby Rules covers both the Visby and the SDR Protocols since the SDR Protocol should be considered part of the Hague-Visby Rules[71]. Nevertheless, the incorporation of only the Visby Protocol may not result in the application of SDR Protocol. Similarly, a clause incorporating the Hague Rules with the "rules thereto annexed" makes clear reference to the Visby and the SDR Protocols amending them[72]. Likewise, a contractual stipulation providing for the operation of the Hague Rules, as enacted in the country of shipment where the Hague-Visby Rules are applicable, should be enough for the application of the Hague-Visby Rules[73].

According to a general principle of international private law, the competent court will consider the paramount clause and apply the chosen foreign law to the contract so long as the foreign law is not against public policy[74]. For example, even the Hague and Hague-Visby Rules State may avoid operating the other chosen Hague and Hague-Visby Rules State's law if the foreign package limitation is lower[75]. If the chosen law protects cargo interests more than the law of court seized of the case by, for instance, fixing the higher liability limits, it should be given effect because under the Rules the carrier's minimum liability was set forth[76].

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71 *INA v. The Atlantic Corona* 1989 AMC 875, 878 (SD NY 1989).

72 *Francosteel Corp. v. The Deppe Europe* 1990 AMC 2962.

73 *Associated Metals & Minerals Corp. v. The Arktis Sky* 1991 AMC 1499, 1506 (SD NY 1991). However, in *Itel Container Corp. v. M/V Titan Scan* 1998 AMC 1965, 1970 (11 Cir. 1998) although the application of the Hague Rules as enacted in the country of shipment (Japan which had been a party to the Hague Rules at the time of the contract) by an agreement, the court applied the Hague-Visby Rules on the ground of the choice of English forum clause.

74 *Sunds Defibrator v. Atlantic Star* 1986 AMC 368 (SD NY 1983); *INA v. The Sealand Developer* 1990 AMC 2967 (SD NY 1989): The US courts avoided recognising the Swedish or English version of the Hague-Visby Rules and applied the US COGSA instead to the carriage inside the coverage of the Hague-Visby Rules - Reynolds,F.M.B.: Bills of Lading, 10/2 Mar.L.Ass.Aust.&N.Z.J. 35 (1994), p.49 / Göğer,E.: Deniz Ticaret Hukukundan Doğan Kanunlar İhtilâfı, Ankara 1969, p.113. For the application of the Hague-Visby Rules which provide higher liability limits than the US COGSA see Tetley,W.: Acceptance of Higher Visby Liability Limits by US Courts, 23 JMLC 55, Ja'92, p.62.

75 *The Morviken* [1983] 1 Lloyd's Rep. 1, 7 (HL): The court avoided applying a choice of Dutch law clause because under Dutch law (the Hague Rules) liability limits were less than under English law (the Hague-Visby Rules) / *The Steel Inventor* 1941 AMC 169, 187 (D. Md. 1940): The court invalidated the choice of Indian law clause as under Indian COGSA 1925 the package limitation was lower than under the US COGSA.

76 *Daval Steel Products v. The Arcadia Forest* 1988 AMC 1669 (SD NY 1988): The chosen Hague-Visby Rules was applied by reason of fixing higher liability limits. For an opposite view see *Insurance Co. of North America v. S/S Sealand Developer* 1990 AMC 2967 (SD NY 1989): The court did not operate the Hague-Visby Rules although the bill of lading made the contract subject to the Hague Rules or others similar to them, due to the divergence of the former from the Hague Rules.

V. JURISDICTION

Which liability regime is applicable to the carrier is determined by the court seized of the case regarding principles under choice of law rules of forum[77]. Nevertheless, before examining this issue a court must first decide whether it has jurisdiction under its own choice of jurisdiction rules[78]. Each country draws the border of its own sovereignty and also jurisdiction. The matter of jurisdiction and law applicable are, therefore, strictly connected to each other, and the operation of the Rules firstly depends on the institution of a suit in the right jurisdiction recognising the Rules[79]. Though, the Rules have no provisions bordering on the CS' jurisdiction. As a consequence, the matter of selection of jurisdiction is governed by domestic procedural law of the forum as clearly stated under Article 21 (1) of the Hamburg Rules providing that "... in a court, *according to the law of the State where the court is situated*, is competent ..."[80]. Even if the Rules had conferred jurisdiction through their own provisions, courts of non-Contracting States would still be free to decide its territorial competence under their choice of jurisdiction rules. There is no uniformity among laws and court decisions even in the same country as to which jurisdiction is competent. Some courts enviously protected their jurisdiction in order to prevent their citizens from being deprived of their right to justice in their country and refused motions calling for the stay of proceedings whereas others approached the matter more favourably under the principle of *forum non convenience* and accepted the foreign jurisdiction which is considered reasonable and convenient for the hearing of the case as competent[81].

As far as the Rules are concerned, any contractual jurisdiction clause lessening the carrier's liability by, for example, opting for the jurisdiction where the court applies a

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77 *Kelso Enterprises, Ltd. v. M/V Wisida Frout* 1998 AMC 1351 (CD Cal. 1998).

78 For Turkish law see Articles 27 and 31of the Turkish Code concerning International Civil Law and Procedural Law 1982 and Articles 9-27 of the Turkish Code of Civil Judicial Procedure 1927.

79 Mensah,T.A.: The Implications of Different Regimes of Liability, in Economic and Social Commission for Asia and Pacific, Forth Report, p.61, 64.

80 Rèmond-Gouillound,M.: Jurisdiction and Arbitration: Articles 21 and 22 of the Hamburg Rules, in EIMTL (ed.): The Hamburg Rules: A Choice for the EEC?, Maklu 1994, p.117 (to be cited thereinafter as "Jurisdiction"). In the same line see Article 10 of the French Law of April 2, 1936. For an opposite view see Group 6 of IMC, the Report on the Jurisdiction and Arbitration, Colloquium on the Hamburg Rules, January 8-10, 1979 - Vienna, p.54.

81 See in general Jackson,D.C.: Forum, p.165; Mankabady,S.: Comments, p.99; Sturley,M.F.: Bill of Lading Choice of Forum Clauses: Comparison between United States and English Law, LMCLQ 248 (1992), p.248.

law reducing the maximum amount of damages or the period for suit shall be deemed null and void under Article 3 (8) of the Hague and Hague-Visby Rules[82] and Article 23 of the Hamburg Rules. Indeed, those provisions are considered contractual clauses *indirectly* relieving the carrier of liability. Nevertheless, they cannot be interpreted to void all jurisdiction clauses which do not intend to remove or limit the carrier's liability otherwise than under the Conventions[83] even if the foreign forum would apply a law other than the uniform Rules[84]; in that case, their validity is a matter for examination under law and public policy of the forum[85]. Hence, the incursion of expense of bringing the case in a foreign country by the cargo interest due to a jurisdiction clause favouring the carrier should not be reason to lessen liability in the Rules because this expense purely "incidental to process of litigation"[86]. Courts must *ipso facto* examine the facts of each case and the law to be applied by the chosen foreign court and then decide on the validity of the clause. With this aim in mind, the cargo interest should help the court reach necessary information relating to the law applicable despite the fact that there is no statutory onus on him.

In order to make the Rules applicable within their scope and attain the uniform regime all over the world, they should be amended by, at least, requiring the institution of an action in jurisdictions recognising the Rules as under Article 28 of the Warsaw-Hague Convention. Since it is sometimes impossible for the plaintiff to foresee whether

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[82] *Fireman's Fund Ins. Co. Ltd. v. MV Enotria* 22 (2) PD 411 (CA) / *The Gottingen (No. 2)* [1964] 2 Lloyd's Rep. 37 (SD NY 1964) (German jurisdiction clause); *Indussa Corporation v. SS Ranborg* 1967 AMC 589, 595 (2 Cir. 1967) (Norwegian jurisdiction clause); *Hughes, Drilling Fluids v. M/V Luo Fu Shan* 852 F2d 840 (5 Cir. 1988) (Chinese jurisdiction clause) - UNCTAD Secretariat, Report of Bills of Lading, p.50 - Klemm,K.: Forum Selection in Maritime Bills of Lading under COGSA, 12 Fordham Int'l L.J. 459 (1989), p.491; Mendelsohn,A.: Liberalism, Choice of Forum Clauses and the Hague Rules, 2 JMLC 661 (1970), p.664. By comparison, in *Silgan Plastic Corp. v. M/V Nedlloyd Holland* 1998 AMC 2286 (SD NY 1998) the court enforced a Rotterdam Jurisdiction clause without prejudice to the plaintiff's right to reopen the case after the conclusion of Dutch proceedings if a final decision by a Dutch court results in reduction in the carrier's liability.

[83] *Maharani Woolen Mills Co. v. Anchor Line* (1927) 29 Ll.L.R. 169 (CA) / *Tribunal de Commerce d'Anvers* JPA 484 (1968) - Carbone,S.M.-Pocar,F.: Conflicts of Jurisdiction, Carriage by Sea and Uniform Law, in Studies on the Revision of the Brussels Convention on Bills of Lading, Genoa 1974, p.314, 325; Delaume,G.R.: Choice of Forum Clauses and the American Forum Patriae; Something Happaned on the Way to the Forum: Zapata and Silvester, 4 JMLC 295, Ja'73, p.295. For an opposite view see *Indussa Corporation v. SS Ranborg* 1967 AMC 589, 595 (2 Cir. 1967); *Conklin & Garret, Ltd. v. M/V Finnrose* 826 F2d 1441 (5 Cir. 1987).

[84] For an opposite view see Yiannopoulos,A.N.: Germany, p.99.

[85] *Seguros Orinoco v. Naviera Transpapel* 677 F Supp. 675 (1 Cir. 1988).

[86] *Muller and Co. v. Swedish American Line, Ltd.* 224 F2d 806 (2 Cir 1955).

the court is to operate the Conventions, the institution of an action in a second court in reasonable time after the rejection of the Rules by the previous court might not be considered a commencement of a new action.

Carriers have mostly inserted jurisdiction clauses with regard to their own interests rather than those of the claimant and provided that "any dispute arising under this contract of carriage shall be decided in a country "where the carrier has his principle place of business"[87]. In that case, since the cargo interest incurs all the expenses of sending the evidence which is normally obtained at the port of arrival after cargo is received, it has become really difficult for him to sue the foreign carrier in a foreign country.

On this account, Article 21 (1) of the Hamburg Rules rightly lists specific places where the case may be instituted by the cargo interest, *at his option* similar to Article 17 of the Athens Convention. Accordingly, in judicial proceedings relating to carriage of goods under the Hamburg Rules, an action may be brought within the jurisdiction in which one of the following places is situated:

(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 the purpose in the contract of carriage by sea.

The statutory option (c) strengthens the legal position of the cargo interest because exporters and importers can thereby sue the carrier in their places of business related to the performance of the contract of carriage. By comparison, the carrier's legal position has not, thus, been weakened since he nowadays usually has permanent agents at the port of loading and discharge other than the ship's master. Article 21 (1) was, however, criticised by the developed countries on the grounds of distrust in developing countries'

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[87] *The Eleftheria* [1969] 1 Lloyd's Rep. 237.

courts. When choosing jurisdiction the plaintiff should respectively consider whether the court will decide itself as competent under the law of the sate where it is situated, whether its decision will be enforceable, and lastly whether its rules (relating to public policy, procedure etc.) other than the Hamburg Rules favour him more than other optional jurisdictions.

The place of action may be extended by parties through contractual jurisdiction clauses [Article 21 (1) (d)], but cannot be restricted as contravening Article 23 of the Hamburg Rules. Despite the agreement allowed by the Hamburg Rules the cargo interest may still bring the case in one of the other optional jurisdictions listed in Article 21 (1) (a)-(c) of the Hamburg Rules. Article 21 (5) of the Hamburg Rules completely frees parties after a claim under the contract of carriage by sea has arisen to agree on the designation of the place where the cargo interest may institute an action.

Article 21 (1) of the Hamburg Rules only deals with compensatory actions but not with proceedings for provisional or protective measures, such as the arrest of the ship [Article 21 (3) of the same Convention]. The latter may be taken in any place where the protection or provision is effected[88]. In that case, by Article 21 (2) (a) of the Hamburg Rules, an action may, in addition to jurisdictions enumerated in Article 21 (1), be instituted in courts of any port or place in a Contracting State at which a carrying or sister vessel may have been arrested in accordance with applicable rules of the law of that state and of international law. The place of arrest where the suit is to be brought should be in a Contracting State compared to Article 21 (1) whereby the case can be opened in any country. However, as the *forum arresti* is the place where the claimant wishes to secure but not necessarily to settle his claim[89], the cargo interest has, at the carrier's petition, been obliged to remove the action, at his choice, to one of the jurisdictions referred to in Article 21 (1) for the determination of the claim by withdrawing his action in the jurisdiction where the vessel was arrested. In return, the carrier must, beforehand, furnish security to ensure payment of any judgement that may subsequently be awarded to the claimant in the action. According to Article 21 (2) (b) of

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[88] Lüddeke,C.F.-Andrew,J.: A Guide to the Hamburg Rules, from Hague to Hamburg via Visby, London 1991, p.36 (to be cited thereinafter as "Hamburg Rules").

[89] Rèmond-Gouillound,M.: Jurisdiction, p.121.

the Hamburg Rules, all questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest. Further, Article 21 (4) (c) of the Hamburg Rules *justifiably* provides that the removal of an action to a different court in any country in accordance with Article 21 (2) (a), is not to be considered as a commencement of a new action. Despite attempts to keep them to a minimum level during the Conference, some conflicts between Article 21 (2) of the Hamburg Rules and Article 1 of the Arrest Convention 1952, which does not give any ground for the arrest of the ship in case of loss or damage, could not be overcome[90].

The jurisdictions specified in Article 21 (1) and (2) (a) of the Hamburg Rules are so exclusive that the cargo interest cannot institute any action somewhere else. However, courts of non-Contracting States may disregard such rule in spite of Article 23 (3) of the Hamburg Rules.

In Article 21 (4) (a) and (b) of the Hamburg Rules some supplementary procedural provisions were set. Thus, a second court, which recognises the previous decision given by a court competent under Article 21 (1) and (2), was prevented from judging in the same matter. Further, for the purpose of Article 21, the institution of measures with a view to obtaining enforcement of a judgement was considered a continuing part of the previous action.

VI. ARBITRATION

Arbitration is an alternative procedure to judicial proceedings. The parties may agree that disputes arising from the contract of carriage are to be subject to arbitration procedure (*arbitration contract*). This agreement could be incorporated into the contract (*arbitration clause*).

The Hague and Hague-Visby Rules contain no provision on arbitration because this matter was considered to be procedural in nature subject to national law during the Conferences. On this account, there is nothing in the Rules preventing parties from taking disputes to arbitration. Since the law applicable by the arbitrator is normally governed by procedural law of forum where the arbitration proceedings are instituted[91],

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[90] Lüddeke,J.F.-Johnson,A.: Hamburg Rules, p.37.

[91] For Turkish law see Articles 516-536 of the Turkish Code of Civil Judicial Procedure 1927.

and there are conflicts among procedural laws, many problems have arisen as to the application of the Rules and interpretation of arbitration clauses in charterparties[92]. In order to harmonise the conflicting regimes and prevent arbitration tribunals from overlooking the Rules, Article 22 of the Hamburg Rules sets fort some useful provisions for arbitration.

By Article 22 (1) of the Hamburg Rules, parties were authorised to provide by agreement that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration. This agreement must be subject to the provisions of Article 22 and must be in writing[93]. Thus, the general assumption that arbitration does not in principle contravene the Rules and oust the jurisdiction of courts was approved.

Article 22 (2) of the Hamburg Rules precludes the carrier from invoking an arbitration clause contained in a charterparty as against the holder having acquired the bill of lading, issued pursuant to the charterparty, in good faith. If the bill of lading includes a special annotation expressly referring to the charterparty clause, such a stipulation shall bind the holder. Thus, the Hamburg Rules bring a simple solution to the arbitration clauses frequently inserted in charterparties rather than bills of lading[94], which has been interpreted differently under various laws.

Article 22 (3) of the Hamburg Rules grants an exclusive option to the cargo interest to institute the arbitration proceedings at one of the places enumerated in that paragraph. Thus, arbitrators no longer have an authority to determine the place of proceedings as other than stated in the Convention. Those places listed are almost the same as in Article 21 (1) of the Hamburg Rules, where judicial proceedings must be taken, because of the fear that carriers would, otherwise, bypass the Rules by going to arbitration[95].

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92 In general see Carbone,S.M.-Luzzato,R.: Arbitration Clauses, Carriage by Sea and Uniform Law, in Studies on the Revision of the Brussels Convention on Bills of Lading, Genoa 1974, p.353; Marshall,E.A.: Incorporation of Arbitration Clauses into Charterparty Bills of Lading, JBL 478 (1982), p.478.

93 In the same way see Article II of the (New York) Foreign Arbitral Award Convention 1958; Section 32 of the UK Arbitration Act 1950; Article 517 of the Turkish Code of Civil Judicial Procedure 1927.

94 McMahon,J.P.: The Hague Rules and Incorporation of Charterparty Arbitration Clauses into Bills of Lading, 2 JMLC 1, O'70, p.1 (to be cited thereinafter as "Incorporation"); Wilner,G.M.: The Revised Hague Rules on Bills of Lading, 32 Arb.J. 35 (1977), p.36.

95 O'Keefe,P.J.: Contract of Carriage, p.84.

Accordingly, parties are free to select other places where the arbitration proceedings are brought, but cannot restrict them by contract as provided under Article 22 (5) of the Hamburg Rules. Yet, by Article 22 (6) of the Hamburg Rules parties may enter into any agreement regarding arbitration after the claim under the contract of carriage of by sea has arisen.

In many jurisdictions, arbitrators are held free to decide *ex aequo et bono*, i.e., according to the principles of equity and fairness without giving regard to the substantive legal provisions unless otherwise agreed by parties. However, such authorisation cannot be construed broadly to empower arbitrators to disregard the mandatory provisions (like the Hague and Hague-Visby Rules) and public policy of the place where the proceedings are brought[96]. For that reason, Article 22 (4) of the Hamburg Rules obliges the arbitrator or arbitration tribunal to apply the rules of this Convention[97]. In order to strengthen the effect of this provision Article 22 (5) of the Hamburg Rules deems the stipulations of Article 22 (3) and (4) to be part of every arbitration clause or agreement, and invalidated any term of such a clause or agreement which is inconsistent therewith.

VII. CONCLUSIONS

(1) Both the Hague and Hague-Visby Rules' and the Hamburg Rules' systems standardise, within certain limits, rights of parties and impose a minimum unavoidable liability on the carrier with different purposes. The aim of the Hague and Hague-Visby Rules is to facilitate the commercial effectiveness of lading contract (and so of international trade) whereas the objective of the Hamburg Rules is to further the economic efficiency of the contract of carriage, and thus to protect cargo interests and their countries.

(2) These goals were secured by virtue of convention based mandatory uniform rules.

a) The Rules have a *sui generis* character as distinct from international and domestic law since they regulate private law relationships, and include a convention based law obligation for Contracting States to achieve their main aim, international uniformity, set under the Conventions within their territories by operating them. With respect to this obligation, Article 10 of the Hague-Visby Rules and Article 30 of the Hamburg Rules were more lucidly written out than Article 10 of the Hague Rules.

Because of the unclearness of Article 10 of the Hague Rules, many States considered the Rules as a model for domestic law and drafted their own boundary rules dissimilar to Article 10 by using the option granted by the Protocol of Signature. As a result, carriers gained an opportunity to escape from liability under the Rules by choosing a law or

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[96] For an opposite view see Yiannopoulos,A.N.: France, p.535.
[97] UNCITRAL Working Group, Report of the Fourth Session, p.143.

forum that incorporates but does not give effect to the Rules. The Hamburg Rules do not, therefore, contain any Protocol conferring this opportunity to the Contracting States to change the Rules. This is one of the advantages of the Hamburg Rules.

b) Under the Conventions, the provisions relating to the carrier's liability were laid down mandatorily, and the freedom of contract was so limited that it would be regarded as an exception. Accordingly, any exemption contract shall be null and void *to the extent* that it *directly or indirectly* removes or restricts the carrier's liability other than as provided in the Rules. The nullity of the exemption contract should not have any influence on the validity of the main contract of carriage. These mandatory stipulations are unilateral, and the carrier may increase his liabilities.

Article 23 (1) and (2) of the Hamburg Rules is much clearer than Article 3 (8) of the Hague and Hague-Visby Rules. In addition, Article 23 (3) and (4) contains a new obligation to make cargo interests aware of the application of the mandatory provisions and its sanction to prevent the carrier from the continued inclusion of invalid clauses. These are useful amendments since invalid clauses mislead cargo interests, prolong the trial and encourage unnecessary litigation.

(3) Contracting States shall fulfil their convention based law obligation *within the scope* of the Conventions without regard to their choice of law rules.

a) The efficiency of the convention based uniform rules depends on whether or not their coverage has been limited by considering all adequate contacts with their subjects. In relation to contracts of carriage, there are three appropriate contacts: The place where the contract is made, the place where the carriage starts (the port of loading) and the place where the contract is finally performed (the port of discharge). The Hague Rules include only the first one whilst the Hague-Visby Rules comprise the first two. By contrast, the Hamburg Rules involve all of them. This is another improvement of the Hamburg Rules.

Furthermore, the Hague Rules apply to the contract of carriage without regard to their international character. However, the Hague-Visby and Hamburg Rules operate only international carriage between two different States whatever the nationality of the ship, or any interested person.

b) Under the Hague Rules the Paramount Clause in principle only has the contractual mandatory effect. On the other hand, the Hague-Visby and Hamburg Rules give it legal force in the territories of the Contracting States. This seems to be one of the advantages of the latter.

(5) The operation of the Rules and the choice of jurisdiction are strictly connected to each other. However, there is no provision in the Rules bordering on the CS' jurisdiction and obliging claimants to open the case in a jurisdiction recognising the Rules. That may prevent the world-wide application of the Conventions. The parties cannot, however, agree on the choice of jurisdiction where the court applies a law lessening the carrier's liability otherwise than as provided in the Rules. Such an agreement would be null and void under Article 3 (8) of the Hague and Hague-Visby Rules and Article 23 of the Hamburg Rules. Article 21 of the Hamburg Rules fills a big gap relating to the jurisdiction, clarifies the parties' legal positions and confers a wide choice of jurisdiction to the cargo interest.

(6) The Hague and Hague-Visby Rules do not gave any provision concerning arbitration, but it does not mean that the Rules prohibit arbitration clauses unless they are contrary to the mandatory provisions. Article 22 of the Hamburg Rules again contains useful stipulations unifying regimes conflicting with each other and forces arbitrators to operate the Convention.

Chapter Three

BASIS OF THE CARRIER'S LIABILITY

The carrier's basic liability for loss of or damage to goods is contained in Article 3 (2) of the Hague and Hague-Visby Rules and Article 5 (1) of the Hamburg Rules. These provisions do not only make the carrier liable for his own act, but also for the acts of his servants or agents. They are the hearts of the Rules because of introducing a ground for compensation from the carrier. In Article 3 (1) of the Hague and Hague-Visby Rules, another special ground for liability is formulated for unseaworthiness before and at the beginning of the voyage. This chapter, therefore, examines the matters relating to the basis of liability, i.e., the reason for the carrier's liability and its legal nature, its relation with other types of liabilities and the burden of proof on parties.

I. THE REASON FOR THE CARRIER'S LIABILITY

In accordance with one of the general rules of law, everybody should endure his own loss. The only opportunity for the aggrieved party to protect himself against the decline in his assets is, in principle, to buy insurance. In that case, insurance arrangements are entirely placed at his disposal.

Nevertheless, the absolute application of this rule may be in conflict with principles of justice. In particular, when goods have been delivered to the carrier, cargo interests lose the physical control over them. Only the carrier, entitled under the contract to freight for the transport of cargo at his risk, can prevent loss of or damage to it while in his custody by taking all necessary measures. It is, therefore, fair to make him liable for loss or damage during carriage[1].

Otherwise, the carrier would avoid taking care of goods in order to save carriage expenses and would so unjustifiably enrich himself[2]; and cargo underwriters would probably provide insurance without any subrogation right against the carrier at such a high premium that the total costs of carriage would spiral.

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1 See Chapter 7.

2 Poor,W.: A New Code for the Carriage of Goods by Sea, 33 Yale L.J. 133 (1923), p.135 (to be cited thereinafter as "New Code").

Since the carrier can take out a P&I insurance against the risk of decrease in his assets due to his liability and can spread the additional expenses among his customers by means of freight, his economic position would not be aggravated thereby[3]. On the contrary, risk of loss or damage would be distributed among cargo interests without their intention.

II. LEGAL NATURE OF THE CARRIER'S LIABILITY

A) GENERAL

The three Conventions in principle lay contractual liability on the carrier for breach of the contract of carriage agreed prior to loss. Indeed, Article 2 of the Hague and Hague-Visby Rules makes the carrier, under every contract of carriage of goods by sea, subject to the responsibilities and liabilities therein. Law may, with different reasons, exceptionally imposes statutory liability on intermediaries, such as sub-carriers (Article 10 of the Hamburg Rules), or grants statutory right of compensation to third parties as if there was a contractual relation between them. In that case liability is based on an extra-contractual relation.

Liability may be sub-divided into liabilities *with fault* and *without fault* (strict liability[4]). The carrier's liability *for his own act* is liability with fault since the carrier is made liable for his own fault under Article 3 (2) of the Hague and Hague-Visby Rules and Annex II of the Hamburg Rules[5]. If the carrier has not taken all reasonable measures to avoid the occurrence or its consequences, he is at fault. To hold the carrier liable is compatible with justice because fault is described as a conduct which can be blamed in legal respects. Law cannot protect the carrier who did not exercise all steps to prevent loss or damage although he would be able to avoid it. Neither would it be fair to render the carrier taking reasonable care in cargo protection liable. Otherwise, he would be

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3 Sassoon,D.M.: Liability for the International Carriage of Goods by Sea, Land and Air: Some Comparisons, 3/4 JMLC 759, Jl'72, p.771.

4 In this thesis the word "*strict liability*" is used to mean "liability without fault" rather than "liability without any exception".

5 Diamond,A.: The Division of Liability as Between Ship and Cargo (Insofar as It Affects Cargo Insurance) under the New Rules Proposed by UNCITRAL, 1 LMCLQ 39 (1977), p.45 (to be cited thereinafter as "Ship and Cargo"); Nicoll,C.C.: Do the Hamburg Rules Suit a Shipper-Dominated Economy?, 24 JMLC 1, Ja' 93, p.162 (to be cited thereinafter as "Hamburg Rules"); Poor,W.: Charter Parties, p.158; Scrutton,T.E.: Charterparties, p.430; Wilson,J.F.: Liability, p.140; Zamora,S.: Liability, p.445.

compelled to exercise extreme diligence. In that case since he would be liable in any way; he would definitely spend less on the prevention of goods than they require, but he would rather insure his liability. As he is liable to his underwriter only when he deliberately causes loss or damage, he might become careless to preclude loss or damage for which the insurer cannot claim any reimbursement from him.

Furthermore, the shipper would most likely avoid exercising due diligence in packing or marking goods to avert loss or damage, which the carrier is strictly liable for, in order to relieve himself of costs. Such a nature of liability thus encourages both the carrier and cargo interests to set and maintain an optimum standard of care.

The increase in risks does not only bring about legal but also economic consequences. If more risks were shifted onto the carrier by accepting liability without fault, liability (P&I) insurance calls would increase. If so, the carrier would include such a rise in freight into costs. By contrast, cargo interests would no longer need to insure goods against risks shifted to the carrier. Nevertheless, the carrier's insurance would probably be more expensive because the rate must reflect the highest possible risk; the importance of individual ratings would decline; and the actuarial risk would be spread among all P&I members. On this account, the fall in cargo interests' expenses would be less than the rise in the carrier's costs. In addition, merchants could continue to make over-insurance arrangements to retain their practical advantages. Indeed, they who are able to sell their merchandises only under CIF contracts could be obligated to take out cargo insurance against transport risks. More importantly, nobody can guarantee that the carrier will procure insurance or will keep up with the payment of premiums or that the extended liability insurance policy will cover all risks which would be protected by the cargo insurance policy. The reason for the purchase of insurance by cargo interests may also be to secure the advantage of quick recovery, to obtain the sort of cover they specifically require in return for lower premium, to defend themselves against the carrier's bankruptcy or to compensate for loss or damage exceeding the carrier's liability

limits[6]. As a result, the imposition of more risks on the carrier would put total freight expenses up, and would also cause cargo underwriters to lose substantial business.

In short, the fault criterion which helps to keep insurance costs down and to prevent loss of or damage to cargo is a reasonable ground for liability[7]. The risks and its economic consequences are, thereby, distributed between the carrier and cargo interest; thus, the unavoidable risks to the ship are borne by the carrier while those to goods are endured by cargo interests.

B) STRICT LIABILITY FOR OTHERS' FAULT

The carrier's contractual liability for *his servants' or agents' acts* unlike his own act is liability without fault (strict liability) since the liable party (carrier) is under an obligation to pay damages even though he is not at fault[8]. The carrier's fault is not a liability condition. The causal relation between loss and his servants or agents' acts is enough for the existence of liability. Fault may be important for the determination of the amount of indemnity and for the establishment of the causal relation.

It is impossible for the carrier to perform carriage sole due to his increasing commercial relations and to specialisation in the whole transportation area owing to the development in shipping technique and procedure. As a result of developments in maritime commerce, the loading, handling, stowage, carriage, custody and discharge of goods by experts have become necessary. Nowadays, almost all segments of carriage are carried out by third parties rather than the contracting carrier.

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6 McDowell,C.E.: Containerisation: Comments on Insurance and Liability, 3 JMLC 503, Ap'72, p.507, 510, 512 (to be cited thereinafter as "Containerisation"); Stebbings,J.: Will the Hamburg Rules Lead to Increased Demand for the Insured Bill of Lading? The Cargo Insurance Continuing Need for Traditional Cargo Insurance, Lloyd's of London Press (Org.): Speakers' Papers for the Bill of Lading Conventions Conference, New York (29/30 November 1978 - New York), New York 1978, p.1, 3, 7 (to be cited thereinafter as "Cargo İnsurance").

7 Diamond,A.: Ship and Cargo, p.44; Poor,W.: New Code, p.135; Sweeney,J.C.: UNCITRAL I, p.102. For an opposite view see Carbone,S.M.: International Carriage by Sea: Towards a New Allocation of Risks between Carriers and Shippers?, 78 Il Diritto Marittimo 629 (1976), p.635 (to be cited thereinafter as "Allocation of Risks"): The Author suggested that the carrier should be made liable as an entrepreneur for loss or damage deriving from the exercise of his economic activity regardless of his fault on the grounds of bringing simplicity and solving the over-insurance problem; see also in the same opinion Rossmere,A.E.: Cargo Insurance and Carrier's Liability: A New Approach, 6/3 JMLC 425, Ap'75, p.428.

8 Tekil,F.: Navlun Mukaveleleri, İstanbul 1973, p.72 (to be cited thereinafter as "Navlun Mukaveleleri").

The possibility and amount of loss of or damage to cargo in the course of carriage are always high. Assets of servants and agents are normally not enough to compensate the cargo interest for the loss he suffers. By contrast, the carrier is in a better position to absorb the cost of damages paid to the aggrieved party because he can spread the loss among all other customers[9]. For those reasons, the guarantee against loss by the carrier instead of his servants and agents is favourable to cargo interests who are usually in a weaker financial state compared to the carrier.

When the carrier contracts to carry goods in his custody, it is not important for cargo interests to find out whose service has been used to fulfil such undertaking. They prefer the contracting carrier to be held liable for breach of the contract by third parties. A rise in the number of people engaged for the performance of carriage increases the probability of loss of or damage to goods. It would not be fair to put all the risks arising therefrom on the aggrieved party's shoulders.

It may be asserted that the assumption of the obligation by capable and specialist persons in place of the unskilled carrier benefits cargo interests. Nevertheless, if the carrier was not made liable for acts of his servants and agents, the loss could not be made good. He could relieve himself of liability by proving that the loss had not resulted from his actual fault, and that he had taken all reasonable measures to appoint, instruct and supervise his servants and agents. The only liable person would be then his servants and agents. In that case, there would be no opportunity left for cargo interests on shore to determine and sue the person at fault with whom they had had no connection[10]. Accordingly, it is highly probable that they would sustain the loss.

For those reasons, the aggrieved party is right to claim damages directly from the carrier for loss resulting from his servants or agents' acts. The carrier should bear all risks increased by the use of such third parties' services to discharge the obligation of carriage.

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9 Kimball,J.D.: Shipowner's Liability and the Proposed Revision of the Hague Rules, 7 JMLC 217, Oc'75, p.249 (to be cited thereinafter as "Hague Rules").

10 Riska,O.: Shipowner's Liability for Damage Caused by the Negligence of an Independent Contractor Performing Work for the Ship, in Grönfors,K. (editor): Six Lectures on the Hague Rules, Göteberg 1967, p.89, 95 (to be cited thereinafter as "Shipowner's Liability").

Although the carrier's fault is not required for liability, he is not obliged to compensate for loss resulting from any act of his servants or agents under the three Conventions. Indeed, unless the loss has been caused by their fault, there will be no liability (liability *for others' fault*). Otherwise, the carrier would be liable for the acts without fault of his servants or agents while he could not pay any damages if he, in the same way, breached the obligation of carriage by his own act without fault. In that case, it is highly likely that the carrier would avoid entrusting the segments of carriage to more capable specialist third parties. That would not be in the interests of maritime commerce.

C) EXEMPTED LIABILITY

Neither is the carrier made liable for all the fault of his servants or agents under the Hague and Hague-Visby Rules. Article 4 (2) (a) and (b) exempts him from liability for loss or damage arising or resulting from nautical fault and fire unless fault belongs to the carrier (*exempted liability*). Since the fundamental difference between the Hague and Hamburg liability regimes is the removal of these exemptions by the latter, and the Hamburg Rules were heavily criticised on this ground, the legal and economic effects of such elimination will be studied below.

The needs and features of maritime commerce historically played a big role when the carrier was first excluded from liability for nautical fault and fire under bills of lading[11], the Harter Act and the Hague Rules. The investment by the carrier in sea transport was bigger compared to other branches of trade including other modes of transport and compared to the value of goods carried in the ship. The slight failure to exercise due diligence in the navigation or in the management of the ship may have caused her grounding, colliding, sinking or taking a list. In that case, the loss suffered by the carrier were often higher than by cargo interests because he, thereby, usually lost his maritime assets. Had the carrier been made liable for loss arising from nautical fault too, then his economic future would have been put in danger. Similarly, fire was a cause which could

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[11] For the first document containing nautical fault defence see the Eastern Trade Bills of Lading 1871: ARCLN, Liverpool Report, p.68.

not have destroyed only goods, but also the whole wooden-hulled ship even if all necessary steps had been taken to extinguish it.

Once the ship started her voyage, she cut all her links with land, and was left alone against maritime hazards for days and months. During this period only the carrier's servants and agents in the ship had an opportunity to supervise her and the goods therein; the master had to act on his own independent judgement. By contrast, the carrier lost all his control over the ship, cargo and, more importantly, his servants and agents. As the adequacies and sufficiency of servants and agents were subject to public inspection, the carrier's choice of offshore employees was limited too. These assistants were aware of that their fault in the navigation or management of the ship or in fire would have probably made them liable in tort and crime and loss of their lives.

These reasons imply that cargo interests have enough protection against the special risks inherent in the navigation or in the management of the ship or in case of fire[12]. Thus, after the voyage began the cargo interest and the carrier became joined in a perilous common venture whereby they shared both the risks and profits of the sea transport. Cargo interests would get more protection insuring their cargoes if they wished. Even the scope of the FPA free from particular average insurance was large enough to cover cargo losses or damages due to nautical fault and fire[13].

Nowadays, thanks to developments in communication and shipping technologies and in the insurance industry, the implications of maritime perils and consequently of the joint venture in maritime trade has changed slightly. Thus, whether or not the old grounds for nautical fault and fire exemptions are still justifiable for all parties to the joint venture has become polemic.

Carriers still make large investments in maritime transport, and failure in the navigation or management of the ship may even today ruins their business. Moreover, as

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[12] Secretary-General, Report: Analysis of Comments by Governments and International Organizations on the Draft Convention on the Carriage of Goods by Sea, General Assembly (1976), Doc. A/CN9/110, 7 Yearbook of the UNCITRAL 263 (1976), p.271 (to be cited thereinafter as "Report of 1976") - Stebbings,J.: Cargo Insurance, p.6.

[13] Cabaud,H.E.: Cargo Insurance, in Carriage of Goods by Water: A Symposium, 45 Tul.L.Rev. 988 (1971), p.994 (to be cited thereinafter as "Cargo Insurance"); Kozolchyk,B.: Bill of Lading, p.188.

a result of advancements in the construction of bulk cargo carriers or tankers capable of carrying large amount of cargo, carriers' income and risks have increased. However, owing to developments in the hull and liability insurance industry, carriers have gained more opportunity to protect themselves against risks endangering their marine assets. Calls paid by them have been added to freight and, consequently, passed onto customers.

Communication and shipping technologies have enormously developed. Steel-built engine vessels which are more durable and safer against maritime perils have replaced wooden-hulled sailing ships. Thanks to the increase in vessel speeds the period when she is at sea has reduced. The invention of radar and other similar equipment, and the preparation of modern charts have minimised the possibility of shipwreck and iceberg collisions, and grounding. Carriers can now keep in contact with their vessels wherever they are, through computerised radios and satellite and control and instruct their servants and agents. Technological developments have, nevertheless, not rendered the carrier capable of full control of his servants' and agents' activities on a sailing ship. Nonetheless, even partial control is enough to cast doubt on the future of these immunities in the mind of cargo interests because none of contractors including bailees and other sorts of carriers have an absolute control over assistants, warehouses and means of transport. The future seems to be open to more changes and developments in the shipping industry which may place the carrier in such a much strong position to supervise a sailing ship. Law must, therefore, be broad and flexible enough to keep up with futuristic advances.

To exonerate the carrier from liability for his servants or agents' fault would discourage the carrier from incurring further expenses in order to control and train the master and crew for the navigation and the management of the ship as well as fire, to equip the ship with modern navigation and communication devices and to maintain her seaworthiness after the voyage starts. That would normally reduce the degree of care expected from the carrier and would increase the amount of loss of or damage to goods and of harm to the public. After the expansion of the scope of the carrier's liability as a result of the narrow interpretation of these exemptions and of the broad construction of his liabilities and obligations listed in Article 3 (1) and (2) of the Hague and Hague-

Visby Rules, these immunities have partially lost their functions anyway in some jurisdictions.

It was submitted that the carrier who has no more nautical fault and fire defences would be reluctant to provide security to salvors on behalf of cargo interests[14]. This view disregards the fact that not only is the carrier entitled, but also obliged to have goods salvaged if necessary. Should he not take reasonable steps to perform this obligation, he may be liable for loss or damage arising therefrom.

The contract of carriage of goods by sea is a synallagmatic contract whereby the cargo interest is obliged to pay freight so long as the carrier has duly carried goods at his own risk. From the view point of cargo interests, who actually perform the contract is not important. They merely wish the carrier to give them their due by delivering goods in the same state as that in which they have been received and on time. They are ready to pay reasonable freight and to endure all unavoidable marine risks.

If the carrier was made liable for nautical fault of his servants or agents, he would probably extend the P&I (liability) insurance coverage to these new risks in return for an additional call paid to the Club and would reflect the increases in his costs on freight[15]. However, the cargo interest would no longer need additional insurance coverage for nautical fault and fire for which the carrier would already be liable. It was argued that the rise in P&I calls would perhaps proportionally be higher than the fall in cargo insurance premium[16]. Nevertheless, this contention may be discussed from many points of view:

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[14] Buglass,L.J.: The Influance of the Hamburg Rules on Average Adjustment, in Lloyd's of London Press (Organisator): The Speakers' Papers for the Bill of Lading Conventions Conference, New York (29/30 November 1978 - New York), New York 1978, p.1, 6 (to be cited thereinafter as "Average Adjustment").

[15] UNCITRAL Working Group, Report of the Fourth Session, p.140.

[16] McGovern,N.: The Practical and Economic Effects of the Hamburg Rules from the Point of View of a Shipowner, in Comité Maritime International: Colloquium on the Hamburg Rules, Vienna - 8-10 January 1979, p.5 (to be cited thereinafter as "Shipowner"); Moore,J.C.: The Need for Change from the Shipowners' Point of View, the Benefits of Unification Laws, in Lloyd's of London Press (Org.): The Speakers' Papers for the Bill of Lading Conventions Conference, New York - 29/30 November 1978, New York 1978, p.1, 10 (to be cited thereinafter as "Shipowner"; Williams,B.K.: The Consequences of the Hamburg Rules on Insurance, in Mankabady,S. (ed.): The Hamburg Rules on the Carriage of Goods by Sea, Leyden-Boston 1978, p.251, 259 (to be cited thereinafter as "Insurance").

First, supposing the carrier desired to extend the P&I insurance coverage, would it necessarily mean that the P&I would raise the call? The shipowner/carrier normally buys P&I insurance policy at least up to the fair market value of the ship since his liability is proportionally limited to her value. Consequently, rates of call on each P&I member have varied with the gross registered tonnage of the vessel and administrative expenses rather than the amount of goods therein or the extent of damages to be paid by them. Hence, the increase in the risks falling on the carrier would not immediately result in rise in P&I premium rates until the new method for the calculation of calls based on risks is found[17].

Secondly, supposing there was a rise in the P&I call, would it definitely result in an increase in freight? Carriers would probably avoid increasing the freight rate owing to the competitive nature of the industry. Competition between conference and non-conference liner carriers and between liner and tramp carriers would curtail their ability to raise rates. Any addition to freight rates would reduce the number of customers which, in turn, would decrease profits to a greater extent than would generate a reduction of costs because most of its expenses, such as the salary of the master and crew, hull insurance premium and fuel cost would hardly be changed while a few expenses, such as P&I insurance premium, stevedoring fee and the cost of paperwork would be lessened[18].

Thirdly, supposing the carrier was able to increase freight, would the decrease in the risks borne by cargo interests not result in a drop in their expenses such as in cargo insurance premium and litigation costs? Cargo insurance premium against nautical fault and fire for which the underwriter had no subrogation right against the carrier used to be higher than ordinary cargo insurance premiums[19]. It was argued that some cargo

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[17] P&I clubs have already obliged their members to notify the club of the voluntary acceptance of the Hamburg Rules in advance so as to charge the members for the extra risks: Hill,C.J.S.: The Clubs' Reaction to the Coming into Effect of the Hamburg Rules, in EIMTL (ed.): The Hamburg Rules, Maklu 1994, p.193, 199.

[18] Hellawell,R.: Less-Developed Countries and Developed Country Law: Problems from the Law of Admiralty, 7 Colum.J.Transnat'l L. 203 (1968), p.213 (to be cited thereinafter as "Less-Developed Countries").

[19] Schalling,K.: The Practical and Economic Effects of the Hamburg Rules from the View of a Cargo Underwriter, in Comité Maritime International: Colloquium on the Hamburg Rules, Vienna - 8-10 January 1979, p.21 (to be cited thereinafter as "Cargo Underwriter".

underwriters might refuse to lower premium rates[20]. Nonetheless, since the cargo insurance industry is quite competitive[21], cargo underwriters would have to pass the benefit of decrease in their costs onto cargo interests[22]. The drop in premiums may, however, not necessarily equal the increase in cargo insurers' rights of recourse against the carrier as compensation made by the carrier may take some considerable time after the cargo insurance claim has been settled, and it may not be the same as the settlement. Moreover, the increase in recourse claims would no doubt add to the litigation costs of cargo insurers and carriers or their P&I clubs[23]. Cargo insurers would be at difficulty reducing their workforce in the beginning when they may have to employ more people to cope with the increasing number of claims. Similarly, carriers would have to provide costly documentary evidence in relation to the recourse claims. Yet, the dispute between the carrier and the cargo insurer would probably be settled through commercial negotiations rather than through litigation which would reduce expenses[24].

International trade requires simple rules regulating the relationship between parties. Any difficulty in their interpretation would lead to parties losing their reliability and, therefore, friction increasing transport costs[25]. When applying nautical fault-exception courts must first separate nautical fault from commercial fault and from fault in the ship's unseaworthiness. The line between these faults depends on the circumstances of each case; consequently, at the time when the contract of carriage is concluded, cargo interests cannot determine what does and what does not constitute nautical fault and, therefore, the exact risks falling on them. Similarly, since the criterion of benefit separating nautical fault from commercial fault is relative rather than objective, the exemption might be so broadly interpreted to cover almost everything that could happen

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20 UNCITRAL Working Group, Report of the Fourth Session, p.140.

21 Taylor,D.E.: Problems Underwriters encounter when insuring Cargo, in Carriage of Goods by Water: A Symposium, 45 Tul.L.Rev. 1002 (1971), p.1003.

22 Selvig,E.: Marine Insurance, p.313, 316.

23 Diplock,K (L): Introduction - Summing up in Comité Maritime International: Colloquium on the Hamburg Rules, Vienna - 8-10 January 1979, p.56, 59 (to be cited thereinafter as "Introduction"); Mann,A.E.: Summing up on How the Hamburg Rules are Likely to Affect Cargo Underwriting, in Lloyd's of London Press Ltd. (Org.): The Hamburg Rules, A One-Day Seminar (September 28, 1978 - London), London 1978, p.1.

24 Huybrechts,M.: An Introduction to the Theme of the Antwerp Colloquium, in EIMTL (ed.): The Hamburg Rules, Maklu 1994, p.21, 29 (to be cited thereinafter as "Antwerp").

25 Sweeney,J.C.: UNCITRAL I, p.103.

on board[26]. For those reasons, cargo interests have had to insure goods against all the uncertain risks for which the carrier might not have been liable therefor although they might have been already insured by the carrier, and the increase in premium might have already been added to freight. In short, the removal of nautical fault exemption would prevent over-insurance and, thus, decrease cargo interests' costs. Nevertheless, the elimination of nautical fault was heavily criticised by average adjusters that the new uncertainty as to whether the carrier, his servants or agents were at fault would substitute for that whether the measures failed to be exercised aimed at goods or the ship, and that the carrier would be reluctant to declare general average[27]. However, the fact that courts are more familiar with the distinction between acts with fault and without fault than the separation between nautical fault and commercial fault should not be overlooked.

Uncertainties in the interpretation of nautical fault and fire exemptions would also result in unnecessary claims and delays in settlement and would consequently increase litigation costs[28]. New rules laying down a carrier's basic liability may be criticised for leading to new doubts in the law and to measures which would have to be tested by courts and, thereof, to additional costs to carriers and the P&I clubs[29]. However, it should be remembered that whenever a new liability regime is introduced it takes some time to be absorbed by courts[30]. This period would be temporary depending on the similarity of the regime to previous systems.

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26 O'Hare,C.W.: Uncitral Convention, p.134.

27 Buglass,L.J.: Average Adjustment, p.6; Crump,J.: Average Adjustment, p.1.

28 Kimball;J.D.: Hague Rules, p.251.

29 Goldie,C.W.H.: Effect of the Hamburg Rules on Shipowners' Liability Insurance, 24 JMLC 111, Ja' 93, p.111 and in Comité Maritime International: Colloquium on the Hamburg Rules, Vienna - 8-10 January 1979, p.24, 26; Honour,J.P.: The P.&I. Clubs and the New United Nations Convention on the Carriage by Sea 1978, in Mankabady,S. (ed.): The Hamburg Rules on the Carriage of Goods by Sea, Leyden-Boston 1978, p.239 (to be cited thereinafter as "P&I Clubs"); P&I: The Hamburg Rules, P&I International 11, Oc'87, p.12; Poole,T.F.: A Cargo Underwriter's View, in Lloyd's of London Press Ltd. (Org.): The Hague-Visby Rules and the Carriage of Goods by Sea Act, 1971, A One-Day Seminar (December 8, 1977 London), London 1977, p.1, 5 (to be cited thereinafter as "Cargo Underwriter"); Reynardson,B.: The Implications on Liability Insurance of the Hamburg Rules, in Lloyd's of London Press Ltd. (Org.): The Hamburg Rules, A One-Day Seminar (September 28, 1978 - London), London 1978, p.1.

30 For the same comment relating to the pre-Hague Rules 1921 see Bisschop,W.R.: The Reception of the Hague Rules, 1921, in the United Kingdom, RIDM 260 (1992), p.260.

In short, it is doubtful whether the removal of these two immunities would make any difference in total costs; if any, then it would be very modest[31]. Any increase could easily be balanced by limiting the amount of damages to be paid by the carrier depending on the trade between ship and cargo interests. The actual difficulties in obtaining access to the relevant data and statistics in the hand of carriers and insurers make the economic approach to the problem impossible[32]. The fear expressed during the 1955 Amendment to the Warsaw Convention of increasing the carrier's liability by removing the clause in Article 20 (2) exonerating the carrier from liability for an error in piloting, in the handling of the aircraft, or in navigation would put up the over-all costs of carriage did not materialise in the field of air transport although the risks are similar in these two types of carriage. Owing to the development in distributing risk techniques of through insurance, carriers, their insurers and cargo underwriters would be able to cope with amendments in the rules governing the carrier's liability[33].

The only change could be in the market share between cargo insurers and P&I Clubs. By reason of the carrier's liability for nautical fault and fire, P&I Clubs, which are generally based in a small number of maritime countries such as the UK and Scandinavia, would get bigger share from the market whereas cargo insurers, which are domestic, would lose substantial business[34]. As is the case with other modes of transport, the carrier's liability could be insured by conventional insurance companies since today "all risks" and "extended liability" policies are broad enough to cover the

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[31] Diamond,A.: Part One of a Legal Analyses of the Hamburg Rules, in Lloyd's of London Press Ltd. (Org.): The Hamburg Rules, A One-Day Seminar (September 28, 1978 - London), London 1978, p.1, 4 (to be cited thereinafter as "hamburg Rules"); Grönfors,K.: The Hamburg Rules - Failure or Success?, JBL 334 (1978), p.337; Nicoll,C.C.: Hamburg Rules, p.179; Selvig,E.: Marine Insurance, p.316.

[32] Huybrechts,M.: Antwerp, p.24; Sturley,M.F.: Changing Liability Rules and Marine Insurance, 24 JMLC 119, Ja' 93, p.119 (to be cited thereinafter as "Marine Insurance"); Sweeney,J.C.: UNCITRAL V, p.181; Tetley,W.: The Hamburg Rules - A Commentary, LMCLQ 1 (1979), p.4 (to be cited thereinafter as "Hamburg Rules"); Canadian Comments on the Proposed Uncitral Rules , 9 JMLC 251, Ja'78, p.255 (to be cited thereinafter as "Canadian Comments"). A Swedish delegate noted that, after careful study, it had been estimated that freight rates would increase by 1-2%; in general the former was around twice the latter so that the net effect of the changes proposed would be an increase in the costs to shippers of 0.5 to 1% of the freight rate: UNCITRAL Working Group, Report of the Fourth Session, p.140; Secretary-General, Report of 1976, p.271.

[33] UNCITRAL Working Group, Report of the Fourth Session, p.140.

[34] Cabaud,H.E.: Cargo Insurance, p.996; Tetley,W.: Hamburg Rules, p.5. For an opposition in this respect see Secretary-General, Report of 1976, p.271, 273 - Nicoll,C.C.: Hamburg Rules, p.174.

carrier's liability[35]. Should P&I insurance calls be calculated considering the risk, then these conventional policy premiums, which are also based on the same criterion could provide a cheaper protection for the carrier.

The elimination of the immunities would also bring the Hague and Hague-Visby Rules into line with other international conventions relating to other modes of transport[36] and would, consequently, help us to reach uniform rules concerning multimodal carriage of goods which would be adopted by all the interests in trade[37]. Thus, the determination of the leg of transport at which the contract of carriage has been breached would not be necessary for the existence of the carrier's liability, but for the limitation of damages.

While the carrier is made liable only for the fault of his servants and agents, and the amount of damages is limited considering the maritime needs and features, there would be nothing to justify the exemption of the carrier from liability for nautical fault and fire so long as cargo interests are ready to pay for the increase in freight if any. Under the Hamburg Rules, after many arguments[38], these Hague and Hague-Visby Rules exemptions were removed thanks to the pressure by cargo interest countries in return for the limitation of liability to relatively low amounts (only slightly above those in the Hague-Visby Rules)[39].

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35 Selvig,E.: Marine Insurance, p.312.

36 Article 3 (1) and (2) of the Athens Convention 1974; Article 17 of the CMR; Article 20 (2) of the Warsaw-Hague Convention.

37 Honnold,J.O.: Ocean Carriers and Cargo; Clarity Fairness - Hague or Hamburg? 24 JMLC 75, Ja'93, p.98 (to be cited thereinafter as "Hague or Hamburg").

38 Sweeney,J.C.: UNCITRAL I, p.102; Review, p.11.

39 In favour of the removal of nautical fault see British Shippers' Council (in P&I: Hamburg Rules, p.11.) - Al-jazairy,M.R.: The Maritime Carrier's Liability under the Hague Rules, Visby Rules and Hamburg Rules, PhD Thesis, University of Glasgow, 1983, p.56 (to be cited thereinafter as "Liability"); Donovan,J.J.: The Hamburg Rules, 4 Mar.Law. 1, Spr'79, p.1, 15 (to be cited thereinafter as "Hamburg Rules"); Hellawell,R.: Less-Developed Countries, p.203; Honnold,J.O.: Hague or Hamburg, p.75; Kindred,H.M.: From Hague to Hamburg, 7 Dalhousie L.J. 585, O'83, p.585, 618 (to be cited thereinafter as "Hague to Hamburg"); Murray,D.E.: Hamburg Rules, p.59, 91; Nicoll,C.C.: Hamburg Rules, p.151; Schollenberger,D.K.: Risk of Loss in Shipping under the Hamburg Rules, 10 Denver J.Int'l L.&Pol'y 568 (1981), p.568, 575, 576 (to be cited thereinafter as "Hamburg Rules"); Selvig,E.: Marine Insurance, p.299, 324; Sturley,M.F.: Marine Insurance, p.119; Sweeney,J.C.: Review, p.1; Tetley,W.: Good, Bad and Indifferent, p.1, 8; Waldron,A.J.: The Hamburg Rules - A Boondoggle for Lawyers?, JBL 305, Jl'91, p.305, 318; Werth,D.A.: The Hamburg Rules Revisited - A Look at US Options, 22/1 JMLC 59; Ja' 91, p.80.

D) LIMITED LIABILITY

By the three Conventions the carrier does not have to indemnify cargo interests for all loss arising from fault although under the principle of *restitutio in integrum* the obligor should, by full compensation, put the obligee into the same position as he would have been had the contract been duly performed. Indeed, under Article 4 (5) of the Hague and Hague-Visby Rules and Article 6 of the Hamburg Rules the carrier's liability is limited to particular amounts (*limited liability*). Limitation of liability in the field of carriage of goods by sea evolved initially to encourage investment in shipping by protecting the shipowner from economic ruins. The carrier/shipowner could become insolvent if he lost his ship and claim for freight in an incident for which he was fully made liable to the cargo interest. That would be against the economic policy of any country which is apt to extend its shipping fleet. The Limitation of Liability Conventions 1924, 1957 and 1976 limits the carrier/shipowner's liability in this respect. By comparison, under the Rules the main reason for the limitation was different, namely, to prevent the carrier from fixing damages to be paid by him to ridiculously low level. This motive itself was, however, not enough to ascertain how much limitation should have been granted to the carrier. It was, therefore, supported by two other pleas regarding the measures used for limitation[40].

The first measure is the *package*. Indemnity has been limited on this ground since the Liverpool Conference Form 1882 and by Section 8 of the Canadian Water Carriage of

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In opposition to the elimination of nautical fault see the International Association of Dry Cargo Shipowners (Intercargo), ICS (in BIMCO: Hamburg, p. 9025); BIMCO: Hamburg Revisited – A Historical Journey, 1 BIMCO Bulletin 9024 (1988); CENSA; the US General Assembly of the American Bar Association and the US Maritime Law Association (see Attorneys Lane Powell Moss & Miller: Hague-Visby or Hamburg? The Debate Continues in the US, P&I Int'l 4, Jl'88, p.4m - Carey,J.E.: Cargo Plaintiff, p.1; Diamond,A.: Ship and Cargo, p.39; Diplock (L): Introduction, p.1, 56; Hill,C.: Some Thoughts on COGSA 1992 and the Hamburg Rules, 6/10 P&I International 14, Oc'92, p.15; Honour,J.P.: P&I Clubs, p.239, 248; Japikse,R.E.: Deck Cargo Exclusion, Nautical Fault Exemption, Fire Exception, in EIMTL (ed.): The Hamburg Rules, Maklu 1994, p.179, 191 (to be cited thereinafter as "Deck Cargo"); Makins,B.: Sea Carriage of Goods Liability, in BIMCO: Hamburg Revisited, 1 BIMCO Bulletin 9024 (1988), p. 9025; McGovern,N.: Shipowner, p.5; Moore,J.C.: Shipowner, p.1, 12; Pixa,R.R.: The Hamburg Rules Fault Concept and Common Carrier Liability under US Law, 433 Virginia J. Int'l L. 433 (1979), p.470 (to be cited thereinafter as "Hamburg Rules"); Poole,T.F.: Cargo Underwriter, p.1; Schalling,K.: Cargo Underwriter, p.21; Stebbings,J.: Cargo Insurance, p.1; Williams,B.K.: Insurance, p.251, 259.
For abstention see Kimball;J.D.: Hague Rules, p.217, 252.

40 UNCTAD Secretariat, Report on Bills of Lading, p.45.

Goods Act 1910 in order to relieve the carrier of paying full compensation for loss of or damage to packages of invisible contents[41]. Since the carrier cannot determine how much: care he has to exercise, insurance he should buy, and freight he ought to charge without knowing the contents of package, it is just to limit damages to its average real value unless the nature and value of goods are declared in the transport document. Otherwise, the carrier might be liable for invisible goods of unanticipatedly high price[42].

The second criterion is the *unit*. It is used for any kind of unpacked goods. As the nature and value of cargo are normally visible to the carrier, the reason put forward to justify it should, therefore, be different from the latter. Indeed, if the carrier could foresee how much protection ought to be brought for goods, then why was his liability for fault limited under the Rules? Since the unit measure was introduced as a secondary alternative to the package formula without any explanation at the close of the Hague Conference, it is difficult to answer this question[43]. It may be argued that while the Limitation of Liability Conventions 1924, 1957 and 1976 limits the carrier/shipowner's liability, and carriers are almost always protected by the hull and P&I insurance policies, there is no reasonable ground to justify another limitation. Nonetheless, the reason for the unit limitation should be sought somewhere in the relation between risk (fault) and freight[44]. As pointed out above, the more the risks are shifted onto the carrier by adopting the reasonable fault principle, the more freight is payable by the cargo interest because P&I insurance calls are normally higher than cargo insurance premiums. Further, the carrier could avoid augmenting freight in proportion to the increase in transport costs owing to the competitive nature of carriage industry. Consequently, the limitation of liability protects both parties against bad economic results of the fault

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[41] ILA, Hague Report, p.160: Mr Dor mentioned the limitation of liability for parcels before the adoption of "unit criterion".

[42] O'Hare,C.W.: Cargo Claim Limitations and the Hamburg Rules, 6 Austl.Bus.L.Rev. 290 (1978), p.290; Selvig,E.: Unit Limitation of Carrier's Liability: The Hague Rules Art.IV (5): A Study in Comparative Maritime Law, London 1961, p.25, 36 (to be cited thereinafter as "Limitations").

[43] ILA, Hague Report, p.160: Sir Norman stated that "but we must have something besides per package" without giving any reason before the adoption of the "unit criterion" and p.216 - Berlingieri,F.: Under 1924 Brussels Convention "Unit" Is Measure of Limitation Only When Goods Are Not Shipped in Packages, 2 JMLC 413, Ja'71, p.423 (to be cited thereinafter as "Unit").

[44] Diplock,K. (L): Conventions and Morals - Limitation Clauses in International Maritime Conventions, 1 JMLC 525, Jl'70, p.530 (to be cited thereinafter as "Limitation Clauses"); Selvig,E.: Unit Limitation and Alternative Types of Limitation of Carrier's Liability, in Grönfors,K. (editor): Six Lectures on the Hague Rules, Göteberg 1967, p.105, 121 (to be cited thereinafter as "Limitation").

principle and over insurance in maritime trade. Damages should, thereof, be limited considering the rise in freight due to the enlargement in risks. Any drop in the amount of indemnity without the consideration of the anticipated increase in freight could be criticised on lack of moral and economic grounds.

Because the value of goods consigned by sea is less than by other means of transport, and the maritime risks are considerably higher than those peculiar to other modes of transport, the sea carrier's liability limits have been kept lower under international conventions relating to sea carriage[45].

III.RELATIONS OF THE CARRIER'S LIABILITY WITH OTHER LIABILITIES

A) RELATIONS WITH THE CARRIER'S EXTRACONTRACTUAL (TORTIOUS) LIABILITY

The basis for liability may be the same in contract and tort so long as there is a contractual relationship between the tortfeasor and the aggrieved party. Indeed, the breach of contractual obligation is almost every time the violation of a statutory duty. The carrier could, therefore, be liable for his fault or that of his servant to the aggrieved cargo interests not only under contractual stipulations but also under rules of tort[46].

The regimes of the carrier's liability under these two grounds are quite different from each other. The contractual rules concerning the exemption from liability, the existence of legal presumptions of liability, the measure of damages, the period for action, the determination of proper law and jurisdiction are normally more favourable to the carrier than the provisions of tort. For example, the period for action in contract is one year under the Hague and Hague-Visby Rules and two years under the Hamburg Rules whereas in tort it is generally up to 10 years[47]. Again, the burden of proof of the tortfeasor's fault has been placed on the aggrieved party[48].

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[45] OIC, Dalhousie Oceans Studies Programme, the Future of Canadian Carriage of Goods by Water Law, in Economic and Social Commission for Asia and the Pacific, Forth Report, p.143, 178 (to be cited thereinafter as "Report of Canadian Carriage") - Röhreke,H.G.: Combined Transport and the Hague Rules, 10 ETL 619 (1975), p.636 (to be cited thereinafter as "Combined Transport").

[46] Cooke,P.J.-Oughton,D.W.: The Common Law of Obligations, 2nd ed., London 1993, p.52 (to be cited thereinafter as "Obligations").

[47] Article 2262 of the French Civil Code 1804; Articles 852-853 of the German Civil Code 1896; Article 60 of the Swiss Obligations Code 1911; Article 60 of the Turkish Obligations Code 1926.

[48] Article 1382 of the French Civil Code 1804; Articles 823-826 of the German Civil Code 1896; Article 41 of the Swiss Obligations Code 1911; Article 41 of the Turkish Obligations Code 1926.

Some jurists asserted that the contractual stipulations are more specific than rules of tort so that liability regimes cannot cumulate, and that the carrier can demand indemnity only under contractual rules; that for the application of the rules of tort there should be no contractual relationship between the liable and aggrieved parties. According to these jurists, the occurrence (such as fault) which has caused loss results in only one right of claim because parties and obligation are the same. Hence, it cannot be correct to talk about the concurrence of liability. By contrast, the rules concerning this demand compete with each other, and the general-special relation occurs between them.

This point of view has been supported by French and Belgium law[49] but not by Canadian, Dutch, English, German, Swiss, Turkish and US law[50]. In fact, there is no general-special relation between the rules relating to the carrier's and the tortfeasor's liability regimes. The legal grounds regulated under these two rules are different. In the course of the determination of whether the rules cumulate or not, the legal ground of right and obligation should be taken into consideration, but not the occurrence, demand or obligation itself. Whereas the tortfeasor's liability is based on violation of an absolute-legal duty, the carrier's liability arises from breach of contractual-personal obligation. Consequently, where the loss or damage has arisen from the fault of the carrier or his employees, two different liability regimes may coexist and cargo interests

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[49] *Cour d'Appel de Paris* October 28, 1960, DMF (1961), 342 - Crépeau,P.A.: Civil Responsibility, in Dainow,J. (editor): Essays on the Civil Law of Obligations, Baton Rouge 1969, p.83, 102 (to be cited thereinafter "Civil Responsibility"); De Wit,R.: Multimodal Transport, p.56, 58; Rodiere,R.: Introduction to Transport Law and Combined Transports, in International Encyclopedia of Comparative Law, Vol. 12, Law of Transport, Chapter 1, p.33.

[50] *Central Trust Co. v. Rafuse* (1986) 2 SCR 147, 204 (SC) / *Hiram Walker & Sons Ltd. v. Dover Navigation Co. Ltd.* (1949) 83 Ll.L.R. 84, 91; *Batty v. Metropolitan Property Realisations Ltd.* (1978) QB 554 (CA); *Johnstone v. Bloomsbury Health Authority* [1991] 2 All ER 293, 298 / *4. HD.*, 1.1.1976, E.6024, K.9292 / *The Pacific Spruce* (1932) 1 F Supp. 593 (DC, WD Wash 1932); *Morrisey v. SS A.. & J. Faith* [1966] AMC 71, 124 (ND Ohio 1965) - Ganado,M.- Kindred,H.M.: Marine Cargo Delays, London 1990, p.84, 89 (to be cited thereinafter as "Delays"); Todd,P.: Contracts for the Carriage of Goods by Sea, London 1988, p.173 (to be cited thereinafter as "Contracts for the Carriage") / Çağa,T.: Akde Muhalif Hareketle Haksız Fiilin Aynı Hadisede İçtimaı, İleri Hukuk Dergisi, 1945, Is.5, p.6; Gürsoy,K.T.: Haksız Eylem (Fiil)den Doğan Talep Hakkı ve Bu Hakkın Diğer Talep Haklarıyla Yarışması (Dava Hakkının Telâhuku), Ank.Huk.Fak.Der., Vol.XXXI, Is.1-4, p.149, 176; Tandoğan,H.: Türk Mesuliyet Hukuku, Ankara 1961, p.528, 536 (to be cited thereinafter as "Mesuliyet Hukuku"). For an opposite view see *HGK* 4.11.1964, E.1018/D-T, K.642 - Villareal,D.R.: Carrier's Responsibility to Cargo and Cargo to Carrier, in Carriage of Goods by Water: A Symposium, 45 Tul.L.Rev. 770 (1971), p.771 (on time limitation) / von Thur,A. (Çev.Edege,C.): Borçlar Hukukunun Umumi Kısmı, Ankara 1983, p.573, 575.

can claim damages under one of these legal grounds[51]. The same right of claim and obligation arising from two individual relations come to an end with only one fulfilment[52].

Nevertheless, the (contractual or statutory) provisions drafted considering the special needs of maritime commerce and features of the contract of carriage cannot be set aside by the application of the rules of tort. Otherwise, the special purpose of the Rules to establish a compromise between carriers' and cargo interests' rights by imposing standard liability might be destroyed. Cargo interests must not be in an advantageous position by claiming in tort rather than in contract[53]. Any uncertainty as to the amount of risks on the carrier increases P&I insurance calls and, consequently, freight rates[54].

In order to avoid the possibility of by-passing the contract and the Rules, Article 4 *bis* (1) of the Hague-Visby Rules and Article 7 (1) of the Hamburg Rules are clearly provided for the application of the defences and limits of liability under the Conventions 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, in tort (or otherwise)[55]. This is similar to Article 24 of the Warsaw Convention; Article 28 (1) of the CMR; and Article 51 of the CMI 1980.

On literal readings of these provisions they seem to cover the cases where there is a contractual relationship between the carrier and the cargo interest to which the Rules

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51 *Wabasso Ltd. v. National Drying Machine Co.* [1981] 1 SCR 578, 584.

52 De Wit,R.: Multimodal Transport, p.45; Weir,T.: Complex Liabilities, in Tunc,A. (ed.): International Encyclopaedia of Comparative Law, Chap. 12, Vol.XI/2, Torts, Tübingen 1983, no.47.

53 Article 362 of the New Dutch Civil Code - *Anglo Irish Beef Processors International v. Federated Stevedores Geelong and Others* [1997] 1 Lloyd's Rep. 207, 213 (Avust. SCA Victoria 1996) / *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] AC 80, 107; *The Good Luck* [1989] 3 All ER 628, 664; *The Maira* [1989] 1 All ER 213, 222 - Cooke,J.-Oughton,D.: Obligations, p.56; Schinas,J.G.: Cargo Claims: Carriage of Goods and Charterparties, 35-36 Revue Héllenique de Droit International 239 (1982-1983), p.249 (to be cited thereinafter as "Cargo Claims"): However, the Author defended that if the aggrieved party opts for the regime of tortious liability, he shall benefit from the limited period for actions in tort; Todd,P.: Contracts for the Carriage, p.173 / Wüstendörfer,H.: Neuzeitliches Seehandelsrechts, 2. Aufl, Tübingen 1950, p.275 (to be cited thereinafter as "Seehandelsrechts").

54 Grönfors,K.: Non-Contractual Claims under the Hamburg Rules, in Mankabady,S. (editor): The Hamburg Rules on the Carriage of Goods by Sea, Leyden-Boston 1978, p.187 (to be cited thereinafter as "Non-Contractual Claims").

55 Since the word, "tort", might be construed narrower than "extra-contract", the Hamburg Rules add the latter into this Article: Secretary-General: Report of 1976, p.281.

apply because their aim is to prevent the cargo interest who is able to sue the carrier in contract from circumventing the Rules by choosing to bring a suit in tort. It is clear that the scope of a stipulation cannot be wider than that of the Convention which governs only the contract of carriage. For that reason, such Articles limit their application to "loss or damage to goods covered *by a contract of carriage*"[56]. If any law assumes that there is a statutory relation – like a contractual one – between parties, the three Conventions will still apply to a person deemed a carrier by law.

C) RELATIONS WITH CARRIER'S OTHER CONTRACTUAL LIABILITIES

1- General

The carrier might have been made liable for only one occurrence breaching the same contractual obligation under more than one rule creating their own regimes. For example, despite the fact that the phrase "loss or damage" contains loss or damage caused by fire and damage to live animals or deck cargo, liabilities for the latter two groups were individually set forth under Articles 5 (4) - (5) and 9 of the Hamburg Rules. Moreover, some national laws impose the general regime of contractual liability on the land carrier and obligor[57].

So long as the legal grounds of liability are the same (breach of the contract of carriage), these regimes and rules of liability compete with each other (*the competition of liability regimes*). For the competition of liability regimes, there must be only one occurrence breaching the contract of carriage and consequently producing loss or damage for which the carrier is liable under two different regimes. The problem of which regime will be applied to the carrier occurs especially when one of these regimes

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[56] *The Captain Gregos* [1990] 1 Lloyd's Rep. 310 - Loewe,R.: Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road, ETL 333, 1976, p.382 (to be cited thereinafter as "CMR"); Mankiewicz,R.H.: The Liability Regime of the International Air Carrier: A Commentary on the Present Warsaw System, Deventer 1981, p.94 (to be cited thereinafter as "Liability Regime"); Scrutton,T.E.: Charterparties, p.454. For an opposite view see Berlingieri,F.: The Hague-Visby Rules and Actions in Tort, 107 LQR 18 (1991), p.18, 21; Diamond,A.: Visby Rules, p.249.

[57] For the land carrier see Article 764 of the Turkish Commercial Code 1956. For the obligor see Articles 1142 and 1384 of the French Civil Code 1804; Articles 280-282, 278 and 325 of the German Civil Code 1896; Articles 97 and 101 of the Swiss Obligations Code 1911; Articles 96 and 100 of the Turkish Obligations Code 1926.

excludes or limits the carrier's liability for the same occurrence whereas another one does not.

In that case, according to the principle of precedence of special over general legislation, the obligee may demand damages only under the special rule. For example, while there is a possibility of the application of the special regime of the carrier's liability for the breach of obligation of carriage by sea under the Hague and Hague-Visby Rules, the loss cannot be compensated under the general rules concerning the obligor's or land carrier's contractual liability.

2- Relations with the carrier's contractual liability for loss or damage arising from unseaworthiness before and at the beginning of the voyage

Under Article 3 (1) of the Hague and Hague-Visby Rules the carrier's liability to provide a seaworthy ship before and at the beginning of the voyage is laid down along with his liability to carry goods under Article 3 (2) of the same Conventions. Both liabilities are contractual because they depend on breach of the contract of carriage. However, the latter covers the former because the carrier should stow and keep goods in a seaworthy ship to perform his obligation to carry them duly during the whole journey[58]. Furthermore, Article 4 (1) of the Hague and Hague-Visby Rules exempts the carrier from liability for loss or damage arising *only* from unseaworthiness unless caused by want of due diligence. By contrast Article 4 (2) (q) of the same Conventions removes liability for loss of or damage arising from *any* occurrence resulting without fault. For that reason, the liability regime under Articles 3 (1) and 4 (1) is more special, and, thereof, prevails over the one under Articles 3 (2) and 4 (2)[59].

The criterion separating these two regimes from each other is the *period of time* when the obligation to provide a seaworthy ship has to be performed by the carrier. For the carrier's special liability, such undertaking should have been breached before or, at latest, at the beginning of the voyage. Consequently, determining which regime of

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[58] Wüstendörfer,H.: Seehandelsrechts, p.240 / Göğer,E.: Sonraki Denize Elverişsizlik Halinde Navlun Mukavelesi ve Taşıyanın Mesuliyeti, Adalet Dergisi, 1961, Vol.5, sh.456, 464. For an opposite view see OIC: Report of Canadian Carriage, p.151 - Al-Jazairy,Mr.R.: Liability, p.85: It was argued that the requirement to make the vessel seaworthy does not continue throughout the voyage under the Hague and Hague-Visby Rules unlike the Hamburg Rules.

[59] Glass,D.A.-Cashmore,C.: Introduction, p.177; Todd,P.: Bills of Lading, p.143.

liability the carrier is subject to, the moment when he has violated the obligation ought to be ascertained. If it is "before or at the beginning of the voyage", then the carrier shall be liable under Article 3 (1) of the Hague and Hague-Visby Rules.

The carrier is obliged to supply a seaworthy ship under Article 3 (1) from the starting of the loading of goods until the beginning of the voyage[60]. Accordingly, for the existence of liability, the occurrence of loss or damage after the commencement of the voyage due to defects not discovered by the carrier before or at the beginning of the voyage, or the state of the ship before loading is not important.

The beginning of the voyage does not mean the commencement of the loading[61]. For the purposes of Article 3 (1) of the Hague and Hague-Visby Rules the voyage starts when the control over the ship passes from the carrier or his personnel ashore to the master and crew. This is when the ship, with a view to departure, breaks ground or leaves her moorings in complete readiness for sailing and proceeding to sea. Before the vessel's lines are untied from moorings, or the anchor leaves the bottom, the carrier or his personnel ashore still have potential authority over the ship[62]. The master has, therefore, not gained total control so long as the ship's lines remained physically tied to the jetty. The existence of the master's control depends not only on the physical but also legal readiness to proceed to sea. If the ship casts anchor with the aim of receiving customs' clearance after leaving her berth, the voyage has not started yet[63]. Similarly, the movement from a loading pier to a buoy in the outer harbour without the intention of operating the ship to sea does not begin the voyage[64].

Ascertaining whether or not the voyage has commenced, each cargo to be loaded should individually be taken into consideration. As a consequence, if the ship has called at an intermediate port to load, there might be unseaworthiness before or at the beginning of the voyage for cargo shipped there whilst there might be unseaworthiness

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60 *Maxine Footwear Co. Ltd. v. Canadian Government Merch. Marine Ltd.* [1959] AC 589, 603 (PC).
61 For an opposite view see *McFadden v. Blue Star Line* [1905] 1 KB 697.
62 For an opposite view see *The Del Sud* 1959 AMC 2143, 2148.
63 Tetley,W.-Cleven,B.: Prosecuting the Voyage, in Carriage of Goods by Water: A Symposium, 45 Tul.L.Rev. 807 (1971), p.809. For an opposite view see *The John Miller* 1952 AMC 1945 (SD NY 1952).
64 *The Willowpool* 1936 AMC 1852 (2 Cir. 1936) (under the UK COGSA 1924).

after the voyage for the others loaded in previous ports[65]. This principle ought to be applicable even where the pieces of cargo subject to the same contract of carriage are loaded at different contiguous ports for the same destination[66].

If the ship is fit to start but not to complete the voyage unless some steps are taken to remedy defects, which can and would ordinarily and customarily be done after the voyage begins, she is seaworthy before and at the beginning of the voyage[67]. In practice, in order to save time vessels commence the voyage without battening their hatches down or closing their port holes. Loss or damage due to the leakage of rainwater into the holds is deemed to be caused by unseaworthiness after the voyage and is compensated under Article 3 (2) of the Hague and Hague-Visby Rules.

Not only does the period when the ship has to be put into a seaworthy condition cover the beginning of the loading and voyage, but also the duration between them and especially the process of loading[68]. Nevertheless, in the course of loading, it is not necessary for the carrier to provide a seaworthy ship by wholly manning, equipping and supplying the vessel as if the voyage would start; but, the possibility to provide her seaworthiness just before the beginning of the voyage is enough[69]. Otherwise, the carrier should be obliged to go on further unnecessary expenses to keep all mariners, equipment and supplies ready in the ship.

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[65] In *Leesh River Tea Co. v. British India Steam Navigation Co.* [1966] 2 Lloyd's Rep. 193 it was held that, where seawater damaged cargo due to the pilferage of the cover plate of a storm valve at an intermediate port in the course of loading of another cargo, there was unseaworthiness after loading within the scope of Article 4 (2) (q) of the Hague Rules.

[66] Berlingieri,F.: The Liability of the Carrier by Sea in Studies on the Revision of the Brussels Convention on Bills of Lading, Genoa 1974, p.68, 95 (to be cited thereinafter as "Liability"). For an opposite view, see *American Mail Line v. USA.* 1974 AMC 1536 (WD Wash. 1974) - OIC: Report of Canadian Carriage, p.149.

[67] *International Packers London, Ltd v. Ocean SS Co.* (1955) 2 Lloyd's Rep. 219 - Poor,W.: Charter Parties, p.177 / Kender,R.: Türk Hukukunda Denizde Mal Taşıyanın Sorumluluğu, Sorumluluk ve Sigorta Hukuku Bakımından Eşya Taşıma Sempozyumu, Ankara 1984, p.75, 78 (to be cited thereinafter as "Taşıyanın Sorumluluğu").

[68] *Maxine Footwear (ibid).* [1959] AC 589, 603 - Wüstendörfer,H.: Seehandelsrechts, p.241. For an opposite view see Maclachan,D.: A Treatise on the Law of Merchant Shipping, 7th ed., by Pilcher and Bateson, London 1932, p.370 (to be cited thereinafter as "Merchant Shipping").

[69] Carver,T.G.: Carriage, p.358 / Sözer,B.: Taşıyanın Gemiyi Sefere Elverişli Halde Bulundurmak Borcu, Ankara 1975, p.69.

Seaworthiness has to be provided *for the whole voyage* from the port of loading to the port of discharge before or at the beginning[70]. The parties might, however, divide the voyage into some stages by the express or implied agreement. For example, it might partially continue at sea or inland waters, or the ship might be planned to call for bunkering at an intermediate port. In that case, the carrier's obligation to provide a seaworthy ship before and at the beginning of the voyage does not begin after each stage[71], as distinct from common law[72]. Indeed, for the discharge of the undertaking the carrier should provide a seaworthy ship for the first stage of the voyage and should arrange necessary things to make her seaworthy for the agreed next legs before starting the initial stage. For example, it might be necessary for the ship to be bunkered at some intermediate ports. In that event, she must sufficiently be bunkered for the first part of the voyage, and adequate bunkers must be negotiated for the following stages so that the contractual voyage could be performed[73]. However, if the ship is not bunkered properly at the intermediate port despite proper arrangement, then the carrier becomes liable for loss or damage arising from unseaworthiness after the voyage under the general provision, Article 3 (2) of the Hague and Hague-Visby Rules, and may relieve himself of liability on the grounds of the exception of the fault in the management of the ship.

The drafters' aim in Articles 3 (1) and 4 (1) of the Hague and Hague-Visby Rules was to avoid the compensation for loss or damage arising from unseaworthiness "before and at the beginning of the voyage" under Articles 3 (2) and 4 (2) which took the needs and features of maritime commerce into consideration. Since "before or at the beginning of the voyage" the ship laying in port has not broken all the links with land, and the carrier is, thus, personally capable to control her and his mariners and to exercise due diligence to provide her seaworthiness at that period as distinct from after the voyage, the carrier is prevented from invoking the rules relieving the carrier of liability for loss

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70 *USA v. Eastmount Shipping Corp.* 1974 AMC 1183 (SD NY 1974).

71 *The Makedonia* [1962] 1 Lloyd's Rep. 316, 330.

72 *Thin v. Richards* [1892] 2 QB 141 (CA); *The Vortigern* [1895-99] All ER 387 - Ivamy,E.R.H.: Carriage of Goods by Sea Act 1924, and the Doctrine of Stages" [Maxine Footwear Co. v. Canadian Government Merchant Marine, Ltd. (1959) 3 WLR 232], 23 MLR 198, Mr'60, p.198.

73 Contrast *Northumbrian Shipping Co. v. Timms* [1939] AC 397.

or damage arising from maritime perils and risks[74]. This is also the natural construction of the opening words of Article 3 (2) of the Hague and Hague-Visby Rules, "subject to provisions of Article 4", which make Article 3 (2) subject to Article 4 (1) and, thereof, Article 3 (1). Consequently, Article 3 (1) brings a special and overriding obligation[75].

However, unlike common law and Section 3 of the Harter Act 1893[76], under the Hague and Hague-Visby Rules the application of the exemptions in Article 4 (2) and (4) is not conditioned on the exercise of due diligence to provide a seaworthy ship. Indeed, Article 4 (1) seeks the principle of proximate causal relation and limits its scope to itself by stating that *whenever* loss or damage *has resulted from unseaworthiness* the burden of proving the exercise of due diligence shall be on the carrier. If the carrier establishes that the amount of loss has been proximately caused by one of the excepted occurrences enumerated under Article 4 (2) and (4) of the Hague and Hague-Visby Rules, then he will be exempted from liability to that extent, and the possibility of the occurrence of loss from unseaworthiness will disappear. Nevertheless, the cargo interest may any time adduce proof to the contrary to establish that loss has been caused by unseaworthiness before and at the beginning of the voyage for which the carrier is liable. Thus, he might prevent the carrier from enjoying the defences in Article 4 (2) of the Hague and Hague-Visby Rules by breaking the fictitious proximate causal relation[77].

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[74] *Fisons Fertilizers Ltd. v. Thomas Watson (Shipping) Ltd.* [1971] 1 Lloyd's Rep. 141 (Can. Ct.); *Charles Goodfellow Lumber Sales Ltd. v. Verreault Navigation Inc.* [1971] 1 Lloyd's Rep. 185, 188 (Can. Ct.) / *USA v. Eastmount Shipping Corpn.* [1975] 1 Lloyd's Rep.216 (SD NY 1974).

[75] *The Fiona* [1994] 2 Lloyd's Rep. 506, 519.

[76] *The Isis* 1933 AMC 1565, 1576 (1933) (SC 1933); *The San Guiseppe* 1941 AMC 315 - Greenwood,E.C.V.: Problems of Negligence in Loading, Stowage, Custody, Care, and Delivery of Cargo: A Symposium, 45 Tul.L.Rev. 790 (1971), p.799 (to be cited thereinafter as "Negligence"); Healy,N.J.: Combined Transport Law in the United States, 74 Dir.Mar. 237 (1972), p.243.

[77] *The Farrandoc* [1967] 1 Lloyd's Rep. 232, 234 (Can. Ct.) / *Minister of Food v. Reardon Smith Line* [1951] 2 Lloyd's Rep. 265 (KBD); *Maxine Footwear v. (ibid).* [1959] 2 Lloyd's Rep. 105, 113 (PC): Although in this case Article III (1) of the UK COGSA was treated as an overriding obligation, it was also stated that only if the non-fulfilment of this obligation *causes* the loss, the immunities of Article IV cannot be relied on; *The Hellenic Dolphin* [1978] 2 Lloyd's Rep. 336, 339; *The Good Friend* [1984] 2 Lloyd's Rep. 586, 588 / *Bernstein Co. v. MS Titania* 1955 AMC 2040, 2043 (ED La. 1955); *Firestone Syn. Fibers Co. v. Black Heron* 1964 AMC 42, 44 (2 Cir. 1963); *Damador Bulk Carrier's Ltd. v. People's Ins. Co. of China* 1990 AMC 1544, 1553 (9 Cir. 1990) - Berlingieri,F.: Liability, p.121; Carver,T.G.: Carriage, p.377; Knauth,A.: Ocean, p.168; Wilson,J.F.: Carriage, p.189. For an opposite view see *Toronto Elevators, Ltd. v. Colonial SS Ltd* [1950] Ex. CR 371, 375; *Canfor Ltd. v. The Federal Saguenay* (1990) 32 FTR 158 (FC) / *The Gladiola* 1979 AMC 2787 (9 Cir. 1979); *Nissan Fire & Marine Ins. Co. v. M/V Hyundai Explorer* 1996 AMC 2409 (9 Cir. 1996) -

Hence, the only network between Article 4 (1) and (2) is a general-special relation. It depends on the occurrence of loss or damage from *only one event* for which the carrier is liable under at least two different liability regimes based on the same legal ground. Since the causes (unavoidable events) listed in Article 4 (2) (b)-(o) and (4) of the Hague and Hague-Visby Rules to exempt the carrier from liability are of different physical nature from the liability incident (fault of the carrier, his servants or agents in the provision of the ship's seaworthiness) in Article 4 (1), those provisions cannot be applicable at the same time. As Article 4 (2) (p) and (q) of the Hague and Hague-Visby Rules brings similar liability regime and the protection to the cargo interest as Article 4 (1), there will be no problem concerning the application of the rules.

By contrast, since the obligation to duly manage the ship may normally cover the undertaking to provide her seaworthiness, the fault in the management of the ship may fall within the scope of Article 4 (1) although the carrier is excluded for this fault under Article 4 (2) (a). Thus, Article 4 (1) and Article 4 (2) (a) compete with each other, and the former which is more special applies to the same fault. For that reason, the real reason for the provision of special rules [Articles 3 (1) and 4 (1)] along with the general rules [Articles 3 (2) and 4 (2)] was to prevent the application of the exemption of the fault of the carrier's servant in the management of the ship which may be committed before or at the beginning of the voyage when the carrier normally can control the ship and his servants.

As a consequence, the existence of special rules concerning unseaworthiness depends strictly on the survival of the exemption of fault in the management of the ship. There is no need for the special stipulations where there is no such immunity granted to the carrier. However, even if the nautical fault exemption is not removed, there is a reasonable ground for the amendment of the provision as making the carrier liable for the unseaworthiness taking place at intermediary ports because, thanks to the

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Richardson,J.: A Guide to the Hague and Hague - Visby Rules, London 1989, p.47 (to be cited thereinafter as "Hague Rules"); Tetley,W.: Navigation and Management of the Vessel, 7 Can.B.J. 744, Ja'64, p.245 (to be cited thereinafter as "Navigation and Managemnet"): The courts and authors argue that due diligence to make the vessel seaworthy in respect to the loss must be proven by the carrier before he may exculpate himself under Article 4 (2) of the Hague and Hague-Visby Rules because the obligation to provide ship's seaworthiness is overriding.

development in telecommunication technology and in agency relationships, the ship physically tied to moorings at land can be controlled, supplied, manned, equipped by the carrier or his agent even though he is not there as if the ship were at the loading port[78].

Article 4 (1) requiring want of due diligence on the part of the carrier seems to deal only with the carrier's liability for his own fault, but not for those of his agents and servants. Accordingly, the carrier's liability for the latter's fault seems to be subject to the general liability regime in Articles 3 (2) and 4 (2). Nevertheless, the application of this general provision should not destroy the benefits expected from the special stipulation in Article 4 (1). Consequently, the only clause applicable in Article 4 (2) is clause (q) which exempts the carrier from liability for causes arising without fault of his servants or agents. This outcome is in conformity with the common law finding shifting onto the carrier a *non-delegable* obligation to provide a seaworthy ship.

Under the Hamburg Rules there is no distinction made between liabilities for loss or damage regarding the ship's seaworthiness. Liability for loss or damage arising from unseaworthiness before and at the beginning of the voyage is subject to the general rule in Article 5 (1). Thus, the carrier's duty to provide a seaworthy ship is converted into a continuing obligation. Since under this Convention the carrier is not exempted from liability for the fault in the management of the ship, it was thought unnecessary to lay down special rules as to unseaworthiness[79].

3- Relations with the carrier's contractual liability for loss or damage arising from deviation

a-. General

The liability to avoid deviation from the agreed route falls within the liability to duly carry goods under Article 3 (2) of the Hague and Hague-Visby Rules. However, Article 4 (4) of the Hague and Hague-Visby Rules eliminates liability for loss or damage arising

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[78] UNCTAD Secretariat, Report of Bills of Lading, p.37.

[79] UNCITRAL Working Group, Report of the Fourth Session, p.149; Secretariat of UNCITRAL, Working Paper, Annex I to the Report of Working Group (A/CN9/74 - 12 October 1972, 4 Yearbook of the UNCITRAL 146 (1973), p.149 (to be cited thereinafter as "Working Paper of 1972") - Bauer,R.G.: Conflicting Liability Regimes: Hague-Visby v. Hamburg Rules - A Case by Case Analysis, 24 JMLC 53, Ja' 93 (to be cited thereinafter as "Hamburg Rules"), p.54, 57; Pixa,R.R.: Hamburg Rules, p.445.

only from deviation if reasonable, whereas Article 4 (2) (q) of the same Conventions exempts the carrier from liability for loss or damage arising from *any* cause resulting from without fault. For that reason, there are two competing liability regimes, and Article 4 (4) is more special and superior to Articles 3 (2) and 4 (2).

The factor separating these two liability regimes from each other is the occurrence of loss or damage *from deviation*. For the application of the special rule, the carrier must deviate from the route or, in other words, must alter or modify it. As the phrase "alteration or modification" of the route makes the intentional change of the route necessary, the deviation should be intentional (voluntary)[80]. This interpretation agreed with Article 4 (2) (a) of the Hague and Hague-Visby Rules exempting the carrier from liability for his servants' act in the navigation of the vessel because, if the intention were not required, the carrier would not be allowed to invoke such defence in the case of deviation although the deviation often stems therefrom[81]. For that reason, only intentional departure from the route must be considered to fall into the scope of Article 4 (4) of the Hague and Hague-Visby Rules, and the carrier must be exculpated from the payment of damages if his servants' negligently change the route.

Since such provision does not require the carrier or his servants to act with intention to contribute loss or damage, only deviation (but not loss or damage) must be intended. Article 4 (5) (e) of the Hague-Visby Rules which generally prevents the carrier, from acting with intent to cause loss or recklessly and with knowledge that loss would probably result, from limiting the amount of damages has nothing to do with Article 4 (4) of the Hague and Hague-Visby Rules although their aim and sanction are the same[82]. Both provisions are special compared to each other regulating different incidents (fundamental breach and conscious fault) having the same effect (loss of right).

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[80] *Ross Ind. v. Gretke Oldendorff* 1980 AMC 1397, 1402 (ED Tex. 1980); *Allstate v. Iint'l Shipping Co.* 1982 AMC 1763, 1769 (SD Fla. 1981); *Delphinus Mar. Lim. Procs.*, 1982 AMC 796, 804 (SD NY 1982) - Lee,J.R.: Law of Maritime Deviation, 47 Tul.L.Rev. 155 (1972), p. 167, 181.

[81] *Stag Line v. Foscolo, Mango & Co.* (1931) 41 Ll.L.R. 165 (CA) - Tetley,W.-Cleven,B.: Voyage, p.810. However, many US courts have often overlooked the essential elements of intention and have not paid attention to nautical fault: *Silvercypress (Fire)* 1943 AMC 224, 510 (DD NY 1943); *Atlantic Mutual Insurance Co. v. Poseidon Schiffahrt GmbH* 1963 AMC 665 (7 Cir. 1963).

[82] For an opposite view see Tetley,W.: Cargo Claims, p.122: By the Author Article 4 (5) (e) of the Hague and Hague-Visby Rules alters the conditions of Article 4 (4) of the Hague and Hague-Visby Rules by requiring the same kind of intention from the carrier or his servants.

The reason for laying down the carrier's liability for loss or damage arising from deviation under special rule is that the carrier who has intentionally left the agreed route has not thereby only deviated from the route but also fundamentally from the contract, and has shaken the contract from its foundation. From cargo interests' view, the route to be followed is such an essential element of the contract of carriage that they would not have concluded without it, or would have subjected it to different conditions had they known that the carrier was to create a new voyage by deviating[83]. Further, especially before the Hague and Hague-Visby Rules, cargo underwriters in practice avoided covering risks resulting from a deviation[84]. It was not just to prevent the cargo interest who lost his opportunity to insure goods due to an intentional deviation by the carrier from recovering the loss because of exemption clauses. For that reason, the carrier, who was guilty of breach which went to the heart of the contract, was put into the insurer's position and was held strictly liable regardless of any clause[85]. Then, Article 4 (4) of the Hague and Hague-Visby Rules imposes a heavy burden on the carrier and treats deviation from the agreed route as infringement or breach of this Convention or of the contract of carriage. Thus, the carrier is precluded from relieving himself of liability and from lessening it[86].

Courts are, therefore, prohibited from applying the exclusion or limitation clauses by construing the agreed terms in the contract[87]. It was argued that, when the Rules apply of their own force *ex proprio vigore*, the deviation does not prevent their application, and the carrier may still rely on exemption clauses therein[88]. However, this view is erroneous because firstly by deviating, the carrier does not breach only the contract, but also the

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[83] *Thiess Brothers (Queensland) Proprietary, Ltd. v. Australian SS Proprietary Ltd.* [1955] 1 Lloyd's Rep. 459 (Aust. NSW SC) / *Jones v. Flying Clipper* 1954 AMC 259 (SD NY 1953).

[84] See § 813 of the German Commercial Code 1897.

[85] *Atlantic Mutual (ibid)* 1963 AMC 665, 667 (7 Cir. 1963) - Peacock,J.H.III: Deviation and the Package Limitation in The Hague Rules and the COGSA: An Alternative Approach to the Interpretation of International Uniform Acts, 68 Tex.L.R. 977, Ap'90, p.978 (to be cited thereinafter as "Deviation").

[86] *The Shahzada* (1956) 96 CLR 477 (Aust. HC) / *Hain SS Co. v. Tate & Lyle* (1936) 55 Ll.L.R. 159 / *Spartus Corp. v. S/S Yafo* 1979 AMC 2294, 2300 (5 Cir. 1979); *Nemeth v. General SS Corp. Ltd.* 1983 AMC 885, 889 (9 Cir. 1982). The carrier changing the agreed route also loses his P&I cover unless he has first given the Club a notice of the deviation.

[87] In the same line see *Stag Line (ibid)* (1931) 41 Ll.L.R. 165; Cashmore,C.: The Legal Nature of the Deviation, JBL 492 (1989), p.496.

[88] Baughen,S.: Does Deviation Still Matter?, 1991 LMCLQ 70, p.95, 96; Debattista,C.: Fundamental Breach and Deviation in the Carriage of Goods by Sea, JBL 22 (1989), p.23, 34.

whole Convention regardless of any particular provision therein. Secondly, the changed voyage is not a voyage subject to the contract of carriage to which the Rules apply, for the purposes of Articles 1 (b) and 2 of the Hague and Hague-Visby Rules[89]. Article 4 (4) of the Hague and Hague-Visby Rules limits the scope of the Conventions to itself in the case of deviation.

Since cargo interests were, in the course of time, protected by insurance under "held covered" clauses, there was no rightful reason left for holding the carrier liable as if he were an insurer of goods. As a consequence, Article 4 (4) of the Rules unlike the classic doctrine of deviation[90] softened the sanction by requiring the proximate causal relation between deviation and loss[91]. Accordingly, if the carrier shows that the amount of loss has been proximately caused by one of the excepted occurrences enumerated under Article 4 (2) of the Hague and Hague-Visby Rules, then he will be excluded from paying damages to that extent, and the possibility of the occurrence of loss from deviation will diminish. Nevertheless, a cargo interest may at any time adduce a proof to the contrary to establish that loss has been caused by deviation for which the carrier is liable. He might thereby prevent the carrier from enjoying the defences in Article 4 (2) of the Hague and Hague-Visby Rules by breaking the fictitious proximate causal relation.

Thus, the mere function of the fundamental breach is to deprive the carrier of his right to rely on Article 4 (5) of the Hague and Hague-Visby Rules limiting the amount of indemnity and Article 3 (6) of the Hague and Hague-Visby Rules fixing the time for suit. Nevertheless, a difficulty arises in the interpretation of the words "*in any event*" under these provisions. Such phrase cannot be given as wide a meaning as covering the cases where all the terms and rules of the contract and Convention are breached and infringed[92]. The phrase "*in any event*" should have been included so as to limit the

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89 *Stag Line (ibid)* (1931) 41 Ll.L.R. 165, 170 - Carver,T.G.: Carriage, p.389.

90 *Edwards v. Newland* [1950] 1 All ER 1072, 1081 - Clarke,M.: Fundamental Breach of Charter Party, LMCLQ 472 (1979), p.476.

91 *Paterson SS Ltd. v. Robin Hood Mills Ltd* (1937) 58 Ll.L.R. 33 (PC) / *Baker Oil Tools, Inc. v. Delta SS Lines, Inc.* 1978 AMC 370, 372 (5 Cir. 1977); *The Yafo* 1979 AMC 294, 2304 (5 Cir. 1979).

92 *The Chanda* [1989] 2 Lloyd's Rep. 494 (deck carriage) / *Nelson Pine Industries Ltd. v. Seatrans New Zealand Ltd.* [1995] 2 Lloyd's Rep. 290, 296 (NZ HC 1993) (deck carriage) / *General Electric Co. v. Nancy Lykes* 1983 AMC 1947 (2 Cir. 1983) - Tetley,W.: Cargo Claims, p.110. For an opposite view

carrier's liability in any case, irrespective of the type of loss or damage, where the Rules govern the contract. If these provisions are applicable in the case of deviation, why was the special provision in Article 4 (4) of the Hague and Hague-Visby Rules set while there is a general provisions in Articles 3 (2) and 4 (2) (q) which had already made the carrier liable for deviation? By contrast, since Article 3 (6) of the Hague-Visby Rules contains a new word "*whatsoever*", the drafters of this word may be said to have intended the carrier to rely on the limited time for suit even in the case of deviation[93].

The Hamburg Rules do not include any special provision concerning deviation and its legal effects because some cargo insurance policies have began to cover risks arising from deviation. The carrier's liability for deviation is, thereof, subject to general provision in Article 5 (1)[94]. Under the Hamburg Rules only the carrier loses his benefit to limit his liability if the route has been changed with intent to cause loss or damage or recklessly and with knowledge that such loss or damage would likely ensue [Article 8 (1)]. Nevertheless, in order to protect their public policy courts may, by interpreting the intention of parties, at any time attribute on the carrier stricter conditions and may regard the intentional deviation from the route without any intent to cause loss or damage or without knowledge that such loss or damage would likely ensue as a fundamental breach of the contract under their domestic law[95]. That would not be against the main purpose of the Hamburg Rules, protecting cargo interests rather than the carrier.

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see *Atlantic Mutual (ibid)* 1963 AMC 665 (7 Cir. 1963); *Francosteel Corp. v. NV Nederlandsch Amerkaansche, Stoomvart Maatschappij* 1967 AMC 2440 (1 Cir. 1967); *Spartus Corp. v. S/S Yafo* 1979 AMC 2294 (5 Cir. 1979) - Friedell,S.F.: The Deviating Ship, 32 Hastings L.J. 1535 (1981), p.1554 (to be cited thereinafter as "Deviating Ship"); Hubbard,J.: Deviation in Contracts of Sea Carriage: After the Demise of Fundamental Breach, 16 Vict.U. Wellington L.Rev. 147 (1986), p.158; Peacock,C.H. III: Deviation, p.993, 1001; Lim,H.L.: Legal Aspects of Sea and Air Cargo Transport Documents with Especial Reference to International Carriage, PhD Thesis, University of Kent, Canterbury 1990, p.53 (to be cited thereinafter as "Transport"). See also Grandy,D.F.: Unreasonable Deviations and the Applicability of COGSA's Limitation of Liability Provision: The Circuit Split - General Electric Co. Int'l Sales Division v. SS Nancy Lykes, 9 Mar.Law. 114, Spr'84, p.122: The author argued that courts may limit the carrier's liability regardless of deviation only if deviation clauses are found to be regularly inserted in cargo insurance policies.

[93] *The Antares* [1987] 1 Lloyd's Rep. 424, 430 (CA) (deck carriage); *The Captain Gregos* [1990] 1 Lloyd's Rep. 310, 315 (misdelivery) - Wooder,J.B.: Deck Cargo, Old Vices and New Law, 22 JMLC 131 (1991), p.137 (to be cited thereinafter as "Deck Cargo").

[94] Chrispeels,E.- Graham,T.: The Brussels Convention of 1924 (Ocean Bills of Lading): Further Action Toward Revision, 7 JWTL 680 (1973), p.692 (to be cited thereinafter as "Ocean Bills of Lading")

[95] Group 2 of IMC, Report on the Basis of Liability, p.46.

b-. Quasi-deviations

Only *geographic deviation* is recognised as a fundamental breach by the carrier under Article 4 (4) of the Hague and Hague-Visby Rules. Nonetheless, there is nothing in the Conventions to prevent courts from considering that parties have considered other elements of the contract to be essential component for the conclusion and continuation of the agreement and to interpret their violations as fundamental breaches of the contract as is the case with geographic deviation. This construction is in line with the main purpose of the Rules, of protecting the aggrieved party and with the principle of that courts are free to protect public policy unless it is contrary to the main purpose of the Rules. As a result, some courts treated unauthorised deck carriage, non-delivery[96] and misdelivery[97] a quasi-deviation and subjected them to the same conditions and sanction as the geographic deviation. Consequently, so long as there is a *proximate* causal relation between loss or damage and an *intentional* quasi-deviation, the carrier should be precluded from relying on limitation clauses under Article 3 (6) and Article 4 (5) of the Hague and Hague-Visby Rules.

The concept and sanction of quasi-deviation may differ depending on changes in the needs and understanding of the public policy[98]. For example, at common law the doctrine of substantive fundamental breach was substituted for the doctrine of constructive fundamental breach[99] whereby breach going to the root of a contract would no longer necessarily prevent the exclusion of liability[100]. By contrast, in the US there is

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[96] *Hellyer v. NYK* 1955 AMC 1258, 1260 (SD NY 1955).

[97] *International Paper v. Malaysia Overseas Lines* 1976 AMC 143 (SD NY 1975) (time limitation).

[98] Morgan,H.S.: Unreasonable Deviation under COGSA, 9 JMLC 481, Jl'78, p.482.

[99] Especially after the legislation of the UK Unfair Contract Terms Act 1977.

[100] *Beaufort Realties (1964) Inc. v. Chomedy Aliminum Co. Ltd.* [1980] 2 SCR 718/ *Nelson Pine (ibid)* [1995] 2 Lloyd's Rep. 290, 296 (NZ HC 1993): The court, after interpreting the contract, ruled that the defendant cannot rely on package limitation due to unauthorised deck carriage / *Suisse Atlantique Société d''Armement Maritime SA v. NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL); *Ailsa Craig Fishing Co. v. Malvern Fishing Co. Ltd.* [1983] 1 WLR 964 (HL); *George Mitchell v. Finney Lock Seeds* [1983] 1 Lloyd's Rep. 168 (CA); *The Antares (Nos. 1 and 2)* [1987] 1 Lloyd's Rep. 424, 428 (deck cargo) - Davenport,B.J.: Limits on the Hague Rules, 105 LQR 521 (1989), p.521; Mills,C.P.: The Future of Deviation in the Law of the Carriage of Goods, LMCLQ 587 (1983), p.596; Rose,F.D.: A Fundamental Breach of Duty, LMCLQ 396, p.401 (1980); Silberg,H.: The Doctrine of Fundamental Breach Revisited, LMCLQ 197 (1971), p.197.

readiness to find new quasi-deviations[101] although not as much as prior to the COGSA 1936[102].

Again, a bill of lading which includes no statement that goods are to be loaded on deck is treated a clean bill of lading importing the carriage below deck[103], and any deck carriage contrary to the agreement is deemed to fundamentally breach contracts[104]. However, as a result of the container revaluation, the loading of goods consolidated in a container on board a container ship no longer fundamentally breaches the contract[105]. By Article 9 (4) of the Hamburg Rules, to substitute a fundamental breach goods must have been carried on deck only contrary to *express agreement* for carriage under deck.

IV. THE BURDEN AND ORDER OF PROOF

The *burden of proof* is the risk of being exposed to an unfavourable court decision because of inability to prove whether or not an occurrence has taken place. The onus of proof depends on who bears this risk, in other words, onto whom the onus of proof of an incident has been shifted. The answer is hidden in statutory or contractual rules distributing the burden between two parties. Every provision contains its own principle for the onus of proof. Since parties cannot know on whom the burden falls, courts must before attempting to analyse the essence of the case, ascertain who is obliged to prove which incident with which evidence, by examining the rule. Without determining who sustains the burden of proof, courts cannot decide.

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[101] Livermore,J.: Deviation, Deck Cargo and Fundamental Breach, 2 J.Cont.L. 241 (1990), p.245.

[102] *Illigan Int. Steel v. John Weyerhouser* 1986 AMC 411 (SD NY 1984): The court limited the cases which could be deviation only to undeclared deck carriage; *Unimac Co. v. CF Ocean Serv.* 1995 AMC 1484 (11 Cir. 1995): The court was reluctant to apply the doctrine of deviation to misdelivery.

[103] *T Roberts & Co. v. Calmar SS* 1945 AMC 375, 384 (ED Pa. 1945) – Tetley,W.: Deck Carriage under the Hague Rules, 3 Mar.Law. 35, Dec'77, p.35 (to be cited thereinafter as "Deck Carriage").

[104] *J Evans v. Andrea Merzario* [1976] 1 WLR 1078 (CA); *The Chanda* [1989] 2 Lloyd's Rep. 494 / *Nelson Pine (ibid)* [1995] 2 Lloyd's Rep. 290, 296 (HC 1993) / *Sealane* 1966 AMC 1405 (5 Cir. 1966); *Encyclopaedia Britannica Inc. v. The Hong Kong Producer* [1969] 2 Lloyd's Rep. 536 (2 Cir. 1969); *Calmaquip v. West Coast Carriers Ltd.* 1984 AMC 839 (5 Cir. 1981); *Thyssen v. Fortune Star* 1986 AMC 1318 (2 Cir. 1985) - Tetley,W.: Deck Carriage, p.37. For the view of the abandonment of the doctrine of deviation in the context of deck carriage see Whitehead III,J.F.: Deviation: Should the Doctrine Apply to On-deck Carriage?, 6 Mar.Law. 37 (1981), p.49.

[105] *DuPont de Nemours v. SS Mormacvega* 1974 AMC 67 (2 Cir. 1974); *Electro-Tec v. SS Dart Atlantica* 1985 AMC 1606, 1610 (D. Md. 1984). For an opposite view see Tetley,W.: Cargo Claims, p.653.

The rule sometimes briefly provides the burden and order of proof as is the case in the last sentences of Article 4 (1) and (2) (q) of the Hague and Hague-Visby Rules and Annex II of the Hamburg Rules. Nevertheless, provisions mostly fail to deal with that clearly, but allude to some elements for their application. The risk of inability to prove these elements should, therefore, be born by the party who benefits from the operation of this rule. Accordingly, under many procedural laws the claimant is made obliged to establish the occurrence on which he has based his legal claim[106]. For that reason, it cannot be said that the onus of proof is always either on plaintiffs or on defendants both of who could be claimants in the trial. The determination of who endures the burden of proof is, thereof, nothing more than the determination of in whose favour the rule is. If so satisfied with the evidence produced by either party that the elements of the rule have taken place in the actual case, the court judges for the party who benefits from this provision. On the contrary, if the claimant has not been able to establish that the components of the rule have occurred, then he loses his right to rely on such provision. In that case, there is no need for the other party to show that these conditions have not occurred. However, without waiting for the claimant to prove them, he may adduce a proof to the contrary to rebut the claim. Producing evidence to the contrary does not alter the burden of proof. Nonetheless, since under some domestic procedural law parties are allowed to adduce evidence only at the beginning of the trial, they are advised to bring all the proofs they have.

On balance, to discover who bears the onus of proof, rules ought to be divided into elements required for their application. Without examining provisions, it is not possible to abstractly say who is obliged to prove the occurrence. For example, in the case of liability with fault, depending on the interpretation of the rule, the onus of proof for fault could be shifted onto the liable party, and for the absence of fault it could be attributed on the aggrieved person. Each party carries the burden of proof for the element of the rule in his favour, and nothing more. For that reason, the claimant cannot be bound to prove the element depriving him of his right.

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[106] See Article 2697 of the Italian Civil Code 1942; Article 8 of the Swiss Civil Code 1911; Article 6 of the Turkish Civil Code 1926 - For other countries see Umar,B.-Yılmaz,E.: İsbat Yükü, 2nd ed., Büyükçekmece 1980, p.74. See also the last sentence of Article 4 (1) and (2) of the Hague and Hague-Visby Rules.

The onus and order of proof for the carrier's liability were set out under Articles 3 - 4 of the Hague and Hague-Visby Rules and Article 5 and Annex II of the Hamburg Rules. Its allocation under the Hague and Hague-Visby Rules seems misleading, and there is a need for careful interpretation because under Article 4 the carrier's liability in Article 3 is subject to numerous exceptions and special provisions whose scopes are unclear. That has caused friction and consequently delays in litigation and arbitration, increase in amount of cases and in litigation costs. Hence, one of the reasons for the Hamburg Rules was to introduce clear burden of proof rules.

Provisions relating to the carrier's liability ought to be separated into elements regarding conditions for the payment of damages, and for the exemption therefrom. Thus, in order to claim damages the cargo interest must initially show that the prerequisites of liability provided under Articles 3 and 4 of the Hague and Hague-Visby Rules and Article 5 of the Hamburg Rules have materialised. Then, the carrier who is entitled to escape from liability under the Conventions ought to establish that there is an exemption available to him.

Contracting parties are also free to apportion their burden of proof within the borders of mandatory provisions of the Rules by an exemption clauses. Such contract relieving the carrier from or lessening liability by laying heavier burden of proof on cargo interests contrary to the Rules shall be null and void under Article 3 (8) of the Hague and Hague-Visby Rules and Article 23 (1) of the Hamburg Rules, as expressly provided under Article 1116 of the Turkish Commercial Code 1956.

V. CONCLUSIONS

(1) It is fair to make the carrier liable because he is the only one who can prevent loss of or damage to goods while in his charge and who enjoys the services of his servants and agents to perform the obligation of carriage in return for freight.

(2) The carrier's liability is contractual for breach of the contractual obligation to carry goods in his custody. His liability for his own act is liability with fault while that for his servants' or agents' conduct is strict liability for others' fault.

(3) Fault is a rightful reason for the imposition of liability on the carrier because it encourages both the carrier and cargo interests to set and maintain an optimum standard of care and helps to keep total transport costs down.

(4) After the developments in carriage and insurance industry, there is no sufficient reasonable ground left for the outdated nautical fault and fire exemptions. The carrier still finds enough protection against maritime risks, thanks to the limitation of damages and insurance. The elimination of these immunities, as is the case in the Hamburg Rules,

will clarify parties' legal and economic positions, prevent friction and bring the Rules into line with other conventions relating to other modes of transport. Likewise, it will remove the need for the special provisions on the ship's unseaworthiness.

(5) The carrier's liability was limited under the three Conventions in order to prevent the carrier from contractually reducing damages to ridiculously low amounts on different two pleas: First, it was thought unreasonable to hold the carrier totally liable for the invisibly packed goods of unanticipatedly high price; second, it was considered just for both parties to limit the quantum of indemnity in order to lessen the amount of freight in proportion to extended liability risks (such as the acceptance of fault principle).

(6) As set forth under Article 4 *bis* (1) of the Hague-Visby Rules and Article 7 (1) of the Hamburg Rules, the immunities and limits of liability provided for in the Conventions apply in any action against the carrier (or the person deemed a carrier by law) in respect of loss or damage to the goods covered by the contract of carriage by sea whether the action is founded in contract or in tort (or otherwise).

(7) The liability regimes for loss or damage arising from unseaworthiness under Articles 3 (1) and 4 (1) and for deviation under Article 4 (4) of the Hague and Hague-Visby Rules are more special than Articles 3 (2) and 4 (2) of the same Conventions and prevail.

(a) The carrier's reliance on the exemptions listed under Article 4 (2) and (4) is not conditioned on the proof of the exercise of due diligence to provide a seaworthy ship.

(b) In the case of deviation the carrier fundamentally breaching the contract cannot rely on the limitation clauses in Article 3 (6) of the Hague Rules and Article 4 (5) of the Hague and Hague-Visby Rules. Courts cannot lighten the effects of Article 4 (4) of the Hague and Hague-Visby Rules by construction; but they may aggravate the results of deviation and find new events of quasi-deviations considering public policy so long as their judgements do not conflict with the purposes of the Rules. Therefore, the removal of the deviation provision in the Hamburg Rules did not make a substantial difference.

(8) During a suit parties are bound to prove the legal occurrence on which they have based their rights. Accordingly, under the three Conventions the cargo interest first show that the prerequisites of the carrier's liability have been materialised; and then the carrier establish the exemptions available to him.

PART II

CONDITIONS OF THE CARRIER'S LIABILITY

Chapter Four

THE CONTRACT OF CARRIAGE OF GOODS BY SEA

The contract of carriage of goods by sea is the first condition of the carrier's liability. Since only this contract in principle imposes a personal obligation on the carrier to carry goods, his contractual liability depends on its existence as implied in Articles 2 and 3 of the Hague and Hague-Visby Rules. The burden of proof is shifted onto cargo interests under the three Conventions because the shipper or his representative is present during the draft of the contract. For the carrier's liability under the Rules the contract should also be within their scope. The court shall *sua sponte* check their applicability to the contract considering facts brought by parties. The party seeking the operation of the Rules therefore practically, but not statutorily, carries the burden of showing such necessary material. This chapter will examine these matters.

I. DEFINITION AND ELEMENTS OF THE CONTRACT OF CARRIAGE OF GOODS BY SEA

A) DEFINITION

The Rules limit their application to the contract of carriage of goods by sea[1]. Nevertheless, as distinct from the Hamburg Rules, the Hague and Hague-Visby Rules do not give any definition thereof. According to Article 1 (6) of the Hamburg Rules, «"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.» Considering such provision and contracting parties, the contract may also be defined as follow:

"*Contract of carriage of goods by sea*" is a contract between the carrier and the shipper whereby parties agree that, in return for freight to be paid by the shipper, the carrier shall carry goods in his custody by sea[2].

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[1] Unlike Article 1 (1) of the Warsaw Convention which limits its coverage considering carriage rather than the contract.

[2] Compare with § 556 of German Commercial Code, 1897 and Article 1016 of the Turkish Commercial Code 1956: Under these Codes, the contract of carriage of goods by sea is as widely defined as including the contract of carriage of goods by chartered ship.

B) ELEMENTS

According to the above definition, such contract includes the following elements: the carriage of goods by sea, freight and an agreement between parties. Since only the first component relates to the carrier's obligation to carry goods, it will be examined below:

1- Carriage

The subject of the contract is carriage. The parties must, first of all, agree on the transportation of goods from one place to another. Thanks to this element the contract of carriage of goods by sea can easily be distinguished from other types of agreements used for maritime transportation, such as contracts for management of the ship and towage.

The carrier may undertake to perform some other *subsidiary* obligations in the contract, such as to warehouse goods at the port of loading or of discharge along with their carriage. In that event, the legal nature of the contract of carriage does not change unless these auxiliary stipulations become prerequisites of the contract of carriage.

The subject of the contract may be *future* carriage whereby the carrier is obliged to carry a certain amount of goods, usually measured in weight or volume, in a series of shipments during a fixed period. In this case, liability regimes should apply to each shipment performed under the contract of future carriage[3]. This outcome agrees with Article 1 (4) of the Hamburg Rules

2- Carriage of goods (cargo)

a-. General

The subject of carriage must be goods. They ought to be movable and have corporeal existence. They should also have economic value since the Rules were created to serve the commercial and economic needs. As a result, things relating to funerals and personal letters cannot be carried under these three regimes[4].

Passengers and their luggage are not goods for the purposes of the three Conventions since their carriage is not governed by the contract of carriage of goods by sea, but by

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3 UNCITRAL: Hamburg Rules, p.593.
4 See Article 1 (4) of the CMR.

the contract of carriage of passengers by sea[5]. For that reason, Article 25 (4) of the Hamburg Rules imposes no liability under the Rules for any loss of or damage to luggage for which the carrier is liable under any international convention[6] or national law relating to carriage of passengers and their luggage by sea[7]. Nevertheless, if proper law is silent on luggage, provisions concerning the contract of carriage of goods may, by analogy, apply to this kind of transportation, and the carrier may be held liable for loss of or damage to luggage under the Hague, Hague-Visby and Hamburg Rules.

b-. Carriage of live animals and deck cargo

Under Article 1 (c) of the Hague and Hague-Visby Rules, live animals[8] and cargo, which by the contract of carriage is stated as being carried on deck and is so carried, are excepted from their scope. The reason for their exclusions from the coverage is the high risk of their exposure to loss or damage during carriage. Indeed, live animals may easily catch disease or may be killed or wounded in the course of their handling. Cargo interests, thereof, usually provide attendants to look after animals on the ship. Similarly, deck cargo are susceptible to more maritime dangers than hold cargo. It is always likely for them to be soaked by sea or rain water or to fall off the vessel in stormy weather.

The legal position of deck cargo is, also, uncertain unlike hold cargo. Indeed, a bill of lading treated clean only if it includes no clear statement that the goods are or will be loaded on deck[9]. Article 31 (i) of the UCP 500, on this account, prohibits banks from accepting such bills of lading without having been authorised in the credit. Again, marine insurance policies do not cover deck cargo unless additional premium has been paid. Neither does the jettison of deck cargo for the ship's safety constitute a general average act[10]. The carriage of live animals and deck cargo, thus, increase transport costs.

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5 Can,M.: Deniz Taşıyanının Yolcuların Bagajının Ziyaı veya Hasarından Doğan Sorumluluğu, Yayımlanmamış Yüksek Lisans Tezi, Ankara 1991, p.7; Doğanay,İ.: Denizde Yolcu Taşıma Mukavelesi, Yargıtay Dergisi, 1976, Vol.2, p.125, 126.

6 Athens Convention 1974.

7 Murray,D.E.: Hamburg Rules, p.59.

8 For the origin of the exception of live animals see Article 7 of the Harter Act.

9 *T Roberts v. Calmar SS Corp.* 1945 AMC 375, 384 (ED Pa. 1945) - Force,R.: Liability for the Carriage of Deck Cargo under US Law, 3/1 Int'l Mar.L. 14, Ja'96, p.14 (to be cited thereinafter as "Deck Cargo").

10 See § 708 of the German Commercial Code 1897 - Hopkins,F.N.: Business and Law for the Shipmaster, 6th ed. by Watkins,G.G., Glasgow 1982, p.563.

"*Live animals*" covers any living creature typically capable of self-movement other than humans and live plants. It, consequently, includes not only domestic and tamed animals like horses and livestock, but also wild animals and sea products such as fish, mussel and oyster[11].

"*Deck cargo*" means any goods totally or partially unprotected by the ship's structure[12]. Accordingly, goods which are loaded on the main deck but in a sheltered place are not ones carried on deck within the meaning of the two Conventions. To exclude deck cargo from the ambit of the Hague and Hague-Visby Regimes, the clear statement as to carriage on deck must be made in the *contract of carriage* regardless of the document covering it[13], and goods must *actually* be so carried[14]. Hence, neither the clause providing general liberty for the carrier to load cargo on deck[15], nor the provision granting the carrier an option to do so unless the shipper objects[16] prevent the application of the Rules because it is ambiguous whether the carrier has exercised the liberty, or whether the shipper has raised an objection. This interpretation is also in line with Article 31 (i) of the UCP 500 which allows banks to accept a transport document stipulating that goods may be carried on deck, provided that it does not specifically state that they are or will be loaded on deck. If goods are in fact carried partly on deck and partly below deck pursuant to a contract of carriage, only the latter is covered by the Rules[17]. So as to preclude the application of the Hague and Hague-Visby Rules, goods, such as timber or inflammable cargo for which it is customary to be shipped on deck should meet the two requirements of Article 1 (c).

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[11] UNIDROIT, Study on the Carriage by Sea of Live Animals, 5 UNCITRAL Yearbook 165 (1974) (UN, New York, 1975; Doc. A/CN9/SER.A /1975), p.168 (to be cited thereinafter as "Study on Carriage of Live Animals") - Richardson,J.: Hague Rules, p.36.

[12] *Massce & Co. Inc. v. Bank Line*, 1938 AMC 1033 (SC of Cal. 1938) - Astle,W.E.: Shipowner's Cargo Liabilities and Immunities, 3rd ed., London 1967, p.43 (to be cited thereinafter as "Liabilities").

[13] For an opposite view see Japikse,R.E.: Deck Cargo, p.183.

[14] *Grace Plastics Ltd. v. The Bernd Wesch II* [1971] FC 273, 282 (FC) / *Aetna Ins. Co. v. Carl Matusek Shipping Co.*, 1956 AMC 400 (SD Fla. 1955); *Export Project Services v. SS Steinfels* 1975 AMC 765 (SD NY 1975). For an opposite view see *Shaw, Savill & Albion Co. v. Electric Reduction Sales Co.* [1955] 1 Lloyd's Rep. 264, 266.

[15] *Svenska Traktor Aktiebolaget v. Maritime Agencies* [1953] 2 Lloyd's Rep. 124.

[16] *Encyclopedia Brittanica v. Hong Kong Producer* [1969] 2 Lloyd's Rep. 536, 542 (2 Cir. 1969).

[17] *The Makedonia* [1962] 1 Lloyd's Rep. 316.

Whereas the carrier is entitled to relieve himself of liability for loss or damage arising from inherent defect, quality or vice of the goods under Article 4 (2) (m), it was not appropriate to take live animals out of the scope of the Rules. Indeed, there might be no protection left for cargo interests against some risks unrelated to their nature, such as unseaworthiness. As the export of these animals plays an important role in the trade of many developing countries, these states stand to lose most[18].

Furthermore, because of technological developments, some goods consolidated in articles of transport have been loaded on deck. This kind of shipment became common in liner carriage. Nonetheless, since deck cargo is ousted from the ambit of the Rules, the carrier may exclude himself from liability by stating in the contract of carriage that articles will in fact be carried on deck.

Hence, Article 1 (5) of the Hamburg Rules does not make any distinction between different types of cargoes, and even live animals and deck cargo are included in the definition of goods to give fair treatment to cargo interests against the carrier and to bring international uniformity in sea carriage[19]. However, they are subject to different liability regimes under Articles 5 (5) and 9 according to their peculiar nature, which exclude the carrier from liability for loss or damage resulting from any special risks inherent in that carriage and entitle him to carry goods on deck if such carriage is clearly or by implication agreed by parties.

c-. Carriage of container goods

Goods have been stowed in containers since 1950 because these devices, in which cargo faces less external risks such as theft and pilferage or water damage: reduce carriage expenses by shortening the period of loading and discharge; relieve shippers of costly packaging of goods; and ease the conveyance of goods by more than one means[20].

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18 UNIDROIT, Study on Carriage of Live Animals, p.171 - Graham,T.-Chrispeels,E.: Revision of the Hague Rules, 7 JWTL 252, 1973, p.257 (to be cited thereinafter as "Revision").

19 UNIDROIT, Study on Carriage of Live Animals, p.172.

20 Schmeltzer,E.-Peavy,R.A.: Prospects and Problems of the Container Revolution, 1 JMLC 203, Ja'70, p.206; Simon,S.: The Law of Shipping Containers, 5 JMLC 507, Ap'74, p.510 (to be cited thereinafter as "Containers"); Tombari,H.A.: Trends in Oceanborne Containerisation and Its Implications for the US Liner Industry, 10 JMLC 311 (1979), p.311.

The criterion separating container cargo from others is merely its consolidation in a container. On this account the container should be defined.

"*Container*" is an article of transport holding goods inside to be loaded onto and off the ship quickly and easily and to safeguard them from external risks. It is usually manufactured from metal for multiple use. Nonetheless, even the box made of wood or plastic and enjoyed only for single carriage is a container within the meaning of the Rules[21]. In the *LASH* (lighter aboard ship) system, a barge lifted from sea onboard the mother ship is a sort of container until lifted off. In the *ro-ro* (roll on / roll off) system, railway wagons and trailers shipped onboard ro-ro ships are also the same sort of equipment during transportation of goods by sea. Further, *pallets* used to facilitate the handling of goods stacked or lashed thereon are of feature similar to a container.

The container has a double function and nature. From the carrier's view-point it is an extension of ship's hold because it protects cargo on its own; but, unlike the ship's hold it is a movable thing which can be brought to the carrier to be loaded, or to the consignee to be discharged[22]. The reason for the use of a container along with the ship's hold by the carrier is merely to save time and expenses resulting from the loading and discharging operations. By contrast, from the cargo interest's view, it has a function and nature similar to a package securing goods. However, as distinct from the package, a container saves expenses arising from the conventional package, and is manufactured in a shape appropriate to both cargo and the ship[23]. Since the package and the container are physically connected with goods to serve the expected benefits therefrom, the carrier is under an obligation to carry them together with the container supplied by the shipper under the contract of carriage. Consequently, Article 1 (5) of the Hamburg Rules provides that, where goods are consolidated in a container, pallet or similar article of

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[21] Compare with the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment 1970; Article c of the Customs Convention on Containers 1956 and 1972; Article II (1) of the International Convention on Safe Containers 1972 whereby a container must be an article of transport equipment of a permanent character and strong enough for repeated use.

[22] *Northeast Marine Term Co. v. Caputo* 432 US 249, 271 (1977) - Armstrong,T.J.: Packaging Trends and Implication in the Container Revolution, 12 JMLC 427 (1981), p.428 (to be cited thereinafter as "Container Revoluation").

[23] Nilson,BG.: Technical and Economical Aspects of Combined Transport Operation, Dir.Mar. 298 (1972), p.301.

transport or where they are packed, "goods" comprises such article of transport or packaging if supplied by the shipper; and thus makes the carrier liable for loss of or damage to it even if goods therein are not impaired.

The contract of carriage of container goods should, therefore, be made subject to a different regime from the other conventional types of contracts of carriage. For instance, the carrier's liability ought to be limited considering containers as under Article 4 (5) (c) of the Hague-Visby Rules and Article 6 (2) of the Hamburg Rules. If not, the provisions concerning the contract of conventional carriage should be applicable by analogy to this sort of carriage.

3- Carriage by sea

The contract ought to relate to carriage by sea as set out under Article 1 (b) of the Hague and Hague-Visby Rules and Article 1 (6) of the Hamburg Rules. Consequently, the contract whose subject is only carriage by land or air is not a contract of carriage within the meaning of these international liability regimes.

Carriage may consist of eleven phases which are: (i) receipt from shipper (ii) from shipper to transit storage; (iii) in transit storage; (iv) from transit storage to ship; (v) loading; (vi) from loading port to port of arrival; (vii) discharge; (viii) from ship to transit storage; (ix) in transit storage; (x) from transit storage to consignee; and finally (xi) delivery to consignee. The period when carriage is in relation to the sea is limited in a different way under the Rules. It must be remembered that the reason for this limitation is not to define the scope of the contract of carriage, but that of the Rules[24]. According to Article 1 (e) of the Hague and Hague-Visby Rules it covers the period from the time when goods are loaded on to the time they are discharged from the vessel[25]. Not only does this definition include the actual carriage, but also the loading and discharging operations, and, accordingly, stages (v), (vi) and (vii) above[26]. Thus, the operative period under normal circumstances means the '*tackle to tackle*' period, that is,

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[24] *Pyrene Co. v. Scindia Steam Navigation Co.* [1954] 2 All ER 158 - Cadwallader,F.J.J.: Care of Cargo under the Hague Rules, Current Legal Probs. 13 (1967), p.19 (to be cited thereinafter as "Care").

[25] *The Captain Gregos*, [1990] 2 Lloyd's Rep. 395 (CA).

[26] *Tasman Express Line Ltd. v. JJ Case (Australia) Pty. Ltd.* [1992] LMCLQ 351, 355 (Aust. CA) / *Pyrene Co. (ibid)* [1954] 1 Lloyd's Rep. 321 - Wilson,J.F.: Carriage, p.179.

from the time the ship's tackle is hooked on at the port of loading to the moment the ship's tackle is disconnected on at the port of arrival[27]. However, if loading or discharging operations, as is often the case nowadays, have been performed by a shore tackle instead of a ship's tackle, the time when goods have crossed the ship's rail is taken into consideration[28]. Where cargo carried is liquid or gas, the moment when it is pumped into or out of the tanker's filling hole is regarded as the beginning or the end of the period of application. Once the carrier has agreed to load or discharge goods by means of lighters, the two Conventions will cover the whole period of their carriage[29]. On this account, Article 7 of the Hague and Hague-Visby Rules allows the carrier or the shipper to enter into an exemption contract prior to the loading on, and subsequent to the discharge from the vessel on which goods are carried by sea. However, the contract might fall into the ambit of other international or national mandatory provisions[30].

In the Hague and Hague-Visby Rules there are some provisions referring to the time before loading and after discharge, such as Articles 3 (2), (3), (4) and (6) and 7. From these stipulations it cannot be concluded that these liability regimes are operated from the time when goods are received by the carrier to the time of their delivery to the consignee, and Article 1 (e) delimits only the mandatory coverage of the Rules[31]. Indeed, Article 1 (e) of the Hague and Hague-Visby Rules restricts the scope of the whole Convention without regard to their mandatory character, since there is no provision under the Rules to the contrary. If the contract of carriage comes within the coverage of the Rules, then these above provisions could be applicable.

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[27] *NPL (Australia) Pty. Ltd. Kamil Export (Aust.) Pty. Ltd.* Unrep., Aust SC Vic., 12 October 1992 - Knauth,A.: Ocean, p.144.

[28] UNCTAD Secretariat, Report of Bills of Lading, p.34 - Tetley,W.: Cargo Claims, p.14.

[29] *Goodwin, Ferreira & Co. v. Lamport & Holt* (1929) 34 Ll.L.R. 192 / *East & West SS Co. v. Hossain Bros* [1968] 2 Lloyd's Rep. 145 (Pak. SC) / *Remington Rand, Inc. v. American Export Lines, Inc.* 1955 AMC 1789 (SD NY 1955).

[30] In some countries the carrier's liability before loading and after discharge was laid down mandatorily. See Section 1 of the US Harter Act 1893; Article 27 of the French Law of June 18, 1966 and Article 38 of the French Decree of December 31, 1966. For the similar legal position in the Arabian Gulf States see Price,R.: The Responsibility of a Carrier of Goods by Sea under the Laws of the Arabian Gulf States: "The Exceptions and the Rule", Arab L.Q., p.29, 30. In Article 46 of the Chinese Maritime Code 1992 container transport is distinguished from non-container transport, and the former is extended to the period of time while the carrier is in charge of goods: Li,L.: China, p.209.

[31] For an opposite view see Berlingieri,F.: The Period of Responsibility and the Basis of Liability of the Carrier, in EIMTL (ed.): The Hamburg Rules, Maklu 1994, p.83, 85, 88 (to be cited thereinafter as "Period").

Pending the preparation of these Articles in the Hague Rules, it was customary that the carrier received goods and delivered them to the consignee alongside the ship. For that reason, the ambit of the Convention is limited to the period when cargo is still attached to the vessel's apparatus. Nowadays, however particularly in liner transport goods are received by a shipping agent appointed by the carrier before loading, and are delivered to a warehouseman nominated by the carrier after discharge. During this pre and post-shipment period, cargo *is* in the carrier's custody, and his obligation to protect the property and liability for loss or damage continues under the contract. To oblige the carrier to protect goods while ashore does not convert the type of contract from carriage into bailment. Additionally, it is, now, realised that the possibility of damage to goods from weather conditions or theft in freight-yards is higher than onboard the ship[32]. Nevertheless, the carrier normally takes the opportunity given by Article 7 of the Hague and Hague-Visby Rules and exculpates himself from liability for loss of or damage ashore by exemption contract[33], such as "tackle to tackle" and "mandate" clauses[34].

For that reason, Article 1 (6) of the Hamburg Rules introduces the *port-to-port* rule and *rightly* extends the period of carriage from one port to another in order to make the carrier liable under the mandatory provisions of the Convention while goods in the carrier's hands are still on land but in port[35]. The word "port" is to be interpreted under the law applicable in the country where the port is situated. In that respect, regulations establishing the jurisdiction of port authority should be taken into consideration. Even the contract for the carriage of goods by sea from or to locations outside but in the vicinity of a port area should be deemed to be within the Rules in order to provide their broad application. Consequently, carriage from or to the shipper/consignee's premises situated outside the vicinity of port area by the carrier is not part of a sea carriage within the meaning of the Hamburg Rules. Otherwise, the word "port" might be so widely

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[32] UNCTAD Secretariat, Report of Bills of Lading, p.35 - Honnold,J.O.: Hague or Hamburg, p.82.

[33] Astle,W.E.: Hamburg Rules, p.93; O'Hare,C.W.: Duration of the Sea-Carrier's Liability, 6 Austl.Bus.L.Rev. 65 (1978), p.67 (to be cited thereinafter as "Duration").

[34] A "*tackle to tackle*" clause limits the carrier's liability to the tackle to tackle period while a "*mandate*" clause authorises the master to instruct stevedores on behalf of the consignee: See Manin,J-P.: Carrier Liability after un-loading in French Ports, 10/7 P&I Int'l 128, Ju'96, p.130 (to be cited thereinafter as "French Ports").

[35] UNCITRAL Working Group, Report of the Seventh Session, p.201. For a similar vein see Harter Act 1893 and Article 18 (2) of the Warsaw-Hague Convention.

interpreted to ruin the literal meaning of Article 1 (6), "*from one port to another*"[36]. Since the carrier is made liable during the period "before loading and after discharge" under domestic law of some Contracting States to the Hague and Hague-Visby Rules, the extension of the period of liability under the Hamburg Rules will not have serious economic effect; if any, it will be modest and will vary from country to country depending on the regime accepted[37].

The stage where carriage is performed should be at sea. The term "*sea*" includes any water which is navigable by ship such as inland rivers[38]. The carriage by sea, of course, ought to be performed by means of a *ship*. Nonetheless, she is not necessarily be named in the contract. The ship is so broadly defined under Article 1 (d) of the Hague and Hague-Visby Rules to mean *any* vessel used for the carriage of goods by sea[39]. Accordingly, all crafts including barges and lighters, which are capable of floating and carrying goods on their own or by towage, is a ship and is governed by the Rules. Otherwise, the two Conventions do not apply to the carriage during the lighterage operations even though the carrier is obliged to do so. To be regarded as a ship, the barges must be afloat on sea. Since the Hamburg Regime cover a port-to-port period, it was thought unnecessary to define the ship therein[40].

In respect to the carrier's liability, what should happen in the course of carriage by sea is neither loss suffered by the cargo interest nor loss of or damage to goods, but breach of contractual obligation. This is so because the carrier is liable for breach of the contract. His liability is not strict, he does not have to pay damages only for the result (loss of or damage to goods or loss suffered by the cargo interest) if there is no breach attributable to him. Thus, if the loss or damage has taken place after discharge due to

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[36] For an opposite view see Al-jazairy,H.R.: Liability, p.128; Arbabi,M.: The Liability of the International Multimodal Transport Operator for Loss of or Damage to the Goods Carried under a Multimodal Transport Contract, PhD Thesis, University of Kent, Canterbury 1991, p.232 (to be cited thereinafter as "Liability").

[37] Group 1 of IMC, Report on the Period of Liability, including Through Carriage, in Colloquium on the Hamburg Rules, January 8-10, 1979 - Vienna, p.44 (to be cited thereinafter as "Period").

[38] Scrutton,T.E.: Charterparties, p.423. For an opposite view see Mankabady,S.: Comments, p.39.

[39] In line with Section 313 of the UK Merchant Shipping Act 1995.

[40] UNCITRAL Working Group, Report of the Sixth Session, p.135; UNCITRAL: Hamburg Rules, p590.

breach of the obligation to unload, the carrier ought to be liable under the Hague and Hague-Visby Rules[41].

4- Carriage of goods in carrier's custody

The carrier must undertake to carry cargo in his charge[42]. It means that during carriage he is to safeguard it as a bailee[43]. It should be expressed or implied in the contract that goods should be in the carrier's custody. Any contract stipulating that the control of goods is to be performed merely by cargo interests is not a contract of carriage. For example, if goods carried while in the actual possession of the supercargo (attendant) who hinders the carrier from guarding them, there is no contract of carriage at all. Regard must be given to the actual function of the supercargo while the nature of contract is determined[44].

II. TYPES OF CONTRACTS OF CARRIAGE COVERED BY THE RULES

A) CONTRACTS COVERED BY THE HAGUE AND HAGUE-VISBY RULES

1- Principle: lading contracts

From Article 10 of the Hague and Hague-Visby Rules it literally seems that the two Conventions are applicable only to bills of lading, that is compatible with the aim of the Rules to facilitate the commercial effectiveness of bills of lading by protecting their holders. Some jurists therefore defended that the Rules apply to a document rather than a contract covered thereby. However, when Article 10 of the Hague and Hague-Visby Rules is construed with Article 2 of the same Conventions which under every contract of carriage makes the carrier subject to liabilities therein it is apparent that the Rules operate this contract.

By Article 1 (b) of the Hague and Hague-Visby Rules, "*contract of carriage*" means only the contract covered by a bill of lading or any similar document of title (*lading*

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[41] SC 1951 NJA 130 (Swe. Ct. 1951) – Ramberg,J.: The Law of Carriage of Goods: Attempts at Harmonization, 9 ETL 2 (1974), p.20 (to be cited thereinafter as "Harmonisation").

[42] Wüstendörfer,H.: Seehandelsrechts, p.225 / Atabek,R.: Taşıma Hukuku, p.30; Kalpsüz,T.: Deniz Ticareti Hukuku Ders Notları, Vol.II, Şahsın Hukuku - Navlun Mukavelesi, Deniz Kazaları, Ankara 1983, p.36. For an opposite view see Akıncı,S.: Navlun Mukaveleri, p.11.

[43] *Buenos Aires Maru* [1986] 1 SCR 752, 782 (SC) - Debattista,C.: Sale of Goods Carried by Sea, London 1990, p.30 (to be cited thereinafter as "Sale of Goods").

[44] Franko,N.: Hatır Nakliyatı ve Hukukî Mahiyeti, Ankara 1992, p.9; Ülgen,H.: Hava Taşıma Sözleşmesi, İstanbul 1987, p.7 (to be cited thereinafter as "Hava Taşıma Sözleşmesi").

contract). Many courts and authors who preferred the narrow interpretation of this provision asserted that the application of the Rules to the contract of carriage depend on the existence of a bill of lading covering it and tried to ascertain under which conditions the bill of lading is a document of title or negotiable[45]. This view is mistaken. Indeed, when Article 1 (b) is considered with Articles 3 (3) and 6 of the Hague and Hague-Visby Rules, it is explicit that for the application of the two Conventions, the issuance of the bill of lading is not necessary. On the contrary, parties' intention in the pre-existing contract of carriage which expressly or by implication provides for a bill of lading is sufficient[46]. Article 3 (3) of the Hague and Hague-Visby Rules, thereof, impose an obligation on the carrier, *after* receiving the goods into his charge, to produce a bill of lading *on demand of the shipper*. So long as the shipper has a right to ask for it, the two Conventions should apply to the contract of carriage. Otherwise, the carrier might escape liability by proving that loss or damage has arisen before its issue. This construction is contrary to the purpose of Article 3 (3) since the shipper's right to request a bill of lading is not restricted to any period. Neither can issuance of other kinds of documents rather than a bill of lading mean that the shipper withdraws his right to

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[45] *Harland & Wolff Ltd. v. Burns & Laird Lines* (1931) 40 Ll.L.R. 286 (sailing bills); *Hugh Mack & Co. Ltd. v. Burns & Laird Lines Ltd.* (1944) 77 Ll.L.R. 377 (CA, Northern Ireland); *Vita Food Products v. Unus Shipping Co.* [1939] AC 277, 288 (PC) – International Sub-Committee on Uniformity of the Laws of the Carriage of Goods by Sea in the Nineteen Nineties: Problem of the Hague-Visby Rules and Possible Solutions of IMC, Report 1990, UNIF-17-III-90, p.14 (electronic bill of lading) - Al-Jazairy,M.R.: Liability, p.134; Baughen,S.: Shipping Law, London 1998, p.95, 101 (to be cited thereinafter as "Shipping Law"); Diamond,A.: Ship and Cargo, p.49 (waybills); Gliniecki,Y.-Ogada,C.G.: The Legal Acceptance of Electronic Documents, Writings, Signatures, and Notices in International Transportation Conventions, 13 Nw.J.Int'l.L.&Bus. 117 (1992), p.139 (to be cited thereinafter as "Electronic Documents"); Japikse,R.E.: Deck Cargo, p.183; Kooyman,J.: Cargo Claim Recoveries, in Lloyd's of London Press Ltd. (org.): The Hague-Visby Rules and the Carriage of Goods by Sea Act, 1971, A One-Day Seminar (December 8, 1977 London), London 1977, p.1, 2; Lim,H.L.: Transport, p.63 (waybills); Ramberg,J.: Documentation: Sea Waybills and Electronic Transmission, in EIMTL (ed.): The Hamburg Rules, Maklu 1994, p.101, 109 (sea-waybills); Williams,R.: Waybills and Short Form Documents: A Lawyer's View, LMCLQ 297 (1979), p.299, 307 (to be cited thereinafter as "Waybills"); P&I: Waybills 1/4 P&I International 3, Ap'87, p.3.

[46] *The Beltana* [1967] 1 Lloyd's Rep. 531, 533 (W Aust. SC) (shipping receipts) / *Anticosti Shipping Co. v. Viateur St. Amand* [1959] 1 Lloyd's Rep. 352 (Can. SC); *Canada SS Lines Ltd. v. Desgagné* [1967] 2 Ex. C.R. 234 (Adm. Ct.) / *Pyrene Co. (ibid)* [1954] 1 Lloyd's Rep. 321, 329 / *Hermann C Starck v. Finn Lines* 1978 AMC 1330 (SD NY 1978) (dock receipts); *Caterpiller Overseas v. Farrell Lines* 1988 AMC 2894, 2902 (ED Va. 1988) - Carver,T.E.: Carriage, p.495; De Wit,R.: Multimodal Transport, p.237; Hughes,A.D.: Casebook on Carriage of Goods by Sea, London 1994, p.202; O'Keefe,P.J.: Contract of Carriage, p.69; Tetley,W.: Cargo Claims, p.11, 12, 944 and Waybills: The Modern Contract of Carriage of Goods by Sea, 14 JMLC 465, Oc'83, p.471 (to be cited thereinafter as "Waybills").

demand a bill of lading, so the protection of the Rules[47]. He may still request for a bill of lading and seek the application of the two Conventions. Otherwise, Article 6 of the Hague and Hague-Visby Rules requiring the production of non-negotiable receipts for the allowance of exemption contracts would mean nothing had the Rules already ousted such documents from their scope[48]. Article 6 is clear in two respects: First, it allows the parties to enter into agreements in the case where a non-negotiable receipt marked as such is issued for unusual carriage, but does not exclude these receipts or carriages from their coverage. Second, even for such exclusion no bill of lading "*shall be issued*" in future; if so, the exemption contract will be void and of no effect. Article 2 supports this conclusion by making itself "*subject to the provisions of Article 6*".

Should the operation of the Convention to bills of lading be accepted, the carrier can indirectly avoid the liabilities or obligations set forth under the Conventions by making a contract under a waybill[49]. This result is opposed to their mandatory nature and purpose to safeguard probable holders of bills of lading. It would be wrong to say that only the actual holders need protection.

Furthermore, some shipping lines have given up issuing bills of lading, and started to use non-negotiable documents or electronic transfers of freight data instead because of their fast and safe transmission[50]. Cargo interests must not bear all the risks of the outcomes of this development in trade. The Rules ought to be interpreted by bearing in mind technological advances unknown at the time when they were drafted.

As a result, since the shipper in principle has a right to ask for a bill of lading in any type of carriage, the Hague and Hague-Visby liability regimes in principle apply to all contracts of carriage regardless of whether they are oral or written, or whether they are covered by bills of lading, waybills, electronic bills of lading or any written documents

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47 For an opposite view see O'Hare,C.W.: Hague Rules, p.541.

48 Carver,T.G.: Carriage, p.347, 468; Scrutton,T.E.: Charterparties, p.423. For an opposite view, see *The European Enterprise* [1989] 2 Lloyd's Rep. 185, 188.

49 *Browner Int'l. Ltd. v. Monarch Shipping Co. Ltd.* [1989] 2 Lloyd's Rep. 185, 188 (QBD - CC) - O'Hare,C.W.: Shipping Documentation for the Carriage of Goods and the Hamburg Rules, 52 Austl.L.J. 415, Ag'78, p.421 (to be cited thereinafter as "Documentation"); Tetley,W.: Cargo Claims, p.11, 944.

50 Faber,D.: Electronic Bills of Lading, 2 LMCLQ 232 (1996), p.232; Grönfors,K.: Simplification of Documentation and Document Replacement, 10 ETL 638 (1975), p.638.

proving the contract of carriage, even where the carriage covered by a waybill is unusual. In case courts do not apply the Rules to the contract of carriage uncovered by a bill of lading, Rule 4 of the IMC Rules for Sea Waybill 1990 and Rule 6 of the IMC Rules for Electronic Bills of Lading 1990 make the sea waybill or electronic bill of lading subject to these international regimes which would be mandatorily applicable as if a paper bill of lading or similar document of title had been issued.

2- Exception: contracts of carriage by chartered ship

The contract of carriage by chartered ship is a contract whereby parties agree that in return for freight paid by the shipper (charterer), the carrier (assignor) shall carry goods by assigning the right to use all or some parts of the ship with the service of seamen to the shipper (charterer). It is normally covered by a charterparty including an obligation of carriage (a responsibility clause)[51].

It is a mixed contract and contains prerequisites of the charter contract and the contract of carriage because the carrier on the one hand undertakes to assign the use of the ship, and on the other hand assumes an obligation to carry goods; thus not only is the subject of the contract goods, but also the ship. While the charter part of the contract is operated by the provisions relating to the charter contract, the other part is governed by the rules concerning the contract of carriage.

By Article 5 of the Hague and Hague-Visby Rules bills of lading are subject to the terms of the Rules if issued in the case of a ship under a charterparty. This provision should be interpreted together with Article 1 (b) of the Hague and Hague-Visby Rules. These two Conventions were designed to regulate relations arising from the lading contract. If a bill of lading has been issued under a charterparty and is still in the hands of a shipper (charterer), there is no bill of lading for the purposes of the Rules at all; it is only a receipt. All contractual relations between the charterer (shipper) and the assignor

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[51] See § 556 and 557 of the German Commercial Code 1897 and Articles 1016 and 1017 of the Turkish Commercial Code 1956 - Gencon 76 (Clause 2), Tankervoy 87 (Clause 26) (Voyage Charterparties); Baltime1939 (Clause 9 and 13), Intertanktime 80 (Clause 28), Linertime 68 (Clause 12) (Time Charterparties); Intercoa 80 (Clause M) (COA).

(carrier) are covered by the charterparty[52] unless parties exhibit a clear intention that the bill proves the carriage part of the contract[53]. Hence, for the existence of the lading contract of carriage, the bill of lading should be in the third party's hands apart from the charterer's[54]. Article 1 (b) clearly states that the Rules govern the lading contract issued under or pursuant to a charterparty *from the moment* at which such bill of lading or similar document of title regulate the relations between a carrier and a holder of the same. Where the charterer regains the bill of lading from a third party after many endorsements, the relationship between a carrier and charterer again are governed by the charterparty rather than the bill of lading and the Rules[55]. From the time when the bill of lading is received by a third party holder, the carriage part of the contract is transferred to the third party holder under the name of lading contract, and the carrier becomes liable under the Hague and Hague-Visby Regimes[56].

If the bill of lading expressly includes the conditions of the charterparty, these provisions can be adduced against a third party[57]. In that case, the terms of charter contract are subject to domestic law as there is no uniform law regulating this type of contract. The main reason for the incorporation of the charterparty stipulations into the

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52 *The Dunelmia* [1969] 2 Lloyd's Rep.476; *President of India v. Metcalfe Shipping* (1979) 2 Lloyd's Rep.476 / *North Am. Steel Prood. Co. v. Andros Mentor* 1969 AMC 1482 (SD NY 1967); *Jefferson Chemical Co. v. M/T Grena* 1968 AMC 1202, 1208 (SD Tex. 1968) - Working Group on International Shipping Legislation of UNCTAD, Report of the Twelfth Session (1990), Doc. TD/B/C4/ISL/55, p.34, 98 (to be cited thereinafter as "Report of the Twelfth Session") - Falkanger,T.: The Incorporation of Charterparty Terms into the Bill of Lading, in Grönfors,K. (editor): Six Lectures on the Hague Rules, Göteborg 1967, p.55, 63.

53 *Ministry of Commerce v. Marine Tankers Corp.* 1961 AMC 320 (SD NY 1960).

54 *Leduc v. Ward* (1888) 10 QBD 475, 479 / *Dodds Shipping Ltd. v. Karobi Lumber Co.* 1968 AMC 1524 (5 Cir.1968); *Cargill Incorporated and Savannah Foods Inc. v. Golden Chariots MV* 1995 AMC 1077 (5 Cir. 1995).

55 *Tillmans v. SS Knutsford Ltd.* (1908) AC 406; *President of India v. Metcalfe Shipping* (1979) 2 Lloyd's Rep. 476 - UNCTAD Working Group, Report of the Twelfth Session, p.34, 99.

56 *Hain SS Co. v. Tate & Lyle* (1936) 55 Lloyd's Rep. 159 - Carver,T.G.: Carriage, p.349; Scrutton,T.E.: Charterparties, p.424; Tetley,W.: Bills of Lading and the Conflict of Laws, in EIMTL (ed.): The Hamburg Rules, Maklu 1994, p.47, 53 (to be cited thereinafter as "Conflict of Laws").

57 *11. HD.* 21.9.1982, E.3233, K.2592 - Chorley,R.S.T.-Giles,O.C.: Chorley and Giles' Shipping Law, 8th ed. by Gaskell,N.J.J.-Debattista,C.-Swatton,R.J., Hong Kong 1988, p.177, 249 (to be cited thereinafter as "Shipping"); Payne,W. -Ivamy,H.: Carriage, p.81; Zock,A.N.: Charter Parties in Relation to Cargo, in Carriage of Goods by Water: A Symposium, 45 Tul.L.Rev. 733 (1971), p.743 (to be cited thereinafter as "Charter Parties") / Çağa,T.: Deniz Ticareti Hukuku, Vol.II, Navlun Sözleşmesi, B.4, İstanbul 1988, p.83 (to be cited thereinafter as "Navlun Sözleşmesi"). For an opposite view see *11. HD.* 6.7.1982, E.82/2838, K.3274.

bill of lading is to provide to the shipowner against the bill of lading holder with legal protection which would otherwise be enjoyed against the charterer[58].

B) CONTRACTS COVERED BY THE HAMBURG RULES

1- Principle: all contracts of carriage of goods by sea

Article 2 of the Hamburg Rules extends their coverage to all contracts of carriage by sea. Then, Article 1 (6) defines this contract without regard to the document covering it[59]. Thus, the Rules on the one hand made their scope clear, and on the other hand kept up with technological developments such as the use of waybills and electronic data instead of paper.

2- Exception: contracts of carriage by chartered ship

Despite governing all contracts of carriage of goods by sea, the Hamburg liability regime do not apply to the contract of carriage by chartered ship provided that the bill of lading is in the charterer's hands. It was thought unnecessary to secure the charterer against the assignor (carrier) by the mandatory rules because he has as much the bargaining power as the carrier, and that the charterparty is usually composed of individually negotiated terms which are much less standardised than bills of lading and other transport documents[60]. As a result, under Article 2 (3) of the Hamburg Rules, it is stated that a bill of lading issued pursuant to a charterparty is governed by the Rules on the condition that it governs the relation between the carrier and the holder of the bill of lading, not being the charterer. Article 2 (4) of the Hamburg Rules lays down a similar principle. Accordingly, the contract of *future* carriage of goods in a series of shipments during an agreed period by chartered ship is operated by the Rules insofar as the bill of lading is transferred to a third party.

III. DOCUMENTS PROVING THE CONTRACT OF CARRIAGE

To claim compensation, the cargo interest shall first of all show the existence of the contract of carriage which is the basis of the carrier's liability. Since under some

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58 Cadwallader,F.J.: Incorporation of Charter Party Clauses into Bills of Lading, in Lloyd's of London Press (Organisator): The Speakers' Papers for the Bill of Lading Conventions Conference, New York (29/30 November 1978 - New York), New York 1978, p.1.

59 For a similar rule see Article 1 (1) of the CMR.

60 UNCITRAL: Hamburg Rules, p.592.

procedural law parties are obliged to bring written evidence of contractual relations, the cargo interest should demand a transport document in which the carrier's obligation to carry goods is clearly or by implication evident. For example, a transport document issued by the carrier to evidence the receipt of goods to be carried should be deemed to imply the conclusion of the contract of carriage by sea. This suggestion is in line with Article 18 of the Hamburg Rules. The transport document can be prepared at the same time with or after the conclusion of the contract of carriage. As a result, for the formation of the contract the issue of a record of evidence is, in principle, not necessary. Nowadays following three transport documents are commonly used for the proof of the contract of carriage.

A) BILLS OF LADING

Considering Article 1 (7) of the Hamburg Rules the bill of lading may be defined as follows: "*Bill of lading*" means a transport document which evidences a contract of carriage by sea and the receipt or loading of goods by the carrier, and by which the carrier undertakes to deliver goods against surrender of the document[61].

As understood from the definition, the bill of lading has three prerequisites. First, it is a *record of evidence* which proves a contract of carriage of goods by sea[62]. It is secondly a *receipt* which shows the taking over or loading of goods by the carrier. Finally, it is a *document of (possessory) title*[63] which represents the cargo so that the possession of the bill is equivalent to the possession of goods and thus grants the legitimate holder a possessory and, in some legal regimes, real right to keep them without their physical delivery[64]. These functions make the bill of lading a safe and effective device for third parties such as holders, bankers and underwriters.

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[61] See also Gülen,O.: Konişmentoların Muayyen Safhaları ve Vesikalı Akreditifler, Banka, 1954, Vol.17-18, p.17, 50; Zevkliler,A.: Konişmento, Mahiyeti ve Diğer Emtia Senetlerinden Farkları, İmran Öktem'e Armağan, Ankara 1970, p.525, 530.

[62] *The Ardennes* (1950) 84 Ll.L.R. 340, 344 - Mankabady,S.: Comments, p.41.

[63] The word "*document of title*" is criticised on the ground that the title passes by agreement rather than the transfer of the bill of lading under Anglo-American law unlike continental law, and the term "document of transfer" is recommended: Tetley,W.: Conflict of Laws, p.66. See in general Bools,M.D.: The Bill of Lading – A Document of Title to Goods – An Anglo-American Comparison, London 1997, p.173.

[64] Section 1 (4) of the UK Factors' Act 1889; § 364 and 650 of the German Commercial Code 1897; Articles 743 and 1104 of the Turkish Commercial Code 1956.

The bill of lading is excellent evidence of the initially agreed contract of carriage because its terms should in principle be compatible with the contract unless parties intend to change it[65]. However, since it is usually issued after the conclusion of the agreement, it may not always be possible to see all colours of the contract therein. It might not mark all stages in development of the pre-contract[66].

B) WAYBILLS

Nowadays, owing to the increased speed of carriage and trade requiring a simple instrument other than a document of title which is easily and safely handled without fear of loss or theft, waybills have been used —in place of bills of lading— for shipments to the consignee whose only intention is to take delivery of goods upon their arrival where the security of a documentary credit transaction is not required because of the strong relationship between these companies[67].

The *waybill* is a simple non-negotiable document which evidences a contract of carriage by sea (way contract) and the taking over or loading of goods by the carrier, and by which the carrier undertakes to deliver the goods to the consignee named in the document. It is recognised by US law as the *straight bill of lading*[68] and by English law as an original document[69].

It has three constituents: Firstly it is a *record of evidence* which proves a contract of carriage of goods by sea and which clearly identifies the consignee. It is also a receipt displaying the taking over or the shipment of goods. It is finally a *simple non-negotiable*

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65 Astle,W.E.: International Cargo Carrier's Liabilities, London 1983, p.28.

66 *Pyrene Co. (ibid)* [1954] 1 Lloyd's Rep. 321 - Debattista,C.: Sale of Goods, p.138; Mankabady,S.: Comments, p.41.

67 For examples see the BIMCO's Liner Waybill, the GCBS and SITPRO's Sea Waybill, the Intertanko's Tankwaybill; P&OCL Non-Negotiable Waybill. The IMC Rules for Sea Waybills were drafted to regulate relations arising from waybills. P&O Containers Ltd.: The Merchants Guide, 4th ed., 1987, p.32; Schmitthoff,C.M.-Goode,R. (ed.): International Carriage of Goods: Some Legal Problems and Possible Solutions, Vol.1, London 1988, p.xxi.

68 Sections 2, 6, 9, 22 and 29 of the US Federal Bills of Lading (Pomerene) Act 1916 - De Wit,R.: Multimodal Transport, p.291; Tetley,W.: Cargo Claims, p.190, 950. For an opposite view see Kozolchyk,B.: Bill of Lading, p.171: The Author argues that the straight bill of lading is a non-negotiable bill of lading. This view is erroneous since the delivery of goods to the consignee is not depended on the presentation of the bill under Section 9.

69 Section 1 (3) of the UK COGSA 1992: Howard,T.: Carriage of Goods by Sea Act 1992, 24 JMLC 181, Ja' 93, p.186, 189.

document, not a document of (possessory) title. So the absence of the waybill does not cause any delay in delivery of goods at the port of discharge. Nevertheless, it has no value where merchandises are intended to be sold, re-sold or pledged at sea. Since the waybill is usually issued when goods are received or loaded of goods by the carrier rather than when the contract of carriage is concluded as is the case in the bill of lading, it might not show all the terms of the pre-contract.

C) ELECTRONIC (PAPERLESS) BILLS OF LADING

Because of advances in computer technology and the need for fast and cheap transmission in the container transport, electronic bills of lading have been introduced into the shipping documentation by liner carriers. Thus, problems arising from the facts that modern fast ships arrive before shipping documents due to delay in postage and slow service of middlemen (agents and banks), and that the paper administration costs 7 percent of the value of international trade and approximately 12 percent of the value of transport have been overcome[70].

The *electronic bill of lading* is, at least today, a simple non-negotiable document consisting of electronic data which proves the contract of carriage of goods by sea (the electronic lading contract) and the taking over or loading of the goods by the carrier and by which the carrier undertakes to deliver the goods to the consignee in the possession of the electronic private key.

The electronic bill of lading has three requisites: It is *physical record of evidence* which establishes the contract of carriage of goods by sea and a *physical receipt* of the taking over or loading of the goods insofar as national procedural law regards it so. It is, finally, for the time being a *simple non-negotiable document* like a waybill. Although it is not written on the paper and does not include the carrier's manual signature, it consists of electronic data containing information similar to that on a paper bill of lading and a private key. Electronic data have physical existence in the computer which can be

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[70] Boss,A.H.: The International Commercial Use of Electronic Data Interchange and Electronic Communications Technologies, 46 BL 1787 (1991), p.1787; Fry,P.B.: Negotiating Bit by Bits: Introducing the Symposium on Negotiability in an Electronic Environment, 31 Idaho L.R. 679, p.680; ICC: UNCID. - Uniform Rules of Conduct for Interchange of Trade Data by Tele-transmission, ICC Publication No.452, 1988, p.7; Kozolchyk,B.: Bill of Lading, p.212, 241; Todd,P.: Dematerialisation of Shipping Documents, 10 JBL 410 (1994), p.410.

seen on the screen and which is ready to be printed out like written details on paper[71]. The private key which may be a digital signature[72] or cipher known only by the carrier and the shipper (or any other holders) secures transactions[73]; consequently it has the same function as a hand-written signature[74]. However, some problems may stem from the reliability of the electronic data and private key. There is a high possibility of the entrance into the system by unauthorised people and of the modification of the electronic document by fraud. Changes in the electronic bill of lading do not normally appear on the screen unlike the paper bill of lading. Likewise, the person who has actually sent and received a message may not easily be identified. The percentage of probability of fraud might increase or decrease depending on the technology used to secure the private key and the data by the shipper and the carrier, and on how much open the system is to public. Nonetheless, it must be remembered that even the paper bill of lading might fraudulently be duplicated, forged or altered. Some national laws[75]

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[71] Rule 4 of the IMC Rules for Electronic Bills of Lading; Article 6 (1) of the UNCITRAL Modal Law on Electronic Commerce: See Burman,H.S.: Introductory Note, UNCITRAL: Model Law on Electronic Commerce (Adopted December 16, 1996), 36/1 ILM 197, Ja'97, p.203 - Chandler III,G.F.: The Electronic Transmission of Bills of Lading, 20 JMLC 571 (1989), p.577.

[72] It could be either eye or palm signature.

[73] Rule 2 (f) of the IMC Rules for Electronic Bills of Lading.

[74] Kelly,R.B.: The CMI Charts a Course on the Sea of Electronic Data Interchange? Rules for Electronic Bills of Lading, 16 Tul.Mar.L.J. 349, Spr'92, p.356.

[75] See in general XIVth ICCL, General Report on the Current Developments Concerning the Form of Bills of Lading, in Yiannopoulos,A.N. (ed.): Ocean, The Hague 1995, p.3 (to be cited thereinafter as "General Report"); for Argentinean law Ray,J.D.: Current Developments Concerning the Form of Bills of Lading - Argentina, in Yiannopoulos,A.N. (ed.): Ocean, p.57, 58; for Australian law Article 6 of the Australian Sea-Carriage Documents Act 1996 - Derrington,S.-White,M.: Australian Maritime Law, p.453; Livermore,J.: Current Developments Concerning the Form of Bills of Lading - Australia, in Yiannopoulos,A.N. (ed.): Ocean, p.67, 76; Livermore,J.-Evarjai,K.: Electronic Bills of Lading, 28/1 JMLC 55, Ja'97, p.59; for Belgian Law Bernauw,K.: Current Developments Concerning the Form of Bills of Lading - Belgium, in Yiannopoulos,A.N. (ed.): Ocean, p.91 (to be cited thereinafter as "Belgium"); for Canadian law ICCL, General Report, p.13; for Dutch law see Japikse,R.E.: Current Developments Concerning the Form of Bills of Lading - The Netherlands, in Yiannopoulos,A.N. (ed.): Ocean, p.229; for German law Herber,R.: Current Developments Concerning the Form of Bills of Lading - Germany, in Yiannopoulos,A.N. (ed.): Ocean, p.161 (to be cited thereinafter as "Germany"); for Greek law Kiantou-Pampouki,A.: Current Developments Concerning the Form of Bills of Lading - Greece, in Yiannopoulos,A.N. (ed.): Ocean, p.197, 200 (to be cited thereinafter as "Greece") and Kousoulis,S.: Current Developments Concerning the Form of Bills of Lading - Greece, in Yiannopoulos,A.N. (ed.): Ocean, p.185, 189; for Japanese law Sakurai,R.-Yoshida,S.: Current Developments Concerning the Form of Bills of Lading - Japan, in Yiannopoulos,A.N. (ed.): Ocean, p.217, 218 (to be cited thereinafter as "Japan"); for New Zealand law: Myburgh,P.: Bits, Bytes and Bills of Lading: EDI and New Zealand Maritime Law, NZLJ 324 (1993), p.327, 330 and New Zealand, p.241; for Scandinavian law Grönfors,K.: Towards Sea Waybills and Electronic Documents, Gothenburg 1991, p.72; for UK law Carr,I.M.: Current Developments Concerning the Form of Bills of Lading - Great Britain, in Yiannopoulos,A.N. (ed.): Ocean, p.165, 166.

may probably avoid accepting this sort of document as evidence until modern technology renders it authenticated to the reasonable degree that the paper bill of lading has already been done by now[76]. For that reason, under Article 1 (8) of the Hamburg Rules it is provided that "writing" includes, *inter alia*" telegram and telex in order to keep up with new technological changes in writings. Then, Article 3 of the Hamburg Rules allows the signature on the bill of lading to be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means insofar as law of the country where the bill of lading is issued recognises such signature.

In order to solve the problems arising from the application of national procedural law, parties are advised to agree that the holder of the electronic bill of lading may demand a paper bill any time[77], that the electronic bill of lading have the same legal effect as if the document were in writing[78], that they will not raise any defence that the contract is not writing, and finally that any national law or local law, custom or practice requiring the contract of carriage to be evidenced in writing and signed, is satisfied by the transmitted and confirmed electronic data residing on computer data storage media displayable in human language on a video screen or as printed out by a computer[79]. Nevertheless, even these agreements may not easily by-pass problems arising from the national procedural law requiring a hand-written signature.

IV. SUB-CONTRACTS OF CARRIAGE

In practice the carrier, for whom it is not necessary to be a shipowner, sometimes entrusts the performance of his obligation to carry goods to somebody else by making another contract of carriage for the foregoing reasons: Firstly, since under the contract of through-carriage the transportation is performed by different means at different stages, he might require another carrier's assistance. Further, he who wishes to enjoy the

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[76] Gliniecki,Y.-Ogada,C.G.: Electronic Documents, p.132; Kozolchyk,B.: Bill of Lading, p.240. See also Article 14 of the Swiss Obligations Code 1911 and Article 14 of the Turkish Obligations Code 1926: "A facsimile of signature produced by mechanical means is only recognised as sufficient where its use is customary, as for example in the case of signatures on financial instruments which are issued in large numbers."

[77] Rule 10 of the IMC Rules for Electronic Bills of Lading.

[78] Rule 4 (d) of the IMC Rules for Electronic Bills of Lading.

[79] Rule 11 of the IMC Rules for Electronic Bills of Lading.

balance of freight may conclude additional contract as freight in lading contracts is higher than in contracts of carriage by chartered ship. Again, the carrier who has undertaken to carry goods which are more than his cargo capacity may want to have this extra part transported.

So, the contract of carriage concluded between the (contracting) carrier and the (contracting) shipper is called the *head-contract of carriage*; by contrast, the contract of carriage which the (contracting) carrier makes in his own name with a third party in order to have the goods subject to the head-contract carried is termed the *sub-contract of carriage*.

More than one contract can be drawn up with a view to the transportation of the same goods. In that case, the head-contract is determined by ascending from the contract made with the last carrier because the sub-contract always serves the performance of the obligation arising from the head-contract[80]. Consequently, the first contract made with the cargo owner to carry goods is constantly a head-contract while one concluded with the shipowner is always a sub-contract. Unless the shipper has unauthorised the carrier or the nature of carriage bars, the carrier can in principle entrust the performance of his obligation of carriage to somebody else by a sub-contract.

The head-contract and the sub-contract are independent of each other. The invalidity of one does not affect the other. While the applicable liability regimes to the carrier are being sought, these contracts should individually be received attention.

The confidence of the obligation to the sub-carrier does not make any difference in the nature of the head-contract, irrespective of whether or not there is a liberty under the contract of carriage by sea to do so. The head-contract depends on the provisions of the three Conventions, as rightly laid down under Article 10 (1) of the Hamburg Rules.

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[80] Arkan,S.: Karada Yapılan Eşya Taşımalarında Taşıyıcının Sorumluluğu, Ankara 1982, p.103 (to be cited thereinafter as "Taşıyıcının Sorumluluğu"); Deniz,İ.: Kombine Taşımalarda Taşıyanın Sorumluluğu, Sorumluluk ve Sigorta Hukuku Bakımından Eşya Taşımacılığı Sempozyumu (1984 / Maçka -İstanbul), Ankara 1984, p.169, 176, n.15 (to be cited thereinafter as "Kombine Taşımalar"). For an opposite view see Akıncı,S.: Navlun Mukaveleleri, p.29; Okay,S.: Navlun Sözleşmesi, p.29.

On the other hand, the relation between the sub-carrier and the carrier (sub-shipper) is based on the sub-contract of carriage. So long as the sub-contract is a contract of carriage for the purposes of the Rules, it is subject to them.

In comparison, there is no contractual relationship between the shipper and the sub-carrier. Accordingly, the sub-carrier has no obligation resulting from the contract of carriage just as the shipper has no authority to instruct the sub-carrier[81]. However, the sub-carrier along with the (contracting) carrier can join in the head-contract and thereby assume an obligation against the shipper[82]. Article 10 (2) of the Hamburg Rules and some national law create legal relationships between the shipper and the sub-carrier to safeguard cargo interests by granting them an opportunity to claim damages from one of the carriers who is financially more capable to pay for it[83].

If the carrier entrusts the performance of the obligation to carry goods to another person on behalf of the shipper, there may be a separate contract of agency but not a sub or head-contract of carriage.

V. CONTRACTS OF THROUGH-CARRIAGE

A) GENERAL

The contract under which the carrier is obliged to carry goods at only one stage of transport is called the *contract of unimodal carriage of goods*. In this contract, carriage is performed by only one vehicle, such as ship, lorry, train, or aeroplane. Sometimes it may be necessary for the carriage to be performed at more than one stage. In that case, the shipper may either make several contracts (*contracts for divided carriage*) with different carriers in order to have his cargo carried or concludes a single contract (*contract for successive carriages*) with numerous carriers who are liable for stages they assumed[84]. These kinds of contracts are inadvisable from many points of view: Firstly, it

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81 Wilson,J.F.: Carriage, p.237 / Deniz,İ.: Kombine Taşımalar, p.177.

82 Selvig,E.: Through - Carriage and on Carriage of Goods by Sea, 27 AJCL 369 - 389, Spr / Summ' 79, p.373 (to be cited thereinafter as "Through Carriage"); Tiberg,H.: Who is the Hague Rules Carrier? in Grönfors,K. (editor): Six Lectures on the Hague Rules, Göteberg 1967, p.127, 145 (to be cited thereinafter as "Hague Rules Carrier").

83 § 796 of the German Commercial Code 1897 and Article 391 of the Turkish Obligations Code 1926.

84 Fitzpatrick,P.G.: Combined Transport and the CMR Convention, JBL 314 (1968), p.314; Wilson,J.F.: Carriage, p.234.

is difficult for the shipper to negotiate with all carriers individually, so as to get the most suitable offers because he does not deal with transportation as his business. Secondly, it causes more expenses since freight and costs are counted for each leg separately. Moreover, unless he has proved at which stage the contract of carriage is breached he might not find any carrier to sue. Lastly, different documents of transport could be needed for every leg of carriage. In order to escape from these obstacles the shipper desires just one carrier to be bound with all transport[85].

So, the contract of carriage under which the carrier undertakes to carry goods at more than one stage of transport is called the *contract of through-carriage*. Accordingly, the shipper makes only one contract covering the whole carriage performed at more than one phase with a carrier, then the carrier discharges his obligation on his own or by sub-contractors[86]. If the carrier does not undertake to perform, but only to procure the performance of all or some legs of transport, there is no contract of through-carriage in respect of these parts. It may be a brokerage or agency contract[87].

Under the contract of through-carriage, the carrier may issue a through bill of lading to shippers for the disposal of goods without their delivery[88] whereas he may still demand individual documents from sub-carriers. The function of the through bill of lading as a document of title is uncertain in some countries[89]. Nevertheless, since the

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85 Arbabi,M.: Liability, p.13; Giles,O.C.: Conbined Transport, 24 International and Comparative Law Quarterterly 379, 443 (1975), p.379; Mankabady,S.: Some Legal Aspects of the Carriage of Goods by Container, 23 ICLQ 317 (1974), p.318 (to be cited thereinafter as "Container"); Porter,J.H.: Multimodal Transport, Containerisation and Risk of Loss, 25/1 Virginia J. Int'l L. 171 (1984), p.171; Wheble,B.S.: The International Chamber of Commerce, Uniform Rules for a Combined Transport Document, LMCLQ 146 (1976), p.146.

86 Wilson,J.F.: Carriage, p.234 / Deniz,İ.: Kombine Taşımalar, p.174.

87 Medina,C.: The Rules on Transshipment Proposed by UNCITRAL in the Light of Italian Experience, in Studies on the Revision of the Brussels Convention on Bills of Lading, Genoa 1974, p. 225, 227 (to be cited thereinafter as "Transshipmnet"). Compare with Article 3 of the MTC; Faber,D.: The Problems Arising from Multimodal Transport, 4 LMCLQ 503 (1996), p.503 (to be cited thereinafter as "Multimodal Transport") / Okay,S.: Navlun Sözleşmesi, p.30.

88 P&OCL Bill of Lading; Combiconbil 1971; Tank Ship Bill of Lading - Ramberg,J.: The Multimodal Transport Document, in Schmitthoff,C.M.-Goode,R. (ed.): International Carriage of Goods, Vol.1, London 1988, p.1, 3 (to be cited thereinafter as "Document")- Wheble,B.: Combined Transport Documentation, A Commercial View, Dir.Mar. 333 (1972), p.333.

89 De Wit,R.: Multimodal Transport, p.299. For the view against the consideration of a multimodal bill of lading as a document of title see Schmitthoff,C.M.: The Development of the Combined Transport Document, Dir.Mar. 312 (1972), p.325, 332.

three Conventions apply to the contract of carriage by sea rather than its document, the through bill may enter into their scope insofar as it relates to sea transport[90].

B) TYPES OF CONTRACTS OF THROUGH-CARRIAGE

1- Contracts of linked carriage

The contract of through-carriage whereby parties agree that the carrier shall carry goods by the same mode of transport is called contract of linked carriage. In such a contract, carriage is fulfilled by at least two means of transport at more than one stage.

Only the contract of linked carriage by *sea* is deemed to be a contract of carriage for the purposes of the Rules because according to Article 1 (b) of the Hague and Hague-Visby Rules and Article 1 (6) of the Hamburg Rules these Conventions govern the contract *in relation to* carriage of goods by sea[91]. The transhipment of goods at an intermediate port by discharging on land and reloading on ships is not an effective element on the contract because the carrier fulfils his obligation just by delivering the goods at the agreed destination. Such contracts keep depending on the special features of sea carriage, and cover all carriage within the Rules[92].

2- Contracts of combined (multimodal) carriage

The contract of through-carriage whereby it is agreed that the carrier (multimodal transport operator) shall carry goods by at least two different modes of transport is termed the contract of combined (multimodal) carriage[93].

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90 Mankabady,S.: Container, p.319.

91 Scrutton,T.E.: Charterparties, p.408.

92 *Mayhew Foods v. Overseas Containers Ltd.* [1984] 1 Lloyd's Rep. 317, 320 / *The Anders Maersk* [1986] 1 Lloyd's Rep. 483 (HK HC). However, if carriage has been divided into two parts by the issue of two separate bills of lading and has been made subject to two contracts, the Rules do not apply during the transhipment as there is no contract of linked carriage: *Captain v. Far Eastern SS Co.* [1979] 1 Lloyd's Rep. 595 (Col. SC) - Dani,A.: Transshipment:, in Studies on the Revision of the Brussels Convention on Bills of Lading, Genoa 1974, p.257, 259 and 76 Dir.Mar. 454 (1974), p.457; Grönfors,K.: Oncarriage in Swedish Maritime Law, in Grönfors,K. (editor): Six Lectures on the Hague Rules, Göteborg 1967, p.31, 48 (to be cited thereinafter as "Oncarriage") / Wüstendörfer,H.: Seehandelsrechts, p.336..

93 See also Article 1 (2) of the CMI Tokyo Rules 1969: CMI. Doc. III/1969, p.56; Article 1 (2) of the UNCTAD/ICC Rules 1971; Article 1 (1) and (3) of the MTC 1980: Arkan,S.: 24.5.1980 tarihli Eşyanın Değişik Tür Taşıtlarla Uluslararası Taşınmasına İlişkin Konvansiyon Üzerinde Bir İnceleme, Batider, 1982, p.27; Rule 2 (a) of the ICC Uniform Rules for a Combined Transport Document 1990; Article 40 of the New Dutch Civil Code - Arkan,S.: Karma Taşımalarla İlgili Hukukî Sorunlar, Prof. Dr. Jale Akipek'e Armağan, Konya 1985, p.341.

For the application of the Rules, the contract may indirectly or partially connect to carriage by sea since there is no limitation made as to the measure of connection with sea under the Hague, Hague-Visby and Hamburg Regimes. Accordingly a contract which involves carriage by sea and also carriage by some other modes is deemed to be a contract of carriage by sea only *in so far as it relates to* sea carriage[94] as clearly provided under Article 1 (6) of the Hamburg Rules[95] unless the Contracting States have also ratified a convention bringing a uniform mandatory regime for multimodal carriage[96].

It was argued that if carriage is from one inland depot to another by a single carrier the Hamburg Rules do not apply at all, not even to the part of carriage which takes place by sea because the phrase, "*from one port to another*", in Article 1 (6) of the Hamburg Rules seems to limit the ambit of the Rules only to carriage in this period[97]. This view is erroneous since these words' only effect is to ascertain the maritime leg of the multimodal transport, and since there would otherwise be no meaning of the second sentence of Article 1 (6).

Whether or not carriage relates to the sea depends on which legs of carriage were being performed when the problem arose, or, in other words, in the case of the carrier's liability, at which stage the contract of carriage was breached (*net-work method*)[98] as provided under Article 4 (1) of the Hamburg Rules[99]. If its answer cannot be given by

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[94] *Pyrene Co. (ibid)* [1954] 1 Lloyd's Rep. 321 - Muscat,A.: The Liability of Carriers engaged in Through Carriage and Combined Transport of Goods, PhD Thesis, University of Oxford, 1983, p.49.

[95] Selvig,E.: The Influence of the Hamburg Rules on the Aims for a Convention on International Multi-Transport, in Lloyd's of London Press (Org.): The Speakers' Papers for the Bill of Lading Conventions Conference, New York - 29/30 November 1978, New York 1978, p.1, 15 (to be cited thereinafter as "Hamburg Rules"). Compare with Article II of the Guadalajara Convention 1961; Article 31 of the Warsaw Convention, Article 2 (1) of the CMR and Article 1 (2) of the CMI: These Conventions apply their provisions to the contract of their own modes of carriage.

[96] It may be an issue for the Contracting States to the MTC designed in line with the Hamburg Rules if the former Convention comes into force. Nevertheless, the Contracting States to the Hague, Hague-Visby and Hamburg Rules are also under a convention based obligation to apply the Rules. In that case, the problem concerning the application of the mandatory provisions may occur and the Contracting States may have to disregard one of the Conventions. In favour of the adoption of a uniform system see Dilock,K. (L): The Genoa Seminar on Combined Transport, Dir.Mar. 177 (1972), p.177, 183.

[97] Diamond,A.: Ship and Cargo, p.49.

[98] Reynardson,W.R.A.: The Insurance of the Combined Transport Operator, Dir.Mar. 215 (1972), p.218.

[99] Selvig,E.: Hamburg Rules, p.11. This method is also accepted under Article 8 of the CMI Tokyo Rules 1969; the UNCTAD/ICC Rules for Multimodal Transport Documents 1971 which came into effect on January 1, 1992: See Faber,D.: Multimodal Transport, p.50, and Article 13 of the ICC Uniform Rules for a Combined Transport Document 1990.

taking the facts of actual event, as is mostly the case where the goods carried in sealed containers, the court must by analogy apply the *mandatory* rules relating to carriage of goods by sea, land or air, whichever is in more conformity with the nature of the combined carriage and with the interests of parties, before the contractual terms[100]. Before examining the contract and the parties' intentions, it cannot conclusively be concluded that the contract is presumed to have breached at sea leg[101]. Although parties may issue a "swithchback" bill of lading which makes the Hague Rules applicable in the case where it cannot be established in whose custody the goods were when the contract was breached, this bill would probably be against international conventions mandatorily regulating other modes of transport and void.

VI. ENLARGEMENT OF THE SCOPE OF THE RULES TO CONTRACTS OUTSIDE THEIR COVERAGE BY AGREEMENT

The parties may conclude an agreement that the Rules or domestic statute will apply to their contract which is wholly or partially outside their ambit. Thus, for example the contract of carriage by chartered ship[102], or the period of carriage before the goods are loaded or after they are discharged[103], or excluded deck cargo[104] can be made subject to the Hague and Hague-Visby Regimes or domestic statutes by incorporation clauses.

These clauses have the function and effect of the paramount clause. So unless the proper law put them into law, they are of a contractual effect. The Contracting States to

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[100] The parties may agree on the provisions of the ICC Uniform Rules for a Combined Transport Document 1990: Schmitthoff,C.M.: The Export Trade, 9th ed., 1990, p.528.

[101] For an opposite view see Arbabi,M.: Liability, p.31; Bannister,J.E.: Containerisation and Marine Insurance, 5 JMLC 463, Ap'74, p.464.

[102] Clause 23 of the Asbatime 1981; Clause 11 of the Linertime 68; Clause 45 Beepeetime 2, Clause 33 of the Multiform 1986; Clause 43 of the Nuvoy-84 (which incorporate the entire Hague and Hague-Visby Rules); Clause 38 of the Beepeevoy 2 1976, Clause 43 of the Beepeevoy 2 '83' (which includes only some parts of the Rules); the Asbatime, 1981; Clause 29 of the Tankervoy 87 (which incorporate the Hague-Visby Rules into the bills of lading issued under a charterparty) - *Adamastos v. Anglo Saxon Petroleum Co.* (1958) 1 Lloyd's Rep.73 (CA); *Nea Agrex v. Baltic Ship. Co.* (1976) 2 Lloyd's Rep. 47 / *Nissho-Iwai Co., Ltd. v. M/T Stolt Lion* 1980 AMC 867 (2 Cir. 1980). For the problems as to incorporation of charterparty terms into a bill of lading contract see UNCTAD Working Group, Report of the Twelfth Session, p.27, 100 - Davies,D.A.: Incorporation of Charterparty Terms into Bills of Lading, JBL 326, p.326 (1966); Mankabady,S.: References to Charter-Parties in Bills of Lading, LMCLQ 52 (1974), p.53; McMahon,J.P.: Incorporation, p.1.

[103] *Falconbridge Nickel Mines v. Chimo Shipping* [1969] 2 Lloyd's Rep. 277 (Can. Adm. Ct.) / *Goodwin, Ferreira (ibid)* (1929) 34 Ll.L.Rep. 192 / *Remington (ibid)* 1955 AMC 1789 (SD NY 1955).

[104] *The Tilia Gorthon* [1985] 1 Lloyd's Rep. 522 (QBD - Adm. Ct.) / *Pannell v. SS American Flyer* 1958 AMC 1428 (SD NY 1957); *General Motors Corp. v. SS Mormacoak* 1971 AMC 1647 (SD NY 1971).

the Hague-Visby and Hamburg Rules have to give the incorporation clause the force of law according to Article 10 (c) of the Hague-Visby Rules and Article 2 (e) of the Hamburg Rules. Consequently, Section 1 (6) of the UK COGSA 1971 and Section 1 (1) (c) of the South African COGSA 1986, without prejudice to Article X (c) of the Rules, give the Rules the force of law in relation to any bill of lading or non-negotiable document marked as such (which must of course be outside the documentary scope of the Rules; otherwise there would be no need for this sort of clause[105]) if the contract contained in or evidenced by it expresses that the Rules shall govern the contract[106].

The Conventions or their national versions must apply by analogy to the contract as confirm with its legal nature. Incorporated Rules represent the parties' intention. The system laid down therein must, therefore, be operated unless there is an agreement to the contrary[107]. However, limited incorporation does not trigger the entire Convention. Its application is limited to the included provisions[108].

XI. CONCLUSIONS

(1) The three Conventions lay down the carrier's liability under the contract of carriage of goods by sea. However, the Hague and Hague-Visby Rules abstain from defining the contract. This gap has led to some uncertainties as to its meaning and the coverage of the Rules. Hence, Article 1 (6) of the Hamburg Rules favourably gives a broad and clear definition of the contract to provide their general application.

(2) The character or conditions of goods such as live animals and deck cargo may justify special provisions. In that case, liability regimes should be designed in a form appropriate to their peculiar nature as done under Articles 5 (5) and 9 of the Hamburg

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[105] Some authors argue that for the application of the Rules to the contract covered by waybill the contract must under any circumstances contain an incorporation clause: Staniland,H.: South Africa, p.307; Williams,R.: Waybills, p.299 and Rules, p.68. However, the way contract falls within the ambit of the Rules. This kind of provision can only be required when the contract is outside the mandatory scope of the Convention, for example the carriage is unusual: Tetley,W.: Waybills, p.478; Cargo Claims, p.949.

[106] However, Section 1 (6) (b) of the UK COGSA also provides that a non-negotiable document must expressly stipulate that the Rules are to govern the contract *as if the receipt were a bill of lading*: *The Vechscroon* [1982] 1 Lloyd's Rep. 301; *The European Enterprise* [1989] 2 Lloyd's Rep. 185.

[107] *Horn v. Cia. De Navegacion Fruco SA* 1968 AMC 2548 (5 Cir. 1968) - Chandler III,G.F.: The Measure of Liability for Cargo Damage under Charter Parties, 20 JMLC 395 (1989), p.395. For an opposite view see *The Marofa* 1984 AMC 769 (NY Arb. 1983): The court shifted the burden of proof for the cause of loss or damage onto the charterer (shipper) contrary to the Section 4 of the US COGSA incorporated into the STBVOY form charterparty and held the carrier liable on the ground that the incorporated Act is only an additional part of the contract and that the Act does not include any burden of proof rule in Section 4 (1) - Bauer,R.G.: The Measure of Liability for Cargo Damage under Charter Parties: A Second Look, 21 JMLC 397 (1990), p.397, 414 (to be cited thereinafter as "Measure").

[108] *In Re Marine Sulphur Queen* 1972 AMC 1122 (2 Cir. 1972).

Rules. Nevertheless, Article 1 (c) of the Hague and Hague-Visby Rules exclude live animals and cargo actually carried on deck according to the contract of carriage from their scope and thus deprives cargo interests of the protection under the mandatory rules although the carrier has a defence to relieve himself of liability for loss or damage arising from inherent defect, quality or vice of the goods under Article 4 (2) (m).

(3) The container has a double function (an extension of the ship's hold and package). For that reason, the carrier's liability for loss of or damage to container goods should be made subject to special provisions regarding that nature. For example, if supplied by the shipper, the carrier must not only be obliged to carry goods, but also such article of transport. Goods ought to be interpreted as covering the container. This is the good approach taken by Article 1 (5) of the Hamburg Rules.

(4) Articles 1 (d) and 7 of the Hague and Hague-Visby Rules which limit carriage by sea to the period between the time when goods are loaded on to the time they are discharged from the ship no longer respond to commercial needs because the carrier receives and delivers goods on shore in order to shorten the period of loading and discharge operations. Yet, he is entitled to release himself from liability although he is still contractually liable for loss or damage to goods in his custody. Article 1 (6) of the Hamburg Rules therefore rightly widens the ambit of the rules to cover carriage from one port to another

(5) The ship means *any* vessel, such as the barge and lighter, used for the carriage of goods by sea including any water which is convenient for navigation such as inland rivers.

(6) The Hague and Hague-Visby Liability Regimes limit their scope to the contract of carriage covered by the bill of lading (lading contract). The lading contract means any contract of carriage of goods by sea which expressly or by implication provides for the issuance of the bill of lading. The Rules shall, therefore, in principle apply to all contracts of carriage notwithstanding whether the contract is oral or written, or whether it is covered by a bill of lading or a waybill even where the unusual carriage is covered by the waybill. Article 2 of the Hamburg Rules clearly extends their ambit to all contracts of carriage by sea. This is one of the advantages of this Convention. However, under both Articles 1 (b) and 5 of the Hague and Hague-Visby Rules and Article 2 (3) of the Hamburg Rules, the contract of carriage by chartered ship is put outside the coverage of the Rules so long as the bill of lading is in the charterer's hands.

(7) For compensation the cargo interest has to prove the contractual relation between parties. Any document proving delivery of goods should be treated as the evidence of the contract of carriage, as provided for under Article 18 of the Hamburg Rules, insofar as its evidentiary function is recognised by law.

(8) The head and sub-contracts are independent of each other. The invalidity of one does not affect the other. There is no contractual relationship between the shipper and the sub-carrier unless there is a special or statutorily presumed agreement between them.

(9) The contract of through-carriage is a contract of carriage of goods by sea for the purposes of these Conventions insofar as it relates to carriage by sea. The transhipment of goods from one ship to another at an intermediate port by discharging on land and reloading on ships is not an effective constituent for the application of the Rules.

(10) The ambit of the Rules can be extended to all contracts by the incorporation clause. In that case, such contractual stipulation has only a contractual effect. However, the Contracting States to the Hague-Visby Rules and Hamburg Rules have to give it the force of law.

Chapter Five

LIABLE PARTY UNDER THE CONTRACT OF CARRIAGE

The second condition of the carrier's liability under the three Conventions is the existence of a liable party under the contract of carriage. By the Rules the burden of proving that the defendant is the one liable for contractual breach is imposed on the cargo interest. That is just because the facts relating to the adverse party to the contract of carriage are available to the cargo interest who is also a party thereto. Identification of the liable party is one of the main issues in liability law. It depends on the relationship between parties. In the field of sea transport since the carrier does not always operate his own ships to carry goods, and cargo owners do not regularly negotiate with the carrier to have their goods carried, this person is not easily determined. The more people are involved in the transport the more problems occur. The basic aim of this chapter is to show who could be the liable party under the contract of carriage.

I. THE (CONTRACTING) CARRIER

Under the contract of carriage of goods by sea, the only one who promises to carry goods in his charge and assumes liability for loss or damage to goods is the (contracting) carrier. As a result, Articles 3 and 4 of the Hague and Hague-Visby Rules and Part II of the Hamburg Rules identify him as the liable party.

According to Article 1 (a) of the Hague and Hague-Visby Rules, «"Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.» This definition may give rise to a question as to whether only the owner or charterer is a carrier. However, the use of word, "includes", seems to make the definition illustrative. On this account, anybody, including the owner or the charterer, who makes a contract of carriage with a shipper must be deemed a carrier for the purposes of the two Conventions[1]. In order to avoid possible conflicts, Article 1 (1) of the Hamburg Rules similarly, but more clearly, provides that «"Carrier" means any person by whom or in

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[1] *Midland Silicones Ltd. v. Scruttons Ltd.* [1961] 2 Lloyd's Rep. 365 - UNCTAD Secretariat, Report of Bills of Lading, p.32 - Lim,H.L.: Transport, p.38; Scrutton,T.E.: Bills of Lading, p.427; Tiberg,H.: Hague Rules Carrier, p.141. For an opposite view see Zock,A.N.: Charter Parties, p.746, n.82: In the Author's view either the shipowner or the charterer should be the carrier.

whose name a contract of carriage of goods by sea has been concluded with a shipper.» On the basis of these definitions and, moreover, considering elements of the contract of carriage such word may be employed with the meaning set out below:

"C*arrier*" is a contracting party under a contract of carriage of goods by sea who, in exchange for freight to be paid by a shipper, undertakes to carry goods in his charge from one place to another by sea. The contract may be concluded by the carrier himself or in his name by his representative.

It is not important for the carrier to be a real or artificial person to perform his duty in the course of his business. He can be a shipowner or freight forwarder so long as he binds himself by the contract to carry cargo. The organ of an artificial person (carrier) is the carrier himself because the organ's act is deemed to be the act of such a juristic person[2]. It covers people entitled to direct, inspect, manage or represent the artificial person by its articles or law[3]. Under Anglo-American law the person "who is very ego and centre of the juristic person"[4], "who is the brain and nerve centre of the artificial person[5]" or "with whom the chief management of the company's business resides"[6] is described as "the carrier". The scope of the duty of organ should exceed the range of an employment relationship with the artificial person[7].

A multimodal transport operator who shall carry goods by more than one mode and at more than one stage is also a carrier under the three Conventions to the extent that the carriage relates to the sea. In that event, he may be obliged both to perform some parts of carriage as a carrier and to arrange other legs in a shipper's name as an agent[8].

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[2] Article 55 of the Swiss Civil Code 1911; Article 48 of the Turkish Civil Code 1926 - Hatemi,H.: Organın Eyleminden Dolayı Tüzel Kişiliğin Sorumluluğu, Sorumluluk Hukukunda Yeni Gelişmeler I. Sempozyumu, İstanbul 1980, p.129; Tandoğan,H.: Kusura Dayanmayan Sözleşme Dışı Sorumluluk Hukuku, Ankara 1981, p.74 (to be cited thereinafter as "Sorumluluk Hukuku").

[3] Gilmore,G.-Black,C.: Admiralty, p.161.

[4] In *Leval v. Colonial SS* [1961] 1 Lloyd's Rep. 560 (Can. SC) an assistant marine superintended was not deemed a carrier.

[5] *Bolton Engineering v. Graham* [1957] 1 QB 159, 172.

[6] *Lennard's Carrying Co. v. Asiatic Petroleum Co.* [1915] AC 705, 713 (HL); [1914] 1 KB 419 (CA).

[7] Diamond,A.: Visby Rules, p.245. For an opposite view see *The Lady Gwendolen* [1965] 1 Lloyd's Rep. 335: A traffic manager was held to be a carrier / *The Edmund Fanning* 1953 AMC 86 (2 Cir. 1953): An expediter assisting in stowing cargoes was treated as a carrier.

[8] Medina,C.: Transshipment, p.227 / Arkan,S.: Taşıyıcının Sorumluluğu, p.22.

The same carriage might be assumed by more than one carrier. In this case, each is an individual carrier and becomes jointly and severally liable to cargo interests[9].

II. LEGAL POSITION OF THE CARRIER WHO HAS ISSUED A BILL OF LADING

The carrier may, by issuing a bill of lading on demand to the actual shipper, assume a statutory possessory/real obligation to carry goods in his custody and to deliver them to the proper holder against surrender of this document.

The issue of the bill of lading aggravates the carrier's legal position because his undertaking is based on a bill of lading that is a document of (possessory) title. For that reason, a carrier, who would like to relieve himself of such an obligation, must hand over cargo to the proper holder only against the presentation of the bill of lading[10]. Otherwise, he might be obliged to pay damages to the proper holder and may lose his P&I cover unless he proves that the actual receiver was the real owner. Even in the latter case, the carrier is advised to act so only against the letter of guarantee issued by the receiver to indemnify the carrier for loss arising from wrong delivery. Yet, the Hague and Hague-Visby Rules unlike the Hamburg Rules do not govern liability for delivery on shore without production of bills of lading, which happens after the discharge of goods. Thus, the carrier is allowed to exculpate himself from liability.

III.LEGAL POSITION OF THE SHIP

Under Article 4 of the Hague and Hague-Visby Rules, the ship is referred together with the carrier as if she were a liable party who could exclude herself from liability. This provision is based on the Anglo-American law which permits suit *in rem* against the vessel[11]. Since "ship (vessel)" would mean individuals who stand behind her, that is, shipowners, and the action *in rem* are only proceeded if the shipowner is personally liable, the reason for reference to the vessel is in fact to allow shipowners to enjoy the

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9 See Article 7 of the Turkish Commercial Code 1956.

10 § 653 of the German Commercial Code 1897; Article 1107 of the Turkish Commercial Code 1956 - *The Sormovski 3068* [1994] Lloyd's Rep. 266 / *Moline Plow Co. v. SS Cabo Villano* 1926 AMC 1212 (ED NY 1926).

11 Article 21 (4) of the UK Supreme Court Act 1981 - Sweeney,J.C.: Compromise Provisions Regarding In Rem Procedures, 27 AJCL 407, Spr/Summ'79, p.409; Williams,B.F.: Cargo Damage at Sea: The Ship's Liability, 27 Tex.L.R. 525 (1949), p.525.

same defences available to the carrier in cases where they are held liable rather than to create an additional liable party[12].

Nevertheless, continental Contracting States to these two Conventions do not make any reference to the ship since she is not recognised as a person. Although there is a *quasi in rem* procedure which allows the arrest of the vessel as security by attachment, and the maritime lien for loss of or damage to the goods against her[13], cargo interests are not permitted to file an action for cargo loss against her. Only the person who benefits from the vessel in maritime commerce can be sued *in personam*[14]. As a result, these Countries, which make the shipowner tortiously liable for the act of the ship's company as a contracting carrier, grant him the same immunities as the carrier has, by using the option awarded to themselves under the Protocol of the Hague and Hague-Visby Rules to include the Rules in a form appropriate to their legislation[15].

On the other hand, the Hamburg Rules which were drafted in the continental legislative style does not show the ship as a liable party; instead, the sub-carrier, who may be a shipowner, is made liable as a contracting carrier. Since the word "*ship*" is included in the term "*actual carrier*" (sub-carrier) under Anglo-American law, this variation has not generated any fundamental difference.

IV. THIRD PARTIES DEEMED CARRIER BY LAW

In principle, third parties cannot be held liable under the contract of carriage of goods by sea to which they are not an original party, and the contract cannot impose any obligation on third parties unless they join it with their consents. Nevertheless, law may impose the same undertakings and liabilities on third parties as under the contract.

A) SUB-CARRIERS

A carrier may confide performance to a sub-carrier by making another contract of carriage. The Hague and Hague-Visby Rules are silent on the sub-carrier's legal

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12 *Gadsen v. Australian Coastal Shipping Commission* [1977] 2 NSWLR 575, 580 - Tetley,W.: Cargo Claims, p.240, 263. For an opposite view see Newell,R.: Privity Fundamentalism and the Circular Indemnity Clause, LMCLQ 97 (1992), p.103 (to be cited thereinafter as "Circular Indemnity Clause").

13 § 754 of the German Commercial Code 1897; Article 1235 of the Turkish Commercial Code 1956.

14 Sweeney,J.C.: In Rem Procedures, p.409.

15 § 485 of the German Commercial Code 1897; Article 947 of the Turkish Commercial Code 1956.

position. In contrast, Article 1 (2) of the Hamburg Rules terms it as "*actual carrier*" which means a person to whom the performance of the carriage of the goods, or part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted. In the light of this stipulation, the sub-carrier can be defined as follows:

"S*ub-carrier*" is a third party to whom the performance of all or some parts of the head-contract of carriage has been entrusted by the (contracting) carrier under the sub-contract of carriage.

The actual performance of the contract by the sub-carrier is not necessary because even the sub-carrier can entrust the fulfilment of the contract to somebody else, who is also a sub-carrier with respect to the first shipper[16]. Hence, it is not appropriate to describe the sub-carrier as an actual carrier, as under the Hamburg Rules, or as a performing carrier, as in the Athens Convention.

The confidence of obligation to the sub-carrier does not change the carrier's legal position. He remains liable, in relation to the carriage performed by the sub-carrier, for the acts and omissions of the sub-carrier and of his servants and agents acting within the scope of their employment as provided under Article 10 (1) of the Hamburg Rules. Otherwise, the cargo interest could not find any carrier to sue since he may not be able to prove at what point the contract of carriage was breached[17].

The carrier cannot escape liability for loss of or damage to goods in the sub-carrier's custody by entrusting the obligation of carriage to somebody else. That is contrary to the mandatory nature of the three Conventions[18]. He could avoid liability by assuming some parts of the transport rather than the whole of it, though, which destroys the advantages of the contract of through-carriage.

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16 Ramberg,J.: The Vanishing Bill of Lading and the "Hamburg Rules Carrier", 27 AJCL, 391-405, Spr/Summ' 79, p.392 (to be cited thereinafter as "Bill of Lading"). For an opposite view see Goldie,C.W.H.: The Carrier and the Parties to the Contract of Carriage, 81 Dir.Mar. 616 (1979), p.620 (to be cited thereinafter as "Parties").

17 For an Australian view see Sweeney,J.C.: The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part II), 7 JMLC 27, Ja'76, p.343 (to be cited thereinafter as "UNCITRAL II").

18 Selvig,E.: Through Carriage, p.373, 382. For an opposite view see Grönfors,K.: Oncarriage, p.37, 49.

In the interest of commerce, Article 11 (1) of the Hamburg Rules, by following some court decisions[19], confers a chance to the carrier to contract out his liability for loss or damage caused by an occurrence which takes place while goods are in the actual carrier's charge during such part of the carriage where the contract of carriage 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. Under the same paragraph any stipulation limiting or excluding such liability is, in return, deemed null and invalid if no judicial proceedings can be instituted against the actual carrier in a court competent under Article 21 (1) or (2), and the burden of proving that any loss, damage or delay in delivery has been caused by such an occurrence is shifted onto the carrier. As the contracting carrier might not know the sub-carrier's name beforehand, he should have been allowed to inform the cargo interest of the sub-carrier's name as soon as goods are taken over by the sub-carrier. If the contracting carrier does not provide such information for the cargo interest immediately, he must remain liable for loss[20].

Since there is no contractual relationship between the shipper and the sub-carrier, the latter is under no contractual liability against the former[21]. Indeed, no one can be bound by a contract to which he is not a party. Unless the statutory relationship between them and liability are recognised by law referring to the provisions regulating the contract of carriage, the shipper first has to sue the carrier for loss or damage, and then the carrier who paid indemnity has a right of recourse against his sub-carrier. Thus, for one loss, two lawsuits may have to be brought. Again, if the carrier becomes bankrupt, the shipper could lose his chance of full compensation for loss although the carrier may still have a right to sue the sub-carrier.

To make the sub-carrier statutorily liable to the shipper does not necessarily increase his liability[22] because the sub-carrier would also relieve himself of the contractual liability against the sub-shipper (the contracting carrier) to the extent of the amount of

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19 *Cour d'Appeal de Paris,* March 2, 1983, DMF 554 (1983) / *El-Khateib v. Eurofreighter* 1980 AMC 893 (SD NY 1980).

20 For a similar view see IMC International Sub-Committee, Report 1996, p.350.

21 There may be only tortious liability: Medina,C.: Transshipment, p.245.

22 Tetley,W.: Articles 9 to 13 of the Hamburg Rules, in Mankabady,S. (ed.): The Hamburg Rules on the Carriage of Goods by Sea, Leyden-Boston 1978, p.197, 199.

indemnities paid by him to the shipper. Besides, cargo interests may be entitled under municipal law to demand indemnity from the carrier for his own or employee's tortious act which has contributed to loss of or damage to cargo. Holding the carrier tortiously liable could bring about unnecessary discrimination between the carrier's and the sub-carrier's liabilities and may cause the sub-carrier, who might have actually carried the goods, not to enjoy the stipulations which were drafted with the needs of maritime commerce and sea transport in mind. In this case, while relieving himself from contractual liability against the sub-shipper, due to contractual or statutory exemption clauses, he can be liable to the shipper under the law of tort[23]. For those reasons, holding the sub-carrier liable is also fair for all parties.

However, the Hague and Hague-Visby Rules do not include any stipulation to govern the relationship between the shipper and the sub-carrier[24], and thus leave the solution of this problem to the municipal law some of which hold the sub-carrier liable to the shipper as if he were liable to the sub-shipper (carrier) under the sub-contract of carriage. This is to shorten the trial period and to give the shipper an opportunity to claim damages either from the carrier or the sub-carrier whoever is in a better financial situation.

In order to unify national laws and to strengthen the shipper's economic position, Article 10 (2) of the Hamburg Rules *rightly* provides for the application of all the provisions of this Convention governing the carrier's liability to the sub-carrier's liability for the carriage performed by him. This is also the case in Article 30 of the Guadalajara Convention and Article 4 (1) of the Athens Convention 1974. Thus, the sub-carrier is regarded as the (contracting) carrier for the contract fulfilled by him. He is not liable for the stage of carriage which is not imputed to him[25].

Parties to the head contract of carriage should not be allowed to aggravate the sub-carrier's legal position by a contract without his consent more than as provided in the

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[23] *Stolt Tank Containers Inc. v. Evergreen Marine Corp.* 1991 AMC 1761, 1767 (SD NY 1990), 1992 AMC 2015 (2 Cir. 1992) - IMC International Sub Committee Report, 1962, p.83 - Carver,T.G.: Carriage, p.252. For an opposite view see DeMay,J.: Carriage of Goods by Sea Act - Application to Non-Parties, 24 JMLC 221, Ja'93, p.221.

[24] For an opposite view see Tetley,W.: Cargo Claims, p.235.

[25] UNCITRAL Working Group, Report of the Sixth Session, p.133.

Rules. In order to improve the sub-carrier's position, Article 10 (3) of the Hamburg Rules, therefore, requires that any special agreement under which the carrier assumes obligations not imposed by the Rules or waives rights conferred by the Rules affects the sub-carrier only if agreed to by him *expressly and in writing*, and that whether or not the sub-carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement. As a consequence, for example, the sub-carrier will not be liable to the head-shipper for delivery after the date unreasonably fixed in the head-contract of carriage unless he has expressly and in writing agreed[26].

Insofar as both the carrier and the sub-carrier are obliged to pay indemnity for the same loss, they should be jointly and severally liable. There is nothing in the three Conventions which prevents the carrier from claiming from the sub-carrier the amount of damages which has already been paid to the cargo interest. These are in conformity with Article 10 (4) and (6) of the Hamburg Rules.

B) SHIPOWNERS

The shipowner is one of the other main players in maritime commerce besides the carrier. The separation of the carrier from a shipowner could be important with respect to the limitation of liability.

"S*hipowner*" means any person who uses his own vessel in order to make profit by maritime commerce for his own account. In consequence, he ought to be both an investor and a venture capitalist. In practice, ships are operated by persons who are not proprietors. They are investors, but not venture capitalists. Such people operate vessels which do not belong to them with the aim of making profit for their own account. They, acting with the same intention as owners, must be deemed shipowners. For that reason, they are called "*disponent owners*" and are placed under the same liability as the shipowner[27]. The relationship between the shipowner and the disponent owner is usually based on a bare-boat or demise charter contracts[28].

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[26] For an opposite view see McGovern,N.: Shipowner, p.8.
[27] See § 484 of the German Commercial Code 1897; Article 946 of the Turkish Commercial Code 1956.
[28] *Baumvoll Manufactur von Carl Scheibler v. Gilchrest* [1892] 1 QB 253, 259, 261; *The Andrea Ursula* [1971] 1 Lloyd's Rep.145.

In short, the essential element of the shipowner is not to be a venture capitalist but an investor, in other words, the operation of the ship in maritime commerce according to his orders and instructions[29]. They lose their titles when a third party gains the authority over the management and navigation of the vessel.

As is apparent under Article 1 (a) of the Hague and Hague-Visby Rules, only the owner who enters into a contract of carriage is a carrier. If the owner has not assumed any obligation of carriage under the contract, he cannot be liable under the two Conventions[30]. It is not necessary for the carrier to be a shipowner, because the carrier's obligation is personal, not possessory/real[31]. Everybody can undertake to carry cargo notwithstanding whether the vessel is being run according to his instruction[32]. Nevertheless, under Anglo-American law there is an understanding that only the person who actually performs the contract of carriage is a carrier notwithstanding whether he has promised to carry goods under the contract or not. This school of thought distinguishes the carrier's obligations as the obligation to provide a seaworthy ship and the obligation to deliver goods and makes the shipowner liable for the former whereas holding the charterer liable for the latter as a carrier[33]. This view is clearly against the definition given under Article 1 (a) of the Hague and Hague-Visby Rules.

Yet, under some national law there is a presumption in favour of cargo interests that the shipowner is a carrier in cases where the carrier is not clearly identified under the bill of lading issued by the master or any other representatives of the shipowner[34]. Thus, while signing the bill of lading, the master is regarded as an agent of the shipowner. The

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29 TBMM Adliye Encümeni Mazbatası, Gerekçe, p.403.

30 *The Sea Star* 1972 AMC 1440, 1446 (2 Cir. 1972); *Associated Metals & Minerals Corp. v. SS Portorid* 1973 AMC 2095 (5 Cir. 1973) - Williams,W.L.: Fire, p.581, n.45. For an opposite view see *Joo Seng Hong Kong Co. v. SS Unibulkfir* 483 F Supp. 43 (SD NY 1979) and 493 F Supp. 35 (1980).

31 See the definition of "non-vessel operating common carrier" in 46 USC App. § 1702 (17).

32 Ramberg,J.: Bill of Lading, p.394 / Prüssmann-Rabe: Seehandelsrecht, 2. Aufl, München 1983, § 556 II A1 (to be cited thereinafter as "Seehandelsrecht").

33 *Yeramex International v. The SS Tendo* 1979 AMC 1282 (4 Cir. 1979); *Hasbro Industries v. The M/S St. Constantine* 1980 AMC 1425 (D. Hawaii 1980).

34 See Article 644 of the German Commercial Code 1897; Article 1099 of the Turkish Commercial Code 1956 - *Wehner v. Dene Steam Ship.* [1905] 2 KB 92, 98; *Tillmanns v. SS Knutsford Ltd.* [1908] 1 KB 185; [1908] AC 406 (HL); *The Venezuela* [1980] 1 Lloyd's Rep. 393, 395 (on the demise charterer) - Selvig,E.: Through Carriage, p.371; Tetley,W.: Cargo Claims, p.236, 244. Since under time and voyage charter contracts the authority over the master is still in the owner's hands, the time or voyage charterer cannot be considered as a carrier: *Paterson SS v. Aluminium Co.* [1951] SCR 852, 859 (SC). *The Berkshire* [1974] 1 Lloyd's Rep. 185, 188; *The Evie W* [1980] 2 SCR 322, 324 (SC).

determination of the shipowner by cargo interests can be easy thanks to the Lloyd's Register of Shipping. However, the Register does not show whether or not the vessel has been chartered. If so, it is also quite difficult to find the charterer's name as there is no special list for him. In that case, cargo interests face the risks of not being able to identify the liable party.

However, Article 15 (1) (c) of the Hamburg Rules clearly imposes an obligation on the carrier to include his name and principal place of business in a transport document in order to protect its bona fide holder who may not know who is the contracting carrier[35]. This is similar to Article 8 of the Warsaw Convention, Article 6 (6) of the CMI and Article 6 (1) of the CMR. Nevertheless, the Hamburg Rules do not provide any sanction where this information has been omitted to incorporate in the document. For the protection of cargo interests the registered shipowner should be regarded as a carrier unless he proves that the another person has contractually undertaken to carry goods. In the latter, this contracting carrier and the registered shipowner must be made jointly and severally liable for all expenses incurred by the claimant due to unnecessary litigation brought against the shipowner, and the period for suit should not run until the contracting carrier is identified[36].

Where the whole or some parts of the performance of carriage has been entrusted to a shipowner, he is a sub-carrier who is made liable for the carriage performed by him under some national law and Article 10 of the Hamburg Rules.

The carrier who is not a shipowner may incorporate into the bill of lading a *demise (identity of the carrier) clause*[37] by which a third party shipowner or demise charterer is regarded as a carrier with a view to limiting liability to marine assets despite being

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35 Secretary-General, Second Report, p.196.

36 IMC International Sub-Committee, Report 1996, p.348.

37 A typical demise clause reads as follows: "If the ship is not owned or chartered by demise to the company or line by whom this bill of lading is issued (as may be the case notwithstanding any thing that appears to the contrary), the bill of lading shall take effect as a contract with the owner or demise charterer as the case may be as principal made through the agency of the said company or line who act as agents only and shall be under no personal liability whatsoever in respect thereof.": *The Berkshire* [1974] 1 Lloyd's Rep. 185, 187. An identity of carrier clause reads as follows: "The contract evidenced hereby is between the merchant and the owner or demise charterer of the vessel designated to carry the goods. No other person or legal entity shall be liable under this contract, ...": Clause 3 of the Visconbill 73, Clause 17 of the Conlinebill 78.

under no contractual obligation against the shipper[38]. However, these clauses are partially null and void under Article 3 (8) of the Hague and Hague-Visby Rules and Article 23 of the Hamburg Rules to the effect that the carrier attempts to relieve himself of liability by identifying a third party as a carrier[39]. By contrast, a third party shipowner or demise charterer may be held jointly and severally liable together with the carrier against cargo interests[40] as the carrier may increase his liability and obligations under the Conventions. It was argued that thanks to the demise clause the charterer concludes the contract on behalf of the shipowner as an agent[41]. However, this view is mistaken on the basis that the clause purports to alter the liable party rather than the notification of an agent. Though, the clause could be valid in some cases where, for example, the charterer signs the bill of lading in the shipowner's name or as his representative (such as the master) and incorporates a "demise clause" therein[42], or where the clause identifies the

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38 Secretary-General, Second Report, p.194; UNCTAD Secretariat, Report of Bills of Lading, p.33 - Tiberg,H.: Hague Rules Carrier, p.142. However, after (Brussels) Limitation of Liability Convention 1957 granting the charterer to limit his liability came into force this purpose lost its meaning for the charterer in the Contracting Countries: Beare,R.E.: The Effect of Conflict of Law on the Exercise of Cargo Underwriters' Subrogation Rights, in Lloyd's of London Press (Org.): The Speakers' Papers for the Bill of Lading Conventions Conference, New York 1978, p.1, 15.

39 *The Mica* (1973) FC 988, 1000 (FC); *Canficorp v. Cormorant Bulk-Carriers* 1985 AMC 1444 (Can. FC) / *Cour d'Apeeal de Paris,* September 29, 1988, DMF 381 (1990) / *Bundesgerichtshof,* January 22, 1990 TranspR 163 (1990); *Bundesgerichtshof,* November 20, 1990 TranspR 65 (1991); *Bundesgerichtshof,* February 4, 1991, ETL 512 (1991) / *Tribunale di Genova,* December 5, 1969, Dir. Mar. 1969, 330; *Tribunale di Trieste,* October 21, 1981, Dir. Mar. 1982, 270; *Corte di Cassazione,* March 13, 1988, Dir. Mar. 1988, 1077 / *Bank of Kentucky v. Adams Express Co.* 93 US 174, 181 (1876); *Epstein v. USA* 1949 AMC 1598, 1601 (SD NY 1949); *The Anthony II* 1967 AMC 103, 121 (SD NY 1966) (under the US Harter Act); *Carling Breweries v. CN Marine* 1987 AMC 954 (SD NY 1987) - Group 2 of IMC, Report on the Basis of Liability, p.50 - Prichett,R.: The Demise Clause in American Courts, LMCLQ 387 (1980), p.394; Tetley,W.: Identity of the Carrier, LMCLQ 519 (1977), p.523. For the argument on the legal basis see PojevicC.: The Problem of the Validity of "Identity of Carrier" Clauses, 30/3 ETL 297 (1995), p.304: The Author argues that the identify of carrier clause can be contrary to the Hague Rules not because they contradict the provisions concerning the carrier's liability, but because they contradict the provisions Article 1 (a) of the Hague Rules. This argument is unacceptable since such clauses totally exempt the contracting carrier from liability although they may only aim at the identification of the carrier and may create another liable person.

40 *Hof van Beroep te Brussel,* March 13, 1970, ETL 398 (1970); *Hof van Beroep te Antwerpen,* March 14, 1990, JPA 1991, 12.

41 *Apex (Trinidad) Oilfields Ltd. v. Lunham & Moore Ship. Co. Ltd.* [1962] 2 Lloyd's Rep. 203 (Can. Ex. Ct.); *Grace Kennedy & Co. v. Canada Jamaica Line* [1967] 1 Lloyd's Rep. 336 (Quebec SC) / *The Berkshire* [1974] 1 Lloyd's Rep. 185, 188; *The Vikfrost* [1980] 1 Lloyd's Rep. 560 (CA) / *The Jasmin,* Tokyo Chiho Saibansho, March 19, 1991, 10 Kaijiho Kenkyu Kaishi 16 (1991).

42 *The Iristo* 1941 AMC 1744 (SD NY 1941); *El Dupont de Nemours International v. SS Mormacvega* 1974 AMC 67 (2 Cir. 1974).

charterer himself as a carrier[43]. Under those circumstances there is no intention of the charterer to change the liable party.

C) INTERMEDIARIES OF TRANSPORT

"*Intermediary of transport*" means any third party who, in return for fee, assumes an obligation to arrange and organise the transport of goods on behalf of a principal. He may arrange either/both a ship for shippers (*freight forwarder*)[44] or/and cargoes for carriers (in practice mostly shipowners or charterers) (*commissioner of transport*).

Many shippers who have been unable to fill cargo holds or containers at a given time have been organised by a third party intermediary to group their shipments therein. His profit is the difference between high freight charged by him according to the value of commodity and low freight fixed by the shipowner regarding the size of place used to carry goods in his vessel.

The intermediary may be entitled to conclude a contract of carriage either in the customer's name or his own name[45]. In the first case, he is only an agent (direct representative), but not a carrier. Any relationship arising from the contract of carriage or the bill of lading is between a carrier and the shipper[46]. Nonetheless, in cases where the intermediary has created such an appearance that he has acted as a carrier, the bona fide shipper should be protected[47]. Hence, under some national law[48], where the intermediary has had the goods carried by his servants and means, or where he has informed the shipper without disclosing the carrier's name of the performance of carriage, he is considered a carrier.

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43 *Yeramex (ibid)* 1977 AMC 1807 (ED Va. 1977).

44 See in general Glass,D.: Freight Forwarding, in Yates,D.(ed.): Contracts for the Carriage of Goods by Sea and Air, Part III, London 1993, Part 7; Gorton,L.: Freight Forwarders and Intermodal Carriage in American Administrative Legislation, ETL 208 (1972), p.208; Hetherington,S.W.: Freight Forwarders and House Bills of Lading - The Cape Comorin, 1 LMCLQ 32 (1992), p.32; Holloway,I.C.: Troubled Waters: The Liability of a Freight Forwarders as a Principal under Anglo- Canadian Law, 17/2 JMLC 243 (1986), p.243.

45 Article 60 of the New Dutch Civil Code.

46 *Halm Industries v. Timur Star* 1985 AMC 391 (SD NY 1984) - Tetley,W.: Cargo Claims, p.708.

47 Carver,T.G.: Carriage, p.38; Glass,D.A.-Cashmore,C.: Introduction, p.72, 92; Tiberg,H.: Hague Rules Carrier, p.145 / Arkan,S.: Ticarî İşletme Hukuku, Ankara 1993, p.217.

48 See § 413 of the German Commercial Code 1897; Article 437 of the Swiss Obligations Code 1911; Article 814 of the Turkish Commercial Code 1956; Article 428 of the Turkish Obligations Code 1926.

The three Conventions which are silent on this issue ought to be amended in this way to protect bona fide cargo interests who are unable to identify the principal carrier. Thus, the agent should be presumed to be the (contracting) carrier unless he discloses the contracting carrier's name and his principal place of business. In the latter, the (contracting) carrier and the agent should be made jointly and severally liable for all expenses incurred by the claimant due to unnecessary litigation brought against the agent, and the period for suit shall not run until the contracting carrier is identified.

However, in the second case, the intermediary acting in his name but on behalf of the carrier is an indirect representative from the carrier's view point, but a carrier for the other party in good faith.

The intermediary's obligation is to arrange transport, but not to carry goods; though, this does not preclude him from assuming an undertaking of carriage or shipment on his own behalf[49]. He may make a contract of carriage with himself *as a carrier* to perform his duty to arrange a ship or *as a shipper* to fulfil his undertaking to find goods to be transported on the condition that parties to the intermediary contract have not otherwise agreed[50]. In the previous case, he may fall within the definition given for the so called non-vessel-operating common carrier under US law[51]. The authority to conclude a contract with himself can clearly or by implication be instructed by the principal[52].

The distinction between the carrier and the intermediary depends on the facts of each case. Courts should, therefore, decide on whether the obligor undertook to procure the transport or to carry the goods considering the terms of the contract and the actual event[53]. Where the intermediary is regarded as a carrier, he is under the same liability as the Hague, Hague-Visby and Hamburg carrier for loss of or damage to the goods. This conclusion is in conformity with the practice of documentary credit. Indeed, Article 30 of UCP 500 enables banks to accept freight forwarder's transport document if it

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49 Hill,D.J.: Freight Forwarders, London 1972, p.16, 25.
50 § 412 of the German Commercial Code 1897.
51 46 USC App. § 1702 (17).
52 Arkan,T.: Taşıyıcının Sorumluluğu, p.23; Eren,F.: Borçlar Hukuku, Genel Hükümler, Vol.I, 2nd ed., Ankara 1987, p.535.
53 *Arkwright Mutual Insurance Co. v. Sarajevo Express* 1994 AMC 360 (SD NY 1993): The court deemed the defendant a forwarder on the strength of the contract referring to the agency relation.

indicates on its face the name of the freight forwarder as a carrier and has been signed by the freight forwarder as a carrier.

D) CARRIER'S SERVANTS OR AGENTS

The carrier's servants or agents might be made liable under national law for loss or damage arising from their tort[54]. Since there is no public interest in protecting them from the results of their own fault, no law of tort brings any legal protection for them[55]. Neither do they have any contractual remedy because they are not parties to the contract of carriage with an aggrieved party (the cargo interest)[56]. Yet, in practice carriers regularly insert Himalaya clauses[57] into the contract of carriage in order to extend to their servants and agents taking part in operations of carriage the benefits of defences and limits granted to them under the Conventions.

The rules of tort have been designed to mandatorily protect public policy and the aggrieved party. Before the tortious act, there is no relationship between parties which could be violated. The aggrieved party cannot, therefore, relinquish his right to claim damages, which does not exist at the time when the exemption contract is made. For those reasons, the carrier's servants or agents cannot in principle contract out or restrict their liability by virtue of the Himalaya clause. Consequently, some courts have ruled against this kind of stipulation and held them liable under the rules of tort[58].

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54 *The Himalaya* [1954] 2 Lloyd's Rep. 267 (as to the carriage of passengers); *Midland (ibid)* [1961] 2 Lloyd's Rep. 365 - O'Hare,C.W.: Documentation, p.427; Sandström,J.: The Limitation of the Stevedore's Liability, JBL 340 (1962), p.341 (to be cited thereinafter as "Stevedore's Liability").

55 Donovan,J.J: The Existing Problems under the Hague Rules and the Need for Changes in the United States Legislation, in Lloyd's of London Press (Org.): The Speakers' Papers for the Bill of Lading Conventions Conference, New York - 29/30 November 1978, New York 1978 (Speakers' Papers), p.1, 7 (to be cited thereinafter as "Hague Rules").

56 *Midland (ibid).* [1961] 2 Lloyd's Rep. 365 (HL) / *International Milling Co. v. Perseus* 1958 AMC 526; *Herd & Co. Inc. v. Krawill Machinery Corp.* 1959 AMC 879; *Cosa Export Co. v. Trans-America Freight Line, Inc.* 1968 AMC 1351 (SD NY 1968) - Doak,J.B.: Liabilities of Stevedores, p.759. For an opposite view, see *Gilbert Stokes & Kerr Pty. Ltd. v. Dalgety & Co. Ltd.* (1948) 81 Ll.L.R. 337 (Aust. NSW Ct.); *Waters Trading Co. Ltd. v. Dalgety & Co. Ltd.* [1951] 2 Lloyd's Rep.385 (NSW) / *AM Collins & Co. v. Panama Railroad Co.* 1952 AMC 2054 (5th Cir. 1952).

57 "... and the protection of Article IV bis of the Hague-Visby Rules and any other statutory exemption from or limitation of liability shall inure also to the benefit of stevedores and other servants or agents of the carrier. For the purpose of this clause all such persons and legal entities are deemed to be parties to this contract, made on their behalf by the carrier.": Visconbill 73.

58 *Wilson v. Darling Island Stevedoring & Lighterage Co. Ltd.* (1956) 1 Lloyd's Rep. 546 (Aust. HC) / *The Lake Bosomtwe* [1971] SCR 41, 43 (SC) - Chatterjee,S.K.: The UN Convention on the Liability of Operator of Transport Terminals in International Trade?, JBL 109 (1994), p.115, 118.

However, cargo interests, who cannot claim full compensation from the carrier as a result of contractual or statutory exemption clauses, have found an opportunity to get round the Hague Rules by suing the carrier's servants and agents in tort. Indeed, the carrier might contractually or in moral sense be obliged to release his servants or agents from all the consequences of cargo interests' tort claims; in that case he might indirectly be made subject to tortious liability beyond this under the mandatory provisions of the Hague Rules[59]. Thus, the balance established under the Convention in order to protect the economic interest of all parties by keeping insurance premiums and consequently freight rates down might be shaken. Subsequently, courts have started to give mandatory stipulations of the Hague Rules a supremacy over mandatory tort rules (with different legal reasons[60]) and have regarded such clauses as valid providing that their wording are clear in regard to who is being protected for what benefit[61].

In order to strengthen the application of its provisions, Article 4 *bis* (2) of the Hague-Visby Rules *rightly* entitles the carrier's servant or agent (not being an independent contractor), whom an action in respect of loss of or damage to goods is brought against, to avail himself of the defences and limits which the carrier is entitled to invoke under this Convention. During the preparation of the Hague-Visby Rules, the Contracting States came to a policy decision not to avail independent contractors of the carrier's

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[59] IMC International Sub Committee Report, 1962, p.83; UNCITRAL: Hamburg Rules, p.603 - Grime,R.: Shipping Law, 2nd ed., London 1991, p.169; Grönfors,K.: Non-Contractual Claims, p.189.

[60] For the reason based on the recognition of the contract for the absolute benefit of third parties see *The Buenos Aires Maru* [1986] 1 SCR 752, 782 (SC) / *Carle & Montanari v. American Export Isbrandtsen Lines* 1967 AMC 1637 (SD NY 1967); *Santa Ana, The* [1975] 1 Lloyd's Rep. 276 (9 Cir. 1974); *B Elliott v. John T. Clark* 1983 AMC 1392, 1396 (D. Md. 1982), 1983 AMC 1743 (4 Cir. 1983); *Moonwalk Int'l. v. S/S Seatrain Italy* 1985 AMC 1270, 1275 (SD NY 1984) - Carver,T.G.: Carriage, p.259; Doak,J.B.: Liabilities of Stevedores, Terminal Operators, and Other Handlers in Relation to Cargo, in Carriage of Goods by Water: A Symposium, 45 Tul.L.Rev. 752 (1971), p.762; Healy,N.: Carriage of Goods by Sea: Application of the Himalaya Clause to Subdelegees of the Carrier, 2 Mar.Law. 91 (1977), p.91; Sandström,J.: Stevedore's Liability, p.342. For the reason based on the agency relationship between the carrier and the defendant party see *Godina v. Patrick Operations Ply Ltd.* [1984] 1 Lloyd's Rep. 333 (Aust. NSW Ct.); *PS Chellaram & Co. Ltd. v. China Ocean Shipping Co.* [1991] 1 Lloyd's Rep. 493 (Aust. NSW SC) / *The Eurymedon* [1974] 1 Lloyd's Rep. 534 (PC); *The New York Star* [1980] 2 Lloyd's Rep. 317, 324 (PC). For an opposite view see Kovats,L.J.: Who is to Pay for the Stevedore's Negligence, LMCLQ 121 (1974), p.121; Mankabady,S.: Rights and Immunities of the Carrier's Servants and Agents, 5 JMLC 111, Oc'73, p.111, 122; Powles,D.G.: The Himalaya Clause, LMCLQ 331 (1978), p.332; Tetley,W.: Cargo Claims, p.761, 774: These authors relied on the principle of privity of contract.

[61] *Herd & Co. v. Krawill Machinery Corp.* 1959 AMC 879 – Wyatt,M.J.: Contract Terms in Intermodal Transport: COGSA Comes Ashore, 16 Tul.Mar.L.J. 177, Fall 91, p.177.

immunities on the ground that there is no social reason to protect them[62]. Nonetheless, this is in conflict with the main objective of the extension. Why were the carrier's exemptions extended to his servants or agents? It was to avoid the possibility of by-passing the Rules by cargo interests, but not to provide social protection. Moreover, that exception has created difficulty to find out in which cases the carrier's servant or agent is not an independent contractor[63].

Then, Article 7 (2) of the Hamburg Rules on the one hand includes independent contractors in the provision, and on the other hand clearly entitles the servant or agent who proves that he acted within the scope of their employment to benefit from the defences and limits of the carrier. This is similar to Article 28 of the CMR.

The carrier's defences are available to his servants or agents insofar as the carrier is liable for their acts. These assistants enjoy immunities granted to the carrier only within the boundaries of the Rules. They cannot be placed in a better position than the carrier. For example, the master like the carrier could not rely on the nautical fault exemption under Article 4 (2) (a) of the Hague and Hague-Visby Rules if he has personally and negligently navigated or managed the ship[64].

Nowadays, some bills of lading incorporate *circular indemnity clauses* whereby the shipper and the carrier agree that the cargo interest shall not bring any action against the carrier's servants or agents, or shall otherwise compensate the carrier, who is also under a contractual obligation to indemnify his servants or agents, for the consequences of this claim[65]. The main reason for the inclusion of these stipulations is to grant the carrier's servants or agents additional protection along with Himalaya clauses. Such a provision could be valid to the extent that it prevents the cargo interest from suing the carrier's servants or agents in the events where the carrier is entitled to the statutory exemptions, on the same grounds as the Himalaya clauses. The stipulation cannot be interpreted to grant them further immunities which the carrier does not have. Consequently, in the

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62 Grönfors,K.: Why not Independent Contractors?, JBL 25 (1964), p.26.
63 Goldie,C.W.H.: Parties, p.623.
64 For an opposite view see Diamond,A.: Visby Rules, p.252.
65 Newell,R.: Circular Indemnity Clause, p.97.

cases where the carrier could be liable, the cargo interest cannot be deprived of the right to file suit against them[66].

V. CONCLUSIONS

(1) Under the Rules, the liable party is in principle the contracting carrier who, in return for the payment of freight by the shipper, assumes an obligation to carry goods in his custody from one place to another by sea under the contract of carriage. The contract may be agreed by the carrier or in his name by someone else.

(2) The reason for the reference to the ship along with the carrier in Article 4 of the Hague and Hague-Visby Rules to avail the ship and consequently the shipowner of the same rights and immunities as the carrier has in the case where the shipowner is liable. Since the term "actual carrier" (sub-carrier) under the Hamburg Rules includes the shipowner, his ship should enjoy the same protection of the carrier provided under the Rules where he is liable *in rem*.

(3) The sub-carrier ought to be made statutorily liable to the shipper for the sub-carriage performed by him so as to shorten the trial period and to give the shipper an opportunity to claim damages from either the carrier or the sub-carrier whosoever is in a better financial position as is the case under some national law and Articles 10 - 11 of the Hamburg Rules.

(4) The shipowner might be a carrier so long as he is obliged to carry goods. Nevertheless, in case of the omission of the contracting carrier's identification in the contract of carriage, the registered shipowner must be deemed to be the carrier unless he shows that the contracting carrier is somebody else. In that event, the registered shipowner and the contracting carrier should be made jointly and severally liable under the Rules for all expenses incurred by the claimant due to unnecessary litigation brought against the registered shipowner, and the period for action should not run until the disclosure of the contracting carrier.

(5) Any clause which releases the carrier from liability by identifying somebody else as a carrier is null and void under the mandatory provisions of the Rules.

(6) Unless the intermediary of transport has concluded the contract of carriage in his name, he is not a carrier. With the aim of protecting bona fide cargo interests, the three Conventions should be amended in order to consider the intermediary who has acted in the (contracting) carrier's name a carrier unless the contracting carrier's name and his principal place of business is disclosed. In the latter, he and the principal should be made jointly and severally liable for all expenses incurred by the claimant due to unnecessary litigation brought against the intermediary and the period for action should not run until the disclosure of the contracting carrier.

(7) Lest cargo interests, who has lost their opportunity to sue the carrier because of the statutory or contractual immunities, get round the mandatory provisions of the three Conventions by instituting an action against the carrier's servants or agents in tort, the servants and agents acting within the scope of their employment should be conferred to the same protection as the carrier regardless of whether they are independent contractors or not. The drafting style of Article 7 (2) of the Hamburg Rules in this respect is better than that of Article 4 *bis* (2) of the Hague-Visby Rules.

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[66] Compare with De Wit,R.: Multimodal Transport, p.500; Newell,R.: Circular Indemnity Clause, p.98.

Chapter Six

BREACH OF CONTRACTUAL OBLIGATION

The third condition of the carrier's liability is breach of the obligation in the contract of carriage. The burden of proof for such an element is on the cargo interest under the Rules because he is the one who knows under what conditions goods have been delivered to him. This chapter will first explore contents of the obligation and then examine its breach.

I. CONTENT OF CONTRACTUAL OBLIGATION

A) CARRIAGE OBLIGATION

The carrier is liable for misfeasance and nonfeasance of the obligation arising from the contract of carriage of goods by sea[1]. The contract of carriage establishes a mutual and continuous relation containing various rights and obligations. In order to determine breach of which duties give rise to the carrier's liability, the terms used expressly or by implication in the contract ought to receive attention.

Parties may negotiate or bargain for all obligations and may incorporate them in the contract. The essential obligation on the carrier in a contract of carriage is to carry goods from one place to another. However, this contractual obligation is not only composed thereof. Parties very often fail to deal with all their duties. In that event, courts ascertain the scope of the agreement and provide implied obligations, considering the nature of the relationship, equity, usage, custom and secondary (directory) statutory provisions[2]. In the case of carriage, the performance of the contract is based on the taking and handing over of goods by the carrier. During carriage only the carrier has an opportunity to avoid loss of or damage to goods. As a result, he is not only obliged to carry goods from one place to another, but also protect them against risks and deliver them to the cargo interest on time. In short, the carrier expressly or by implication assumes an obligation to carry goods in his custody. Such an undertaking is an essential obligation which classifies the contract.

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1 Schinas,J.G.: Cargo Claims, p.243.
2 Crépeau,P.A.: Civil Responsibility, p.93.

Determining the content of this key obligation, the *ex recepti* nature of the contractual relation and the meaning of carriage should be born in mind. Indeed, carriage covers the period from the time goods are received by the carrier to the time they are delivered to the consignee. As a result, the carriage obligation includes receipt, loading, handling, stowage, keeping, caring for, discharge and delivery of the cargo[3]. These undertakings, except those of receipt and delivery[4], are enumerated under Article 3 (2) of the Hague and Hague-Visby Rules in case parties may have forgotten to define them[5]. By contrast, under the Hamburg Rules, such duties are not mentioned at all. That does not make any fundamental differences because the carrier' obligations are subsumed under Article 5 (1) anyway.

Parties are at liberty to entrust some of the carrier's duties (especially to load, stow and discharge goods) mentioned under Article 2 (3) of the Hague and Hague-Visby Rules, to the cargo interest by FIO (free in & out) or similar clauses[6] identifying who bears the cost of loading, stowage and discharge provided that the essence of the carriage obligation is not affected thereby. For example, automobiles are usually loaded, stowed and discharged by cargo interests at their own expenses. Again, parties are free to determine whatever voyage they wish by, for instance, a contract granting the carrier freedom to unload the ship at a place other than the nominated port of discharge. Those are not contrary to Article 3 (8) of the Hague and Hague-Visby Rules because the main aim of Article 3 (2) is to make the carrier liable to exercise care in carrying out his obligations assumed by the carrier under the contract of carriage and, if parties have failed to ascertain the scope of the contract, to help them, but not to impose any agreement on parties against their wishes. A carrier is obliged to perform his obligations *properly and carefully* only if they have been expressly or by implication set in the contract. These clauses do not absolve the čarrier from liability for his own act or those of his servants and agents. Any other interpretation would shift non-delegable obligation

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3 Lüddeke,C.F.-Johnson,A.: Hamburg Rules, p.7.

4 since the scopes of the Hague and Hague-Visby Rules are limited to cover the period from the time when the goods are loaded on to the time they are discharged from the ship under Article 1 (e): *Gosse Millerd v. Canadian Government*, [1927] 2 KB 432, 434.

5 Scrutton,T.E.: Charterparties, p.430.

6 Such as FIOS (free in & out & stowage) and FD (free delivery) clauses.

and strict liability onto the carrier for loss or damage caused by the cargo interest's activities outside the control of the carrier[7] and would force parties to change the present practice, which might result in freight increase and consequently higher costs to the shipper.

The FIO or similar clauses transferring the implied obligation from a carrier to the cargo interest do not, however, relieve the carrier of the obligation to: supervise the loading of goods[8]; care for other goods[9]; and provide a seaworthy ship for goods stowed. Accordingly, the carrier who became aware of the misfeasance of the loading, stowage or discharge should inform the actual shipper. In that case, goods may be said to have partially come under the carrier's charge despite being still in the cargo interest's physical possession.

For the imposition of the obligation and liability on a cargo interest, he or his agent or servant (other than the carrier) should have actually carried out this obligation[10]. An exemption clause stating that the carrier will load, stow or discharge goods as a shipper's agent or servant is invalid under Article 3 (8) of the Hague and Hague-Visby Rules and Article 23 (1) of the Hamburg Rules because of excluding the carrier from liability.

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7 *Pyrene Co. v. Scindia Navigation Co.*, [1954] 2 QB 402, 418; *GH Renton v. Palmyra Trading Corp. of Panama*, [1957] AC 149, 170, 173, 174 (HL) / *Atlas Assurrance Co. v. Harper, Robinson Shipping Co.* 1975 AMC 2358, 2369 (9 Cir. 1975); *Sigri Carbon Corp. v. Lykes Bros. SS Co.* 1988 AMC 1787, 1790 (WD Ky. 1987) - Carver,T.G.: Carriage, p.363, 374; O'Hare,C.W.: UNCITRAL Convention, p.131; Todd,P.: Bills of Lading, p.161 / Prüssmann-Rabe: Seehandelsrechts, §606 B3b / Alnıak,M.İ.: Kurtulma Kayıtları, p.322. For an opposite view see *Demsey & Assciates, Inc. v. SS Sea Star* 1972 AMC 1440 (2 Cir. 1972); *Nichimen Co. M/V Farland* 1972 AMC 1573 (2 Cir. 1972); *Associated Metals & Minerals Corp. v. M/V Arktis Sky* 1993 AMC 509, 513 (2 Cir. 1992) - Wüstendörfer,H.: Seehandelsrecht, p.247: The courts and author suggest that the carrier's obligations to load, stow and discharge are genuine non-delegable to the cargo interests. See also the amendment recommended in Article 3 (2) of the Hague Rules by the IMC International Sub-Committee Report, 1962, p.75: "(2) In so far as these operations are not performed by the shipper or consignee the carrier shall...."

8 *Rechtbank Van Koophandel Gent*, September 11, 1973, [1973] ETL 736 / *Canadian Transport Co. Ltd. v. Court Line Ltd.* [1940] AC 934, 943; *RT Jones Lumber Co. v. Roen SS Co.*, 1960 AMC 46, 51 (2 Cir. 1959) / *Sumitomo Corp. of America v. M/V Sie Kim* 1987 AMC 160, 173, 180 (SD NY 1985) - Hegarty,M.: A COGSA Carrier's Duty to Load and Stow Cargo is Nondelegable, or is it?, 18 Tul.Mar.L.J. 125 (1993), p.125, 135; Scrutton,T.E.: Charterparties, p.430.

9 *Canadian Transport Co. v. Court Line* [1940] AC 934, 943.

10 Tetley,W.: Cargo Claims, p.532.

The engagement of anybody as an agent or servant by the carrier to carry goods does not release him from his obligations. This is so because the carrier's obligation to carry goods in his custody is a personal and non-delegable duty[11].

The carrier's implied duties within the carriage obligation will be summarised below considering common law and other national maritime laws. Thus, obligations whose breach might lead to the carrier's liability under the Rules will be ascertained.

B) OBLIGATION TO RECEIVE GOODS

For the carriage obligation to be discharged, the carrier should first of all perform his duty to receive cargo presented for acceptance to him pursuant to contractual terms. Since the three Conventions are not concerned with the period before the loading (in the Hague and Hague-Visby Rules) and the receipt (in the Hamburg Rules) of goods, the carrier's liability for breach of such obligation does not come within their scopes.

However, it should be noted that before and after receiving goods, carrier must use all reasonable means to inspect them to ascertain their general nature and apparent order which might affect their carriage[12]. On that occasion, he must use his experience together with modern methods and up-to-date practices[13]. If goods are stuffed in a package or a container, the carrier's inspection is limited to the apparent order and condition of the package or container[14]. In that case, he determines the degree of care to be taken during carriage considering the container or the package itself rather than contents therein. If the carrier, upon this survey, foresees that he might not be able to properly and carefully carry them, that their receipt might endanger the ship or other cargoes, or that they might need special facilities and care, he should avoid accepting

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[11] *International Packers London Ltd. v. Ocean SS Co. Ltd.* [1955] 2 Lloyd's Rep. 218, 236; *The Munchaster Castle* [1961] 1 Lloyd's Rep. 57; *Leesh River Tea Co. v. British Indian Stem Navigation Co.* [1966] 1 Lloyd's Rep.450, 457 - Oceans Institute of Canada, Canadian Carriage, p.154. For an opposite view Riska,O.: Shipowner's Liability, p.103.

[12] *Accinanto Ltd. v. Cosmopolitan Ship.* 1951 AMC 1464 (D. Md. 1951) - Peyrefitte,L.: The Period of Maritime Transport: Comments on Article 4, in Mankabady,S.(editor): the Hamburg Rules on the Carriage of Goods by Sea, Leyden-Boston 1978, p.125, 130 (to be cited thereinafter as "Period").

[13] *The Flowergate,* [1967] 1 Lloyd's Rep. 1, 46.

[14] For an opposite view see Grönfors,K.: Container Transport and the Hague Rules, JBL 298 (1967), p.300 (to be cited thereinafter as "Container").

them[15]. In addition, he ought to notify the shipper of his such inability without any delay in order to obtain the shipper's authorisation to convey them under available conditions[16]. For example, the shipper may give special instructions concerning live animals which list the measures that might reasonably be required to avoid loss or damage or may employ an attendant to look after them.

B) OBLIGATION TO LOAD GOODS

The carrier's second carriage obligation is to load. Loading is subject to the custom and usage at the place of departure so long as there is no contractual or statutory rule to the contrary.

Loading is to move cargo from shore to the loading part of the ship. It is divided into several stages. Contractual terms should be considered in order to determine parties' obligations at every step. The carrier is normally required to control all loading phases of goods brought alongside the ship's rail to the quay[17]. The contract, law applicable or custom may, however, give a shipper or port authority some role in the performance of shipment.

If goods are loaded by means of lighters, again the contract is only a guide for the identification of the obligor. Where a carrier takes on lighterage under the contract of carriage or any other agreement, that operation must not risk the safety of goods to be loaded and of other cargoes.

The carrier should examine the quay and pier before loading and load goods on the agreed ship. In liner carriage it might be customary for them to be shipped in any conference vessel which is fit to carry goods of the same kind.

Cargo must be put in the agreed part of the ship. For example, in carriage by chartered ship goods are loaded in a chartered space. If there is no contractual provision concerning the space, cargo is shipped in usual carrying places. The customary manner under sea carriage is to place goods in a ship's hold but not on deck because they can be

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15 *Atlantic Consolidated Foods v. The Dorothy* [1979] 1 FC 283, 295 (FC) / *The Ensley City* 1947 AMC 568, 572 (D. Md. 1947) - Tetley,W.: Cargo Claims, p.555.

16 *Armour & Co. v. Compania Argentina de Navegacion* 1958 AMC 332, 338 (SD NY 1957).

17 *Pyrene (ibid)* [1954] 1 Lloyd's Rep. 321 - Mankabady,S.: The Duty to Care for the Cargo (Article III, Rule 2 of the Hague Rules), 10 ETL 2 (1975), p.4.

more exposed to maritime danger while on deck than in hold[18]. The carrier is authorised to put goods on deck only if parties have clearly[19] or by implication[20] agreed so. This is evident in Article 9 (1) of the Hamburg Rules[21].

So long as the shipper knows that goods shall or may be carried on deck and does not protest, he consents to it. This is in line with Article 9 (2) of the Hamburg Rules. Consequently, even a contractual option granted to the carrier to load goods on deck is enough to authorise him to do so[22]. Since parties are free to determine the conditions of the contract of carriage, the agreement on deck carriage which does not absolve the carrier from liability would not be contrary to Article 3 (2) and (8) of the Hague and Hague-Visby Rules and Article 23 of the Hamburg Rules[23]. US law and Article 9 (2) of the Hamburg Rules require the inclusion of the agreement in a written contract and, otherwise, presume that there is no such agreement[24]. By the principle of estoppel, the carrier should not be allowed to invoke this agreement against a third party bona fide cargo interest. This rule is *justly* expressed in Article 9 (2) of the Hamburg Rules.

The carrier can be permitted to load goods on deck by implication. There is nothing in the three Conventions to prevent him from carrying goods on deck, if deck carriage is in accordance with the usage of the particular trade[25] or is required by statutory rules or regulations. Although Article 1 (c) of the Hague and Hague-Visby Rules wants a statement that goods will actually be carried on deck, this provision concerns only the application of the Rules rather than the obligation to avoid loading on deck[26]. For

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18 See § 566 of the German Commercial Code 1897; Article 1029 of the Turkish Commercial Code 1956 - Chorley,R.S.T.-Giles,O.C.: Shipping, p.237; Lüddeke,C.F.-Johnson,A.: Hamburg Rules, p.18.

19 *Burton v. English* (1883) 12 QBD 218.

20 *Milward v. Hibbert* (1842) 3 QB 120, 136.

21 Secretary-General, First Report on Responsibility of Ocean Carriers for Cargo: Bills of Lading, General Assembly (1972), Doc. A/CN9/63/Add.1, 3 Yearbook of the UNCITRAL 270 (1972), p.270 - Graham.T.-Chrispeels,E.: Revision, p.256;.

22 For an opposite view see *Encyclopaedia Britannica v. Hong Kong Producer* 1969 AMC 1741 (2 Cir. 1969) - Klein,M.P.: $ 500-Per-Package Limitation in COGSA Inapplicable due to Deviation, 1 JMLC 473, Ap'70, p.473, 482.

23 *Svenska Traktor v. Maritime Agencies* [1953] 2 QB 295. For an opposite view see Tetley,W.: Cargo Claims, p.659.

24 *Ingersoll Mill. Mach. Co. v. M/V Bodena* 1988 AMC 223 (2 Cir. 1987) - Force,R.: Deck Cargo, p.15.

25 *Blandy Bros & Co., Ltd. v. Nello Simoni Ltd.* [1963] 2 Lloyd's Rep.393 (CA).

26 *Svenska Traktor (ibid)* [1953] 2 QB 295 - Bauer,R.G.: Deck Cargo, 22 JMLC 287 (1991); Force,R.: Deck Cargo, p.20; Wilson,J.: Carriage, p.178; Wooder,J.B.: Deck Cargo, p.134. For an opposite view see Tetley,W.: Cargo Claims, p.644, 652, 658: The Author argues that custom or practice authorising the carrier to load goods on deck cannot overcome the clear wording of Article 1 (c).

example, a statutory rules or regulation ordering deck loading of dangerous cargo does not only permit, but also forces the carrier to act so. Likewise, nowadays the carriage of container goods on deck has become the usage of trade because container ships generally operate on certain trade routes[27]. To require the shipper's express permission would contrast with technical developments. Indeed, containers, protecting cargo from external risks and reducing carriage expenses for shippers, are frequently used in transport. In liner-container carriage, there is usually no particular order for shipment. In order to save time, containers which have come first are loaded below decks; and the rest are shipped on deck[28]. Again, the carrier who is not able to stow containers properly without prior knowledge of weights and sizes may avoid loading until receiving the whole. In that case, the shipper may be *ipsa facto* deprived of their opportunity to demand under-deck loading[29]. Furthermore, container ships specially designed to carry containers on deck are preferred by shippers. In that case, shippers should be assumed to allow the carrier to load them on deck[30]. The shipper, with his express or implied permission, consents to that shipment, but not to loss of or damage to goods[31].

To avoid shipping goods on deck without the shipper's express or implied authorisation is part of the duty to load[32]. Where goods are placed on deck without such permission, the carrier becomes liable for breach of such undertaking under Articles 3 (2) and 4 (2) of the Hague and Hague-Visby Rules and Article 9 (3) of the Hamburg Rules to the extent that the deck carriage is not considered fundamental breach of the

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27 Spitz,C.E.: Cargo Risk Problems - Container Operator's Dilemma, in Carriage of Goods by Water: A Symposium, 45 Tul.L.Rev. 925 (1971), p.925.

28 Angus,D.: Legal Implications of the "Container Revolution" in International Carriage of Goods, 14 McGill L.J. 463 (1969), p.465; Sassoon,D.M.: Trade Terms and the Container Revolution, 1 JMLC 73, Oc' 69, p.81, n.32.

29 Gonzoles,J.: Stowage of Containers on Deck, 1 Mar.Law. 114 (1975), p.115.

30 Article 22 of the French Law of June 18, 1966 as amended by Law of December 21, 1979 - *Sealane* 1966 AMC 1405, 1408 (5 Cir. 1966); *Encyclopaedia (ibid)* 1969 AMC 1741, 1755 (2 Cir. 1969); *Electro-Tec Corp. v. SS Dart Atlantica* 1985 AMC 1606, 1610 (D. Md. 1984); *O'Connell Machinery Company Inc. v. Americana* 1986 AMC 2822, 2828 (2 Cir. 1986); *Elec. Valve Co. v. M/V Hoegh Mallard* 1987 AMC 1351 (2 Cir. 1986) - Cooke,J.-Young,T.-Taylor,A.-Kimball,J.D.-Martowski,D.-Lambert,L.: Voyage Charters, London 1993, p. 105; Simon,S.: Latest Developments in the Law of Shipping Containers, 4 JMLC 441, Ap' 73, p.450 (to be cited thereinafter as "Shipping Containers").

31 Deniz,İ.: Konteyner Taşımacılığı ve Hukuki Sorunları, Doktora Tezi, İstanbul 1982, p.99 (to be cited thereinafter as "Konteyner Taşımacılığı).

32 Tetley,W.: Cargo Claims, p.662.

contract (quasi-deviation) by national public policy or under Article 9 (4) of the Hamburg Rules: deck carriage contrary to express agreement for carriage under deck.

C) OBLIGATION TO HANDLE GOODS

The carrier's third carriage obligation is to handle goods being carried. He may be obliged to perform this duty by means of shore or vessel's apparatus such as cranes, winches, pulleys, strops, and so on. These devices must be fitted for goods carried[33]. The carrier should also take hook holes into consideration to prevent loss of or damage to cargo, other goods ashore or onboard the ship[34].

Rough handling which could cause breakage should be avoided especially if the contents of packages or containers are not exactly known. When lifting or lowering unpacked or partially packed goods, such as steel plates, rails, metal or other piping, etc., care must be taken to ensure to properly hook or clamp to apparatus, and consequently weights ought to adequately distributed to avoid damage resulting from bending, distortion, etc. The carrier also should mark goods or their packages to prevent them from being mixed up.

D) OBLIGATION TO STOW GOODS

The fourth carriage obligation on the carrier is to stow goods[35]. The placing of the goods in a ship's loading spot or a container is called "*stowage*". Where the stowage is performed by the actual shipper or stevedores employed by him, the carrier's obligations to supervise goods and to care for others continue[36].

Cargo should firstly be put into agreed parts of the loading place which is seaworthy[37], in other words, which is fit to encounter the ordinary perils of the specified

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33 Alpa,G.-Berlingieri,F.: Liability, p.111. Under the Hague and Hague-Visby Rules, the obligation to have suitable loading and discharging tackles onboard before and at the beginning of the voyage is, however, subject to Articles 3 (1) and 4 (1).

34 *Stein and Goitein v. US Lines* 1955 AMC 722 (SD NY 1955).

35 *Canadian Transport Co. Ltd. v. Court Line Ltd.* [1940] 3 All ER 112; *Blandy Brothers & Co. Ltd. v. Nello Simoni Ltd.* [1963] 2 Lloyd's Rep. 393 (CA).

36 Scrutton,T.E.: Charterparties, p.171.

37 *The Good Friend* [1984] 2 Lloyd's Rep. 586, 592. Under the Hague and Hague-Visby Rules, the obligation to stow goods in a seaworthy (and cargoworthy) ship before and at the beginning of the voyage is, however, subject to Articles 3 (1) and 4 (1): *Paterson SS Ltd. v. Canadian Co-operative Wheat Producers Ltd.* (1934) Ll.L.R. 421 (PC).

voyage regarding its hull[38], engines[39], generators[40], boilers[41], pumps, valves[42], pipes[43], gears[44], lines, bolts[45] and navigational equipment; which is properly manned[46], equipped[47] and supplied[48] for the continuation of such voyage; and which is safe for the reception, carriage and preservation of the specified goods regarding the ship's holds[49], cargo tanks, hatches[50], vents[51], refrigerating and cool chambers[52] etc. The carrier cannot protect goods in an unseaworthy ship, which threatens their safety, and might not, therefore, deliver them in the same state as that in which he received them and on time. Similarly where goods are stuffed in a container provided by the carrier, such article of transport must be in good state too[53]. This duty includes provision of a seaworthy vessel examining the ship regularly and repairing discovered defects causing unseaworthiness[54]. The carrier cannot start the voyage with these faults unless they can ordinarily be remedied in the course of the trip[55].

Secondly, the carrier ought to place goods according to the contract of carriage, the shipper's instruction and a stowage plan, and consequently avoid improperly stowing

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38 *Federazione Italiana v. Mandask Compania* 1968 AMC 315 (2 Cir. 1968).
39 *The Amstelslot* [1963] 2 Lloyd's Rep. 223 (HL).
40 *Atlantic Banana Co. v. M/V Calanca* 1972 AMC 880 (SD NY 1972).
41 *Karobi Lumber Co. v. SS Norco* 1966 AMC 315 (SD Alab. 1966).
42 *BC Sugar Refining Co. Ltd. v. The Ship Thor I* [1965] 2 Ex. C.R. 469 / *The Muncaster Castle* [1961] AC 807 / *The Quarrington Court* 1941 AMC 1234 (2 Cir. 1941).
43 *Hof Van Beroep te Brussel,* October 13, 1967, ETL 373 (1968).
44 *The Assunzione* [1956] 2 Lloyd's Rep. 468 (steering gear); *The Yamatogawa* [1990] 2 Lloyd's Rep. 39 (reduction gear).
45 *The Antigoni* [1991] 1 Lloyd's Rep. 209.
46 *The Farrandoc* [1967] 1 Lloyd's Rep. 232 (Can. Ex. Ct.) / *The Roberta* (1937) 58 Ll.L.R. 159, 177; *The Makedonia* [1962] 1 Lloyd's Rep. 316, 334 / *Liberty Shipping Lim. Procs.* 1973 AMC 2241 (WD Wash. 1973); *Ta Chi Lim. Proc. (Eurybates)* 1981 AMC 2350 (ED La. 1981). The obligation to man the ship properly does not cover such to ensure that the wages to seamen have been approved by the International Workers Federation: *The Derby* [1985] 2 Lloyd's Rep. 325.
47 *The Marion* [1983] 1 Lloyd's Rep. 156 (with up-to-date charts) / *The Irish Spruce* [1976] 1 Lloyd's Rep.63 (SD NY 1975) (with the latest Admiralty List of Radio Signals).
48 *Nothumbrian Shipping Co. Ltd. v. Timm & Son Ltd.* [1939] AC 397 (bunker fuel).
49 *Tattersall v. National SS Co.* (1884) 12 QBD 297: The ship which was not disinfected after an outbreak of foot and mouth disease was held unseaworthy.
50 *Sears, Roebuck & Co. v. American President Lines* 1971 AMC 2225 (ND Cal. 1971); *Fireman's Fund Insurance Companies v. M/V Vigness* 1986 AMC 1899 (11 Cir. 1986).
51 *Liberty Shipping Lim. Procs.* 1973 AMC 2241 (WD Wash 1973).
52 *The Maori King* [1895] 2 QB 550.
53 *Houlden & Co. v. SS Red Jacket* [1978] 1 Lloyd's Rep. 300 (SD NY 1977); *Centennial Ins. v. Constellation Enterprise* 1987 AMC 1115, 1157 (SD NY1986) - Booker,M.D.: Containers, p.111; Harrington,S.: Containerisation, p.12. For a suspicion see Mankabady,S.: Container, p.323.
54 *Greenwich Marine,* 1965 AMC 98 (Arb. NY 1964).
55 *Elder Dempster v. Paterson* (1924) AC 552, 558 - Poor,W.: Charter Parties, p.167.

them[56]. The discharge of this duty gets difficult depending on the variety of goods, kind of ship and nature of voyage. Poor stowage may endanger the ship's instability (seaworthiness) and, thereof, safety of cargo[57]. For that reason, the carrier must appropriately distribute vertical, horizontal and lengthwise weights in the vessel by supplying ballast, dunnage and other equipment[58].

Poor stowage may also jeopardise the safety of goods, though not that of the ship. With the aim of protecting goods, the carrier must use the ship's size in the most appropriate way by: placing them in the vessel in the reverse order so that they are to be unloaded easily and quickly[59]; separating them to avoid leading damage to each others[60] and producing chemical reaction[61]; providing suitable dunnage (such as mats, battens, loose wood, etc.)[62]; lashing to keep them in their place[63]; and maintaining spaces to allow adequate circulation of air[64], drainage and any leakage of the ship. Moreover, in

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[56] *Cour d'Appel de Bordeaux*, March 28, 1963, DMF 483, 485 (1963).

[57] Under the Hague and Hague-Visby Rules, the obligation to stow goods for the provision of a seaworthy ship before and at the beginning of the voyage is, however, governed by Articles 3 (1) and 4 (1): *The Friso* [1980] 1 Lloyd's Rep. 469, 476; *The Waltraund* [1991] 1 Lloyd's Rep. 389 / *The Anthony II* [1966] 2 Lloyd's Rep. 437, 445 (SD NY 1966);

[58] *The Waltraud* [1991] 1 Lloyd's Rep. 389 - Aybay,G.: Kuruyük Gemilerinde Yük İşleri ve İşlemleri, İstanbul 1983, p.12.

[59] Stevens,E.F.: Shipping Practice, p.118.

[60] *The Continental Shippers* [1974] 1 Lloyd's Rep. 482 (Can. FC): Cars should not be stowed together too closely; *Crelinsten Fruit Co. v. Maritime Fruit Carriers Co.* [1975] 2 Lloyd's Rep. 249 (Can. Ex. Ct.): Pears and apples ought not be stowed in block / *Vancouver SS Co. v. Herdman* (1933) Ll.L.R. 223: Green lumber should not be put over wheat; *Hovis Ltd. v. United British SS Co.* (1937) 57 Ll.L.R. 117: Sacks of wheat germ must not be stowed in the same hold as Douglas fir boards; *Coventry Sheppard & Co. v. Larrimaga SS Co.* (1942) Ll.L.R. 256: Flour in sacks ought not be placed by dried timber; *David McNair & Co. Ltd. and David Oppenheimer Ltd. and Associates v. Santa Malta* [1967] 2 Lloyd's Rep. 391: Melons, garlic and onions must not be kept in a hold containing a cargo of fishmeal / *Cour d'Appel de Rouen*, December 17, 1953, DMF 398 (1954): Coffee should not be loaded near dried guano / *Shickshinny* 1942 AMC 910, 917 (SD Ga. 1942): Dry cargo should not be placed close to liquid goods; *Edouard Materne v. SS Leerdam* 1956 AMC 1977, 1981 (SD NY 1956): The possibility of leakage of wet cargo must be considered while stowing.

[61] *Cour de Cassation*, March 6, 1962, DMF 343 (1962): Condensed milk must not be loaded near barrels of sodium chlorate / *Standard Brands Inc. v. T & J Brocklebank* 1948 AMC 1624, 1627 (SD NY 1948): Tea must not be stowed with a large quantity of jute and jute products which are hydroscopic and readily produce moisture; *Inland Waterways v. Miss Valley* 1961 AMC 739 (ED Mo. 1960): Dirty stained pipes ought not be placed on top of clean pipes; *The Frances Salman* 1975 AMC 1521 (SD NY 1975): Drums of caustic soda and bags of quebracho should not be placed next to coffee; *Knott v. Botany Worsted Mills* 179 US 69 (1900): The wool should not be stowed by sugar; *Werner & Others v. Bergenske*: Eggs must not be put near potatoes which increases the heat in the ship's hold.

[62] *Bruck Mills Ltd. v. Black Sea Steamship Co.* [1973] 2 Lloyd's Rep. 531 (Can. FC).

[63] *Svenska Traktor (ibid)* [1953] 2 QB 295 (on deck carriage).

[64] *The Split* [1973] 2 Lloyd's Rep. 535 (Can. FC): The crates of melon must be loaded in a place where have openings for the air circulation / *The Rita Sister* 1946 AMC 910 (ED Pa. 1946): Dunnage ought

stowing goods, he must take steps to protect others which have already been loaded. For example, heavy cargo must not be put on top of the loaded ones[65].

The stowage of cargo into a container by the carrier must also be performed with proper bracing, blocking and dunnage[66]. If the carriage of refrigerated containers have been arranged, the ship should have necessary devices to supply electric current to the container.

E) OBLIGATION TO CARRY GOODS

Article 3 (2) of the Hague and Hague-Visby Rules contains another carriage obligation. The word "carriage" in fact covers all period when goods are in the carrier's custody. For that reason, such obligation must be interpreted so narrowly that the carrier under the contract of carriage assumes an obligation to safely and timely proceed to the port of discharge.

The carrier must commence the voyage at the agreed time or, if the parties' intentions are not clear in the contract, without unreasonable delay when the ship is ready for sailing. He must avoid acts resulting in delay. On this account, he should not visit or call at a port if there is a strike or blockade[67]. Similarly, after the beginning of the voyage, he is obliged not to abandon and deviate from the agreed route[68]. However, parties may allow the carrier to follow a route other than the agreed one by *deviation clauses*. Such clauses should not, however, contravene public policy, and must consequently be reasonable[69]. If there is no provision as to the route pursued in the contract[70], the most suitable course ought to be taken. "Most suitable course" does not mean a shortest one,

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to be used to allow the cargo to be aired and consequently to prevent sweat; *American Tobacco Co. v. SS Katingo Hadjipatera* 1949 AMC 49 (SD NY 1948): Cheese must not be put in unventilated forepeak or a lower cross-bunker; *Ocean Commercial Co. v. SS Polykarp* 1955 AMC 1262 (SD NY 1955): Potatoes may be carried in the lower port providing air circulation.

65 *Elder Depmpster (ibid)* (1924) AC 522: The heavy goods ought not to be put on to the light cargo.

66 *Cour de Cassation,* July 16, 1985, DMF 238 (1987).

67 *Crelinsten (ibid)* [1969] 1 Lloyd's Rep. 515 (Can. Adm.Ct.).

68 The carrier's liability for deviation is subject to Article 4 (4) of the Hague and Hague-Visby Rules.

69 *Connolly Shaw, Ltd. v. A/S Det Nordenfieldske D/S* (1934) 49 Ll.L.R. 183, 191 / *Surrendra (Overseas) v. SS Hellenic Hero* 1963 AMC 1217, 1222 (SD NY 1963); *ECL Sporting Goods v. US Lines* 1970 AMC 400, 403 (D. Mass. 1969); *Hellenic Lines Ltd. v. USA.* 1975 AMC 697 (2 Cir. 1975); *General Electric Co. v. Nancy Lykes* 1983 AMC 1947, 1953 (2 Cir. 1983).

70 *Stag Line v. Foscolo Mango* [1932] AC 328 (HL); *GH Renton (ibid)* [1957] AC 149, 170, 173 (HL).

but the most direct, safe geographical route to her destination[71]. This is normally the usual and customary route though followed only by ships of a particular line and though recently adopted[72].

Not only is the carrier obligated to follow the agreed route, but also, if he deviates, to return to that course as soon as possible[73]. He is both entitled and obliged to abandon and to deviate in the interest of cargo and the safety of voyage. In those cases, he must notify the cargo interest and, if necessary, forward goods by another ship without any unreasonable delay. If the carrier does not act quickly, he might be liable for further deterioration to goods[74].

The carrier shall inform the shipper of circumstances which may cause delay in carriage to give them a chance to avoid or minimise loss or damage[75]. All precautions must be taken with the object of safety of the voyage and consequently that of goods. Accordingly, the carrier should properly signal, manoeuvre, anchor, use navigational devices (such as radar and charts), adjust the ship's speed, listen to weather forecast and follow navigational rules. If necessary, a pilot must be board to advise the master in the navigation of the ship. A *pilotage clause* relieving the carrier of liability for loss or damage resulting from not taking the pilot onboard the ship is void under Article 3 (8) of the Hague and Hague-Visby Rules and Article 23 of the Hamburg Rules.

F) OBLIGATION TO KEEP GOODS

One more carriage obligation on the carrier is to keep goods in his control during the voyage. Nonetheless, under certain circumstances, the carrier may be authorised and obliged to sell them to minimise further damage[76].

The carrier should keep cargo in the nominated ship and should avoid transhipping it to another vessel. In cases where transhipment is justifiable, he must appoint a suitable

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71 *Achille Lauro v. Total* [1968] 2 Lloyd's Rep. 247 - Williams,R.: Rules, p.75.
72 *Reardon Smith Line v. Black Sea and Baltic General Insurance* [1939] AC 562 / *TD.*, 7.5.1945, E.1345, K.1094 - Secretary-General, Second Report, p.180 - Scrutton,T.E.: Charterparties, p.256.
73 *Stag Line (ibid)* [1932] AC 328 (HL).
74 Tetley,W.: Cargo Claims, p.310.
75 *Atchison, T & S F Ry. Co. v. Jarboe Livestock Commission Co.* (1947) 159 F 2d 527 (10 Cir. 1947).
76 *Lekas & Drivas v. Basil Goulandris* 1962 AMC 2366, 2373 (2 Cir. 1962).

sub-carrier as soon as possible[77]. The obligation to care for goods during and after the transhipment continues. They must, therefore, be kept in a safe place ashore before being re-loaded[78]. As parties are free to decide which ship is to carry goods, a clause which entitles the carrier to tranship cargo on to another vessel (*transhipment clause*) is valid provided that they are in conformity with the public policy and are consequently reasonable[79].

The sub-carrier undertaking to convey goods after transhipment acts on behalf of the (contracting) carrier rather than the cargo interest. On this account, with the transhipment, the new relation between the carrier and the cargo interest similar to the *contract of linked carriage* arises.

Moreover, the carrier ought to keep cargo in a seaworthy and cargoworthy ship after the beginning of the voyage[80]. The hatch covers must be closed and, if necessary, covered with tarpaulins or tents within a customary period so as to protect goods against bad weather conditions[81].

G) OBLIGATION TO CARE FOR GOODS

The carrier has an obligation to care for goods being carried. The obligation continues on the ship, ashore, during any delay and even in situations of emergency[82]. He must, thereof, regularly control cargo. Steps should be taken to prevent theft, barratry, pilferage etc. in the course of loading, stowage or discharge[83].

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77 *US v. Farrell Lines* 1982 AMC 1904 (D. Md. 1980); *AE Pellett & Co. v. Ouirgan* 1986 AMC 2749 (SD NY 1986) - Kalpsüz,T.: Aktarma, p.650.

78 *Captain v. Far Eastern SS Co.* 1978 AMC 2210 (Can. SC) / *Mayhew Foods Ltd. v. Overseas Containers Ltd.* [1984] 1 Lloyd's Rep. 317.

79 *Transocean Machine Co. v. Oranje Line and the Prins Willem IV* [1958] Ex. CR 227, 228 / *The Anders Maersk* 1986 AMC 1269 (HK HC 1986). "The general liberty to tranship clause" giving the carrier freedom to tranship at any time would be void: *Holland Colombo Trading Society v. Alewdeen* [1954] 2 Lloyd's Rep. 45 (PC).

80 Compared with the view of OIC: Report of Canadian Carriage, p.149 suggesting that there is no requirement to maintain seaworthiness after the voyage has begun.

81 *Gosse Millerd (ibid)* (1928) 32 Ll.L.R. 91 (HL); *Minister of Food v. Lamport and Holt Line Ltd.* [1951] 2 Lloyd's Rep. 371; *The Bulknes* [1979] 2 Lloyd's Rep. 39 - Astle,W.E.: Liabilities, p.82.

82 *Propeller Niagara v. Cordes* 21 How. 7, 28.

83 *City of Baroda v. Hall Line* (1926) 25 Ll.L.R. 437; *Hourani v. Harrison* (1927) 28 Ll.L.R. 120 (CA); *Chris Foodstuffs (1963) Ltd. v. Nigerian National Shipping Line Ltd.* [1967] 1 Lloyd's Rep. 293 (CA).

The carrier must take all reasonable precautions to ventilate, heat or cool goods in accordance with their types and nature to avoid loss or damage resulting from external or internal causes[84]. Refrigerated cargo must be maintained at their recommended temperature[85]. Similarly, the temperature inside the ship or container supplied by the carrier should be kept below or above dew point in order to avoid sweat damage to goods by ventilation[86].

Not only is he obliged to prevent direct loss of or damage to goods, but also to take measures to check or stop their spread. Water which has entered the hold must be pumped out, and wet cargo must be dried in order to arrest its further destruction[87]. Again, in cases where seawater has penetrated the hold, or where fire has broken out, the carrier may have to put goods on deck or ashore pending carriage.

H) OBLIGATION TO DISCHARGE GOODS

The carrier is bound to discharge goods carried under the contract. The obligation of discharge is governed by the custom and usage in the place of arrival so long as there is no contractual or statutory rule to the contrary.

The discharge itself consists of several stages. To determine who is liable for each, one should have regard to the contractual terms. In the case of lack of agreement, the carrier is normally under an obligation to take all steps to unload goods ashore alongside the ship's rail. The contract, statute or custom may leave the operation into the hands of the cargo interest or port authority.

Goods might be discharged by means of lighters by the carrier according to the contract of carriage or of lighterage. Such operation must not risk the safety of cargo to be unloaded or that of other goods[88].

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[84] For ventilation see *The Eric Boye* (1929) 34 Ll.L.R. 442; *California Packing Corp. v. SS P&T Voyager* 1960 AMC 1475 (ND Cal. 1960).

[85] *Foreman & Ellams v. Federal Steam Navigation* [1928] 2 KB 424; *Bortwick v. New Zealand Shipping Co.* (1934) 49 Ll.L.R. 19 • Arness,F.F.: Error in Navigation or Management of Vessel, 13 Wm&Mary L.Rev. 638, Sp'72, p.646 (to be cited thereinafter as "Error"); Reitsma,A.: Carriage and Care of Refrigerated Cargoes, 5/11 P&I Int'l 6, Nov'91, p.6.

[86] *Armour & Co. (ibid)* 1958 AMC 332 (SD NY 1957).

[87] *TD.*, 13.10.1959, E.1365, K.2497 / *Notara v. Henderson* (1870) LR 5 QB 346; *Smith Felmongery v. P and OSN Co.* (1938) 60 Ll.L.R. 419.

[88] *Hoegh v. Green Truck Sales Inc.* 1962 AMC 431, 434 (9 Cir. 1962).

Goods must be taken out at the *place of arrival*. This location is an area where the ship comes alongside or anchors at the port of discharge. The parties who are free to agree on whatever voyage the vessel proceeds can determine this port, which does not contravene Article 3 (2) and (8) of the Hague and Hague-Visby Rules[89]. The right to nominate the port may be granted to the cargo interest. He must then select a suitable port in a reasonable time. The carrier is entitled to discharge goods at a safe and convenient port under Article 4 (4) of the Hague and Hague-Visby Rules if the place of arrival is not safe. If the port is a strike-bound, since the consignee may not be ready at this alternative port, the carrier must inform the consignee immediately and preserve goods or warehouse them at the consignee's expense until he comes, but does not have to forward them to the port of discharge by land because under the contract of carriage the carrier's obligation to carry is limited to port-to-port period, and the carrier who has unloaded cargo at an alternative port regarded as the port of discharge is deemed to performed his obligation[90]. Nevertheless, in a multimodal carriage the carrier might undertake to carry goods until the place of arrival depending on the contractual terms.

The carrier should anchor the ship at the place of arrival agreed by all cargo interests. This place must be fit and safe for discharge[91]. If it has not been named on time or is unsuitable for unloading, the vessel can be kept ready at the usual spot where cargoes of the agreed kind are generally unloaded[92]. By contrast, as is the case in carriage by general ship, where the determination of a single place of discharge by many consignees might be impossible, it is almost always determined by the carrier or the port authority.

After discharge goods must also be made available for inspection and delivery by separated[93]. In oil carriage, it might be difficult to remove the whole cargo from the ship. It is likely that some might be left in the vessel. However, this amount should be minimised.

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89 *Associated Lead Manufactures Ltd. v. Ellerman & Bucknall SS Co. Ltd.* [1956] 2 Lloyd's Rep. 167.
90 Article 240 of the UAE Maritime Code: Change,C.: Discharge, p.104. For an opposite view see Dor,S.: Hague Rules, p.69.
91 *FJ Walker Ltd. v. Lemoncore* 1978 AMC 300, 305 (5 Cir. 1977): The wharf must be fit to discharge.
92 § 592 of the German Commercial Code 1897; Article 1050 of the Turkish Commercial Code 1956.
93 *American President Lines v. Fed. Maritime Board* 1963 AMC 2380, 2384 (DC Cir. 1962).

I) OBLIGATION TO DELIVER GOODS

The carrier's final and fundamental carriage obligation is to deliver goods carried. He can relieve himself of all his carriage obligations just by duly handing over goods[94]. In short, the benefit expected from the contract materialises with proper delivery.

The handing over of cargo depends on the transfer of possession. The legal position of the carrier who has presented goods to the consignee according to the requirements of performance is lightened by law because the consignee who refuses to receive goods submitted pursuant to the contractual terms without any rightful reason is regarded as in default and assumes the consequences of his delay[95]. In that event, the carrier may either keep the goods as a bailee or store them in a fit and customary warehouse at the cargo interest's risk and expense[96] and can, thus, release himself from the obligation of carriage even though goods are not in fact transferred to the consignee's custody[97]. With this view, the carrier should first notify the consignee of the expected time and place of arrival of the vessel and invite him to take over goods by segregating them from others[98].

Cargo must be submitted in conformity with the requirements of performance which have been clearly or by implication agreed in the contract[99]. Such contractual requirements are elements used for the fulfilment of obligations as are due. These are the subject, party, place and time of performance.

The first requirement is the *subject of performance*. The carrier should deliver the agreed goods received by him. They could be ascertained in the contract. If not, they must have been determined when taken over by the carrier at the port of loading. The carrier can perform his carriage obligation just by delivering them. He may also replace

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94 Cadwallader,F.J.J.: Care, p.32.

95 Articles 1257 and 1264 of the French Civil Code 1804; Articles 293-304 of the German Civil Code 1896; Article 91 of the Swiss Obligations Code 1911; Article 90 of the Turkish Obligations Code 1926 - *Standard Brands (ibid)* 1938 AMC 933 (2 Cir. 1938).

96 *North American Smelting Co. v. Moller SS Co.* 204 F 2d 384, 386 (3 Cir. 1953) - Gaitas,G.A.: Common Carrier's Liability to Landed Cargo: Obligations before Loading and after Discharge, 3 Mar.Law. 53, Dec'77, p.61, 65, 68 (to be cited thereinafter as "Common Carrier").

97 § 601 of the German Commercial Code 1897; Article 1057 of the Turkish Commercial Code 1956; Gorton,L.: Common Carrier, p.112 / Kalpsüz,T.: Ticarî Satışta İfa Mahalli, Ankara 1960, p.145.

98 *Cameco Inc. v. Sullivan Security Services* 1974 AMC 1853 (SD NY 1973).

99 O'Hare,C.W.: Duration, p.70.

goods by better quality ones so long as the consignee's position is not, thereby, aggravated[100].

The carrier should in principle deliver the whole cargo. He cannot discharge the obligation by handing over its some part unless the consignee accepts this partial performance[101]. However, if the discharge of goods cannot be completed at once, they may partially be delivered over a period of time. In that case, the obligation ends with the handing over of goods. The carrier is still obliged to care for and deliver the other parts which have not been received by the consignee.

The second contractual requirement is *the party of performance*. There are two parties: active and passive ones. The active party who is to deliver goods is the carrier. He may appoint his servant or agent to hand over cargo unless otherwise agreed in the contract[102]. Delivery may be made by a third party without the carrier's consent and knowledge if both parties agree[103]. The passive party is the consignee (cargo interest) to whom goods are to be delivered under the contract. Handing over goods to a third party who is not a consignee's representative is not performance and cannot exempt the carrier from his obligation. Nevertheless, the consignee may consent to such delivery. Similarly, the carrier may be obliged to deliver goods to a port authority pursuant to law, or regulations applicable at the port of discharge.

The third contractual requirement is *the place of performance*, i.e., where goods are delivered. Goods normally must be handed over at the place of discharge ashore alongside the ship. Nonetheless, a consignee may be obliged to receive them onboard the vessel before unloading. Delivery might also be carried out in the carrier's warehouse after discharge. Similarly, the carrier could have to bring goods to the shipper's place. In the last two cases above, the carrier's obligation to care for cargo

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[100] *Court of Cassation*, August 2, 1971, JICCD, p.81, 82 (Ir. Ct.).

[101] Article 1244 of the French Civil Code 1804; Article 266 of the German Civil Code 1896; Article 69 of the Swiss Obligations Code 1911; Article 68 of the Turkish Obligations Code 1926.

[102] Articles 1236, 1237 and 1797 of the French Civil Code 1804; Articles 267 of the German Civil Code 1896; Articles 68 and 367 of the Swiss Obligations Code 1911; Articles 67, 356 of the Turkish Obligations Code 1926.

[103] Eren,F.: Borçlar Hukuku, Genel Hükümler, Vol.III, 2nd ed., Ankara 1990, p.106 (to be cited thereinafter as "Borçlar III"); Tekinay-Akman-Burcuoğlu-Altop: Borçlar Hukuku, Genel Hükümler, 6th ed., İstanbul 1988, p.1023 (to be cited thereinafter as "Borçlar Hukuku").

continues while they are in his custody ashore. Under normal circumstances, the consignee must come to the place of delivery and call for goods to be handed over[104] as distinct from carriage by land.

Although the place of performance in principle is a spot at the port of arrival, a consignee may demand goods at an earlier port provided that the carrier's position is not, thereby, aggravated.

The last contractual requirement is *the time of performance* when the obligation becomes due to fulfil, i.e., when the carrier is obliged to hand over goods.

At the beginning of the XIXth century, this requirement and the obligation to timely deliver goods were separate from the first three requirements and the obligation to safely carry goods; while in the latter the carrier's liability was strict, in the former he was liable with fault because of the unforeseeable and unpredictable nature of sea carriage. As a result, the Hague and Hague-Visby Rules, unlike the Hamburg Rules, do not address this requirement although strict liability was altered to liability with fault under these Conventions. Nowadays, the circumstances of sea carriage have changed so drastically that forces of nature are no longer substantial element of carriage. Similarly, in modern trade the need for the receipt of goods on time has increased due to the easily changeable character of markets and their prices. Hence, today not only safety but also timely delivery of cargo have become important[105]. For that reason, stipulations under the Hague and Hague-Visby Rules must be interpreted broadly to give effect to this requirement and obligation.

For the discharge of the obligation, the consignee should firstly have carried out his own part of agreement or have offered its performance. Otherwise, the carrier may adduce *exceptio non adimpleti contractus* and avoid delivering cargo unless freight or

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[104] Tunçomağ,K.: Türk Borçlar Hukuku, Vol.I, Genel Hükümler, 6th ed., İstanbul 1976, p.682 (to be cited thereinafter as "Borçlar Hukuku").

[105] *US v. Middleton* 1925 AMC 85 (4 Cir. 1925) - Ganado,M.-Kindred,H.M.: Delays, p.1.

other debts are paid[106]. The carrier's right to hold goods until his contractual claims have been satisfied is called "*lien*".

Secondly, the time agreed upon expressly or by implication in the contract should expire. An obligation which does not contain the time of performance is not enforceable. Parties are free to decide when goods will be left in the consignee's custody. This time can be later extended by them. In the absence of clear agreement, the time provided by law, custom or usage at the port of arrival is taken into consideration. In the absence of law, custom or usage, goods should be delivered within the time which would be reasonable for a diligent carrier, having regard to the circumstances of the case[107]. This is clearly provided under Article 5 (2) of the Hamburg Rules. The test used for the determination of time of performance is objective[108] with respect to a prudent carrier in the carrier's shoes[109]. Although there is nothing in the Convention to prevent carriers from fixing a generous period of carriage to escape the obligation to timely deliver cargo[110], they would probably avoid doing so due to the competitive nature of maritime business, and courts would overlook the period unfairly and excessively exceeding the reasonable time for delivery.

II. BREACH OF OBLIGATION (LOSS OF OR DAMAGE TO GOODS)

The carrier who has not safely or timely carried and delivered goods in his charge to the consignee is deemed to be in breach of the obligation and becomes liable for loss or damage arising thereby[111].

A) MISFEASANCE OF OBLIGATION (DAMAGE TO GOODS)

The carrier might not carry out his obligation pursuant to the contractual requirements of performance despite delivering goods; to do so would be the

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[106] Article 1187 of the French Civil Code 1804; Article 273 of the German Civil Code 1896; § 614 of the German Commercial Code 1897; Article 82 of the Swiss Obligations Code 1911; Article 81 of the Turkish Obligations Code 1926; Article 1069 of the Turkish Commercial Code 1956.

[107] *Hick v. Raymond & Reid* [1893] AC 22, 32 (HL); *Moel Tryvan Ship Co., Ltd. v. Andrew Weir & Co.* [1910] 2 KB 844, 857 (CA) / *The Newburgh* 1927 AMC 1646 (6 Cir.).

[108] *Hick v. Raymond & Reid* [1893] AC 22, 29, 32 (HL) / *The Panola* 1925 AMC 1173, 1183 (2 Cir.).

[109] *Carlton SS Co. Ltd. v. Castle Mail Packets Co. Ltd.* [1898] AC 486, 491 (HL).

[110] Pollock,G.: Part Two of a Legal Analysis of the Hamburg Rules, in Lloyd's of London Press Ltd. (Org.): The Hamburg Rules, A One-Day Seminar (September 28, 1978 - London), London 1978, p.1,2 (to be cited thereinafter as "Hamburg Rules").

[111] *Bradley v. Federal S.N. Co.* (1927) 27 Ll.L.R. 395, 396 - Carver, T.G.: Carriage, p.98.

misfeasance of the obligation. Therefor, the carrier should first have presented goods, and the consignee should have accepted them. Unlike the nonfeasance of the obligation, there must be a possibility of fulfilling the duty. Secondly, goods should not have been delivered either in the same state as that in which they have been received (*poor performance*) or on time (*late performance*). On this account, such delivery of goods is not regarded as proper discharge of duty.

The misfeasance of a contractual obligation always results in damage to goods. "Damage to goods" must be construed broadly to cover any damage in connection with goods. As a consequence, the decrease in benefits expected from goods, and, therefore, from their carriage is, in fact, damage to goods. Damage may be separated into physical and non-physical damage.

In *physical* damage, goods will have some material defects which reduce their benefits. For example, cargo might have been broken, frozen, rotten, or might have become soiled, wet and rusty. Physical damage to goods forms strong *prima facie* evidence that contractual obligation has not been performed. For that reason, under Article 5 of the Hamburg Rules it is presumed to be caused by the misfeasance of obligation, and the carrier is not required to show how it occurred.

By contrast, in the event of *non-physical* damage, delivery of cargo becomes partially useless (worthless) for a cargo interest although there is no physical damage. For instance, some economic benefits expected from goods may disappear due to late delivery (*economic* damage).

There is an argument as to the meaning of the expression "loss or damage" in Article 4 (1), (2) and (4) of the Hague and Hague-Visby Rules. It could either mean "loss of or damage to goods" or "loss or damage suffered by the cargo interest". As, when the words "loss or damage" are used alone, they, in English, normally refers to the latter, it ought to be interpreted as such. However, loss or damage should be "in connection with goods" because the subjects of the contract of carriage are goods. This is in line with Articles 3 (8) and 4 (5) of the same Rules. The carrier is therefore liable for all kinds of

damage to goods no matter what the cause[112]. However, Continental Contracting Countries incorporated the expression "loss or damage" in Article 4 (1), (2) and (4) into their domestic legislation as "loss of or damage to goods" and interpreted it as "physical" loss or damage[113] as distinct from Anglo-American jurisdiction[114]. Thus, the carrier is held liable for non-physical damage arising from late delivery under general provisions regulating the obligor's liability for delay[115]. Consequently, special provisions drafted by considering the needs of maritime commerce and features of the contract of carriage are circumvented by the application of general rules relating to delay. Thus, the carrier is, on the one hand, put outside the scope of mandatory provisions of the Hague and Hague-Visby Rules while, on the other hand, he is deprived of the defences and immunities granted to him thereunder. The words "damage to goods" must, thereof, be construed to the extent of the inclusion of non-physical damage. This interpretation is also in compliance with developments in navigational technology and trade requiring not only safe carriage but also timely delivery.

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[112] Ganado,M.-Kindred,H.M.: Delays, p.35.

[113] Cleton,R.: Contractual Liability for Carriage of Goods by Sea, in Voskuil,C.C.A.-Wade,J.A.(Editors): Hague-Zagreb Essays 3, Carriage of Goods by Sea, Germantown 1980, p.3, 15; Schinas,J.G.: Cargo Claims, p.246 / Prüssmann-Rabe: Seehandelsrecht, §606 C1b and E1a / Akıncı,S.: Navlun Mukaveleleri, p.338; Arkan,S.: Taşıyıcının Sorumluluğu, p.51; Çağa,T.: Navlun Sözleşmesi, p.133 and 143; Göknil,M.N.: Deniz Ticareti Hukuku, 3rd ed., İstanbul 1946, p.223; Kender,R.: Türk Hukukunda Denizde Mal Taşıyanın Sorumluluğu, Sorumluluk ve Sigorta Hukuku Bakımından Eşya Taşıma Sempozyumu, Ankara 1984, p.75, 77 (to be cited thereinafter as "Taşıyanın Sorumluluğu"); Okay,S.: Deniz Nakliyatında Ademi Mesuliyet Kayıtları, Hususiyle Bunların Muteberliği Meselesi, Doçentlik Tezi, İstanbul Üniversitesi 1954, p.15 (to be cited thereinafter as "Ademi Mesuliyet Kayıtları"); Sözer,B.: Türk Sivil Havacılık Kanununun Hükümlerine Göre Taşıyanın ve İşletenin Sorumluluğu, Batider, Aralık 1984, Vol.XII, Is.4, p.3, 33; Tekil,F.: Deniz Hukuku, İstanbul 1988, p.181; Ülgen,H.: Hava Taşıma Sözleşmesi, p.181, 184; Ülgener,M.F.: Taşıyanın Sorumsuzluk Halleri, İstanbul 1991, p.72 (to be cited thereinafter as "Sorumsuzluk Halleri"); Yazıcıoğlu,E.: Hamburg Kurallarına Göre Taşıyanın Sorumluluğu, Doktora Tezi, İstanbul Üniversitesi Hukuk Fakültesi, İstanbul 1997, p.58 (n.175), 69. For an opposite view see Wüstendörfer,H.: Seehandelsrechts, p.294.

[114] *St Lawrence Construction Ltd. v. Federal Commerce and Navigation Co. Ltd.* [1985] 1 FC 767 (FC) / *Anglo-Saxon Petroleum Co. v. Adamostos Shipping Co.* [1959] AC 133, 157 (HL) / *The Main* 1940 AMC 1299; *GH Renton (ibid)* (1956) 3 All ER 957; *Commercio Transito Inter., Ltd v. Lykes Bros. SS* (1957) AMC 1188 (2 Cir. 1957) - Carver,T.G.: Carriage, p.311; Ganado,M.-Kindred, H.M.: Delays, p.21; Glass,D.A.-Cashmore,C.: Introduction, p.174; Scrutton,T.E.: Charterparties, p.443. For an opposite view see *Imperial Smelting Corp. v. Constantine SS. Line* [1942] AC 154, 175 (HL); *United Merchants & Man. v. US Lines.*, (1953) 126 NYS 2d 560; *Hellenic Lines v. Embassy of Pakistan* [1973] 1 Lloyd's Rep. 363 - Kindred,H.: Hague to Hamburg, p.598; Thommen,T.K.: Carriage of Goods by Sea: The Hague Rules and Hamburg Rules, 32 J.Ind.L.Inst. 285 (1990), p.288.

[115] Articles 284-291 of the German Civil Code 1896; Articles 102-109 of the Swiss Obligations Code 1911; Articles 101-108 of the Turkish Obligations Code 1926.

The existence of non-physical damage, unlike physical damage, does not necessarily show that a contractual obligation has been breached. Indeed, the decrease in the benefits expected from goods may happen any time due to, for example, inflation or unbalance between demand and supply during carriage despite goods being delivered on time. For that reason, the cargo interest must be required to prove the cause of the non-physical loss or damage (i.e. late delivery)[116]. This is also just because he is the only one to whom the facts, as to whether goods are delivered late are available.

In order to prevent continental courts from setting aside special provisions and to bring carriage by sea into line with carriage by other modes of international transport[117], the carrier is made liable under Article 5 (1) of the Hamburg Rules for loss resulting both from (physical) loss of or damage to the goods and, in the case of non-physical loss or damage, from delay in delivery.

The carrier might cause damage to the whole consignment (*total* damage) as well as some parts of them (*partial* damage). Where he is not able to deliver some parts of a set of goods, which cannot be separated from each other without reducing all its value, there is damage, but not loss.

The reduction in value of goods due to normal shrinkage, deterioration with time which is expected no matter how careful the carrier has been is not damage to goods. The cargo interest cannot regard damaged goods as lost and, consequently, cannot claim full damages by abandoning them to the carrier[118] unless he has lost all benefits expected from them; for instance, they might have turned from liquid to solid[119], have been contaminated by seawater which could not be reconditioned at the port of discharge[120], or have become dangerous to be received[121].

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[116] Al-Kabban,R.A.M.: Recovery of Losses, Damages, and Delay in Delivery in the Admiralty Cases According to the Iraqi Jurisprudence, 4 Arab L.Q. 149 (1989), p.152 (to be cited thereinafter as "Iraqi Jurisprudence".

[117] Article 19 of the Warsaw Convention; Article 17 (1) of the CMR; Article 27 (1) of the CMI 1970.

[118] Tetley,W.: Cargo Claims, p.311 / Wüstendörfer,H.: Seehandelsrechts, p.285.

[119] *Massassoit* 1928 AMC 1458, 1485 (D NJ 1928).

[120] *Puerto Madrin SA v. Esso Standard Oil Co.* 1962 AMC 147 (SD NY 1961).

[121] *Connecticut Fire Ins. Co. v. Lake Transfer Co.* 1932 AMC 1307 (ED NY 1932).

B) NONFEASANCE OF OBLIGATION (LOSS OF GOODS)

The nonfeasance of obligation by the carrier depends on the objective impossibility of fulfilment and consequently on the exposure of cargo to loss. The disappearance of all benefits expected from goods and, therefore, from their carriage is called *loss*. Loss may be divided into physical and non-physical loss. As there is no distinction made under the Hague and Hague Visby Rules, the carrier is liable for all sorts, as explained above in view of damage to goods. This is clearer under the Hamburg Rules.

In the case of *physical* loss, the possibility of delivery of goods pursuant to the requirements of performance has physically vanished. Goods no longer have material existence. There is nothing which could be delivered to the cargo interest. For example, cargo might have completely burnt out. The physical loss may also occur where the delivery of goods is not possible under current conditions; for example, the cargo might have fallen out of the ship and might have disappeared in the deepest sea without any prospect of retrieval. Likewise, if goods to be delivered in physical damaged condition had no value at all or became dangerous to be received (for instance, the cargo of china could have been broken into pieces and could have become worthless), there is also physical loss[122]. Physical loss is the strong *prima facie* evidence for the nonfeasance of the contract. Consequently, the cargo interest is only obliged to prove the physical loss, but not its cause.

By contrast, in the event of *non-physical* loss, delivery of goods has become totally useless (worthless) owing to breach of the requirements although there is still possibility to deliver them. Indeed, the whole expected economic benefit from goods may vanish due to late delivery (*economic* loss).

For the carrier's liability, it is not important to determine breach of what requirement has caused loss of goods. The disappearance of all the benefits anticipated from cargo may have resulted from the violation of one of the requirements of subject, party, place and time. Yet, such disappearance must be permanent and certain[123]. So long as there is

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[122] Arar,K.: Kara Ticaret Hukuku, Vol.II, Ankara 1955, p.66.

[123] Dural,M.: Borçlunun Sorumlu Olmadığı Sonraki İmkânsızlık, İstanbul 1976, p.80; Eren,F.: Borçlar III, p.205; Tandoğan,H.: Mesuliyet Hukuku, p.396.

a possibility of regaining the vanished benefit, it does not amount to loss (nonfeasance of the obligation), but to damage (misfeasance of the obligation). Indeed, although goods have been handed over to the wrong person or at the wrong place, or there is a delay in performance, the delivery of goods to the proper party at the proper place might still be possible. In the former two cases, if the taking over of goods from the wrong person or place to the proper party or place leads to expenses more than its value, than there will be loss of goods[124]. Otherwise, goods would be handed over only late. In the event of delay, the carrier would not be able to deliver goods on time temporarily; for instance, if the embargo on the cargo is discontinuous, the execution of the contract becomes possible after the embargo is lifted. However, if the benefit expected from goods vanishes due to late delivery, loss will arise. The question when this benefit disappears is one which will be answered by the court considering the express or implied terms in the contract and the special circumstances of the case. To make the cargo interest wait for goods indefinitely would be against justice. Article 5 of the Hamburg Rules comes to the aid of the court and treats the goods as lost if they have not been delivered as required by Article 4 within 60 consecutive days following the expiry of the time or delivery according to paragraph 2 of this Article[125]. Thus, it is assumed that after 60 consecutive day the cargo interest loses his benefit anticipated from cargo. However, the cargo interest should be given opportunity to reduce the period of 60 consecutive days by showing that the *exact* day when the goods has to be delivered to him has been fixed in the contract. He may also claim and accept the presentation of goods by the carrier provided that all the compensation for loss already made by the carrier must be returned to him. This is the position taken under Article 20 (2) of the CMR and Article 30 (3) of the CMI 1970. The carrier does not have the same right to force the cargo interest to accept goods. If the consignee's only intention is to receive damages for loss, then the carrier becomes the owner of goods by operation of law if they exist[126].

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[124] *Monarch SS Co. Ltd. v. Karlshamns Oljefabriker AB* (1949) 1 All ER 1; Carver,T.G.: Carriage, p.313, 1497; Glass,D.A.-Cashmore,C.: Introduction, p.20 / Okay,S.: Navlun Sözleşmesi, p.174.

[125] See also Article 133 of the Iraqi Transport Law - Al-Kabban,R.A.M.: Iraqi Jurisprudence, p.150. Under Article 20 of the CMR and Article 30 of the CMI 1970 the period is accepted as 30 days.

[126] Pollock,G.: Hamburg Rules, p.4.

The presence of non-physical loss does not necessarily prove that it has been arisen from breach of the contract. The cargo interest must therefore show that the loss has resulted from late delivery unlike physical loss.

Loss may effect the whole consignment as well as part thereof. If the benefit expected from all the goods totally vanishes, *total loss* occurs. If some of them completely lose their expected benefit, there will be *partial loss*. Where cargo loses its weight or size, the partial loss, but not partial damage becomes questionable. Only goods which are dividable into pieces according to their nature can be exposed to partial loss[127].

III.CONCLUSIONS

(1) The third condition of the carrier's liability is breach of the contract of carriage, and the burden of its proof is shifted to the cargo interest who claims damages.

(2) The carrier's essential obligation and its content can be determined according to the express or implied terms of the contract of carriage. Thus, the carrier's obligation to carry goods in his custody is a duty which determines the type of contract. Since carriage covers the whole period when goods are in the carrier's custody, he is obliged to receive, load, handle, stow, keep, care for, discharge and deliver the goods. These obligations, except the duty to receive and deliver, are clearly enumerated under Article 3 (2) of the Hague and Hague-Visby Rules regarding the scope of the two Conventions unlike the Hamburg Rules; but this divergence does not make any fundamental difference since Article 5 (1) of the Hamburg Rules contains them anyway.

(3) The contracting parties are free to transfer some of the carrier's duties in Article 3 (2) of the Hague and Hague-Visby Rules to the cargo interest by FIO or similar clauses or to choose whatever voyage they want so long as these agreements are not contrary to the public policy and are, therefore, reasonable. Since Article 3 (2) of the Hague and Hague-Visby Rules intents to show the manner how to perform the obligations agreed by parties but not to delimit the scope of the contract by restricting the parties' freedom, these clauses do not contravene Article 3 (8) of the Hague and Hague-Visby Rules.

(4) To avoid loading goods on deck, stowing or keeping them in an unseaworthy ship, transhipping them to another vessel, and deviating from the agreed route are obligations within the carrier's carriage obligation. Consequently, the carrier is liable for loss or damage arising from breach of these obligations under the general provision of the Hague and Hague-Visby Rules [Articles 3 (2) and 4 (2)] and the Hamburg Rules [Article 5] regarding liability for loss or damage, in lack of special provision [Articles 3 (1) and 4 (1) and (4) of the Hague and Hague-Visby Rules for unseaworthiness and deviation and Article 9 of the Hamburg Rules for deck carriage].

(5) As clearly provided under Article 9 (1) of the Hamburg Rules, the carrier may load goods on deck if clearly or by implication agreed so ,i.e., if deck carriage is pursuant to an agreement with the shipper or to the usage of the particular trade or is required by

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[127] Atabek,R.: Taşıma Hukuku, p.188; Arkan,S.: Taşıyıcının Sorumluluğu, p.50.

statutory rules or regulations. On balance, the container carriage on deck may be regarded as permitted by the actual shipper's implied consent.

(6) Not only does the carriage obligation consist of the duty to carry safely but also timely. These two sub-obligations cannot be separated from each other. The Hamburg Rules, unlike the Hague and Hague-Visby Rules, expressly impose both duties on the carrier.

(7) For the carrier's liability, he should have breached the contract of carriage by losing or damaging cargo. Loss of or damage to goods must be interpreted broadly to include any damage or loss in connection with goods. This is in line with Articles 3 (8) and 4 (5) of the Hague and Hague-Visby Rules. As a consequence, the total or partial decrease in benefits expected from goods and, therefore, from their carriage must be deemed loss of or damage to goods which contains both physical and non-physical loss or damage no matter breach of which contractual requirement caused them. In order to clarify the language of the Hague and Hague-Visby Rules, Article 5 (1) of the Hamburg Rules provides that, the carrier is liable for loss resulting from (physical) loss of or damage to the goods as well as from delay in delivery.

Chapter Seven

BREACH OF THE CARRIAGE OBLIGATION WHILE IN THE CARRIER'S CHARGE

The fourth condition of the carrier's liability is breach of the carriage obligation while goods are in his custody. The burden of proof for this element is on the cargo interest to whom evidence of the states of goods before and after carriage are more available. This chapter will first examine the duration of the carrier's liability and then breach of the contractual obligation during such period.

I. DURATION OF THE CARRIER'S LIABILITY

The carrier is liable for breach of the obligation to carry goods in his custody. His liability should therefore be limited to the period while he is in charge of goods[1], as provided under Article 4 (1) of the Hamburg Rules.

Since cargo is not inside the carrier's control before received and after delivered by him, it is unreasonable to make him liable outside those times. In order to determine the duration of the carrier's liability, moments when goods are taken and handed over by the carrier ought to be ascertained.

The duration of the carrier's liability and the period during when the Rules apply do not pose the same legal issues; they may not coincide. If not, matters outside the scope of the Rules are governed by domestic applicable law.

A) RECEIPT OF GOODS BY CARRIER

"*Receipt*" is to obtain direct or indirect possession of goods by a mutual legal transaction made between the carrier and the shipper. Goods can be given directly to the carrier or indirectly left for him in such a manner that he is able to control[2]. The shipper

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1 Peyrefitte,L.: Period, p.125; Poor,W.: Charter Parties, p.141 and sup. p. 34.
2 Gaitas,G.A.: Common Carrier, p.56.

must, under any circumstances, intend to transfer possession of cargo to the carrier; and in return, the carrier must accept to take it over[3].

Goods may be received onboard the ship or on shore. For the determination of the moment when they have been taken over by the carrier, the person who is obliged to load and stow them must be identified. If the obligation is on the carrier, they are received on shore before or at the beginning of loading. In liner carriage they are normally taken over by a warehouseman nominated by the carrier. Receipt of cargo from the shipper's agent by the carrier's agent ought to be considered the taking over from the shipper by the carrier himself. This is apparent under Article 4 (2) and (3) of the Hamburg Rules.

By contrast, receipt of goods by a port authority or any other third party to whom, pursuant to law or regulations applicable at the port of loading, goods must be handed over for shipment cannot be regarded as a receipt by the carrier. The carrier is in charge of goods from the time he has taken them over from an authority or any other third party. This is clearly provided under Article 4 (2) of the Hamburg Rules. Although a port authority might start loading goods on the carrier's instruction, that does not make such authority the carrier's servant because this instruction is given to inform the shipper of the readiness of the ship to load[4].

Similarly, goods might be received by the carrier on shore and might then have to be delivered to a port authority for shipment according to law or regulations at the port of loading. In that case, neither can the carrier be placed in charge of goods and be held liable for loss or damage arising from the act of the port authority who is not the

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[3] Poor,W.: Charter Parties, p.141 / Wüstendörfer, H.: Seehandelsrechts, p.268 / Arkan,S.: Karayoluyla Yapılan Eşya Taşımalarında Taşıyıcının Sorumluluğu, Sorumluluk ve Sigorta Hukuku Bakımından Eşya Taşımacılığı Sempozyumu (26 - 27 Ocak 1984, Maçka İstanbul), Ankara 1984, sh.97, 104 and Demiryoluyla Yapılan Uluslararası Eşya Taşımaları, Ankara 1987, p.93; Oğuzman,M.K.-Seliçi,Ö.: Eşya Hukuku, 4th ed., İstanbul, p.61. For an opposite view see Mankabady,S.: Comments, p.50 / Akipek,J.: Zilyedlik, Ankara, p.187; Esener,T.-Güven,K.: Eşya Hukuku, Ankara 1990, p.21; Esener,T.-Güven,K.: Eşya Hukuku, Ankara 1990, p.90; Reisoğlu,S.: Türk Eşya Hukuku, 3rd ed., Ankara 1984, p.57: The Authors argue that delivery is only a physical act but not a mutual agreement.

[4] Prüssmann-Rabe: Seehandelsrechts, § 606 C2a. For an opposite view see Kender,R.: Yükleme, Boşaltma ve Ardiye Safhasında Sorumluluk ve Sigorta ile İlgili Bazı Sorunlar, Sorumluluk ve Sigorta Hukuku Bakımından Eşya Taşıma Sempozyumu, Ankara 1984, p.247, 250 (to be cited thereinafter as "Yükleme, Boşaltma ve Ardiye").

carrier's servant or agent unless he has delayed receipt of cargo from the port authority without any justification[5].

If the obligation to load is on the actual shipper, goods are received onboard the vessel after loading[6]. However, immediately cargo has passed over the ship's rail, it partly enters to the carrier's custody because the vessel is under his control. Likewise, in the carriage of live animals although they are not in the carrier's charge where the cargo interest has employed an attendant to take full care of them onboard the ship, the carrier is liable for the supervision of these animals after crossing the ship's rail.

If shipment is performed by use of barges or lighters, the same principles are also applicable. If there is no FIO or similar clause in the contract of carriage, the moment of receipt of cargo is determined in relation to barges or lighters rather than the mother ship[7]. In that case, each lighter and barge is a vessel. By contrast, where the actual shipper performs the loading, cargo is not regarded as received by the carrier until connected to the ship's apparatus[8].

In container carriage, when the carrier consolidates goods in containers, there is receipt of container goods, otherwise of containers by the carrier[9]. A carrier is not therefore liable for improper stowage of goods in a container by the actual shipper.

In the carriage of bulk liquid or grain cargo, the liquid or grain must be in the carrier's control, in other words, must be pumped or sucked into the ship's pipes to constitute receipt. On this account, the carrier is liable for any leakage or escape from the ship's pipes[10].

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5 For an opposite view see Lüddeke,C.F.-Johnson,A.: Hamburg Rules, p.7.

6 *Federal Insurance v. Sabine Towage* 1986 AMC 1860, 1864 (2 Cir. 1986).

7 *TD.*, 3.11.1956, E.6935, K.9; *TD.*, 15.6.1961, E.1913, K.1991 / *Caterpiller Overseas v. SS Expeditor* 1963 AMC 1662 (2 Cir. 1963); *The Scow Steelweld* 1968 AMC 2064 (SD NY 1968).

8 *ET Barwick Mills v. Hellenic Lines* 1972 AMC 1802 (SD Ga. 1971); *A/S Damp. Torm v. McDermott, Inc.* 1987 AMC 353 (5 Cir. 1986). Nevertheless, in *The Yoro* 1952 AMC 1094, 1096 (5 Cir. 1952) the carrier was held liable for damage to the goods in lighters manned by the shipper and moored alongside the ship.

9 Deniz,İ.: Konteyner Taşımacılığı, p.66. In the case of a "*full container load*", the container in which goods were consolidated by the shipper is collected by the carrier in the shipper's place, while in the case of "*less than full container load*", the container is delivered to the carrier to pack goods in: Mankabady,S.: Comments, p.51.

10 Al-Jazairy,Mr.R.: Liability, p.118; Peyrefitte,L.: Period, p.131.

In through-carriage the same principles apply. Thus, when goods are received by the (contracting) carrier on the first vehicle, his liability begins. However, before the carrier loads them under the Hague and Hague-Visby Rules and receives them at the port of loading under the Hamburg Rules, his liability is not subject to these convention based liability regimes.

If cargo consists of more than one unit, each must be considered individually, fixing the moment of their receipt.

B) DELIVERY OF GOODS BY CARRIER

To end his liability, the carrier should deliver goods to the consignee (cargo interest). *Delivery* means transfer of direct or indirect possession of goods to the consignee by a mutual legal transaction made between the carrier and the consignee[11]. Goods can either be handed over to the consignee or be left to his authority. Delivery is completed at the time goods enters into the consignee's possession with both parties' consents[12].

To inform the consignee of the readiness to receipt does not amount to their delivery because they are still in the carrier's hands. However, in some cases the carrier's liability may end although goods have not actually been put in the consignee's possession. Indeed, the carrier may be entitled to place them at the consignee's disposal in accordance with the contract or with law or usage of a particular trade, applicable at the port of discharge, where the consignee does not receive goods within a reasonable period. The consignee is bound to take over goods presented pursuant to contractual conditions[13]. Otherwise, the carrier may land and warehouse them at the consignee's risk and expense[14]. To place goods at the consignee's disposal cannot constitute their delivery to the consignee because the person who has taken delivery is not acting on behalf of the consignee[15]. He is in fact the carrier's servant or agent rather than the consignee's. Nevertheless, since the consignee has not done necessary things for

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[11] *TD.*, 27.3.1950, E.1376, K.1501; *TD.*, 27.12.1955, E.7435, K.8506 - Poor,W.: Charter Parties, p.141 / Prüssmann-Rabe: Seehandelsrechts, § 606 C2a; Wüstendörfer, H.: Seehandelsrechts, p.268.

[12] *American Hoesch Inc. v. SS Aubade and Maritime Com.* 1971 AMC 1217, 1221 (D SC 1970).

[13] *Hick v. Raymond & Reid* [1893] AC 22 (HL).

[14] Section 596 of the Canada Shipping Act 1985; § 601 of the German Commercial Code 1897; Article 1057 of the Turkish Commercial Code 1956.

[15] *American Hoesch (ibid)* 1971 AMC 1217, 1221 (D SC 1970) - Carver,T.G.: Carriage, p.1100.

acceptance of goods, he is in default. Accordingly, his liability is only for fault in the choice of the warehouseman[16]. As rightly provided under Article 4 (2) of the Hamburg Rules, goods must in that case be considered to fall within the consignee's custody (*constructive delivery*)[17].

Goods can be delivered onboard the ship or on shore. For the determination of when they are handed over to the consignee, the one who is under an obligation to discharge them should be ascertained. If the carrier discharges them, they may either be delivered on quay, or may be handed over in a warehouse depending on the contract. Delivery of goods to the consignee's servants or agents or any person acting on his behalf should be treated the handing over to the consignee himself. This is in line with Article 4 (2) of the Hamburg Rules[18].

If the carrier can negotiate with a port authority or a terminal operator, delivery of goods to them cannot be regarded as a handing over to the consignee because they act as though they were the carrier's servant[19]. If such delivery is made pursuant to law or regulations applicable at the port of discharge, they should be considered to have been delivered to the consignee so long as all necessary document are surrendered to him because the carrier losses control over goods by handing them over to the third party pursuant to law or regulation[20]. Domestic law or regulations often grant monopolies to State owned companies to discharge, handle and store goods. In that case, the carrier is no longer into a position to prevent loss or damage. If he had no agent at the port of discharge, he would also be incapable of having news about their last conditions after the ship leaves the port. Once the carrier duly delivers goods to such a third party, he must be presumed to have fulfilled his obligation to carry them in his charge. This view is clearly approved by Article 4 (2) (b) (iii) of the Hamburg Rules. Where domestic law

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16 Wüstendörfer,H.: Seehandelsrechts, p.264 / Okay,S.: Ademi Mesuliyet Kayıtları, p.17.

17 UNCITRAL: Hamburg Rules, p.595 - Gorton,L.: Common Carrier, p.112.

18 *Tribunal de Commerce de Marseille*, January 23, 1996, Revue Scapel 51 (1996) (*The World Appolo*): The court ruled under the Hamburg Rules that the carrier's liability ended at the point when the stevedoring company appointed by the consignee began discharge operations.

19 Prüssmann-Rabe: Seehandelsrecht, § 606 C2a; / Kender,R.: Yükleme, Boşaltma ve Ardiye, p.250.

20 *Cour d'Appeal Paris*, January 31, 1989, BT 334 (1990) / *TD.*, 24.12.1971, E.5012, K.7684 - Manin,J-P.: French Ports, p.131; Pallua,E.: Liability, p.26 / Arkan,S.: Taşşıyıcının Sorumluluğu, p56. For an opposite view see Kender,R.: Yükleme, Boşaltma ve Ardiye, p.252.

or regulation entitles the carrier to select one authorised company among others to handle goods, he could be liable for his choice.

If the obligation to discharge goods is shifted to the consignee, their delivery is performed onboard the ship. However, until they have passed the ship's rail, the carrier's custody thereon continues because control over the vessel is still on the carrier.

If the carrier unloads goods by means of lighters or barges, the moment of their delivery is fixed in relation to barges or lighters rather than the mother ship[21]. In that case, each lighter or barge is a vessel. By contrast, where discharge is performed by the consignee, cargo is still in the carrier's possession until disconnected from the ship's apparatus[22].

In container carriage, the moment of delivery of goods is determined in relation to the container itself. However, where they are taken out of the container by the carrier, the subjects of delivery are goods but not containers[23].

In the carriage of bulk liquid or grain cargo, delivery is performed at the moment they are pumped or sucked out of the ship's pipes[24]. The leakage from pipes is, therefore, at the carriage expense.

In through-carriage the same principles above are also applicable. Thus, once goods are finally delivered to the consignee, the carrier's liability ends. However, after goods are unloaded under the Hague and Hague-Visby Rules and delivered at the port of discharge under the Hamburg Rules, liability is no longer governed by these convention based liability regimes.

If cargo consists of more than one thing, each must be treated individually determining the moment of their delivery.

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[21] *TD.*, 3.11.1956, E.6935, K.9; *TD.*, 15.6.1961, E.1913, K.1991 / *Caterpiller Overseas (ibid)* 1963 AMC 1662 (2 Cir. 1963); *The Scow Steelweld* 1968 AMC 2064 (SD NY 1968).

[22] *ET Barwick (ibid)* 1972 AMC 1802 (SD Ga. 1971); *A/S Damp. (ibid)* 1987 AMC 353 (5 Cir. 1986).

[23] Deniz,İ.: Konteyner Taşımacılığı, p.81.

[24] *Cetterchem Products v. A/S Rederiet Odfiell* 1972 AMC 373 (ED Va. 1971) - Prüssmann-Rabe: Seehandelsrecht, § 606 C2dd.

C) AGREEMENT ON TIME OF RECEIPT OR DELIVERY

Clauses limiting the period of the carrier's liability otherwise than as provided under Article 1 (e) of the Hague and Hague-Visby Rules or Article 4 of the Hamburg Rules are null and void under Article 3 (8) of the Hague and Hague-Visby Rules[25] or Article 23 of the Hamburg Rules.

Parties are however free to fix the moment of receipt or delivery of goods by FIO or similar clauses. Such clauses are not contrary to Articles 23 (1) and, therefore, 4 of the Hamburg Rules because, in that case, the loading, stowage or discharge are still performed onboard a ship staying in the port area[26]. By contrast, the clause providing that the carrier has received goods on shore at the port of loading or discharge as a bailee would be contrary to Article 4 of the Hamburg Rules since it aims to restrict the scope of the Convention[27].

II. BREACH OF THE CONTRACT OF CARRIAGE DURING THE PERIOD OF THE CARRIER'S LIABILITY

A) GENERAL

For liability to arise, the contractual obligation to carry goods must have been breached during the period of the carrier's liability. The cargo interest should, therefore, show that the state of goods when received by the consignee from the carrier was worse than when taken over by the carrier from the shipper[28].

What should occur during the period of the carrier's liability is neither loss suffered by the consignee nor loss of or damage to goods, but breach of contractual obligation. The carrier is, thus, liable under the three Conventions for any loss suffered after delivery of goods *due to* breach of the contract while cargo was in his custody. His liability is not strict, he does not have to pay damages only for a result (loss of or damage to goods or loss sustained by the cargo interest) if there is no breach attributable

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[25] *Solar Turbines v. SS Al Shidadiah* 1984 AMC 2002, 2004 (SD NY 1983): A clause relieving the carrier from liability during loading was held to be void under Section 3 (8) of the US COGSA.

[26] Group 1 of IMC, Report on the Period, p.44.

[27] Peyrefitte,L.: Period, p.130.

[28] *Chung Hwa Steel Products & Trading Co. v. Glen Lines* (1935) 51 Ll.L.R. 248 - Clarke,M.: Containers, in Schmitthoff,C.M.-Goode,R. (ed.): International Carriage of Goods, Vol.1, London 1988, p.64, 65 (to be cited thereinafter as "Containers").

to him. However, the occurrence of physical loss of or damage to goods while in the carrier's custody creates strong *prima facie* evidence that the carrier breached the contract during transportation and is presumably liable for loss of or damage to goods[29].

For that reason, Article 5 of the Hamburg Rules requires only the *occurrence* which caused the loss or damage (but not loss or damage itself) to have taken place while the goods were in the carrier's charge. Nevertheless, the provision is far from being clear in explaining who has to prove the occurrence which led to loss or damage. It is broad enough to be interpreted to impose the onus on the cargo interest although that could not be the aim[30].

B) STATE OF GOODS AT THE TIME OF RECEIPT

1- Receipt function of bills of lading and other documents

The aggrieved party should firstly establish the state of goods at the time of receipt. With this aim, he must submit evidence, preferably written one such as a bill of lading or any other transport receipts, proving the taking over of cargo.

The bill of lading is regarded under Article 3 (4) of the Hague and Hague-Visby Rules and Article 16 (3) (a) of the Hamburg Rules as *prima facie* evidence of the taking over or, where a "shipped" bill of lading is issued, of the loading, by the carrier of goods as described in the bill of lading.

Where a carrier issues a transport receipt other than a bill of lading, such as a waybill, electronic bill of lading or mate's receipt, to prove the taking over of goods to be carried, such a document has also the same effect. This is clearly provided in Article 18 of the Hamburg Rules. The evidentiary function of the receipt must be recognised by law. If there are a bill of lading and another transport receipt issued by the carrier for the same consignment, and if these receipts conflict with each other, then the one favouring

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[29] *Gosse Millard v. Canadian Government Merchant Marine Ltd.* [1927] 2 KB 432, 434; *Albacora SRL v. Westcott & Laurance Line Ltd.* [1965] 2 Lloyd's Rep. 37, 46; *The Farrandoc* [1967] 2 Lloyd's Rep. 276, 284; *Goodfellow Lumber Sales Ltd. v. Verreault* [1971] 1 Lloyd's Rep. 185, 186.

[30] For doubts see Diamond,A.: Hamburg Rules, p.10; Carey,J.E.: Cargo Plaintiff, p.3.

the cargo interest should be taken into consideration on the basis of the principle (*contra proferentem*) that in case of doubt a contract should be interpreted against its author[31].

The bill of lading and other transport receipts are only *prima facie* evidence, that is a presumption *de juris tantum* rather than *et de jure*, as stipulated in Article 3 (4) of the Hague and Hague-Visby Rules and Article 16 of the Hamburg Rules; so parties may adduce a proof to the contrary showing that the goods were not actually received or taken over in a state otherwise than as described in the document[32]. However, proof to the contrary should not be admissible when the *bill of lading* (unlike other non-negotiable transport documents) has been transferred to a bona fide third party acting in reliance on the description of goods therein (*the principle of estoppel* at common law[33] / *the principle of reliance on appearance* in continental law[34]). Otherwise, the holder who relies on statements in the bill of lading would avoid trading under that document. The third party's rightful interest to act on the definitions in a bill of lading ought to be protected. The carrier is bound to all particulars furnished in the bill of lading[35] insofar as the statement is sufficiently clear and unqualified[36]. Even if the carrier's representative acts beyond his authority by noting the quantity of goods in the bill of lading despite the fact that the whole cargo has never been shipped, the bill of lading is still conclusive evidence as to quantity against the carrier. This is so because the bona fide cargo interest counts on the carrier or his representative stating the truth in the bill of lading; he could never know whether goods have been loaded or not. The

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31 *Inter American Foods v. Co-ordinated Caribbean Transport* 313 F Supp. 1334 (SD Fa. 1970) - Schacar,Y.: Container, p.43.

32 *HGK.*, 8.12.1971, E.69/T-821, K.729; *11. HD.*, 26.2.1982, E.448, K.294; *11. HD.*, 26.1.1989, E.3541, K.294 / *SS Shickshinny* 1954 AMC 1616, 1620 (SD NY 1954). The shipper may also adduce evidence contrary to bills of lading: *McAllister Ligterage Line v. SS Steel Age* 1968 AMC 2064, 2075 (SD NY 1968).

33 *Evans v. James Webster & Brother Ltd.* (1928) 32 Ll.L.Rep. 218, 222; *V/O Rasnoimport v. Guthrie & Co.* [1966] 1 Lloyd's Rep.1, 14 / *Freedman v. M/S Concordia Star* 1958 AMC 1308, 1309 (2 Cir. 1958); *Warner Communications v. Argonaut* 1986 AMC 2400, 2404 (SD NY 1985). Under the common law principle of estoppel, the carrier must also intend that the representation should be relied upon: *Silver v. Ocean SS Co.* [1930] 1 KB 416, 433; *Dent v. Glen Line Ltd.* (1940) 67 Ll.L.Rep. 72, 82; *Brown, Jenkinson & Co., Ltd. v. Percy Dalton* [1957] 2 Lloyd's Rep. 1.

34 *Cour de Cassation*, November 7, 1973, ETL 414 (Fr. Ct. 1974) / *Cour d'Appeal de Rouen*, March 21, 1985, Bull. des transp. 285 (1985). However, in Belgium neither doctrine nor jurisprudence has been able to find a solution to protect the bona fide third party: See IMC International Sub-Committee Report, 1962, p.93.

35 *Spanish American Skin v. M/S Ferngulf* 1957 AMC 611 (2 Cir. 1957).

36 *Canada & Dominion Sugar v. Canadian National* (1946) 80 Ll.L.R. 13, 18 (PC).

representative is under the carrier's control, but not the cargo interest's[37]. Where a third party acts in bad faith or does not rely on the description on the bill of lading estoppel does not arise[38]. This interpretation agrees with Article 16 (3) (b) of the Hamburg Rules. Nevertheless, under Article 3 (4) of the Hague-Visby Rules it seems that a third party does not need to show reliance on the statement so as to benefit because under this Article proof to the contrary is not permitted when the bill of lading has been transferred to a third party acting only in good faith, but not in reliance on the description[39].

What must be stated on the bill of lading (transport receipt) depends on its possible three functions as a receipt of goods, a record of evidence for the contract of carriage and a document of (possessory) title. For that reason, goods must be ascertained in the bill of lading (transport receipt) to be distinguished from others; otherwise, it cannot be determined which goods are subject to the contract, have been received by the carrier and are to be delivered to the cargo interest[40]. This conclusion is in compliance with Article 15 (3) of the Hamburg Rules. On this account, Article 3 (3) of the Hague and Hague-Visby Rules and Article 15 (1) (a) and (b) of the Hamburg Rules enumerate particulars which must be contained in the transport receipt.

2- General nature, leading marks, number, weight or quantity of goods

By Article 3 (3) of the Hague and Hague-Visby Rules, when taking goods into his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading (transport receipt) showing among other things:

(a) The leading marks necessary for identification of goods; and
(b) Either the number of packages or pieces, or the quantity, or weight.

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37 Section 4 of the UK COGSA 1992 - *Noble Resources Ltd. Cavalier Shp.* [1996] 1 Lloyd's Rep. 642 - Tetley,W.: Cargo Claims, p.276. This view is rejected at common law: *Grant v. Norway* (1851) 10 C.B. 665; but under the UK COGSA 1971: Carver,T.G.: Carriage, p.367; Wilson,J.: Carriage, p.122, and under Article 22 of the US Pomerene Act 1916: Poor,W.: Charter Parties, p.139.

38 *Hoge Raad der Nederlanden* November 30, 1973 [1974] ETL 563 / *Portland Fish Co. v. States SS Co.* 1975 AMC 395, 401 (9 Cir. 1974).

39 Thomas,R.J.I.: Part Three of a Legal Analysis of the Hamburg Rules, in Lloyd's of London Press Ltd. (Org.): The Hamburg Rules, A One-Day Seminar (September 28, 1978 - London), London 1978, p.1, 3 (to be cited thereinafter as "Hamburg Rules") - Tetley,W.: Cargo Claims, p.278.

40 XIVth ICCL, General Report, p.14 - Bernauw,K.: Belgium, p.92; Herber,R.: Germany, p.162; Kiantou-Pampouki,A.: Greece, p.210; Sakurai,R.-Yoshida,S.: Japan, p.221.

It appears thereunder that the bill of lading (transport receipt) does not need to show both the number and the weight, and that the carrier is only bound by only one of them unless both particulars, as it is common practice nowadays, have been stated in the bill[41]. As a consequence, if the carrier is liable only for the number of boxes, there is nothing in the two Conventions to prevent him from delivering them empty[42]. The weight and the number of packages are fundamental components in determining goods carried and the amount of damages to be paid by the carrier. Hence, Article 15 (1) (a) of the Hamburg Rules in addition to those in the Hague and Hague-Visby Rules requires the inclusion of the number of packages or pieces as well as the weight and the general nature of goods in the bill of lading (transport receipt)[43].

The carrier must insert the above particulars only upon and pursuant to the shipper's declaration. They are *prima facie* or, where the bill of lading is in the hands of a bona fide holder, conclusive evidence which could be adduced against the carrier. For that reason, the carrier should inspect goods upon receiving them to ascertain whether the shipper's statements are true. He can examine goods on his own. There is no need for the employment of experts[44]. The examination which costs too much or delays carriage cannot be expected from the carrier. Upon this inspection:

(a) the carrier may discover or may have reasonable ground to suspect that the particulars declared by the shipper do not accurately represent goods actually taken over or, where a shipped bill of lading is issued, loaded; or

(b) the carrier may have had no reasonable means of checking the particulars declared by the shipper.

For instance, goods could be delivered to the master just five or ten minutes before the beginning of the voyage; the conditions at the port might not be suitable for checking cargo; goods could be packed or consolidated in a container by the shipper; or,

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41 *Cour'd Appeal d'Aix*, June 14, 1954, DMF 222 (1955) - Dor,S.: Hague Rules, p.87. For discussions see Secretary-General: Fourth Report, p.207.

42 *Cour de Cassation*, July 8, 1955, JPA 1955, 404.

43 Secretary-General: Fourth Report, p.208; UNCITRAL: Hamburg Rules, p.612 - Sweeney,J.C.: The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part IV), 7 JMLC 615, Jl'76, p.635.

44 *Hof Van Beroep te Brussels*, June 24, 1971 [1971] ETL 635 / *Groban v. SS Pegu* 1972 AMC 460, 468 (SD NY 1971).

as provided under Article 3 (3) (a) of the Hague and Hague-Visby Rules, the leading marks might not be stamped or otherwise shown clearly upon goods if uncovered, or on their cases or coverings, in such manner as might not ordinarily remain legible until the end of the voyage[45].

In those cases, the Hague and Hague-Visby Rules and the Hamburg Rules introduce two different methods in order to relieve the carrier of the onerous burden of proof. Article 3 (3) of the Hague and Hague-Visby Rules, under those circumstances entitles the carrier not to state or show in the bill of lading (transport receipt) the particulars declared by the shipper[46].

However, this approach does not agree with commercial practice and the functions of the bill of lading. The bill of lading is normally presented by the shipper to the carrier for signature at the latest time just before the beginning of the voyage. Similarly, in liner carriage the carrier is able to complete signing hundreds of bills of lading after the vessel has sailed. Thereupon, the carrier, who is obliged to issue a bill of lading[47], has only an opportunity to insert reservations to show that particulars in the bill of lading do or might not represent goods received[48]. Likewise, particulars such as leading marks, the number of packages or pieces, quantity, or weight which may be important to identify goods carried must be inserted into the bill of lading (transport receipt). Otherwise, the bill of lading (transport receipt) may lose its value as a receipt, document of title and evidence of the contract, and the carrier cannot ascertain which goods is to be delivered[49]. Accordingly, some Contracting States to the Hague and Hague-Visby

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45 *TD.*, 7.9.1961, E.2421, K.2773.

46 *The Boukadoura*, [1989] 1 Lloyd's Rep. 393 - Oceans Institute of Canada, Canadian Carriage, p.140 - Tetley,W.: Cargo Claims, p.283.

47 For an opposite view see Schilling,R.: The Effect on International Trade of the Implementation of the Hamburg Rules from the Point of View of the Shipper, in Comité Maritime International: Colloquium on the Hamburg Rules, Vienna - 8-10 January 1979, p.15, 16: The Author asserted that the carrier is not required to sign bills of lading where there is a doubt as to the accuracy of the particulars shown thereon. This view is contrary to Article 3 (3) of the Hague and Hague-Visby Rules which obliges the carrier to issue a bill of lading after receiving the goods on demand of the shipper. The carrier may only avoid carrying goods and may discharge them if they have already been loaded.

48 Dor,S.: Hague Rules, p.91; Temperley: Carriage of Goods by Sea Act 1924, 4th ed., London 1925, p.33 (to be cited thereinafter as " Carriage").

49 XIVth ICCL, General Report, p.14 - Bernauw,K.: Belgium, p.92; Herber,R.: Germany, p.162; Kiantou-Pampouki,A.: Greece, p.210; Sakurai,R.-Yoshida,S.: Japan, p.221.

Rules[50] and Article 16 (1) of the Hamburg Rules allow the carrier to insert a reservation which must specify the inaccurate particulars, grounds of suspicion or absence of reasonable means of checking, such as the clause "one container said to contain 437 crates of household appliances, closed and sealed by the shipper"[51]. The reservation without reasonable grounds for suspecting an inaccuracy or for disability to check goods cannot overcome *prima facie* evidence[52]. As a result, qualifying clauses which do not clearly include their grounds, such as "shipper load and count", "particulars furnished or declared by the shipper[53]", "said to be or weight unknown[54]", "weight and quantity unknown[55]", "weight and condition of contents unknown[56]", "quality, condition and measure unknown[57]" or "without liability for the contents and weight of sacks, impossible to verify[58]" do not relieve the carrier of being bound by the statements in the bill of lading (transport receipt). Reasonable grounds could be anything understood from an ordinary inspection. Where a carrier, after describing goods as to both weight and number, inserts partial qualifying statements such as "weight unknown" in the bill of lading (transport receipt) in order to be bound by only one of these particulars, the clauses are valid so long as they are reasonable[59].

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50 Article 36 of the French Decree of 1966; Section 21 of the US Federal Bills of Lading Act 1994 - *Ace Imports Pty. Ltd. v. Companhia de Navergacao Lloyd Brasilero* [1988] 1 Lloyd's Rep. 206 (Aust. NSW Ct. 1987). German and Turkish jurisprudence also adopted the same view, applying § 656 of the German Commercial Act 1897 and Article 1110 of the Turkish Commercial Act 1956: *TD.*, 7.2.1957, E.57/7515, K.374; *TD.*, 27.10.1961, E.60/35, K.2807 - Wüstendörfer,H.: Seehandelsrechts, p.304.

51 *Carte v. Sudcarcos (Trib. Prem. Ins. Tunis, 9eme Chr)* November 2, 1994, Rev. Scapel 40 (1996) (under the Hamburg Rules).

52 *TD.*, 7.2.1957, E.57/7515, K.374; *TD.*, 27.10.1961, E.60/35, K.2807 - Thomas,R.J.I.: Hamburg Rules, p.2 / Çağa,T.: Navlun Sözleşmesi, p.76, 78. For an opposite view in English law see *Attorney-General of Ceylon v. Scindia Steam Navigation Co. Ltd,* [1961] 2 Lloyd's Law Rep. 173; *Rederiaktiebolaget Gustav Erikson v. Ismail* [1986] 2 Lloyd's Rep. 282 (QBD CC); *The Atlas* [1996] 1 Lloyd's Rep. 642 (QBD): In those cases, "weight, number and quantity unknown" clauses were held valid although they do not include their reasonable grounds. See also Dor,S.: Hague Rules, p.93.

53 *Pettinos v. American Export Lines* 1946 AMC 1252, 1258 (ED Pa. 1946); *Industria Nacional del Papel, v. M/V Albert F.* 1985 AMC 1437, 1440 (11 Cir. 1984).

54 *Patagonier v. Spear & Thorpe* (1933) 47 Ll.L.Rep.59, 61 (under the Canadian Water Carriage of Goods Act 1910).

55 *Supreme Court of Polland*, April 16, 1968, [1972] ETL 787.

56 *Corte di Appello Genova*, April 10, 1970, [1972] ETL 803 / *Spanish American Skin Co. v. M/S Ferngulf* 1957 AMC 611 (2 Cir. 1957).

57 *Rechtbank Van Koophandel Gent*, September 11, 1973, [1973] ETL 736; *Rechtbank Van Koophandel Van Antwerpen* October 24, 1973, [1974] ETL 136.

58 *Hof Van Beroep te Antwerpen*, March 8, 1985, [1985] ETL 552.

59 *Cour de Cassation,* March 5, 1952, DMF 307 (1952) / *Spanish American Skin v. M/S Ferngulf,* 1957 AMC 611, 614 (2 Cir. 1957). For an opposite view under Canadian and English law see *The Ermua v.*

The burden of proof for particulars outside the notation is still on the carrier. For example, a reservation "wet before shipment" does not have any effect on the onus of proof where loss or damage is caused by seawater[60]. Again, the notation "partly rust stained" does not include the heavy rust scales and oily contaminant if the condition of the steel at destination is substantially different from that at the time of the issue of the bill of lading (transport receipt)[61].

Valid reservation clauses shift the onus of proving the state of goods at the time of receipt onto the cargo interest. They do not, however, destroy the functions and negotiable character of the bill of lading. Indeed, by CIF-A7, CF-A6 and FOB-A7 of INCOTERMS 1980[62], clauses (a) which do not expressly state that goods or packaging are unsatisfactory, e.g. "second hand cases", "used drums", etc.; (b) which exempt the carrier from liability for risks arising through the nature of goods or the packaging; and (c) which disclaim on the part of the carrier knowledge of contents, weight, measurement, quality, or technical specification of goods, such as "shipper's load and count" and "said by shipper to contain" do not convert a clean into an unclean bill of lading[63].

While Article 3 (3) of the Hague and Hague-Visby Rules and Article 15 (1) (a) of the Hamburg Rules assess the evidentiary effect of the bill of lading as conclusive against the bona fide holder, they, in return, make the shipper liable to carrier for the loss resulting from inaccuracies in such particular even if the shipper transfers the bill of lading. The carrier's right to compensate the loss, however, in no way limits his liability under the contract of carriage by sea to any other person.

3- Apparent order and condition of goods

By Article 3 (3) of the Hague and Hague-Visby Rules and Article 15 (1) (b) of the Hamburg Rules bills of lading or other transport receipts should also show the apparent

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Coutinho, Caro & Co. Ltd. [1982] 1 FC 252, 257 / *Attorney-General (ibid)* [1962] AC 60, 75; *Oricon Waren - Handels GmbH v. Intergraan NV* [1967] 2 Lloyd's Rep. 82, 90: These courts is of the view that these partial qualifying statement misleads third parties.

60 *Pincoffs Co. v. Atlantic Shipping Co.* 1975 AMC 2128 (SD Fla. 1974).

61 *The Arcadia Forest* [1986] ETL 86 (SD NY 1985).

62 In line with Article 31 (ii) of the UCP 500.

63 Goldie,C.W.H.: Documentation - The Writing on the Bill, Articles 15 to 18 of the Hamburg Rules, in Mankabady,S.(editor): the Hamburg Rules, p.209, 211.

order or condition of goods. Unlike other particulars, the apparent order and condition of goods must be described in the transport receipt by the carrier from his own observation, regardless of any declaration. Since the last paragraph of Article 3 (3) of the Hague and Hague-Visby Rules does not refer to Article 3 (3) (c) of the same Conventions, it does not deprive the carrier of having to describe the apparent order and condition of goods. If the carrier fails to note this on the transport receipt, it should, thereby, be presumed that goods were in apparent good condition[64]. This presumption is clearly approved by Article 16 (2) of the Hamburg Rules. It is conclusive if the bill of lading (transport receipt) is in the hands of a third party. Where the clean bill of lading (transport receipt) prepared by the shipper fails to accurately state the condition of goods received, the carrier has a right to refuse to sign it[65]. However, if defects are not visible or fairly ascertainable on a *reasonable* inspection, the description of the apparent order of packed or consolidated goods is needless[66]. This is the case even where the transport receipt does not include any reservation for goods packed or consolidated in a container by the shipper because the carrier is not required under the three Conventions to open up sealed packages or containers[67]. Nevertheless, the carrier must indicate the apparent order and condition of the bag or container itself in the transport receipt, such as "many bags stained, torn and re-sewn"[68] because the container or packages supplied by the

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64 *British Imex Industries v. Midland Bank Ltd.* [1958] 1 QB 542, 551 - Powles,D.G.: The Concept of a Clean Bill of Lading, JBL 123 (1981), p.123. For an opposite view, see *Tokio Marine & Fire Insurance Co. v. Retla SS Co.* 1970 AMC 1611 (9 Cir. 1970) - Scrutton,T.E.: Charterparties, p.120, n.94 / Akıncı,S.: Navlun Mukaveleri, p.106; Çağa,T.: Navlun Sözleşmesi, p.478.

65 *The Nogar Marin* [1987] 1 Lloyd's Rep. 456.

66 *Samincorp South American Minerals & Merchandise Corp. v. Cornwall* 1964 AMC 2411, 2413 (D Md. 1963); *Groban v. SS Pegu* 1972 AMC 460, 468 (SD NY 1971) - Schacar,Y.: The Container Bill of Lading as a Receipt, 10 JMLC 39, Oc'78, p.58 (to be cited thereinafter as "Container").

67 *The Katingo Hadjipatera* 1949 AMC 49, 60 (SD NY 1948); *Aetna Ins. Co. v. General Terminals* 1969 AMC 2449 (La. CA 1969); *Caemint Food, Inc. v. Lloyd Brasileiro Companhia* 1981 AMC 1801, 1812 (2 Cir. 1981); *Cigna Ins. Co. v. M/V Skanderborg* 1996 AMC 600 (DPR 1995) - UNCITRAL Working Group, Report of the Seventh Session, p.191 - Benedict,E.C.: Admiralty 2A, p.6/15; Tetley,W.: Cargo Claims, p.272, 646. For an opposite view see *M. Paquet & Co. v. Dart Containerline* 1973 AMC 926 (NY Civ. Ct. 1973) - Grönfors,K.: Container, p.300. Compare to Article 8 (3) of the CMR: Clarke,M.: Containers, p.69.

68 *The TNT Express* [1992] 2 Lloyd's Rep. 636 (Aust. NSW SC) / *Lutfy Ltd. v. CPR Co.* [1973] FC 1115: It was against the rail carrier who gave a clean receipt to the ocean carrier in through-carriage although the container was damaged at the time of receipt / *Canada and Dominion Sugar v. Canadian National (West Indies) SS Ltd.* [1947] AC 46 (PC) / *Centennial Ins. v. Constellation Enterprise* 1987 AMC 1155 (SD NY 1986); *Eastman Kodak Comp. v. Sealand Voyager* 1991 AMC 2356 (DNJ 1991) - Schacar,Y.: Container, p.41.

shipper have a nature of goods and consequently enter into the scope of the provision[69]. Otherwise, it may be assumed that damage, not only to the container but also to goods therein, arose in the course of carriage since the external feature of packages evidences the probable condition of goods therein[70].

The carrier's description as to the apparent order and condition of goods must be clear. For example, he may not issue a bill of lading showing that goods are in apparent good condition, which does not however mean that, when received, they were free of visible rust or moisture (*rust clause*). If they are in apparent rusted condition it must be stated in the bill of lading. Otherwise, the carrier is bound to his description in the clean bill of lading, and the "rust clause" must be considered invalid under Article 3 (8) of the Hague and Hague-Visby Rules and Article 23 (1) of the Hamburg Rules[71].

A bill of lading (transport receipt) which bears no superimposed clauses expressly declaring a defective condition of goods or packaging is a *clean bill of lading* (*transport receipt*). This is the definition given in CIF-A7, C&F-A6 and FOB-A7 of INCOTERMS 1980 and Article 32 (a) of the UCP 500. Normally, clean bills of lading include clauses as "shipped in (apparent) good order and condition".

Under the CIF-A7, C&F-A6 and FOB-A7 of INCOTERMS 1980[72], the CIF, C&F or FOB seller is required to surrender a clean bill of lading. If the bill of lading includes clauses which cast doubt on the apparent order and condition of goods, then it will not be good tender[73]. Similarly, Article 32 (b) of the UCP 500 prohibits banks to accept unclean transport receipts unless the Credit expressly stipulates the clauses or notations which may be accepted. As a result, the negotiability of unclean bills of lading (transport receipt) is really weak.

If the carrier does not verify the apparent order and condition of goods, he will be bound by his false description against a bona fide third party; or if he did so, he would

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69 Secretary-General: Fourth Report, p.208.
70 Grönfors,K.: Container, p.300; Schacar,Y.: Container, p.47.
71 Tetley,W.: Limitation Clauses, p.217. For an opposite view, see *Tokio Marine & Fire Ins. Co. v. Retla SS Co.*1968 AMC 1742, 1746 (CD Cal. 1968).
72 By contrast, CIF-A.8, and FOB-A.8 of INCOTERMS 1990 no longer require a clean bill of lading.
73 *The Galatia* [1980] 1 All ER 501 - Todd,P: Bills of Lading and Bankers' Documentary Credits, 2nd ed., London 1993, p.96.

issue an unclean bill of lading which would be unacceptable to his client (the shipper) and of course the shipper's client (the consignee or the bank). In order to prevent the carrier from issuing an unclean bill of lading and to obtain payment of the price or immediate documentary credit, the actual shipper normally undertakes to indemnify the carrier against loss resulting from the issuance of the bill of lading by the carrier without entering a reservation relating to the apparent condition of goods and provides a letter proving such an obligation (*letter of guarantee / indemnity*). Thus, the carrier finds an opportunity both to satisfy his client and to preserve his business networks with him.

This wrong statement made in the bill of lading has been treated as a misrepresentation. The carrier is therefore bound by his misstatement since he misleads the third party holder into acceptance of such bill. The guarantee agreement indirectly relieving the carrier of liability for loss or damage to goods under the three Conventions is also an exemption contract, and is consequently against the mandatory nature of the Rules. Hence, many Contracting States to the Hague and Hague-Visby Rules[74] and Article 17 (2) of the Hamburg Rules make this letter void and of no effect as against any third party holder of the bill of lading.

The letter of indemnity can be used by the carrier against the shipper who both are parties to a misrepresentation[75]. That is clearly allowed under Article 17 (3) of the Hamburg Rules. This is so because if the carrier is not permitted to invoke the letter against the shipper due to misrepresentation, the shipper who is also the party to such misstatement is entitled to benefit therefrom[76]. However, Article 17 (3) of the Hamburg Rules invalidates the letter of guarantee against the shipper where the carrier has issued the inaccurate bill of lading with a view to defrauding a third party holder acting in reliance on the description of the goods in such bill of lading. Indeed, it has already been held that the carrier, not showing the (evidently) apparent order and condition of goods

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[74] Article 30 of the French Law of June 18, 1966 - *Copco Steel & Engineering Co. v. S/S Alwaki* 1955 AMC 2001 (SD NY 1955); *Demsey & Assocs v. SS Sea Star* 1972 AMC 1440, 1448 (2 Cir. 1972) - Tetley,W.: Letters of Indemnity: Should They be Tolerated?, 23 McGill L.J. 668 (1977), p.671.

[75] Article 30 of the French Law of June 18, 1966.

[76] *Ben Line v. Joseph Heureux* (1935) 52 Ll.L.R. 27, 32 - Tetley,W.: Cargo Claims, p.830. For an opposite view see *Brown, Jenkinson (ibid)* [1957] 2 Lloyd's Rep. 1, 6 (CA) / *Hellenic Lines, Ltd. v. Chemoleum Corp.* 1971 AMC 2605 (NY SC, App. Div. 1971).

in the bill of lading, commits the tort of deceit, and the letter of indemnity is unenforceable[77]. In that case, the carrier also loses the benefit of the statutory limitation of liability by Article 17 (4) of the Hamburg Rules. With this aim, the shipper should show the carrier's intent to defraud, in other words, that the carrier's awareness of the misstatement was evident. Otherwise, the carrier should enforce the letter of indemnity as is in the case where the carrier had no reasonable means of checking the goods received just before the commencement of voyage, and he relied on the description given by the shipper in return for a letter of indemnity in order not to lose his customer and not to delay the completion of loading.

4- Date of receipt by carrier and quality of goods

The bill of lading (transport receipt) should also include the date when goods were taken over by the carrier at the port of loading together with the carrier's signature in order to determine time of receipt and, consequently, when liability has started and whether goods were late for delivery to the consignee. This is clearly required under Article 15 of the Hamburg Rules. Since a shipped bill of lading has been issued after goods have been received, the shipper should also ask for the inclusion of the receipt date therein.

The carrier is not required to insert quality marks in the bill lading by the three Conventions on the grounds that he is not expected to notice the quality of goods; but if he does so, he may also be bound to this statement. However, quality marks are of only *prima facie* effect at common law[78].

5- Proof of state of goods with independent evidence

If the bill of lading (transport receipt) has not been issued, or includes valid reservation clauses, or does not contain any statement as to the quantity, weight, leading marks, number of packages, pieces, or the date of receipt, the cargo interest must show the condition of goods at the time when being taken over by the carrier in other way. In the case of physical loss or damage to goods in bulk or liquid cargo, the cargo interest

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77 *Brown, Jenkinson (ibid)* [1957] 2 Lloyd's Rep. 1, 9 - Wilson,J.F.: Carriage, p.129.
78 Baughen,S.: Shipping Law, p.60.

should firstly prove the accuracy of the figures used for the measurement of goods[79]. Then, the burden is on the carrier to establish why these figures should have not been employed.

C) STATE OF GOODS AT THE TIME OF DELIVERY

The cargo interest who proved the state of goods at the time of receipt by the carrier should establish that their state at the time of delivery to the consignee was worse than their previous state. With this aim, he must survey goods and report the loss or damage to the carrier.

1- Inspection of goods

In order to supply evidence in time prior to its loss, goods should be surveyed as soon as possible before being received by the consignee. This inspection may be made by the consignee himself or any expert appointed by him. However, to use the survey report in a court as formal evidence, it must be prepared by the inspector assigned by the court or any other governmental authority, or must be accepted by the carrier[80]. Under Section 535 of the Canadian Shipping Act 1985, the carrier was also obliged to call the port warden to open hatches and to make a survey if he suspects that there is damage to cargo. Otherwise, the damage was deemed to have arisen from improper stowage or negligence.

This right should be used before goods are received by a consignee. He can avoid removing them until the inspection of their apparent states ends. In that case, the carrier has no right to place them at the consignee's disposal and to release himself from liability.

The subject of survey is the determination of the number, quantity, weight, general nature, apparent and physical order and condition of goods including their packages and containers at their arrival. If possible, the cause of physical loss of or damage to goods, such as insufficiency of packaging or marks, must also be reported.

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79 *The George S.*, [1987] 1 Lloyd's Rep. 69, 74 - Todd,P.: Bills of Lading, p.232.
80 § 610 of the German Commercial Code 1897; Article 1065 of the Turkish Commercial Code 1956.

The inspection can be made by the consignee and the carrier jointly. Although a consignee is not obliged to call a joint survey under the three Conventions, he should invite the carrier to a survey of goods by notifying the carrier of the place and time goods are examined whenever they have been received in poor condition. Otherwise, the carrier could also ask for a joint survey to be held[81]. If goods are inspected onboard the ship by a consignee, the survey will be deemed a joint one because the examination on the vessel is only possible with the carrier's consent[82]. Similarly, if the carrier and the consignee have appointed the same representative at the port of arrival, the survey should be considered jointly held by such representative[83].

Article 3 (6) (V) of the Hague and Hague-Visby Rules and Article 19 (4) of the Hamburg Rules, in the case of an actual or apprehended loss or damage, oblige the carrier and the cargo interest to give all reasonable facilities to each other for inspecting and tallying goods. Otherwise, the adverse party is treated to have discharged his burden of proof. If necessary, the carrier should permit the cargo interest onboard to examine cargo unless the carrier's position is, thereby, aggravated. When the carrier without any reason withholds permission, the surveyor ought to note that on his report.

The expenses arising from the inspection are borne by the applicant. Yet, if any (physical) loss or damage for which the carrier is liable is ascertained on the inspection, the carrier should cover these expenses incurred by the consignee[84].

2- Notice of loss or damage

In order to give the carrier an opportunity to examine goods, to assess loss or damage and to collect evidence in time, the burden of notice for (physical) loss or damage, specifying the general nature of such loss or damage, in writing to the carrier is imposed on the consignee (cargo interest) under Article 3 (6) of the Hague and Hague-Visby Rules and Article 19 of the Hamburg Rules.

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81 *Cour d'Appel d'Aix,* December 11, 1952, DMF 381 (1953).
82 *Rechtbank Van Koophandel Van Antwerpen,* January 28, 1981, [1982] ETL 28.
83 Tetley,W.: Cargo Claims, p.295.
84 § 613 of the German Commercial Code 1897; Article 1068 of the Turkish Commercial Code 1956.

Notice must be given by the consignee or his representative. Once goods are received by sub-carriers, stevedores, terminal operators, truckers or any other person acting on behalf of the consignee, they must also inform the carrier of (physical) loss or damage and must avoid issuing any clean receipt. Otherwise, the consignee is deemed not to give notice, and the (physical) loss or damage is presumed to happen while goods have been in the consignee's and consequently his representative's custody [85].

Notice should be given to the carrier or his representative. If goods have been delivered by a sub-carrier, any notice given to him should have the same effect as if given to the carrier[86]. This is clear under Article 19 (6) of the Hamburg Rules. Nevertheless, the same stipulation also provides that any notice given to the (contracting) carrier shall have effect as if given to the sub-carrier. Since the carrier may not be obliged to inform the sub-carrier of notice under domestic law, this provision is ambiguous.

By Article 3 (6) of the Hague and Hague-Visby Rules, notice must specify the general nature of loss or damage. It is not necessary to show all their features. To examine loss or damage in detail is a question of fact before courts. However, reservations in notice must not be too general.

Notice ought to be made in writing. The *poor condition receipt* at delivery, or *tally slips* prepared by a stevedore[87], is a written notice for the purposes of the Conventions. Accordingly, in order to clarify the Hague Rules, Section 1303 (6) of the US COGSA 1936 permits the endorsement of the notice of loss or damage upon receipt of goods given by the person taking delivery thereof.

Under Article 3 (6) of the Hague and Hague-Visby Rules, a distinction is made between apparent and non-apparent (physical) loss or damage regarding the time of notice. Accordingly, the notice should be given either before or at the time of the removal of goods into the consignee's custody, or if the loss or damage is not apparent,

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[85] *Tribunal de Commerce de la Seine*, February 23, 1960, DMF 365 (1960) - Harrington,S.: Legal Problems Arising from Containerisation and Intermodal Transport, 17 ETL 3 (1982), p.9.
[86] Scrutton,T.E.: Charterparties, p.435.
[87] *Cour de Cassation*, February 23, 1968, [1971] ETL 477.

within three (consecutive[88]) days. During negotiations heading to the provision, it was customary that the carrier did not have any representative at the port of arrival, and that his only agent (the master) left the port of discharge immediately goods were unloaded. Subsequently, the carrier did not have any chance to survey the reported loss or damage after the ship commenced her voyage. For that reason, the time for notice is so shortened that the master would be able to check goods. Nowadays, however, carriers have agents who may inspect cargo on their behalf at the port of arrival. As a consequence, the period should be extended to a few days in order to allow the consignee to examine goods carefully.

On this account, Article 19 (1) and (2) of the Hamburg Rules requires notice given not later than the working day after the day when the goods were delivered to the consignee, where the loss or damage is not apparent, within 15 consecutive days. Nevertheless, 15 consecutive day period is such a long term that goods in the consignee's custody might suffer loss or damage due to different causes. It should, therefore, have been limited to the terms of 7 consecutive days in which cargo could normally be examined. This is also the case under Article 30 (1) of the CMR and Article 46 (2) of the CMI 1970[89]. Moreover, to reduce the period does not change the legal position of the consignee by much because absence of notice does not alter the burden of proof anyway.

It was found unfair that a clean receipt for goods on delivery by the carrier is not even *prima facie* evidence of the taking over by the consignee in good order and condition until the time for notice expires whereas his unqualified receipt for goods on delivery by the consignee is *prima facie* evidence of the handing over by the carrier in good order and condition immediately the bill of lading (transport receipt) is issued[90]. Nonetheless, it must be remembered that in the latter the carrier has an opportunity to examine goods before submitting the bill of lading (transport receipt) whereas in the former the

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[88] By contrast, under Article 57 of the French Decree No. 66-1078 of December 31, 1966 only working days were counted.

[89] However, in these Conventions working days are taken into account. Yet, the consecutive day provision is fine one because of not leading to any problem concerning how to count days and holidays: Murray,D.E.: Hamburg Rules, p.79.

[90] McGovern,N.: Shipowner, p.7.

consignee has to receive goods without checking their non-apparent state in return for a clean receipt so as not to put himself in default.

Loss of or damage to goods in parcels, packages or containers are considered non-apparent loss or damage so long as the carrier does not inform the cargo interest of such loss or damage by, for instance, keeping cooperage book or tagging packages[91].

When Article 3 (6) of the Hague and Hague-Visby Rules was drafted, non-physical loss or damage was not taken into consideration[92]. It is unjust to apply such provision to that sort of loss or damage because it may often arise after many days when goods are taken over by the consignee. In that case the longer period of time for notice ought to be granted by court. Accordingly, under Article 19 (5) of the Hamburg Rules a notice of non-physical loss or damage resulting from delay in delivery is required to be endorsed within 60 consecutive days after the day when goods were delivered to the consignee. Nonetheless, this period is one of the few exceptions in the Hamburg Rules limiting the carrier's liability more than the Hague and Hague-Visby Rules which limits amount of loss in the case of delay in delivery under the principle of *restitutio in integrum*.

The period of notice for non-apparent loss or damage begins with the receipt of goods by the consignee or his representative including the inland carrier appointed by him[93]. With this aim, possession of cargo must be transferred to him with his and the carrier's consent. The consignee may not postpone the time of notice by avoiding taking over goods presented pursuant to the terms of the contract of carriage[94]. Otherwise, he puts himself in default. Accordingly, a consignee who does not receive goods from a carrier is regarded to be in their charge from the time when they are placed at the consignee's disposal in accordance with the contract, law or the usage of a particular trade, applicable at the port of discharge. The period, therefore, begins when the cargo

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91 Tetley,W.: Cargo Claims, p.874.

92 Ganado,M.-Kindred,H.M.: Delays, p.23.

93 Ward,J.R.: The Floundering of "Delivery" under Section 3 (6) of COGSA: A Proposal to Steady Its Meaning in Light of Its Legislative History, 24 JMLC 287, Ap'93, p.332 (to be cited thereinafter as "delivery"). For an opposite view see *Leather's Best International, Inc. v. M/V Lloyd Sergipe* 1991 AMC 1929 (SD NY 1991): delivery to the trucker appointed by the consignee was decided not to constitute delivery to the cargo interest.

94 *Lithotip, CA v. SS Guarico* 1985 AMC 1813 (SD NY 1984): The court dismissed the consignee's case because he received the cargo 4 day late after Customs had issued a gate pass.

interest is notified, and cargo is presented in accordance with the contract[95]. If goods are delivered to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, they must be handed over, the consignee cannot be deemed to take them over[96]. The authority or other third party is not a consignee's servant or agent[97]. Such an authority, who does not normally accept any liability for goods under their control, may not make proper tally and inspection and give accurate notice to the carrier. A consignee like a carrier might be incapable of actually looking after goods in the third party's custody[98]. However, where there is a fault shifted on to the consignee, for example, he might not have followed a procedure to receive goods from a port authority, it is just to presume him to have taken delivery of goods.

In case of total (physical) loss, there is nothing to be delivered; the consignee does not have to give notice to the carrier.

Article 3 (6) (III) of the Hague and Hague-Visby Rules and Article 19 (3) of the Hamburg Rules release the consignee from giving notice of loss or damage ascertained during a joint survey or inspection by parties (the carrier and the consignee). Failure by the carrier to join in an inspection upon proper invitation is *prima facie* evidence of the poor state of goods at the time of delivery[99] provided that the survey is made on time[100].

Article 3 (6) of the Hague and Hague-Visby Rules and Article 19 (1) of the Hamburg Rules lay down a sanction for failure to give notice so that receipt of goods by the cargo

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95 For an opposite view see *Mendes Junior International Co. v. M/V Sokai Maru* 758 F Supp. 1169 (SD Tex 1991): Without examining whether the consignee was able to accept cargo, the court decided that delivery completes upon notice and discharge. By contrast, in *Atlantic Mutual Insurance Companies v. M/V Balsa 38* 1989 AMC 356 (SD NY 1988) it was held that delivery completes after inspection of cargo by the consignee.

96 *National Packaging Corp. v. Nippon Yusen Kaisha* 1972 AMC 2537 (ND Cal. 1972); *Orient Atlantic Parco, Inc. v. Maersk Lines* 1991 AMC 148 (SD NY 1990) . For an opposite view see *American Hoesch v. SS Aubade* 1971 AMC 1217 (D.C.C. 1970); *Bottom Line Imports v. Korea Shipping Corp.* 1982 AMC 418, 422 (NJ 1981): The courts decided that delivery of cargo to a port authority qualifies delivery to the consignee as the port authority acts on his behalf. - Ward,J.R.: Delivery, p.332.

97 *Lithotip (ibid)* 1985 AMC 1813 (SD NY 1984) .

98 However, in France the burden of proof for the state of goods at the time of delivery to the port authority is shifted onto the carrier: *Cour d'Appel d'Aix*, February 27, 1980, DMF 736, 739 (1980); *Cour d'Appel de Paris*, April 29, 1982, DMF 274, 280 (1983).

99 *Rechtbank Van Koophandel Van Antwerpen*, September 4, 1979, [1980] ETL 291 / *C Itoh & Co. v. Hellenic Lines, Ltd.* 1979 AMC 1923, 1926 (SD NY 1979).

100 *INA v. Hellenic Lines* 1979 AMC 2424 (Mun. Ct. of Phil. Pa. 1979): Even survey held twelve days after delivery was considered insufficient.

interest is *prima facie* evidence of delivery by the carrier of the goods as described in the bill of lading or any other transport receipt or, if no such document has been issued, in good condition[101]. In that event, a cargo interest must adduce a proof to the contrary to rebut the presumption *de juris tantum*. One who wishes to overcome the presumption should collect all necessary evidence[102] and should act quickly[103].

Since a cargo interest is already obliged to prove loss or damage so as to claim damages, failure to give notice does not change his legal position very much[104]. However, once notice is given, loss or damage is presumed to take place before delivery. Under German and Turkish law, the second sanction is introduced so that, in case of failure to give notice, loss or damage is regarded to result from one of the exempted causes for which the carrier is not liable[105].

In order to clarify the Hague Rules, Section 3 (6) (prgf. IV) of the US COGSA expresses that failure to give a notice of loss or damage shall no longer affect or prejudice the right of the cargo interest to bring suit[106]. By contrast, Article 19 (5) of the Hamburg Rules provides no compensation for loss or damage resulting from delay in delivery unless notice has been given on time.

Upon receiving a notice of loss or damage the carrier should prove that goods were in good condition at the time of delivery by employing tally services and similar methods as soon as possible, and must, if necessary, call joint survey.

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[101] *EM Jones v. Polynesia Line*, 1977 AMC 1664 (D. Ore 1977); *Sumitomo Corp. v. Sie Kim*, 1987 AMC 160 (SD NY 1985.); *Sogem Afriment v. M/V Ikan Selayang* 1998 AMC 1366 (SD NY 1996).

[102] In some cases, only documentary evidence has been seen sufficient by courts: *MV Zack Metal Co. v. SS Bimingham City* 1962 AMC 919 (2 Cir. 1961); *NE Petroleum v. Prairie Grove* 1977 AMC 2139, 2143 (SD NY 1977). By contrast, in *Harbert Internat. Estab. v. Power Shipping* 1983 AMC 785 (5 Cir. 1981) testimonial evidence was found enough.

[103] *Assoc. Metals and Minerals Corp. v. M/V Rupert de Larrinage* 1979 AMC 483 (5 Cir. 1978); *Castle and Cooke v. Moller SS Co.* 1980 AMC 2723 (SD NY 1980).

[104] Carver,T.G.: Carriage, p.370; Scrutton,T.E.: Bill of Lading, p.440.

[105] See § 611 of the German Commercial Code 1897; Article 1066 of the Turkish Commercial Code 1956. This sanction was not accepted in IMC International Sub-Committee Report 1962, p.76 proposing the amendment on the Hague Rules. The sentence "... but shall have no other effect on the relations between the parties." was therefore added to the first paragraph of Article 3 (6).

[106] *Southern Cross* 1940 AMC 59, 62 (SD NY 1939); *Berkery Inc. v. USA*, 1949 AMC 74 (SD NY 1948); *Fire Assoc. of Phila. v. Isbrandtsen Inc.*, 1950 AMC 2017 (NY SC 1950).

Clauses in the contract of carriage which shorten the time for notice[107], aggravate the sanction for failure to give notice[108], limit persons who may give or receive notice, or complicate the formality of notice are exemption clauses relieving the carrier of liability or lessening such liability, and are null and void according to Article 3 (8) of the Hague and Hague-Visby Rules and Article 23 of the Hamburg Rules. Moreover, law, custom or practice at the port of arrival cannot make notice of loss or damage more difficult by, for example, requiring that it should be given to Customs & Excise as well as to the carrier[109].

The burden of proving that notice was properly given on time is placed on the consignee[110]. He is advised to use a registered letter or telex.

III.CONCLUSIONS

(1) The cargo interest claiming damages must prove that the contract was breached while the carrier was in charge of goods because the carrier's liability covers the period during which he is in custody of them onboard the ship or on shore. This is apparent under Article 4 (1) of the Hamburg Rules.

(2) Liability begins with receipt of goods and ends with their delivery by the carrier. Receipt and delivery are mutual legal transactions depending on the consents of parties and the transfer of possession. However, if the consignee has not taken necessary steps to remove the cargo presented pursuant to the contract of carriage, the carrier could place it at his disposal; in that case the cargo is deemed to be taken over by the consignee in default. Similarly, where goods are firstly received by an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading or discharge, goods must be handed over, there is no receipt for the purposes of the three Conventions. The carrier who has compulsorily handed over goods to a third party relieves himself of liability since they are no longer under his control. Article 4 of the Hamburg Rules unlike the Hague and Hague-Visby Rules lays down the period of liability clearly and fairly.

(3) The cargo interest must prove the state of goods when the carrier received them by evidence such as bills of lading or other transport receipts. The bill of lading or transport receipt is *prima facie* evidence of the taking over of goods by the carrier. Such proof must not, however, be adduced against the bona fide third party holder who has acted in reliance on the description of goods in the bill of lading. This is clear under Article 16 (3) (b) of the Hamburg Rules. By Article 3 (4) of the Hague-Visby Rules, the third party in good faith does not need to have acted in reliance on the description.

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[107] *Colonial Sugar Refining Co. Ltd. v. British India Steam Navigation Co. Ltd.* (1931) 32 SR (Aust. NSW Ct.) 245 (one month) / *Zarembo (Balfour, Guthrie & Co. v. American-West African Line)* 1943 AMC 954 (2 Cir. 1943); *US v. Farrell Lines* 1982 AMC 1904 (D. Md. 1980): Ten days.

[108] *Elser, Inc. v. Internat. Harvester* 1955 AMC 1929 (Philip. SC 1954) / *Coventry Sheppard & Co. v. Larrinaga SS Co. Ltd.* (1942) LI.L.R. 256.

[109] *Lidner & Co. v. Farley and Fearey* 1938 AMC 805 (SD NY 1938).

[110] *Rechtbank Van Koophandel Van Antwerpen,* October 20, 1966, [1969] ETL 131.

(4) Under Article 15 (1) of the Hamburg Rules as distinct from Article 3 (3) (a) of the Hague and Hague-Visby Rules, the carrier is justly required, on demand of the actual shipper, to issue to him a transport document showing among other things not only the number of packages or pieces, but also the weight and the general nature of goods.

(5) Article 3 (3) of the Hague and Hague-Visby Rules, which allows carrier not to state or show in the bill of lading any particulars furnished by the actual shipper is contrary to commercial practice and the functions of bills of lading. As a result, under Article 16 (1) of the Hamburg Rules, the carrier is obliged to insert in the bill of lading a reservation together with its reasonable ground in order to exclude himself from being bound by particulars furnished by the actual shipper.

(6) If the carrier fails to note on the bill of lading the apparent order and condition of goods, it should be presumed that they were in apparent good order and condition. This presumption is also made under Article 16 (2) of the Hamburg Rules.

(7) Any letter of guarantee must be held void as against any third party holder, but valid between the actual shipper and the carrier insofar as the carrier did not defraud a third party holder acting in reliance on the description of the goods in such bill of lading, as clearly laid down under Article 17 (2) of the Hamburg Rules.

(8) The cargo interest or his representative including an inland carrier, who has proved the state of goods at the time of receipt by the carrier, must show that they are in worse state at the time of their receipt by the consignee. With this aim, he must inspect goods before and after taking over, and, if he finds that they are not in good order and condition, must give a notice to the carrier of the general nature of such (physical) loss or damage. While the time for notice under Article 3 (6) of the Hague and Hague-Visby Rules is insufficient not to give the cargo interest an enough opportunity to examine goods carefully, under Article 19 (1) and (2) of the Hamburg Rules is so long to lead to additional loss or damage. Although under Article 19 (5) of the Hamburg Rules, the time for notice of loss resulting from delay in delivery is fixed, this provision might be construed as narrowing the carrier's liability. Failure to give a notice of loss or damage does not affect or prejudice the right of the cargo interest to bring suit, but only presumes that there was no loss or damage which occurred during carriage. By comparison, Article 19 (5) of the Hamburg Rules forbids any compensation for loss resulting from delay in delivery unless a notice has been given in statutory time.

Chapter Eight

LOSS RESULTING FROM BREACH OF THE CARRIAGE OBLIGATION

The carrier's liability lastly depends on the existence of loss suffered by the cargo interest resulting from breach of the contract of carriage. Loss is one of the essential conditions of all liabilities. The carrier is not liable if there is nothing suffered by the aggrieved party. As a result, the cargo interest who sustains loss is obliged to prove it and its monetary extent in order to claim damages[1]. Loss suffered by the cargo interest must be separated from that of goods. This distinction is clearly made under Article 5 (1) of the Hamburg Rules: "The carrier is liable for loss arising from loss of or damage to the goods, as well as from delay in delivery". Otherwise, these two meanings of the same word could be confused, which was the case when Continental Contracting Countries to the Hague and Hague-Visby Rules included the expression "loss or damage" in Article 4 (1), (2) and (4) into their domestic legislation as "loss of or damage to goods" and construed it as "physical" loss or damage.

I. DEFINITION OF LOSS

Under the three Conventions, the carrier's liability is for loss. Loss is a decrease in the aggrieved party's assets[2]. A decrease in assets may be seen as an increase in passive assets, such as debts, as well as a reduction in active assets, such as credits. By contrast, the mental and spiritual anguish arising from breach of the contract of carriage cannot be compensated under the Rules[3]. For that reason, only decrease in pecuniary assets, which is called as *pecuniary loss* and separated from moral loss in civil law has a ground for liability under the Rules.

To hold the carrier liable according to the Rules, there must also be *contractual* loss which results from breach of the contract of carriage and which relates to carried goods[4].

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1 *Toho Brussan Kaisha, Ltd. v. American President Lines, Ltd.* 1959 AMC 1114 (2 Cir. 1959); *Interstate Steel Corp. v. SS Crystal Gem* 1970 AMC 617 (SD NY 1970).

2 Akünal,T.: Haksız Fiilerde Denkleştirme Sorunu, İstanbul 1977, p.43; Tandoğan,H.: Mesuliyet Hukuku, p.63.

3 *Santiago v. Sea-Land Service, Inc.* 1974 AMC 673 (D PR 1973).

4 Tetley,W.: Measure of Damages; Hague Rules, Visby Rules, UNCITRAL, 12 ETL 339 (1977), p.343 (to be cited thereinafter as "Measure").

In the case of physical loss of or damage to goods, the causation of loss by breach can clearly be seen from the apparent state of goods. By contrast, the existence of causal relation between loss arising from non-physical loss or damage and the violation of contract might not be so obvious. In that event, the cargo interest must show that the benefits expected from goods have dropped due to breach of contract, for example, by delay in delivery. However, he does not need to prove the occurrence which has caused loss or damage and, therefore, loss.

II. QUANTUM OF LOSS

A) GENERAL

The burden of proof for the monetary extent of loss is shifted to the cargo interest[5]. He must adduce evidence to prove the amount of loss suffered by him with reasonable certainty. Otherwise, he will not be awarded damages[6].

According to the principle of *restitutio in integrum*, the aggrieved party must, by compensation, be put into the same position as he would have been had the contract been duly performed[7]. Not all types of loss can be recoverable, though. Indeed, in breach of contract, loss to be compensated must firstly have been foreseen or foreseeable by a prudent carrier at the time of the contract (*foreseeable loss*) because how much care is to be taken for goods to be carried, expense is to be born, risk is to be insured and finally freight is to be agreed depend on the extent of loss foreseeable by the carrier. Ordinary loss arising naturally from breach of the contract is of foreseeable nature. By contrast, extraordinary loss which could not be anticipated by the prudent carrier should have been communicated to him by the shipper (cargo interest) at the time of the agreement[8].

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5 *Toho Bussan (ibid)* 1959 AMC 1114 (2 Cir. 1959).

6 *Erie County Natural Gas and Fuel Co. Ltd. v. Carroll* [1911] AC 105, 118 (PC) / *First National Bank of Chicago v. Jefferson Mortgage Co.* (1978) 576 F 2d 479 (3 Cir. 1978); *Bally Inc. v. M/V Zim America* 1994 AMC 2762 (2 Cir. 1994); *RBK Argentina v. M/V Dr Juan B Alberdi* 935 F Supp. 358 (SD NY 1996); *AIG Europe v. M/V MSC Lauren* 940 F Supp. 925 (ED Va. 1996).

7 *Sally Wertheim v. Chicoutimi Pulp Co.* [1911] AC 301; *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 2 KB 528, 539 - Wood,G.F.: Damages in Cargo Cases, 45 Tul.L.Rev. 932 (1971), p.932 (to be cited thereinafter as " Damages").

8 Article 1150 of the French Civil Code 1804 - *Hadley v. Baxendale* (1854) 9 Ex. C.R. 341, 354, 156 ER 145, 151 (Adm. Ct.) / *The Heron II* [1969] 1 AC 350, 388, 406, 410, 414 (HL) / *BF McKernin & Co. v. US Lines* 1976 AMC 1527, 1531 (SD NY 1976) - Gaskell,N.: Damages, Delay and Limitation of Liability, in European Institute of Maritime and Transport Law (ed.): The Hamburg Rules, Maklu 1994, p.129, p.131 (to be cited thereinafter as "Damages").

As to which loss is foreseeable and ordinary can only be decided on the circumstances of each case[9]. The test of whether loss could have been predicted is objective; i.e., that of a *prudent carrier* in the carrier's shoes[10].

Secondly, loss must have been actually sustained by the aggrieved party (*actual loss*). This is clearly required by Section 4 (5) of the US COGSA 1936[11]. Otherwise, a claim for damages should be dismissed under the principle of *damnum absque injuria* even if there is physical damage to goods as is in the case where the consignee sold damaged cargoes at market by sample and none were refused, nor were any refunds demanded[12]. A court must assess all types of loss actually suffered until the time the decision has been reached because loss is not limited only to present loss, but also to future loss foreseen by the prudent carrier under the principle of *restitutio in integrum*. For example, the carrier's action may have led to the deterioration of the packaging of goods and may thereby subsequently have damaged packed cargo or other goods belonging to the cargo interest. If the extent of loss is calculated as from the day the loss or damage has occurred, such future loss actually suffered until the court render its decision could never be measured. However, Article 19 (5) of the Hamburg Rules does not allow the recovery of future loss resulting from delay if it has occurred after 60 consecutive days of delivery to the consignee.

B) DIFFERENCE THEORY

The difference theory explains how to calculate loss. Accordingly, loss consists of a difference between the states of the aggrieved party's assets prior and subsequent to breach of the contract[13]. In calculation of net loss not only decreases but also increases in

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9 *Monarch SS Co., Ltd. v. Karlshamns Oljefabriker (A/B)* [1949] AC 196, 222 (HL).

10 *The Pegase* [1981] 1 Lloyd's Rep. 175, 182 (QB).

11 Section 1304 (5) of the US COGSA 1936 - *Victoria Laundry (ibid)* [1949] 2 KB 528, 539 / *Salzman Tobacco v. SS Mormacwind,* 1967 AMC 277, 281 (2 Cir. 1967); *Dixie Plywood Co. v. SS Federal Lakes et al,* 1976 AMC 439, 444 (SD Ga. 1975). In *BF McKernin (ibid)* 1976 AMC 1527 (SD NY 1976) it was held that there was no actual loss sustained since the goods were sold for the same price they would have received had they arrived on time - Blachman,D.M.: Punitive Damages under the Carriage of Goods by Sea Act: A Bulkhead is Breached, 62 Wash.L.Rev. 523 (1987), p.526.

12 *Stein v. US Lines Co.* 1957 AMC 272 (SD NY 1956).

13 *4. HD.*, 12.1.1981, E.1981/133941, K.1982/274 - İnan,A.N.: Borçlar Hukuku, Genel Hükümler, 3rd ed., Ankara 1984, p.474 (to be cited thereinafter as "Borçlar Hukuku"); Karahasan,M.R.: Sorumluluk ve Tazminat Hukuku, Vol.I, İstanbul 1989, p.147; Tunçomağ,K.: Borçlar Hukuku, p.806.

assets due to such breach are taken into account, and net loss sustained by the aggrieved party can be determined by deducting benefits from decreases in assets.

1- Decreases in assets

Quantifying decreases in assets is a matter of opinion and highly dependent on the facts of each case, consequently on the type of decrease, the method used for its calculation and the nature of goods.

a-. Decrease in value of goods carried

The decrease in the value of goods carried may result from either physical or non-physical loss or damage. If goods are rotten or rusted during carriage, their price unfortunately goes down. Again, seasonal cargo, such as vegetable or fruit, and goods having a fluctuating value, such as oil or natural gas, may lose their value owing to high inflation or change in supply and demand.

The Hague Rules do not contain any provision concerning the calculation of decrease in the value of goods carried. As a result, its measure depends on domestic law[14]. Contracting States have mostly preferred the objective method which calculates loss by reference to the value of the damaged or lost part of cargo at the time and place of discharge[15]. Arrived sound market value less arrived damaged market value is equal to the said value[16]. This method is clearly accepted under Article 4 (5) (b) of the Hague-Visby Rules in order to determine the method used for calculation of the foreseeable decrease in value of goods carried[17].

Arrived sound market value and damaged market value are fixed considering the date and place at which goods are discharged from the ship in accordance with the contract

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[14] Gaskell,N.: Damages, p.136.

[15] Tetley,W.: Measure, p.339.

[16] § 429, 430, 658 and 659 of the German Commercial Code 1897; Articles 785, 786, 1112 and 1113 of the Turkish Commercial Code 1956 - *Tribunal de Commerce de Rouen*, February 23, 1962, DMF 294 (1962) / *US SS Co. v. Haskins* 181 F 962 (9 Cir. 1910); *US v. Middleton* [1925] AMC 85, 103 (4 Cir. 1925); *Holden v. SS Kendall Fish* 1968 AMC 2080 (5 Cir. 1968); *Seguros Banvenez SA v. Oliver Drescher* 1985 AMC 2180, 2185 (2 Cir. 1985). For the same decision discussing the measure of damages for loss arising from delay in delivery see *Atlantis Mutual Insurance Companies v. Poseidon Schiffahrt* 1963 AMC 665, 669 (7 Cir. 1963).

[17] Ganado,M.-Kindred,H.M.: Delays, p.128.

or, in case of non-delivery, at which they should have been so discharged. A cargo interest, therefore, benefits from all increases in sound market value until goods are discharged at the port of arrival[18].

The market value of lost or damaged part of goods should be fixed according to the *commodity exchange price* if any. Exchanges are markets founded by law for commodities such as grain, rubber and sugar to be traded[19]. The price of goods registered in the exchange is regularly published in a list. The existence of an exchange at the place where loss is to be calculated is not necessary. The important thing is that trade should be made in view of any exchange price there[20]. In the absence of sale published, the nearest sale dates are taken into account[21].

If there is no commodity exchange price, the value shall be ascertained according to the *current market price*. The current market price is a price of a particular merchandise in a regular trade in a specific market[22]. The lowest or highest prices fixed by government are also reflected in these kinds of prices[23]. In the absence of a market at the destination for lost or damaged goods, the nearest existing market price may be applied[24]. It is important to find out whether merchandise would be sold wholly or retailed because the wholesale price is normally lower than the retail price[25]. Usually, the market value would be the wholesale value unless the cargo interest has specially communicated to the carrier that goods are to be retailed[26]. If goods are intended to be exported and their export market price is less than domestic market value as is the

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[18] *JM Rodriguez & Co. v. Moore-McCormack Lines* 1972 AMC 965, 967 (NY App. Div. 1972).

[19] Tandoğan,H.: Borçlar Hukuku Özel Borç İlişkileri, Vol..I/1, Kendine Özgü Yapısı Olan ve Karma Sözleşmeler, Satış ve Çeşitleri, Trampa, Bağışlama, 4th ed., Ankara 1985, p.142 (to be cited thereinafter as "Özel Borç İlişkileri, Vol..I/1").

[20] Arkan,S.: Taşıyıcının Sorumluluğu, p.154.

[21] *Levatino Co. v. American President Lines* 1965 AMC 2386, 2393 (SD NY 1965) - Tetley,W.: Measure, p.341.

[22] Arkan,S.: Zıya Nedeniyle Ödenecek Tazminatın Belirlenmesinde Esas Alınan Değer ve İadesi Gereken Masraflar, Batider, Aralık 1987, Vol.XIV, Is.2, p.25, 28.

[23] Atabek,R.: Taşıma Hukuku, p.267.

[24] *Sanib Corp. v. United Fruit Co.* 1947 AMC 419 (SD NY 1947).

[25] Arkan,S.: Taşıyıcının Sorumluluğu, p.154.

[26] *McNeely & Price Co. v. Ellerman & Bucknall Co.* 1951 AMC 1620 (E.D. Pa. 1951); *National Distillers Products Corp. v. Companhia Nacional de Navegacoa* 1952 AMC 1613 (ED Pa. 1952); *Santiago (ibid).* 1974 AMC 673, 681 (D PR 1973) - Wood,G.F.: Damages, p.939.

normal case today, the export market price should be born in mind since the cargo interest's loss is limited to the decrease in the assets actually suffered[27].

If there is no commodity exchange price or current market price due to lack of comparable sales, the market value of merchandise is the normal value of the same kind and quality (*objective price*). Goods whose prices depend on the degree of buyers' desires such as work of art have no current market price. So their market value is determined regarding the objective price[28].

In the case of *total loss*, since there is no damaged market value, the measure of compensation equals the sound market value at the destination to which the carrier undertook to carry them[29].

The objective method can be used just for the calculation of foreseeable decrease in value. However, by some school of thoughts, the objective method and Article 4 (5) (b) of the Hague-Visby Rules can also limit the whole decreases in assets (loss) to the decrease in value of goods carried[30]. There are four reasons showed in favour of this view:

Firstly, it is suggested that the wordings, "*total amount recoverable*" in Article 4 (5) (b) of the Hague-Visby Rules places specific limit on the compensation[31]. Secondly, it is advocated that the amount of loss more than the value of cargo can never be foreseen by a prudent carrier. Again, it is pointed out that both the carrier and the cargo interest benefit from the limitation of loss the value of goods since the court cannot decide amount of compensation more or less than it[32]. Finally, it is submitted that the carrier's liability is aggravated, in order to relieve himself of liability, by requiring him to prove

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27 *US v. The Holland* 1958 AMC 1904 (D. Md. 1958).

28 Akıncı,S.: Taşıyanın, Navlun Mukavelesinden ve Konişmentodan Doğan Sorumluluğu, Doçentlik Tezi, İstanbul Üniversitesi Hukuk Fakültesi 1960, p.169 (to be cited thereinafter as "Taşıyanın Sorumluluğu") and Navlun Mukaveleri, p.356; Tandoğan,H.: Özel Borç İlişkileri I/1, p.142.

29 *St Johns NF Shipping Corp. v. SA Compania Geral* 1923 AMC 1131 (1923).

30 Tetley,W.: Measure, p.361: The author argues that this Article limits the whole loss the decrease in value of goods carried and that damages for delay, other foreseeable damages and punitive damages are probably ruled out / Eren,F.: Borçlar Hukuku, Genel Hükümler, Vol.II, 2nd ed., Ankara 1988, p.320 (to be cited thereinafter as "Borçlar II").

31 In this line see Memorandum by the UK Government, Document No.14 rev.1, Diplomatic Conference, p.207 (cited in Gaskell,N.: Damages, p.138.) and Tetley,W.: Cargo Claims, p.331.

32 Wüstendörfer,H.: Seehandelsrechts, p.285 / Çağa,T.: Navlun Sözleşmesi, p.165; Okay,S.: Navlun Sözleşmesi, p.203; Yazıcıoğlu,E.: Hamburg Kuralları, p.132, n.391.

not only lack of fault but also the occurrence which has caused loss; thus, the balance of interest is rebuilt by limiting the amount of loss to the market value of the merchandise.

Although it is not easy to interpret the wordings, "*total amount recoverable*" in Article 4 (5) (b) of the Hague-Visby Rules, it seems clear from the explanations made[33] during the Conference that Article 4 (5) (b) deals with the method of calculating the decrease in the value of goods rather than a supplementary limit for damages[34]. The objective method is only one technique of quantifying the extent of loss suffered by the cargo interest. The dominant rule of law is the principle of *restitutio in integrum*, and any method can only be justified if they give effect to that rule[35]. It has not been appropriate to take only the market value of goods carried into consideration when calculating loss because loss is an interest of the aggrieved party not to suffer any decrease in his assets. As a consequence, subjective elements must be used for the calculation of reduction in such interest insofar as they were communicated to the carrier at the time of the contract (*subjective method*)[36]. Where the lost or damaged goods have relation with other things in the aggrieved party's assets, to assume that loss of that interest consists of just the decrease in market value of the carried good makes the compensation for total foreseeable loss impossible. Moreover, it is wrong to limit the foreseeable loss only to the decrease in value of goods carried. Other decreases in assets, such as decrease owing to court costs could be foreseen by a prudent carrier[37]. Otherwise, as a general principle of law, to claim compensation, the shipper (cargo interest) should have notified the carrier beforehand. While the carrier is entitled to limit

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[33] Diplomatic Conference, p.115 (by Sir Kenneth Diplock) and p.95 (by M. Van Ryn) (cited in Gaskell,N.: Damages, p.139.).

[34] Gaskell,N.: Damages, p.139.

[35] *A/B Karlshamns v. Monarch SS Co.* (1949) Ll.L.R. 137, 154; *Victoria Laundry (ibid)* [1949] 2 KB 528, 539 / *US v. Palmer & Parker Co.* (1932) 61 F 2d 455 (1 Cir. 1932); *Dixie Plywood Co. v. SS Federal Lakes et al* 1976 AMC 439, 444 (SD Ga. 1975).

[36] İnan,A.N.: Borçlar Hukuku, p.325.

[37] *Victoria Laundry (ibid)* [1949] 2 KB 528, 539; *The Heron II* [1969] 1 AC 350, 388, 406, 410, 414 and 425 (HL) / *BF McKernin (ibid)* 1976 AMC 1527 (SD NY 1976) the claim for damages was rejected on the grounds that the cargo interest did not prove that the carrier had known or foreseen the future loss.- Ganado,M.-Kindred,H.M.: Delays, p.116; Meng,T.L.: Carriage of Goods by Sea Act 1972 and the Hamburg Rules, 22 Malaya L.R. 199 (1980), p.205; Williams,R.: Risks and Responsibilities of Cargo Delays and Force Majeure, in Economic and Social Commission for Asia and the Pacific, Forth Report, p.82. In *Gluck v. Isbrandtsen Co.*, 1961 AMC 1549 (NY City Ct. 1960); *BF McKernin (ibid)* 1976 AMC 1527 (SD NY 1976) the claim for damages was rejected on the grounds that the cargo interest did not prove that the carrier had known or foreseen the future loss.

damages under the three Conventions, there is no need to restrict loss sustained by the aggrieved party. Lastly, only the carrier benefits from this limitation. If loss is less than the value of goods, the carrier compensates only for actual loss suffered by the cargo interest. For example, if the cargo interest purchases the same thing cheaper than the market value, loss compensated will be less than the market value of goods. Compensation is not an article for the aggrieved party to get unjustly rich[38]. As a result, in the objective method, loss is not determined at minimum but maximum. For that reason, in the case where necessary costs for repairing or reconditioning are less than the diminution in market value sustained and the cargo interest realises the market value after the repair or restoration, courts have taken such reconditioning costs into account[39].

Article 5 (1) of the Hamburg Rules, therefore, clearly makes the carrier liable for every sort of loss resulting either from physical loss or damage to goods or from delay in delivery. Nevertheless, loss arising from the assertion of a superior right to merchandise by a third party seems not to have been taken into consideration under the Convention.

b- Decrease in value of other things in assets

Goods may be required for a specific purpose in connection with other things in the cargo interest's assets. In that event, a decrease in benefits expected from goods carried may cause a drop in the value of others in the assets. For example, the cargo interest may have had to close down his factory due to delay in delivery of equipment or materials for the production. Similarly, disease in cows carried could spread it to other animals, which belong to the cargo interest, after delivery.

Since the carrier is not normally expected to know that merchandise to be carried have a relation with other things, their important role in assets must have been informed to the carrier at the time of contract[40].

c-. Decrease in assets due to non-compensation of decrease in value at the time of occurrence of loss or damage

Loss may arise from the non-compensation of decrease in value of goods at the time of the occurrence of loss or damage because the carrier has kept money owed to the

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38 *Salzman Tobacco v. SS Mormacwind,* 1967 AMC 277, 281 (2 Cir. 1967).
39 *Weirton Steel Co. v. Isbrandtsen-Moller Co.* 1942 AMC 356 (2 Cir. 1942).
40 *Hadley v. Baxendale* (1854) 9 Ex. C.R. 341, 354.

cargo interest and retained it for himself. Thus, the cargo interest is deprived of the compensation which he would be awarded if he used this monetary amount on his own. This decrease can easily be foreseen by the prudent carrier; consequently, there is no need to communicate to him to be compensated. However, the granting of interests is strictly subject to the law of court seized of the case[41]. Some courts have a wide discretionary power in respects of the rate of interests and the date when it begins to run[42].

d-. Decrease in profits

Physical or non-physical loss or damage may lead to decrease in profits expected from cargo for trade or from equipment, components or raw materials which would be used for the performance of service contract or for the production of other goods for trade.

The carrier must be liable for profits which could be earned from the ordinary use or sell of goods[43]. Indeed, not only does the value of merchandise contain cost including freight and insurance premium, but also a fair margin of profit[44]. CIF sale price and invoice value are not sound value alone. A measure of a fair margin of profit is based on the facts of each case. Normally 15% profit is added to the CIF sale price[45]. Similarly, decrease in profits due to loss of or damage to samples for a trade fair can be expected by the prudent carrier and, therefore, must be compensated by the carrier[46]. Nevertheless, if goods are going to be stored and not to be sold in the near future after their carriage, the sound value excludes a fair margin of profit[47]. If the cargo interest intends special

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41 Such as the Turkish Code Relating to the Statutory Interests and Moratory Interests 1984.

42 Section 35/A of the UK Supreme Court Act 1981 - *Canadian General Electric v. Pickford & Black* [1972] SCR 52, 57; *Davie Shipbuilding Ltd. v. The Queen* [1984] 1 FC 461, 468 / *The Funabashi* [1972] 1 Lloyd's Rep. 371, 374; *The Dona Mari* [1973] 2 Lloyd's Rep. 366, 376 / *Lekas & Drivas Inc. v. Basil Goulandris* 1962 AMC 2366 (2 Cir. 1962); *Nat G Harrison Overseas Corp. v. American Tug Titan* 1975 AMC 2257, 2267 (5 Cir. 1975).

43 *Cory v. Thames Ironworks and Shipbulding Co., Ltd.* (1868) LR 3 QB 181.

44 Article 1149 of the French Civil Code 1804; Article 1233 of the Italian Civil Code 1942 - UNCTAD Secretariat, Report of Bills of lading, p.48 - Tetley,W.: Cargo Claims, p.326. For the inclusion of customs duties, see *The Ocean Dynamic* [1982] 2 Lloyd's Rep. 88, 93 / *Variety Textile Manufecturers v. The City of Columbo* 1977 AMC 1148.

45 *Crelinsten Fruit Co. v. The Mormacsaga* [1986] 2 Lloyd's Rep. 184, 192 (Can. Ex. Ct.) / *Dixie Plywood Co. v. SS Federal Lakes* 1976 AMC 439 (SD Ga. 1975).

46 *Jameson v. Midland Ry. Co.* (1844) 50 LT 426 (QBD) - Ganado,M.-Kindred,H.M.: Delays, p.137.

47 *Instituto Cubano v. Star Line* 1958 AMC 166 (Arb. NY 1957).

use through which higher profits will be gained, the carrier must be informed beforehand[48].

e-. Increases in expenses

Owing to loss or damage the carrier may have had to make a lot of unnecessary extra expenses. For example:

(1) The cargo interest may have arranged with third parties to unload, warehouse, transport, use or sell goods after sea carriage. Due to delay he may have been obliged to pay extra fees, price or damages to them. Unusual increases in expenses must be communicated to the prudent carrier to be recovered.

(2) Legitimate expenses may have had to be made by the cargo interest to minimise and to avoid further loss or damage to the goods[49]. These necessary or beneficial expenses are foreseen by the prudent carrier.

(3) Loss or damage may deprive a cargo interest of the use of goods and may cause expenses for the rent of the same kind of thing in place of lost or damaged goods. Unless the carrier has been informed of the use of the piece of equipment such as a delivery vehicle in his business at the time of the contract, they could not be predicted by a prudent carrier.

(4) As a general principle of law, court costs follow the liability cause, which means the party who has led to litigation unjustifiably is obliged to pay these expenses. Court costs are expenses which are necessary for the continuation of the trial. It can be made before or at trial until the final judgement is rendered. It includes attorney's and surveyor's fee paid by the aggrieved party[50]. In order to claim surveyor's fee, the report must have been prepared for that litigation[51]. In some countries, court costs are fixed by

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48 *The Pegase* [1981] 1 Lloyd's Rep.175, 183 (QB).
49 *The Radja* 1953 AMC 1888, 1890 (ND Cal. 1953); *Compagnie De Navigation Fraissinet & Cyprien Fabre, SA v. Mondial United Corp.* 1963 AMC 946 (5 Cir. 1963).
50 For surveyors fee, see Article 1068 of the Turkish Commercial Code 1956.
51 *The Continental Shipper* [1976] 2 Lloyd's Rep.234, 237 (CA).

law. In the US, they can only be awarded if there is a statute or an agreement between parties[52] or if the court uses its special discretionary power to do so[53].

f-. Agreement on the method used for calculation

Parties are free to negotiate under which method loss will be ascertained. However, this agreement should not be against public policy and, consequently, the main rule of *restitutio in integrum*. Many courts held that the determination of loss less than the market or objective value of goods by the invoice value or CIF clauses fixing the value to the invoice value or CIF price is void under municipal law because of unjustifiably favouring the carrier[54].

Parties have in every system been permitted to increase the amount of loss although at no point should the carrier be liable for more than the amount of loss actually sustained[55].

2- Increases in benefits

The occurrence which has caused decreases in assets of the cargo interest might also bring about increases in the assets. In calculating loss not only drops in assets but these increases ought to receive attention too because the net loss sustained by the aggrieved party can be determined only by deducting benefits from reduction in assets. Thus, decreases and increases in assets are brought into balance[56].

With this aim, firstly the occurrence which has caused loss must lead to increase in the aggrieved party's assets. This may appear as increase in active assets or decrease in passives assets. Secondly, benefits must be foreseen or foreseeable by prudent parties.

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[52] *The Sea Star* 1974 AMC 834, 836 (2 Cir. 1974); *Noritake Co. v. Hellenic Lines* 1982 AMC 173, 176 (SD Tex. 1980).

[53] *Nordstern v. The Lauriergracht* 1981 AMC 981, 984 (SD NY 1980).

[54] *Foy & Gibson v. Holyman & Sons* (1946) 79 Ll.L.R. 339 (Aust. CA) / *Nabob Foods Ltd. v. The Cape Corso,* [1954] 2 Lloyd's Rep. 40 (Can. FC) / *Tribunal de Commerce de Marseille,* March 17, 1950, 598 / *Ralli Bros Ltd. v. Isthmian SS Co.* 1941 AMC 169 (D. Md. 1940); *American Trading v. SS Harry Culbreath* 1951 AMC 754 (2 Cir. 1951); *The Harry Culbreath* 1952 AMC 1170 (SD NY 1951); *Otis McAllister v. Skibs* 1958 AMC 2432 (9 Cir. 1958); *Club Coffee Co. Ltd v. Moore McCormack Lines* 1968 AMC 1749 - Tetley,W.: Limitation Clauses, p.212.

[55] Section 4 (5) of the US COGSA 1936.

[56] Akıncı,A.: Taşıyanın Sorumluluğu, p.169 and Navlun Mukaveleri, p.357; Eren,F.: Borçlar II, p.308 and Borçlar III, p.238; Tekinay-Akman-Burcuoğlu-Altop: Borçlar Hukuku, p.790.

Lastly, there must not be a contractual or statutory rule to the contrary. For example, the donation granted to the aggrieved party after the loss or damage cannot be subtracted from loss. Otherwise, the carrier would benefit from the donation, but not the donee (the cargo interest) contrary to the intention of the donor.

Customs' duties and other expenses saved as a result of loss or damage are benefits which can be deducted from gross loss. It is argumentative whether or not freight can be subtracted from gross loss as an increase. When goods are damaged or lost, the obligation of carry the cargo substitutes for the obligation to pay damages, and the contract of carriage does not come to an end. Consequently, the cargo interest's obligation to pay freight continues to exist. Since there is no freight saved in case of loss or damage, it cannot be deducted from gross loss[57]. However, the carrier can exchange his freight credit for his debt of damages (compensation / set-off)[58].

IV. CONCLUSIONS

(1) To claim damages, the cargo interest must prove that he has actually suffered pecuniary contractual loss which could have been foreseen by a prudent carrier or which was communicated to the carrier at the time of the contract.

(2) Loss sustained by the cargo interest must have arisen from breach of the contract of carriage. In the case of physical loss or damage the causation of loss by the breach can be seen from the apparent state of goods whereas in the event of non-physical loss or damage the cargo interest has to prove that loss was caused by delay in delivery. Under Article 5 (1) of the Hamburg Rules unlike the Hague and Hague-Visby Rules the carrier is clearly made liable for any loss suffered by the cargo interest resulting from loss of or damage to goods as well as from delay in delivery.

(3) Loss is a difference between the states of assets of the aggrieved party prior to and subsequent to breach of the contract. Quantifying loss not only decreases but also increases in assets are taken into account.

(4) The drop in market (objective) value of goods to be carried is presumed to be foreseen by a prudent carrier. There is no need to inform the carrier beforehand. However, a decrease in the subjective value of goods cannot be compensated by the cargo interest unless the special position of goods in assets was communicated to the carrier at the time of contract. Article 5 (b) of the Hague-Visby Rules, therefore, facilitates the calculation of the foreseeable decrease in value of goods, but does not limit the amount of loss suffered to the decrease in market value.

(5) By Article 19 (5) of the Hamburg Rules, future loss resulting from delay in delivery after sixty days following the day when goods were handed over to the cargo interest cannot be foreseen and compensated. This provision reduces the carrier's liability.

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[57] Arkan,S.: Taşıyıcının Sorumluluğu, p.151; Çağa,T.: Navlun Sözleşmesi, p.231.
[58] Poor,W.: Charter Parties, p.246; Tetley,W.: Cargo Claims, p.893.

PART III

CONDITIONS OF THE CARRIER'S EXEMPTION FROM LIABILITY

Chapter Nine

EXEMPTED INCIDENT

Once the cargo interest establishes the liability conditions, examined in preceding five chapters, the carrier becomes obliged to prove the prerequisites of his exemption from liability, i.e., the exempted incident and its proximate causal relation with the loss suffered by the cargo interest. This chapter will centre on the former. Since the carrier is exculpated from liability for the unavoidable occurrence under the three Conventions, and this exemption is, however, made subject to some special provisions and exceptions especially under the Hague and Hague-Visby Rules, all these issues is explained below.

I. UNAVOIDABLE OCCURRENCE

A) GENERAL

As the Hague and Hague-Visby Rules were drafted in the form of a model bill of lading in the Anglo-American style of legislation, Article 4 (2) includes 17 exemption clauses which exclude the carrier from liability for loss or damage. When these clauses are analysed, it appears that Article 4 (2) (q) of the Hague and Hague-Visby Rules is designed as *an all-embracing exemption rule* generally releasing the carrier from paying damages for loss or damage resulting *from any other cause* arising without the actual fault or privity of the carrier, *and*[1] without the fault or neglect of his agents or servants. Some continental Contracting States[2] adopting the Rules into their domestic legislation, therefore, separated this rule from the other 16 exemption clauses and inserted it in a separate exemption provision by using the option granted to them under the Protocol of Signature.

These remaining 16 exemption clauses are so different that they do not contain any *genus* which would embrace them all. Consequently, "any other cause" under Article 4 (2) (q) must be interpreted broadly regardless of the principle of *ejusdem generis* to

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1 Under Article 4 (2) (q) of the Hague and Hague-Visby Rules in place of the word "and", the term "or" is used by mistake: *Gosse Millerd v. Canadian Government Merchant Marine* (1927) 28 Ll.L.R. 88, 103; *Canadian Co-operative Wheat Producers Ltd. v. Paterson SS, Ltd.* [1934] AC 538, 549. For that reason, under Article 4 (2) (q) of the US COGSA 1936 the word "and" is preferred.

2 § 606 of the German Commercial Code 1897; Article 1061 of the Turkish Commercial Code 1956.

cover all cases where neither the carrier nor his servants and agents are at fault[3]. Nevertheless, since the general rule (q) is made subject to so many exceptions in Article 4 (2) (a)-(p), there are very few "other causes" left. On this account, the possibility of the application of clause (q) is almost removed barring few cases such as the pilferage of goods.

The Hamburg Rules do not contain any list of exemptions, unlike the Hague and Hague-Visby Rules. Under Article 5 (1), in order to bring transport conventions close to each other and to facilitate the making of multimodal carriage contracts and the preparation of uniform rules applicable to them, the catch-all provision (q) is converted into one which makes the carrier liable for loss or damage unless he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. The incident which is unavoidable with measures taken by the carrier, his servant or agent is, in fact, a cause arising without the fault of the carrier, his servant or agent. This is evident under Annex II of the Hamburg Rules[4]. Hence, the Hamburg Rules which adopt the general exemption rule in Article 4 (2) (q) of the Hague and Hague-Visby Rules do not change the basic legal position of parties and the final burden of proof on them[5].

The occurrence arising without the fault of the carrier, his servants and agents, is called an *unavoidable occurrence*. On this account, there must be an occurrence and lack of fault on the part of carrier, his servant or agent.

B) OCCURRENCE

The carrier first has to prove the occurrence (which has caused loss or damage) in order to exempt himself from liability under the Conventions because Article 4 (2) (q) of the Hague and Hague-Visby Rules and Article 5 (1) of the Hamburg Rules highlight "*Any other cause* ..." and "... *the occurrence* ..." as a prerequisite of exemption. Accordingly, the carrier cannot claim his immunity by merely showing that there was no

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3 *Potts v. Union SS Co. of New Zealand* NZLR 276, 286 - UNCITRAL Secretariat, Report of Bills of Lading, p.43 - Astle,W.E.: Liabilities, p.161; Wilson,J.F.: Carriage, p.261.

4 OIC: Report of Canadian Carriage, p.155 - Berlingieri,F.: Period, p.91.

5 Pixa,R.R.: Hamburg Rules, p.450; Schollenberger,D.K.: Hamburg Rules, p.573; Sweeney,J.C.: Review, p.16; Tetley,W.: Canadian Comments, p.260. For an opposite view see Honour,J.P.: P.&I. Clubs, p.243; McGovern,N.: Shipowner, p.10.

fault on his part or those of his servants and agents in performing the contract of carriage even where the cause of loss or damage is inexplicable[6]. By comparison, under domestic contract law, the obligee in general has to show the cause of loss (i.e., the act of obligor or his assistants), and then the obligor will establish the absence of fault in the fulfilment of the contract[7]. The reason for this difference is that only the carrier, not the cargo interest, is capable of knowing why and how the contract of carriage was breached while goods were on the ship sailing, and that mariners would be reluctant to produce evidence against either the carrier (their employer) or each other. Had the carrier been excused when the cause of loss or damage was unknown, he would never try to investigate and prove the incident. Likewise, the investigation of the occurrence by the carrier was considered much easier and, consequently, cheaper than by cargo interests[8]. The attribution of the burden of proof for the cause of loss or damage will not aggravate the carrier's actual position so much because he would normally have to show it anyway in order to prove lack of fault.

The cause of loss or damage could be either natural (such as wind, storm, tornado, earthquake and lightning), legal (such as arrest or restraint of authorities and quarantine restrictions) or human (such as act of public enemies, pilferage and theft).

C) LACK OF FAULT ON THE PART OF THE CARRIER, HIS SERVANTS AND AGENTS

For the carrier to escape liability, the event (which has caused loss or damage) must have arisen without his fault or that of his servants and agents. With the same reason

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6 *Lady Drake* 1935 AMC 427, 434 (Can. SC - Québec); *North Star Cement, Ltd. v. Labelle* 1976 AMC 944 (FC); *The Farrandoc* [1967] 2 Lloyd's Rep. 276, 279 / *Herald & Weekly Times, Ltd. v. NZ Shipping Co. Ltd.* (1947) 80 Ll.L.R. 596, 607; *Albacora SRL v. Westcott & Laurance Line, Ltd.* [1966] 2 Lloyd's Rep. 53, 64 (HL); *The Ocean Dynamic* [1982] 2 Lloyd's Rep.88, 90, 93 / *Cour de Cassation* February 26, 1963, DMF 334 (1963) / *Edouard Materne v. SS Leerdam* 1956 AMC 1977, 1980 (SD NY 1956); *Quaker Oats v. M/V Torvanger* 1984 AMC 2943, 2949 (5 Cir. 1984) - OIC: Report of Canadian Carriage, p.161 - Naylor,B.T.: The Elements of the Burden of Proof under the Carriage of Goods by Sea Act, 12 Colum.J.Transnat'l L. 289 (1973), p.295 (to be cited thereinafter as "Burden of Proof"); Richardson,J.: Hague Rules, p.52. For an opposite view see *Heyn v. Ocean SS Co.* (1927) Ll.L.R. 334; *Phillips & Co. v. Clan Line Steamers (Smithfield), Ltd.* (1943) 76 Ll.L.R. 58, 61/ *The Vermont* 1942 AMC 1407, 1410 (ED NY 1942); *Lekas and Drivas, Inc. v. Basil Goulandris* 1962 AMC 2366, 2370 (2 Cir. 1962); *California Packing Corp. v. Matson Navigation Co.* 1962 AMC 2651, 2653 (Cal. Mun. Ct. 1962) - Berlingieri,F.: Liability, p.133; Ganado,M.-Kindred,H.M.: Delays, p.65, 103; Kimball,J.D.: Hague Rules, p.226; Wolfson,R.: Enactments, p.521.

7 Article 280-282 of the German Civil Code 1896; Article 1142 of the French Civil Code 1804; Article 97 of the Swiss Obligations Code 1911; Article 96 of the Turkish Obligations Code 1926.

8 UNCITRAL Secretariat, Report of Bills of Lading, p.43.

explained in respect of the cause of loss or damage, the onus of proof is attributed to a person claiming the benefit of this exemption, i.e., on the carrier, to show that neither the actual fault or privity of the carrier nor the fault or neglect of his agents or servants actually contributed to the occurrence and its consequences (loss or damage) under Article 4 (2) (q) of the Hague and Hague-Visby Rules[9] and Annex II of the Hamburg Rules[10].

1- Lack of fault on the carrier's part

The act or omission which can be blamed by law is described as "*fault*", which depends on the failure to take due care to prevent the occurrence and its consequences during the performance of the contract of carriage.

With respect to its seriousness fault may be divided into deliberate action (intention) and negligence[11]. *Deliberate action* (*intention*) occurs when the carrier intentionally fails to use due care to avoid the occurrence and its consequences, carrying out the contract. *Negligence* may also be sub-classified as *advertent* and *inadvertent negligence*. In the former, the carrier recklessly fails to exercise due care to prevent the incident and its consequences, fulfilling the contract, despite the fact that the results of the failure are foreseeable but not desired by him. By comparison, in the latter, the carrier, performing the contract, fails to take due care to foresee and prevent the occurrence and its consequences. Deliberate action (intention) and advertent negligence (recklessness) are deemed to be gross fault especially in civil law. The carrier is liable for all types of faults regardless of their seriousness. Still, these distinctions could be important in the calculation of damages and the determination of cases where the carrier is not allowed to limit the compensation under municipal law.

For lack of fault care should be exercised to avoid the occurrence and its consequences during the performance of the contract of carriage. For that reason, the carrier must show that he took actually care of goods. He cannot escape liability only by

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9 *City of Barado v. Hall Line* (1926) 25 Ll.L.R. 437 (under the Hague Rules 1921) / *Fabri Co. Inc. v. Universal Shipping Corp.* 1969 AMC 1613, [1970] 2 Lloyd's Rep. 201 (SD NY 1969).

10 *Tribunal de Commerce de Marseille*, January 23, 1996, Revue Scapel 51 (1996) (*The World Appolo*) (under the Hamburg Rules).

11 Cooke,P.J.-Oughton,D.W.: Obligations, p.171, 173.

proving that loss or damage would have taken place anyway even if he had taken necessary steps. This hypothetical approach cannot be supported as it would reduce the degree of diligence expected from the carrier.

There are two different theories explaining how much care should be used by the obligor during the fulfilment of the contract. To *subjective theory*, if the obligor could foresee the harmful results under his circumstances and could avoid them, he is at fault; it is not right to consider the diligence which could be taken by the imaginary obligor because otherwise liability with fault would be substituted for the strict liability[12]. By contrast, *objective theory* focuses on a prudent third party; if the act or omission of the obligor veers from that of the hypothetical person, he is at fault; from this point of view, liability with fault becomes close to strict liability (without fault). The main difference between these two liabilities is, for the former, the obligor's state and conditions are still examined so as to identify the diligent person[13]. In short, ascertaining the measure of care exercised to avoid the occurrence or its consequences, objective theory considers a hypothetical (prudent) third party while subjective theory pays attention to the obligor himself.

Currently the dominant theory is the objective one[14]. The difficulty in determining the obligor's whole personal features is an important factor to support that theory. Whether the carrier on his own could foresee and avoid the occurrence and its consequences cannot be taken into consideration measuring care because people living in a society are expected to exercise care not to harm others. Especially the merchant who does not have a professional skill inherent in the sort of activity he is engaged in cannot be forgiven by commercial community for the loss he has caused to its members. The acceptance of the objective theory in the field of the carriage of goods by sea has brought the degree of

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[12] Schwarz,A.(trans. by Dayınlarlı,K.): Borçlar Hukuku Dersleri, Vol.I, İstanbul 1948, p.108, 113 (to be cited thereinafter as "Borçlar Hukuku").

[13] Martin,R.: Categories of Negligence and Duties of Care: Caparo in the House of Lords, 53 The MLR 824 (1990), p.824 / İnan,A.N.: Borçlar Hukuku, p.265.

[14] § 347 of the German Commercial Code 1897; Article 20 of the Turkish Commercial Code 1956 - *Blythy v. Birmingham Waterworks Co.* (1856) / *4. HD.*, 9.10.1980, E.9386, K.11399 (YKD., 1981, Is.8, p.964.) - Atabek,R.: Kara Nakliyatında Taşıyıcının Mesuliyeti Hakkında Bazı Mülâhazalar, Ticaret ve Banka Hukuku Haftası, Ankara 1960, p.145, 147.

care very close to that required from a common carrier[15]. Thus, the carrier is obliged to exercise a very high standard of care in any regime of contractual liability with fault regardless of legal expressions used to determine the degree of care.

Article 3 (2) of the Hague and Hague-Visby Rules which ascertains the degree of care should be assessed in this light. Hence, the words "*carefully*" and "*properly*" therein should mean the same as the expression, "*with care which could be exercised by a prudent carrier*". It is not right to suggest that "carefully" means merely using care, and that the word "properly" adds something to it because the carrier has already been obliged to exercise a very high degree of diligence[16]. These two words were adopted from the US Harter Act 1893 which alternatively uses them under Sections 1 and 2. If they had different meaning, then the standard of care required by the Sections would not be the same. On balance, both "to act carefully" and "to act properly" mean "to act as a prudent carrier", that is, "in accordance with a sound system under all the circumstances in relation to the general practice of carriage of goods by sea"[17].

In order to remove any uncertainty as to the interpretation of the words "carefully and properly", the best method would be to concretise the degree of care as much as possible by clearly requiring the prudent carrier's care to avoid the occurrence or its consequences[18]. However, under Article 5 (1) of the Hamburg Rules like the Warsaw Convention another abstract word, "*reasonably*", is preferred, which could be interpreted differently depending on the jurisdiction because the care which is reasonable for a person would not be necessarily so for others. One may ask whose care will be considered[19]. In short, the Hamburg Rules have failed to clarify the degree of diligence required from the carrier in the performance of the contract of carriage. If the dominant objective theory is supported by court, "to act reasonably" will, of course,

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15 Tetley,W.: Cargo Claims, p.531, 554.

16 Berlingieri,F.: Liability, p.81; O'Hare,C.W.: UNCITRAL Convention, p.131. For an opposite view see *GH Renton & Co. Ltd. v. Palmyra Trading Corp.* [1956] 2 Lloyd's Rep. 379, 388 - OIC: Report of Canadian Carriage, p.154.

17 *Albacora SRL (ibid)* [1966] 2 Lloyd's Rep. 53, 58, 62, 64 (HL) - Berlingieri,F.: Liability, p.81; Cadwallader,F.J.J.: Care, p.18; Nicoll,C.C.: Hamburg Rules, p.162.

18 § 606 of the German Commercial Code 1897 and Article 1061 of the Turkish Commercial Code 1956 expressly refers to "*prudent carrier*" determining the degree of care exercised by the carrier.

19 Carbone,S.M.: Allocation of Risks, p.631.

imply to "to act as a prudent carrier"[20]. Nevertheless, in Anglo-American jurisdiction a reasonable man might not refer to a prudent man. By contrast, in continental law merchants including carriers should in principle act as a prudent businessman[21].

The measure of care brought into the Rules is not absolute and perfect, but is demanding[22] because a shipper (cargo interest) enters into a contractual relationship with the carrier before the loss unlike tortious liability and, thereof, finds an opportunity to pay attention to the features of the contract and the carrier. The contracting shipper who is free to select the adverse party must bear the negative consequences of his choice[23]. Consequently, fixing the carrier's care, a diligent carrier who is *in the same state or conditions* as him is taken into consideration[24]. Accordingly, the nature of goods[25], the type of ship[26], the conditions of voyage[27], other cargoes and weather, the usage and practice and so on are all important elements[28]. For example, if goods are stuffed in a container away from the carrier and his servants or agents, and he has no means of checking the contents, the degree of care should be in relation to the container rather than the goods therein.

However, if the carrier's knowledge and talent are superior to those of the prudent carrier, these additional personal knowledge and talent also receive attention[29]. For that reason, under Article 4 (2) (b) and (q) of the Hague and Hague-Visby Rules both the carrier's fault and his privity are mentioned. For instance, where the carrier knows that goods are insufficiently packed or marked by the shipper, then the carrier has two

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[20] Group 2 of IMC, Report on the Basis of Liability, p.46 - Kindred,H.M.: Hague to Hamburg, p.608. See for a similar approach in carriage by air under Warsaw Convention: *Goldman v. Thai Airways International Ltd.* (1981) 125 Sol. J 413 (QB): "all measures necessary in the eyes of the reasonable man". For an opposite view see Nicoll,C.C.: Hamburg Rules, p.163: The Author advances the view that the Hamburg Rules demand a measurably higher standard of care.

[21] § 347 of the German Commercial Code 1897; Article 20 of the Turkish Commercial Code 1956.

[22] *Chris Foodstuffs Ltd. v. Nigerian National Shipping Line* [1967] 1 Lloyd's Rep. 293, 297 (CA).

[23] Oğuzman,K.: Borçlar Hukuku Dersleri, 3rd ed., İstanbul 1979, p.288; Tandoğan,H.: Mesuliyet Hukuku, p.418.

[24] Haight,C.: Opening Address, in Lloyd's of London Press (Organisator): Speakers' Papers, p.1, 4; Mankabady,S.: Comments, p.56.

[25] *Levatino Co. v. SS Hellas* 1966 AMC 40, 48 (SD NY 1966); *Sucrest v. Jennifer* 1978 AMC 2520, 2539 (D. Me. 1978).

[26] *Albacora SRL (ibid)* [1966] 2 Lloyd's Rep. 53, 58 (HL).

[27] *Shipping Corp. of India v. Gamlen Chemical Co. (A/Asia) Pty.* (1980) 32 ALR 609, 611 (HC 1980).

[28] *GH Renton (ibid)* (1956) 2 Lloyd's Rep. 379 - Richardson,J.: Hague Rules, p.40; Scrutton,E.: Bills of Lading, p.436; Wilson,J.F.: Carriage, p.190 / Prüssmann-Rabe: Seehandelsrecht, § 606 B2.

[29] *GH Renton (ibid)* (1956) 2 Lloyd's Rep. 379 - Carver,T.G.: Carriage, p.363.

choices: first, to refuse to carry the goods, or, second, to exercise greater care to avoid loss or damage[30].

The appropriate relationship between foreseeable loss or damage and expenses which would be made for measures to avoid it is another important criterion in determining the degree of diligence. A prudent carrier cannot be required to spend on prevention of damage to cargo more than the amount of foreseen loss or damage because the carrier would prefer insuring his liability and increasing freight rates[31]. As a result, a minor damage which cannot be avoided without too much expense should remain on the aggrieved party[32].

Due to technological developments, new methods of performance of the contract of carriage have become possible. Hence, the standard of care required from the carrier gets higher and higher everyday. However, he cannot be expected to keep up with all costly technological advances immediately unless the custom and usage of such carriage oblige him to adopt that new system.

In assessing whether the carrier has taken all care and measures to avoid the occurrence and its consequences, it is important to investigate whether the occurrence and its consequences could be foreseen, and, if so, whether they could be prevented by the prudent carrier. Incidents which could not be foreseen and consequently could not be avoided by a prudent carrier or which could not be prevented by him despite their foreseeability are unavoidable occurrences. In short, the *unavoidability* is the essential element of the fault and unavoidable occurrence. This conclusion is in line with Article 5 (1) of the Hamburg Rules.

2- Lack of fault on the part of the carrier's servants or agents

a-. General

To escape liability under Article 4 (2) (q) of the Hague and Hague-Visby Rules and Article 5 (1) of the Hamburg Rules, the carrier has to show that not only him, but also

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30 For an opposite view see *SM Wolff v. SS Exiria* 1962 AMC 436, 441 (SD NY 1961) - Tetley,W.: Cargo Claims, p.496: The court and Author argued that the shipper cannot cast the burden of proof for extra special stowage on the carrier by simply not packaging the shipment properly.

31 Hellawell,R.: Allocation of Risk between Cargo Owner and Carrier, 27 AJCL 357 - 367, Spr/Summ' 79, p.363.

32 *Silversandal* 1940 AMC 731 (2 Cir. 1940).

his servants or agents were not at fault or, in other words, have acted as a prudent carrier to prevent the occurrence and its consequences. Since the carrier's obligation to carry goods is an inescapable duty, and thereof the servants' or agents' fault is presumed to be the carrier's own fault, the above explanations defining the carrier's fault are, therefore, valid for the fault of the servants or agents.

In order to determine whether the carrier may exculpate himself from liability for the act or omission of his servants or agents, the terms "the carrier's servants or agents"[33] ought to be clarified first.

b-. Carrier's servants

All people employed temporarily or permanently by the carrier in his business enterprise dealing with carriage, with a view to the performance of any job within the subject of this enterprise, are "*carrier's servants*".

Accordingly, to be the carrier's servant, one must be temporarily or permanently employed in the carrier's business enterprise dealing with carriage[34]. On this account, the master and other mariners hired by the actual carrier (shipowner) are his servants. The business enterprise should be so broadly construed to cover all enterprises directly or indirectly carrying out the business of carriage[35]. People working in the carrier's other business enterprises are not, however, in this category because the Rules deals with the *carrier*'s servants only in relation to carriage.

A servant ought to work under the carrier's supervision. He should act on the carrier's instructions. There must be employer-employee relationship between them. This tie is normally based on the service contract[36].

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[33] These words are also used in the Athens Convention 1974, the UK Carriage of Goods by Road Act 1965 and the UK Carriage by Air Act 1961. By contrast, in the translation made by the US during the ratification of the Warsaw Convention the term "agent" is used: See Gravensande,J.M.: The Employee in Air Law, 17/1 ETL 149 (1982), p.152 (to be cited thereinafter as "Employee in Air Law"); Haak,K.F.: The Liability of the Carrier under the CMR, The Hague 1986, p.176; Mankiewicz,R.H.: Liability Regime, p.45 / Arkan,S.: CMR Hükümlerine Göre Yardımcıların Fiillerinden Doğan Sorumluluk, Ankara 1988, p.319, 320 (to be cited thereinafter as "Yardımcıların Fiilinden Sorumluluk").

[34] Prüssmann-Rabe: Seehandelsrecht, § 607 B1a.

[35] Wüstendörfer,H.: Seehandelsrechts, p.269 / Akıncı,S.: Navlun Mukaveleleri, p.298.

[36] Kırman,A.: Hava Yolu İle Yapılan Uluslararası Yolcu Taşımalarında Taşıyanın Sorumluluğu, Ankara 1990, p.108 (to be cited thereinafter as "Hava Yolu").

Furthermore, it is not important whether servants have been employed specifically for carriage, or whether they have been authorised to carry out the carrier's other duties. Even if the carrier has not delegated the actual performance of the carriage of goods, he could be held liable for his servant's act or omission. To do any work within the context of the carrier's business dealing with carriage is enough to be his servant[37]. For example, managers, accountants, janitors, etc. might be in this category.

c-. Carrier's agents

Carrier's agents are people having expressed or implied authority to represent or to act on behalf of the carrier with the aim of bringing him directly or indirectly into legal relations with third parties with respect to carriage.

As distinct from the carrier's servants, there is no dependency relationship between agents and the carrier. However, their relationship is much stronger because it is based on the trust between them. If the carrier loses confidence in his agent, he may at any time dismiss him. The relationship between the carrier and agent normally stem from the agency contract. The carrier is liable for the act or omission of even statutory agents since the Rules do not limit the meaning of agent[38].

The authority of agents to act for the carrier must include all matters directly or indirectly relating to his carriage business because the three Conventions name the agents of the *carrier*. As a result, one instructed by the carrier to defend him in the divorce case is not an agent whereas one authorised to make a service contract with mariners on behalf of the carrier or to collect freight from a cargo interest is so for the purposes of the Rules.

d-. People deemed "the carrier's servants or agents": carrier's assistants (in the performance of the contract of carriage)

People whose services are used by the carrier to fulfil the contract of carriage are called "*carrier's assistants* (*in the performance of the contract*)".

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37 Kender,R.: Taşıyanın Sorumluluğu, p.81.

38 Sözer,B.: Taşıyanın Taşıma Sözleşmesinden Doğan Sorumluluğunu Düzenleyen Hükümlere İlişkin Bazı Meseleler ve Görüşler, Batider, Aralık 1987, Vol.XIV, Is.2, p.85, 123 (to be cited thereinafter as "Taşıyanın Sorumluluğu"). For an opposite view see Arkan,S.: Taşıyıcının Sorumluluğu, p.65; Çağa,T.: Navlun Sözleşmesi, p.141: The Authors argue that the general provisions relating to the obligor's contractual liability must govern them.

To be carrier's assistants, they must be used by the carrier in the fulfilment of the obligation to carry goods. They might, at the same time, be the carrier's servants or agents, but it is not necessary. For example, people employed in the carrier's business of carriage to clean offices are servants, not assistants. On the other hand, sub-contractors obliged to take some parts in the contract of carriage are not servants but assistants.

Under Article 4 (2) (q) of the Hague and Hague-Visby Rules and Article 5 (1) of the Hamburg Rules, the term, "the assistants of the carrier", is not used together with terms "the servants or agents of the carrier". Consequently, some jurists and authors[39] argue that the carrier's liability for the act or omission of his assistants is not subject to the Rules, but to general provisions of domestic law. Although this view seems literarily correct, it might destroy the benefit expected from the three Conventions. Indeed, if the carrier's assistants were not deemed his servants or agents, he would be held liable under the general rules of obligations for the act or omission of his assistants who carried out some undertakings in the contract of carriage only because they were not employed or authorised by him although he would be held liable under the Conventions for the act or omission of his servants or agents who did not actually perform the carriage only because they were hired or instructed by the carrier. Similarly, in that case, the non-vessel operating carrier's liability for the act of the master and mariners would be governed by general rules whereas the same liability for the sub-carrier (shipowner) would be subject to the Conventions. Thus, the special provisions of the Rules regulating the contract of carriage would not apply to the liability for fault of the people who actually performed such contract and could be circumvented by general stipulations in national law.

Likewise, it may be pointed out that one of the reasons for making the carrier liable for acts or omissions of his servants or agents under the Rules is that the carrier is the only one who could instruct and control third parties to whom the performance of obligations under the contract of carriage has been entrusted. The carrier is in a better

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[39] *11. HD.*, 17.01.1980, E.1, K.1333 - Mankabady,S.: Comments, p.69 / Prüssmann-Rabe: Seehandelsrecht, § 607 B1a; Wüstendörfer,H.: Seehandelsrechts, p.269 / Akıncı,S.: Navlun Mukaveleleri, p.299; Çağa,T.: Navlun Sözleşmesi, p.139; Kender,R.: Taşıyanın Sorumluluğu, p.81; Okay,S.: Navlun Sözleşmesi, p.167; Sözer,B.: Taşıyanın Sorumluluğu, p.119; Ülgener,M.F.: Sorumsuzluk Halleri, p.62, n.26; Yazıcıoğlu,E.: Hamburg Kuralları, p.105.

position than the cargo interest and at least has a right to terminate the relationship with his assistants who do not obey his directions. Accordingly, to be the carrier's servant or agent, a strict relationship between him and the carrier should not be necessary. The important thing is that the person ought to work under the *direct or indirect* control and command of the carrier. This is the position rightly taken in the Anglo-American jurisprudence[40].

The relationship between the carrier and his assistants may be based on a contract, law or actual fact[41]. However, if the carrier is obliged to use third parties' service by law and does not have any opportunity to control their acts, they cannot be treated carrier's assistants within the meaning of the Rules[42]. For example, unlike compulsory-advisory pilots, compulsory navigational pilots, whom the carrier is obliged to authorise to navigate the ship by law, are not his assistants because they are not under his instruction. There is no reasonable ground to make him liable for their fault[43].

The carrier may engage third parties called "*independent contractors*" as his assistants to carry out all or some of the obligations under the contract of carriage[44]. In the field of carriage of goods by sea, these people may be an independent carriage contractor (sub-carrier)[45], independent towage contractor, independent stowage contractor or independent pilotage contractor. Nevertheless, the carrier is not liable

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40 *Potts v. Union SS Co. of New Zealand* [1946] NZLR 276 / *Heyn (ibid)* (1927) Ll.L.R. 334; *Hourani v. Harrison* (1927) 28 Ll.L.R. 120 (CA) / *Agrico Chemical v. Atlantic Forest* 1979 AMC 801, 812 (ED La. 1978) - Group 2 of IMC, Report on the Basis of Liability, p.46 - Diamond,A.: Hamburg Rules, p.13; Chorley,R.S.T.-Giles,O.C.: Shipping, p.209; Mankiewicz,R.: Liability Regime, p.45; Tetley,W.: Cargo Claims, p.519. For the same view in air carriage see UNIDROIT, Report, ICAO, 11 The Hague Conference Documentation 133 - Gravensande,J.M.: Employee in Air Law, p.150, 152 / Kaner,İ.D.: Taşıyanın Sorumluluğu, p.427. By contrast, in *Metalimport v. SS Italia* 1976 AMC 2347 (SD NY 1976); *Farrell Lines v. Highlands Ins. Co.* 1982 AMC 1430 (SD NY 1982); *Hojgaard & Schultz v. Transamerican SS Corp.* 1985 AMC 2129 (SD NY 1984); *Sumitomo Corp. v. Sie Kim* 1987 AMC 160 (SD NY 1985) the stevedores who were not under the control of the carrier, but cargo interests were not considered "carrier's servants or agents".

41 Loewe,R.: CMR, p.333; Mankiewicz,R.: Liability Regime, p.45 / Feyzioğlu,F.: Borçlar Hukuku, Genel Hükümler, Vol.I, 2th ed., İstanbul 1976, p.190; Saymen,F.H.-Elbir,H.K.: Türk Borçlar Hukuku, Umumi Hükümler, Vol.I, İstanbul 1958, p.419; Şenocak,Z.: Borçlunun İfa Yardımcılarından Dolayı Sorumluluğu, Doktora Tezi, Ankara Üniversitesi Hukuk Fakültesi 1994, p.77.

42 Kırman,A.: Hava Yolu, p.110.

43 Akıncı,S.: Navlun Mukaveleleri, p.305.

44 Arkan,S.: Yardımcıların Fiilinden Sorumluluk, p.324.

45 For an opposite view see *11. HD.*, 17.01.1980, E.1, K.1333 - Wüstendörfer,H.: Seehandelsrechts, p.269 / Çağa,T.: Navlun Sözleşmesi, p.140; Okay,S.: Navlun Sözleşmesi, p.183; Sözer,B.: Taşıyanın Sorumluluğu, p.123, n.63; Ülgener,F.: Sorumsuzluk Halleri, p.23.

under the three Conventions for the fault of an independent shipbuilding contractor who is not the carrier's assistant in the performance of the contract of carriage so long as the carrier takes all appropriate steps to carry goods in a seaworthy ship by surveys and inspections after receiving the ship[46].

There is also no rule under the Conventions to prevent independent contractors from entrusting the performance of their obligations to their servants, agents and assistants. Insofar as the contractor has an opportunity to control the activities of his servants, agents or assistants, they come under the indirect control of the carrier and should be deemed the carrier's assistants[47]. The non-vessel operating carrier is, therefore, liable for the fault of the master or mariners employed by the actual carrier under the Rules.

e-. Relationship between the carrier and his servants, agents or assistants

Since a cargo interest may not know the extent of the relationship between the carrier and his servants or agents, Article 4 (2) (q) of the Hague and Hague-Visby Rules and Article 5 (1) of the Hamburg Rules do not require servants or agents to act within the scope of their relationship (employment or instruction) for the carrier's liability and exemption to arise[48]. Consequently, the carrier must pay damages for loss or damage arising from any tortious acts, such as theft, by his servants or agents[49].

By contrast, the relationship between the carrier and his assistants is not as strong as that between the carrier and his servants or agents since his opportunity to control his assistants' activities is limited. For that reason, his assistants acting outside the scope of their relationship should be regarded as third persons, and the carrier should not be made liable for their fault. Yet, in drawing the coverage of relationship, a lenient measure should be used. Thus, to the extent that the use of the assistants' service facilitates the commitment of their fault, they must be considered to have acted within their relationship and, therefore, the carrier's servants or agents for the purposes of the

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46 *Anglis & Co. v. P&O Steam Navigation Co.* [1927] 2 KB 456; *Union of India v. Reederij* [1963] 2 Lloyd's Rep. 223 - OIC: Report of Canadian Carriage, p.149, 150.

47 *Heyn (ibid)* (1927) 27 Ll.L.R. 334.

48 Unlike Article 3 of the CMR.

49 *Mimi Limitation Procs* 1979 AMC 1680, 1695 (4 Cir. 1979): It was held that a mariner who scuttled the ship after murdering fellow crew members was acting in the course of his engagement - Tetley,W.: Cargo Claims, p.522 / Prüssmann-Rabe: Seehandelsrecht, § 607 B1a.

Conventions. Otherwise, the carrier would be made liable for acts which cannot be related to him. For example, if a mariner steals cargo carried outside their working hours, or if a stevedore, handling cargo, pilfers other goods or ship's equipment, the carrier might be held liable for their fault because they have taken advantage of their contract by the carrier and, consequently, of coming into contact with the stolen goods[50]. This interpretation agrees with the principle that the rules applied by analogy must be interpreted narrowly regarding the features of event.

D) ACTS OF GOD

The carrier is exempted from liability for the act of God under Article 4 (2) (d) of the Hague and Hague-Visby Rules. In civil law and at common law it is often seen that the act of God (*force majeure*) is separated from *cas fortuit* according to the degree of its seriousness. However, both exempt the carrier from liability with fault because in both cases there is no fault attributable to the carrier[51]. The difference between them has, thus, no real importance with regard to the carrier's liability with fault. For that reason, there was no point in enumerating it as an exemption in this two Conventions imposing on the carrier liability based on fault. All the exempted incidents listed in Article 4 (2) could arrive at the stage of acts of God. For the sake of clarity it should be removed from that exemption provision as is the case in some continental statutes[52].

II. EXCEPTIONS

A) GENERAL

While Article 4 (2) of the Hague and Hague-Visby Rules were being drafted in the shape of a model bill of lading in the Anglo-American style of legislation, attention was not paid to the fact that 17 exemption clauses therein had different legal functions and meanings, though German, Netherlands, Norwegian and Swedish delegations opposed this approach. That destroyed the main purpose of the Rules to seek uniformity in

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50 However, in *Leesh River (ibid)* [1966] 2 Lloyd's Rep. 193 (CA) (having reversed [1966] 1 Lloyd's Rep. 450, 460) the stevedore stealing a storm valve cover plate during discharge of cargo at an intermediary port was not deemed the carrier's servant or agent because of having acted outside the scope of his engagement. The CA did not seem to consider whether the stealing of cover plate had been made easy by the engagement of stevedore; see also Mankabady,S.: Comments, p.71.

51 Gözübüyük,A.P.: Mücbir Sebepler - Beklenmeyen Haller, 3rd ed., Ankara 1977, p.66.

52 Accordingly, under § 608 of the German Commercial Code 1897 and Article 1063 of the Turkish Commercial Code 1956 the act of God is not listed as an exemption.

international carriage by creating numerous obstacles in the construction of the Article. For that reason, different jurisdictions developed different rules on burdens of proof.

Without analysing these clauses carefully considering their history, words and structures, it is difficult to achieve their main objectives and, therefore, to interpret them correctly. Firstly, Article 4 (2) (q) is a general (catch-all) clause relieving the carrier of liability for loss or damage arising from *any other cause* resulting without the fault of the carrier, his servants and agents. It contains its own burden of proof rule; thus, the onus of proof for lack of fault is shifted onto the carrier claiming the benefit of "*this [q] exception*". All the remaining 16 exemption clauses are, consequently, more special and exceptions thereto.

However, these exceptions could also be divided into two parts regarding their different legal roles in the carrier's liability. The main purpose of the following parts of this chapter is to show that the exemption clauses in (a) and (b) are real exceptions to the general exemption rule (q) because they release the carrier from liability for the fault of his servants and agents although in that event he cannot rely on clause (q) and is liable whereas those under clauses (c)-(p) are exceptions only to the general burden of proof rule (q) because they do not change the fact that the carrier is not liable for an occurrence resulting without fault, but only shift the burden of proof for fault onto the cargo interest though the onus remains on the carrier under clause (q).

B) EXCEPTIONS TO GENERAL EXEMPTION RULE: NAUTICAL FAULT AND FIRE

1- General

Under Article 4 (2) (a) and (b) of the Hague and Hague-Visby Rules two real exceptions are introduced to the general rule (q). Accordingly, the carrier is not liable for loss or damage arising 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; and from (b) fire, unless caused by the carrier's actual fault or privity.

These exceptions relieve the carrier of liability only for *the act of his servants or agents* in the navigation or management of the ship[53] or in fire. The exemption from

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[53] *Cour d'Appeal de Rennes*, March 21, 1963, DMF 663 (1963).

liability for the carrier's own act is still governed by Article 4 (2) (q). Consequently, to escape liability the carrier has to show not only that loss or damage has been caused by his servants' fault in the navigation or management of the ship or by fire, but also prove that his personal fault has not contributed to the exempted incidents[54]. If the nautical fault belongs to the carrier himself[55] or if the fire is caused by his fault[56], he cannot rely on neither these exceptions nor clause (q). In that case, he is still liable for loss or damage arising or resulting therefrom under Article 3 (2). With this aim he, first of all, has to prove that fault contributing to loss or damage belongs to his servants or agents, and that he has also exercised due care to choose, train, instruct and control his servants and agents in the provision of seaworthiness, and the navigation or management of the vessel.

Nevertheless, who carries the burden of proof for the carrier's fault in fire under the Rules is controversial. The problem arises from the language used in the fire clause (b): "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (b) fire, unless caused by the actual fault or privity of the carrier". The solution to this problem depends on whether Article 4 (2) (b) of the Hague and Hague-Visby Rules can be divided into two rules distributing the burden of proof. It literally seems there are two provisions, i.e., one excluding the carrier from liability for fire and one depriving the carrier of such defence if fire is caused by his own fault. Since each party carries the burden of proof for the occurrence on which he has based his claim, the

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[54] *The World Prodigy* 823 F Supp. 68 (DRI 1993) (for the carrier's fault in the instruction on the nautical matters) - Benedict,E.C.: Admiralty 2A, p.6/15, 13/7; Gilmore,G.-Black,C.: Admiralty, p.165. For an opposite view see OIC: Report of Canadian Carriage, p.159; UNCITRAL Secretariat, Report of Bills of Lading, p.43 (for nautical fault exemption).

[55] *Leval v. Colonial SS* [1961] 1 Lloyd's Rep. 560 (Can. SC) / *The Isis* (1933) 48 Ll.L.R. 35 (under the US Harter Act 1893); *The World Prodigy* 823 F Supp. 68 (DRI 1993).

[56] *The Venice Maru* 1943 AMC 277(2 Cir. 1943) (under the US Fire Statute): The carrier was exonerated from liability because the fire broke out due to improper stowage of goods under the supervision of an independent stowage contractor who is not a carrier himself but one of his servants or agents; *American Tobacco Co. v. The Katingo Hadjipatera* 1949 AMC 49 (SD NY 1948); *The Ocean Liberty* 1952 AMC 1681 (4 Cir. 1952) - Carver,T.G.: Carriage, p.180; Chorley,R.S.T.-Giles,O.C.: Shipping, p.205; Williams,W.L.: The American Maritime Law of Fire Damage to Cargo: An Auto-da-Fe for a few Heresies, 26 Wm&Mary L.Rev. 569 (1985), p.592 (to be cited thereinafter as "Fire"). The US courts gave the COGSA's phrase "actual fault and privity" the same meaning as the Fire Statute's words "design or neglect": *The Marquette* 1973 AMC 1683, 1686 (2 Cir. 1973).

majority submit that the burden of proof for fire is on the carrier while the onus of proof for the carrier's actual fault is on the cargo interest[57].

However, when Article 4 (2) (b) of the Hague and Hague-Visby Rules is examined thoroughly considering its history, its principal aim seems to exculpate the carrier from liability for fire caused only by the fault of his servants or agents but not to separate this rule into two parts in order to apportion the burden of proof. Indeed, thanks to the proposal of the German, Netherlands, Dutch and Swedish delegations, the option was granted to the Contracting States under the Protocol of Signature to entitle the cargo interest to establish liability for loss or damage arising from the personal fault of the carrier *only* in the cases referred to in (c)-(p), but not in (a) and (b) because in the latter liability and the burden of proof for the carrier's personal fault were subject to (q) anyway. Consequently, some Contracting States drafted nautical fault and fire clauses under the same rule separating them from the other clauses in (c)-(p)[58]. The reason for imposing the burden of proof for lack of fault on the carrier was that all the facts regarding fire onboard the ship be available to the carrier but not the cargo interest[59]. Although it is true that fire normally destroys the ship and goods as well as evidence of its origin, the carrier is in a better position than the cargo interest to discover how fire broke out because he or his servants would be there at the time of incident[60].

Nevertheless, though in the Hamburg Rules no exception is made for the fire arising out of the fault of his servants and agents, under Article 5 (4), the burden of proof for

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[57] *Drew Brown Ltd. v. The Orient Trader* [1972] 1 Lloyd's Rep. 35, 50 (Can. Ct.) / *Cour de Cassation*, May 27, 1964, DMF 666 (1964) / *The Shell Bar (Fire)* 1955 AMC 1429, 1434 (2 Cir. 1955); *The Marquette* 1973 AMC 1683, 1687 (2 Cir. 1973); *Westinghouse v. Leslie Lykes* 1985 AMC 247, 256 (5 Cir. 1984); *Damador Bulk Carriers* 1990 AMC 1544 (9 Cir. 1990) - Bassoff,J.M.: Fire Losses and the Statutory Fire Exceptions, 12 JMLC 507, Ju'81, p.512 (to be cited thereinafter as "Fire"); Naylor,B.T.: Burden of Proof, p.298; Poor,W.: Charter Parties, p.182; Tetley,W.: Cargo Claims, p.415; Williams,W.L.: Fire, p.601, 612.

[58] § 607 of the German Commercial Code 1897; Article 1062 of the Turkish Commercial Code 1956.

[59] *Norman v. CNR* [1980] 27 Nfld. and PEIR 451, 514 (Can. Ct.) / *The Gladiola* 1979 AMC 2787 (9 Cir. 1979); *Nissan Fire & Marine Ins. Co. Ltd. v. M/V Hyundai Explorer* 1996 AMC 2409 (9 Cir. 1996): However, the courts grounded their decisions on different and erroneous view that the rules concerning liability for unseaworthiness prevails, and the carrier firstly has to prove that he had exercised due diligence - OIC: Report of Canadian Carriage, p.159; US House Report No. 2218, 74 Cong., 2d sess. (1936) - Gilmore,G.-Black,C.: Admiralty, p.160, 183; Nicoll,C.C.: Hamburg Rules, p.167 / Wüstendörfer,H.: Seehandelsrechts, p.274 / Çağa,T.: Navlun Sözleşmesi, p.161.

[60] Secretary-General, Working Paper of 1972, p.148.

the fault of the carrier or his servants or agents contributing to the fire damage is unjustly shifted from the carrier onto the cargo interest in return for the deletion of nautical fault exemption as a result of political compromise[61]. The destructive consequences of fire and its frequent origin from cargo may justify the carrier's exemption from liability[62], but not the alteration of the burden of proof[63]. In order to assist the cargo interest to discharge the onus of proof, Article 5 (4) (b) of the Hamburg Rules entitles the carrier and the cargo interest to demand a fire survey and a copy of the surveyor's report although this right is exist under Article 3 (6) of the Hague and Hague-Visby Rules and Article 19 (4) of the Hamburg Rules[64].

The only difference between nautical fault and fire exemption clauses is that in clause (a) the carrier is required to prove that loss or damage has arisen from act or fault of his servants or agents in the navigation or management of the ship whereas in clause (b) the proof for fire is enough, and the carrier is not obliged to show that fire was caused by his servants or agent's act or fault. As under Article 4 (2) (b) unlike Article 4 (2) (a) the fault of the carrier's servants is not divided into nautical and commercial faults, if fire has been caused by the nautical fault, the carrier may mount either fire or nautical fault defences.

2- Nautical fault

a-. General

Under Article 4 (2) (a) of the Hague and Hague-Visby Rules the fault of a carrier's mariner and servant is divided into nautical and commercial faults, and the carrier is exempted from the former (act, neglect, or default in the navigation or management of the ship); which is one of the most significant immunities granted to the carrier under the Rules[65]. Although the term "commercial fault" is not mentioned under clause (a); it

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61 UNCITRAL Working Group, Report of the Fourth Session, p.142 - Donovan,J.: Hamburg Rules, p.10; McGilchrist,N.R.: The New Hague Rules, 3 LMCLQ 255 (1974), p.260; Sweeney,J.C.: Review, p.16.

62 UNCITRAL Working Group, Report of the Fourth Session, p.140, 141.

63 Diamond,A.: Hamburg Rules, p.12; O'Hare,C.W.: Uncitral Convention, p.153.

64 Tetley,W.: Hamburg Rules, p.9.

65 *11. HD.*, 22.1.1988, E.5285, K.183 (542) - UNCTAD Secretariat, Report of Bills of Lading, p.39.

has been frequently used in practice for the expression of the fault opposite to that in the navigation or the management of the ship[66].

For the determination of fault for which the carrier is not liable, these two types of faults must be separated from each other. There is no key provided under the Hague and Hague-Visby Rules. As a result, the Anglo-American jurisdiction solved this problem on the grounds of the criterion of benefit[67]. Then, incorporating the Rules into their national law, some States clearly made the carrier liable for the failure to exercise measures which should have been taken for the benefit of goods rather than that of the ship in line with the Anglo-American approach[68].

Nevertheless, uncertainty might arise as to whose benefit has been breached by fault because the same fault often affects the benefit of both the vessel and cargo. The foregoing example may well explain the difficulty courts are in. Improper stowage caused by fault could jeopardise safety of goods as well as the ship's stability directly and as a consequence the security of goods. So who will bear the loss or damage arising from improper stowage? To answer this question, the main reason why precautions should have been taken in the actual case must be found[69]. The distinction between nautical fault and commercial fault depends on the actual purpose of the measures which have been failed and is, therefore, drawn from facts of each case[70]. It is not important to determine for which goal the ship apparatus has generally served[71]. Only actual failure to use ship's devices efficiently for the protection of goods, such as refrigerating equipment, could be regarded as commercial fault[72].

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66 See the next page for definition.

67 *The Ferro* [1893] P 38; *The Glenochil* [1896] P 10; *The Rodney* [1900] P 112; *Foremen & Ellams Ltd. v. Federal Steam Nav. Co.* [1928] 2 KB 424, (1928) 30 Ll.L.R.52; *Gosse Millerd (ibid)* (1928) 32 Ll.L.R. 91 (HL); *Smith Felmongery v. P and OSN Co.* (1938) 60 Ll.L.R. 419; *The Washington* [1976] 2 Lloyd's Rep. 453 / *The Frances Salman* [1975] 2 Lloyd's Rep. 355 (SD NY 1975) - Astle,W.E.: Liabilities, p.134; Carver,T.G.: Carriage, p.335; Poor,W.: Charter Parties, p.174.

68 § 607 of the German Commercial Code 1897; Article 1062 of the Turkish Commercial Code 1956.

69 Prüssmann-Rabe: Seehandelsrecht, § 607 C4a; / Karan,H.: Taşıyanın Yükün Ziya veya Hasarından Sorumluluğunda Teknik Kusur Ticari Kusur Ayırımı, Yüksek Lisans Tezi, Ankara Üniversitesi Hukuk Fakültesi 1992, p.102 (to be cited thereinafter as "Teknik Kusur-Ticari Kusur".

70 Arness,F.F.: Error, p.641; Gilmore,G.-Black,C.: Admiralty, p.155; Knauth,A.: Ocean, p.197.

71 Wüstendörfer,H.: Seehandelsrechts, p.272.

72 *The Washington* [1976] 2 Lloyd's Rep. 453, 460.

The following conclusions can be drawn: If steps which should have been taken for the benefits and safety of goods were more than those of the ship, the carrier would be liable for *commercial fault*[73]. Failure to: ventilate cargo[74], stow and keep goods in a cargoworthy ship, control the temperature of special cargo spaces, protect hatches by tarpaulins against rain[75], leave hatches open during the voyage[76], keep down the temperatures in the hold by means of refrigeration[77], secure cargo on a barge not to slide[78], and minimise the subsequent loss or damage arising from one of the excepted causes[79], affects the benefit of cargo more than the ship.

If the same measures which should have been exercised for the benefit and safety of goods at the same degree and in the same mode as those of the ship were not taken, the carrier would also be liable for *commercial fault* because the narrow approach to exceptions is a principle of interpretation[80]. For that reason, in order to clarify Article 4 (2) (a) of the Hague Rules, Article 1062 of the Turkish Commercial Code 1956 provides that if there is any doubt, the loss is presumed not to have arisen from the management of the ship. In short, the carrier may rely on *nautical fault* only if the failed measures that should have been exercised were for the benefit the ship more than goods[81].

Article 3 (2) of the Hague and Hague-Visby Rules enumerate under which circumstances care ought to be used for the benefit of goods. They are in the loading, handling, stowage, carriage, caring for and discharging of goods. Fault in these performances is assumed to be commercial fault. Consequently, the carrier shall pay

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[73] § 607 of the German Commercial Code 1897 and Article 1062 of the Turkish Commercial Code 1956: "Measures which are mainly taken in the interest of cargo do not relate to the management of the ship" - *The Germanic* 196 US 589, 594 (1905) - Bartle,R.: Introduction, p.132; Scrutton,T.E.: Charterparties, p.243; Wilson,J.F.: Carriage, p.257 / Karan,H.: Teknik Kusur-Ticari Kusur, p.134.

[74] *California Packing Corp. v. SSP & T Voyager* 1960 AMC 1475 (ND Cal. 1960).

[75] *Gosse Millerd (ibid)* (1928) 32 Ll.L.R. 91 (even if hatches are left open so that workmen could go in and out of the hold more easily.)

[76] *Cour de Cassation* DMF 423 (1950).

[77] *Foremen & Ellams (ibid)* (1928) 30 Ll.L.R.52, 62. However, the appliance must not be actually and primarily used for the ship as opposed to cargo.

[78] *Falconbridge Nickel Mines Ltd. v. Chimo Shiping Ltd.* [1973] 2 Lloyd's Rep. 469 (SC).

[79] *Smith Felmogery (ibid)* (1938) 60 Ll.L.R. 419.

[80] *Kalamazoo Paper v. CPR. Co.* [1950] SCR 356 (SC). For an opposite view see *Cour de Cassation* July 6, 1954, DMF 714 (1954) - Tetley,W.: Cargo Claims, p.398 and Navigation and Management, p.245: " where the single error is both in the management of the ship and in the care of cargo, the carrier normally is not responsible because the error is, in effect, relative to the whole voyage."

[81] *Kalamazoo (ibid).* [1950] SCR 356 (SC) / *The Glenochil* (1896) P 10.

damages for loss or damage unless he proves that the precautions related to the ship more than goods[82].

b-. Forms of nautical fault

The nautical fault may take place only in two forms: in the navigation or the management of the ship.

aa: Fault in the navigation of the ship

Fault in measures which should have been exercised during the navigation of the ship for her safe arrival to the place of discharge is "*fault in the navigation of the ship*". For the existence of such fault the vessel must be in motion or cast off[83]. Examples of faults relating to the navigation of the ship and largely facilitating her benefit are fault in: the determination of her location and route, berthing[84], signalling, manoeuvring, anchorage, the evaluation of meteorological news[85], the adjustment of her speed, her abandonment[86], taking refuge in a port, obeying navigational rules, forcing her through a storm[87]; and ascertaining what time to proceed and what course to take over a bar[88].

As a result of fault in navigation, a ship normally strands, grounds[89], takes a list, collides with another ship[90] or strikes a quay[91], and goods get wet by seawater penetrated in cargo holds thereby. In the case of collision due to joint fault in the navigation of the ship, this exception plays important role because cargo interests cannot claim damages from their own carrier whose servants negligently contributed to a collision when navigating the vessel while other shipowners may be held tortiously liable to them in

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82 Carver,T.G.: Carriage, p.151 / Prüssmann-Rabe: Seehandelsrecht, § 607 C3a.
83 *Lord (SS) v. Newsum* [1920] 1 KB 846 / *Royal Ins. Co. v. S/S Robert E Lee* 1991 AMC 1750 (SD NY 1991) - Bartle,R.: Introduction, p.132.
84 *Tribunal de commerce de Sète*, July 19, 1960, DMF 45 (1961).
85 *Gerechtshef Te's -Gravenhage*, January 12, 1966, ETL 345 (1968).
86 *Bulgaris v. Bunge* (1933) 38 Com. Cas. 103, 114.
87 *Yawata Iron & Steel v. Anthony Shipping* 1975 AMC 1602 (SD NY 1975) - Tetley,W.: Navigation and Management, p.246.
88 *Wilbur-Ellis Co. v. M/V Captayannis* 1969 AMC 2484 (D.Or. 1969): The ship was not adequately manned, which was, however, not found to be the proximate cause of loss or damage.
89 *The Portland Trader* [1964] 2 Lloyd's Rep.443 (CA).
90 *The Satya Kailash* [1984] 1 Lloyd's Rep. 586, 595 (CA) / *Agrico Chemical(ibid)* 1979 AMC 801 (ED La. 1978).
91 *The Aliakmon Progress* [1978] 2 Lloyd's Rep. 499 (CA).

proportion to the degree of faults of their mariners or servants[92]. By comparison, under US law, where both ships are to blame in a collision cargo interests may recover their entire loss from the non-carrying ship, then the non-carrying shipowner may have right of recourse against the carrying shipowner for one-half of this sum. If the carrier's servants are fully at fault in the collision, then the carrier is under no liability. But if they are partly to blame, the carrier becomes directly liable to the non-carrying shipowner and indirectly to cargo interests. With the aim of avoiding that result, carriers started to include into bills of lading "both-to-blame clauses" stipulating that cargo interests will reimburse him in proportion to the extent of his contribution for cargo loss or damage to the non-carrying shipowner. This clause in a bill of lading was regarded by US courts as by-passing the general rule forbidding any exemption from the common carrier's liability for fault[93].

Delay is often caused by fault in the navigation of the vessel. However, the speedy prosecution of a voyage may be affected by matters other than navigation, such as strike, sea perils, war, etc.[94].

bb: Fault in the management of the ship

Another form of nautical fault is *fault in the management of the ship* which can be described as fault in handling of the vessel other than for navigational purpose[95]. The obligation to manage the ship firstly covers the undertaking to maintain the ship's seaworthiness except for her cargoworthiness[96]. For that reason, conditions under which the carrier may be granted this exemption must be ascertained.

Since the carrier's liability for loss or damage arising from unseaworthiness prior to the beginning of the voyage under Articles 3 (1) and 4 (1) of the Hague and Hague-Visby Rules is a separate cause of liability, the carrier cannot benefit from the exception

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92 Article 4 (1) of the Brussels Collision Convention 1910 / Section 1 (1) of the UK Maritime Conventions Act 1911; § 736 of the German Commercial Code 1897; Article 1218 of the Turkish Commercial Code 1956 - Gilmore,G.-Black,C.: Admiralty, p.173.

93 *The Frances Hammer* [1975] 1 Lloyd's Rep. 305 (SD NY 1975).

94 *Suzuki and Co. Ltd. v. J Beynon and Co. Ltd.* (1926) 42 TLR 269 (HL).

95 ILA, Hague Report, p.145-152.

96 Poor,W.: Charter Parties, p.174 / Prüssmann-Rabe: Seehandelsrecht, § 607 C3a.

of fault in the management of the ship if the fault has been committed before the voyage begins[97]. The court must *sua sponte* investigate whether conditions of the special rule in Articles 3 and 4 have materialised and, if necessary, must impose the burden of proving that fault in the management of the ship has been performed after the commencement of the voyage on the carrier who invokes the defence (a).

Fault in the management of the ship may occur any time after she has commenced her voyage until goods are discharged[98]. She does not need to be off shore[99]. Even when she stays at the port of call for any reason if she is not properly managed, the carrier may claim his exclusion from liability.

The followings are examples of faults in the management of the ship so long as they influence the safety of the vessel more than that of goods: fault in providing and maintaining seaworthiness of the ship (apart from her cargoworthiness) in the course of the voyage for her hull, valves, (bilge) pipes, pumps, ballast tanks, machines and boilers by checking and clearing them[100]; manning, equipping, supplying and stabilising her by ballasting[101] or stowing[102]; closing port holes[103]; pumping bilge[104], bunkering; and using the inert gas system in the carriage of automotive diesel oil by a crude oil tanker[105].

3- Fire

Under Article 4 (2) (b) of the Hague and Hague-Visby Rules the carrier is excused from liability for loss or damage arising from fire unless caused by the actual fault or

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97 *Maxine Footwear Co. Ltd. v. Canadian Govn. Merchant Marine Ltd.* [1959] 2 All ER 740 / *Firestone Syn. Fibers Co. v. Black Heron* 1964 AMC 42 (2 Cir. 1963); *American Smelting and Refining Co. v. SS Irish Shipping Ltd.* 1977 AMC 780 (2 Cir. 1977) - ILA, Hague Report, p.82 - Karan,H.: Teknik Kusur-Ticari Kusur, p.124. See also for the similar judgements under Article 3 of the Harter Act 1893, *Int'l Navigation Co. v. Farr & Bailey Co.* (1901) 181 US 218; *May and Others v. Hamburg Amerikanische Packetfahrt A/G* (1933) 48 Ll.L.R. 35.

98 *The Glenochil* (1896) P 10 / *The Germanic* (1903) 107 Fed. Rep. 294; *Vistar SA v. Sea Land Express* 1986 AMC 2382 (5 Cir. 1986) - Carver,T.G.: Carriage, p.150.

99 *Lord (SS) v. Newsum* [1920] 1 KB 846, 849.

100 *The Rodney* [1900] P 112; *The Touraine* [1928] P 58.

101 *Leon Bernstein Co. v. Wilhelmsen* 1956 AMC 754, 756 (5 Cir. 1956); *Orient Ins. Co. v. United SS Co.* 1961 AMC 1228 (SD NY 1961); *Firestone Synthetic Fibers Co. v. M/S Black Heron* 1964 AMC 42 (2 Cir. 1963) - Tetley,W.: Navigation and Management, p.246.

102 *Cour de Cassation* April 10, 1959, DMF 401 (1959).

103 *The Silvia* 171 US 462 (SC 1898).

104 Arness,F.F.: Error, p.649.

105 *The Iron Gippsland* [1994] 1 Lloyd's Rep. 335, 358 (Avust. NSW SC. - Adm. Div.).

privity of the carrier[106]. "*Fire*" means a destructive flame which breaks out or spreads outside the combustion place[107].

A *flame* is a prerequisite for fire. Mere heat, which has not arrived at the stage of incandescence or ignition, and smoke do not constitute fire[108], neither does the internal development of heat within cargo[109]. Despite the fact that extreme heat might cause damage to goods consistent with fire, it cannot be excepted because the reason for the exclusion of the carrier's liability for fire is to protect him from its dangers which could destroy the ship together with goods[110]. However, if fire breaks out due to the heating up of goods, the fire and the heating up should be treated as a part of the same process because it is impossible to separate how much loss arose from the heating up and fire[111]. Placing inflammable goods close to the combustion place is improper stowage for which the carrier is liable. Should a flame break out outside the combustion place, such as a boiler, or should spread it out, the carrier cannot claim immunity either, if goods have dropped into the coal boiler.

This immunity applies to all carriers notwithstanding whether they are shipowners or not and to all vessels including lighters regardless of their nationality unlike under the US Fire Statute 1851 which grants protection only to the shipowner and Section 186 of the UK Merchant Shipping Act 1995 which covers fire only onboard a British ship[112].

Loss by reason of fire covers any damage which has resulted from extinguishing the fire and avoiding or mitigating its consequences. This is the approach taken by Article 5 (4) (a) of the Hamburg Rules. The carrier is not therefore liable under the Hague and Hague-Visby Rules even for damage due to smoke and water used to put out a fire

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[106] Section 186 of the UK Merchant Shipping Act 1995; the US Fire Statute 1851 also granted the carrier such exemption.

[107] Bozer,A.: Sigorta Hukuku, Ankara 1981, p.153.

[108] *Hof Van Beroep Brussel,* March 30, 1967, ETL 755 (1967) / *David NcNair & Co. Ltd. v. The Santa Malta* [1967] 2 Lloyd's Rep. 391, 394 (Can. Exc. Ct.) / *Tempus Shipping v. Louis Dreyfus* [1930] 1 KB 699, 708 / *The Buckeye State* 1941 AMC 1238 (WD NY 1941); *Cargo Carriers Inc. v. Brown SS Co.* 1950 AMC 2046 (WD NY 1950) - Poor,W.: Charter Parties, p.182 / Prüssmann-Rabe: Seehandelsrechts, § 607 C5 / Ülgener,M.F.: Yangın Zararları Hakkında Taşıyanın Mutlak Sorumsuzluğu, İst.Bar.Der., 1987, Is.1-3, p.97.

[109] Boyette,Van R.: Fire, p.72.

[110] Williams,W.L.: Fire, p.584.

[111] *American Tobacco Co. v. Goulandris* 1959 AMC 1462 (SD NY 1959) (under the US Fire Statute).

[112] *Goodwin Ferreira v. Lamport and Holt* (1929) 34 Ll.L.R. 192.

onboard a ship[113]. However, failure to extinguish a fire[114], to guard against indiscriminate use of water in dousing a fire or to separate undamaged cargo from fire-damaged goods[115] is not within this exception.

C) EXCEPTIONS TO THE GENERAL BURDEN OF PROOF RULE: OCCURRENCES PRESUMED UNAVOIDABLE

1- General

The carrier is exempted from liability for loss or damage arising from 13 different incidents in Article 4 (2) (c)-(p) save for (d) of the Hague and Hague-Visby Rules. The function of these immunities is not easily seen from this Article. Are they real exceptions to the general exemption rule (q), in other words, can the carrier who or whose servants or agents are guilty of fault in the occurrence of loss or damage still rely on these immunities? The reference made in Article 3 (2) to Article 4 adds more problems. A school of thought interpreted the phrase "*subject to*" in Article 3 (2) to conclude that, if the carrier fits within one of the exemptions in Article 4, he has no liability to exercise proper care for cargo because Article 3 (2) is displaced or modified by Article 4[116]. This view is erroneous and has, in practice, reduced the degree of care for safe carriage[117]. During the preparation of the Hague Rules, it was thought unnecessary to require the absence of fault for the carrier's release from liability because Anglo-American courts had not allowed the carrier to mount such defences in the event where he, his servants or agents were at fault. However, since the Anglo-American practice might not have been followed by continental courts, the Protocol of Signature grants Contracting States an option to entitle cargo interests *in the cases referred to in Article 4 (2) (c)-(p)* to establish liability for loss or damage arising from the carrier's or his servants' fault which are not covered by paragraph (a). As a result, some Contracting

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[113] *The Diamond* [1906] P 282 - Ülgener,M.F.: Sorumsuzluk Halleri, p.89.

[114] *American Mail Line v. Tokyo M & F Ins. Co.* 1959 AMC 2220 (9 Cir. 1959); *Asbestos Corp. v. Cyprien Fabre* 1973 AMC 1683, 1686 (2 Cir. 1973); *Ta Chi Navigation (Panama) Corp.* 1982 AMC 1710, 1713 (2 Cir. 1982) - Bassoff,J.M.: Fire, p.511.

[115] *La Territorial de Seguros v. Shepard Steamship Co.* 1954 AMC 935, 938 (ED NY 1954).

[116] *Albacora SRL (ibid)* [1966] 2 Lloyd's Rep. 53, 63.

[117] Cadwallader,F.J.J.: Care, p.29; Kindred,H.M.: Hague to Hamburg, p.613; McGilchrist,N.R.: Hague Rules, p.259; O'Hare,C.W.: Uncitral Convention, p.143, 152.

States[118], incorporating the Rules into their legal system, used this right and clearly deprived the carrier of reliance on the exempted occurrences caused by fault. Accordingly, by reference made under Article 3 (2) the fault principle is neither eliminated, nor is the degree of care lessened in Article 4. The carrier, his servants and agents still have to take adequate steps as if they were a prudent carrier[119]. The only reason for the reference was to ensure that Article 4 is to be given effect. On this account, it appears innocuous and appends nothing new to the law. As is the case in Section 3 (2) of the US COGSA 1936, the words "subject to" might be deleted to remove uncertainty.

In short, these clauses, unlike nautical fault and fire exemptions in (a) and (b), do not really provide immunity to the carrier from liability as the general clause (q) does; but they are exceptions to the general burden of proof rule in (q) providing that "... *but* the burden of proof shall be on the person claiming the benefit of *this [q] 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 loss or damage".

Their common feature is that they *prima facie* stem without the fault of the carrier, his servants or agents[120]. In other words, they are typical unavoidable occurrences which cannot, at the first sight, be avoided by a prudent carrier and for which the carrier cannot be blamed from legal view-point. Accordingly, where the carrier shows that loss or damage arose from one of the exempted occurrences[121], it is presumed to have arisen without fault, and the carrier may, therefore, claim exemption[122].

Excepted incidents in Article 4 (2) (c)-(p) ought to be of an unavoidable nature[123]. It is not necessary for them to take place rarely or have extraordinary character, though[124].

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[118] Article 422 of the Italian Code of Navigation 1942; § 608 of the German Commercial Code 1897; Article 1063 of the Turkish Commercial Code 1956.

[119] OIC, Report of Canadian Carriage, p.154.

[120] Brækhus,S.: The Hague Rules Catalogue, in Grönfors,K. (editor): Six Lectures on the Hague Rules, Göteberg 1967, p.11, 20 (to be cited thereinafter as "Catalogue").

[121] *Charles Goodfellow Lumber Sales Ltd. v. Verreault* [1971] 1 Lloyd's Rep. 185, 191 (Can. SC); *Falconbridge (ibid)* [1973] 2 Lloyd's Rep. 469 (Can. SC).

[122] O'Hare,C.W.: Uncitral Convention, p.138. However see Brækhus,S.: Catalogue, p.23: The Author argues that Article 4 (2) (c)-(p) of the Hague and Hague-Visby Rules does not contain any burden of proof rule.

[123] For sea perils see *The Bunga Seroja* [1994] 1 Lloyd's Rep. 455, 470 (Aust. Ct.) / *The Washington* [1976] 2 Lloyd's Rep. 453, 459 (Can. FC) / *Cour de Cassation*, May 15, 1956, DMF 142, 168 (1957)

It must be evident from the actual fact that the exempted occurrence is of such a nature that it cannot at the first sight be avoided by a prudent carrier. However, there is no onus on the carrier to show that he actually took due care to avoid it. Otherwise, the granting of 13 exceptions to the carrier under Article 4 (2) (c)-(p) would make no sense while the general exception of unavoidable occurrence under Article 4 (2) (q) had already been laid down[125]. Nevertheless, because of the deficient legislative style, exemptions (c) and (p) have sometimes been interpreted as requiring the carrier to establish lack of fault on his part as well as on those of his servants and agents before he is decided to fit within the exemptions[126].

In determining *prima facie* unavoidability, each case must be judged with reference to its own circumstances. Accordingly, a relative but not an absolute measure ought to be used, and the question as to whether the cause of loss or damage (such as storm) could at the first sight be prevented by a prudent carrier in view of goods carried, ship used, and the route followed ought to be asked. For instance, a sea peril in a given area at a particular time of the year may not be a danger elsewhere or during another season of the year[127].

/ Corte di Cassazione, April 4, 1957, Dir.Mar. 67 (1958). For an opposite view see *Charles Goodfellow (ibid)* [1971] 1 Lloyd's Rep. 185, 191 (Can. SC) */ The Tuxpan* 1991 AMC 2432, 2438 (SD NY 1991): The courts are in the opinion that only the occurrence which would not be expected in the area of the voyage, at that time of the year may be held a sea peril without examining whether the carrier could avoid the sea perils.

[124] *Keystone Transports Ltd. v. Dominion Steel & Coal Corp.* 1943 AMC 371, 381 (Can. SC) */ USA v. Eastmount Shipping Corp.* [1975] 1 Lloyd's Rep. 216, 219 (SD NY) - OIC: Report of Canadian Carriage, p.159. For an opposite view see *Anglis (ibid)* (1927) 28 Ll.L.R. 202, 204 */ The Giulia* 218 F 744, 746 (SD NY 1914); *Virgin Islands Corp. v. Mervin Ltge. Co.* 1958 AMC 294 (3 Cir. 1958).

[125] *Minister of Food v. Reardon Smith Line, Ltd.* [1951] 2 TLR 1158 (KB); *Albacora SRL (ibid)* [1966] 2 Lloyd's Rep. 53, 64 (HL); *The Flowergate* [1967] 1 Lloyd's Rep. 1, 8 (QBD - CC): To the UK courts there was no express or implied provision in the Hague Rules that the carrier was debarred from relying on an exception unless he proved the absence of negligence on his part - OIC: Report of Canadian Carriage, p.159 (for sea perils) */ Corte di Cassazione*, April 4, 1957, Dir. Mar. 67 (1958) (for sea perils) - Ganado,M.-Kindred,H.M.: Delays, p.65; Tetley,W.: Cargo Claims, p.435.

[126] *The Lady Drake* 1937 AMC 290 (Quebec CA) */ Tribunal de Commerce d'Anvers*, April 1, 1977, JPD 1977/78, 77 (for sea perils) */ Tulsa* 1941 AMC 1474 (SD Ga. 1941) (for latent defects) - Secretariat, Working Paper of 1972, p.151 - Naylor,B.T.: Burden of Proof, p.297, 302.

[127] *GE Crippen & Associates Ltd. v. Vancouver Tug Boat Ltd.* [1971] 2 Lloyd's Rep. 207 (Can. Ex. Ct. - Adm. Dist.) */ The Tilia Gorthon* [1985] 1 Lloyd's Rep. 552 (QBD - Adm. Ct.) */ Southern Sword* 1951 AMC 1518, 1520 (3 Cir. 1951); *RT Jones Lumber Co. v. Roen SS Co.* 1960 AMC 46, 47 (2 Cir. 1959); *Yawata Iron & Steel Co. v. Anthony Shipping Co.* 1975 AMC 1602, 1605 (SD NY 1975) - Tetley,W.: Peril of the Sea, 6 Can.B.J. 148, Ap'63, p.148, 172.

The excepted occurrences which have or should have at the first sight been expected and avoided by a prudent carrier cannot exculpate the carrier from liability[128]. Nowadays, owing to technological developments, dangers can be conveyed to carriers beforehand, that has decreased the number of hazards constituting excepted occurrences. Indeed, thanks to the radar and other technical equipment, other vessels, shipwrecks, icebergs can be fixed in advance, and collision therewith can easily be avoided. Again, meteorological reports assist the carrier with preparing the ship for changes in weather conditions; the vessel, thus, gains an opportunity to take refuge in a port or cove during bad weather. Similarly, due to progresses in telecommunication, a carrier may no longer escape paying damages for acts against public policy and restraints of labour at the first sight known to and avoided by a prudent carrier. For example, the carrier nowadays cannot assert that he has not foreseen the embargo on trade such as one against Iraq or on ships of various flags barred in some countries, e.g., as Cypriot flag in Turkey.

Article 4 (2) (c)-(p) only grants presumptions *de juris tantum* of an unavoidable occurrence to the carrier because under general burden of proof rule in clause (q), the onus of proof for the fault is shifted onto cargo interests in *other* exemptions mentioned in clauses (c)-(p) save for (d). Consequently, a cargo interest may adduce evidence to rebut these presumptions and make the carrier liable. He should show that an exempted occurrence or its consequences could have been precluded by the carrier had the prudent carrier's care actually been taken[129].

The catalogue of exceptions might be abolished, as is the case under the Hamburg Rules (except salvage). The elimination of the list does not make substantive difference. Conversely, it clarifies and simplifies the rules relating to the carrier's liability and the burden of proof on parties, and thus solves the problem arising from friction relating to litigation, arbitration, negotiation, investigation, etc. and brings them into line with other international conventions regulating carriage by air and land. Indeed, the exemptions based on the actual facts of each case. Since courts are free to evaluate factual evidence,

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[128] For sea perils see *Weyerhouse Sales Co. v. SS Cynthia Olson* 1955 AMC 377, 378 (ND Cal. 1954); *RT Jones Lumber (ibid)* 1960 AMC 46, 48 (2 Cir. 1959).

[129] Hunter,R.J.: Proving "Inherent Vice" at Common Law, under the Hague-Visby Rules and under the CMR, MA Business Law Course Dissertation, London Guildhall University, 1985, p.88, 98.

they may at any time presume the carrier, who has established the occurrence and its *prima facie* unavoidable nature, to have proved the unavoidable occurrence. Thus, it may be said that the exemptions in Article 4 (2) (c)-(p) of the Hague and Hague-Visby Rules are retained under Article 5 (1) of the Hamburg Rules[130]. If the removal of these exemptions is undesired, then at least they ought to be set under independent paragraph clearly distributing the burden of proof between parties.

2- Sea perils

Perils, dangers, accidents of the sea or other navigable waters can be summarised as "*sea perils*". They are *prima facie* unavoidable in nature. For that reason, they are presumed to be unavoidable in Article 4 (2) (c). They may be defined as perils peculiar to the sea or other navigable waters which cannot, at the first sight, be avoided by a prudent carrier.

Apart from other unavoidable occurrences, they must be peculiar to the sea, in other words, must jeopardise the ship and consequently goods thereon only because of being at sea[131]. Although direct action by waves and incursion of the sea are not necessary, being at sea must at least ease the occurrence of a peril and, therefore, of loss or damage. Seawater might either directly come into contact with goods or indirectly endanger them by unbalancing the strength of a seaworthy ship[132]. Waves getting rough due to storm, gale or tornado; fog due to evaporation of the sea; shipwrecks, sand banks, shoals, rocks and icebergs hiding in the sea, are such examples. By contrast, dangers which can equally be encountered on land, such as rain[133], lightning, fire[134], rats[135], cockroaches, vermin, so far as their general character is concerned, are not exempted[136].

Not only do dangers peculiar to the sea but also those remarkably incident to other navigable waters come within the exemption under Article 4 (2) (c) of the Hague and

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[130] Carey,J.E.: Cargo Plaintiff, p.4; Donovan,J.J.: Hamburg Rules, p.7; Hellawell,R.: Allocation of Risks, p.359; Sweeney,J.C.: Review, p.16; Tetley,W.: Hamburg Rules, p.7; Canadian Comments, p.260. For an opposite view see OIC: Report of Canadian Carriage, p.163.

[131] Ülgener,M.F.: Sorumsuzluk Halleri, p.98, 103.

[132] *Chiswick Products, Ltd. v. SS Stolt Avence* 1966 AMC 307, 313 (SD Tex. 1966).

[133] *Canada Rice Mills v. Union Marine* [1941] AC 55, 64.

[134] *Hamilton Fraser & Co. v. Pandorf & Co.* (1887) 12 App. Cas. 518, 523, 527.

[135] *Hamilton (ibid)* (1887) 12 App. Cas. 518.

[136] *Stott (Baltic) Steamers v. Marten* [1916] 1 AC 304, 309.

Hague-Visby Rules. They may occur while the vessel is alongside a quay to load or discharge goods[137]. The ship does not need to be in motion. For example, high waves which release a container from a tackle in the course of a loading operation are in fact sea perils.

They usually lead to sinking, foundering, colliding, stranding, taking a list, springing a leak, falling overboard of deck cargo, sweating of the hold, etc. However, whether an occurrence is a sea peril or not should be determined according to the occurrence rather than its consequences.

3- Acts against public order

By Article 4 (2) (e), (f) and (k) of the Hague and Hague-Visby Rules, the carrier is relieved of liability for the act of war, act of public enemies, riots and civil commotions. These exemptions are *acts against public order* because their common feature is to be contrary to public order. They are of *prima facie* unavoidable nature. Indeed, the carrier cannot be expected to escape these events which are difficult to be precluded even by public authorities. As a result, acts against public order are presumed to be unavoidable. They include any act which violates public order and which cannot, at the first sight, be guarded against by a prudent carrier.

The first type is *acts of war* which have often been incorporated into charterparties and bills of lading to exempt the carrier from liability and have been interpreted to cover warlike operations[138] such as civil war[139] and retaliation. Acts of war may be defined as any conflict between two or more organised groups to force each other to accept their wills[140]. From this definition a formal declaration of war[141], severance of diplomatic relations and the use of armed force are not necessary. War can be at sea, on land or in

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[137] *The Stranna* [1938] P 69.

[138] *Pesqueerias y Secadores v. Beer* (1949) 82 Ll.L.R. 501 (HL) (insurance case) - Glass,D.A.-Cashmore, C.: Introduction, p.182. For an opposite view see Astle,W.E.: Liabilities, p.147; Scrutton,T.E.: Charterparties, p.444.

[139] *Kawasaki Kisen Kabushiki Kaisha v. Bantham SS Co.* [1939] 2 KB 544 (hostilities between governments still in diplomatic relation).

[140] Richardson,J.: Hague Rules, p.51.

[141] *The Wildwood* 1943 AMC 320 (9 Cir. 1943) - DeOrchis,M.E.: Restraint of Princes: The Carrier's Dilemma When Trouble Brews at Foreign Ports, ETL 3 (1980), p.5 (to be cited thereinafter as "Restraint of Princes").

air. States can attack enemy's country territory including their ships, bomb or blockade them[142], seize vessels and cargoes therein, and lay an embargo on trade. Even if the ship used by the carrier is neutral, the carrier can invoke such defence[143].

Riots and civil commotions are the other two exempted events enumerated under Article 4 (2) (k) of the Hague and Hague-Visby Rules as acts against public order. *Riots* are criminal offences committed by organised small groups to achieve their purpose by frightening the public. *Civil commotions* is an insurrection of people for general purposes against a public authority, which fall between riots and civil war.

Acts of public enemies have also been listed in Article 4 (2) (f) of the Hague and Hague-Visby Rules. Any act threatening the public interest and committed against public authorities can constitute acts of public enemies. They include "the act of King's or Queen's enemies" at common law. Thieves and robbers violating for only personal but not public benefits are not that kinds of actions[144], except *acts of pirates* regarded as enemies of humanity[145].

4- Restraints of public authority

Article 4 (2) (g) and (h) of the Hague and Hague-Visby Rules excuses the carrier from liability for arrest or restraint of princes, rulers or people, or seizure under legal process and quarantine restrictions, i.e., "*restraints of public authority*". They are all unavoidable in nature because the carrier is not supposed to disobey the orders of a public authority and, consequently, to commit crimes. They, therefore, cover any forcible interference with the voyage or adventure during peace or war[146] by a public authority which cannot, at the first sight, be avoided by a prudent carrier.

The administrative and judicial bodies using a sovereign power of a state are *public authorities*. Compulsions of others, such as mobs, rebels, terrorists or guerrillas, cannot

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[142] *Seabridge Shipping Ltd. v. Antco Shipping Ltd.* [1977] 2 Lloyd's Rep.367: During the war between Israel and Arab countries, Libya hampered the shipping of oil to some destinations.

[143] Chorley,R.S.T.-Giles,O.C.: Shipping, p. 206; Scrutton,T.E.: Charterparties, p.444.

[144] Wilson,J.F.: Carriage, p.246. For an opposite view see Richardson,J.: Hague Rules, p.51.

[145] Astle,W.E.: Liabilities, p.148 / Meray,S.L.: Devletler Hukukunda Denizle İlgili Bazı Örnek Olaylar, AÜSBFD, 1957, Vol.XII, Is.3, p.42, 48; Okay,S.: Ademi Mesuliyet Kayıtları, p.147. For an opposite view see Wilson,J.F.: Carriage, p.246. For the different definitions of "pirates" see Kahn,L.J.: Pirates, Rovers, and Thives, 20/2 Tul.Mar.L.J. 293, Smr'96, p.293.

[146] which is also covered by "act of war" in Article 4 (2) (e).

be restraints of public authorities[147]. Whether the body has acted in its authority granted by a state is a question of fact in each circumstance[148].

The carrier's relief of liability does not depend on actual state intervention[149]. Even where the carrier avoids completing the voyage due to imminent threat of state compulsion, he could escape liability[150]. However, mere apprehension of being faced with state obstruction in future cannot form a restraint of public authority[151] unless there is a well-grounded fear.

Administrative bodies using their authority could prohibit or restrict the importation, exportation of goods, confiscate them as contraband, lay embargoes on trade, blockade ports, arrest mariners, seize cargoes and ships[152], put them into quarantine[153], and search the vessel for illegal drugs[154].

Restrictions by public authority also involve constraints *by judicial bodies* so long as they act under authority granted by a State. For that reason, unlike at common law[155] *seizure under legal process* is clearly exempted in Article 4 (2) (g) of the Hague and Hague-Visby Rules. The origin of restrictions under legal process could be public or civil law. Consequently, seizure of goods or the ship under criminal rules[156], and

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147 Payne,W.-Iwamy,H.: Carriage, p.183; Wilson,J.F.: Carriage, p.252.

148 In *Silver Coast Shipping Co. Ltd. v. Union Nationale des Co-operatives des Céréales* [1981] 2 Lloyd's Rep. 95, 98, the leader of the FNLA during the civil war in Angola in 1975 was deemed a prince because his authority was so powerful to be regarded as a state authority.

149 *Rickards v. Forrestal Co.* [1942] AC 50, 81: The court decided that the German carrier who obeyed his Government's order and came alongside the neutral port during the Second World War despite being outside the German jurisdiction may have benefited from this exception.

150 *Nobels Explosives Co. v. Jenkins & Co.* (1896) 2 QB 326: The court was held that the discharge of the goods carried to Japan in Hong Kong with an intent to prevent their seizure during the war between Japan and China was due to the restrictions of public authority.

151 *Watts & Co. Ltd. v. Mitsui & Co. Ltd.* [1917] AC 227: The court did not entitle the carrier, who did not continue his voyage to the Black Sea because of his fear of the closure of the Dardanelles by the Ottoman Empire, to rely on such exception; *The Andros Island* (1980): The arbitration tribunal ruled that instruction of the Greek Ministry to Greek carriers that there was a dispute between Turkey and Greece concerning Cyprus did not forcibly interfere with the voyage on its own and consequently was not a restraint of public authority - DeOrchis,M.E.: Restraint of Princes, p.6.

152 *De La Roma SS Co. Inc. v. Jack E Ellis* 1945 AMC 389 (9 Cir. 1945).

153 *Miller v. Law Accident Insurance Co.* [1903] 1 KB 712 (CA).

154 *Benjamin v. Balder Eeems* 1987 AMC 55 (SD NY 1986).

155 Carver,T.G.: Carriage, p.179.

156 See Article 36 the Turkish Criminal Code; Article 832 of the Turkish Commercial Code 1956; Article 63 and 79 of the Turkish Seizure and Arrest Code 1940.

executive and cautionary attachments and cautionary judgements on goods or ships under civil rules are enough to release the carrier from liability.

5- Restraints of labour

By Article 4 (2) (j) of the Hague and Hague-Visby Rules the carrier is not liable for "strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general" or, in short, for "*restraints of labour*". Since they take place outside the carrier's control and impede his work, they are of unavoidable nature. On this account, they are presumed to be unavoidable. Any obstacle which hampers the work of any employee directly or indirectly taking part in the performance of the contract of carriage, and which cannot, at the first sight, be avoided by a prudent carrier falls within the immunity.

Strikes and lockouts are just two of them. They are defined in many national labour statutes[157]. Nevertheless, this exemption is wide enough to cover any restraint of labour *from whatever cause* irrespective of the legal definition. On this account, any stoppage or impediment of work (including even unlawful, general or political strikes, work slowdowns or partial labour stoppages) due to fear of disease, bombscare, and war; drafting of mariners into military service; or with a view to improving wages or conditions, giving vent to a grievance, making a protest, supporting or sympathising with other workers or political belief; or in an effort to gain from the employer more desirable terms and closure of business enterprise without any reason are all restraints for the purposes of the Hague and Hague-Visby Rules[158]. However, the carrier who refuses to pay crew's wages or closes down his business on this basis without any reasonable ground is guilty of fault[159].

For the exclusion of liability, people who stop working or are dismissed from work do not need to be the carrier's servants or agents. The avoidance of work by any person who directly or indirectly takes part in the performance of the contract of carriage falls

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[157] See Article 25 and 26 of the Turkish Collective Labour Agreement, Strike and Lockout Act.
[158] *The Arawa* [1977] 2 Lloyd's Rep. 416 (QB).
[159] Colinvaux,R.P.: COGSA, p.81.

within this exemption[160]. For example, if the ship is not fuelled due to a strike by coal miners, the carrier can escape from liability[161]. He is not liable for the act of third parties other than his servants and agents anyway.

Restrictions of labour do not necessarily concern all employees. Under the Hague and Hague-Visby Rules even *partial* restrictions have been enough to grant the carrier immunity from liability. The important thing is that shortage of employees should endanger the fulfilment of carriage obligation[162].

6- Acts or omissions of the cargo interest

Article 4 (2) (i) of the Hague and Hague-Visby Rules exempts the carrier from liability for acts or omissions of the shipper or owner of the goods, his agent or representative. The reason for the presumption of this occurrence to be unavoidable is the impossibility of checking and controlling activities of third parties, and consequently of preventing their acts or omissions.

Only the shipper, owner of the goods, their agents or representatives are considered under this provision as persons for whose acts or omissions the carrier is not liable. *Owner of the goods* must refer to all people who has right to make a cargo claim under the contract of carriage (cargo interests) and their agents or representatives rather than a bare owner[163].

The carrier is excluded from liability only for the act or omission of the cargo interest whose goods have been lost or damaged. By contrast, he cannot invoke such defence if cargo interests damaged other goods on the ship[164]. Though, he may rely on Article 4 (2) (p) and (q) of the Hague and Hague-Visby Rules.

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[160] Chorley,R.S.T.-Giles,O.C.: Shipping, p.207. For an opposite view see Glass,D.A.-Cashmore,C.: Introduction, p.183.

[161] For an opposite view see Ülgener,M.F.: Sorumsuzluk Halleri, p.128.

[162] *USA v. Lykes Bros. SS Co., Inc.* 1975 AMC 2244, 2252 (5 Cir. 1975).

[163] For a similar approach see Tetley,W.: Cargo Claims, p.451.

[164] *Silver and Layton v. Ocean SS Co. Ltd.* (1930) 1 KB 416 - Carver,T.G.: Carriage, p.381; Tetley,W.: Cargo Claims, p.505. For an opposite view see *Goodwin Ferrerira (ibid)* (1929) 34 Ll.L.R. 192; *Ministry of Food v. Lamport* [1952] 2 Lloyd's Rep. 371, 381: Even where the goods were damaged due to insufficiency of packing of others, the carrier's exclusion from liability was suggested.

The first example of the act or omission by the cargo interest is the *insufficiency of packing*, which is listed in Article 4 (2) (n) of the Hague and Hague-Visby Rules[165]. Unless otherwise agreed by parties in the contract of carriage, goods are packed by shippers. They should, therefore, bear all consequences for the deficiency of packing.

Packing ought to be done considering the nature and type of goods and of the ordinary hazards expected during their voyage[166]. Since theft is not a risk concerning their nature and kind, their packing does not need to be done in a way to prevent pilferage[167]. Nor can the shipper be required to pack goods with a view to keeping them safe from unusual risks, such as collision or stranding. Packaging does not have to be strong enough to prevent minor damage to cargo for which the carrier is not liable[168]. Ordinary and customary packing in trade is presumed to be sufficient[169]. Certain types of goods, such as automobiles, might not need any packing[170] whereas few, such as steel roads, may have to be tied very lightly in bundle. In through carriage, packing should be strong enough to carry goods during transhipment. If they are consolidated in a container by the shipper, even the container's deficiency is deemed to be that of packing because the container has the same function as cargo[171]. If the carrier has issued a clean bill of

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[165] Under § 608 of the German Commercial Code 1897 and Article 1063 of the Turkish Commercial Code 1956 this exception was not laid down individually because of being found unnecessary. By contrast, in the same line, Article 27 (g) of the French domestic Law No. 66-420 of June 18, 1966 provides only one exception "the faults of the shipper, notably in the packing, conditioning and marking of the goods".

[166] *The Lucky Wave* [1985] 1 Lloyd's Rep. 80 / *Tribunal de commerce de Marseille*, April 22, 1953, DMF 576 (1953) / *Ponce* 1946 AMC 1124 (D NJ 1946) - Wilford,M.-Coghlin,T.-Healy,N.J.-Kimball,J.D.: Time Charters, London 1989, p.46 (to be cited thereinafter as "Time Charters").

[167] *AE Potts & Co. Ltd v. Union SS Co. of New Zealand, Ltd.* [1946] NZLR 276: The court rendered the carrier liable for the pilferage of 25 bales of cotton which was packed insufficiently; Scrutton,T.E.: Charterparties, p.444 / Prüssmann-Rabe: Seehandelsrecht, § 608 B.

[168] *Southern Cross* 1940 AMC 59, 65 (SD NY 1939); *Copco Steel & Engineering Co. v. SS Alwaki* 1955 AMC 2001 (SD NY 1955). For an opposite view see *The Continental Shipper* [1976] 2 Lloyd's Rep. 234, 236 (Can. CA).

[169] *The Lucky Wave* [1985] 1 Lloyd's Rep.80, 86 / *Cour d'Appeal de Rouen*, January 15, 1960, DMF 669 (1960) / *Continex, Inc. v. SS Flying Independent* 1952 AMC 1499, 1503 (SD NY 1952).

[170] In *The Continental Shipper* [1976] 2 Lloyd's Rep. 234, 236 (Can. CA) / *Southern Cross* 1940 AMC 59, 65 (SD NY 1939), it was held that the defence of insufficient packing was not available to the carrier since automobiles are customarily shipped uncrated.

[171] *Guadano v. SS Cap Vincent* [1973] FC 726: The consolidation of the furniture and antiques only wrapped in paper in containers was deemed to be insufficient / *Bundesgerichtshof*, March 18, 1971, [1971] ETL 461 - Booker,M.D.: Containers, Volume I, Conditions, Law and Practice of Carriage and Use, London 1987, p.47.

lading despite apparent insufficiency of packing, then he can be estopped from relying on the exception against a third party holder acting in good faith[172].

Another example of the cargo interest's acts is the *insufficiency or inadequacy of marks*, which is enumerated in Article 4 (2) (o) of the Hague and Hague-Visby Rules[173]. Shippers should mark goods so as to prevent them from being mixed up with others and to make their discharge easy and speedy. If goods have been lost due to insufficiency or inadequacy of marks, the carrier may escape liability, and the cargo interest endures all loss they suffered[174]. The words "insufficiency or inadequacy" does not cover cases where marks are incorrect, inaccurate[175], or unlawful, as is the case where marks stamped upon cargo and stated in the contract of carriage are not the same.

Marks must be shown on goods themselves, if they have been packed, on their packing as should ordinarily remain legible until the end of voyage[176]. However, where a clean bill of lading is in the hands of a bona fide third party holder, the carrier may be deprived of the defence of the insufficiency and inadequacy of marks which have been apparently visible.

The shipper should *instruct* the carrier beforehand on goods requiring special care which would not be expected from the prudent carrier to exercise. If these instructions are not given duly, then the carrier may relieve himself of liability for loss or damage resulting therefrom[177]. For example, if the shipper persuaded the master to use an unsound method of stowage, loss or damage falls on him[178].

Another instance of the shipper's act or omission for which the carrier has immunity is the shipper's *misrepresentation* as to the marks, number, quantity, weight, general

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[172] *Silver (ibid)* [1930] 1 KB 416.

[173] Under § 608 of the German Commercial Code 1897 and Article 1063 of the Turkish Commercial Code 1956 this exception was not laid down individually because of being found unnecessary. By contrast, in the same line, Article 27 (g) of the French domestic Law No. 66-420 of June 18, 1966 provides only one exception "the faults of the shipper, notably in the packing, conditioning and marking of the goods".

[174] *Sandeman v. Tyzack and Branfoot SS Co.* [1913] AC 680.

[175] Carver,T.G.: Carriage, p.381.

[176] Richardson,J.: Hague Rules, p.53.

[177] *Jensen v. Matson Navigation Co.* 1947 AMC 1082 (D. Hai. 1947).

[178] *Ismail v. Polish Ocean Lines* [1976] 1 QB 893.

nature or value of goods carried. In that case, as the carrier cannot estimate how much care is required for the protection of cargo, consequently how much expense should be borne, and what risks should be insured, he can rely on the defence of the shipper's act. If the carrier stows cargo unduly, for example next to others which might produce chemical reaction and might cause damage to it, or goods are seized as contraband owing to the shipper's misrepresentation, the carrier cannot be obliged to pay damages[179]. However, even if the shipper misstates the facts in the bill of lading, the carrier may be held liable to a bona fide third party holder.

Where goods is loaded, stowed or discharged by the cargo interest, they, of course, bear all loss arising from their acts or omissions[180]. Likewise, if goods are delayed or seized due to *insufficiency in the document* supplied by the shipper, the carrier cannot be held liable for loss or damage arising therefrom[181].

7- Salvage

Under Article 4 (2) (l) of the Hague and Hague-Visby Rules the carrier is freed from liability for loss or damage resulting from saving or attempting to save life or property at sea. This exemption forms part of "salvage". The carrier who attempts to save life or property at sea, and, with this aim, puts himself, his servants and ship in danger cannot be blamed from legal view-points and deemed to be at fault. All prudent carriers are expected to help others in danger, without endangering their ships and cargoes therein. The main reason for the consideration of salvage unavoidable was, therefore, to encourage carriers to save life or property at sea. Accordingly, "*salvage*" may be defined as a process of saving or attempting to save life or property in danger at sea which is, under the circumstances of the case, expected to be performed by a prudent carrier.

For the existence of salvage, there must firstly be a hazard threatening life or property at sea. It is not necessarily to be a maritime peril. Even the salvage of ship in fire due to the explosion of her tank is within the exemption. The important thing is that the

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[179] *Silver (ibid)* (1930) 1 KB 416 - Ülgener,M.F.: Sorumsuzluk Halleri, p.132.
[180] *Arrondissementsrechtbank Te Rotterdam,* March 13, 1978 ETL 483.
[181] Ganado,M.-Kindred,H.M.: Delays, p.101.

danger, which could be actual or probable[182], should be so serious that it cannot be avoided without attempting to salvage.

The peril does not have to be externally visible. Internal danger may be communicated by the master[183]. Unless the master refuses any help, the carrier (salvor) can save life or property on the ship in clear danger without waiting for the master's invitation. Even if the master does not act in a reasonable way to reject any assistance, or, in other words, the ship cannot protect itself against the danger on its own, then the salvor may go on salvage[184].

The danger should not necessarily threaten life and property at the same time. Indeed, during an emergency it is not easy to ascertain whether the performance has been made to salvage property or life. In that case, since the carrier's risk of liability for loss of or damage to goods carried increases, he might hesitate to salvage life at sea[185]. With a view to removing such hesitation under the Conventions the conjunction, "or", is used between the terms "life" and "property". The term, "property", covers everything at sea, such as ships, wrecks, cargo and luggage therein.

Nevertheless, if the carrier goes on salvage for the purpose of saving only property rather than life, his act must be reasonable because, while the loss suffered by the carrier would be compensated by salvage fee, loss of or damage to goods would not. The carrier should, therefore, not place his ship and cargoes into unreasonable danger and cause unreasonable delay. He must act as a prudent carrier and consider all the circumstances existing at the time including the terms of the contract and the interests of all the parties to the common venture when saving only property. For that reason, under Article 5 (6) of the Hamburg Rules granting the carrier an exemption for salvage, the saving of life is rightly distinguished from the saving of property; and in the latter, measures exercised is required to be reasonable[186].

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[182] Tekil,F.: Deniz Nakliyatı ve Sigorta Hukukunda Kurtarma ve Yardım, İstanbul 1962, p.92.
[183] Kender.R.: Denizde Kurtarma - Yardım, İstanbul 1962, p.22.
[184] § 742 of the German Commercial Code 1897; Article 1224 of the Turkish Commercial Code 1956.
[185] Richardson,J.: Hague Rules, p.52.
[186] Sassoon,D.M.-Cunningham,J.C.: Unjustifiable Deviation and the Hamburg Rules, in Mankabady,S. (ed.): The Hamburg Rules, Leyden-Boston 1978, p.167, 181 (to be cited thereinafter as "Deviation").

The main purpose of the salvage is to save or at least attempt to save life or property at sea. Even if the carrier has not successfully salvaged life or property, he is protected by the immunity[187] although he might not be awarded salvage fee[188]. The word, salvage, covers the continental law term, *assistance*, too. The salvage must not aim at the ship and goods subject to the contract of carriage because the carrier is obliged firstly to protect cargo in the vessel. The towage of the ship, waiting along her to boost its crew's morale or to provide technical service, extinguishing the fire, etc. are examples of salvage.

The carrier can be liable for loss or damage arising from salvage if loss or damage is of general average nature. In that case, he is obliged to contribute in general average[189]. This approach is in line with Article 5 (6) of the Hamburg Rules.

8- Inherent deterioration of goods

Another occurrence which is presumed to be unavoidable in Article 4 (2) (m) of the Hague and Hague-Visby Rules is wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of goods. This exception could be summarised as "inherent deterioration of goods". It could be defined as any deterioration which arises from the hidden defect, or the inherent nature or vice of cargo with a lapse of time in any case, and which cannot, at the first sight, be avoided by a prudent carrier.

Not only might inherent deterioration result from inherent nature or vice of goods but also from hidden defects thereof[190]. Indeed, by exact translation of the French official version of Article 4 (2) (m) of the Hague and Hague-Visby Rules the carrier is not liable for loss or damage arising from hidden defect, the special nature and the inherent vice of goods[191]. As distinct from other types of unavoidable occurrences, these occurrences must be related to goods themselves and must *ipso facto* bring about. If the deterioration

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[187] Okay,S.: Navlun Sözleşmesi, p.233; Ülgener,M.F.: Sorumsuzluk Halleri, p.135.
[188] Kender,R.-Çetingil,E.: Deniz Ticareti Hukuku Temel Bilgiler, B.5, İstanbul 1992, p.148.
[189] Buglass,L.J.: Average Adjustment, p.1.
[190] *Missouri Pacific Railroad Co. v. Elmora & Stahl* 377 US 134, 138 (1964); *Vana Trading Co. v. SS Mette Skou* 1977 AMC 702, 706 (2 Cir. 1977).
[191] Tetley,W.: Cargo Claims, p.479.

has resulted from external causes, such as insufficient packing, the carrier cannot release himself from liability on this ground[192].

Hidden defects are faults which cannot, at the first sight, be detected externally from the nature of goods by a prudent carrier. For instance, defective goods might be packed or consolidated in a container by the shipper[193]; assembly of automobiles may be faulty[194]; timber could not be seasoned[195]; flour may be infested by tiny larvae[196]; etc.

The deterioration could also be caused by the *inherent vice or nature of goods* which is an internal unfitness of goods for carriage contemplated[197]. For example, glass may be broken; fresh fruit could rot or over-ripen[198]; bales of rubber might be distorted or indented[199]; steel bars may be bent, nicked or cable-burned[200]; liquid might become acidic, and iron may get rusty[201]. As provided under Article 5 (5) of the Hamburg Rules special risks may also be inherent in the carriage of live animals.

The most common form of inherent deterioration of goods is wastage in bulk and weight, i.e., *shrinkage* which is a minor decrease in weight or bulk of cargo resulting without any external influence in the course of carriage. For example, decrease in weight due to the drying of goods or in bulk owing to the evaporation or extraordinary leakage of liquid is shrinkage.

The amount of shrinkage changes depending on the nature and type of cargo and on the development in methods of carriage[202]. In practice, customary percentage of wastage

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[192] *11. HD.*, 15.5.1984, E.2559, K.2581; *11. HD.*, 21.3.1985, E.1289, K.1567. For an opposite view in English law see Glass,D.A.-Cashmore,C.: Introduction, p.16, 51; Payne,W.-Ivamy,H.: Carriage, p.7.

[193] *Gutiérrez v. Sea-Land Service* 1979 AMC 2277 (D PR 1979).

[194] *Lister v. Lancs & Yorks Ry.* (1903) 1 KB 878.

[195] *Wm. Fergus Harris & Son Ltd. v. China Mutual S.N. Co.* [1959] 2 Lloyd's Rep.500.

[196] *Cour de Cassation*, February 24, 1981, DMF 74 (1982).

[197] *Lister (ibid)* (1903) 1 KB 878, 879 - Hunter,R.J.: Inherent Vice, p.4.

[198] *Eastwest Produce Co. v. SS Nordness* [1956] Ex. C.R. 328; *Westcoat Food Brokers Ltd. v. The Ship Hoyanger and Westfal-Larsen & Co. A/S* [1979] 2 Lloyd's Rep. 79 (Can. Ct.).

[199] *Silversandal* 1938 AMC 1489 (SD NY 1938), affirmed 1940 AMC 731 (2 Cir. 1940).

[200] *Copco Steel & Eng. Co. v. SS Alwaki* 1955 AMC 2001 (SD NY 1955).

[201] For the exemption, deterioration must be normal atmospheric rather than heavy or excessive rust: *Tokio M. & F. Ins. Co. v. Retla SS Co.* 1970 AMC 1611, 1620 (9 Cir. 1970).

[202] For liquids see *Cour d'Appeal de Montpellier,* January 7, 1958, DMF 220 (1958): 0.25% leakage in wine in bulk; *Cour d'Appeal d'Aix,* October 7, 1958, DMF 468 (1959): No shrinkage for wine in demijohns; *Cour d'Appeal de Montpellier,* January 10, 1974, DMF 341 (1974): 0.45% loss in wine in bulk / *National Distillers Products Corp v. Companhia Nacional* 107 F Supp. 65, 69 (SD NY 1952):

in weight or bulk of certain kinds of goods has been, as an allowance, agreed by parties or fixed by courts[203]. However, the standardisation of percentage of shrinkage less than its actual amount conflicts with the mandatory nature of the Rules because it reduces the carrier's statutory liability[204].

9- Latent defects

Article 4 (2) (p) of the Hague and Hague-Visby Rules provides that the carrier is not liable for latent defect not discoverable by due diligence. "*Latent defect*" is a fault which cannot, at the first sight, be detected and, therefore, remedied by a prudent carrier[205]. For that reason under the Rules it is presumed to be unavoidable.

Since what constitutes latent defect is not defined in the provision, this exemption presumably covers defects in the ship, cargo, shore tackle, crane[206], etc. Yet, hidden defects in the contract cargo, its packing and marks are also subject to Article 4 (2) (m), (n) and (o) of the Hague and Hague-Visby Rules.

Defects in a part of the ship, the quality and sufficiency of sailors, supplies and equipment may cause ship's unseaworthiness. Since the carrier's liability for loss or damage arising from unseaworthiness "before and at the beginning of the voyage" is laid down separately under Article 4 (1) of the Hague and Hague-Visby Rules, this exception

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2% shrinkage for wine in wooden pipes; *Palmco v. American President Lines, Ltd.* 1978 AMC 1715 (D. Ore. 1978): 0.5% shrinkage for palm oil; *Amoco Oil v. Lorenzo Halcoussi* 1984 AMC 1608 (ED La. 1983): 0.225% leakage for crude oil; *M Golodetz v. Lake Anja* 1985 AMC 891, 894 (2 Cir. 1985): 0.3-0.4% loss for tallow. For dry cargo in bulk see *Shui Fa Oil Mill Co. Ltd. v. M/S Norma* 1976 AMC 936, 938 (SD NY 1976) 1.55% shrinkage for soy beans; *US v. Central Gulf Lines* 699 F 2d 243, 247 (5 Cir. 1983): 1.5% to 2% loss for urea. For goods in bag see *Cour d'Appeal de Douai,* November 22, 1956, DMF 100 (1957): 0.5% to 1% loss in flour in bags; *Cour de Appeal de Montpellier,* December 14, 1956, DMF 536 (1957): 4% shrinkage in cement in bags; *Tribunal de Commerce de Paris,* June 25, 1975, DMF 748 (1976): 0.1%, 0.25% and 0.3% leakage for coffee in bags.

[203] In Turkey an unfair 5% leakage for crude oil, 2% leakage in cargoes in bags and 1% leakage in other goods were accepted as a customary trade allowance: *11. HD.*, 24.5.1983, E.1980, K.2693; *11. HD.*, 15.5.1984, E.2559, K.2581; *11. HD.*, 21.3.1985, E.1289, K.1567; *11. HD.*, 14.10.1985, E.5116, K.5262. On the other hand, in English and US practices a 0.5% shrinkage for crude oil cargoes was granted: *The Rio Sun* [1985] 1 Lloyd's Rep.350, 357 / *Sun Oil Co. v. M/T Mercedes Maria* 1983 AMC 718 (ED Pa. 1983); *Wesco. Intl. v. Tide Crown* 1985 AMC 189 (SD Tex. 1983).

[204] *Cour d'Appeal de Rennes,* May 14, 1959, DMF 149 (1960) / *Nederland v. Trade Fortitude* 1977 AMC 2144, 2148; *Kerr-McGee Ref. Corp. v. La Libertad* 1982 AMC 340, 349 (SD NY 1981); *Sun Oil Co. v. Carisle* 1986 AMC 305, 319 (3 Cir. 1985).

[205] *Corporacion Argentina v. Royal Mail Lines* (1939) 64 Ll.L.R. 188, 192.

[206] Carver,T.G.: Carriage, p.382, n.23. For an opposite view see O'Hare,C.W.: Uncitral Convention, p.134; Tetley,W.: Cargo Claims, p.508.

only governs defects in the ship not discoverable after the voyage has commenced[207]. However, the application of special rule does not change the carrier's legal position so much because defects not discoverable both before and after the voyage exempt the carrier from liability. The only difference between these two regimes is that in Article 4 (2) (p), unlike Article 4 (1), the carrier is not bound to prove that he actually exercised due diligence to examine defects, but that defects had such a nature that they cannot at the first sight been foreseen by a prudent carrier.

Whether the defect is latent or not is determined referring to the facts of each case. With this aim in mind, all known and customary tests should be taken into consideration. A fracture of the web of a crankshaft[208], defect in design used in the manufacture of a new suction valve[209] and the vice in the locking device on the rudder post[210] were held not to be discoverable. By contrast, corrosion is unlikely to be a latent defect as it develops so slowly that it can detected early or in time[211]. Neither are a tear, wear and a crack in hull or strike plate of hidden nature[212].

III.PARTICULAR UNAVOIDABLE OCCURRENCES

A) UNAVOIDABLE OCCURRENCE WHICH RELEASES THE CARRIER FROM LIABILITY ONLY FOR UNSEAWORTHINESS BEFORE AND AT THE BEGINNING OF THE VOYAGE : UNSEAWORTHINESS WITHOUT FAULT

Article 4 (1) of the Hague and Hague-Visby Rules releases the carrier from liability for loss or damage arising from unseaworthiness without fault. This exemption is just a special form of unavoidable occurrence in Article 4 (2) (q) of the Hague and Hague-Visby Rules.

From the first sentence of the rule, the carrier who wishes to escape liability on the grounds of such exemption has to prove the cause of loss or damage, i.e.

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[207] Compare with UNCITRAL Secretariat, Report of Bills of Lading, p.43 and Tetley,W.: Cargo Claims, p.508: The Secretariat and the Author submit that Article 4 (2) (p) concerns a defect not discoverable *any time*. By contrast see O'Hare,C.W.: Uncitral Convention, p.131: The author argues that this exemption duplicates liability for seaworthiness in Article 4 (1) of the Hague and Hague-Visby Rules.

[208] *Toledo*1939 AMC 1300, 1310 (ED NY 1939).

[209] *National Sugar Refining Co. v. M/S Las Villas* 1964 AMC 1445 (ED La. 1964).

[210] *Tata, Inc. Farrel Lines* 1987 AMC 1764 (SD NY 1987).

[211] *The Gundulic* [1981] 2 Lloyd's Rep. 418, 421, 425 / *West Kyska* 1946 AMC 997, 1003 (5 Cir 1946) - Tetley,W.: Cargo Claims, p.509.

[212] *The Falls City* (1932) 44 LL.L.R. 17, 18 / *Otho* 1944 AMC 43, 46 (2 Cir. 1944); *The Walter Raleigh* (1952) AMC 618, 637 (SD NY 1951).

unseaworthiness before or at the beginning of the voyage[213]. From the last sentence of the provision, he has to show that there has been no fault on his part, i.e., that he has actually exercised due diligence to provide a seaworthy ship[214]. The carrier who did not in fact take necessary steps, cannot relieve himself of paying damages by showing that even if he had exercised due care, unseaworthiness would have happened anyway[215]. The imposition of the burden of proving the exercise of due diligence to provide a seaworthy ship on the carrier is fair because details relating to the ship are available only to him[216].

The carrier's liability for unseaworthiness is not strict unlike at common law; but, he is liable for loss or damage arising from want of due diligence to provide a seaworthy ship. Consequently, if he has not discovered any defect causing unseaworthiness, having actually taken due care to inspect the ship, he will not be liable[217]. The carrier's duty to exercise "due diligence" is treated as a non-delegable obligation[218]. His liability for the fault of his servants and agents is therefore strict (without fault). He cannot release himself from liability by proving that he has exercised due diligence in engaging his servants and agents' services. Although it is often claimed by carriers that a strict liability is imposed on them by courts for the act of his servants or agents including his

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[213] Tetley,W.: Cargo Claims, p.375. For an opposite view see Bauer,R.G.: Measure, p.406; Wolfson,R.: Enactments, p.528.

[214] *Parkyn & Peters and Another v. Coppack Bros. & Co.* (1934) 50 Ll.L.R. 17 (KBD 1934); *The Toledo* [1995] 1 Lloyd's Rep. 40, 54 (QB – Adm. Ct.) - Benedict,E.C.: Admiralty 2A, p.6/15.

[215] For an opposite view see Cadwallader,F.J.J: Seaworthiness - Due Diligence, Hague and Hague-Visby Rules, in Lloyd's of London Press (Organisator): Speakers' Papers, p.1, 8.

[216] O'Hare,C.W.: Uncitral Convention, p.138.

[217] *Anglis (ibid)* [1927] 2 KB 456: Where fuel oil damaged frozen goods by escaping from an adjacent bunker space due to inadequacy of design, the carrier was not held liable because of latent defects; *The Amstelot* [1963] 2 Lloyd's Rep. 223, 229 (HL): The carrier was exempted because a fatigue crack in the reduction gear could not found although due diligence had been exercised; *The Yamatogawa* [1990] 2 Lloyd's Rep. 39: Since the carrier is not expected to open and dismantle reduction gears which are supposed to last the ship's life, visual examination of gears was held to be enough to scan the defects causing unseaworthiness / *The Quarrington Court* 1941 AMC 1234 (2 Cir. 1941): The failure to inspect of the valve letting seawater into the ship one year before the voyage was decided not to be the failure to exercise due diligence because the valve needed examining once in four years; *Peter Paul, Inc. v. Rederi A/B Pulp* 1958 AMC 2377 (2 Cir. 1958): The carrier was relieved of liability for the breaking of the steel ship into two due to brittle nature of the steel and all-welded construction of the hull which could not be foreseen under present scientific facts; *Gerber and Co. v. The Sabine Howaldt* 1971 AMC 539 (2 Cir. 1971) and *Fireman's Fund Insurance Companies v. M/V Vigsnes* 1986 AMC 1899 (11 Cir. 1986): Since the hatch covers were tested and no defects were found, the carrier was excluded from liability for the leakage.

[218] *The Muncaster Castle* [1961] 1 Lloyd's Rep. 57, 71, 82 (HL); *The Amstelot* [1963] 2 Lloyd's Rep. 223, 229 (HL) / *Fireman's Fund (ibid)* 1986 AMC 1899 (ND Fla. 1985) - Greenwood,E.C.V.: Negligence, p.796; Wilson,J.F.: Liability, p.140.

assistants (such as independent contractors and Lloyd's surveyors) used in the performance of the obligation to provide a seaworthy ship, as is the case at common law, there is an important difference that the carrier is liable only if his servants and agents have not exercised due diligence, i.e., they have been at fault[219]. Indeed, the words "due diligence" were first used in the US Harter Act 1893 in order to mitigate the strict effect of common law imposing absolute duty on the carrier. For that reason, the delegate must be as much diligent as a prudent carrier. This is clearly required under § 559 of the German Commercial Code 1897 (as amended by the law of 1937) and Article 1019 of the Turkish Commercial Code 1956 when incorporating Articles 3 (1) and 4 (1) into their national legislation.

The degree of due diligence is a question of fact depending on the sort of ship, particular goods carried and route followed[220]. For example, the expected care for a brand new ship cannot be the same as that for an old tramp vessel. In the former, the carrier may be required to supply the vessel with all the latest navigational equipment. Indeed, today radar and loran are considered essential elements for seaworthiness[221].

A survey certificate showing that the ship is in a seaworthy condition or that the crew are competent to work on the vessel cannot be accepted by a court as conclusive evidence of the exercise of due diligence by the carrier. This is so because the surveyor could be at fault in issuing the document[222].

Although under the Hamburg Rules the carrier's liability for unseaworthiness before or at the beginning of voyage is not laid down, it is covered by Article 5 (1) of the Hamburg Rules making the carrier liable for the breach of obligation to carry the goods on a seaworthy ship. Accordingly, the carrier who or whose servants or agents took all

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[219] Wilson,J.F.: Carriage, p.10 and 187.

[220] *Artemis Maritime Co. v. S.W. Sugar Co.* 1951 AMC 1833 (4 Cir. 1951) – Villareal,D.R.: The Concept of Due Diligence in Maritime Law, 2/4 JMLC 763, Jl'71, p.768; Williams,R.: Rules, p.67

[221] *Deutsche Shell Tanker Gesellchaft v. Placid Ref. Co.*, No.91-3669 (5 Cir. June 8, 1993). Compare to the decisions given during 1960s and 1970s: *President of India v. West Coast SS Co.* 1963 AMC 649, 654 (D. Ore. 1962); *Irish Spruce* 1975 AMC 2259, 2568 (SD NY 1975).

[222] *The Assunzione* [1956] 2 Lloyd's Rep. 468; *Riverstone Meat Co. v. Lancashire Ship. Co.*. [1959] 1 QB 74 / *Sundance Cruises v. American Bureu of Shipping* 1992 AMC 2946 (SD NY 1992).

measures that could reasonably be required to avoid defects causing unseaworthiness and their consequences is entitled to the exception under the same provision[223].

B) UNAVOIDABLE OCCURRENCE WHICH RELEASES THE CARRIER FROM LIABILITY ONLY FOR DEVIATION: REASONABLE DEVIATION

By Article 4 (4) of the Hague and Hague-Visby Rules the carrier is not liable for loss or damage resulting from any reasonable deviation. The carrier who deviates from the agreed route on reasonable grounds cannot be blamed legally and, consequently, cannot be considered at fault. Carriers are expected to alter their agreed route if there are reasonable grounds therefor. For that reason this immunity is just a special type of unavoidable occurrence in Article 4 (2) (q) of the Hague and Hague-Visby Rules.

Reasonable grounds could be any event which makes the change of route necessary. Article 4 (4) of the Hague and Hague-Visby Rules does not limit them to the saving or attempting to save life or property at sea. They are enumerated only to give examples. Thus, unlike at common law[224] a deviation in either saving or attempting to save property rather than life at sea could exempt the carrier from liability. The main reason for this addition is to encourage the carrier to save life.

Fixing the route to be followed the carrier, who is the person controlling the voyage at the time, must consider all the circumstances at the time including contractual terms and the interests of all the parties to the common venture along with his own benefit[225]. For example, deviation in preventing goods and the ship from being seized during war, escaping from storm or quarantine restrictions, avoiding a strike-bound port, having the ship repaired[226], and conveying a patient in the vessel to the hospital are reasonable. However, deviation only for the sole benefit of the ship rather than the cargo cannot

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[223] Bauer,R.G.: Hamburg Rules, p.58.

[224] *Scaramanga v. Scamp* (1880) 5 CPD 295 - Hilton,C.: Seaworthiness - A Legal Perspective, in the Nautical Institute (ed.): The Mariner and the Maritime Law - Seminar 3 (Seaworthiness), London 1992, p.28; Smith,K-Keenan,D.J.: Mercantile, p.288; Todd,P.: Bills of Lading, p.147.

[225] *Stag Line v. Foscolo, Mango & Co.* [1931] 2 KB 48, 60, 69, 79 (AC); [1932] AC 328, 343 (HL) - Astle,W.E.: Liabilities, p.310; Carver,T.G.: Carriage, p.385; Sassoon,D.M.-Cunningham,J.C.: Deviation, p.172 / Wüstendörfer,H.: Seehandelsrechts, p.256.

[226] *The Daffodil B* [1983] 1 Lloyd's Rep. 498 (QBD - CC).

release the carrier from liability[227]. For example, as stated under Section 4 (4) of the US COGSA 1936, if the deviation is for the purpose of loading or unloading cargo or passengers, it shall, *prima facie*, be regarded as unreasonable. Again, a deviation so as to land engineers testing a superheater, to land or to take onboard the carrier's friends for pleasure[228] and to take on bunkers for the next voyage[229] were decided to be unreasonable.

The reason justifying deviation does not have to be an actual physical danger. It is enough to be reasonably anticipated to take place in the near future. Nevertheless, only fear without any reasonable ground that cargo would be confiscated was not considered reasonable[230].

Deviation for the purposes of salvaging property should also be reasonable as distinct from the saving of life. If there is a possibility of saving property without deviating from the agreed route, the carrier cannot exculpate himself from liability. For example, it was held that the change of the route to save the steamer on the rocks which could have been towed by tugs to a safe port, was unjustifiable deviation[231].

At the moment when the carrier decides whether deviation would be reasonable, he is in a dilemma because if he misinterprets the facts and deviates from the routes, supposing that he acts reasonable, or if he does not change the route although there are reasonable grounds, assuming that they are unreasonable he might be held liable. He should figure out as quickly as he can that a situation is serious enough to alter the route.

In order to escape from liability the carrier who would like to enjoy such exception should firstly show the cause of loss or damage, i.e. deviation, and then its reasonable ground.

In the Hamburg Rules this exemption is not granted to the carrier because the carrier's liability for deviation is not provided therein. However, liability can be subject

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[227] *International Drilling Co. v. M/V Doriefs* 1969 AMC 119, 127 (SD Tex. 1968); *Manuel Int'l v. Rascator Maritime* 1986 AMC 1445, 1457 (2 Cir. 1986).
[228] *Stag Line (ibid)* [1932] AC 328, 341 (HL).
[229] *The Macedon* [1955] 1 Lloyd's Rep. 459 (Aust. NSW SC).
[230] *The Ruth Ann* 1962 AMC 117.
[231] *The Emily* (1896) 74 Fed. Rep. 881.

to general rule in Article 5 (1), and the carrier may escape liability by proving that he, his servants or agents took all measures that could reasonably be required to avoid the deviation and its consequences. In addition, the carrier may mount the defence granted under Article 5 (6) releasing him from liability for salvage.

V. CONCLUSIONS

(1) Article 4 (2) (q) of the Hague and Hague-Visby Rules is a general (catch-all) exemption and burden of proof rule excluding the carrier from liability for unavoidable occurrences and shifting the onus of proof for the cause of loss or damage and the absence of fault onto him. This provision is incorporated into Article 5 (1) of the Hamburg Rules in a preferable style.

(2) Both the Hague and Hague-Visby Rules and the Hamburg Rules have failed to concretise and consequently to clarify the degree of care expected from the carrier, his servants or agents. In principle, the carrier should act as a prudent carrier in the same state and conditions as him unless his knowledge and talent are more and superior to that of the hypothetical carrier.

(3) The carrier's assistants in the performance of the contract of carriage ought to be treated as servants or agents. However, as distinct from the latter, they must act within the scope of their engagement, in other words, their engagement should make the occurrence of loss or damage easy.

(4) The act of God is only a type of unavoidable occurrence regarding its seriousness. For that reason, there was no point in enumerating it as an independent exemption under Article 4 (2) (d) of the Hague and Hague-Visby Rules.

(5) Article 4 (2) (a)-(p) of the Hague and Hague-Visby Rules introduces exceptions to Article 4 (2) (q) of the same Conventions. It can be divided into two parts considering its functions. Article 4 (2) (a)-(b) exculpates the carrier from liability for the fault of his servants or agents whereas Article 4 (2) (c)-(p) amends the burden of proof for fault in favour of the carrier. The Hamburg Rules do not contain such exceptions (except for salvage) to the general exemption or burden of proof rule on the grounds that they depend on the facts of each case and, therefore, confuse the legal position of cargo interests and lead to friction. Even if the elimination of these exceptions is not intended, they must be re-drafted in respect to their different functions.

(6) In order to escape from paying damages for fire or nautical fault, not only does the carrier have to prove the fire or the act or fault of his servants in the navigation or management of the ship under Article 4 (2) (a) or (b) of the Hague and Hague-Visby Rules, but also lack of fault on his part since the carrier's exemption from liability for his own fault is still operated by Article 4 (2) (q). Nevertheless, under the Hamburg Rules the onus of proving fault in fire is imposed on the cargo interest in return for the removal of the nautical fault exemption as a result of political compromise despite the fact that all the details relating to fire onboard the ship are available to the carrier.

(7) The elimination of the exceptions in Article 4 (2) (c)-(p) of the Hague and Hague-Visby Rules will not change the legal situation so much because courts which are free to evaluate facts may any time re-introduce them as *prima facie* evidence of the unavoidable occurrence.

(8) The immunity granted to the carrier under Article 4 (1) of the Hague and Hague-Visby Rules is just a special form of the unavoidable occurrence in Article 4 (2) (q). The obligation to exercise "due diligence" is non-delegable and imposes on the carrier strict

liability for the fault of his servants or agents including his assistants. The carrier relying on Article 4 (1) must prove that not only he but also his servants or agents actually exercised due diligence to make the ship seaworthy.

(9) When the carrier deviates from the agreed route, he must consider all the circumstances existing at the time including contractual terms of the contract and the interests of all the parties to the common venture along with his own benefit. Deviation to save property should also be reasonable, as rightly provided for under Article 5 (6) of the Hamburg Rules.

Chapter Ten

PROXIMATE CAUSAL RELATION

The second condition for the carrier's release from liability is a proximate causal relation between an unavoidable occurrence (or other exempted occurrences) and loss. The carrier must prove that loss has effectively resulted from one of the exempted incidents in order to relieve himself of liability.

I. GENERAL

Article 4 (1) and (2) of the Hague and Hague-Visby Rules provides that the carrier is not liable for loss or damage *arising or resulting from* one of the excepted occurrences therein. On this account, for the carrier to gain immunity from liability, the exempted event should be the proximate, i.e., effective cause of the loss (*principle of proximate causal relation*, that is, *principle of causa proxima non remota spectatur*). Although under Article 5 (1) of the Hamburg Rules the causal relation is not mentioned clearly, this principle should undoubtedly be required. Such a rule firstly separates causes into *remote* and *proximate* ones and prevents the carrier from escaping liability for remote exempted incidents which cannot effectively be related to the loss[1]. Whether the cause is proximate or not depends on the facts of each case and on whether that loss would have occurred as a matter of course and according to general commercial experiences *but for* the exempted incident. If the answer of this question is in the negative, or, in other words, if the excepted occurrence was capable of leading to the loss as a matter of course and according to general commercial experiences, then it was a proximate cause for which the carrier is not liable.

The second function of the principle is to limit the amount of damages which the carrier will escape from paying to the amount of loss which has been proximately caused by the exempted incident. For instance, if the ship takes refuge in a port in order to avoid a storm or war and, consequently, delays her voyage and damages goods therein, the carrier may relieve himself of liability not only for direct damage to the goods but also other damages, such as economic loss, which have arisen from the

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[1] *Edouard Materne v. SS Leerdam* 1956 AMC 1977, 1980 (SD NY 1956).

excepted incident under normal circumstances. Likewise, if cargo is unloaded in a wrong port owing to a strike at the port of discharge, the carrier does not have to compensate for expenses spent on its forwarding to the place of arrival.

For liability to be excluded the carrier has to first show that the loss stemmed from one of the exempted events effectively. Otherwise, the loss is presumed to have resulted from an occurrence for which the carrier is liable[2]. For example, if goods became wet due to the incursion of seawater whose cause could not be explained by the carrier, the ship's unseaworthiness was presumed to be the proximate cause of the incursion[3]. Even if the cause of loss is inexplicable, the carrier cannot avoid liability by only proving that he, his servants and agents were not at fault[4]. Any other approach would preclude the carrier from collecting appropriate evidence in his possession for the occurrence. Second, not only does the carrier wishing to remove liability have to prove the proximate cause of loss, but also how much loss, whose total amount has already been proved by the cargo interest, proximately resulted therefrom[5]. Unexplainable loss falls on the carrier.

However, the carrier does not need to establish absolute proximate causal relation between the excepted occurrence and loss in order to release himself from liability. He cannot be obliged to prove all the circumstances which could explain an obscure

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2 *Kaufman Ltd. v. Cunard Steamship Co. Ltd.* [1965] 2 Lloyd's Rep. 564, 566 (Can. Ct.); *The Washington* [1976] 2 Lloyd's Rep. 453, 459 (Can. FC) / *White & Son v. Owners of Hobson's Bay* (1933) 47 Ll.L.R. 207; *Ismail v. Polish Ocean Lines* [1975] 2 Lloyd's Rep. 170 (QBD - CC); *The Mekhanik Evgrafov and Ivan Derbenev* [1987] 2 Lloyd's 634 (QBD - Adm. Ct.) / *Cour d'Appeal de Bordeux* May 7, 1951, DMF 393 (1951) / *Fagundes Sucena v. Miss. Shipping Co.* 1953 AMC 148, 153 (ED La. 1952); *Edouard Materne v. SS Leerdam* 1956 AMC 1977, 1980 (SD NY 1956) - Scrutton,T.E.: Charterparties, p.205; Wilson,J.F.: Carriage, p.262.

3 *North Star Cement, Ltd. v. Labelle* 1976 AMC 944 (Can. FC) / *Wessels v. Asturias* 1942 AMC 360, 362 (2 Cir. 1942); *The Southern Sword* 1951 AMC 1518, 1521 (3 Cir. 1951); *Ralston Purina Co. v. USA* 1952 AMC 1496, 1498 (ED La. 1952); *Federazione Italiana v. Mandask Compania* 1968 AMC 315, 318 (2 Cir. 1968); *Consol. Grain v. Marcona Conveyor* 1985 AMC 117 (5 Cir. 1983).

4 OIC: Report of Canadian Carriage, p.161. For an opposite view see Kimball,J.D.: Hague Rules, p.226.

5 *Gosse Millerd Ltd. v. Canadian Government Merchant Marine* [1929] AC 223, 241; *Silver v. Ocean SS Co.* [1930] 1 KB 416, 430, 435; *Heskell v. Continental Express Ltd.* (1950) 83 Ll.L.R. 438, 458; *Wayne Tank & Pump v. Employers' Liability* [1973] 2 Lloyd's Rep. 237, 240, 241, 245 (CA); *The Tolmidis* [1983] 1 Lloyd's Rep. 530, 540; *The Torenia* [1983] 2 Lloyd's Rep. 210, 218 (QBD - CC) / *Vallescura* 1934 AMC 1573, 1576 (1934) (under the US Harter Act 1893); *Empresa Central Mercantil v. Brasileiro* 1958 AMC 1809 (2 Cir. 1958) - Secretariat, Working Paper of 1972, p.149 - Naylor,B.T.: Burden of Proof, p.297 / Akıncı,S.: Navlun Mukaveleleri, p.461.

situation. He has to show, on the balance of probabilities, a proximate causal relation[6]. However, it must be realised that this is not the problem of burden of proof but the rules of evidence. Accordingly, the court will decide whether the claimant's evidence establishing mere balance of probabilities is sufficient to discharge the burden of proof[7].

Under § 608 of the German Commercial Code 1897 and Article 1063 of the Turkish Commercial Code 1956, as distinct from the Hague and Hague-Visby Rules, a presumption of proximate causal relation is granted to the carrier, as is the case with cargo insurance at common law[8]. Thus, if the loss which according to the circumstances of the event could arise from one of the exempted occurrences set forth in these Articles has occurred, it is presumed to have arisen therefrom. Consequently, the carrier's release from liability does not depend on loss having actually resulted from one of the exempted causes, but on the existence of its possibility[9]. For example, if navigation of the ship in bad weather is clear from a meteorological report, the wetting of tobacco bales should *prima facie* be assumed to have resulted from a sea peril.

Likewise, Article 5 (5) of the Hamburg Rules presumes with respect to live animals that, if the carrier proves his compliance with any special instructions given to him by the shipper regarding the live animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to any special risks inherent in that kind of carriage, the loss, damage or delay was so caused. The high risk of these animals' exposure to loss, damage or delay during carriage justifies this assumption.

The violation of any statute or regulation by the carrier cannot be a reason for its construction as the existence of the causation[10]. This is so in the Rules the cargo interest does not need to prove that the loss arose from the violation, but the carrier has to show that it resulted from one of the exempted events.

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6 *Dominion Tankers Ltd. v. Shell Petroleum Co. Ltd.* 1939 AMC 541, 551 (Ex.Ct.) / *City of Barado v. Hall Line* (1926) 25 Ll.L.R. 437 (under the Hague Rules 1921); *The Popi M* [1985] 2 Lloyd's Rep. 1, 5 (HL) - Brækhus,S.: Catalogue, p.23 - Tetley,W.: Cargo Claims, p.365.

7 *Pendle and Rivet Ltd. v. Ellerman Lines Ltd.* (1927) 29 Ll.L.R. 133, 136. Compare with Pixa,R.R.: Hamburg Rules, p.458.

8 Hazelwood,S.J.: Barratry - the Scuttler's Easy Route to the "Golden Prize", LMCLQ 383, Feb'1982, p.383.

9 Wüstendörfer,H.: Seehandelsrechts, p.276 / Ülgener,M.F.: Sorumsuzluk Halleri, p.142, 148.

10 *Usinas Siderugicas v. Scindia Steam Corp.* 118 F 3d 328 (5 Cir. 1997).

II. COMBINATION OF PROXIMATE CAUSES

The joining of more than one proximate cause to produce the same loss is called the *combination of proximate causes*[11]. It may take place in two ways: Either occurrences which cannot cause loss individually might contribute to loss jointly (*joint causal connection*), or, if capable of creating loss separately, might lead to loss at the same time (*competitive causal connection*).

It is possible that some of these combined occurrences may make the carrier liable while others may relieve him thereof. In that case, a question, who bears the result of loss, the carrier or the cargo interest, automatically arises. Its answer is strictly depended on whether it would be fair to allow the carrier to exclude himself from liability by proving precise amount of loss caused by an exempted event despite the fact that another cause of the same loss was the failure to exercise due diligence to carry goods while in his custody. Of course, it would be unjust because the carrier should endure any loss resulting from his, his servant's or agent's fault in the performance of the contract of carriage for which he has charged the shipper and should not be permitted to hide himself behind any defensive door. Accordingly, where there is a possibility that the same loss has arisen from two proximate causes for which the carrier both is and is not liable, he is in principle liable for the loss unless he proves that the cause of loss was the exempted incidents *alone*[12].

However, in some exceptional cases where the exempted event pushes the liability cause (fault) to the background, or, in other words, breaks the causal chain and removes the fault from the carrier, his servants or agents, it might be just to exculpate the carrier from the whole or some part of liability. Third parties' gross negligence, cargo interests' any act and (objective) force majeure which are one of the effective combined causes of loss are examples of the incidents cutting the causal link or removing the fault. For

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[11] Eren,F.: Sorumluluk Hukuku Açısından Uygun İlliyet Bağı Teorisi, Ankara 1975, p.147; Schwarz,A.(trans. by Davran,B.): Borçlar Hukuku, p.130.

[12] *Gosse Millerd (ibid)* (1928) 32 Ll.L.R. 91, 98; *Heskell (ibid)* (1950) 83 Ll.L.R. 438, 458; *Wayne Tank (ibid)* [1973] 2 Lloyd's Rep. 237, 240, 241, 245 (CA); *The Tolmidis* [1983] 1 Lloyd's Rep.530, 540; *The Torenia* [1983] 2 Lloyd's Rep. 210, 218 / *Vallescura* 1934 AMC 1573 (1934) (under the US Harter Act 1893); *Irish Shipping Ltd. Lim. Procs.* 1975 AMC 2559, 2581 (SD NY 1975); *Trade Arbed v. Lagada Bay* 1985 AMC 1766, 1770 (SD Ga. 1982) - Diamond,A.: Hamburg Rules, p.15; Tetley,W.: Cargo Claims, p.315.

instance, a non-carrying ship may deliberately have collided with the carrying vessel while being negligently navigated by the carrier himself. In that case, in no way can the loss be connected to the carrier and his act breaching the contract, and no longer can his liability be justified; only reason for the loss was the third parties deliberate act. In short, once established before the court in any how that the cargo interest's act, a third party's gross fault or (objective) force majeure contributes to loss together with another cause for which the carrier is liable, the court may totally or partially exculpate the carrier from liability considering the seriousness of such act, fault or (objective) force majeure only if he proves the amount of loss attributable thereto.

Nevertheless, Article 5 (7) of the Hamburg Rules provides that "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 not attributable thereto." It appears from this provision that the carrier may in any case escape liability to the extent that the loss is attributable to an exempted event as long as he shows the amount of the loss attributable thereto[13]. Such style of drafting may unjustly relieve the carrier despite the fact that the carrier is in principle under an obligation to duly carry the goods while in his custody because there is no clarification in the Rules who shall prove the amount of loss attributable to the fault, which cannot be expected from the carrier who wishes to escape from rather than to create liability. It, therefore, needs modification in this respect.

III.CHAIN OF PROXIMATE CAUSES

The direct cause of loss may be followed by other occurrences contributing to eventual loss. The occurrence of direct or previous proximate cause of loss in the chain by subsequent incidents is called the "*chain of proximate causes*". For example, ventilators in a hold may have had to be kept closed due to bad weather, and cargo in a hold may have suffered loss due to heat from engines. In that case, whether or not the

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[13] For doubt see Lüddeke,C.F.-Johnson,A.: Hamburg Rules, p.12; Murray,D.E.: Hamburg Rules, p.65. For an opposite view see Yazıcıoğlu,E.: Hamburg Kuralları, p.92.

carrier may exonerate himself from liability should be solved according to the principle of proximate causal relation. Accordingly, as distinct from the contract of insurance[14], under the contract of carriage occurrences which are proximate causes of direct or previous proximate causes of loss ought to receive attention. If the direct or previous proximate causes of loss would have arisen as a matter of course and according to general commercial experiences *but for* its final cause, the final cause must be regarded as a proximate cause of loss. In the example above, although the direct cause of damage was the heat from engines, this incident would not have occurred if the ventilators had not been closed due to bad weather. The bad weather was, consequently, the indirect but, at the same time, proximate cause of damage to the goods[15].

As explained above, the burden of proof is shifted onto the carrier. He should show that, in spite of the fact that the amount of loss was directly attributable to an incident, its proximate cause was one of the exempted events.

IV. LEGAL POSITION OF CARGO INTERETS ADDUCING EVIDENCE TO THE CONTRARY

Although the carrier discharges his onus of proof by showing that the exempted occurrence was the effective cause of loss, that does not mean that he will definitely avoid liability in every case. Since the carrier is not obliged to produce watertight evidence of the proximate causal connection between the loss and the exempted occurrence, and the proximate cause of loss is not limited only to the direct cause of loss, there is always a possibility that loss may have effectively arisen from a non-exempted incident for which the carrier is liable. For that reason, the cargo interest had better introduce all evidence to the contrary available to him during the trial without waiting for the carrier to carry out his burden of proof despite the fact that he is not obliged to do so. Otherwise, he may be prevented from adducing new evidence after the hearing has begun under domestic procedural law.

As is always the case in practice, both the carrier and the cargo interest provide as much information about the occurrence in question as possible at the beginning of the

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[14] Clarke,M.: Insurance Law: Recent Causes, LMCLQ 576, Feb'83, p.576.

[15] *The Trunscoe* [1897] P 301. See also *Canada Rice Mills v. Union Marine* [1941] AC 55, 70 - Scrutton,T.E.: Charterparties, p.226; Wilson,J.F.: Carriage, p.248.

trial, the burden of proof problem does not normally arise. Many liability cases have, therefore, been decided on a balance of evidence by courts without determining on whom the burden of proof is shifted under the rule.

In order to defeat the carrier's reliance on the protection granted under Article 4 (1), (2) and (4) of the Hague and Hague-Visby Rules or Article 5 (1) and (6) of the Hamburg Rules, the cargo interest ought to establish that loss or its direct cause which relieves the carrier of liability was *effectively* and *actually* caused by the breach of the obligation to carry the goods [Article 3 (2) of the Hague and Hague-Visby Rules and Article 5 (1) of the Hamburg Rules][16], to provide a seaworthy ship before and at the beginning of the voyage [Article 3 (1) of the Hague and Hague-Visby Rules and Article 5 (1) of the Hamburg Rules][17] or to avoid deviating from the agreed route [Article 4 (4) of the Hague and Hague-Visby Rules and Article 5 (1) and (6) of the Hamburg Rules][18]. Breach of a contractual obligation must be the proximate cause of loss, i.e., must be capable of contributing to loss as a matter of course and according to general

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[16] *Gamlen Chemical Co. (A'sia) Pty. Ltd. v. Shipping Corp. of India Ltd.* [1978] 2 NSWLR 12 (Aust. CA): Although the ship ran into a storm resulting in damage to the goods, the court decided that the real cause of damage was the improper stowage / *Eisernz - GmbH v. Federal Commerce & Navigation Co. Ltd.* [1970] Ex. CR 192: It was found that the proximate cause of loss or damage was the negligently mixing of the cargo at an intermediary port of repair, not nautical fault leading to the ship's grounding / *The Canadian Explorer* [1928] NZLR 767, 781 (CA).

[17] *Charles Goodfellow Lumber Sales Ltd. v. Verreault Navigation Inc.* [1971] 1 Lloyd's Rep. 185 (Can. SC): The proximate cause of loss or damage was discovered to be the insufficiency of the vessel's hull, but not sea perils / *Kopitoff v. Wilson* (1876) 1 QBD 377: If the proximate cause of the penetration of water into the ship's hold is unseaworthiness rather than sea perils, the carrier cannot escape liability; *Sassoon v. Western Assurance* [1912] AC 561: It was found that the proximate cause of damage was the decayed condition of the hulk (unseaworthiness) and not to the incursion of seawater through the opening in the rotten hulk into the ship hole (sea perils); *Maxine Footwear v. Canadian Government Merchant Marine* [1959] AC 589 (PC): The carrier cannot benefit from fire exception if caused by unseaworthiness; *Blackwood Hodge v. Ellerman Lines* [1963] 1 Lloyd's Rep.454: It was decided that the loss was due to inadequate stowage although the vessel encountered a hurricane; *The Red Jacket* [1978] 1 Lloyd's Rep. 300: The court held the carrier liable for loss or damage resulting from the fatal weakness of the containers, but not from heavy weather washing a whole stack of containers overboard; *The Good Friend* [1984] 2 Lloyd's Rep. 586 (QBD - CC): The carrier who fails to inspect the trunking of the vessel cannot rely on the defence of quarantine restrictions even if the cargo is infested with insect which is the subject of quarantine / *The Willowpool* 1936 AMC 1852 (2 Cir. 1936) (under the UK COGSA 1924): The carrier was not allowed to rely on technical fault in pumping ballast water into the forepeak which had been cracked before the beginning of the voyage due to collision; *The Irish Spruce* [1976] 1 Lloyd's Rep. 63 (SD NY 1976): The fault in the navigation of the ship due to lack of the latest Admiralty List of Radio Signals was not found enough to release the carrier from liability.

[18] *Stag Line Ltd. v. Foscolo, Mango & Co. Ltd.* [1932] AC 328 (HL) - Ramberg,J.: Document, p.65.

commercial experiences[19]. If the cargo interest cannot provide a proximate causal relation between the loss and the occurrence (such as unseaworthiness due to incompetence of the crew but not of the master, or as a consequence of an outdated chart, or owing to the wrong placement of the fire extinguishers), then the carrier cannot be held liable for loss arising from one of the excepted occurrences (such as fault of the master in the navigation of the vessel or fire).[20]

For instance, rats could have gnawed a hole in a pipe leading from a bathroom in the ship to the sea and sea water could have entered through the hole and damaged the cargo of rice subject to a bill of lading containing sea peril exception. In that case, if the cargo interest proves that, although direct cause of damage has been the incursion of seawater from time to time through the pipe by the rolling of the ship as she proceeds on her voyage, i.e., a sea peril, this cause would not have occurred had the rats not gnawed a hole in the ship, he will have the carrier held liable. Indeed, rats were thus the indirect but, at the same time, the proximate cause of damage to rice[21]. The carrier breaches his obligation to duly carry the goods by not clearing the rats from the ship.

Again, the ship may have negligently delayed in departing and then may have stuck in a frozen port in winter, or may have sunk due to storm, or a war may have broken out which may have resulted in the closure of a canal or in the deviation of the ship from the agreed route by reason of a government order. Under those circumstances, whether the exempted occurrences would have taken place as a matter of course and according to general commercial experiences but for the delay are in negative, then the carrier will be obliged to pay damages[22].

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19 *Hamilton, Fraser & Co. v. Pandorf & Co.* (1887) 12 AC 518, 526 (HL); *The Xantho* (1887) 12 AC 503, 510 (HL).

20 *The Apostolis* [1996] 1 Lloyd's Rep. 475, 483 (QBD - CC 1995) / *India Supply Mission v. SS Janet Quinn* 1972 AMC 1227 (SD NY 1971); *The Marquette* 1973 AMC 1683, 1686 (2 Cir. 1973) (fire case); *The World Prodigy* 823 F Supp. 68 (DRI 1993).

21 *Hamilton (ibid)* (1886) 17 QBD 670, 682. However, this judgement was restored by the HL - (1887) 12 AC 518, 525 - on the grounds that the court can only go behind the proximate cause of loss or damage for the purpose of ascertaining whether the cause was one of the cause for which the carrier is liable. The latter view was also supported by *The Xantho* (1887) 12 AC 503, 510 (HL).

22 *Monarch SS Co. Ltd. v. Karlshamns Oljefabriker (A/B)* [1949] AC 196 (HL) / *The Malcolm Baxter* 1928 AMC 960 (SC) - Ganado,M.-Kindred,H.M.: Delays, p.65.

Thereupon, the carrier should show that he exercised due care to carry the goods or to provide a seaworthy ship before and at the beginning of the voyage, or that he reasonably deviated from the agreed route and he was not, therefore, at fault. Indeed, under Article 4 (1), (2) and (4) of the Hague and Hague-Visby Rules and Article 5 (1) and (6) of the Hamburg Rules the burden of proof for lack of fault is shifted to the carrier[23] unlike at common law[24]. It is not fair to hold the carrier liable for the consequences of his act or these of his servants or agents who were not able to foresee or avoid them despite exercising the prudent carrier's care. For instance, the carrier might have negligently refused to deliver goods, and then they might have been destroyed by fire. The carrier is not expected to predict the fire as a consequence of his delay in the delivery. For that reason, he cannot be rendered liable on the grounds of the delay that put the goods in the way of the fire[25]. However, the degree of care exercised by him to protect goods should of course get higher depending on his previous fault.

V. BLOCKED CAUSAL RELATION

There might be more than one occurrence capable of causing loss, and only one of them (real cause) might actually bring about loss while others (hypothetical causes) might not contribute thereto because of the real cause (*blocked causal relation*). Under this circumstance, whether or not the carrier is liable depends on the real cause of loss. The carrier cannot rely on a hypothetical exempted cause[26]. For example, after goods were pilfered by the carrier's servant onboard, the ship might have collided with another vessel due to fault in its navigation and sunk. In that case, the real cause of loss of or damage to the goods is not fault in the navigation of the vessel but pilferage of the cargo. However, the court may limit damages paid by the carrier having in mind equity and justice.

VI. CONCLUSIONS

(1) By the principle of *causa proxima non remota spectatur*, in order to escape liability, the carrier has to prove the proximate causal relation between the loss and

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23 Kimball,J.D.: Hague Rules, p.226. For an opposite view see Naylor,B.T.: Burden of Proof, p.302.
24 *Woodley v. Michelll* (1883) 11 QBD 47; *The Glendarroch* (1894) P 226.
25 For an opposite view see *Schaff v. Roach* (1925) 243 P 976 (SC Okla).
26 Akıncı,S.: Navlun Mukaveleleri, p.452.

exempted incident. However, Article 5 (1) of the Hamburg Rules is not clear in this respect compared to Article 4 (2) (q) of the Hague and Hague-Visby Rules.

(2) Not only is the carrier obliged to show the exempted incident caused loss but also its amount.

(3) Where there is a possibility that an occurrence for which the carrier's liability is exempted combines with another cause for which the carrier is liable to produce the same loss suffered by the cargo interest, the carrier is still liable for the loss unless he proves that the cause of loss was such exempted occurrence alone. However, once established that the cargo interest' act, a third party's gross fault or (objective) force majeure contributes to loss together with another cause for which the carrier is liable, the court may mitigate or remove liability in proportion to the seriousness of such act, fault or (objective) force majeure provided that the carrier proves the amount of loss attributable thereto. Nevertheless, Article 5 (7) of the Hamburg Rules seems to lay down just the opposite provision which may partially relieve the carrier of liability.

(4) In founding the proximate causal relation, not only the direct cause of loss but also the subsequent proximate causes of the direct cause are taken into consideration. Whether the direct or previous proximate causes of loss would have taken place as a matter of course and according to general commercial experiences *but for* its final cause is in the negative, then the final cause must be regarded as a proximate cause of loss.

(5) Since the carrier does not have to adduce watertight evidence of the proximate causal relation, and the proximate cause of loss is not limited to the direct cause, the cargo interest had better adduce evidence at the beginning of the trial to prove that the loss actually and effectively arose from one of the liability causes. Then, the carrier is obliged to show lack of fault on his part or those of his servants or agents.

PART IV

LIMITATITION OF THE CARRIER'S LIABILITY

Chapter Eleven

LIMITATION OF DAMAGES

Under Article 4 (5) of the Hague and Hague-Visby Rules and Article 6 of the Hamburg Rules the carrier's liability is limited to particular amount of damages. The limits are operational without the need for the carrier's express claim because they are not the prerequisites of liability, but ones limiting liability that already exists. Courts should, therefore, *sua sponte*, apply them whenever the carrier is liable under the Rules[1]. This chapter examines this sort of limitation of liability.

I. GENERAL

When the carrier breaches the contractual obligation to duly carry goods, he becomes liable, and the nature of the obligation turns into a subsidiary undertaking to pay damages. The indemnity performed by the obligor to compensate the aggrieved party for pecuniary loss is called (*compensatory*) *damages*. In maritime law the carrier has to compensate the cargo interest in cash at once; he cannot perform his subsidiary obligation in kind or in instalments unless otherwise agreed by the aggrieved party.

The Rules do not regulate *punitive damages* because they are penalties punishing the defendant for gross fault rather than indemnities making good loss suffered by the plaintiff[2]. The only similarity between compensatory and punitive damages is the awarding of the latter in the form of additional compensatory damages. Neither do the Rules prevent courts from granting punitive damages. For example, Section 4 (5) of the US COGSA 1936 stipulating that "*in no event*" should the carrier be liable for more than the amount of loss "*actually sustained*" does not purport to exclude punitive damages, but only to limit the compensation to the amount of loss actually suffered[3]. Nor does Article 4 (5) (b) of the Hague-Visby Rules, showing how the fall in the value

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1 Group 3 of IMC, the Report on the Limits of Liability and the Loss of the Right to Limit, January 8-10, 1979 - Vienna, p.48, p.48 (to be cited thereinafter as "Report on theLimits of Liability").

2 Blachman,D.M.: Punitive Damages under the Carriage of Goods by Sea Act, 62 Wash.L.Rev. 523 (1987), p.523.

3 *Armada Supply, Inc. v. S/T Agios Nikolas* 639 F Supp. 1161, 1164 (SD NY 1987) - Leacock,S.J.: Liability for Punitive Damages under the American Carriage of Goods by Sea Act, JBL 170 (1990), p.170. For an opposite view see *Cosmos USA v. US Lines* 1983 AMC 1172, 1173 (ND Cal. 1980) - Tetley,W.: Cargo Claims, p.340.

of goods is to be calculated forbid punitive damages[4]. Whether or not courts have been empowered to decide punitive damages is an issue within the public policy of *lex fori*. In the US punitive damages have occasionally been awarded[5] whereas in England and continental countries courts have been reluctant to recognise them in the field of contract law.

Damages are normally paid in a national currency of forum. However, parties may agree on the payment of indemnity in a foreign currency. Nevertheless, whether or not the damages can be awarded in a foreign currency, and, if so, at which rate and date of exchange, are decided under *lex fori*[6].

Although, by the principle of *restitutio in integrum*, the obligor has to make good all the loss suffered by the aggrieved party by placing him in the same position as he would have been had the contract duly been performed, under the Conventions the principle is made subject to some limitations. By Article 4 (5) of the Hague Rules the carrier is made liable not exceeding £100 per package or unit, or the equivalent of that sum in other currency. Again, Article 4 (5) of the Hague-Visby Rules limits the indemnity to be paid by the carrier to 10,000 francs (666.67 SDR) per package or unit or 30 francs (2 SDR) per kilo of gross weight of the goods lost or damaged, whichever is the higher. Such figure of limitation is replaced by Article 6 (1) of the Hamburg Rules with 835 SDR for the package and unit limitation and 2.5 SDR for the weight limitation. Then, Article 6 (2) of the Hamburg Rules introduces a new limitation for delay in delivery. Accordingly, the carrier's liability 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.

Those provisions fix the maximum amount of indemnity. If the quantum of loss suffered by the aggrieved party is less than that amount, the carrier's liability is,

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4 For an opposite view see Tetley,W.: Cargo Claims, p.340, 342.

5 *Armada Supply (ibid)* 639 F Supp. 116 (SD NY 1987).

6 See Article 1115 of the Turkish Commercial Code 1956 - English courts entitled cargo interests to indemnity in foreign currencies: *The Folias* [1977] 1 Lloyd's Rep. 535 (HL); *The Despina* [1977] 2 Lloyd's Rep. 319 (HL).

consequently, up to that quantum[7]. Otherwise, cargo interests would recover for the extra amount they did not sustain and would be unjustly enriched thereby.

II. IN CASE OF PHYSICAL LOSS OR DAMAGE

A) MEASURES USED FOR LIMITATION OF DAMAGES

In order to determine the maximum amount of indemnity for physical loss or damage several measures may be used individually or alternatively. Whereas the Hague Rules limit the carrier's liability per package, otherwise, per unit, the Hague-Visby Rules and the Hamburg Rules also do so by introducing an equivalent alternative weight criterion to the former.

It was suggested that the more satisfactory criterion could be the statutory percentage of the declared value of goods by the shipper[8]. However, since the carrier has an opportunity to increase freight rate in proportion to the declared value, the shipper would most likely avoid asserting the real value of goods and would buy cheaper insurance, instead. Thus, the carrier could escape his duty to exercise due diligence.

1- Package

a-. General

The word "package" is not defined under the Rules[9]. It should, therefore, be interpreted according to its plain meaning bearing in mind the main aim of the package limitation, that is to relieve the carrier of paying huge damages for the package of invisible contents[10]. Accordingly, a wrapper enveloping its contents for their carriage in such a way that the prudent carrier cannot see them through is called "*package*".

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7 The Record of the Judicial Committee of the Turkish Parliament, Ground, p.410 - *The Dorothy* [1979] 1 FC 283 / *Waterman SS Corp. v. US Smelting & Mining Co.* 155 F 2d 687 (5 Cir. 1946).

8 Egger,P.N.W.: Unworkable Per-Package Limitation of the Carrier's Liability under the Hague (or Hamburg) Rules, 24 McGill L.J. 459 (1978), p.476 (to be cited thereinafter as "Per-Package Limitation").

9 For the petition for Rulemaking as to the definition of package see US Federal Maritime Commission, Definition, p.403: A package was defined "as each individually wrapped bag, carton, box, or drum, whether or not palletised and/or placed or assembled in containers." The petition was finally denied.

10 *Gulf Italia v. American Export Lines, Inc.* 1959 AMC 930, 932 (2 Cir. 1959); *Hartford Fire Ins. Co. v. Pacific Far East Lines Inc.* 1974 AMC 1478, 1480 (9 Cir. 1974).

As seen from the definition, the wrapper should, first of all, cover its contents for their carriage[11]. It could be any packaging or parcel, such as a box, carton, case, bag, etc. regardless of material used for its production. It ought to facilitate the protection of cargo against external risks peculiar to the ordinary voyage of the ship and to ease the performance of its safe handling. Nevertheless, the insufficiency of the package does not make any difference in its nature; even an insufficient one is still a package.

A package must conceal cargo in such a way as not to leave any opportunity for a prudent carrier to see through its contents; otherwise the carrier who can anticipate the value and nature of goods and thereby determine easily how much care he ought to exercise would escape liability for fault on the basis of the package measure, which was not intended during the preparation of the Rules[12]. Nevertheless, judicially even visible goods partially covered by packaging or placed on a skid or pallet were ruled to be packaged[13]. This approach cannot provide any reasonable solution to the Rules adopting the package system along with the unit criterion. The latter has already introduced

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[11] Scowcroft,J.C.: Recent Developments Concerning the Package Limitation, 20 JMLC 403, Jl'89, p.409 (to be cited thereinafter as "Package Limitation").

[12] *Gerling-Konzern v. Hapag-Lloyd AG* 1976 AMC 629 (Ger. CA): A large compressor bolted to a skid was not considered to be packed / *Middle East Agency v. SS John B Waterman* 1949 AMC 1403, 1410 (SD NY 1949): An uncrated tractor was disregarded as a package; *Pannell v. US Lines Corp.* 1959 AMC 935 (2 Cir. 1958): The court ruled that, if the US COGSA had applied *ex proprio vigore* rather than by contract, the yacht placed on a cradle would not have been deemed a package; *Mitsubishi Int'l Corp. v. SS Palmetto State* 1963 AMC 958, 961 (2 Cir. 1962): An article completely enclosed in a wooden box prepared for shipment was treated as a package; *Island Yachts Inc. Federal Facific Lakes Line* [1972] 1 Lloyd's Rep. 426 (ND Ill. 1971): Cruiser mounted in a cradle was considered a package; *Hartford Fire (ibid)* 1974 AMC 1478, 1480 (9 Cir. 1974): An electrical transformer attached to a skid without any covering was deemed not to be a package; *The Prinses Margriet* [1974] 1 Lloyd's Rep. 599 (SD NY 1972): A sailing yacht mounted on a cradle was held to be unpacked; *Tamini v. Salen Dry Cargo AB* 866 F 2d 741 (5 Cir. 1989): A tractor containing a rotary drilling rig some parts of which was apparent was decided not to constitute a package - * Admiralty - Skidded Machinery Held to Be a "Package" for Purposes of Limitation of Carrier's Liability under Section 4 (5) of the COGSA, 46 USC and 1304 (5) (1964), 2 Rutgers Camden L.J. 361, Fall'70, p.371.

[13] For an opposite view see *Whaite v. Lancashire and Yorkshire Railway Co.* (1874) LR 9 Ex. 67, 70: An uncovered railway wagon consisting of paintings were ruled to be a package under the US Carrier's Act 1830; *Saarland* 1979 VersR 29 (FC): The folded and tied leather was held to be a package / *Standard Electrica v. Hamburg Sudamerikanische* 1967 AMC 881, 885 (2 Cir. 1967): A pallet was described as a package; *Aluminios Pozuelo, Ltd. v. SS Navigator* 1968 AMC 2532, 2535 (2 Cir. 1968): A three-ton toggle press which had been attached to a skid for easy transportation and handling was regarded as a package; *Companhia Hidro Electric v. SS Loide Honduras* 1974 AMC 350, 354: Five unwrapped gas circuit breakers which were fully visible were treated as packages; *Vegas v. Compania Anonima Venezolana* 1984 AMC 1600 (11 Cir. 1983): A pallet was ruled to be a package - Al-Kabban,R.A.M.: Limitation of the Carrier's Liability under the Iraqi Transport Law, 19 JMLC 409 (1988), p.410 (to be cited thereinafter as "Limitation"); Tetley,W.: Cargo Claims, p.880.

limitation for all goods irrespective of whether they are packed or not. It was argued that a shipper who wishes to extend the carrier's liability will probably hesitate to pack cargo into many units since the unit limitation is generally higher than the package limitation; he, who attempts to minimise possible damage to his property by packaging goods would thereby be placed in a worse position than his colleague who spends nothing for the packaging of goods, and any test dependent on the degree of extent of coverings would lead to uncertainty[14]. This view seems to overlook the fact that the carrier is excused anyway from liability for the insufficiency of packing due to the shipper's act under Article 4 (2) (n) of the Hague and Hague-Visby Rules and Article 5 (1) of the Hamburg Rules. The shipper may recover nothing for loss or damage when trying to extend the carrier's liability by not properly packing goods.

The measure used for the determination of visibility is objective (a prudent carrier). Where a prudent carrier could foretell the contents of the wrapper, the wrapper is not enough to constitute a package within the meaning of the Rules. If the packaging is done under the supervision of or participation by the carrier, his servants or agents, the carrier is supposed to guess the contents[15]. Bills of lading or other shipping documents, such as invoices and packing lists, may be records of evidence for the visibility of contents[16]. Indeed, when the carrier issues a bill of lading indicating the contents of the wrapper on demand of the shipper, the carrier is presumed to know what the wrapper includes. Even if the "said to contain" or similar qualifying clauses have been inserted in the bill of lading, the presumption will still be effective on the grounds that the carrier normally applies the freight rate considering the shipper's description of goods rather than his qualifications in the document, and that these statements are intended to disprove loss or damage during carriage rather than to show the contents of the package. Yet, because of

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[14] *Gulf Italia (ibid)* 1959 AMC 930, 932 (2 Cir. 1959): A caterpillar tractor partly wrapped by waterproof covering was decided not to qualify a package on the basis that the wrapping was not enough to ease the transportation and handling of goods.

[15] Çetingil,E.: Milletlerarası Sözleşmelerde ve Türk Hukukunda Taşıyanın Koli-Konteyner ve Parça Başına Belirli Bir Tutarla Sorumluluğu, Sorumluluk ve Sigorta Hukuku Bakımından Eşya Taşımacılığı Sempozyumu, (26-27 Ocak 1984 Maçka - İstanbul), Ankara 1984, p.140 (to be cited thereinafter as "Belli Bir Tutarla Sorumluluk").

[16] For an opposite view see *Primary Industries Corp. v. Barber Lines A/S and Skilos A/S* [1975] 1 Lloyd's Rep. 461 (City Ct. of NY 1974): The court limited the carrier's liability considering 25 packages containing 22 tin ingots despite the fact that the bill of lading stated 510 packages.

qualifying clauses, a cargo interest becomes bound to prove that the package actually contains the contents outlined in the bill of lading[17]. If the carrier does not have any reasonable opportunity to inspect the contents of the package before he actually receives them, the amount of limitation should be calculated on the basis of package rather than the items therein unless the bill refers to them.

Parties cannot characterise goods and define the word "package" as limiting the carrier's liability otherwise than under the mandatory Rules[18]. When any word in a mandatory provision is to be explained, the court's interpretation of the rule rather than the parties' construction of its terms prevails because mandatory provisions precede over contractual stipulations. For that reason, the face of the bill and the column therein marked "number of packages" should not be taken into consideration to determine what is "package" or "unit". It may, however, be relevant as to what could be seen by a prudent carrier[19]. If the three Conventions apply only by virtue of a paramount clause, then parties may be permitted to give their own definition so long as it is not contrary to public policy[20].

The shape, weight, size and nature of the wrapper or goods shipped therein are not important factors, determining the package[21]. Although it may be argued that, when the package limitation was granted to the carrier, the drafters of the Hague Rules had in mind a small package of high value[22], it must be remembered that at that time packaging of goods was not as much developed as is the case today.

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17 *The River Gurara* [1996] 2 Lloyd's Rep. 53, 58, 62 (QB – Adm. Ct.).

18 *Matsushita Elec. Corp. v. SS Aegis Spirit* 1976 AMC 779, 793; *Omark Industries, Inc. v. Associated Container Transportation* 1977 AMC 230, 236 (D Ore. 1976); *Yeramex Int'l v. SS Tendo* 1977 AMC 1807, 1834 (E.D. Va. 1977); *Seguros Crispin Co. v. M/V Morning Park* 1985 AMC 766, 768 (SD Tex. 1984) - Egger,N.W.P.: Per-Package Limitation, p.463; Wood,G.F.: Damages, p.946.

19 *Int'l Factory Sales v. Alexandr Serafimovich* [1975] 2 Lloyd's Rep. 346, 354 (Can. FC) / *Croft & Scully Co. v. M/V Skulptor Vuchetich* 1982 AMC 1042, 1047 (5 Cir. 1982); *Trotter & Co. v. Delta SS Lines* 1985 AMC 2783, 2793 (ED Pa. 1982) - Tetley,W.: Cargo Claims, p.881; Per Package Limitation and Containers under the Hague Rules, Visby & Uncitral, 4 Dalhousie L.J. 685, May'78, p.687 (to be cited thereinafter as "Package").

20 *Crispin Co. v. M/V Morning Park* 1985 AMC 766 (SD Tex. 1984); *Institute of London Underwriters v. Sea-Land Services Inc.* 881 F 764 (9 Cir. 1989) - Stover,S.: Good Things Do Not Always Come in Small Packages, 21/9 Golden Gate U.L.Rev. 19, Spr'91, p.36.

21 *Herd & Co. v. Krawill Machinery* 1959 AMC 879 (1959): A fully crated 19 ton press was treated as a package - Al-Kabban,R.A.M.: Limitation, p.410; van Wageningen,H.J.: Interpreting COGSA: The Meaning of "Package", 30 U. Miami L.Rev. 169, Fall'75, p.179 (to be cited thereinafter as "Package".

22 *Stirnimann v. The San Diego* 1945 AMC 436, 448 (2 Cir. 1945).

b-. Container, pallet or similar article of transport

A problem has arisen from the operation of the Hague Rules' package criterion to newly invented articles of transport, such as containers and pallets, used for consolidation of goods. These large shipping devices were not envisaged during the preparation of the Hague Rules. Courts consequently encountered the question whether the container, pallet or similar article of transport is a package where such device consists of other packages or pieces of goods. In that case, the determination of the formula applied to the limitation gains real importance as the cargo interest may be provided with derisory remedy should the carrier's liability be limited to the statutory figure, which was fixed considering small packages, for the whole contents of an article. Several methods have been developed in order to solve the problem.

The first method is based on the economic function of the contents of the article. Where the existence of the article is necessary for the protection of goods, i.e., where the contents cannot be transported in the ship's hold without such a device, the article is a package[23]. In that case the cargo interest has to prove the reason why the article should not be treated as a package[24]. Conversely, if its contents are adequate to face up to ordinary risks of the contracted voyage, then each one is subject to the package or unit limitation. Still, this solution cannot be reconciled with the economic function of the article. Indeed, articles have been used in place of expensive and elaborate package of individual items to decrease transport costs. Shippers who do not wish carriers to limit liability per article would probably continue wrapping goods in conventional expensive packages[25]. An insufficient package in an article is still a package; its deficiency may, however, only lead to a question who is to bear the consequences of such insufficiency.

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[23] *Cour d'Appeal de Rouen* February 14, 1975, DMF 473 (1975) / *Royal Typewriter Co. v. M/V Kulmerland* 1973 AMC 1784 (2 Cir. 1973): It was ruled that 350 cartons of adding machines in the container were not economically functional, and that the amount of damages was limited to $500 per container; *Cameco v. SS American Legion* 1974 AMC 2568 (2 Cir. 1974): The court decided that cases and pallets of tinned ham met the requirement by the functional test.

[24] *Royal Typewriter (ibid)* 1973 AMC 1784 (2 Cir. 1973).

[25] *Matsushita Electric (ibid)* 1976 AMC 779, 795 (WD Wash. 1976); *Allstate Ins. Co. v. Inversiones Navieras Imparca* 1982 AMC 945, 948 (5 Cir. 1981) - DeOrchis,M.E.: The Container and the Package Limitation - the Search for Predictability, 5 JMLC 463 (1974), p.257 (to be cited thereinafter as "Package"); Simon,S.: Containers, p.522; Shipping Containers, 441, 448.

The second method relates to the intentions of parties which may be implied in the ownership of the article[26] or expressed in the transport document. For example, the contents of an article are subject to package or unit limitation if enumerated in the bill of lading[27]. On the contrary, if the bill refers directly to the article without mentioning its contents, it is a package[28]. That test left open what the result would be if the bill did not list articles or their contents as packages. French courts decided that the article was a package unless the bill disclosed its contents[29]. This view can be criticised for allowing the carrier to limit his liability and to lighten his obligation to exercise care otherwise than as provided in Article 4 (5) of the Hague Rules[30]. The US courts have, therefore, been reluctant to treat the container as a package in the absence of any clear reference to it as a package. Some courts imposed the burden of proving that packages in such a device are economically functional onto the shipper who has not demanded from the

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[26] For containers *Rosenbruch v. Amer. Export Isbrandtsen Lines* 1976 AMC 487 (2 Cir. 1976); *Monica Textile Corp. v. SS Tana* 1992 AMC 609 (2 Cir. 1991) - Calamari,J.A.: The Container Revaluation and the $ 500 Package Revaluation, 51 St John's L.Rev. 687 (1977), p.715. For pallets *Standard Electrica (ibid)* 1967 AMC 881, 885 (2 Cir. 1967); *Omark Industries (ibid)* 1977 AMC 230, 233 (D Ore. 1976).

[27] For containers *Chellaram v. China Ocean Shipping Co.* [1989] 1 Lloyd's Rep.413 (Aust. Ct.); *PS Chellaram & Co. Ltd. v. China Ocean Shipping Co.* [1989] 1 Lloyd's Rep. (Aust. NSW SC) / *The Tindefiell* [1973] 2 Lloyd's Rep.253 (Can. Ct.): The court ruled that the parties meant the cartons of shoes and not the containers to be packages; *Quebec Liquor Corp. v. Dart Europe* 1979 AMC 2382 (Can. FC); *Carling O'Keef Breweries v. CN Marine* 1987 AMC 954 (Can. FC) / *The River Gurara* [1996] 2 Lloyd's Rep. 53, 58 (QB – Adm. Ct.) / *Leather's Best Inc. v. SS Mormaclynx* 1971 AMC 2383 (2 Cir. 1971): The court held 99 cartons to be packages rather than the container itself under the container clause reading that "one container said to contain 99 bales of leather; *Mitsui & Co. v. American Exports Lines* 1981 AMC 331 (2 Cir. 1981): Each roll of flour covering disclosed in the bill of lading was held a package; *Binladen BSB Landscaping v. M/V Nedlloyd Rotterdam* 1985 AMC 2113, 2125 (2 Cir. 1985); *Hayes-Leger Assocs. v. M/V Oriental Knight* 1986 AMC 1724 (11. Cir. 1985); *Monica Textile (ibid)* 1992 AMC 609 (2 Cir. 1991): The court applied the bill of lading clause stating that "the shipment consisted of 76 bales" rather than another clause providing that "the word package shall include each container where the container is stuffed and sealed by the Merchant"; *Universal Leaf Tobacco v. Companhia De Navegacoa* (4 Cir. 1993) - DeOrchis,M.E.: Package, p.279; Hover,M.C.: A Container Is Not a COGSA Package When the Bill of Lading Discloses the Contents, 15 Pc.L.J. 737, Ap'84, p.738, 758; Wijkmans,F.M.K.: The Container Revolutions and the Per Package Limitation of Liability in Admiralty, 22 ETL 505 (1987), p.505, 518. For pallets *Vegas v. Compania Anonima Venezolana* 1984 AMC 1600 (11 Cir. 1983) - Tetley,W.: Cargo Claims, p.882.

[28] For containers *Luchese v. Malabe Shipping Co.* 1973 AMC 979. For pallets *Standard Electrica (ibid)* 1967 AMC 881, 882, 885 (2 Cir. 1967): Where pallets each of which contained six cardboard containers each of which included forty television sets, the court decided on the strength of the parties' intention to define the pallets as COGSA packages in the dock receipts; *Allied Intern Am. Eagle v. SS Export Bay* 1982 AMC 820, 829 (2 Cir. 1982): The court treated 18 pallets enumerated in the bill of lading as individual packages.

[29] For containers *Cour d'Appeal de Lyon,* May 18, 1978, DMF 73 (1980); *Cour d'Appeal de Aix,* October 13, 1978, DMF 79 (1980).

[30] Deniz,İ.: Konteyner Taşımacılığı, p.124.

carrier to issue a bill of lading showing the contents of the article[31] whereas others placed all the consequences on the carrier if he has not insisted on its contents being listed in the bill[32].

The third method treats the article of transport as a detachable compartment of the ship, not a package. Each package or unit in the article is, consequently, a package or unit. Such article cannot be treated as a package, notwithstanding the disclosure of its contents or its ownership[33]. This view can be challenged since the article of transport has a double function. Indeed, it protects cargo like a ship's hold[34] despite the fact that it also has a function and nature similar to the package preserving cargo during carriage.

Lastly, it was submitted that a set of goods which, throughout a voyage, is handled physically as a complete indivisible unit is a package[35]. Accordingly, a box shipped breakbulk is a package, whereas unbanded stack of boxes on a pallet is not. This view suggests that the word "package" includes every shipping unit and leaves the "customary freight unit" measurement to apply only to bulk and similar cargoes[36].

Anything falling within the definition intended in the Rules must be a package. Courts are not allowed to change the law[37]. Accordingly, so long as the article of transport, designed for the carriage of goods therein, wraps its contents so as not to be seen by a prudent carrier, it should be deemed a package within the meaning of Article 4 (5) of the Hague Rules. The article should firstly facilitate the carriage of its contents by protecting them and easing their handling. Secondly, it ought to cover its contents in such a way that a prudent carrier cannot see them through. If the carrier knew or should have known its contents, he cannot rely on it as a package because he could determine

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[31] For pallets *Menley & James Lab. V. M/V Hellenic Splendor* 1977 AMC 1782, 1783 (SD NY 1977); *Allied Intern. (ibid)* 1979 AMC 1578, 1580 (SD NY 1979).

[32] *Matsushita Electric (ibid)* 1976 AMC 779 (WD Wash. 1976).

[33] Armstrong,T.J.: Container Revolution, p.464; McEwen,D.F.: Per Package Limitation - A Diverging Approach in Canadian Courts, LMCLQ 269 (1976), p.269, 277; Murphy,J.F.: Containers and the Problem of Interpretation under COGSA Section 4 (4), 35 Wash.&Lee L.Rev. 301 (1978), p.314; Reisert,M.E.: A Container Should Never Be a Package, 2 Pace L.Rev. 309 (1982), p.309, 327; Simon,S.: More on the Law of Shipping Containers, 6 JMLC 603 Jl'75, p.603, 618.

[34] *Northeast Marine Terminal Co. v. Caputo* 432 US 249, 270 (SC 1976).

[35] Toedt III,D.C.: Defining "Package" in the Carriage of Goods by Sea Act, 60 Tex.L.Rev.961 (1982), p.983.

[36] van Wageningen,H.J.: Package, p.197.

[37] Tetley,W.: Cargo Claims, p.640.

the degree of care to be exercised, the extent of insurance to be effected and the rate of freight to be charged beforehand[38]. The word "package" is, therefore, apt to cover only boxed or wrapped containers and motor vehicles[39]. Conversely, a pallet[40], cradle[41] and uncovered wagon[42] cannot be a package. Where the article is stuffed with the participation or supervision by the carrier, his servants or agents, liability is limited regarding the contents thereof[43]. The carrier cannot deny that he knew the contents where any part of the bill has disclosed them even if they include the "said to contain" or similar qualifying clauses[44]. The problem is one which can be solved on a case by case basis.

Conflicts between court decisions in the application of package limitation to the article of transport have affected the shipping and insurance industries. Cargo interests could not forecast their insurable risks, and underwriters could not fix appropriate premium rates due to uncertainty[45]. Thus, the solution depended on international compromise subsequently achieved under the Hague-Visby Rules and the Hamburg Rules[46]. Nevertheless these Rules concentrate on the parties' intention without regard to the invisibility of the contents of the article. By Article 4 (5) (c) of the Hague-Visby Rules and Article 6 (2) (a) of the Hamburg Rules where a container, pallet or similar article of transport is used to consolidate goods, the package or other (shipping) units enumerated in the transport document as packed in such article of transport, are deemed packages or (shipping) units; except as aforesaid such article of transport are considered one shipping unit. Accordingly, if any package or (shipping) unit has been itemised in the transport document as packed in the article of transport, the carrier's liability will be limited per package or unit ("1 container, containing 30 items" = 30 units of limitation).

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38 * Shipper's Sealed Container Constitutes COGSA "Package" Where Contents Not Enumerated, 4 JMLC 159, Oc'72, p.162.

39 *Tug Dorothy H,* Civ. No. 79-164 (ED Va., Oct. 4, 1979) - Carver,T.G.: Carriage, p.391.

40 For an opposite view see *Standard Electrica (ibid)* 1967 AMC 881, 885 (2 Cir. 1967); *Vegas v. Compania Anonima Venezolana* 1984 AMC 1600 (11 Cir. 1983) - Williams,R.: Rules, p.78.

41 *The Prinses Margriet* [1974] 1 Lloyd's Rep. 599 (SD NY 1972).

42 For an opposite view see *Whaite v. Lancs and Yorks. Railway* (1874) LR 9 Ex. 67 (under the UK Carriers' Act 1830) - Carver,T.G.: Carriage, p.391, 396.

43 *Sperry Road Corp. v. Nordeutscher Lloyd and Others* [1974] 1 Lloyd's Rep. 122 (SD NY 1973).

44 *Universal (ibid)* (4 Cir. 1993).

45 Donovan,J.: Hague Rules, p.4.

46 Simon,S.: B/L Clause Treating Container as Single Package for Purposes of COGSA Limitation of Liability Invalid, 2 JMLC 190, Oc'70, p.200.

Where the document does not refer to the contents of the article at all or only discloses it as general cargo, the article itself is a unit of limitation ("1 pallet, including general cargo" = 1 unit of limitation). If the document mentions the contents of the article as partly packages or units and partly general cargo, each of the packages or units and general cargo will attract a separate unit of limitation ("1 container, containing 7 packages, 7 items and some general cargo" = 7 + 7 + 1 = 15 units of limitation).

Further, Article 6 (2) (b) of the Hamburg Rules regards lost or damaged article of transport, if not owned or otherwise supplied by the carrier, as one separate shipping unit on the strength that it can sustain costly loss or damage too. Suppose that the bill of lading has mentioned five packages (shipping units) in a shipper-supplied container and all including the container are damaged, liability is limited to six shipping units. The same rule should be applicable in the Hague-Visby Rules.

The place where the numbers of packages or units have been enumerated in the transport document is not an important factor in discovering the intention of parties. The number may appear anywhere in the document. Neither is the formulation of the enumeration a determining element. "Said to contain" clauses have no function in relation to the limitation of liability since Article 4 (5) (c) of the Hague-Visby Rules and Article 6 (2) of the Hamburg Rules clearly require the enumeration of packages or units in the document notwithstanding the carrier's own qualification which facilitates the proof of the moment when the physical loss of or damage to goods occurred[47].

Although it literally appears from the statement "number enumerated in the bill" that the function of enumeration is conclusive, the opportunity of adducing evidence against the declaration should be granted to parties. Unless there is a qualifying clause inserted in the bill, the burden of proving that the declaration is not true ought to be shifted onto the carrier. The carrier may be estopped from adducing proof against a bona fide third party-holder.

Any device used for the consolidation and, therefore, transportation of goods is an article of transport. For example, a roll on - roll off lorries, LASH barges, trailers and

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[47] OIC, Report of Canadian Carriage, p.179 - *Quebec Liquor (ibid)* 1979 AMC 2382 (Can. FC) - Chorley,R.S.T. - Giles,O.C.: Shipping 212.

wagons may fall in this category[48]. Even if the article of transport has its own means of propulsion, e.g., lorries, it is an article of transport for the purposes of the Rules since their carriage still depends on the ship's power rather than their own propulsion during the carriage of goods by sea. It was argued that the principle may apply to lorries and LASH barges by analogy although they are not similar to containers or pallets[49]. Suppose that they were different, how could the rule be applied to them by analogy?

The word "consolidation" should be broadly interpreted to cover not only circumstances where a freight forwarder groups different goods belonging to several consignors in a single article of transport, but also any situation where goods are stuffed in or on an article[50]. In the former case, it would not be just to limit liability considering the article on the strength of the reference made in the bill of lading to such a device[51].

The formula based on the parties' intention could be unfair to cargo interests. Carriers will probably be most reluctant to state in the document the number of packages or pieces covered in the article unless they charge extra freight because the enumeration increases the limits of liability. The carrier is also entitled under Article 3 (3) of the Hague-Visby Rules not to show the number of packages or pieces in the boxed article. In that case, cargo interests would prefer insuring their goods to paying higher freight since insurance premium rates would be less than freight rates. Thus, the same problem may arise, as is the case where the shipper uses his right to declare the value and nature of goods in order to prevent the carrier from relying on the limitation clause[52]. That would reduce the degree of care expected from the carrier. Indeed, there is still an unanswered question: why the carrier who knows or should, in any way, know the contents of the article and consequently how much care should be exercised for the visible goods is allowed to limit his liability for fault on the grounds of package while there is another criterion based on unit for every kind of goods? For that reason, a US delegate proposed the addition of a text clarifying language to Article 6 (2) (a) of the Hamburg Rules, as follows "Where numbers of packages or shipping units are

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48 Carver,T.G.: Carriage, p.397. For an opposite view see Scrutton,T.E.: Charterparties, p.451.
49 Diamond,A.: Visby Rules, p.243.
50 Diamond,A.: Visby Rules, p.243.
51 UNCTAD Secretariat, Report on bills of lading, p.46 - Scrutton,T.E.: Charterparties, p.451, n.59.
52 Diplock,K.: Limitation Clauses, p.532; Röhreke,H.G.: Combined Transport, p.636.

enumerated in the bill of lading, the carrier shall not be permitted to impose additional *ad valorem* freight charges". However, the proposal was not supported on the *unfair* ground that it was a matter of trade practices and competition[53].

Since parties are not free to negotiate on the meaning of package, any general clause defining the container as a package are null and void under Article 3 (8) of the Hague and Hague-Visby Rules and Article 23 of the Hamburg Rules[54]. However, as explained before, under Article 4 (5) (c) of the Hague-Visby Rules and Article 6 (2) of the Hamburg Rules the disclosure of the container as a package in the transport document is valid.

2- Unit

The unit criterion is used as a secondary alternative to the package formula for all kinds of unpacked goods under the Rules[55]. If cargo cannot be considered as packed, the amount of indemnity payable by the carrier will be limited on the basis of unit[56]. If the conjunction "or" between "package" and "unit" in Article 4 (5) of the Hague and Hague-Visby Rules and Article 6 (1) of the Hamburg Rules was interpreted to mean that these two criteria were on the same level, and that the latter could not prevail over the former, then the question as to which measure would be taken into account in the case where their application resulted in different limitation amounts would be born in mind. The conjunction "or" should, therefore, be construed as "otherwise". Under Section 4 (5) of the US COGSA 1936 it is clearly provided that unit limitation is applicable only in case of goods not shipped in packages.

There is nothing in the Hague and Hague-Visby Rules to explain to what the term "unit" refers. As it may have different meanings, its context is somewhat ambiguous. It

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53 Sweeney,J.C.: UNCITRAL II, p.331.

54 *The River Gurara* [1996] 2 Lloyd's Rep. 53, 64 (QB – Adm. Ct.) / *Yeramex (ibid)* 1977 AMC 1807 (ED Va. 1977); *Monica Textile (ibid)* 1992 AMC 609 (2 Cir. 1991): The court did not apply the bill of lading clause stating that "the word package shall include each container where the container is stuffed and sealed by the Merchant".

55 Aybay,G.-Atamer,K.: Taşıyanın Parça Başına Belli Bir Tutarla Sınırlı Sorumluluğu, VI. Ticaret Hukuku ve Yargıtay Kararları Sempozyumu, (14-15 Nisan 1989), Ankara 1989, p.241, 243 (to be cited thereinafter as "Parça Başına Sorumluluk").

56 *Corte di Appello Florance*, 1965 AMC 364, 384 - Berlingieri,F.: Unit, p.413; Bonelli,F.: Limitation of Liability of the Carrier, Present Regulation and Prospects of Reform, in Studies on the Revision of the Brussels Convention on Bills of Lading, Genoa 1974, p.156, 169; O'Hare,C.W.: Limitations, p.290.

could either mean the *shipping unit* in which goods are shipped, i.e., physical unit of cargo, or the *freight unit* on which freight is calculated[57]. Again, it can be determined according to either the intention of parties in the contract (*declared unit*) or the custom in maritime trade (*customary unit*)[58].

There is no consensus among statutes, courts and authors as to what the term, "unit", really means[59]. This creates many obstacles to achieving the main aim of the Rules, i.e., the unification of provisions relating to the contract of carriage by standardising the carrier's liability. First of all, whatever kind of unit is accepted, the customary unit should be preferred because the carrier would, otherwise, be granted an opportunity to increase monetary limits contrary to the mandatory Rules[60].

Secondly, the purpose of the drafters should, in defining "unit", be born in mind. The unit measure was a secondary alternative to the package criterion. If "unit" referred to the shipping unit, there would be no need to limit the carrier's liability on the basis of package since the term "shipping unit" is wide enough to cover the package which is a sort of physical unit of cargo. Had the drafters intended to define it so, they could use "pieces" instead of the unit since Article 3 (3) (b) of the Hague Rules has already used "pieces" for unpacked

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57 Ivamy,I.R.H.: "Units" and "Customary Freight Units" in the Carriage of Goods by Sea, 22 MLR 550 (1959), p.550 / Tekil,F.:Deniz Hukuku, Uluslararası Konvansiyonlar, İstanbul 1987, p.184.

58 Secretary-General, Second Report, p.163, n.11.

59 For the freight unit see Section 4 (5) of the US COGSA - *Corte di Appello Florance*, 1965 AMC 364 / *Arrondissementsrechtbank Te Rotterdam*, January 9, 1968, ETL 420 (1970); *Gerechtshof Te's Gravenhage*, February 6, 1970, ETL 410 (1970) / *The Bill* 1944 AMC 883, 887 (D Md. 1944); *Freedman & Slater v. M/V Tofevo* 1963 AMC 1525, 1538 (SD NY 1963) - Schinas,J.G.: Cargo Claims, p.252 / Prüssmann-Rabe: Seehandelsrecht, § 3 a. For the shipping unit see Section 423 of the Italian Code of Navigation 1942 - *Anticosti Shipping Co. v. St. Amand* 1959 AMC 1526 (Can. SC); *JA Johnston Co. v. The Tindefjell Sealion Navigation Co.* [1973] 2 Lloyd's Rep. 253 (Can. FC - Trial Div. 1973); *Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd.* [1973] 2 Lloyd's Rep. 469 (Can. SC); *NS Tractors v. M/V Tarros Gage* 1986 AMC 2050 (Can. FC) - Berlingieri,F.: Unit, p.424; Diamond,A.: The Hague-Visby Rules, in Lloyd's of London Press Ltd. (Org.): The Hague-Visby Rules and the Carriage of Goods by Sea Act, 1971, A One-Day Seminar (December 8, 1977 London), London 1977, p.1, 12 and Visby Rules, p.241; Temperley: Carriage, p.81 / Wüstendörfer,H.: Seehandelsrechts, p.287. For other decisions see Selvig,E.: Limitation, p.113.

60 For opposite views see Maclachan,D.: Merchant Shipping, p.381; Scrutton,T.E.: Charterparties (16th ed., 1955), p.490 / Wüstendörfer,H.: Seehandelsrechts, p.287.

objects[61]. The unit formula is, in short, an independent of the package criterion and does not overlap it[62].

The unit measure may be justified on different grounds from the package. The main reason for the creation of the unit as a secondary alternative to the package was to mitigate the consequences of the unfair increase in freight due to the risks in the rise of the carrier's liability. Consequently, the unit criterion should provide a balance between increased liability and increased freight. The freight unit is the most suitable measure serving this purpose compared to the shipping unit[63].

The shipping unit makes no sense for bulk cargo consisting of only one single physical unit. Hence, if the shipping unit is favoured, a question will automatically arise whether the limitation of the carrier's liability for bulk cargoes which are generally carried in large volumes, was intended by the Hague and Hague-Visby Rules. As the prevailing view has agreed[64], another artificial criterion for bulk cargo has been created, that is, the weight or volume unit, but is not necessarily the one on which freight is calculated[65]. By comparison, the freight unit is suitable for all kinds of goods including bulk cargo[66].

Lastly, had the carrier's liability been limited to the strength of the shipping unit[67], an unpacked large piece of cargo of high value, such as an automobile, tractor, helicopter, etc. would be deemed a shipping unit, and the carrier's liability would be limited to the statutory amount which is definitely not sufficient to balance increased freight with increased liability and to protect cargo interests. By contrast, if the freight unit had been the measure, the limitation of the carrier's liability would probably be calculated on the

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61 Tetley,W.: Cargo Claims, p.885; Package, p.692.

62 *The Bill* 1944 AMC 883, 887 (D Md. 1944) - Bissell,T.: The Operational Realities of Containerisation and Their Effect on the "Package" Limitation and the "On-deck" Prohibition, 45 Tul.L.Rev. 902 (1971), p.906.

63 O'Hare,C.W.: Limitations, p.2901.

64 ILA, Hague Report, p.160; UNCTAD Secretariat, Report on bills of lading, p.45 - Selvig,E.: Unit Limitation, p.36 and Limitation, p.113. For an opposite view on bulk cargo see *Studebaker Distributors, Ltd. v. Charlton Steam Shipping Co., Ltd.* (1938) 1 KB 459 - Carver,T.G.: Carriage, p.399; Scrutton,T.E.: Charterparties (18th ed.), p.441; Williams,R.: Rules, p.78.

65 OIC, Report of Canadian Carriage, p.177 - Temperley: Carriage, p.81.

66 *The Pioneer Moon* [1975] 1 Lloyd's Rep.199 - Wilson,J.F.: Carriage, p.195.

67 As done in *Trenton Works Lavalin v. Panalpina Inc.* (1995) 139 NSR (2d) 46 (CA).

basis of the weight or volume of goods unless freight was stipulated as a *lump sum* for one shipping piece. It is, therefore, more profitable for cargo interests since freight units on many occasions exceed the number of shipping units[68].

For these reasons and in order to clarify the limitation provision in the Hague Rules, Section 4 (5) of the US COGSA 1936 clearly employs the customary freight unit[69]. Although freight could mean goods carried, it is always interpreted as a reward for carriage by US courts[70]. *Customary freight unit* is the measure customarily used for the calculation of freight in a particular trade[71]. It should be one that is well known in the shipping industry or at least one known to parties[72]. It may change depending on the route followed and the goods carried. The customary freight might be calculated on the *lump sum* basis[73]. In that case, freight and shipping units are the same[74]. Otherwise, the freight unit would be a weight, length or volume unit since freight is normally stipulated per ton, hundredweight, cubic-feet, meter etc. Even if parties actually measure freight according to the formula other than customary one, for example on the basis of contractual terms, the customary measure should be taken into consideration in ascertaining the maximum quantum of damages[75]. Provided that there is no existing custom at all, the contractual measure used for the calculation of freight by parties may be taken into account.

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[68] *Gulf Italia (ibid)* 1958 AMC 439 - UNCTAD Secretariat, Report on bills of lading, p.45 - Bissell,T.: Containerisation, p.905; O'Hare,C.W.: Limitations, p.291.

[69] *The Bill* 1944 AMC 883, 886 (D Md. 1944) - Tetley,W.: Cargo Claims, p.884, n.41. For an opposite view see *Falconbridge (ibid)* [1973] 2 Lloyd's Rep. 469 (Can. Ct.): In the court's opinion the US COGSA 1936 has diverged from the Hague Rules and the UK COGSA 1924.

[70] *Brazil Oiticica v. M/S Bill* 1944 AMC 883, 887 (D Md. 1944).

[71] *The Bill* 1944 AMC 883, 887 (D Md. 1944).

[72] *Freedman & Slater v. M/V Tofevo* 1963 AMC 1525, 1538 (SD NY 1963).

[73] *Zeebauw v. Roman Pazinski* 1985 AMC 1513 (SD NY 1984); *Ulrich Ammann v. M/V Monsun* 1985 AMC 1965 (SD NY 1985) .

[74] *Anticosti (ibid)* [1959] 1 Lloyd's Rep. 359 (SC).

[75] *Barth v. Atl. Container Line* 1985 AMC 1196 (D Md. 1984): Although in the contract freight was computed according to metric length of the automobile, the court limited the damages per automobile which is a customary freight unit - Scowcroft,J.C.: Package Limitation, p.412. However, some courts ignored custom and limited the carrier's liability on the strength of agreed freight unit: *Waterman SS Corp. v. US Smelting Refining & Mining Co.* 1946 AMC 997 (5 Cir. 1946); *Petition of Isbrandtsen Co.* 1953 AMC 86 (2 Cir. 1953): As in the contract freight was estimated per ton for small locomotives and per item for large locomotives the court reached a bizarre result that cargo interests was granted higher damages for smaller and less valuable objects; *General Motors Corp. v. SS Mormacoak* 1971 AMC 2408 (2 Cir. 1971); *FMC Corp. v. SS Marjorie Lykes* 1988 AMC 2113 (2 Cir. 1988); *Aetna Ins. Co. v. M/V Lash Italia* 1989 AMC 135 (4 Cir. 1988).

After the weight criterion is introduced as an equivalent alternative to the unit criterion, problems arising from the application of unit limitation to the bulk cargo and large piece of goods are removed. Thus, it was submitted that "unit" under the Hague-Visby Rules may refer to an individual article or piece of goods which was not packed; for instance an unpacked car, a yacht or a log of wood[76]. This conclusion is supported by the wordings in Article 4 (5) (a) of the Hague-Visby Rules, "package or unit". This is much clearer in the Hamburg Rules, whose Article 6 (1) and (2) (a) prefers "shipping unit" criterion in order to remove the uncertainties which may arise from the determination of unit based on the calculation of freight[77]. Consequently, shipping unit in the Hamburg Rules seems to have no application to bulk cargo[78]. Despite clarifying and unifying the legal regimes, the Hamburg Rules cannot be said to create a good balance between increased liability and freight.

3- Weight

Package and unit systems may lead to unjustifiable consequences in some cases. Firstly, the expected value of a package is changeable according to the size of the package and goods therein. The bigger the package is and the smaller and more expensive goods therein the more the expected value thereof will be. Accordingly, it is not right to use only one criterion for all kinds of packages. The freight unit measure may also generate differences in limitation amounts for the various types of goods. The quantum will be different where freight for the same sort of cargo is customarily fixed on different basis on different routes. More importantly, countries adopting the shipping unit instead of freight unit urgently needed a new statutory criterion for bulk cargo and large pieces of goods.

The weight measure is the one which may be used as an equivalent alternative to the first two measures to recover their drawbacks. Thus, a reasonable amount of limitation for the all kinds of goods can be fixed[79]. The weight criterion alone despite being clear and simple is, however, insufficient for the light but expensive goods. For that reason,

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[76] Carver,T.G.: Carriage, p.399.
[77] UNCITRAL Working Group, Report of the Fifth Session, p.202.
[78] Group 3 of the IMC, Report on the Limits of Liability, p.48.
[79] Chrispeels,E.-Graham,T.: Ocean Bills of Lading, p.686, n.27; Selvig,E.: Limitation, p.124.

Article 4 (5) of the Hague-Visby Rules and Article 6 (1) of the Hamburg Rules retain the package and unit limitation of liability for individual small pieces or packages of cargo having high value, but also an equivalent alternative formula based on the weight is introduced for the large expensive pieces or packages[80]. This is unlike Articles 31 (1) and 33 of the CMI, Articles 23 (3) and 25 (2) of the CMR and Article 22 (2) of the Warsaw Convention which employ only the weight standard.

The weight criterion is applicable to all kinds of goods so long as it provides higher protection to cargo interests. Consequently, if cargo falls within the category of two measures, two different calculations should be made in order to ascertain the amounts of limitation, and the higher amount should be applied notwithstanding any reference made in the bill of lading because the limitation provisions reading "whichever is the higher" do not leave any choices. If a court cannot ascertain the weight of goods accurately as, for example, goods might have fallen overboard, it should instead estimate their possible weight considering all the factors. Otherwise, it should operate the package or unit limitation because those are equivalent alternatives to the weight limitation. If one fails in any reason, others remain applicable[81].

The wording "per kilo of gross weight of the goods *lost or damaged*" in Article 4 (5) (a) of the Hague-Visby Rules and Article 6 (1) of the Hamburg Rules does not permit parties to claim a partial application of weight criterion to cargo totally lost or damaged. Consequently, if the lost or damaged cargo consists of several parts which can be made subject to different limitation criterion, the court will operate only one of them whichever contributes to higher limitation[82].

B) UNIT OF ACCOUNT

1- General

Cargo interests is compensated for loss in cash by the carrier. The unit of account used for the limitation of the pecuniary damages must, therefore, be first convertible to the currency applicable under *lex fori* without any difficulty.

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80 Secretary-General, Second Report, p.163, 167; UNCITRAL: Hamburg Rules, p.601 - Gröfors,K.: The Hague-Visby Rules, JBL 201 (1968), p.202.

81 For an opposite view see Diamond,A.: Visby Rules, p.241.

82 Diamond,A.: Visby Rules, p.244.

The unit of account should secondly provide certainty, uniformity and stability[83]. Consequently, it must be outside the control of any governmental institution. It must also maintain its real value on its own notwithstanding any changes in inflation and devaluation. Otherwise, the carrier's liability could lose its actual financial function to compensate cargo interests for loss, and the rules relating the carrier's liability would make no sense. It would not be worth the aggrieved party suing the carrier or making him liable by law if there was no real indemnity left to be performed by the carrier. This would destroy the benefits expected from the fault principal and the balance between risks shifted onto the carrier and freight charged on the cargo interest. The carrier would thereby unjustifiably relieve himself of the obligation to act as a prudent carrier.

The Hague Rules and the Visby Protocol take the gold value of currency while the SDR Protocol and the Hamburg Rules introduce SDR as units of account.

2- Gold value of currency

a-. Gold value of pound sterling or other equivalent national currency (in the Hague Rules)

Article 4 (5) of the Hague Rules limits the damages to be paid by the carrier to £100 sterling or the equivalent in other currencies. Article 9 takes the monetary units mentioned in this Convention to be gold value, and grants an option to the Contracting States in which the pound sterling is not a monetary unit to translate the sums indicated in this Convention in terms of pound sterling into their own monetary systems in round figures.

Since Article 9 was not properly drafted, some disputes as to its meaning have occurred. First, it was affirmed that the carrier's liability was limited to 100 gold sovereign or the equivalent in other gold currencies at the beginning because most national currencies, including the UK pound sterling, were backed by gold, and one unit of currency was represented by one gold sovereign. Once the countries came off the gold standard, Article 9 and the gold standard lost all its function, and the unit of account became £100 sterling or the equivalent of that sum in other currencies.

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[83] Diamond,A.: Hague-Visby Rules, p.9.

Secondly, it was pointed out that the gold value of £100 sterling is to be taken into consideration only to convert the equivalent of £100 sterling into another currency by the Contracting States using the option under the second paragraph of Article 9. Accordingly the £100 sterling or the equivalent could be paid only in legal tender without regard to gold value[84].

As a result many Contracting States used the option granted to them and translated the sums indicated in this Convention in sterling into their own monetary system with or without paying attention to the gold value of pound sterling. As there is no stipulation in the Rules concerning the date of conversion, most Contracting States took the value of £100 in currency at the time of legislation[85]. Supposing that convention based law obligation was performed thereby, some Countries did not include the first paragraph of Article 9 into their national statutes either[86]. Nor do most require the necessary amendment of the amount of limitation in the case of change in its real value[87]. Although in some Contracting States, the right to expand the maximum amount is awarded to state organs such as the cabinet by the national legislation in order to keep up with the rise in inflation, this option could not be used in response to pressures by shipowners[88].

In order to give fair treatment to cargo interests, the British Maritime Law Association (Gold Clause) Agreements 1950 and 1977, increasing the maximum amount of damages from £100 to £200 and then to £400 in legal tender, were signed. They were approved by English courts[89] despite the fact that even this augmentation did not cover fully the rise in the gold value of £100, and that such gentleman's agreements should, therefore, have been void as a contravention of the mandatory provision in

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[84] Scrutton,T.E.: Charterparties (18th ed. 1974), p.449; Todd,P.: Bills of Lading, p.156. For Cypriot law see McBride,S.G.: Package and Unit Limitation under Cyprus Law, 3/5 Int'l.Mar.L. 158, May 96, p.160.

[85] Asser,T.M.C.: Golden Limitations of Liability in International Transport Conventions and the Currency Crisis, 5 JMLC 645, Jl'74, p.648 (to be cited thereinafter as "Golden Limitations").

[86] As is the case in the US COGSA 1936.

[87] Knauth,A.: Ocean, p.285.

[88] See Article 38 of the Turkish Code concerning the Procedure of the Effectiveness and Application of the Turkish Commercial Code 1956.

[89] *Pyrene v. Scindia Steam Nav. Co.* [1954] 1 Lloyd's Rep. 321, 334; *Eurico SpA v. Leros Shipping Co.* [1987] 1 Lloyd's Rep. 530.

Article 9 of the Hague Rules. Eventually, they were abandoned in 1988. Since the monetary unit was not backed by gold standard in Article 9, the amount of damages is made subject to changes in rates of inflation and devaluation in most Contracting States. In the course of time, it has differed from country to country[90]. The maximum quantum of damages has, thus, become a matter of law applicable today.

Article 9 should be interpreted bearing in mind its aim of standardising the carrier's maximum liability and to protect it from fluctuations in national currencies owing to inflation and devaluation by linking the unit of account to gold[91]. Consequently, when Articles 4 (5) and 9 are read together, the limitation amount ought to be taken as the sum equivalent of gold in 1924 for £100[92]. The Contracting States under convention based obligation to give effect to the Rules cannot release their courts from applying the gold standard by not including Article 9 into national statutes. Courts are, as a result, obliged to determine the limits of liability taking the gold price into account. Since Article 9 failed to specify the weight and fineness of gold represented by £100 in 1924, two types of calculation must be made in order to fix the maximum amount of compensation. First, the limitation (£100 or the equivalent of that sum in other currencies) should be converted into gold from the date of the Hague Rules (1924) or of the national statutes if they took the gold value of £100 in 1924 during their incorporation. The conversion of £100 into gold considering the date of the Hague Rules is easy because the pound sterling was standardised on gold from 1717 until 1931. £3 were one troy ounce of gold of 22 carats[93]. Then, the value of gold is to be translated into legal tender.

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[90] See Appendix.

[91] IMC International Sub-Committee Report, 1962, p.79.

[92] *Brown Boveri (Australia) Pty. Ltd. Baltic Shipping Co.* [1989] 1 Lloyd's Rep. 518 (Aust. NSW 1987) / *Norway and Asia Lines v. Adamji Jute Mills* [1981] BLD 152 (CA) / *Loizos Louca & Sons Ltd v. Batsi Shipping Ltd. and the Ship Libra* July 10, 1992 (Cyp. Ct.) / *The Rosa S* [1989] 2 Lloyd's Rep. 574, 577 (QB) / *Cour d'Appeal de Rouen*, February 10, 1967, DMF 675, 678 (1967) / *Corte di Casazione*, April 27, 1984 (*SpA Carniti & Co. v. SpA Comesmar*) Dir. Mar. 824, 872 (1984) / *The Thomaseverett* [1992] 2 SLR 1068; - Diamond,A.: Liability, p.47; Scrutton,T.E.: Charterparties, p.451; Tetley,W.: Package & Kilo Limitations and the Hague, Hague/Visby and Hamburg Rules & Gold, 26 JMLC 133, Ja'95, p. 135 (to be cited thereinafter as "Limitations"). For an opposite view see *The Vishva Pratibha* [1980] Sing.Rep. 265.

[93] Tetley,W.: An Update of the Per Package Limitation, 14 JMLC 331 (1983), p.332 (to be cited thereinafter as "Per Package Limitation"). In *The Rosa S* [1989] 2 Lloyd's Rep. 574, 577 (QB) it was also held that £100 were, having the gold content specified in the UK Coinage Act 1971, 798,805 milligrams of gold of millesimal fineness 916.66 or 732.238 grams of fine gold.

The Hague Rules are silent on how the gold is to be valued in national currency. Before 1968 there was almost no difference between the official and market value of gold because of the "Gold Pool" arrangement formed between some IMF member countries in order to keep the market price of gold close to the official price[94]. However, after the 1967 and 1968 economic crises which led to a large demand for gold, seven major IMF member countries concluded an agreement not to supply gold from their central banks to the private gold market[95]. Then, a "two-tier" gold market under which gold was bought or sold either by official authorities at official price or by private merchants at market price stemmed[96]. In 1971 some countries gave up stabilising the par value of their currencies by selling or buying gold in the official market. Still, the IMF kept expressing the SDR value in terms of gold (a SDR was equivalent to 0,888671 grams of fine gold which amounts to the par value of the US dollar between 1934 and 1971 of 35 US dollars per fine ounce). As a result, some Contracting States have converted the monetary unit in gold into the SDR expressed in gold and then counted the equivalent in their currencies. Nevertheless, in 1974 the IMF replaced the official price of gold with the SDR in terms of a "standard basket" of particular currencies as the IMF' unit of conversion in order to reduce the negative effects of inflation on currencies. On balance, no official price of gold was left to be measured against[97]. Consequently, the gap between the market price and the last official price grew so much not to be bridged[98]. The former was ten times higher than the latter. Then judicial arguments arose as to whether a monetary unit in gold refers to the "last official price", or "current market price" of gold. In some court decisions the "last official price" of gold was applied on the ground that the application of the free market price would create uncertainties concerning the extent of liability due to differences in gold market prices depending on time and place[99]. These judgements seemed to disregard the fact that

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94 Asser,T.M.C.: Golden Limitations, p.650; Diamond,A.: Hague-Visby Rules, p.10.

95 Sweeney,J.C.: Article 6 of the Hamburg Rules, in Mankabady,S. (ed.): The Hamburg Rules on the Carriage of Goods by Sea, Leyden-Boston 1978, p.151, 153.

96 Heller,P.P.: The Warsaw Convention and the "Two-Tier" Gold Market, JWTL 126 (1973), p.126.

97 Diamond,A.: Visby Rules, p.238.

98 Lincoln,B.A.-Lanzon,C.E.: Resolution of the Warsaw Convention Gold-Based Liability Limits Issue?, 18 Geo.Wash.J.Int'l.L.&Econ. 393 (1984), p.397 (on the Warsaw Convention).

99 *Corte di Appello Florence* 1965 AMC 384; *Corte d'Appello of Genoa* 1965 Dir. Mar. 462, 470 (1965); *Corte di Appello Genoa* Dir. Mar. 584 (1965) / *Hornlinie v. Societe National des Petroles d'Aquitaine*, SC, April 14, 1972, Nederlandse Jurisprudentie 269 (1972) (under the Brussels

official rates became unrealistic compared to the purchasing power of gold in the market and no longer reflected inflationary changes[100]. By contrast, the market price of gold always represents more realistic economic solution against inflation[101]. It is also free from the control of any country[102]. Nevertheless, since it is changeable from market to market, each court has to calculate the amount of limitation for each case separately, but that does not ruin its reliability.

With the coming into force on April 1, 1978 of the Second Amendment to the Articles of Agreement of the IMF, in some countries, such as France[103] and Netherlands[104], the gold value of the statutory sum was converted into SDR, which is the unit of account for IMF members. This conversion is inappropriate as the mandatory provisions of the Hague Rules cannot be by-passed by the application of a third Convention which may cause differences in the maximum amount of damages to be paid by the carrier, and may destroy the main aim of the Rules to achieve international uniformity in the rules relating to the carrier's liability. The gold value should be used as a unit of conversion notwithstanding the recognition of the SDR as an international monetary unit[105].

There is no consensus among jurists as to which date and place (the place and date of delivery[106], judgement[107] or payment) will be taken into account in expressing the

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Limitation of Liability Convention 1957) / *Trans World Airlines v. Franklin Mint Corp.* 1984 AMC 1817 (SC 1984) (under the Warsaw Convention).

100 Bristow,L.: Gold Franc - Replacement of Unit of Account, LMCLQ 31 (1979), p.32 (to be cited thereinafter as "Gold Franc").

101 *SS Pharmaceutical Co. Ltd. v. Quantas Airways Ltd.* [1989] 1 Lloyd's Rep. 319 (Aust. NSW SC) (under the Warsaw Convention) / *Cour d'Appeal de Rouen*, February 10, 1967, DMF 675, 678 (1967) / *Zakoupolos v. Olympic Airways Corp.* February 15, 1974 (Gr. CA) (under the Warsaw Convention) / *Associated Metals & Minerals Corp. v. M/V Lumbe* 1993 AMC 700 (DNJ 1991) - Asser,T.M.C.: Golden Limitations, p.652; Costabel,A.M.: Gold, p.328; Heller,P.P.: The Value of the Gold Franc - A Different Point of View, 6 JMLC 73, Oc'74, p.96, 102 (on the Warsaw Convention); Mendelsohn,A.I.: The Value of the Poincaré Gold Franc in Limitation of Liability Conventions, 5 JMLC 125, Oc'73, p.127 (on the International Convention on the Establishment of an International Fund for Compensation for Oil Damage 1971.).

102 Lincoln,B.A.-Lanzon,C.E.: Gold, p.416 (as to the Warsaw Convention).

103 *Cour'd Appeal d'Aix*, July 6, 1987, DMF 390 (1988); *Cour d'Appeal de Paris*, October 25, 1989, DMF 590, 593 (1991).

104 *Hoga Raad der Nederlanden*, May 30, 1981, Rechtspraak van de Week 321 (under the Warsaw Convention).

105 *Trans World (ibid)* 104 US 1776, 1787 (1984) (under the Warsaw Convention).

106 *The Rosa S* [1989] 2 Lloyd's Rep. 574, 577 (QB).

107 Article 22 of the Hague Protocol.

maximum amount in terms of gold. It was suggested that the date of payment would seem to have been a more sensible rule expressing the maximum amount in the unit of account[108]. Nevertheless, because of the change in the unit of account in the short time, the carrier may be given an opportunity to delay the payment of damages. As a result, the date and place of judgement would be fairer to cargo interests.

b-. Gold value of franc (in the Visby Protocol)

In order to overcome the problems arising from the ambiguous language of Articles 4 (5) and 9 of the Hague Rules, Article II (a) and (c) of the Visby Protocol in the same way as Article 22 (5) of the Warsaw Convention limits the carrier's liability, considering the artificial currency "the Poincaré francs", and defines it as a unit consisting of 65.5 milligrams of gold of millesimal fineness 900. Courts are no longer allowed to calculate the maximum amount of damages in any currency without regard to its gold value. No more do the Contracting States have an option to translate the unit of account into the unit of currency since Article 9 of the Hague Rules is amended by Article IV of the Visby Protocol in this respect[109]. The replacement of the gold sovereign with the Poincaré franc was not a substantial divergence from the Hague Rules, though.

Nevertheless, the Visby Protocol has no provision in relation to the calculation of the maximum amount. Instead, Article II (d) leaves the date of conversion to the law of the Court seized of the case to decide[110] although the real solution would be to take the market value of the gold on the date of judgement as explained above.

3- Special Drawing Rights value together with gold value (in the SDR Protocol and the Hamburg Rules)

After the coming into force on April 1, 1978 of the Second Amendment to the Articles of the IMF Agreement, Article 4 (5) (a) and (d) of the Hague-Visby Rules is amended by Article II (1) and (2) of the SDR Protocol, and the gold value is replaced by

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[108] Silard,S.A.: Carriage of the SDR by Sea: The Unit of Account of the Hamburg Rules, 10/1 JMLC 13, Oc'78, p.29 (to be cited thereinafter as "Unit of Account").

[109] IMC International Sub-Committee Report, 1962, p.80.

[110] Falih,A.B.A.: The Statutory Limitation of the Maritime Carrier's Liability under the Hague Rules, Visby Rules and Hamburg Rules, PhD Thesis, University of Glasgow, 1980, p.322.

the SDR value as defined by the IMF[111]. The same unit of account is also adopted by Article 6 (1) and Article 26 of the Hamburg Rules. The main difference between these two regimes is that the former leaves the matter of the date of conversion of the maximum amount of liability in SDR into the national currency to the discretion of the court seized of the case while in the latter the limit of liability is to be expressed in terms of national currency at the date of judgement or the date agreed upon by parties[112].

Both Article II (2) of the SDR Protocol and Article 26 (1) of the Hamburg Rules provide that the value of a national currency, in terms of the SDR, of a Contracting State which is a member of IMF is to be calculated in accordance with the method of valuation applied by the IMF in affect at the date in question for its operations and transactions. The value of a national currency in terms of the SDR of a Contracting State which is not a member of the IMF is to be computed in a manner determined by that State. By Article II (2) of the SDR Protocol and Article 26 (2) of the Hamburg Rules if the Contracting States are not members of the IMF and their laws do not permit the application of the provisions mentioned above, they may use the gold value in place of SDR value. The calculation and conversion are 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 statutory maximum amounts of damages as is expressed in units of account.

The SDR value represents the market value of fixed amounts of particular national currencies in the IMF trade-weighted baskets[113]. It is an artificial currency the value of which can be obtained daily from financial journals. In theory, drops in one currency in the basket will normally lead to increases in others therein; and the effect of a fall in one currency does not have so much influence on the total SDR value. This multinational character at first sight provides a protection against the domestic inflation and

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[111] In the same line see Article 21 of the London Limitation of Liability Convention 1976 and Article 5 of the Athens Convention.

[112] Silard,S.A.: Unit of Account, p.29.

[113] Çağa,T.: Enternasyonel Deniz Hukukunda Yeni Bazı Gelişmeler, Batider, Aralık 1977, Vol.IX, Is.2, p.289, 307 (to be cited thereinafter as "Enternasyonel"); Navlun Sözleşmesi, p.168.

devaluation[114]. The reason for the preference of SDR to gold was the 1967 and 1968 economic (gold) crises. After 1978 it was realised that those economic crises created only temporary consequences which could be seen in any market subject to the state's intervention. In the course of time it has become clear that the gold value has gone up relatively evenly with inflation since 1924 despite the fact that its value may easily be effected by market conditions in short term like other commodities[115]. Therefore, it provides stable limitation and represents a realistic solution to inflation and devaluation problems in the long run[116]. By comparison, the strength of the SDR may weaken in the case of world-wide inflation leading to a decrease in all the component currencies[117]. The market value of gold is today outside the control of any country since the currencies are no longer tied up to gold value. As a result, gold nowadays has no nationality and no direct or indirect connection to any currency whereas the SDR can be affected by a country's economic decisions on the value of their legal tenders. The use of the SDR value also generates another difference concerning the maximum amount of damages among the countries whose law permits and disapprove the limitation in SDR. In the course of time due to increase in the gold value more than the SDR value, the limit of damages varied[118]. However, today, especially after the collapse of the Soviet Union, there are a few countries left which are not members of the IMF. Consequently, this problem has almost subsided[119]. In short, the gold value should have been preferred to the SDR value under the SDR Protocol and the Hamburg Rules as did the Visby Protocol.

C) MONETARY AMOUNT

The monetary amount should be fixed with regard to expectations from the limitation rules. Consequently, the maximum amount for the package limitation ought to be determined by considering the average real value of the average size package. If the aim

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[114] Bristow,L.: Gold Franc, p.34; Tobolewski,A.: Limits of Liability in the Present Economic Situation, LMCLQ47 (1980), p.51 (to be cited thereinafter as "Limits of Liability".
[115] Lincoln,B.-Lanzon,C.E.: Gold, p.420 (on the Warsaw Convention); Todd,P.: Bills of Lading, p.157.
[116] Tetley,W.: Limitations, p. 144, 147.
[117] Tobolewski,A.: Limits of Liability, p.51.
[118] Berlingieri,E.: Conversion of the Gold Monetary Unit into Money of Payment, LMCLQ 97 (1991), p.101.
[119] Tetley,W.: Limitations, p. 144.

was to limit the compensation per unit, then the balance between increased liability and the increased freight should receive attention. By contrast, in the case of weight limitation, the average real value of big packages or pieces should be taken into account. Nevertheless, it would not be true to suggest that all these goals anticipated from the limitations were being really assessed during the Conferences. The statutory amounts of damages are therefore results of political rather than economic compromises.

Since the unit of account may be affected by inflation or other economic causes, the limitation provisions ought to be put into easily changeable format by the Contracting States without the need for further legislation[120]. Hence, despite the fact that Article 33 of the Hamburg Rules eases the call for a conference to revise the amount or unit of limitation in the case where an alteration of the amount becomes necessary because of a significant change in their real value, the Convention probably would fail to keep up with the economic changes because the amendment still requires a diplomatic settlement which could probably be difficult to reach.

The highest amount of limitation in the Hague-Visby and Hamburg Rules is on average lower than it would be in the Hague Rules had the gold value of £100 been taken into account. Nevertheless, since the risks assumed by the carrier are expanded in the Hamburg Rules, the decrease in the maximum amount of damages may be justified on the ground of the avoidance of rise in freight rates due to increase in the carrier's liability[121].

Because the value of goods consigned by sea is comparatively less, and the increase in maritime risks leads to rises in transport costs due to over insurance of the same kinds of risks, the limits of the sea carrier's liability is kept lower under the Rules than other Conventions relating to other modes of carriage[122].

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[120] CMI International Sub-Committee, Second Session, p.3 - Diamond,A.: Visby Rules, p.240.

[121] Delwaide,L.: The Hamburg Rules: A Choice for the EEC? - Conclusion, in EIMTL (ed.): The Hamburg Rules, Maklu 1994, p.201, 203; Herber,R.: Hamburg Rules, p.33. For an opposite view see Tetley,W.: Hamburg Rules, p.9: The author criticised the lowest amount of damages in the Hamburg Rules without taking increased risks therein into consideration.

[122] OIC, Report of Canadian Carriage, p.178; UNCITRAL: Hamburg Rules, p.601 - Diplock,K.: Limitation Clauses, p.531.

III. IN CASE OF NON-PHYSICAL LOSS OR DAMAGE

The Hague and Hague-Visby Rules do not make any distinction between the non-physical and physical loss or damage. On the contrary, Article 4 (5) of the Hague and Hague-Visby Rules limits the amount of liability for loss or damage *in connection with* goods *in any event.* Accordingly, limitation provisions govern every kind of loss or damage[123]. In order to clarify the position, Section 4 (5) of the US COGSA 1936 adds a new phrase "in connection with *the transportation of* goods"[124]. The application of limits to all kinds of loss or damage may cause unjustifiable results for the carrier because cargo interests' loss in the case of non-physical loss or damage will most likely be lower than physical loss or damage since in the case of non-physical loss or damage goods could be delivered to the consignee in perfect physical condition[125]. Further, package, unit and weight measures are not suitable criterion for the calculation of the maximum amount of liability for non-physical loss or damage.

For those reasons, under Article 6 (1) (b) of the Hamburg Rules cases where cargo is suffered from non-physical loss or damage owing to delay in delivery and physical loss or damage are separated, and the opportunity is granted to the carrier to pay less quantum of damages on the basis of freight. Accordingly, the carrier's liability for loss arising from delay in delivery under 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. If *lump sum* freight is stipulated for the whole shipment or the whole multimodal carriage some parts of which have been delayed, the maximum amount should be calculated by taking the part of shipment or of carriage into account.

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[123] UNCTAD Secretariat, Report on bills of lading, p.45 - Ganado,M.-Kindred,H.M.: Delay, p.149. Even the authors who do not accept that the Hague Rules are applicable to the loss or damage arising from delay in delivery support the same view on the grounds that the provision contains the phrase "in any event": Wüstendörfer,H.: Seehandelsrechts, p.287 / Akıncı,S.: Navlun Mukaveleleri, p.361; Okay,S.: Navlun Sözleşmesi, p.205. For an opposite view see Çağa,T.: Navlun Sözleşmesi, p.169, n.123; Çetingil,E.: Belli Bir Tutarla Sorumluluk, p.157, n.48.

[124] Relating to the Carriage of Goods by Sea: Hearings before the House Committee on Merchant Marine and Fisheries, 68th Cong., 2 Sess. 81, 84 (1925) (cited in Friedell,S.F.: Deviating Ship, p.1557, n.92).

[125] Secretary-General, Report of 1976, p.278.

IV. IN CASE OF BOTH PHYSICAL AND NON-PHYSICAL LOSS OR DAMAGE

Even if the cargo interest sustains loss arising from both physical and non-physical loss or damage, the maximum amount of indemnity cannot not exceed the statutory quantum since Article 4 (5) of the Hague and Hague-Visby Rules provides a ceiling to liability for every kind of loss or damage[126]. Likewise, Article 6 (1) (c) of the Hamburg Rules clearly provides that in no case shall the aggregate liability of the carrier exceed the limitation established for total loss of goods with respect to which such liability was incurred.

V. LOSS OF RIGHT TO LIMIT DAMAGES

The carrier could be prevented from the benefit of the limitation of damages by mandatory rules or public policy. As the effects of mandatory rules and public policy, including those of the fundamental breach of the contract, were dealt within chapters 2 and 3, only two other cases where the carrier is deprived of his right to limit damages will be examined below. Under any circumstances the burden of proof is on cargo interests seeking to hold the carrier liable for the whole.

A) DECLARATION OF THE NATURE AND VALUE OF GOODS

1- General

The shipper may preclude the carrier from relying on the limitation of damages clause in Article 4 (5) of the Hague and Hague-Visby Rules by declaring the nature and value of the goods before shipment in the transport document. Thus, under the Rules on the one hand the carrier is awarded a right to limit his liability, on the other hand a fair opportunity to preclude the carrier from invoking this right is provided for the shipper[127]. The carrier who is aware of the nature and value of goods can predict how much care to be required for their carriage, how much insurance to be effected and how much freight to be charged. Consequently, in that case he needs no additional protection through the limitation of damages.

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[126] Ganado,M.-Kindred,H.M.: Delay, p.149.

[127] Sturley,M.F.: The Fair Opportunity Requirement under COGSA Section 4(5) (Part I), 19 JMLC 1, Ja' 88; 157, Ap' 88, p.1 (to be cited thereinafter as "COGSA 4 (5)"), The Fair Opportunity Requirement under COGSA Section 4(5) (Part II), 19 JMLC 157, Ap' 88, p.157 and The Future of the COGSA Fair Opportunity Requirement, 20 JMLC 559, Oc'89, p.559.

For the loss of the right to limit indemnity there must be a declaration made by the shipper[128]. It should state both the nature and value of goods. The declared value may be either higher or lower than the maximum statutory amount of compensation[129]. It is not necessary therefor to be prescribed in pound sterling or any other currency. The statement should be made before shipment. In this way the opportunity ought to be given to the carrier to make changes in the carriage of goods and to buy insurance covering his increased risks. The declaration after the beginning of the shipment does not lose the carrier his right[130]. Nevertheless, the carrier may be deprived of the right of limitation if he has found a chance thereafter to raise freight in proportion to increased costs of transport[131]. The declaration by the shipper can be done in any form.

The statement ought to be incorporated into a transport document. The nature and value of goods must be evident therein. The inclusion of the objective components easing the calculation of the value of goods in the document or the attachment of the invoice thereto could be enough[132].

The declaration, if embodied in the document, is *prima facie* evidence, but not binding or conclusive on the carrier as made clear under Article 4 (5) of the Hague and Hague-Visby Rules. The carrier may, therefore, adduce evidence showing the real nature and value of cargo if lower than the declared ones.

Since the risks born by the carrier will increase with the incorporation of the value and nature of goods in the document, it is inevitable for him to raise freight rates *ad*

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[128] *Anticosti (ibid)* [1959] 1 Lloyd's Rep. 352 (Can. SC) / *11. HD.*, 24.5.1988, E.87/8023, K.88/3357 - Payne,W.-Ivamy,H.: Carriage, p.206.

[129] Wüstendörfer,H.: Seehandelsrechts, p.288 / Çağa,T.: Navlun Sözleşmesi, p.173.

[130] Okay,S.: Navlun Sözleşmesi, p.207.

[131] Astle,W.E.: Liabilities, p.173.

[132] *11. HD.*, 26.2.1982, E.82/810, K. 82/785; *11. HD.*, 15.3.1982; *11. HD.*, 8.4.1982, E.82/1029, K.1564; *11. HD.*, 28.9.1984, E.84/4053, K.84/4240; *11. HD.*, 21.1.1985, E. 84/6621, K.85/13; *11. HD.*, 17.4.1985, E.83/11-529, K.85/327; *11. HD.*, 30.5.1985, E.85/3012, K.85/3370; *11. HD.*, 5.6.1985, E.85/3572, K.85/3583; *11. HD.*, 12.2.1986, E.85/11-561; *11. HD.*, 16.4.1986, E.86/1987, K.86/2584. For an opposite view see *11. HD.*, 17.1.1980, E.79/5764, K.80/121; *11. HD.*, 27.11.1981, E.4997, K.5086; *11. HD.*, 24.5.1988, E.87/8023, K.88/3357 - Aybay,G.-Atamer,K.: Parça Başına Sorumluluk, p.234; Çetingil,E.A.: Belli Bir Tutarla Sorumluluk, p.158, n.53; Yazıcıoğlu,E.: Hamburg Kaideleri, p.140, n.415.

valorem[133]. As cargo insurance premium rates are lower than *ad valorem* freight rates, and the declaration of value of goods may generate the payment of additional taxes, in practice shippers prefer insuring goods against the amount of loss unrecoverable from the carrier to paying *ad valorem* increase in freight. In short, the opportunity granted to the shipper is usually unworkable in the field of sea carriage[134]. For that reason, under the Hamburg Rules this right is not granted to the shipper although the real solution would be to make this opportunity operable by forbidding carriers to unjustly increase freight. Countries may also at anytime intervene in trade between carriers and shippers and regulate the freight rate schedule, by keeping down the additional freight charged for excess value.

2- Burden on the carrier to give shippers fair opportunities to declare the value of goods

Carriers normally avoid inserting the value of goods in the transport document in order not to lose their rights to limit compensation. There is no statutory obligation on the carrier to do so unless otherwise agreed by parties[135]. However, the carrier cannot abuse his right which would be contrary to the good faith principle. For that reason, the carrier has to give the shipper a fair opportunity to declare the value of the goods[136]. Accordingly, first he should not fix a*d valorem* freight rates so unjustifiably high as to prevent the shipper from declaring the value[137]. A line between reasonable and unreasonable *ad valorem* freight rates is difficult draw[138]. Whether the freight rate is unjust or not can be ascertained by considering the increase in P&I calls and other transport costs due to the declaration of value. Secondly, once the value and nature of

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[133] DeGurse,J.L.: The "Container Clause" in Article 4 (5) of the 1968 Protocol to the Hague Rules, 2 JMLC 131, Oc'70, p.133 (to be cited thereinafter as "Container Clause"); Sturley,M.F.-Grover,S.F.: Ad Valorem Rates under Article 4 (5) of the Hague Rules, 23 JMLC 621, Oc'92, p.624.

[134] UNCTAD Secretariat, Report on Bills of Lading, p.46 - DeGurse,J.L.: Container Clause, p.134; Diplock,K.: Limitation Clauses, p.529; Hellawell,R.: Less-Developed Countries, p.217; McDowell, C.E.: Containerisation, p.507; Selvig,E.: Unit Limitation, p.197 and Limitation, p.118.

[135] Payne,W.-Ivamy,H.: Carriage, p.206; Scowcroft,J.C.: Package Limitation, p.407 / Çağa,T.: Navlun Sözleşmesi, p.80, 173. For an opposite view see Okay,S.: Navlun Sözleşmesi, p.58.

[136] *NS Tractors v. Tarros Gage* 1986 AMC 2050 (FC) / *The Edmund Fanning* 1953 AMC 86, 91 (2 Cir. 1953); *Tessler Brothers Ltd. v. Italpacific Line* 1974 AMC 937 (9 Cir. 1974); *DB Trade International v. Astramar* 1985 AMC 1476 (ND Ill. 1985) – Alexander,L.B.: Containerisation, the Per Package Limitation, and the Concept of "Fair Opportunity", 11 Mar.Law. 123, Spr'86, p.139.

[137] *General Electric v. Nedlloyd Rouen* 1987 AMC 1817, 1827 (2 Cir. 1987).

[138] Scowcroft,J.C.: Package Limitation, p.408.

goods are properly declared, he has to incorporate them into the transport document[139]. Thirdly, he must make the shipper aware of his right to declare the value and nature of goods. Nevertheless, he is not obliged to give direct warning[140]. The shipper may be informed of his right clearly by, for example, a blank space left in the bill to disclose the value[141], or by implication with, for instance, a reference to the Rules or their national versions in the document[142], or with incorporation of a tariff based on the value cargo in the document[143].

The fair opportunity should be given to the shipper, not to the consignee. This is so because only the shipper is entitled to prevent the application of limitation provision in Article 4 (5) of the Hague and Hague-Visby Rules by incorporating the value of goods into the transport document[144].

The onus of proving that fair opportunity has not been provided should be placed on the shipper who stands to recover the whole[145]. Whether or not the carrier has breached the principle of good faith by not effecting fair opportunity is discoverable by courts from analysing the facts of each case. The main question is whether the shipper was aware of his right to declare the value of goods in the actual event. If the shipper is sophisticated as is the case where he professionally runs his business and usually has his goods transported under the same contractual terms, he is supposed to know his rights under the Rules or their national versions. In that case, even if there is no reference

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[139] For an opposite view see *11. HD.*, 28.1.1975; *11. HD.*, 17.1.1980, E.79/5764, K.80/121 / Çetingil, E.: Belirli Bir Tutarla Sorumluluk, p.158.

[140] *Nurance Co. of North America v. M/V Ocean Lynx* 901 F 934 (11 Cir. 1990).

[141] *Pan American World Airways v. California Stevedoring & Ballast Co.* 1978 AMC 1834, 1836 (9 Cir. 1977); *Brown & Root v. M/V Peisander* 1982 AMC 929, 937 (5 Cir. 1981); *DB Trade International v. Astramar* 1985 AMC 1477 (ND Ill. 1985).

[142] *Tessler Brothers (ibid)* 1974 AMC 937, 942 (9 Cir. 1974); *Komatsu v. State SS* 1982 AMC 2152, 2154 (9 Cir. 1982). Even the reference made in short form bill of lading to the long form referring to the COGSA was decided to be sufficient insofar as the shipper is aware of the latter form: *Brown & Root (ibid)* 1982 AMC 929, 943 (5 Cir. 1981); *Binladen BSP (ibid)* 1985 AMC 2113, 2128 (2 Cir. 1985); *Cincinnati Milacron, v. M/V American Legend* 1987 AMC 282 (4 Cir. 1986).

[143] *Couthino, Caro and Co. Inc. v. M/V Sava* 1988 AMC 2941, 2949 (5 Cir. 1988). For an opposite view see *Komatsu (ibid)* 1982 AMC 2152, 2158 (9 Cir. 1982): The court imposed a burden that a reference to Article 4 (5) of the Hague Rules must be stated in the bill of lading.

[144] *Carman Tool & Abrasives, Inc. v. Evergreen Lines* 1989 AMC 913 (9 Cir. 1989).

[145] *Wuerttembergische v. M/V Stuttgart Express* 1984 AMC 2738 (5 Cir. 1984). For an opposite view see *Pan American (ibid)* 1978 AMC 1834 (9 Cir 1977) - Tamulski,J.J.: Uniformity of the Law of Carriage of Goods by Sea, 3 U. San Francisco Mar.L.J. 105 (1991), p.115.

made in the bill to the Rules or their national versions or no clause incorporated in the bill relating to the *ad valorem* freight rates, the carrier should be entitled to the limitation of damages[146]. However, some US courts without examining the criterion of awareness imposed a judicial duty to provide express reference to the Hague Rules (the US COGSA 1936)[147]. This view is erroneous because the carrier cannot be deemed to have abused his right to limit liability if the shipper is sophisticated and aware of his opportunity granted under Article 4 (5) of the Hague and Hague-Visby Rules.

It was argued that the imposition of a fair opportunity requirement appears to interfere with the Rules' primary purpose to achieve international uniformity because of its uncertainty, unpredictability and difficulty in its application[148]. It was also pointed out that there is no duty on the carrier to inform the shipper of his right under Article 4 (5) of the Hague and Hague-Visby Rules; on the contrary, that the provision limits the carrier's liability "in any event", and finally that, if the Rules need to be altered, they should be done by legislators[149]. These views are contrary to the main aim of the Rules that is to attain international uniformity by fixing the minimum rather than the maximum level of liability for the carrier and by protecting cargo interests but not the carrier. Accordingly, courts are not forbidden under the Rules from imposing on the carrier heavier burdens. The principle that law should not protect one evidently abusing his right is not removed by the Rules. It is a simple public policy rule to be considered by courts seized of the case.

3- Sanction on the shipper for misrepresentation

Under Article 4 (5) of the Hague and Hague-Visby Rules an onerous sanction is introduced for misrepresentation of the nature or value of goods by the shipper. Accordingly, the carrier is not liable in any event for loss or damage to, or in connection with, goods if the nature or value has been knowingly misstated by the shipper in the

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[146] *Wuerttembergische (ibid)* 1984 AMC 2738 (5 Cir. 1984).

[147] *Pan American (ibid)* 1978 AMC 1834 (9 Cir. 1977): The expertise of the airliner in shipping was refused, and the carrier, who could not discharge his burden of proof for the provision of the fair opportunity, was not allowed to limit liability.

[148] Scowcroft,J.C.: Package Limitation, p.417.

[149] Reilly,M.T.: COGSA $500 Package Limitation: Shipper's Opportunity to Declare a Higher Value, 13 JMLC 245, Ja'82, p.245, 252; Sturley,M.F.: COGSA 4 (5), p.1 and Opportunity, p.158, 203.

bill[150]. The main aim of this provision is to prevent the shipper from intentionally misstating the value or nature of cargo against the carrier who would be deprived of his right to limit his liability thereby[151]. The shipper doing so breaches the contract of carriage fundamentally because the carrier would not conclude the agreement if he knew that the nature or value was not correct, and that he would be held liable. Since the violation is so severe, no causal relation between the misrepresentation and loss is required. The carrier's release from liability does not depend on the actual occurrence of loss suffered by the carrier due to such misstatement but only the possibility of loss[152].

This sanction applies to any cargo interest where either value or nature of goods has been declared in the transport document[153]. Consequently, not only is the carrier released from liability to the shipper, but also to other cargo interests. Since a bona fide third party cargo interest who cannot claim damages from the carrier may demand indemnity for loss from the shipper who knowingly misstated the value or nature of goods in tort or contract (such as the sale contract), from their view-points only the liable party changes[154]. The misrepresentation of leading marks, the number of packages or pieces, or the quantity, or weight of the goods does not lead to the application of the sanction. Neither does the declaration of the value of goods as lower than actual one do so[155] because only when the value is furnished higher, the quantum of liability increases. What constitutes a misstatement of nature of goods depends on the facts of each case together with custom and commercial practice. For example, the description of deep frozen goods as frozen does not qualify a misstatement because the term "frozen" is broad enough to cover "deep frozen"[156].

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[150] *Frank Hammond Pty Ltd. v. Huddart Parker Ltd.* [1956] VLR 496 / *Tribunal de Comerce d'Alger*, July 9, 1958, DMF 487 (1958): The court held that the description of "perfume" as "drugs" deprives the carrier of all liability / *Arrondissementsrechtbank Te Rotterdam*, LMCLQ 90 (1980): The qualification of " folding carton or foodboard" as "craft liner board" knowingly and fraudulently was ruled to be within Section 4 (5) of the US COGSA.

[151] Prüssmann-Rabe: Seehandelsrecht, §609 A1 / Okay,S.: Navlun Sözleşmesi, p.228.

[152] *Cour d'Appeal de Paris*, July 7, 1978, DMF 397, 400 (1979) - Wüstendörfer,H.: Seehandelsrehts, p.289.

[153] Akıncı,S.: Navlun Mukaveleleri, p.436.

[154] Okay,S.: Navlun Sözleşmesi, p.229.

[155] For an opposite view see Ülgener,M.F.: Sorumsuzluk Halleri, p.155.

[156] *Cour d'Appel de Douai*, October 19, 1973, DMF 94 (1974).

For the fundamental breach the shipper has to have *knowingly* misstated the value or nature of cargo[157]. However, under Section 4 (5) of the US COGSA 1936 the misstatement must be made "fraudulently" as well as "knowingly". The shipper must, therefore, intend to deceive the carrier and to benefit himself from the misrepresentation. For instance, the misstatement of the value or nature of goods to obtain a lower freight rate relieves the carrier of liability under the US COGSA[158].

The Hamburg Rules (2) have no provision concerning the misrepresentation of the shipper. This is so because the opportunity to prevent the carrier from relying on the limitation clause by declaring the nature or value of goods is not granted to the shipper.

B) CONSCIOUS FAULT

It may be felt somewhat unjust to entitle the carrier to limit his liability without respect to the degree of fault contributing to loss or damage. There is, however, no provision in the Hague Rules as to whether the carrier may benefit from the right to limit damages even if he, his servants or agents were personally at gross fault. Hence, the problem is to be solved under the mandatory rules and public policy of each Contracting State[159].

By comparison Article 4 (5) (e) of the Hague-Visby Rules and Article 8 (1) of the Hamburg Rules deprives the carrier of the benefit of the limitation of liability if it is proved that the loss resulted from his act or omission done with intent to cause damage, or recklessly and with knowledge that damage would probably result. From the wording of the provision, it is clear that the carrier loses the right of limitation only if he is *personally* at fault[160], compared to Article 25 of the Warsaw Convention, Article XIII of the Hague Protocol and Article 29 (4) of the CMR. That was the result of a political

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[157] Prüssmann-Rabe: Seehandelsrecht, §609 B4.

[158] *La Fortune v. SS Irish Larch* 1974 AMC 2184, 2185 (2 Cir. 1974).

[159] § 276 of the German Civil Code 1896, Article 100 of the Swedish Obligations Code 1911 and Article 99 of the Turkish Obligations Code 1926; Article 150 (2) (b) of the Iraqi Transport Law: Al-Kabban,R.A.M.: Limitation, p.409 - *The Tuxpan* 1991 AMC 2432 (SD NY 1991): The court allowed the carrier enjoy the package limitation despite the fact that the carrier's failure to inform the classification society surveyors of various cracks in the tanks was gross-conscious fault - Bonelli,F.: Limitation, p.173.

[160] OIC, Report of Canadian Carriage, p.179 - *Browner International v. Monarch Ship. Co.* [1989] 2 Lloyd's Rep. 185 - Chorley,R.S.- Giles,O.C.: Shipping, p.213; Scrutton,T.E.: Charterparties, p.451.

compromise reached during the Conferences. It was pointed out that the carrier may ignore risks arising from fault of his servants or agents beyond the Hague Rules or the Hamburg Rules' limits[161], that there is no reasonable ground for deviating from the other international conventions, and finally that it is sometimes impossible to draw a distinction between acts of the carrier and his servants or agents in the setting of modern large artificial persons[162]. Nevertheless, it should be remembered that the carrier may be deprived of the right to limit liability for fault of his servants or agents under national public policy or mandatory rules[163].

Further, the carrier is not precluded from mounting the defence of the limitation of damages in all cases where he is at any kind of gross fault. Indeed, for the loss of right to limit damages the carrier must have acted with intent to cause loss, or recklessly and with knowledge that loss would probably result. By comparison, under Article 25 of the Warsaw Convention and Article 29 of the CMR the carrier is prevented from relying on the limits if loss is caused by "wilful misconduct" whereas Article 37 of the CMI does so if loss arises from either "wilful misconduct" or "gross negligence". The carrier who intentionally or recklessly fails to exercise a prudent carrier's care may, thus, still rely on the limitation clause provided that he intends merely to so act but not to cause loss or knows that his act would probably deviate from a prudent carrier's conduct but would not probably cause loss[164]. Thus, the Hague-Visby Rules and the Hamburg Rules divide gross fault into the conscious or unconscious fault regarding the consequences of fault and forbid the carrier from benefiting from the limitation of liability in the event of conscious fault[165]. The carrier who intentionally causes damage or act recklessly and with knowledge that damage could probably result is guilty of *conscious fault*[166]. As distinct from other kinds of faults the conscious fault is linked to consequences of careless act rather than the careless act itself.

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[161] Murray,D.E.: Hamburg Rules, p.69.
[162] Secretary-General, Second Report, p.170 - Bonelli,F.:Limitation, p.181.
[163] Lüddeke,J.F.-Andrew,J.: Hamburg Rules, p.18.
[164] Tetley,W.: Cargo Claims, p.122.
[165] Bonelli,F.: Package, p.627. For an opposite view see Schmithoff,C.M.: COGSA 1971, p.193; Kırman,A.: Hava Yolu, p.162.
[166] Sözer,B.: Hava Yolu İle Yapılan Milletlerarası Taşımalarda Yolcunun Ölümü veya Yaralanması Sonucunda Doğan Zararlardan Taşıyıcının Sorumluluğu, Batider, Haziran 1978, Vol.IX, Is.3, p.765. For an opposite view see Çağa,T.: Enternasyonel, p.301: The Author classifies it as an original fault.

It is not easy to determine whether or not the carrier has acted intentionally to cause damage. The phrase "intent to cause damage" requires the carrier's subjective intention to act in a wrong way[167]. Similarly, there might be some difficulties in ascertaining if he has acted recklessly and with knowledge that such loss or damage would probably result. First, the word "recklessly" implied some action without regard to consequences. Secondly, for the loss of right to limit liability something more than a possibility is required because Article 4 (e) of the Hague-Visby Rules and Article 8 (1) of the Hamburg Rules refer not to possibility, but to the probability of resulting damage[168]. The word "probably" implies an objective test[169]. Proof of the knowledge of the carrier that loss would probably result is, therefore, quite difficult compared with the actual fault or privity of the carrier[170]. Suppose that the carrier knew that the ship was in an unseaworthy condition due to some defects, but he could not remedy them by any reason, it would not be simple to determine whether there was a conscious fault on the part of the carrier because it is not easy to assume that all defects in the ship would probably cause damage to goods.

Article 4 (5) (e) of the Hague-Visby Rules and Article 8 (1) of the Hamburg Rules restrict their scopes to the loss of right to limit damages. Consequently, they do not deprive the carrier of his right to plead the other statutory or contractual defences unlike Article 25 of the WHC and the CMR. Nevertheless, this restriction has no practical importance in the application of the exemption clauses in Article 4 (1), (2) and (3) of the Hague and Hague-Visby Rules and Article 5 (1) and (6) of the Hamburg Rules since the carrier who is at fault cannot rely on them anyway[171]. Similarly, the time bar defence can be invoked in the case of all liability whatsoever under the Hague-Visby Rules and the Hamburg Rules but the Hague Rules.

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[167] Diamond,A.: Visby Rules, p.245.

[168] *Goldman v. Thai Airways International Ltd.* [1983] 3 All ER 693 (under the Warsaw-Hague Convention); *SS Pharmaceutical Co. Ltd. v. Quatas Airways Ltd* [1991] 1 Lloyd's Rep. 288 (under the Warsaw-Hague Convention) - Gaskell,N.: Damages, p.165.

[169] Group 3 of the IMC, Report on the Limits of Liability, p.49.

[170] OIC, Report of Canadian Carriage, p.179 - Maskell,J.: New Rules, p.3; Scrutton,T.E.: Charterparties, p.452, n.63.

[171] Chorley,R.S.T. - Giles,O.C.: Shipping 213.

Under Article 4 bis (4) of the Hague-Visby Rules and Article 8 (2) of the Hamburg Rules similar provisions are laid down in order to prevent the carrier's servants or agents from availing themselves of the exemption clauses except the time-bar defence. On balance, both the carrier and his servants or agents will lose all the benefits of the Rules if there is conscious fault on their own parts.

VI. CONCLUSIONS

(1) Under Article 4 (5) of the Hague and Hague-Visby Rules and Article 6 of the Hamburg Rules the carrier's liability is limited to certain amounts of damages. These provisions do not preclude courts from awarding punitive damages which are penalties rather than compensations.

(2) The word "package" should be construed according to its plain meaning as well as the main objective expected from the package limitation. Consequently, any wrapper enveloping its contents for their carriage in such a way that a prudent carrier cannot see them through is a package regardless of its size, weight and volume. If the Rules are applicable by their own force, parties are not allowed to give their own definition to the term "package".

(3) Whether newly invented articles of transport are packages or not should be assessed according to the definition thereinbefore. Unless the contents of article designed for carriage has been stowed by the participation or supervision of the carrier, his servants, or agents, or these contents have been enumerated in the transport document, or a prudent carrier can tell them in any other way, it should be deemed a package. Nevertheless, in order to simplify and unify the limitation of liability regimes, Article 4 (5) (c) of the Hague-Visby Rules and Article 6 (2) (a) of the Hamburg Rules pay attention only to the intention of parties but not to the visibility of the contents of the article. This approach has reduced the degree of care required from the carrier since he would probably avoid incurring expenses for the protection of goods over liability limits despite the fact that he could be aware of the contents of the article, and consequently determine how much care he should exercise.

(4) The unit limitation is introduced as a secondary alternative to the package limitation for all kinds of visible goods. The word "unit" ought to be interpreted in order to further the main aim of the unit limitation. Consequently, it means a freight unit customarily used for the calculation of freight in a particular trade. However, under Article 4 (5) (c) of the Hague-Visby Rules and Article 6 of the Hamburg Rules the "shipping unit" is preferred in spite of the fact that it is insufficient to build a link between increased freight and increased liability.

(5) Under Article 4 (5) of the Hague-Visby Rules and Article 6 (1) of the Hamburg Rules, the "package" and "unit" limitation of liability is kept for individual small pieces or packages of cargo of high price, but an equivalent alternative criterion based on the weight is also justly employed for the large expensive pieces or packages.

(6) The unit of account should be certain, uniform and stable. Consequently, it must not be controlled by any governmental institution in any how and must not easily be affected by inflation and devaluation. The market value of gold is the one which is the most suitable unit in this respect despite the fact that the SDR Protocol and Hamburg Rules introduce SDR value as a unit of account unlike the Hague Rules and the Visby Protocol.

(7) When Articles 4 (5) and 9 of the Hague Rules are construed together, the limitation amount ought to be taken as the sum which was the equivalent of gold which could be bought in 1924 for £100. In order to clarify and unify liability regimes, an international solution similar to that found in the Visby Protocol should be favoured. The market value of gold at the time and place of judgement represents a more realistic economic approach against inflation because it is outside the control of any government. Yet, the Visby Protocol leaves the matter to the discretion of the court seized of the case.

(8) The limitation amount should be fixed, becoming in mind the purposes expected from the limitation measures. It ought to be put into easily changeable format without the need for further legislation. All three Conventions have failed to do so. It is just to keep the limitation quantum lower in the field of carriage of goods by sea since the risks endured by the carrier are more, and the value of carried goods is less compared to the other modes of transports.

(9) Article 4 (5) of the Hague and Hague-Visby Rules is applicable to any liability regardless of the type of loss or damage. Since in the case of non-physical loss or damage loss sustained by the cargo interest would normally be less than in the case of physical loss or damage, Article 6 (1) (b) of the Hamburg Rules rightly limits the carrier's liability 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. As also clearly stated under Article 6 (1) (c) of the Hamburg Rules, in no case shall the aggregate liability of the carrier exceed the limitation which would be established for total (physical) loss of the goods.

(10) The Hague and Hague-Visby Rules, on the one hand, limit the carrier's liability, and on the other hand, give the shipper a fair opportunity to prevent the carrier from relying on limitation clauses by declaring the nature and value of goods in the bill. Nevertheless, this option has not been used frequently because shippers enviably always prefer buying cheaper cargo insurance to paying higher *ad valorem* freight. For that reason, the Hamburg Rules do not contain such right though the better solution would be to retain this opportunity and to forbid the carrier unjustly increase freight.

(11) As nobody should evidently abuse his rights against others, the carrier must provide the unsophisticated shipper with a fair opportunity to declare the value of goods. Whether the shipper is aware of his right or not is a matter which should be examined according to the facts of each case.

(12) Article 4 (5) of the Hague and Hague-Visby Rules removes all liability from the carrier's shoulders where the shipper fundamentally breaches the contract by knowingly misstating the nature or value of goods.

(13) Under Articles 4 (5) (e) and 4 bis (4) of the Hague-Visby Rules and Article 8 of the Hamburg Rules the carrier, his servants and agents are deprived of their rights to limit liability for their own conscious faults. Although these provisions were useful steps for the unification of the Rules, they could not prevent courts from applying their own public policies and mandatory rules which aggravate the carrier's liability otherwise than as provided in these Conventions.

Chapter Twelve

LIMITATION OF THE PERIOD FOR ACTION

Under Article 3 (6) of the Hague and Hague-Visby Rules and Article 20 of the Hamburg Rules, the carrier's liability is limited to a specific period for an action. The purpose of this chapter is to examine the effects of such limitation on the carrier's liability.

I. GENERAL

By Article 3 (6) of the Hague Rules, the carrier is discharged from all liability in respect of loss or damage unless a suit is brought within one year after delivery of goods or the date when goods should have been delivered. That provision is adopted by Article 3 (6) of the Hague-Visby Rules with almost identical words, with the exception in the latter, of additional expression "whatsoever in respect of the goods". Similarly, Article 20 (1) of the Hamburg Rules time-bars any action relating to carriage of goods under the Convention if judicial or arbitral proceedings have not been instituted within two years.

Those provisions limit the period for an action and consequently the carrier's liability. The general rationale for this kind of restriction is to release the carrier from the threat of action hanging over him for an uncertain period and to prevent courts from being pressurised with countless cases[1]. However, the specific objectives of the three Conventions were to preclude the carrier from reducing the limitation period to ridiculously short time, to harmonise differing legal regimes, and to shorten the period bearing in mind the needs of the transport industry.

The carrier can rely on these limitations *in any event* regardless of the type of loss or damage. For that reason, the Hague-Visby Rules clearly relieves the carrier of "*all liability whatsoever in respect of the goods*"[2]. If the claim is not in respect of goods as is

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[1] Chorley,R.S.-Giles,O.: Shipping, p.492; Cooke,P.J.-Oughton,D.W.: Obligations, p.291 / Akıncı,S.: Navlun Mukaveleleri, p.402. Nevertheless, in the Iranian public policy, based on Islamic law, disapproves any kind of limitation to the period for suit: Amin,S.H.: The Limitation in Iranian Maritime Law, 3/1 Int'l.Mar.L. 24, JA'96, p.24.

[2] *The Marinor* [1996] 1 Lloyd's Rep. 301, 310 (QBD - CC 1995) / *Commercio Transito Internazionale., Ltd v. Lykes Bros. SS Co.* 1957 AMC 1188 - Secretary-General, Second Report, p.186 - Ganado,M.-Kindred,H.M.: Delays, p.23. For an opposite view see Akıncı,S.: Navlun Mukaveleleri, p.403; Çağa,T.: Navlun Sözleşmesi, p.205; Okay,S.: Navlun Sözleşmesi, p.210.

the case where substitution costs for tonnage are claimed[3], the time bar is not operative. Again, the limitation is applicable only where the carrier is liable under the Rules. The words "*in any event*" or "*whatsoever*" in Article 3 (6) of the Hague and Hague-Visby Rules cannot be interpreted to give the provision further coverage than those Conventions themselves have. Consequently, under the Hague and Hague-Visby Rules Article 3 (6) cannot limit liabilities for excluded deck cargo[4], the breach of a letter of guarantee or indemnity[5], non-payment of freight, loss or damage before loading[6] and after discharge[7] and wrong delivery[8]. The non-application of the limitation period to the wrong delivery after discharge causes a practical problem. Indeed, the person who takes over goods without producing the bill of lading in return for letters of indemnity would be obliged to run the guarantee for a long prescription period fixed under contract law and to incur all the expenses for maintaining the guarantee during this time. For that reason, the drafters of the Visby Protocol tried to amend Article 3 (6) of the Hague Rules in this respect. Accordingly, in the event of delivery of 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[9]. Nevertheless, during the Conference this amendment was not incorporated into the Rules. The only inclusion of the term "*whatsoever*" is not enough to justify that the drafters thereby succeeded in effecting their aim[10]. The problem is solved under the Hamburg Rules by extending the scope of the Rules to the period while goods are in the carrier's custody and by making clear that the period for actions is limited in case of any action relating to carriage of goods *under this Convention.*

II. LEGAL NATURE OF THE PERIOD

A period whose expiration prevents the claiming or suing of the right could be sub-divided as prescription and barring periods. When a *prescription period* expires, the

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3 *The Marinor* [1996] 1 Lloyd's Rep. 301, 312 - Baughen,S.: The "Clause Paramount" and the One-Year Time Bar: The Marinor, 2 LMCLQ 173 (1996), p.173.

4 *Insurance Co. of North America v. SS Exminster* 1955 AMC 739 (SD NY 1954).

5 *Rambler Cycle Co. Ltd. v. Peninsular and Oriental Steam Navigation Co. Ltd, Inc.* [1968] 1 Lloyd's Rep. 42 (Mal. FC).- Tetley,W.: Cargo Claims, p.677.

6 *Ulpiano Rodriguez v. Flota Mercante* 1984 AMC 600 (SD NY 1983).

7 *Schweizeirische v. Atlantic Container Line* (1986) 63 NR 104 (FCA).

8 Scrutton,T.E.: Charterparties, p.435, n.43.

9 IMC International Sub-Committee Report, 1962, p.77.

10 For an opposite view see Diamond,A.: Visby Rules, p.256.

right to claim or sue does not come to an end, but the possibility of its claim weakens because the right can still be claimed on the condition that the prescription which bars only remedy is not raised before the court by the defendant. The judge cannot *sua sponte* consider it without any plea. The obligation faced with the plea of prescription is non-enforceable undertaking[11]. However, there is still a valid right of compensation which can be subject to a set-off claim[12]. The prescription period may be suspended or interrupted by events enumerated by the law applicable.

By comparison, barring periods (*déchéance*) have a direct effect on the right of claim and action. In the case of delay of suit there is no right left which can be deducted by the cargo interest from other liquidated debt due. If the plaintiff does not comply with the period, the right is terminated on its own. The court must *sua sponte* examine whether or not the period has expired without requiring the application by the plaintiff. Barring periods are in principle definite and cannot be suspended or interrupted[13].

In the Hague and Hague-Visby Rules, the carrier's liability is limited by barring periods. Indeed, Article 3 (6) discharges the carrier from *all liability* after the lapse of period. If there is no liability, there is no cause for a claim for damages, and, consequently, no liability action[14]. By contrast, during the incorporation of the Hague Rules into Article 1067 of the Turkish Commercial Code 1956, the end of the right of liability action rather than of the claim for damages was mentioned as distinct from its sources[15]. From the wordings of this stipulation it is not clear whether or not damages for which the suit cannot be taken can be claimed unless the carrier refuses. However, because of contravening Article 3 (6) of the Hague Rules and, thus, deviating from the Rules, the affirmative answer to that question cannot be supported. In fact, from the

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11 Eren,F.: Borçlar III, p.482.

12 Articles 1291 and 1292 of the French Civil Code 1804; Article 120 of the Swiss Obligations Code 1911; Article 118 of the Turkish Obligations Code 1926.

13 Wüstendörfer,H.: Seehandelsrecht, p.293 / Tunçomağ,K.: Borçlar Hukuku, p.1236.

14 *Aries Tanker Corp. v. Total Transport* [1977] 1 Lloyd's Rep. 334; *Consolidated Investments & Contracting Co. v. Saponaria Shipping Co.* [1978] 2 Lloyd's Rep. 167 / *Weinstock Hermanos & Cia v. American Aniline & Extract Co.* 1968 AMC 325, 326 (ED Pa. 1967) - Astle,W.E.: Liabilities, p. 114; Glass,D.A.-Cashmore,C.: Introduction, p.187; Schinas,J.G.: Cargo Claims, p.253; Scrutton,T.E.: Charterparties, p.436; Thomas,R.J.I.: Hamburg Rules, p.8. For an opposite view see Tetley,W.: Cargo Claims, p.679 / Okay,S.: Ticaret Kanununun 1067. Maddesindeki Dâva Açma Süresinin Mahiyeti, İst.Huk.Fak.Mec. 1963, Is.3, p.843, 851 (to be cited thereinafter as "Dava Açma Süresi").

15 § 612 of the German Commercial Code 1897 and Article 3 (6) of the Hague Rules.

Report of the Turkish Judicial Committee this was a barring period[16]. Nevertheless, even in some other countries, the limitation period has been treated as prescription[17] since in the contract law limitation periods are normally laid down as prescription rather than as a barring period. This does not agree with the wordings of the Hague and Hague-Visby Rules. If there is no liability at all, how could there be a claim for indemnity? The obligation to pay damages (liability) and the right to claim them are strictly dependant on each other.

In fact, the legal grounds for the prescription and barring periods are the same. Both are accepted in order to protect the obligor and the courts from the pressure of actions hanging over them indefinitely. Both have the same effect of ceasing the right. However, the prescription period is slightly in favour of the cargo interest because first the right of compensation can be claimed unless the carrier specifically pleads the limitation; secondly the carrier cannot reimburse the claimant for the damages which he has already paid; thirdly the cargo interest may raise the defence of set-off in order to deduct his freight obligation from his claim for indemnity regardless of the carrier's plea[18], fourthly the prescription period can be suspended or interrupted by, for example, acknowledgement of the obligation, by the institution of an action, even in motion, by a court order or by a seizure, served against the carrier[19]. Since the Hague and Hague-Visby Rules were intended to secure cargo interests' legal position, it would have been better to introduce a prescription rather than strictly barred period. There was no reasonable ground for departing from the general rules of contract when liability was limited to a shorter period.

Nevertheless, under Article 20 (1) of the Hamburg Rules, the period is again stipulated as a barring period. This is not subject to suspension or interruption[20].

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16 *TD*, 28.2.1961, E.3013, K.686 3202; *HGK*, 10.10.1962, E.2293, K.3202 - Arseven,H.: Deniz Ticareti, p.128. For an opposite view see Okay,S.: Dava Açma Süresi, p.847, 849, 852.

17 *Cour d'Appeal de Beyrouth*, November 24, 1970, ETL 314 (1972) / *Hof Van Beroep te Brussel*, January 28, 1966, ETL 436 (1966).

18 See Article 32 (4) of the CMR.

19 Articles 2244-2248 and 2252 of the French Civil Code 1804; Articles 202-220 of the German Civil Code 1896; Articles 134-138 of the Swiss Obligations Code 1911; Articles 132-136 of the Turkish Obligations Code 1926.

20 Lüddeke,J.F.-Johnson,A.: Hamburg Rules, p.35; Mankabady,S.: Comments, p.97. For an opposite view see Thomas,R.J.I.: Hamburg Rules, p.8.

III.LENGTH OF THE PERIOD

The length of period should on the one hand be adequate to investigate claims, negotiate them and institute legal proceedings; and, on the other hand, it should not be so long as evidence could disappear[21]. Under Article 3 (6) of the Hague and Hague-Visby Rules the cargo interest was given one year to bring an action against the carrier, like Article 32 (1) of the CMR[22], compared to general contract law which normally limits the obligors' liability to six or ten years[23]. The reason for one year limitation was to release the carrier from difficulties of collecting evidence because he had no representative at the port of discharge other than the master. The master stayed there only during loading or discharge operations, and might not have, later on, recollected the conditions of goods previously carried since after each shipment marks of prior carriage normally disappeared.

However, nowadays one year limitation does not meet the needs of practice. This is so firstly because carriers in most cases have permanent agents at the port of discharge. Secondly, the period of one year is not enough for cargo interests to decide whether it is worth suing the carrier. Cargo interests especially in multimodal carriage, would have little time to find out where the contract was breached if the period was limited to one year. Further, one-year is insufficient to conclude negotiations out of court settlements. On this account, in practice parties often agree on the issuance of the bill of lading lengthening the limitation period to two years. In order to answer the needs of commerce Article 20 (1) of the Hamburg Rules also rightly extends the limitation period to two years. This is in line with Article 16 of the Athens Convention and Article 29 of the Warsaw Convention[24].

IV.COMMENCEMENT AND CALCULATION OF THE PERIOD

The limitation period starts to run from when the claim for damages becomes due, in other words, when the cause of action accrues because executory obligation cannot be

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21 Secretary-General, Second Report, p.190.

22 In case of "wilful misconduct" it is extended to three years: Wetter,J.: The Time Bar Regulations in the CMR Convention, LMCLQ 504 (1978), p.505 (to be cited thereinafter as "Time Bar in CMR").

23 For ten years see Article 1234 of the French Civil Code 1804; Articles 194-195 of the German Civil Code 1896; Article 127 of the Swiss Obligations Code 1911; Article 125 of the Turkish Obligations Code 1926. For six years see the UK Limitation Act 1980.

24 For an opposite view see IMC International Sub-Committee, First Session, p.5; Second Session, p.3.

claimed and consequently sued; otherwise, the action brought would be dismissed. The cause of action for breach of contract accrues on the occurrence of loss or damage[25]. Since (physical) loss or damage is presumed to arise at the time when the goods have been handed over to the consignee, Article 3 (6) of the Hague and Hague-Visby Rules and Article 20 (2) of the Hamburg Rules start the limitation period from the day on which the carrier has delivered the goods or part thereof, in cases where no goods have been delivered, from the day on which the goods should have been delivered[26].

If the delivery of cargo is completed in more than one days, the period begins after the delivery of its *last* piece to the consignee since it only then comes under his effective disposition[27]. The day when the ship commences her voyage again[28] and when other goods are discharged from the vessel might help for the determination of the last day. In the case of non-delivery, the cargo interest would be placed in a dilemma because he might bring the case so untimely that his action might be refused and he might incur unnecessary judicial expenses, or he might wait until he becomes sure that goods will not be delivered and might, thus, miss the period[29]. On this account, courts ought to be flexible in deciding the last day when goods should have been delivered in events where the time for delivery is not stipulated in the contract of carriage.

Even if the consignee has not suffered any actual loss at the moment when cargo has been delivered in damaged condition, and some future loss arises after its delivery due to physical or non-physical loss of or damage to goods in the course of carriage, the period still runs against the consignee from his taking over. That may be criticised as unfair.

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[25] *American Hoesch Inc. v. SS Aubade and Maritime Corp.* 1971 AMC 1217 (D SC 1970).

[26] On the delivery of goods see chapter seven. By comparison in Article 32 of the CMR and Article 47 (1) and (2) of the CIM the time when the limitation period starts running is laid down differently depending on the type of loss or damage (in case of non-delivery the period starts from the 30th day after the expiry of the transit period), which caused many problems: Secretary-General, Second Report, p.190 - Hardingham,A.C.: Aspects of the Limitation of Actions under CMR, LMCLQ 362 (1978), p.362; Wetter,J.: Time Bar in CMR, p.505. Again, by Article 29 (1) of the Warsaw Convention the period commences from the arrival or scheduled arrival of the aircraft.

[27] *Tribunal de Commerce de Marseille* February 3, 1948, DMF 485 (1949) / *Ungar v. SS Urola* 1946 AMC 1662 (SD NY 1946); *Nissho Iwai Amer. Ocean Lily* 1982 AMC 1301 (SD NY 1981); *Krupp Int'l. v. Fed. Atl. Lake Lines* 1982 AMC 1799 (ED Mich. 1981) - Tetley,W.: Cargo Claims, p.673.

[28] *American Export Isbrandtsen v. Joe Lopes* ETL 665 (1976) (Ind. SC).

[29] Secretary-General, Second Report, p.189.

In contracts of successive carriage and of divided carriage, the period begins from each delivery by each carrier. Whether or not goods have been delivered depends on each actual case rather than the contract itself. A contractual clause stipulating that delivery takes place at discharge, is null and void under the mandatory Rules since it shortens the limitation period by giving priority to the time of discharge over that of delivery[30].

Under Article 3 (6) of the Hague and Hague-Visby Rules there is no provision on the calculation of the limitation period. Consequently, whether the date of delivery is taken into account, and whether the period can be extended when the last day is a holiday are subject to law applicable.

By comparison Article 20 (3) of the Hamburg Rules expressly provides that the day on which the limitation period commences is not included in the period[31]. However, the second issue is not dealt with even in the Hamburg Rules. The better solution would be to extend the period in the case where the last day encounters holidays to the following first working day in order to clarify the legal position of foreign parties[32].

V. COMPLIANCE WITH THE PERIOD

To comply with the limitation period, the claimant (cargo interest) must bring suit. The bringing of suit can be done by the institution of any kind of legal proceedings including judicial or arbitral[33] proceedings. This is the approach taken also by Article 20 (1) of the Hamburg Rules. Even executive or bankruptcy proceedings, in order to enforce a right or to satisfy a judgement, are within "*action*" for the purposes of the

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30 *Milikowsky Bros. V. W. F. Kampman's* 1969 AMC 111 (ND Ill. 1968).

31 In the same line as Article 32 (1) of the CMR; Article 132 of the Swiss Obligations Code 1911; Article 130 of the Turkish Obligations Code 1926.

32 Article 193 of the German Civil Code 1896; Article 78 of the Swiss Obligations Code 1911; Article 77 of the Turkish Obligations Code 1926.

33 *The Merak* [1964] 2 Lloyd's Rep. 527, 532; *Nea Agres SA v. Baltic Shipping Co. Ltd.* [1976] 2 All ER 842 / *SS John Weyerhaeuser* 1972 AMC 1636 (NY Arb.); *SS Prairie Grove* 1976 AMC 2589 (Arb.); *M/S Uranus* 1977 AMC 586 (Arb.) - Secretary-General, Second Report, p.186 - Astle,W.E.: Liabilities, p.115; Carver,T.G.: Carriage, p.371; Knauth,A.: Ocean, p.239. For an opposite view see *Son Shipping Co. v. De Fosse & Tanghe* 1952 AMC 1931 (2 Cir. 1952): The court decided that the one-year limitation period applied only to judicial but not arbitration proceedings, and that claim for damages was not time-barred. For a suspicion see Colinvaux,R.P. (ed.): Sea Transport (The Time Bar of the Hague Rules), JBL 171 (1964), p.175.

Rules[34]. If the cargo interest pleads set-off or recourse in a case or informs the carrier of the suit instituted against him, he should be deemed to have brought an action[35]. The date when the action is instituted is fixed under procedural law applicable (*lex fori*)[36]. Under most laws, the filing of the complaint is considered to be enough, the service of process within the limitation period is not necessary[37].

The cargo interest, so as to comply with the period, has to start competent proceedings (judicial or arbitral) in a competent jurisdiction[38]. Otherwise, the incompetent court may dismiss or stay the proceedings on the basis that it does not fall within its jurisdiction; and the case brought in the incompetent court may be regarded not to be instituted within the limitation period by the competent court under the law applicable[39]. Similarly, the suit should be taken by the right plaintiff against the right defendant (the carrier) within the time limit. If not, the cargo interest's cause of action would cease to exist even where the action was brought on time although the claim for the substitution of the wrong party for a right party was made after the expiry of the time bar[40]. These are so because the claimant who should investigate where and what type of proceedings he should take against whom beforehand must bear the result of his investigation.

Errors of detail in the case which has been already instituted could not, however, have the effect of rendering the suit one which failed to satisfy the requirements of the

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34 *TD*, 10.10.1973, E.3017, K.3757.

35 Wüstendörfer,H.: Seehandelsrecht, p.293 / Çağa,T.: Navlun Sözleşmesi, p.207.

36 Tetley,W.: Cargo Claims, p.685.

37 See § 612 of the German Commercial Code 1897; Article 178 of the Turkish Code of Civil Judicial Procedure 1927 - *Oregon SS Corp. v. D/S A/S Hassel* 1943 AMC 947 (2 Cir. 1943) - Wood,G.F.: Damages, p.954. For an opposite view see Ramberg,J.: Harmonisation, p.31.

38 *Continental Fertilizer Co. Ltd. v. Pionier Shipping CV* 1 Lloyd's Rep. 223, 227 (QBD – CC) - Carver,T.G.: Carriage, p.372; Mankabady,S.: Comments, p.95; Scrutton,T.E.: Charterparties, p.436. For opposite views see UNCTAD Secretariat, Report of Bills of Lading, p.38: It was argued that the claimant can bring the action in any jurisdiction having a reasonably close connection with the contract of carriage since the object of the time limits is to make cargo owners give prompt notice of claims to carriers. This view is mistaken because the reason for the limitation is not to inform the carrier, which is done by the notice of loss or damage – Colinvaux,R.P.: Time Bar, p.172.

39 *Compania Colombiana de Seguros v. Pacific Steam Navigation Co.* [1963] 2 Lloyd's Rep. 479: The court rejected the case brought after the limitation period without giving regard to the fact that the action had previously been instituted in wrong jurisdiction (a New York court) on time, which was found immaterial - Payne,W.-Ivamy,H.: Carriage, p.175.

40 *The Nordglimt* [1987] 2 Lloyd's Rep. 470; *The Jay Bola* [1992] 1 Lloyd's Rep. 62 (QBD); *Transworld Oil USA Inc. v. Minos Compania Naviera SA* [1992] 2 Lloyd's Rep. 48; *Payabi v. Armstel Shipping Corp.* [1992] 2 Lloyd's Rep. 62 (QBD).

time bar[41]. Even if the claimant adds or a further ground of liability for loss of or damage to the goods for which he is already suing the carrier, he is deemed to have complied with the period[42].

Any contractual clause limiting procedural ways for the institution of actions otherwise than under law applicable is void and null under Article 3 (8) of the Hague and Hague-Visby Rules and Article 23 of the Hamburg Rules.

VI. THE PERIOD FOR RECOURSE ACTION

By making the carrier liable for the acts or omissions of third parties (such as his servants or agents) Articles 3 (2) and 4 (2) (q) of the Hague and Hague-Visby Rules and Article 5 (1) of the Hamburg Rules create an additional liable person for single loss. Indeed, a third party who has caused loss or damage by his fault could also be under statutory (such as tortious) liability to the cargo interest. In such a case where more than one person is made liable for the same loss, "*joint and several liability*" takes place[43].

To the extent that the carrier pays damages for the loss suffered, both the carrier's and the third parties' liabilities to the cargo interest end. Nevertheless, the carrier thereof gains the right of recourse against the third party to the amount of indemnity paid by him. Law leaves the last liability on the person at fault. Where a third party does not compensate the carrier for the loss from prior payment of damages to the cargo interest, the carrier may bring a *recourse action* against the third party who caused loss or damage by fault[44]. However, the carrier may lose his right of recourse to the degree that his fault contributed to the loss or damage. The amount of damages to be paid to the carrier is determined by taking into account the nature of the relationship between him and the third party. So long as there is a contract between them, the third party (who is probably the carrier's servant or agent)'s liability to the carrier is contractual.

When Article 3 (6) of the Hague Rules was drafted, the limitation period for a recourse action was not taken into consideration. If the recourse relationship between

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41 *Continental Fertilizer (ibid)* [1995] 1 Lloyd's Rep. 223, 227 (QBD – CC).
42 *Anglo Irish Beef Processors International v. Federated Stevedores Geelong and Others* [1997] 1 Lloyd's Rep. 207, 222, 223 (Aust. SC Victoria 1996).
43 Eren,F.: Borçlar II, p.407.
44 *The Francesko C* [1965] 2 Lloyd's Rep. 527 (SD NY 1965).

the carrier and third party is not governed by the Rules, then the limitation period shall be subject to applicable law[45]. By contrast, where the third party benefits from the time limitation in the Rules as is the case where the sub-carrier is sued by the head carrier in relation to a sub-contract of carriage[46] or the carrier's servant or agent who is contractually or statutorily protected by a Himalaya clause, those third parties enjoy the limitation periods in the Rules as if they were a contracting carrier. Nevertheless, it is not fair to start the period for recourse action from the date of delivery because the carrier who has paid damages would have little or no time if a suit is brought against him at the last minute[47]. The period, like others, should run from the accrual of the cause of action and, consequently, from the final court decision holding the carrier liable or, earlier, from the settlement of the claim[48]. Otherwise, the court might dismiss the recourse action on the grounds that it is not due yet and, therefore, unenforceable. On balance, the period for recourse action subject to the Hague Rules should start when the cause of action accrues[49]. Nevertheless, in that case the application of the period of one year could be unfair to the defendant who is to be claimant in the recourse action.

For that reason, Article 32 of the French Law of June 18, 1966, also allowed the carrier to bring a recourse action within three months as from the date of the suit taken against himself or as from the settlement of claim notwithstanding whether the one-year limitation period expired or not. Similarly, Article 3 (6 *bis*) of the Hague-Visby Rules and Article 20 (5) of the Hamburg Rules permit a recourse action to be instituted even after the expiration of the limitation period if brought within the time allowed by the *lex fori*. However, the time allowed shall not be less than 3 moths (90 days in the Hamburg Rules) commencing from the day when the third person instituting such action for

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45 *Hof Van Beroep te Antwerpen,* April 7, 1979, ETL 614 (1979).

46 *The Andros* [1987] WLR 1213, 1219 (PC) - Carver,T.G.: Carriage, p.370 / Doğanay,İ.: Karada Eşya Taşıma Akdinden Dolayı Tazminata Mahkûm Olan Birinci Taşıyıcının, Kendi Yerine Geçen Diğer Taşıyıcılar Aleyhine Açacağı Rücu Davasının Zaman Aşımı Başlangıcı, Acaba Hangi Tarihtir?, Batider, 1973, Vol.VII, p.87, 98.

47 Secretary-General, Second Report, p.193; IMC International Sub-Committee Report, 1962, p.93 - Williams,R.: Rules, p.80 / Okay,S.: Navlun Sözleşmesi, p.210, n.803.

48 *ITT Rayonier v. Souteastern Maritime* 1981 AMC 854 (5 Cir. 1980); *AC&L Israel Coffee v. Maria U* 1981 AMC 2624 (SD NY 1981); *Hercules Inc. Stevens Ship.* 1983 AMC 1786, 1794 (5 Cir. 1983); *Tokio Marine & Fire Ins. v. Nippon Yusen Kaisha* 1998 AMC 1558, 1564 (CD Cal. 1997).

49 For an opposite view see *Bukhta Russkaya, The* [1997] 2 Lloyd's Rep. 744 (QBD - CC 1997).

indemnity has settled the claim or has been served with process in the action against himself.

VII. ALTERATION OF THE PERIOD

As limitation periods are related to public policy, they have been made subject to mandatory rules, and, therefore, cannot be changed[50]. Nevertheless, since the Hague Rules is laid down as *unilateral* mandatory provisions favouring cargo interests under Article 5, the period may be lengthened by parties at any time[51] to the extent of the mandatory prescription periods fixed under contract law. By comparison, in Article 3 (6) of the Hague-Visby Rules the extension of period by an agreement is permitted only after the cause of action has arisen whereas by Article 20 (4) of the Hamburg Rules the person against whom a claim is made may at any time during the running of the limitation period extend that period only by a declaration in writing to the claimant; this lengthened period may be further extended by another declaration. Provision 4 of the British Gold Clause Agreement 1977 permitted the extension of the period for another year where the notice of claim was given within the one year.

The extension binds only the carrier who undertakes it. The onus of proof for the extension is on the cargo interest who stands to benefit therefrom. The proof could be made by written or unwritten evidence in the Hague and Hague-Visby Rules unlike the Hamburg Rules, and, for example, the carrier's publicised policy of lengthening the limitation period can be shown[52].

Once the limitation period expires, no extension can be allowed[53]. The carrier may waive his right, though.

Any contractual clause reducing the limitation period is null and void for limiting the carrier's liability other than as stated under the Rules. It will be interpreted as though it was a one-year clause[54].

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50 Eren,F.: Borçlar III, p.489.
51 UNCTAD Secretariat, Report of Bills of Lading, p.38 - Richardson,J.: Hague Rules, p.43.
52 *Armenia Coffee v. Santa Magdalena* 1983 AMC 1249 (SD NY 1982).
53 *New Hampshire Ins. Co. v. Saipan Shipping Co.* 1973 AMC 792 - Tetley,W.: Cargo Claims, p.682.
54 *Coventry Sheppard v. Larrinaga SS Co.* [1973] LI.L.R. 256; *The Ion* [1971] 1 Lloyd's Rep. 541, 544 (QBD) (on arbitration) / *Buxton v Rederi* 1939 AMC 815 (SD NY 1939) - Secretary-General, Second Report, p.192 - McMahon,J.P.: Incorporation, p.15.

VIII. LOSS OF RIGHT TO LIMIT THE PERIOD

If the application of right to limit the period for an action contravenes public policy of the court seized of the case, the carrier may be deprived of his right. Since the effect of the fundamental breach and the gross (conscious) fault are dealt with in chapters 2 and 11, only the effect of the misleading of the claimant by the carrier will be examined here.

Accordingly, if the carrier intentionally induces the cargo interest into mistake such that he brings an action after the limitation period by, for example, misleading him to sue a wrong person, by not providing the documents necessary for suit[55] or by delaying active negotiations, he loses the right to limit the period because nobody should benefit from his own fault by evidently abusing his right and acting unjustly against others[56]. In that case the period becomes suspended, and, after the carrier stops preventing the cargo interest from taking suit, the suspension is lifted, and the period reruns from that date as the time accumulated counts[57].

Where the carrier had no intention of misleading cargo interest, he cannot be deprived of his limitation right[58]. For example, although active negotiations conducted between parties to settle the argument began within the time limitation, the carrier may still rely on the limitation if he has not deliberately delayed the negotiations and, consequently, the institution of proceedings. Cargo interests are, therefore, advised to start taking suit before the expiry of the limitation period in case active negotiations does not bear fruits[59].

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[55] *Cour de Cassation*, July 16, 1958, DMF 34 (1959).

[56] *Cour d'Appeal de Paris*, May 5, 1978, DMF 716 (1978) / *Glus v. Brooklyn Eastern Terminal* 1959 AMC 2092 (SC 1959).

[57] *HGK*, 18.5.1966, E.66,K.152 - Arkan,S.: Taşıyıcının Sorumluluğu, p.215.

[58] *Schwabach Coffee Co. v. SS Suriname* 1967 AMC 604, 605 (ED La. 1966): The carrier's failure to reply a written request was not considered to be a waiver of his right; *Subaru of America v. M/V Ranella* 1972 AMC 722, 725 (D Md. 1972): The carrier's omission to answer the consignee's letter extending the limitation period was decided not to mislead the plaintiffs unjustifiably; *Bitchoupan Rug Corp. v. AS Atlas* 1975 AMC 298 (SD NY 1975): The oral expression of an intention to settle the claim was decided not to lose the carrier his right.

[59] *Cour d'Appeal de Montpellier*, February 8, 1951, DMF 276 (1951) - Arkan,S.: Taşıyıcının Sorumluluğu, p.215; Karayalçın,Y.: Meseleler ve Görüşler, p.320. For an opposite view see *Buxton v. Rederi* 1939 AMC 815 (SD NY 1939): The court held the suit brought sixteen and a half months after delivery to be valid without examining the carrier's intention.

The burden of proof for the loss of right to the limitation period is on the cargo interest who stands to profit thereby.

IX. CONCLUSIONS

(1) The limitation of the period for actions in Article 3 (6) of the Hague and Hague-Visby Rules and Article 20 (1) of the Hamburg Rules is applicable to any kind of loss or damage within the scope of the Rules. The word "whatsoever" in Article 3 (6) of the Hague-Visby Rules might cause some disputes. By comparison, the structure of Article 20 (1) of the Hamburg Rules is much clearer.

(2) The limitation period in the Rules is a barring period rather than a prescription. It cannot, therefore, be interrupted and suspended and should *sua sponte* be considered by the court. No reason really justifies the departure from the other fields of contract law which regard the period as prescription and make it subject to suspension and interruption.

(3) In Article 20 (1) of the Hamburg Rules the limitation period is extended to two years considering the needs of commerce unlike Article 3 (6) of the Hague and Hague-Visby Rules which limits the period to one year that is insufficient to conclude the negotiations in order to reach a compromise.

(4) As more clearly stipulated in Article 20 (2) of the Hamburg Rules, the limitation period commences on the day on which the carrier has delivered goods or part thereof or, in cases where no goods have been delivered, on the last day on which goods should have been delivered. The Hague and Hague-Visby Rules have no provision on the calculation of the period whereas Article 20 (3) of the Hamburg Rules provides that the day on which the limitation period commences is not included in the period. There is still a need for a provision extending the period to the following first working day when the last day is a holiday.

(5) The claimant (cargo interest) has to bring an action in order to comply with the time-bar. With this aim, the correct plaintiff should institute legal proceedings, including judicial, arbitral, enforcement or bankruptcy proceedings in a competent jurisdiction against the right defendant (carrier).

(6) When Article 3 (6) of the Hague Rules was drafted, the recourse action was not considered. However, it does not mean that the limitation period is not applicable to the defendant in a recourse action who is liable under the Hague Rules. Yet, this period, like others, should start from the accrual of the cause of action, namely from the date when the claimant has been held liable to the cargo interest by the court, or earlier from the date of the settlement of the claim. In that case, the application of one-year period could be unfair for the defendant in the recourse action. For that reason, under Article 3 (6 *bis*) of the Hague-Visby Rules and Article 20 (5) of the Hamburg Rules the period for recourse action in principle is limited to three months (90 days in the Hamburg Rules) commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with the process in the action against himself.

(7) The parties may agree on the extension of the limitation period since the rules relating to time-bars are *unilateral* mandatory provisions. Nevertheless, in Article 3 (6) of the Hague-Visby Rules this agreement ought to be made after the cause of action has arisen whereas in Article 20 (4) of the Hamburg Rules it should be in writing during the running of the limitation period unlike in the Hague Rules.

(8) The carrier who intentionally delays the institution of legal proceedings is deprived of his right to limit the period for actions. This is so because nobody can rely on his fault and act only to give harm to others.

CONCLUSION

I. URGENT NEED FOR THE HARMONİSATİON OF INTERNATIONAL LIABILITY REGIMES IN THE FIELD OF CARRIAGE OF GOODS BY SEA

Since the Hamburg Rules came into effect in November 1992, two convention based liability regimes have governed the contract of international maritime carriage of goods, which are the Hague and Hague-Visby Rules and the Hamburg Rules (together with some domestic laws totally or partially differing from them). It is true that there is, for the time being, only a few examples of the application of the Hamburg Rules by courts, which are *The World Appolo* (decided by *Tribunal de Commerce de Marseille*, January 23, 1996, Revue Scapel 1996, 51) and *Carte v. Sudcarcos* (judged by *Trib. Prem. Ins. Tunis, 9eme Chr* November 2, 1994, 1996 Rev. Scapel 40). This is so because they have been ratified by only few (25) developing countries which have almost no significant importance in maritime transportation (representing approximately 5 per cent of world trade), and because P&I clubs forbid carriers to give effect to the Rules.

However, it does not mean that there will not be more decisions operating the Hamburg Rules in future; quite the opposite. Indeed, the scope of the Hamburg Rules is enlarged by Article 2 to inbound and outbound shipments unlike the Hague and Hague-Visby Rules; Article 23 (3) makes the contract of carriage subject to this Convention within its coverage; and Article 21 (1) grants the claimant a wide choice of forum. Further, the carrier who fails to include a paramount clause expressly incorporating the Hamburg Rules may have to compensate the cargo interest for any loss arising therefrom under Article 23 (3) and (4). Even the courts of the Contracting States to the Hague and Hague-Visby Rules may soon feel obliged to apply the Hamburg Rules within their scope insofar as they are in conformity with Articles 3 (8) and 5 of the Hague and Hague-Visby Rules, in other words, favour the cargo interest as much as or more than the Hague and Hague-Visby Rules as was the case in *The World Appolo* where the French court operated the Hamburg Rules as applicable law under Article 2 (1) (b) since the carriage was to a port of discharge located in Senegal which is a Contracting State to the Hamburg Rules. The Hamburg Rules were, in principal, drafted in favour of cargo interests. However, there are few exceptions which decrease the carrier's liability as follows:

(1) Article 5 (5) has, in case of fire, shifted the burden of proving the carrier's own fault from the carrier onto the cargo interest.

(2) Articles 5 (3) and 6 (1) (b) reduce the amount of damages to be paid for the loss suffered by the cargo interest due to delay in delivery.

(3) Articles 6 (1) and 26 do not increase the quantum of damages in proportion to the rise in inflation since 1924 or 1968.

(4) Article 19 (5) does not allow the recovery of loss resulting from delay in delivery after 60 consecutive days of delivery to the consignee.

Consequently, barring the provisions mentioned thereinbefore the Hamburg Rules may be applicable to the contract of carriage of goods by sea along with the Hague and Hague-Visby Rules. Nevertheless, courts are free to evaluate the regime applicable in their country under their choice of law rules. It is, therefore, impossible from now on to guess what kind of decision courts might render. As a result, while the main purposes of these Conventions are to unify the rules regulating international carriage by sea, they are unfortunately the main reason for lack of uniformity in the field of international maritime law. Their existence has, furthermore, led to new national laws and drafts (such as the Iraqi Transport Law, the Chinese Maritime Code 1993, the Scandinavian Maritime Codes 1994, the Australian Carriage of Goods Act 1997, the new proposed US Carriage of Goods by Sea Law 1996) which incorporate certain principles similar to the Hague-Visby and Hamburg Rules. The absence of harmony prevents the materialisation of the expectations from international commerce. Without knowing how much risk they assume and expense they bear, merchants cannot continue trading with their customers through international contracts directly or indirectly performed by sea.

On balance, it would not be wrong to say that due to a variety of convention based rules there is an urgent need for the harmonisation of liability regimes in the field of carriage of goods by sea.

II. COMPARISON OF INTERNATIONAL LIABILITY REGIMES

In the light of the previous chapters of this thesis, the convention based liability regimes may briefly be compared as follows:

(1) The Hague, Hague-Visby and Hamburg Rules are *sui generis* in character and contain a convention based law obligation for the Contracting States to achieve international uniformity set thereunder within their territories by giving the Rules the force of law, operating and construing them. They were laid down mandatorily *to the extent* that the exemption contract *directly or indirectly* removes or restricts the carrier's liability otherwise than as provided therein. Unlike the Hague and Hague-Visby Rules, Article 23 (3) and (4) of the Hamburg Rules imposes a new undertaking on the carrier to make cargo interests aware of the application of the mandatory provisions together with its sanction and prevents the carrier from the continued inclusion of invalid exemption clauses.

(2) The Hague Rules apply to the contract of carriage of goods by sea which is or might be covered by a bill of lading [unless the bill of lading in the shipper's hand is issued under a charterparty] so long as the contract is concluded in any of the Contracting States. By contrast, the Hague-Visby Rules is operated if such a contract relates to international carriage, and if the contract is agreed in a Contracting State, or the carriage is from a port in a Contracting State. However, the Hamburg Rules govern all kinds of contracts of international carriage of goods by sea [unless the bill of lading in the shipper's hand is issued under a charterparty] if the contract is made in a Contracting State, or the carriage is from or to a port in a Contracting State. The Hague and Hague-Visby Rules oust goods actually carried on deck pursuant to the contract of carriage and live animals from their scopes, and cover the "tackle to tackle" period as compared to the Hamburg Rules which contain special provisions for deck carriage and live animals and regulate "port to port" transport. The Hague-Visby and Hamburg Rules expressly chosen by the parties in principle has the statutory mandatory effect in the territories of the Contracting States.

(3) The carrier's liability in the three Conventions is a contractual liability for breach of the contractual obligation to duly carry goods. His liability for his own act is liability with fault while that for the act of his servants or agents, which include the carrier's assistants in the performance of the contract of carriage, is strict liability for somebody else's fault.

(4) The defences and limits of liability provided for in the three Conventions apply in any action against the contracting carrier (or the person considered a carrier by law) in respect of loss of or damage to goods covered by the contract of carriage by sea whether the action is founded in contract or in tort (or otherwise). This is the position taken by Article 4 *bis* (1) of the Hague-Visby Rules and Article 7 (1) of the Hamburg Rules.

(5) Articles 3 (1) and 4 (1) of the Hague and Hague-Visby Rules includes special liability and exemption provisions for loss or damage arising from unseaworthiness before and at the beginning of the voyage. These rules prevail over those in Articles 3 (2) and 4 (2) of the same Conventions. The obligation to exercise "due diligence" in Article 3 (1) is non-delegable and imposes strict liability on the carrier for the fault of his servants or agents including his assistants used in the performance of the duty to provide a seaworthy ship. The Hamburg Rules do not distinguish liability for unseaworthiness from general cargo liability and make the obligation to provide a seaworthy ship a continuing duty.

(6) Article 4 (4) of the Hague and Hague-Visby Rules unlike the Hamburg Rules contains another special exemption for loss or damage arising from deviation in order not to deem the carrier deviating from the agreed route to have breached the Convention and the contract of carriage if the deviation from the agreed route was to save or attempt to save life or property at sea or was reasonable.

(7) In order to claim damages under the three Conventions the cargo interest must initially show that the prerequisites of liability provided therein have materialised. Accordingly he must establish that there is a right granted by law to him to claim, damages from the carrier under the contract of carriage of goods by sea, and that the loss suffered by him arose from breach of the contract while goods were in the carrier's custody. Physical loss of or damage to the goods forms a strong *prima facie* evidence of breach of the contract.

(8) Under the Conventions, the liable party is in principle the contracting carrier. However, in Articles 10 and 11 of the Hamburg Rules the sub-carrier is made liable too. Servants and agents also benefit from the same protection as the carrier under Article 4 *bis* (2) of the Hague-Visby Rules and Article 7 (2) of the Hamburg Rules.

(9) The Rules obligates the carrier to pay damages for the loss sustained by the cargo interest arising from breach of the contract because "loss or damage" is wide enough to be defined as any decrease in the benefits expected from goods and the contract of carriage. Consequently, not only is the carrier liable for physical loss of or damage to goods, but also for the non-physical loss of or damage to goods resulting from delay in delivery. In comparison to the Hague and Hague-Visby Rules, the Hamburg Rules contain special provisions concerning delay in delivery.

(10) The bill of lading and other transport receipts are *prima facie* evidence of the physical conditions of goods when handed over by and to the carrier. Article 3 (4) of the Hague-Visby Rules and Article 16 (3) of the Hamburg Rules make the bill of lading conclusive evidence while in the hands of bona fide third parties.

(11) The periods of notice for physical loss or damage in Article 3 (6) of the Hague and Hague-Visby Rules are extended by Article 19 of the Hamburg Rules. Failure to give a notice of loss or damage does not affect or prejudice the right of the cargo interest to bring suit, but only presumes that the carrier deliver the goods as described in the bill of lading or other transport receipt or, if no such document has been issued, in good condition. By comparison, Article 19 (5) of the Hamburg Rules prohibits the cargo interest from making compensation for loss resulting from delay in delivery unless he has given a notice in proper time indicated thereunder.

(12) Once the cargo interest discharges the burden of proof, the carrier who was entitled to escape liability under the three Conventions ought to establish that the loss resulted from an exempted incident. With this view, he, relying on Article 4 (2) (q) of the Hague and Hague-Visby Rules or Article 5 (1) of the Hamburg Rules, has to prove the occurrence which arose without the fault of the carrier, his servants and agents, in other words, which could not be avoided despite the fact that he, his servants and agents actually took care expected from a prudent carrier to do so. Article 4 (2) (c)-(p) of the Hague and Hague-Visby Rules, unlike the Hamburg Rules, lays down presumptions *de juris tantum* that in the events enumerated therein there is no fault on the carrier, his servants and agents. Before the carrier can take advantage of these presumptions he has the burden of proving that the occurrence falls within one of the specified exceptions

listed in that Article. Further, fire and nautical fault were introduced in Article 4 (2) (a) and (b) of the Hague and Hague-Visby Rules as exemptions from liability if the carrier proves that he was not at fault in the occurrence of nautical fault or fire. The carrier is also obliged to prove the proximate causal relation between the exempted occurrence and the loss suffered by the cargo interest, and the quantum of loss proximately resulting therefrom. This shows that Article 4 (2) (q) of the Hague and Hague-Visby Rules introduces a residual exception which is effective in only a few cases, such as the pilferage of cargo, where Article 4 (2) (a)-(p) of the same Conventions is not applicable.

(13) The amount of damages is limited under the Hague Rules to £100 in gold per package or unit, under the Visby Protocol to 10,000 Poincaré francs per package or unit or 30 Poincaré francs per kilo (whichever is higher), under the SDR Protocol to 666.67 SDR per package or unit or 2 SDR per kilo (whichever is higher), and under the Hamburg Rules to 835 SDR per package or shipping unit or 2.5 SDR per kilo (whichever is higher). Poincaré franc and SDR are artificial currencies. The former is defined in the Visby Protocol in terms of gold. The Hamburg Rules also show the maximum quantum of compensation for delay in delivery: two and half times the freight payable for the goods delayed but not exceeding the total freight under the contract. The Hague-Visby and Hamburg Rules consider the contents of the container enumerated in the bill of lading or other transport document as packed in a container packages or units. Apart from the Hague Rules, the Hague-Visby and Hamburg Rules deprive the carrier of the right to limit indemnity if the loss resulted from the carrier's own conscious fault, i.e., from an act or omission done with intent to cause the loss, or recklessly and with knowledge that such loss would probably result.

(14) The period for action is strictly limited under the Hague and Hague-Visby Rules to one year and under the Hamburg Rules to two years from the day of delivery of the goods or the date they should have been delivered. The Hague-Visby and Hamburg Rules include special provision extending the period for recourse action.

III. THE PREFERRED INTERNATIONAL LIABILITY REGIME: THE AMENDED HAMBURG RULES

In the previous chapters, the Rules were examined to ascertain their satisfactory and unsatisfactory parts. This investigation has concluded that the Hague and Hague-Visby Rules do not meet the needs of international maritime law for the following reasons:

(1) The Protocol of Signature of the Hague and Hague-Visby Rules unintentionally allowed the Contracting States to diverge from the Rules by, for example, limiting the scope of the Conventions, changing the principles of burden of proof on the carrier and reducing the degree of care expected from him, when incorporating them in national statutes. As a result, even in the domestic laws of the Contracting States to the Hague and Hague-Visby Rules uniformity could not be achieved.

(2) The Hague and Hague-Visby Rules were drafted as if they had been parts of a model bill of lading issued by the carrier, not an international statute. Although, for example, Article 3 (1) and (2) , by implication, imposes a dual liability on the carrier to exercise due diligence to provide a seaworthy ship and to take due care in the carriage of goods, such liability is made subject to so many exceptions in Article 4 (1), (2) and (4) that it would be difficult to divide such provision into rules to establish the burden of proof on parties. For that reason, many courts have reached conflicting decisions, in interpreting Article 4. Since all the exceptions listed therein are based on the actual facts of each case rather than on general law, similar matters have also been made subject to different decisions.

(3) There is nothing to justify the exemption of a carrier, who benefits from the limitation of damages, from liability for nautical fault and fire which reduces the degree of care required from him, insofar as cargo interests are ready to pay for the increase in freight if any.

(4) Since Article 4 (5) of the Hague Rules and consequently £100 or its equivalent in other currency are not properly linked to Article 9 of the same Convention and gold value of that sum, limitation figures defined in terms of national currencies under national acts lost their real value due to inflation and devaluation, and there is no uniform figure left today due to difference in the value of currencies.

(5) Article 4 (5) (b) of the Hague-Visby Rules is another example of poor drafting as it may be read as limiting the amount of loss compensated contrary to the principle of *restitutio in integrum.*

(6) Article 3 (3) of the Hague and Hague-Visby Rules, which provides that the carrier shall not be bound to state or show in the bill of lading any particulars furnished by the actual shipper if he knows or has reasonable grounds for suspecting they do not accurately represent the goods or if has had no reasonable means of checking, does not take commercial practice and the functions of bills of lading into consideration. This is so because the liner carrier, who is obliged to issue hundreds of bills of lading upon demand by the shipper, normally signs such documents presented by the shipper at the latest time just before the ship starts her voyage and therefore has only an opportunity to insert reservations in the previously drafted bills of lading to show that particulars therein do or might not represent goods received, and, without the description of goods, what is the subject of the contract, receipt and document of title cannot be ascertained, which negatively effects the negotiable character of bills of lading.

(7) The Hague and Hague-Visby Rules do not meet the needs of modern maritime trade on the grounds that: [i] they only cover the period when goods are on the ship rather than in the carrier's possession at the port of loading and discharge; [ii] they exclude cargo actually and contractually carried on deck and live animals from their scope; [iii] Article 1 (b) may be so narrowly construed that only the contract of carriage actually covered by a bill of lading is within the scope of the Conventions; [iv] they contain no specific rule on the sub-contract of carriage, the relation with other statutory liabilities (except Article 4 *bis* Hague-Visby Rules) and liability for delay in delivery; [v] neither do the Hague Rules regulate the legal position of the carrier's servants or agents; and [vi] nor do they deal with the carriage of goods consolidated into newly invented packaging, such as containers and pallets except for Article 4 (5) of the Hague-Visby Rules.

(8) In the Hague and Hague-Visby Rules there are many terms, such as "loss", "damage", "package", "unit", "navigation", "management", "deviation", "the agents or

servants of the carrier", which are not defined therein and which might be construed narrowly to limit the scope of Conventions.

(9) The convention based law obligations on the Contracting States to the Hague Rules and their geographical coverage under Article 10 are uncertain. This gives carriers an opportunity to escape liability by choosing a law which adopts but does not give effect to the Rules.

Unlike the Hague and Hague-Visby Rules the Hamburg Rules are much clearer. During their preparation all the criticisms of the language of the former were taken into consideration. The carrier's liability therein was set in a positive rule based on the simple presumed fault principle. Their answer to the requirements of international maritime trade is more comprehensive. They cover all the amendments made to the Hague Rules by the Visby and SDR Protocols. Moreover, they include some additional provisions to keep abreast economic and technological changes. They bring the regime of the carriage of goods by sea into line with international conventions relating to other modes of transport and facilitate the acceptance of uniform rules concerning multimodal carriage of goods.

When the Hamburg Rules are compared to the Hague and Hague-Visby Rules, it is apparent that there is no fundamental differences between these two liability regimes except that the Hamburg Rules do not contain nautical fault and fire exceptions. Almost all the variations arise from their different styles of legislation. Both lay down the carrier's contractual liability for his own fault together with those of his servants or agents.

If there are no substantial differences in two Conventions except the archaic nautical fault and fire exceptions, and if the Hamburg Rules, which contain all the amendments of the Visby and SDR Protocols, were more clearly drafted by taking the needs of modern trade into the consideration, why should the Hamburg Rules not become the law on carriage by sea?

However, the liability regime in the Hamburg Rules can be criticised for causing new doubts in parties' legal positions and liability measures. However, it should be

remembered that whenever a new system of liability is introduced it takes some time to be absorbed by courts. This period will probably be temporary because of the similarity of the regime to the previous international conventions, such as the Warsaw-Hague Convention, the CMR and the CIM, the rules of which have already been tested in courts.

Despite the superiority of the Hamburg Rules over the Hague and Hague-Visby Rules in respect of their language and style, the former needs some amendments for their clarification. They discussed in previous chapters of this thesis will be outlined in general terms below:

(1) Since the Hamburg Rules' system is based on the contract of carriage which might be evidenced by any document and aims to catch up with the documentary evolution, the document showing the contract of carriage or the receipt of goods (such as the waybill and electronic bill of lading) should also be defined in Article 1 along with the bill of lading regardless of whether they are documents of title or in hand-written forms insofar as their evidentiary function is recognised by the law of the country where the document or receipt is issued.

(2) Article 5 (1) of the Hamburg Rules using the abstract word "*reasonably*" has failed to clarify the degree of care expected from the carrier because it might be interpreted so favourably to the carrier that he would be obliged to act as a reasonable man rather than as a prudent carrier which would of course reduce the degree of care as against the previous court decisions rendered under the Hague and Hague-Visby Rules. For that reason, "*reasonably*" ought to be replaced by "*as from a prudent carrier*".

(3) It is ambiguous under Article 5 (1) of the Hamburg Rules who is obliged to prove the occurrence which caused the loss. Such provision should be clarified so that the proof of the cause of loss would be placed on the carrier wishing to exempt himself from liability, which would be in conformity with the dominant view expressed under the Hague and Hague-Visby Rules.

(4) For the compensation for loss resulting from delay in delivery under Article 5 (1) of the Hamburg Rules, the foreseeability of such loss by a prudent carrier when the

contract was concluded should be required. Again, the decrease in the value of goods at the place and time at which the goods are discharged from the ship pursuant to the contract or should have been so discharged ought to be presumed to be foreseen by a prudent carrier.

(5) There is no reasonable ground for imposing in Article 5 (4) of the Hamburg Rules the burden of proving the fault of the carrier, his servants or agents in fire on the cargo interest and for the deviation from the general onus of proof rule in Article 5 (1) of the same Convention on the ground that the details relating to fire onboard the ship are available only to the carrier but not to the cargo interests.

(6) Article 5 (7) of the Hamburg Rules is unclear. It must be revised so that, where there is a possibility that an occurrence for which the carrier's liability is exempted combines with another cause for which the carrier is liable to produce the same loss, the carrier would be allowed to escape liability only if he proves that the cause of loss was such exempted occurrence alone. However, once established that the act of the cargo interest, gross fault of a third party or force majeure of an objectively exceptional, inevitable and irresistible character contributes to loss together with another cause for which the carrier is liable, the court seized of the case should be granted to a discretionary power to exonerate the carrier wholly or partly from liability in proportion to the seriousness of such act, fault or force majeure provided that the carrier proves the amount of loss attributable thereto. Otherwise, the carrier, who would probably abstain from establishing his fault, might relieve himself from liability proving only the cargo interests' fault.

(7) The word "package" in Article 6 of the Hamburg Rules ought to be defined with regard to its aim. Consequently, it should mean any wrapper, including a container or similar article of transport used to consolidate goods, which covers its contents for their carriage in such a way as a prudent carrier cannot see them through. Article 6 (2) (a) of the same Convention paying attention only to the intention of parties, but not to the visibility of the contents of the package ought to be amended in this respect. Such present provision reduces the degree of diligence required from the carrier since he would probably avoid incurring expenses for the protection of goods over limited

amounts in spite of the fact that he could be aware of the contents of the package and ascertain how much care he should exercise and how much freight he should fix. Again, "shipping unit" which is insufficient to link the increase in freight to that in liability ought to be replaced by "customary freight unit", as in Section 4 (5) of the US COGSA 1936.

(8) SDR used in Article 6 of the Hamburg Rules as a unit of account might be controlled by governments and affected by world-wide inflation and devaluation. It should, therefore, be substituted for the market value of gold representing more realistic economic solution to inflation, as in the Visby Protocol 1968.

(9) In case where there is a significant decrease or increase in the value of limits or where the unit of account is no longer capable of keeping up with economic changes, the easier procedure of the revision of the limitation amounts and monetary unit ought to be found in Article 33 of the Hamburg Rules without the need for any international convention.

(10) New amounts of limitation of liability should be determined in Article 6 of the Hamburg Rules. Thus, for a package limitation the limited amount ought to be the average actual value of the average size package. If the aim was to limit the compensation per unit, then the balance between increased risks and increased freight should be considered. By contrast, in the case of weight limitation, the average actual value of large packages or pieces ought to be taken into account.

(11) Article 6 of the Hamburg Rules should be amended so as to grant the shipper a fair opportunity to prevent the carrier from relying on limitation clauses by declaring the nature and value of goods before shipment in a transport document as in the Hague and Hague-Visby Rules. In that event, the carrier should not be permitted to unjustly impose additional ad valorem freight charges.

(12) Since the carrier might be unaware of the actual carrier's name in the beginning, he wishing to escape from liability for an occurrence taking place while the goods are in the actual carrier's charge ought to be allowed in Article 11 (1) of the Hamburg Rules to inform the consignee of the actual carrier's name and principal place

of business later as soon as the goods are taken over by the actual carrier. Unless the carrier provides such information, he should be kept liable for loss.

(13) There is a need for a new provision relating to the identification of the carrier in order to protect the cargo interest unable to identify the liable party. Thus, where the bill of lading or any other transport document does not clearly show the carrier's name and his principal place of business, the registered owner of the ship by which the contract of carriage by sea is performed ought to be presumed to be the carrier unless he discloses the carrier's name and principal place of business. Again, where the bill of lading or any other transport document is issued by an agent in a principal carrier's name without clearly showing the principal's name and his principal place of business, the agent should also be deemed to be the carrier unless he reveals the carrier's name and principal place of business. Even if the carrier's name and principal place of business are disclosed, the carrier and the registered shipowner or the agent ought to be made jointly and severally liable for all expenses incurred by the claimant due to unnecessary litigation brought against the registered shipowner or the agent, and the period for suit should not run until the contracting carrier is identified.

(14) The time for notice of non-apparent loss or damage (15 consecutive days) under Article 19 (2) of the Hamburg Rules is such a long period that the goods in the consignee's custody might suffer loss or damage due to different causes from those for which the carrier is liable. Consequently, it should be limited to 7 consecutive days which is sufficient to give the consignee an enough opportunity to carefully examine goods.

(15) In the case where the last day is a holiday, the period for action in Article 20 should be extended to the following first working day.

(16) To strengthen the application of the Hamburg Rules whose aim is to unify the liability regimes, Article 21 (1) of the Hamburg Rules should oblige the plaintiff to institute the liability action in a court recognising this Convention.

(17) Another paragraph should be added to Article 23 of the Hamburg Rules for "the effect of the public policy of the *lex fori*". Accordingly, the court seized of the case

should be allowed to increase the carrier's liabilities and obligations under this Convention insofar as the public policy of the *lex fori* justifies such an increase and the deviation from the Rules promoting international uniformity, which would not be against the purpose of the Convention to protect cargo interests.

As is evident, almost all these proposed amendments of the Hamburg Rules are satisfactory because they clarify and do not affect the fundamental liability principles. In order to give effect to some minor changes in the Hamburg Rules, the depository — at the request of not less than one-third of the Contracting States to the Hamburg Rules — should convene a conference of the Contracting States for revising or amending them (Articles 32 and 33). If the Conference amended the Rules in the above respects, then other States may ratify, accept, approve or access the amended Hamburg Rules (Article 28). Otherwise, a new fourth convention ought to be drafted and adopted in line with the revised Hamburg Rules through an international conference. However, this would be a dangerous option because it would add a new Convention to the existing ones and would increase the disharmony of laws if universal acceptance is not achieved. If the option is not used either, then the Hamburg Rules should be ratified without any change for the sake of international uniformity in the field of carriage of goods by sea, and then the Contracting States favouring the amendment of the current Hamburg Rules may try to get enough majority provided in Article 32. Until then, States must avoid any national legislation differing from the Hague, Hague-Visby and Hamburg Rules and must encourage national and international law organisations to act immediately on uniformity and harmonisation of the convention based rules.

APPENDIXES

I. THE HAGUE RULES 1924

International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, August 25, 1924

Article 1

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 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 reasonable 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, 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 an 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 the 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, 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.

Article 4

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of 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 liable 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 therefrom.

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 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.

6. Goods of an inflammable, explosive or dangerous nature 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 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 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 as to responsibility and liability of the carrier for such goods, and as to rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect.

Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried

or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

Article 7

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to 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 rights 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 arrival of the ship at the port of discharge of 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 procès-verbal signed by the representatives of the Powers which take part therein and by the Belgian Minister of Foreign Affairs.

The subsequent deposit of ratifications shall 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 procès-verbal relating to the first deposit of ratifications, of the notifications referred to in the previous paragraph, and also of the instrument of the 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 the 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 any 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 shall 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 covering the Conference.

Done at Brussels, in a single copy, August 25, 1924

Protocol of signature

At the time of signing the International Convention for the Unification of certain Rules of Law relating to Bills of Lading the Plenipotentiaries whose signatures appear below have adopted this protocol, which will have the same force and the same value as if its provisions were inserted in the text of the convention to which it relates.

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.

They may reserve the right:

1. To prescribe that in the cases referred to in paragraph 2 (c) to (p) of Article 4 the holder of a bill o lading shall be entitled to establish responsibility for loss or damage arising from the personal fault of the carrier or the fault of his servants which are not covered by paragraph (a).
2. To apply Article 6 in so far as the national coasting trade is concerned to all classes of goods without taking account of the restriction set out in the last paragraph of that article.

Done at Brussels, in a single copy, August 25, 1924.

II. THE VISBY PROTOCOL 1968

Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, February 23, 1968

The contracting parties,

Considering that 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 August 25, 1923,

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 4 shall be replaced by:

   "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 parties so agree after the cause of action has arisen".

3. In Article 3, after paragraph 6 shall be added the following paragraph 6 *bis*:

   "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 II

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 goods in an amount exceeding the equivalent of Francs 10.000 per package or unit or Francs 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 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 package or units concerned. Except as aforesaid such article of transport shall be considered the package or unit.

(d) A franc means a unit consisting of 65.5 milligrams 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 nor 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 the that sub-paragraph.

(h) 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".

Article III

Between Articles 4 and 5 of the Convention shall be inserted the following Article 4 *bis*:

"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 or 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 or 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 IV

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 V

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 is issued in a contracting State,

(b) the carriage is from a port in a contracting State,

(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 preceding paragraphs".

Article VI

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 VII

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 VIII

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 organisation of the arbitration, any one of those Parties may refer the dispute to International Court of Justice by request in conformity with the Statute of the Court.

Article IX

1. Each contracting party may at the time of signature or ratification of this Protocol or accession thereto, declare that is does not consider itself bound by Article VIII 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 X

This Protocol shall be open for signature by the States which have ratified the Convention or which have adhered thereto before February 23, 1968, and by any State represented at the twelfth session (1967-1968) of the Diplomatic Conference on Maritime Law.

Article XI

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 this Convention.
3. The instruments of ratification shall be deposited with the Belgian Government.

Article XII

1. States, Members of the United Nations or Members of the specialised 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 ratification shall be deposited with the Belgian Government.

Article XIII

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 § 1 of this Article, this Protocol shall come into force three months after the deposit of its instrument of ratification or accession.

Article XIV

1. Any contracting state may denounce this Protocol by notification to the Belgian Government.
2. This denunciation shall have 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 XV

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 territories 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 Government extend to the territories named therein, but not before the date of 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 XVI

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 XVII

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 States Parties to the Convention, of the following:

1. The signatures, ratifications and accessions received in accordance with Articles X, XI and XII.
2. The date on which the present Protocol will come into force in accordance with Article XIII.
3. The notifications with regard to the territorial application in accordance with Article XV.
4. The denunciation received in accordance with Article XIV.

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 text being equally authentic, in a single copy, which shall remain deposited in the archives of the Belgian Government, which shall issue certified copies.

III. THE SDR PROTOCOL 1979

Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (August 25, 1924, as Amended by the Protocol of February 23, 1968), Brussels, December 21, 1979

The contracting parties to the present Protocol,

Being Parties to the International Convention for the unification of certain rules of law relating to bills of lading, done at Brussels on August 25, 1924, as amended by the Protocol to amend that Convention done at Brussels on February 23, 1968.

Have agreed as follows:

Article I

For the purpose of this Protocol, "Convention" means the International Convention for the unification of certain rules of law relating to bills of lading and its Protocol of signature, done at Brussels on August 25, 1924, as amended by the Protocol to amend that Convention done at Brussels on February 23, 1968.

Article II

1. Article 4, paragraph 5 (a) of the Convention is 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 goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilo of gross weight of the goods lost or damaged, whichever is the higher".

2. Article 4, paragraph 5 (d) of the Convention is replaced by the following:

"(d) The unit of account mentioned in this Article is the Special Drawing Rights as defined by the International Monetary Fund. The amounts mentioned in sub-paragraph (a) of this paragraph shall be converted into national currency on the basis of the value of that currency on the date to be determined by the law of the Court seized of the case. The value of the national currency, in terms of the Special Drawing Right, of a State which is a member of the International Monetary Fund, shall 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 the national currency, in terms of the Special Drawing Right, of a State which is not a member of the International Monetary Fund, shall be calculated in a manner determined by that State.

Nevertheless, a State which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of the preceding sentences may, at the time of notification of the Protocol of 1979 or accession thereto or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in its territory shall be fixed as follows:

(i) in respect of the amount of 666.67 units of account mentioned in sub-paragraph (a) of paragraph 5 of this Article, 10,000 monetary units;

(ii) in respect of the amount of 2 units of account mentioned in sub-paragraph (a) of paragraph 5 of this Article, 30 monetary units.

The monetary unit referred to in the preceding sentence corresponds to 65.5 milligrams of gold of millesimal fineness 900. The conversion of the amounts specified in that sentence into the national currency shall be made according to the law of the State concerned. The calculation and the conversion mentioned in the preceding sentences shall be made in such a manner as to express in the national currency of that State as far as possible the same real value for the amounts in sub-paragraph (a) of paragraph 5 of this Article as is expressed there in units of account.

States shall communicate to the depositary the manner of calculation or the result of the conversion as the case may be, when depositing an instrument of ratification of the Protocol of 1979 or of accession thereto and whenever there is a change in either.

Article III

Any dispute between two or more Contracting Parties concerning the interpretation or application of the present Protocol , which cannot be settled through negotiation, shall, at the request of one of them, submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organisation of the arbitration any one of those Parties may refer the dispute to International Court of Justice by request in conformity with the Statute of the Court.

Article IV

(1) Each contracting party may at the time of signature or ratification of this Protocol or accession thereto, declare that is does not consider itself bound by Article III.
(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 V

This Protocol shall be open for signature by the States which have signed the Convention of August 1924 or the Protocol of 23 February 1968 or which are Parties to the Convention.

Article VI

(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 ratification of this Convention.
(3) The instruments of ratification shall be deposited with the Belgian Government.

Article VII

1. States not referred to in Article V may accede to this Protocol.
2. Accession to this Protocol shall have the effect of accession to the Convention.
3. The instruments of ratification shall be deposited with the Belgian Government.

Article VIII

(1) This Protocol shall come into force three months after the date of the deposit of five instruments of ratification or accession.
(2) For each State which ratifies this Protocol or accedes thereto after the fifth deposit, this Protocol shall come into force three months after the deposit of its instrument of ratification or accession.

Article IX

(1) Any Contracting Party may denounce this Protocol by notification to the Belgian Government.
(2) The denunciation shall take effect one year after the date on which the notification has been received by the Belgian Government.

Article X

(1) Each 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 territories 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 Government extend to the territories named therein, but not before the date of 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 paragraph (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.

Article XI

The Belgian Government shall notify the signatory and acceding States of the following:
1. the signatures, ratifications and accessions received in accordance with Articles V, VI and VII.
2. the date on which the present Protocol will come into force in accordance with Article VIII.
3. the notifications with regard to the territorial application in accordance with Article X.
4. the declarations and communications made in accordance with Article II.
5. the declarations received in accordance with Article IV.
6. The denunciation received in accordance with Article IX.

IV. THE HAMBURG RULES 1978

United Nations Convention on the Carriage of Goods by Sea 1978

ANNEX I

Preamble

THE STATES PARTIES TO THIS CONVENTION,

HAVING RECOGNISED 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 agreed as follows:

PART I. GENERAL PROVISIONS

Article 1. 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 by 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 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 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 the 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 port 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.

3. The provisions of this Convention are not applicable to charterparties. However, where a bill of lading is issued pursuant to a charterparty, 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 charterparty, 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 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
      (ii) 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 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.
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 the time for delivery according to paragraph 2 of this Article.
4. (a) The carrier is liable
      (i) for loss 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 or 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 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 practice 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 part of the loss, damage or delay in delivery resulted from fault or neglect 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 not attributable thereto.

Article 6. Limits of liability

1. (a) The liability of the carrier for loss resulting from loss or damage to goods according to the provisions of Article 5 is limited to an amount equivalent to 835 units of account per package or other shipping 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 a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage 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 other 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 damaged, 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-contractual 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 delivery whether the action be 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 referred 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 intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably 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 intent to cause such loss, damage or delay, or recklessly and with knowledge that damage 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 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 or damage to the goods, as well as 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 liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts or 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 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 or 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 paragraphs 1 or 2 of Article 21. The burden of proving that any loss, damage or delay in delivery has been caused by such occurrence 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 or damage 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 dangerous 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 with knowledge of their dangerous character.
4. If, in cases where the provisions of paragraph 2, subparagraph (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 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 sea 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 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 are 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 of 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 of 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 admissible 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 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 indicate 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 admissible 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 issuance 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 referred 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 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 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 within15 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 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 an 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 the 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 been 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 the 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 defendant, 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 o arrest.
3. No judicial proceeding relating to carriage of goods under this Convention may be instituted in a place not specified in paragraphs 1 and 2 of this Article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.
4. (a) Where an action has been instituted in a court competent under paragraphs 1 and 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 of the court before which the first action was instituted is not enforceable in the country in which the 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 to be 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 charterparty contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charterparty does not contain 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 or, in the absence thereof, the habitual residence of the defendant; or

      (ii) 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

      (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 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 part. A clause assigning benefit of insurance of the goods in favour of the carrier, or any other 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 the contract of carriage by sea is issued, it must contain a statement that the carriage is subject to the provisions of this Convention which nullify 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 or damage to the goods as well as for delay in delivery. The carrier must, in addition, pay compensation for costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.

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 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 July 29, 1960, on Third Part Liability in the Field of Nuclear Energy as amended by the Additional Protocol of January 28, 1964, or the Vienna Convention of May 21, 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 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 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 Rights as defined by the International Monetary Fund. The amounts mentioned in Article 6 are to be converted into national currency of a State according to the value of that currency on 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 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 the national currency, in terms of the Special Drawing Right, of a Contracting State which is not a member of the International Monetary Fund, shall 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 37.5 monetary units per kilogram 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 milligrams 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 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 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.

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, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States until April 30, 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 April 30, 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 enter 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 enter 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 of 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 August 25, 1924 (1924 Convention) must notify the Government of Belgium as the depositary of the 1924 Convention of its denunciation of the said Convention with a declaration that 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 States 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 February 23, 1968, to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on August 25, 1924.
4. Notwithstanding Article 2 of this Convention, for the purposes of paragraph 1 of this Article, a Contracting State may, it deems it desirable, defer the denunciation 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 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 convened 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 the States signatories of the Convention for information.

4. Any amendments 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 moths 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 affect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Hamburg, this thirty-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 are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised by their respective Governments, have signed the present Convention

ANNEX II

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 of proof rests on the carrier but, with respect to certain cases, the provisions of this Convention modify this rule.

ANNEX III

RESOLUTION ADOPTED BY THE UNITED NATIONS CONFERENCE ON THE CARRIAGE OF GOODS BY SEA

"The United Nations Conference on the Carriage of Goods by Sea,

"Nothing with appreciation the kind invitation of the Federal Republic of Germany to hold the Conference in Hamburg,

"*Being aware* that the facilities placed at the disposal of the Conference and the generous hospitality bestowed on the participants by the Government of the Federal Republic of Germany and the Free and Hanseatic city of Hamburg, have in no small measure contributed to the success of the Conference,

"*Expresses* its gratitude to the Government and people of the Federal Republic of Germany, and

"*Having adopted* the Convention on the Carriage of Goods by Sea on the basis of a draft Convention prepared by the United Nations Commission on International Trade Law at the request of the United Nations Conference on Trade and Development,

"*Expresses* its gratitude to the United Nations Commission on International Trade Law and to the United Nations Conference on Trade and Development for their outstanding contribution to the simplification and harmonisation of the law of the carriage of goods by sea, and

"*Decides* to designate the Convention adopted by the Conference as the: 'UNITED NATIONS CONVENTIONS ON THE CARRIAGE OF GOODS BY SEA, 1978', and

"*Recommends* that the rules embodied therein be known as the 'HAMBURG RULES'."

V. SIGNATORIES AND CONTRACTING STATES

Country	HR	HVR		HmR
		VP	SDRP	
Algeria	(a) 13/4/1964			
Angola	(a) 2/2/1952			
Anquilla	(a) 2/12/1930			
Antigua	(a) 2/12/1930			
Argentina	(a) 19/4/1961	P (Decree-Law of 15/1/1973)		
Aruba	NL			
Ascension, St. Heléne and Dependencies	(a) 3/11/1931			
Australia	(a) 4/7/1955 den. 16/4/1993	NL (COGSA 1991)	(a) 16/7/1993	Conditional
Austria (LC)				(r) 29/7/1993
Bahamas	(a) 2/12/1930			
Bahrain		P (Maritime Code 1982)		
Bangladesh	NL (Law of 1972)			
Barbados	(a) 2/12/1930 no renunciation			(a) 2/2/1981
Barbuda	(a) 2/12/1930			
Belgium	(r) 2/6/1930	(r) 6/9/1978	(r) 7/9/1983	
Belize	(a) 2/11/1930			
Bermuda	(a) 2/12/1930 den. 20/10/1983	(a) 1/11/1980	(a) 20/10/1983	
Bolivia (LC)	(a) 28/5/1982			
Bonaire	NL			
Botswana (LC)				(a) 16/2/1988
Brazil	NL			S
Bulgaria	NL (Merch. Ship. Cd. 1970 and 94)			
Burkina Faso (LC)				(a) 14/8/1989
Caicos and Turks Islands	(a) 2/12/1930 den. 20/10/1983	(a) 20/10/1983	(a) 20/10/1983	
Cameroon	(a) 2/12/1930 no renunciation	S		(a) 21/10/1993
Canada	NL (COGWA 1936) revoked	NL (COGWA 1993)	NL (COGWA 1993)	Conditional (considered in 1999)
Cape Verde Islands	(a) 2/2/1952			
Cayman Islands	(a) 2/12/1930 den. 20/10/1983	(a) 20/10/1983	(a) 20/10/1983	
Chile	S			(r) 9/7/1982
China		P (Maritime Code 1993)	P (Maritime Code 1993)	P (Maritime Code 1993)
Colombia	P			
Croatia (?)	(r) 8/10/1991	6/4/1995	6/4/1995	
Cuba	(a) 25/7/1977			
Cyprus	(a) 2/12/1930			S
Czech Republic (LC)				23/6/1995
Denmark	(a) 1/7/1938 den. 1/3/1984	(r) 20/11/1975	(a) 3/11/1983	S X
Dominican Republic	(a) 2/12/1930			
Ecuador	(a) 23/3/1977	(a) 23/3/1977		S
Egypt	(a) 29/11/1943 den. 1/11/1997	(r) 31/1/1983 den. 1/11/1997		(r) 23/4/1979 effect 1/11/1998
Estonia	P (Merch. Ship. Cd. 1992)			
Falkland Islands and dependencies	(a) 2/12/1930 den. 20/10/1983	(a) 20/10/1983	(a) 20/10/1983	
Fiji	(a) 2/12/1930			
Finland	(a) 1/7/1939 den. 1/3/1984	(r) 1/12/1984	(r) 1/12/1984	S X
France	(r) 4/1/1937	(r) 10/7/1977	(r) 18/11/1986	Conditional

Gambia	(a) 2/12/1930 no renunciation			(r) 7/2/1996
Georgia		(a) 20/2/1996 no renunciation	(a) 20/2/1996 no renunciation	(a) 21/3/1996
Germany	(r) 1/7/1939 NL 1937	NL (Law 1986)	NL (Law 1986)	S
Ghana	(a) 2/12/1930			S
Gibraltar	(a) 2/12/1930 den. 22/9/1977	(a) 22/9/1977	(a) 20/10/1983	
Goa	(a) 2/2/1952			
Greece	(a) 23/3/1993	(a) 23/3/1993	(a) 23/3/1993	
Grenada	(a) 2/12/1930			
Guinea				(r) 23/1/1991
Guinea-Bissau	(a) 2/2/1952 no renunciation			
Guyana	(a) 2/12/1930			
Holy See		S		S
Hong Kong	(a) 2/12/1930 den. 20/10/1983	(a) 1/11/1980	(a) 20/10/1983	
Hungary (LC)	(r) 2/6/1930 no renunciation			(r) 5/7/1984
Iceland		NL (Law 1985)	NL (Law 1985)	
India	Revised	NL (Multimodal TOGA 1993)	NL (Multimodal TOGA 1993)	
Indonesia		NL (Commercial Code)		
Iran	(a) 26/4/1966			
Iraq				P (Law of Transport 1983)
Ireland	(a) 30/1/1962			
Isle of Man	(r) 2/6/1930 den. 13/6/1977	(a) 1/10/1976	(a) 20/10/1983	
Israel	(a) 5/9/1959	P (COGSA 1992)	P (COGSA 1992)	
Italy	(r) 7/10/1938 den. 22/11/1984	(r) 22/8/1985	(r) 22/8/1985	Conditional
Ivory Coast	(a) 15/12/1961			
Jamaica	(a) 2/12/1930			
Japan	(r) 1/7/1957 den. 1/6/1992	(r) 1/3/1993	(r) 1/3/1993	
Kenya	(a) 2/12/1930 no renunciation			(a) 31/7/1989
Kiribati	(a) 2/12/1930			
Korea (S)	Revoked	NL (Commercial Code 1993)	NL (Commercial Code 1993)	
Kuwait	(a) 25/7/1969			
Latwia		P (Maritime Code 1994)		
Lebanon	(a) 19/7/1975 no renunciation	(a) 19/7/1975 no renunciation		(a) 4/4/1983
Lesotho (LC)				(a) 26/10/1989
Liberia	Revoked	NL (Maritime Law 1982)	NL (Maritime Law 1982)	
Luxembourg (?)	(a) 18/8/1991	(a) 18/5/1991	(a) 18/5/1991	
Macao	(a) 2/2/1952			
Madagascar	(a) 13/7/1965			S
Malagasy Republic (?)	(a) 13/1/1966			
Malawi (LC)				(r) 18/3/1991
Malaysia	(a) 2/12/1930			
Mauritania		S		
Mauritius	(a) 24/8/1970			
Mexico	Revoked	NL (Navigation Law 1994)	(a) 20/5/1994	S
Monaco	(a) 15/5/1931			
Montserrat	(a) 2/12/1930 den. 20/10/1983	(a) 20/10/1983	(a) 20/10/1983	
Morocco				(a) 12/6/1981
Mozambique	(a) 2/2/1952			
Nauru	(a) 4/7/1955			

Netherlands	(a) 18/8/1956 den. 26/4/1982	(r) 26/4/1982	(r) 18/2/1986	
New Zealand	NL Revoked	(a) 20/12/1994	(a) 20/12/1994	
Nigeria	(a) 2/12/1930 no renunciation			(a) 7/11/1988
North Borneo	(a) 2/6/1931			
Norway	(a) 1/7/1938 den. 1/3/1984	(r) 19/3/1974	(r) 1/12/1983	S X
Oman		NL	NL	
Pakistan	NL			S
Panama	NL			S
Papua New Guinea	(a) 4/7/1955			
Paraguay (LC)	(a) 22/11/1967	S		
Peru	(a) 29/10/1964			
Philippines	NL (Commonw. Act 1936)	S		S
Poland	(r) 4/8/1937	(r) 12/2/1980	(r) 6/12/1984	
Portugal	(a) 24/12/1931	P (Decree-Law 352/86)		S
Qatar		NL	NL	
Romania	(r) 4/8/1937 no renunciation			(a) 7/1/1982
Russia	P (Merch. Ship. Code 1929)			
Sabah	NL			
Sao Tomé and Principe	(a) 2/2/1952			
Sarawak	(a) 3/11/1931			
Senegal	(a) 14/2/1978 no renunciation			(r) 17/3/1986
Seychelles	(a) 2/12/1930			
Sierra Leone	(a) 2/12/1930 no renunciation			(r) 7/10/1988
Singapore	(a) 2/12/1930	(a) 25/4/1972	(?)	S
Slovakia				S
Slovenia	(a) 25/6/1991			
Solomon Islands	(a) 2/12/1930			
Somalia	(a) 2/12/1930			
South Africa	Revoked	NL (COGSA 1986)		
Spain	(r) 2/6/1930	(r) 6/1/1982	(r) 6/1/1982	
Sri Lanka	(a) 2/12/1930	(a) 21/10/1981		
St. Kitts and Nevis	(a) 2/12/1930			
St. Lucia	(a) 2/12/1930			
St. Martin-N. Ant.	NL			
St. Vincent and the Grenadines	(a) 2/12/1930			
Sweden	(a) 1/7/1938 den. 1/3/1984	(r) 9/7/1974	(r) 14/11/1983	S X
Switzerland (LC)	(a) 28/5/1954	(r) 11/12/1975	(r) 20/1/1988	
Syrian Arab Republic	(a) 1/8/1974	(a) 1/8/1974		
Taiwan	NL (Maritime Code 1962)			
Tanganyika (?)	9/12/1963			
Tanzania (United Republic of)	(a) 3/12/1962 no renunciation			(a) 24/7/1979
Thailand		NL (COGSA 1991)		
Timor	(a) 2/2/1952			
Tonga	(a) 2/12/1930	(a) 13/6/1978		
Trinidad and Tobago	(a) 2/12/1930			
Tunisia				(a) 15/9/1980
Turkey	(a) 4/7/1955			
Tuvalu	(a) 2/12/1930			
Uganda (LC)				(a) 6/7/1979
Ukraine		P (Marine Code 1994)	P (Marine Code 1994)	P (Marine Code 1994)
United Arab Emirates		P (Federal Law		

		1981)		
United Kingdom of GB and Northern Ireland	(r) 2/6/1930 den. 13/6/1977	(r) 1/10/1976	(r) 2/3/1982	
UK Antarctic Territories	(a) 2/12/1930 den. 20/10/1983	(a) 20/10/1983	(a) 20/10/1983	
UK Virgin Islands	(a) 2/12/1930 den. 20/10/1983	(a) 20/10/1983	(a) 20/10/1983	
United States of America	(r) 29/6/1937			S
Uruguay		S		
USSR	NL			
Venezuela				S
Vietnam		NL (Maritime Code 1990)		
Yemen		P (Law 1994)		P (Law 1994)
Yugoslavia (?)	4/17/1959	NL	NL	
Zaire	(a) 17/7/1967			S
Zambia (LC)				(a) 7/10/1991

VI. APPLICATION OF THE RULES OR DOMESTIC STATUTES TO THE CONTRACT OF INTERNATIONAL CARRIAGE

Country	Outward carriage	Inward carriage	Carriage agreed in a Contracting State
Argentina			x
Australia	x		x
Barbados	x	x	x
Belgium	x		x
Bermuda	x		x
Botswana	x	x	x
Burkina Faso	x	x	x
Cameroon	x	x	x
Canada	x		x
Cayman Islands	x		x
Chile	x	x	x
Colombia	x		
Cyprus	x		
Czech Republic	x	x	x
Denmark	x		x
Ecuador	x		x
Egypt	x	x	x
Finland	x		x
France	x		x
Georgia	x	x	x
Gibraltar	x		x
Greece	x		x
Guinea-Bissau	x	x	x
Hong Kong	x		x
Hungary	x	x	x
India	x		x
Isle of Man	x		x
Italy	x		x
Japan	x		x
Kenya	x	x	x
Korea (S)	x		x
Lebanon	x	x	x
Lesotho	x	x	x
Liberia	x		x
Malawi	x	x	x
Malaysia	x		
Mexico	x		x
Montserrat	x		x
Morocco	x	x	x
Netherlands	x		x
New Zealand	x		x
Nigeria	x	x	x
Norway	x		x
Oman	x		x
Philippines	x	x	
Poland	x		x
Portugal			x
Romania	x	x	x
Russia (?)			
Senegal	x	x	x
Sierra Leone	x	x	x
Singapore	x		x
South Africa	x		x
Spain	x		x
Sri Lanka	x		x
Sweden	x		x
Switzerland	x		x
Syrian Arab Republic	x		x
Taiwan	x	x	
Tanzania	x	x	x

Thailand	x		x
Tonga	x		x
Tunisia	x	x	x
Turkey (?)			x
Uganda	x	x	x
United Kingdom	x		x
UK Antarctic Territories	x		x
UK Virgin Islands	x		x
United States	x	x	
Vietnam	x		x
Yugoslavia	x		x
Zambia	x	x	x

VII. MONETARY LIMITS OF THE CARRIER'S LIABILITY IN VARIOUS COUNTRIES

Country	Monetary Limits		
	Package	Unit	Weight
Algeria	Presumably £100 in gold	Presumably £100 in gold	
Angola	Presumably £100 in gold	Presumably £100 in gold	
Anquilla	Presumably £100 in gold	Presumably £100 in gold	
Antigua/Barbuda	Presumably £100 in gold	Presumably £100 in gold	
Argentuna	£100 in gold, or 400 Pesos in gold	£100 in gold, or 400 Pesos in gold	
Aruba			
Ascension, St. Heléne and Dependencies	Presumably £100 in gold	Presumably £100 in gold	
Australia	667.67 SDR	667.67 SDR	2 SDR
Austria (LC)	835 SDR	835 SDR	2.5 SDR
Bahamas	Presumably £100 in gold	Presumably £100 in gold	
Bahrain	100 Bahrain Dinar	100 Bahrain Dinar	
Bangladesh	£100 in cash, or £100 in gold		
Barbados	835 SDR	835 SDR	2.5 SDR
Barbuda	Presumably £100 in gold	Presumably £100 in gold	
Belgium	667.67 SDR (HVR), or 17,500 BF	667.67 SDR (HVR), or 17,500 BF	2 SDR
Belize	Presumably £100 in gold	Presumably £100 in gold	
Bermuda	667.67 SDR	667.67 SDR	2 SDR
Bolivia (LC)	Presumably £100 in gold	Presumably £100 in gold	
Bonaire			
Botswana (LC)	835 SDR	835 SDR	2.5 SDR
Brazil	contractual	contractual	contractual
Bulgaria		280 Bulg. levs	
Burkina Faso (LC)	835 SDR	835 SDR	2.5 SDR
Caicos and Turks Islands	667.67 SDR	667.67 SDR	2 SDR
Cameroon	835 SDR	835 SDR	2.5 SDR
Canada	667.67 SDR	667.67 SDR	2 SDR
Cape Verde Islands	Presumably £100 in gold	Presumably £100 in gold	
Cayman Islands	667.67 SDR	667.67 SDR	2 SDR
Chile	835 SDR	835 SDR	2.5 SDR
China	667.67 SDR	667.67 SDR	2 SDR
Colombia	None	None	None
Croatia (?)	667.67 SDR (£100 in gold)	667.67 SDR (£100 in gold)	2 SDR (-)
Cuba	$100 Cuban	$100 Cuban	
Cyprus	£100 in gold	£100 in gold	
Czech Republic (LC)	835 SDR	835 SDR	2.5 SDR
Denmark	667.67 SDR	667.67 SDR	2 SDR
Dominican Rep.	None	None	None
Ecuador	10,000 PGF	10,000 PGF	30 PGF
Egypt	835 SDR	835 SDR	2.5 SDR

Estonia		EEK 2.000	
Falkland Islands and dependencies	667.67 SDR	667.67 SDR	2 SDR
Fiji	$236 Fiji	$236 Fiji	
Finland	667.67 SDR	667.67 SDR	2 SDR
France	667.67 SDR	667.67 SDR	2 SDR
Gambia	835 SDR	835 SDR	2.5 SDR
Georgia	835 SDR	835 SDR	2.5 SDR
Germany	667.67 SDR (HVR) / DM 1250 (HR)	667.67 SDR (HVR) / DM 1250 (HR)	2 SDR (HVR)
Ghana	£100, or 200 Ghanaian Pounds	£100, or 200 Ghanaian Pounds	
Gibraltar	667.67 SDR	667.67 SDR	2 SDR
Goa	Presumably £100 in gold	Presumably £100 in gold	
Greece	667.67 SDR	667.67 SDR	2 SDR
Grenada	Presumably £100 in gold	Presumably £100 in gold	
Guinea	835 SDR	835 SDR	2.5 SDR
Guinea-Bissau	Presumably £100 in gold	Presumably £100 in gold	
Guyana	Presumably £100 in gold	Presumably £100 in gold	
Holy See (?)			
Hong Kong	667.67 SDR	667.67 SDR	2 SDR
Hungary (LC)	835 SDR	835 SDR	2.5 SDR
Iceland	667.67 SDR	667.67 SDR	2 SDR
India	667.67 SDR	667.67 SDR	2 SDR
Indonesia	Dfl/Idr 600	Dfl/Idr 600 (?)	
Iran	Presumably £100 in gold	Presumably £100 in gold	
Iraq	350 Iraqi Dinars	350 Iraqi Dinars	1.250 Iraqi Dinar
Ireland	£100 Irish	£100 Irish	
Isle of Man	667.67 SDR	667.67 SDR	2 SDR
Israel	667.67 SDR	667.67 SDR	2 SDR
Italy	667.67 SDR	667.67 SDR	2 SDR
Ivory Coast	£200		
Jamaica	Presumably £100 in gold	Presumably £100 in gold	
Japan	667.67 SDR	667.67 SDR	2 SDR
Kenya	835 SDR	835 SDR	2.5 SDR
Kiribati	Presumably £100 in gold	Presumably £100 in gold	
Korea (S)	500 SDR	500 SDR	
Kuwait	250 Kuwait Dinars	250 Kuwait Dinars	750 fils
Latwia			
Lebanon	835 SDR	835 SDR	2.5 SDR
Lesotho (LC)	835 SDR	835 SDR	2.5 SDR
Liberia	667.67 SDR	667.67 SDR	2 SDR
Luxembourg (?)	667.67 SDR	667.67 SDR	2 SDR
Macao	Presumably £100 in gold	Presumably £100 in gold	
Madagascar	Presumably £100 in gold	Presumably £100 in gold	
Malagasy Republic	Presumably £100 in gold	Presumably £100 in gold	
Malawi (LC)	835 SDR	835 SDR	2.5 SDR
Malaysia	Presumably £100 in gold	Presumably £100 in gold	
Mauritania (?)			
Mauritius	Presumably £100 in gold	Presumably £100 in gold	
Mexico	667.67 SDR	667.67 SDR	2 SDR
Monaco	Presumably £100 in gold	Presumably £100 in gold	
Montserrat	667.67 SDR	667.67 SDR	2 SDR

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Tuvalu	Presumably £100 in gold	Presumably £100 in gold	
Uganda (LC)	835 SDR	835 SDR	2.5 SDR
Ukraine (?)			
United Arab Emirates	Df 10,000	Df 10,000	Df 30
United Kingdom of GB and Northern Ireland	667.67 SDR	667.67 SDR	2 SDR
UK Antarctic Territories	667.67 SDR	667.67 SDR	2 SDR
UK Virgin Islands	667.67 SDR	667.67 SDR	2 SDR
United States of America	$500	$500	
Uruguay	None	None	None
Venezuela	Contractual	Contractual	Contractual
Vietnam	10,000 PGF	10,000 PGF	30 PGF
Yemen	Yemen Rials 30,000		Yemen Rials 100
Yugoslavia	667.67 SDR	667.67 SDR	2 SDR
Zaire	Presumably £100 in gold	Presumably £100 in gold	
Zambia (LC)	835 SDR	835 SDR	2.5 SDR

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