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AN EVALUATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA (THE ROTTERDAM RULES) THROUGH CRITICAL ANALYSIS

by

Abhinayan Basu Bal

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No. 2, June 2009
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Foreword

As a centre of excellence in postgraduate maritime education, the World Maritime University (WMU) has positioned itself as a role model in the forefront of emerging efforts worldwide to raise academic standards for maritime professionals. It is recognized in the higher education milieu in any field that academic research is the hallmark of progress. It fosters a culture of innovation and a philosophical approach to advancement which can crystallize into finite returns for government, industry and academia alike.

While the research portfolio of WMU is yet in a state of relative infancy, the university has already distinguished itself as a world leader in such areas of inquiry as maritime security and maritime law and policy through an interdisciplinary approach. This project, currently the most significant academic research initiative undertaken by WMU, is ground breaking as an academic exercise carried out by a maritime university.

The findings articulated in this report reflect an in depth study of an initiative originally spearheaded by the Comité Maritime International (CMI) and subsequently passed on to the United Nations Commission on International Trade Law (UNCITRAL) for the creation of a new international regime for carriage of goods wholly or partly by sea. The ultimate object is to replace the present fragmentation in this area of law manifested through three current sets of international convention rules, namely, the Hague Rules, the Hague-Visby Rules and the Hamburg Rules with a new regime subsuming and incorporating multimodal carriage as well as sea carriage under contractual arrangements other than the traditional bill of lading. The final product of the deliberations of CMI and UNCITRAL is the adoption of a convention instrument, namely, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, otherwise referred to as the Rotterdam Rules.

The impact of the Rotterdam Rules is permeating through the public and private sectors of shipping. In the context of the maritime law and policy programme of WMU this subject is fertile ground for academic research. Through this initiative WMU is poised to position itself as a centre for research excellence in this field. This report represents the first phase of the research initiative at WMU aimed at integrating and synthesizing the debates surrounding the principal issues at the deliberations leading to the final instrument. It is hoped that the critical analysis reflected in this report which encompasses economic and socio-political perspectives will assist states in arriving at optimum policy parameters in relation to this convention.

The research team under the leadership of the Director of Doctoral Programmes of WMU consists of the principal author of this report Abhinayan Basu Bal, who is a Ph.D. candidate at WMU, KofiMbiah, another Ph.D. candidate and Mikis Fotis Manolis who has recently received his Ph.D. from WMU and Swansea University under their
joint doctoral programme in Maritime and Commercial Law. All three individuals
have been working on different aspects of the draft convention, following its
evolution over the last several years. The team has been fortunate in that they had
the opportunity to attend various sessions of the CMI and UNCITRAL. Mr. Mbiah has
attended UNCITRAL sessions as a member of the Ghanaian delegation, and Dr.
Manolis, as a member of the Canadian Maritime Law Association (CMLA) delegation
at CMI and as a CMLA observer at UNCITRAL sessions. Mr. Basu Bal has attended the
UNCITRAL sessions as an observer representing WMU and it is anticipated that he
will attend the conference accompanying the signing ceremony at Rotterdam and
present a paper at the invitation of the organizers.

The first hand experience of the research team members attending these sessions
has provided a valuable insight into the dynamics of the negotiations and the
thinking and policy perspectives of national delegations. All this has been of immense
value in the preparation of this report. An independent academic review of this
report has been carried out by Professor In Hyeon Kim of Pusan National University,
Korea.

The impetus for this aspiration has come from three members of the research team
focusing their respective inquiries on three aspects of this expansive area of law
reform. Their participation in the research team is a key factor in, if not the centre
piece of, WMU’s academic research profile and excellence.

Proshanto K. Mukherjee
Vice President (Research)
Director of Doctoral Programmes
ITF Professor of Maritime Safety and Environmental Protection
World Maritime University
Malmö, Sweden
June 2009
Author’s Preface

This report is based on the author’s personal observations of the deliberations which took place during the 19th, 20th and 21st sessions of the UNCITRAL Working Group III (Transport Law) and the 41st UNCITRAL Commission session. The object of this report is two-fold: first to reflect the discussions that took place in the three Working Group sessions and the Commission session, second to provide the foundation for the author’s continuing research in this field to fulfil his personal academic aspirations. The author had the privilege and opportunity to attend the above-mentioned UNCITRAL sessions as an observer representative of the World Maritime University (WMU) in connection with the university’s research project on the emerging international regime on transport law for carriage of goods wholly or partly by sea.

The style of this report is not entirely in accordance with the protocol of format adopted by the Working Group for its deliberations, but rather in synoptic form highlighting some of the key elements of each of the issues that were discussed during the three Working Group sessions as well as the Commission session. The author has also made an effort to summarize the important provisions of the new convention and the proposed changes to existing law by comparing its provisions with the corresponding provisions of the Hague/Hague-Visby Rules and the Hamburg Rules. Judicial decisions of major jurisdictions are also considered in this context. Accordingly, all errors, inaccuracies and omissions are the responsibility of the author.

The author wishes to take this opportunity to express his gratitude to Professor Tomotaka Fujita of Japan, Professor Francesco Berlingieri of Italy, Professor G.J. van der Ziel of Netherlands, Professor Hannu Honka of Finland, Dr. V.D. Sharma of India and Professor Jan Ramberg of FIATA for sharing their first hand experiences and explaining the intricacies of the provisions of the Rotterdam Rules. The author also acknowledges the significant input provided by other delegates and observers whom he interviewed during the various Working Group sessions in connection with the preparation of this report.

The author is grateful to WMU for nominating him as an observer at the above-mentioned UNCITRAL sessions representing the university’s research team on this subject matter. Immense appreciation is due to his colleagues in the WMU Research team headed by Professor Proshanto K. Mukherjee for providing invaluable comments and opportunities for scholarly discourse on the intricate legal issues pertaining to the Rotterdam Rules.

Abhinayan Basu Bal
Malmö, Sweden
June 2009

* See, infra, notes 3, 4, 5 and 9 for the full names of the conventions.
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Liverpool & Great Western Steam Co. v. Phenix Insurance Co., 129 U.S. 397 (1889)


New Jersey Steam Navigation Co. v. Merchants’ Bank of Boston (The Lexington), 1848 WL 6458 (U.S.R.I.)

Nitram Inc v. MV Cretan Life, 599 F.2d 1359 (5th Cir.1979)

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Propeller Niagara v. Cordes, 1858 WL 9337 (U.S.Wis.)


Schnell v The Vallescura, 293 US 296 (1934)

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1. INTRODUCTION

Evolving out of an original initiative of the Comité Maritime International\(^1\) (CMI), Working Group III (Transport Law) of the United Nations Commission on International Trade Law (UNCITRAL) has been involved in the creation of a new international regime for the carriage of goods by sea, the ultimate objective of which is to replace the present fragmentation\(^2\) in this area of maritime law manifested through three sets of international convention rules, mainly the Hague Rules\(^3\), the Hague-Visby Rules\(^4\) and the Hamburg Rules\(^5\) and the proliferation of national "hybrid" regimes\(^6\). The situation is worsened by these hybrid regimes often applying inwards and outwards, thus creating a nightmare for legal practitioners and their clients in terms of conflict of laws issues.\(^7\) In view of the urgency of the situation, two international bodies, the CMI and UNCITRAL

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joined forces to promote reform in the law of international sea carriage of goods.\textsuperscript{8}

Since 15 April 2002, the Working Group III of UNCITRAL has held biannual sessions alternating between New York in the spring and Vienna in the fall. At its forty-first session in New York, the UNCITRAL Commission finalized and approved the text of a draft convention which the Sixth Committee of the General Assembly recommended for adoption. The General Assembly, following that recommendation, passed Resolution 63/122 on 11 December 2008 adopting the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea and authorizing a signing ceremony in Rotterdam on 23 September 2009.\textsuperscript{9} What transpired within this period of six and a half years is essentially the substance of this report although it is not simply a chronology of events and factual details but is also an exercise in comparative analysis touching on the extant convention regimes on sea carriage of goods.

The raison d'etre of this report has already been alluded to in the Foreword and the Author's Preface. It represents the culmination of a concerted research effort. Immediately following this introduction, the report presents the background to the evolution of the convention regime currently being developed and nearing the end of a strenuously ambitious effort on the part of the international maritime community to achieve uniformity on a subject that has far-reaching implications for the future of world trade and maritime transportation. The report then speaks to the procedural aspects of the deliberations at UNCITRAL leading up to the finalization of the convention. The next section of the report contains the core and substance, that is, a detailed analytical appreciation of the provisions of the convention, chapter by chapter, reflecting the outcomes of the deliberations. Finally, in the conclusion, a summary is presented together with a prognosis from the author's perspective based on his first-hand observations regarding the viability and success of yet

\textsuperscript{8} For much of the 1980s and 1990s, while advocates of the Hague-Visby and Hamburg Rules battled over the direction that cargo liability law should take, many observers viewed the CMI and UNCITRAL as rivals, at least on this issue. But UNCITRAL's return to the field of transport law has been in active partnership with the CMI. Since 1998, the two organizations have been fully cooperative allies seeking to develop a new international convention that will be widely acceptable to the world maritime community. The two organizations have their unique strengths; CMI has greater access to industry representatives, while UNCITRAL mainly works with government representatives and international organizations. Thus, by joining their efforts they have paved the path for building necessary consensus for the widespread adoption of a new convention. For a comprehensive explanation of the interrelationship between these two bodies, see Michael F. Sturley, "The United Nations Commission on International Trade Law's Transport Law Project: An Interim View of a Work In Progress", 39 Tex. Int'l L.J. 65, 2003, at p. 69.

\textsuperscript{9} The final text of the UN Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea is annexed to General Assembly Resolution 63/122, UN Doc. A/RES/63. The convention is now referred to as the Rotterdam Rules because the signing ceremony is to be held in that city in the fall of 2009. See UN Doc A/C.6/63/L.6. In this report, the subject instrument is interchangeably referred to as the "Rotterdam Rules" or "draft convention", as appropriate contextually. Its full text is appended to this report in Annex I.
another effort by the international maritime community to create global harmony in the field of carriage law.
2. **THE ROTTERDAM RULES: BACKGROUND AND EVOLUTION**

In private law conventions, national and private interests with commercial, economic and other implications are at stake, with the result that international rule-making is fragmented. In the law of carriage of goods by sea, the lack of uniformity in the international law is glaringly obvious. As witnessed in recent times, when discussions on the law of carriage of goods by sea under bills of lading reach the stage of a diplomatic conference, the characters of the play are mainly restricted to the shipper and the carrier. The unexpected character, the insurer, is not mentioned in the cast. The storyline is mainly focused on the debate surrounding the contractual imbalance between carrier and shipper due to the “unequal bargaining power” in relation to clauses which define and limit the liabilities of the parties to the contract of carriage. The implicit metaphor reflects a world of conflict rather than cooperation, a confrontation rather than a deal, in which only if a side is sufficiently powerful can it expect its concerns to be included in the final convention.

The contractual imbalance, it is alleged, is attributable to the philosophy underlying the Hague Rules or the Hague-Visby Rules which dominate current carriage transactions. The imbalance is a function of the conflict between states whose international trade is based on cargo owning interests, namely shipper or consignee, and states whose international trade is based on carrier interests, i.e., shipowners, charterers and the like. It must be appreciated in this context that ships of a large flag state are not necessarily owned by individuals who are nationals of that state or companies incorporated in and directed from that state. Indeed in the realm of open registries today\(^\text{10}\) in most instances, neither is the individual owner a national of the flag state nor is the mind and management of a company resident there even if the company is incorporated in the flag state.

It is also to be noted that states which identify themselves primarily with cargo owning interests may also be major flag states whether or not they operate in an open or closed registry system or any other alternative type of registry. Therefore, the assumption that there is an irreconcilable divide between traditional maritime states as representing carrier interests and developing countries with primarily cargo owning interests is no longer valid. The advent of multiple registry types leading to varieties of flag states has in practical terms obliterated the original polarized characteristics of states opting for the Hague/Hague-Visby regimes or the Hamburg regime.

\(^{10}\) In present times, more than half of the world’s merchant ships (measured by tonnage) are registered under open registries. Panama, Liberia and Bahamas, all developing nations are the leading open registries in the world.
During the development of the Rotterdam Rules, the emphasis has been on the potential of the instrument to promote global harmonization, because with rapid increase in the volume of international trade, it is becoming increasingly important to create an international legal framework to address the problem posed by varying national solutions that are at variance with each other. The notion of “unification” in maritime law, the term used in CMI sponsored conventions does not mean total uniformity in terms of national regimes. Whether one refers to uniformity or unification, both terms simply mean that different sovereign states have adopted similar substantive rules concerning a certain matter through the articulation of a convention or other treaty instrument. Uniformity, in a complete sense may be impeded or rendered impossible to achieve, or may even not be desirable, because of differences in legal systems and legal philosophy. Perhaps, the objective is better expressed by referring to harmonization rather than unification.\(^\text{11}\) Harmonization is a more precise term the connotation of which is that the essential rules are the same but account is taken of the fact that they operate within different legal systems. A similitude can be found in music, where sounds may be in unison, or they may be in harmony, but what is undesirable is discord.\(^\text{12}\) In the consideration of the law of carriage of goods by sea, it is submitted that harmonization is what carriage conventions have aspired to achieve; however, that is not evident from the formal title of the Hague/Hague-Visby Rules which embodies the word “unification”.\(^\text{13}\)

Harmonization has never been an easy process but now it is much more difficult than it was during the colonial era, when it evolved through stress of practical and inevitable circumstances. Now States are more conscious of their interests as they seek to emphasize their preferences independently when negotiating in international forums in conformity with their national interests. The diverse nature of policy preferences and interests do not create an easy situation for formulation of common rules by consensus, coordination or compromise. When formulating such common rules, the object should be to find a solution through which diverse national demands can be preserved but also contained within certain limits. Furthermore, the rules should be predictable to a certain extent.

The Hague Rules gained no serious recognition, until the United Kingdom incorporated them in its domestic legislation by passing its Carriage of Goods by Sea Act (COGSA) in 1924 followed by the United States which adopted its COGSA in 1936. Other major maritime States such as France, Germany, Japan, Italy, the Netherlands, Belgium and Spain ratified or acceded to it in the same decade or shortly thereafter. With the demise of colonialism and the emergence of independent sovereign states which were at the time referred to as the third world states, the Hamburg Rules were developed to accommodate their

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\(^\text{12}\) Ibid.

\(^\text{13}\) Reference is made to the full title of the Hague Rules. See supra, note 3.
interests. These states together with some others viewed the Hague/Hague-Visby regimes as being biased in favour of carrier interests. Apart from the express creation of a so called “presumed fault or neglect” liability regime\textsuperscript{14} the Hamburg Rules have brought about a number of significant changes. These are the elimination of the “nautical fault” defence found in article 4(2)(a) of the Hague/Hague-Visby Rules; the enlargement of the carrier’s period of responsibility; the application of the regime to all contracts of carriage without regard to whether a document of title is issued; the addition of provisions imposing liability for delay; the application of the regime to deck cargo; the incorporation of provisions relating to jurisdiction and arbitration and an increase in the applicable monetary limits on liability. The Hamburg Rules have been available for ratification since 1978; thus far there have been only 34 ratifications\textsuperscript{15} but a number of other countries have incorporated some of the provisions into their domestic legislation.\textsuperscript{16} As such, this convention currently governs only a relatively small fraction of world shipping.

UNCITRAL took the initiative for developing new rules in the field of carriage of goods by sea when existing national laws and international conventions left significant gaps regarding issues such as the functions of bills of lading and sea waybills, the relationship of those transport documents with the rights and obligations vis-à-vis the seller and buyer of goods and the legal position of entities financing the acquisition of such goods.\textsuperscript{17} It is recognised that some states do have provisions on these issues in their national laws, but they are largely disparate. This lack of parity combined with the absence of provisions in some jurisdictions constitutes an obstacle to the free flow of goods and an increase in the cost of transactions. The growing use of electronic means of communication in the carriage of goods further aggravates the consequences of those fragmentary and disparate laws and also creates the need for uniform

\textsuperscript{14} See Common understanding adopted by the United Nations Conference on the Carriage of Goods by Sea, UN Doc A/CONF.89/13, Annex II. 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 the Convention modify this rule.


\textsuperscript{16} See supra, note 6.

\textsuperscript{17} The reform of international transport law was initiated at the 29\textsuperscript{th} session of the UNCITRAL Commission, between May 28 and June 14, 1996. “It was proposed that the Commission (UNCITRAL) should include in its work programme a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules in the areas where no such rules existed and with a view to achieving greater uniformity of laws than has so far been achieved.” See “Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session”, UN Doc A/51/17, 1996 at p. 210, hereinafter referred to as the UNCITRAL 29\textsuperscript{th} Commission Session Report.
provisions addressing the issues relevant to the use of new technologies. In a temporal perspective it is understandable that in consideration of modern transport methods and logistics, the technical, commercial and legal circumstances have changed fundamentally since the 1920's. Moreover, such a move embodies the hypothesis that the existing regimes of the Hague and Hague-Visby Rules no longer provide, and the Hamburg Rules will never provide a proper basis for governing liability in carriage of goods by sea.

The UNCITRAL Working Group III officially met for the first time at its 9th session in New York, between 15 and 26 April 2002. The first reading took place during the Working Group’s initial three meetings on the basis of the preliminary draft prepared by CMI. The fourth meeting marked the beginning of the second reading of the draft instrument. A change in methodology was also adopted shifting the discussion from an “article-by-article” review to a topic-based review. Topics were considered in a broader context, including the commercial compromise that had to be reflected in the final draft of the convention to ensure its widespread adoption. The second reading represented the most substantial of the negotiations as decisions had to be reached over the final wording of each provision. It spread over seven meetings between 2003 and 2006, representing a total of 14 weeks.

At its nineteenth session at the United Nations Headquarters in New York between 16 and 27 April, 2007, the Working Group III of UNCITRAL, comprising all states members of the Commission, commenced its third reading of the draft convention. The session was attended by states members of the Working Group, observers from states and from various international intergovernmental and non-governmental organizations invited by the Working Group. The

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18 See UNCITRAL 29th Commission Session Report at p. 211.
21 “Draft convention on the carriage of goods [wholly or partly] [by sea]”, UN Doc A/CN.9/WG.III/WP.81. This document was preceded by the “Preliminary draft instrument on the carriage of goods by sea”, the “Draft instrument on the carriage of goods [wholly or partly] [by sea]” and the “Draft convention on the carriage of goods [wholly or partly] [by sea]”. See UN Docs A/CN.9/WG.III/WP.21, A/CN.9/WG.III/WP.32 and A/CN.9/WG.III/WP.56 respectively. After the end of the third reading at the 20th session, the Secretariat prepared a consolidated and revised version of the “Draft convention on the carriage of goods [wholly or partly] [by sea]”, UN Doc A/CN.9/WG.III/WP.101 for consideration by the Working Group in the 21st session. During the 21st session, the Working Group approved the title of the draft convention, as the “Draft UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea”. All the above documents are available online at http://www.uncitral.org/uncitral/en/index.html (last visited on 13 October 2008) along with other Working Group III documents referred to in this report.
22 A detailed list of the attendees can be found in UN Doc A/CN.9/621.
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consolidated or revised provisions of the draft convention contained in UN Doc A/CN.9/WG.III/WP.81 were used as a basis for the continuation of the deliberations at the session. The Working Group also had before it position papers, proposals and comments from various attendees. At the end of the nineteenth session the Working Group had discussed most of the text up to draft article 43 and agreed to postpone the third reading of the remaining draft articles until the twentieth session in Vienna.

At its twentieth session at the UNO City in Vienna between 15 and 25 October, 2007, Working Group III continued with its third reading, commencing with draft article 42, and continued with Chapter 10 of the draft convention. There were various position papers, proposals and comments submitted to the Working Group. At the end of the twentieth session the Working Group had completed the third reading of the draft convention and agreed to complete the final review at the twenty-first session in Vienna.

At its twenty-first session at the UNO City in Vienna between 14 and 25 January, 2008, the Working Group commenced its final review of the draft convention on the basis of the text contained in UN Doc A/CN.9/WG.III/WP.101 accompanied by several position papers, proposals and comments. At the closing of its deliberations, the Working Group approved the text of the draft convention on contracts for the international carriage of goods wholly or partly by sea.

At the forty-first session of the UNCITRAL Commission held in New York between 16 June and 3 July, 2008, the delegates deliberated on the basis of the text of the draft convention appearing as an annex to the report of the twenty-first session of Working Group III in Vienna. During the deliberations a consolidated and revised version of the draft convention was produced by the

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23 A detailed list of documents the Working Group had before it can be found in UN Docs A/CN.9/WG.III/WP.80 and A/CN.9/WG.III/WP.80/Corr.1.
24 The deliberations and decisions of this session are published in “Report of Working Group III (Transport Law) on the work of its nineteenth session”, UN Doc. A/CN.9/621.
25 A detailed list of documents the Working Group had before it can be found in UN Docs A/CN.9/WG.III/WP.92 and A/CN.9/WG.III/WP.92/Corr.1.
26 The deliberations and decisions of this session are published in “Report of Working Group III (Transport Law) on the work of its twentieth session”, UN Doc. A/CN.9/642.
27 The documents the Working Group had before it are UN Docs A/CN.9/WG.III/WP.102 and A/CN.9/WG.III/WP.103.
28 The deliberations and decisions of this session are published in “Report of Working Group III (Transport Law) on the work of its twenty-first session”, UN Doc. A/CN.9/645.
By the end of the session the Commission finalized and approved the text of the draft convention with a view to submitting it to the General Assembly for adoption at its sixty-third session, in 2008.31

This report focuses on particular aspects of the Rotterdam Rules which will result in significant changes in the carriage of goods by sea law in many jurisdictions. The Rotterdam Rules draws largely from the Hague-Visby and Hamburg Rules, incorporating significant elements from each. Nevertheless, from the very nature of the compromise reached in Working Group III, there will be considerable changes to the existing laws of jurisdictions which adhere to the Hague-Visby or Hamburg Rules and major changes to the laws of jurisdictions which continue to subscribe to the Hague Rules.

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30 The revised version of the text was circulated as a conference room paper during the 41st Commission session as contained in UN Doc A/CN.9/XLI/CRP.9.
3. THE UNCITRAL PROCEDURAL FRAMEWORK

In the context of the present discussion it is important to note that there are certain established practices and procedures that are followed as a matter of course within United Nations bodies. UNCITRAL is no exception where such standard procedures prevail. The deliberations that took place within UNCITRAL in the process of the development of the Rotterdam Rules and the decisions that emerged from those deliberations were consonant with the practices and procedures of the Commission.\(^{32}\)

The Working Group session and the 41st Commission session was chaired by Mr. Rafael Illescas of Spain. Mr. Walter de Sa Leitao of Brazil was the rapporteur in the 19th and 21st session while Mr. V. D. Sharma of India was the rapporteur in the 20th session of the Working Group. The Chairman with the assistance of the Secretariat, consisting of Mr. José Angelo Estrella Faria, Ms. Kate Lannan, Ms. Claudia Gross, Mr. Jae Sung Lee and Ms. Franca Musilino, played a key role in guiding the proceedings at the sessions. The Secretariat's contribution was indispensable in the preparation and coordination of documents which were considered by the Working Group and the Commission.

The Working Group operated by way of consensus and compromise. Where a substantial majority of the delegations expressed a clear preference for a specific approach or wording, those delegations in the minority, in a spirit of compromise accepted it.

The workaday procedure of the Working Group during the above-mentioned three sessions can be described as follows. The Chairman introduced each draft article for consideration by the delegates. Often the long articles were introduced in paragraphs and the floor was opened up for interventions from the delegations that raised their flags. It is notable that consistent with established UNCITRAL practice, observer delegations actively participated in the deliberations. The draft convention contained textual choices in square brackets and variants, which indicated that the wording was not yet finalised and would be adopted by way of consensus by the delegations. The Working Group was reminded that the text contained in the second draft reflected the results of negotiations within the Working Group since 2002, and that while the provisions

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\(^{32}\) It is standard UNCITRAL procedure not to identify the delegations making specific interventions during the session in its sessional reports, unless there is a specific written proposal presented to the Working Group for its consideration. This “sanitization” apparently results from the notion that the sessional reports and the decisions described therein are the product of the Working Group independently from its constituent delegations. The author of this report has, on some occasions, identified the delegations that made specific interventions during the nineteenth, twentieth and twenty-first sessions by compiling his observation notes and the sessional reports. This has been done for further detailed study into the dynamics of different delegations at a later stage.
of the draft convention could be further refined and clarified, to the extent that they reflected consensus already reached by the Working Group, the policy choices should be revisited if there was a strong consensus to do so. Once the discussion on a draft article was completed, the Chairman summarised the interventions and drew conclusions on the relative support for the various proposals and textual choices in square brackets or variants. The delegations paid close attention to these conclusions which are similar to rulings, and sought clarifications and elaborations to ensure that the conclusions accurately reflected the discussion and decisions taken by the Working Group. The conclusions drawn by the Chairman reflected the decisions made by the Working Group and were set out in the session reports.

While the Working Group was in session, small drafting groups were formed when a majority of the delegates proposed changes in wording while discussing a draft article. The new draft articles were then circulated amongst the delegates to facilitate further discussion on those articles. Also, portions of the sessional reports were circulated amongst the delegates for review and to facilitate the adoption of the report on the final day of the session.

The level of participation amongst the delegates attending the sessions varied widely with a few delegations intervening in respect of every article while a few delegations shied away from making even a single intervention during the whole period of the session. Though intervening in respect of every article is not necessarily a sign of leading the discussion or exerting influence, it may be interesting to note that the active delegations have been shaping the draft convention right from the time of formation of the Working Group. The delegations with a high level of participation during the last three sessions were the China, Denmark, Finland, Germany, Italy, Japan, Netherlands, Republic of Korea, Sweden, Switzerland and United States. Delegations with a medium level of participation included Australia, Brazil, Canada, France, Gabon, Ghana, Greece, Nigeria, Norway, India, Senegal, Spain, BIMCO, ICS, P&I Clubs, and Shippers Council. Among the countries with low, if any, interventions were the Colombia, Czech Republic, Iran, Pakistan and Russian Federation. The absence of the United Kingdom during the nineteenth session and little participation during the discussions at the subsequent sessions was conspicuous.

It is interesting to note that although a small proportion of the world’s maritime trade is governed by the Hamburg Rules, almost one-third of the countries participating in Working Group III have adopted that regime. Many of them felt strongly that the draft convention should represent significant progress over the Hamburg Rules. Also, the Central and West African States formed the
African Group\textsuperscript{33} which held consultation meetings to develop a common stance and make proposals accordingly during the Working Group sessions.

\textsuperscript{33} The countries which formed the African Group are Angola, Benin, Burkina Faso, Cameroon, Congo, Côte d’Ivoire, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Ghana, Guinea, Guinea-Bissau, Mauritania, Niger, Nigeria, Senegal, Togo.
4. DELIBERATIONS AND DECISIONS

4.1 Scope of application

In order to promote international uniformity and the observance of good faith in international trade in the law relating to carriage of goods by sea, the draft convention has been given a relatively wide scope of application – substantially wider than that of the prevailing regimes of the Hague Rules, the Hague-Visby Rules and the Hamburg Rules.

The Working Group during the course of the deliberations at the formal Working Group sessions and at special seminars and meetings34 agreed in substance as to what types of transactions should be within the scope of the convention. The Working Group agreed that the draft convention should cover transactions - that are functionally similar to those covered under the Hague and Hague-Visby Rules; those covered by the non-negotiable bill of lading substitutes such as sea waybills or data interchange receipts; those covered by electronic bills of lading and their substitutes; and those in which no document is issued but the parties are functionally similar to those in a traditional bill of lading transaction. The Working Group also agreed that the instrument is intended to cover contracts in the liner trade35 because such contracts are less likely to be negotiated individually and because a certain inequality of bargaining power between the shipper and the carrier is assumed to exist. Likewise, the Working Group agreed that the instrument should generally speaking not cover the tramp trade, where individually negotiated charterparties and an equality of bargaining power are typically present. It was also agreed that with respect to contracts of carriage in non-liner transportation, the Rotterdam Rules would not apply except where there is no charterparty or other contract between the parties for the use of a ship or of any space thereon; and when a transport document or an electronic transport record is issued.

A mix of three different approaches was identified for defining the scope of application of the Rotterdam Rules, namely the “documentary” approach, under which the application of the convention would turn on the issuance of a particular type of document, the “contractual” approach, under which application would depend on the parties concluding a particular type of contract, without regard to whether a particular document was issued, and the “trade” approach,

35 Article 1(3) of the Rotterdam Rules defines "liner transportation" as a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.
in which application of the convention would turn on the nature of the trade in which the carrier was engaged. It is submitted that all of these approaches have strengths and weaknesses and this has been implicitly if not expressly recognized in the deliberations. Any of them would work for the vast majority of transactions that everyone agrees should clearly fall within or outside the convention. But, with each approach, there is a danger that some transactions at the margins would accidentally be included or excluded from the convention’s scope.

The Working Group agreed on a modern, hybrid proposal prepared under the leadership of Professor Hannu Honka of Finland. The proposal takes advantage of the strengths of each of the three approaches and minimizes simultaneously the weaknesses. This proposal starts with a contractual approach, by stating that the convention applies to all contracts of carriage by sea that meet certain geographic conditions. This approach, standing alone, is too broad and would sweep in contracts that all agree should not be subject to the convention; therefore, the proposal then uses a trade approach to exclude charterparty contracts and other non-liner contracts. It was observed that the exclusion of all non-liner contracts could result in the exclusion of certain transactions that the Working Group agreed should be included. Such transactions technically do not meet the definition of contracts in the liner service; however, they essentially operate as if they were in the liner service and issue traditional liner service bills of lading. Therefore, the policy justification for subjecting them to the convention’s mandatory rules applies to them just as strongly as in the strict liner context. This problem is addressed by adding a provision based on the documentary approach that would bring back into the Rotterdam Rules’ coverage contracts of carriage in the non-liner service where a traditional liner-service-type bill of lading has been issued. This innovative approach is demonstrative of a practical solution to a frustrating problem that has plagued previous carriage of goods conventions.

One of the most controversial aspects of the Rotterdam Rules has been the coverage of the entire contract of carriage including land carriage preceding the loading of the vessel and land carriage subsequent to the unloading of the vessel.

In sharp contrast with the previous international maritime transport conventions, the application of the Rotterdam Rules is contractual which is
defined by the contract of carriage itself.  
If the contract covers land carriage preceding the loading of the vessel and land carriage subsequent to the unloading of the vessel, then the Rules also cover such carriage. But if the contract covers only the maritime leg of a multimodal movement, then that is all that the Rules cover. In other words, if a contract of carriage provides for a shipment from one port to another port, then the Rules' coverage is simply “port-to-port.” But if a contract of carriage provides for a shipment from the shipper’s manufacturing plant to the consignee’s warehouse, then the Rules’ coverage is “door-to-door.”  
This door-to-door coverage of the Rules is different from traditional multimodal coverage. Ideally, in a multimodal regime, the contract of carriage should provide for any two (or more) modes of carriage and could also govern a shipment involving only road and rail transport. The new convention, in contrast, requires a maritime leg. Since the existing liability regimes are port-to-port or narrower, door-to-door coverage was controversial. The Working Group finally agreed on a modified door-to-door approach that has come to be called a “maritime plus” or “limited network” regime. This means that when there is a through bill of lading covering an international multimodal shipment, and one of the legs of the journey is by sea, then, as between the parties to the contract, the convention’s terms, including its liability terms, apply, regardless of whether the damage occurred on the ocean leg or during the inland carriage. This is a significant improvement over the current situation where the liability rules depend on where damage occurred. This uncertainty is presently the cause of much litigation.

There is one significant exception to this regime. During the early days of the preparation of the draft convention many European delegations initially opposed a door-to-door scope because they feared that it would conflict with existing European unimodal regimes, such as the CMR and CIM-COTIF (the European

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41 See Rotterdam Rules, definition of “contract of carriage”, article 1(1).
42 Similarly, the Rotterdam Rules’ coverage may be “door-to-port” or “port-to-door,” depending on the scope of the contract. See draft convention, article 11.
43 United Nations Convention on International Multimodal Transport of Goods, May 24, 1980, article 1(1), UN Doc TD/MT/CONF/16 (1980), (defining “international multimodal transport” as “the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country”) (hereinafter “Multimodal Convention”).
44 See supra, note 41, “... The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.
45 See for example, Proposal by the Netherlands on the application door-to-door of the instrument, UN Doc A/CN.9/WG.II/WP.33, para. 1(c).
46 See Rotterdam Rules, articles 5, 6 and 7.
47 Ibid., articles 11 and 12.
49 Article 3(1) of the Convention Concerning International Carriage by Rail (COTIF), May 9, 1980, 1987 Gr. Brit. T.S. No. 1 (Cm. 41), provides that “international through traffic” is subject to the
road and rail conventions). The Rotterdam Rules deals with this by providing
that, if it can be proved that the damage occurred during land transport that
would have been subject to a mandatorily applicable international convention,
then that land convention will apply, otherwise these Rules will apply.  

Another development in the Rules in contrast to the previous international
maritime transport conventions is that the old rules were developed at a time
when multimodal shipping contracts were much less common, and therefore it
was appropriate for those rules merely to regulate the relationship between the
contracting shipper and the contracting carrier. The early regimes did not
address the responsibilities of parties, other than contracting parties, who
actually performed the contract. This caused some problems from the beginning,
because shipowners have always contracted with independent stevedores and
terminal operators to load and unload vessels, and to store cargo. Different
countries, and different courts within a single country, have dealt with these
issues inconsistently. The resulting uncertainty has been a source of much
litigation. Under modern commercial shipping practices, and with the increasing
number of door-to-door contracts, more and more of the contracting carrier’s
responsibilities are performed by others. This is addressed in detail in this report
under the heading “Himalaya Clauses”.

There was not much support within the Working Group for application of the
draft convention to suits against inland performing parties (i.e., trucks and
railroads), but there was widespread support for applying the convention to
maritime performing parties  (e.g., terminal operators and stevedores) in
addition to the parties to the contract. This is an improvement over the current
law and discussed in detail in this report under the heading “Himalaya Clauses”.
Cargo claimants will remain free to sue inland performing parties under the laws
of their national jurisdictions.

Based on a US proposal, the Rotterdam Rules allow for certain derogations
from the Rules with respect to “volume contracts”. This is discussed in detail in
this report under the heading “Volume Contracts”. The corollary of derogations is
the use of a convention regime in respect of carriage between non-contracting
states. While this is not expressly provided for in the Rules, under general
principles of law there should be no impediment in invoking the Rotterdam
Rules through the carriage contract.

“Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM),” which
forms Appendix B to COTIF. These rules are hereinafter referred to as “CIM-COTIF”. These rules
were amended by the Protocol of Modification of 1999.

50 See Rotterdam Rules, article 26.

51 For definition of “maritime performing party”, see, infra, note 144.

52 See Rotterdam Rules, article 18.

53 For definition of “volume contract”, see, infra, note 175.
4.2 The obligations of the carrier

The basic obligation of a carrier under a contract of carriage of goods is to carry goods from the place of receipt to the place of destination and deliver them to the consignee at the appropriate time in the same condition as they were at the time of receipt. The obligation of the carrier is set out in article 11 of the Rotterdam Rules, except that no reference is made to the time by which delivery must take place and to the conditions of the goods on delivery. However article 21 provides that delay in delivery occurs when the goods are not delivered at destination within the time agreed. Pursuant to article 17(1), the carrier is liable for loss of or damage to the goods and for delay in delivery. Since the time of the Harter Act the legislators have deemed appropriate to set out the fundamental obligations of the carrier relating to providing a seaworthy ship and the custody of the cargo. They were set out in legislation of various national jurisdictions which followed the Harter Act and also the Hague Rules.

With respect to the Hamburg Rules, since the basis of carrier liability is “presumed fault”, it was not found necessary to explicitly provide for carrier’s liability in relation to seaworthiness. Similarly there is no express provision relating to carrier’s liability in terms of custody of the cargo on board. Both these issues are considered to be adequately covered by the provision in article 5(1) pursuant to which the carrier is liable for cargo loss or damage from whatever cause unless he is able to discharge the burden of proof imposed on him that he, his servants and agents took all preventive measures that could reasonably be required to avoid the occurrence and its consequences. In respect of seaworthiness a further analytical probe would indicate that the lower threshold of exercising due diligence to make the ship seaworthy before and at the beginning of the voyage in the Hague-Visby regime was discarded in the Hamburg Rules. Arguably therefore, there is an implied continuous obligation on the carrier to maintain his ship in a seaworthy condition. Liability squarely rests on the carrier for cargo damage regardless of the circumstances subject to discharging the burden of proving that “he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences”.

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54 Pursuant to article 3(2) of the Hague-Visby Rules, the carrier must “properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried”. The provision is silent about the obligation to deliver the goods at destination. The only provision in the Hamburg Rules is article 5 which relates to the liability of the carrier in case of loss, damage or delay.
55 For the sake of clarity, liability for delay is excluded if nothing is said in the contract of carriage in respect of the time of delivery, because that could only be done by qualifying delay as failure to deliver within a reasonable time, a description extremely vague which could give rise to much litigation.
The UNCITRAL Working Group III however preserved the traditional obligations, even though, in view of the door-to-door scope of application of the Rotterdam Rules, it was necessary to regulate separately the obligations relating to the care of the cargo and those relating to the seaworthiness of the ship. The former, set out in article 13(1), apply throughout the period of responsibility of the carrier. The latter, set out in article 14, applies only to the voyage by sea. But while the obligations relating to the care of the cargo are the same as those in the Hague-Visby Rules, those relating to the seaworthiness of the ship, though not differing quality-wise (they are still obligations to exercise due diligence), are significantly different time-wise since they are now continuous obligations and not only obligations to be fulfilled at the beginning of the voyage.

4.2.1. The continuing obligation of seaworthiness

It is obvious that the concept of seaworthiness is peculiar to maritime law. It is also of importance to note that whereas the concept is primarily one that is intimately associated with private law, being an element of maritime safety there are certain public law connotations that cannot be overlooked. While it is beyond the scope of this report to enter into a detailed comprehensive discussion of the subject of seaworthiness, it is a fundamental observation that in the traditional law of carriage of goods by sea exemplified by the Hague/Hague-Visby Rules, the requirement by the carrier with respect to seaworthiness has never been an absolute obligation. In other words the carriers’ obligation under that regime is not to provide a seaworthy ship at all costs, but rather to “exercise due diligence to make the ship seaworthy at the beginning of the voyage”. The nature of the obligation is obviously one that has consciously been cast at a lower than absolute threshold. Not only is due diligence the most significant element of the seaworthiness obligation, but also, it need only be exercised before and at the commencement of the voyage. The jurisprudence on these two issues is ample and well known and there is, therefore, no need to dwell on it.

It is pertinent to note in this context that the application of the obligation of seaworthiness in the realm of charterparties is multifarious. In some kinds of charterparties the obligation is identical to that of the existing carriage of goods Rules. In others the obligation is deemed to be continuous in cases where the charterparty contains a maintenance clause. In other charterparties the doctrine of stages applies, in other words the obligation is triggered each time a vessel leaves a port even if that is part of the same voyage. In virtually all cases the obligation is not an absolute one to provide a seaworthy ship but simply to exercise due diligence to make it seaworthy.

59 See Hague/Hague-Visby Rules, article 3(1).
60 If a charterparty contains terms to the effect that the ship will be “maintained in a thoroughly efficient state during service”, then the undertaking will be considered as a continuing one. See M Wilford and J Kimball, Time Charterers, LLP, 4th ed. 1995, at pp. 96-97.
In comparison with all of the above situations it is a significant point to note that in the Rotterdam Rules the obligation is continuous one but is still cast at the lower threshold of exercising due diligence and is expressed in the following terms "The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to: [make and keep the ship seaworthy... etc]."\(^{61}\)

4.3 The allocation of the burden of proof

The provisions dealing with the allocation of the burden of proof in the draft convention are the result of very protracted debates during the Working Group sessions and also through formal and informal consultations of the participating delegations and various interest groups of the shipping industry. It has been the most difficult and complicated aspect of the liability regime of the carrier dealt with during the Working Group sessions, in particular because of the different views on the legal nature of the items in respect of which the carrier may not be liable.

In common law jurisdictions it is preferable to clearly itemize the exceptions to a rule in any legal instrument. By contrast, in civil law jurisdictions the need for a long list of items to which a rule may not apply is not readily appreciated. As well, where there is presumed fault on the part of the carrier for loss or damage proven to have occurred during its period of responsibility, from a civil law perspective it is felt that a shifting back and forth of the burden of proof is unnecessary.\(^{62}\) But as a trade-off for not accepting article 5(1) of the Hamburg Rules as the sole basis for determining the rights and obligations of the carrier and cargo interests, the list in article 4(2) of the Hague/Hague-Visby Rules is incorporated together with the removal of the defences of error of navigation

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\(^{61}\) See Rotterdam Rules, article 14.

\(^{62}\) It is notable in this context that the debate at Brussels in October 1922 included an exchange between the Norwegian Secretary-General of its Ministry of Justice, Mr Alten, Sir Leslie Scott and Monsieur Franck. Mr Alten pointed out that under the Continental system of law, the liability of a carrier was in principle an 'ex culpa' liability and consequently the list of exceptions in the proposed article 4(2) (b)-(p) seemed to him to be redundant. The answer to that contention was compelling in the following exchange between Professor Berlingieri and Monsieur Franck, as chairman:

\textit{The Chairman (Monsieur Franck)} - ... We cannot create a convention if we cannot find a formula that covers both instances. If, from the vantage point of our own law, it is sufficient for the captain to be exonerated in all cases of force majeure or unforeseeable circumstances, it is not sufficient under Anglo-Saxon law. We must consequently create a formula that has a common meaning.'

\textit{Mr Berlingieri} – We could not put a formula such as that in the Italian Code

\textit{The Chairman} – The solution will be extremely simple in practice. You will not have to introduce the formula into your Code but you will have to translate the clause honestly into your law ....' (emphasis added.)

and management of the vessel and of fire caused by fault of the servants or agents of the carrier as listed under article 4(2) (a) and (b) of the Hague-Visby Rules. The Rotterdam Rules treat fire just as a relief of liability of the carrier. Furthermore, neither the Hague-Visby Rules nor the Hamburg Rules regulate in full the allocation of the burden of proof, because they do not state which, if any, is the burden of proof resting on the claimant. Pursuant to article 17 of the Rotterdam Rules the allocation of the burden of proof has been regulated as follows:

The initial burden of proof is on the claimant who must prove that the goods have been lost or damaged and, that the loss or damage occurred during the period of responsibility of the carrier.\(^{63}\)

The burden of proof then shifts on the carrier, who may alternatively prove

(a) that the cause of the loss, damage or delay was not due to his fault or to the fault of the persons for whom he is responsible\(^{64}\), or

(b) that one of the enumerated perils which provides relief from liability, caused or contributed to the loss, damage or delay.\(^{65}\)

In the first case, the claim is rejected or reduced according to whether the absence of fault related to the only cause or one of the causes of the loss, damage or delay.

In the second case, the claimant on whom the burden of proof has shifted has three alternatives:

(i) pursuant to article 17(4)(a) he may defeat the presumption by proving that the fault of the carrier caused or contributed to the article 17(3) peril on which the carrier relies\(^{66}\), or

(ii) pursuant to article 17(4)(b) he may defeat the presumption by proving that another event, which is not an article 17(3) peril, caused or contributed to cause the loss, damage or delay, or

\(^{63}\) See Rotterdam Rules, article 17(1).

\(^{64}\) Ibid., article 17(2). It is to be noted that the basis of liability in the Hague-Visby Rules and in the Hamburg Rules is also fault based.

\(^{65}\) Ibid., article 17(3).

\(^{66}\) In the view of a commentator, this provision is curious. It provides that, despite the carrier establishing the applicability of an exemption under article 17(3), it will still be liable for all or part of the loss, etc, if the claimant proves that the carrier (or a person for whom it is responsible) caused or contributed to the event or circumstance on which the carrier relies, i.e., although the carrier has proved it is not at fault under article 17(3), the claimant can prove that it is at fault under article 17(4)(a). See, The Hon Justice Steven Rares, “The Onus of Proof in a Cargo Claim – Articles III and IV of the Hague-Visby Rules and the UNCITRAL Draft Convention”, presented for the MIG/MLAANZ lecture series, 23 July 2008.
(iii) pursuant to article 17(5)(a) he may defeat the presumption by proving that the loss, damage or delay was probably caused or contributed to by the unseaworthiness or uncargoworthiness of the ship.\(^{67}\)

If the claimant chooses alternative (i) and is successful, the carrier has no further defence. If instead he chooses alternative (ii) or (iii) and is successful, the burden of proof shifts once more on the carrier.

In case the claimant has chosen alternative (ii) the carrier may, pursuant to article 17(4)(b), prove that the other event that caused or contributed to cause the loss, damage or delay is not attributable to his fault or to the fault of the persons for whom he is responsible.

In case the claimant has chosen alternative (iii) the carrier may, pursuant to article 17(5)(b), either prove that the loss, damage or delay was not caused by the unseaworthiness or uncargoworthiness of the ship or prove that he had exercised due diligence to make and keep the ship seaworthy and cargoworthy.\(^{68}\)

The list of perils enumerated in article 17(3) of the Rotterdam Rules, with some minor changes, are similar to those in article 4(2) of the Hague-Visby Rules from (c) to (p). Unlike the Hague-Visby Rules, however, article 17(3) of the Rotterdam Rules expressly provides that the carrier bears the burden of proving that one of the circumstances specified, caused or contributed to the loss, damage or delay. Notably, article 17(3) of the Rules omits the ‘nautical fault exception’. That relieves the carrier of responsibility where the damage was caused by the actions of the master, mariner, pilot or servants of the carrier in the navigation or management of the ship. Instead, the carrier is now to be liable for the acts and omissions of the master or crew, any performing party, employees or agents of the performing party or any other person that performs or undertakes to perform the carrier’s obligations under the contract of carriage at the carrier’s request, or under the carrier’s supervision or control.

In the Rotterdam Rules the carrier is not relieved from liability for loss or damage caused by fault in the navigation or management of the ship. The carrier’s relief from liability for nautical fault of the master or crew is considered unjustified by reason of the principle of *respondeat superior*; relief from liability for loss or damage caused by fire due to fault of the servants or agents of the carrier is unjustified because of seaworthiness being made a continuous obligation.

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\(^{67}\) Unlike the Hague-Visby Rules, the Rotterdam Rules explicitly puts the burden of proving unseaworthiness etc. on the cargo claimant.

\(^{68}\) See article 14; It extends the concept of seaworthiness, and hence the obligation of due diligence by requiring the carrier to keep the vessel seaworthy and cargoworthy during the voyage.
The Rotterdam Rules create a subtle but tactical alteration in the “ping-pong game of burden-shifting”\textsuperscript{69}. Article 17(5) of the Rotterdam Rules reformulates the concepts in article 4(1) of the Hague-Visby Rules.\textsuperscript{70} However, article 17(5) of the Rotterdam Rules requires the claimant to prove that unseaworthiness etc. caused or contributed to the loss or damage. While article 4(1) of Hague-Visby Rules is framed as a negative proposition\textsuperscript{71}, article 17(5) of the Rotterdam Rules is framed in the positive\textsuperscript{72}. The Australian Government noted in its comments to UNCITRAL that, once the claimant establishes a loss, the existing rules place the burden of proof as to the cause of loss on the carrier effectively. It observed:\textsuperscript{73}

‘This is based on the carrier being in a better position than the shipper to know what happened while the goods were in the carrier’s custody. If there were more than one cause of loss or damage, then under those regimes the carrier had the onus of proving to what extent a proportion of the loss was due to a particular cause. The current text changes this and puts part of the onus of proof on the shipper...

33. Australia argues that the shipper (i.e. the claimant in this case) would have difficulty proving unseaworthiness, improper crewing, equipping or supplying, or that the holds were not fit for the purpose of carrying goods. This change to the general rule on allocation of liability is expected to affect a significant number of cargo claims and shippers will be disadvantaged in cases where there is more than one cause of the loss or damage and a contributing cause was the negligently caused unseaworthiness of the vessel. In such cases, the shipper will bear the onus of proving to what extent unseaworthiness contributed to the loss.\textsuperscript{74}

The criticism against article 17(5) of the Rotterdam Rules is nevertheless defended by the drafters of the convention as a provision reflecting how claims are handled in practice.

It is notable that article 4(2)(q) of the Hague/Hague-Visby Rules applies where the damage arises without the fault or privity of the carrier or of the

\textsuperscript{69} The burden of proof has been described as ‘the ping-pong game of burden-shifting’ in the case \textit{Nitram Inc v. MV Cretan Life}, 599 F2d 1359 (CA5 1979) at 1373.
\textsuperscript{70} Both the articles deal with the liability of the carrier where the damage arises or results from the unseaworthiness of the vessel. Both the articles require the carrier to prove that it exercised due diligence or that the damage was not caused by the unseaworthiness of the vessel etc.
\textsuperscript{71} The provision reads as ‘Neither the carrier nor the ship shall be liable for the loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the carrier to make the ship seaworthy...’
\textsuperscript{72} The article provides ‘The carrier is also liable ... for all or part of the loss, damage, or delay if: (a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship...’
\textsuperscript{73} See “Comments received from Governments and intergovernmental organizations – States – Australia – 14 April 2008”, UNICTRAL 41st session, New York, 16 June - 3 July 2008, UN Doc A/CN.9/658, paras. 32 and 33.
actual fault or neglect of his servants or agents with the burden of proof resting on the person claiming the benefit available in that provision. In contrast, the same benefit is provided for as a separate item under article 17(2) of the Rotterdam Rules in terms of the carrier’s relief from liability who has to carry the burden of proof.

Article 17 (2), (3) and (6) of the Rotterdam Rules affect the position under the Hague/ Hague-Visby Rules relating to carriers’ liability in circumstances involving concurrent causes. Article 17 (2) and (3) relieve the carrier of all or part of its liability if it proves either that the cause, or one of the causes of the loss was not attributable to its fault74, or that one or more of the stipulated events or circumstances caused or contributed to the loss, damage or delay75. This reverses the Vallescura Rule76, a principle which is now codified as part of article 5(7) of the Hamburg Rules. The modified Vallescura Rule as provided in article 17(6) of the Rotterdam Rules places the primary burden of proof on the claimant to show to what extent the carrier’s fault contributed to the loss or damage or delay. As a result of this, the carrier need only show absence of fault or that of a peril listed in article 17(3) of the Rules while the claimant has the primary task of showing unseaworthiness and fault of the shipper, thus making claim recoveries considerably more difficult than under the existing regimes.

This discussion remains incomplete without a detailed consideration of whether the items listed in the so-called catalogue in article 4(2) of the Hague/Hague-Visby Rules are characterised as, exceptions, exemptions or

74 See Rotterdam Rules, article 18(2).
75 Ibid., article 18(3).
76 The Supreme Court of the United States enunciated, in Schnell v The Vallescura, 293 US 296 at 306, a principle known as the Vallescura Rule. There, Stone J, delivered the opinion of the Court and said:

‘Where the state of the proof is such as to show that the damage is due either to an excepted peril or to the carrier’s negligent care of the cargo, it is for him to bring himself within the exception or to show that he has not been negligent ...

Similarly, the carrier must bear the entire loss where it appears that the injury to cargo is due either to sea peril of negligent stowage, or both, and he fails to show what damage is attributable to sea peril.’

Stone J explained that this result arose because of the effect of the presumption, that where goods were delivered in apparent good order and condition to the carrier but out-turned in a different condition, the carrier had the burden of showing facts relieving him from liability. Thus, where the carrier cannot demonstrate what part of any damage to cargo was attributable to a cause falling within an exception under article 4, he must bear responsibility for the whole loss or damage.

Moreover, if unseaworthiness is a cause of the loss and the carrier is in breach of its overriding obligation to exercise due diligence to make the ship seaworthy as required under article 3(1), it cannot rely on an exception under article 4. See Tetley, Marine Cargo Claims (4th ed., Thomson, 2008) at p. 325 and footnote 44. The principles in the Vallescura Rule are applied also in Australia, Canada and England.
exonerations. The confusion is exacerbated by the fact that both “exemption” and “exception” is used in article 4 of the Hague/Hague-Visby Rules.77 It is submitted that these are not exceptions in the true sense; if they were, the convention in question would not without an express provision to the contrary, apply to the items listed under article 4(2) of the Hague/Hague-Visby Rules. They are not exonerations of liability because they are not absolute exceptions. Since the liability of the carrier is fault based and not strict liability, the so called catalogue is simply a list of circumstances that would reverse the burden of proof and create a rebuttable presumption that the damage was not caused by the carrier’s fault.78 Therefore, the items listed in article 4(2) of the Hague/Hague-Visby Rules are nothing more than exemptions which may be tentatively defined as exceptions to the rule applicable to specified circumstances as exemplified in the Safety of Life at Sea (SOLAS) Convention.79 In the same vein, the items listed in article 17(3) of the Rotterdam Rules have the same status. It is notable in this regard that the use of the words “exception” and “exemption” has been consciously avoided in this provision; instead the notion of “relief of liability” is used.

4.4 The liability regime for deck cargo

Pursuant to article 25 of the Rotterdam Rules carriage of goods on deck is permissible if, as provided in paragraph 1 in the following circumstances:

(a) such carriage is required by law;

(b) they are carried in or on containers or vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or vehicles; or

(c) The carriage on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.

Under paragraph 2 of this article the carrier is liable for loss, damage or delay in respect of deck cargo except that in respect of carriage under sub paragraphs (a) and (c) above, any loss, damage or delay is attributable to special risks involved with the carriage of such cargo on deck. According to Professor Berlingieri, where third parties who have acquired a negotiable transport document or a negotiable electronic record in good faith, there is no need to mention deck carriage with respect to (a) and (c) above because third parties should be aware that the cargo must have been carried on deck either under

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77 See paragraph 1 and paragraph 2(q) respectively.
79 See SOLAS, Chapter 1, Regulation 3, which sets out the Exceptions and Regulation 4, which sets out the Exemptions. The distinction between the two is abundantly clear. The convention does not apply to the items in Regulation 3; but under Regulation 4 application of the convention may be exempted in certain situations specified in that regulation.
compulsion under sub paragraph (a) or because of any of the circumstances mentioned under sub paragraph (c). However, in respect of carriage under sub paragraph (b) there must be express mention in the negotiable instrument in question. If there is a failure to do so, then under article 25(4) the carrier is precluded from invoking the rule allowing deck carriage. The net effect will be that deck carriage in such a circumstance will not be considered permissible; consequently for a third party the applicable regime will be as set out below.\(^{80}\)

Professor Berlingieri explains that if cargo is carried on deck in circumstances other than those referred to above, the carrier is liable to a significantly higher degree because he is not entitled to the article 17 defences. Furthermore, he is strictly liable for loss of or damage to the goods and delay in delivery due to the carriage of the cargo on deck. However there is no such strict liability if the loss, damage or delay is not due to carriage on deck but would have occurred regardless of where the cargo had been carried. The reference to “defences” made in article 25(3) relate to the reversal of the onus of proof set out in article 17(3). They do not include the basis of liability provided for in article 17(1) and (2) which continue to apply.\(^{81}\)

It is further explained by him that if the carriage on deck is in breach of the contract which requires under deck carriage, then pursuant to article 25(5) the carrier is not entitled to limit his liability. In any event the carrier is strictly liable for loss, damage or delay caused by the cargo being carried on deck. He points out that there is nothing provided in article 25 regarding whether the carrier is entitled to the article 17 defences. It can be surmised, however, that the carrier’s breach in this case being more serious than that covered under article 25(3), the provisions of article 25(3) should apply in their entirety.\(^{82}\)

4.5 Obligations of the shipper

Traditionally, the obligation of the shipper has been to deliver goods ready for carriage, and to pay freight. The current carriage of goods by sea regimes focus almost entirely on the carrier’s obligations to the shipper and very little liability is imposed on the shipper. The shippers’ obligations are not well defined as in the Hague and Hague-Visby Rules, only two paragraphs of article 4 address the issue of shippers’ obligations. Article 4(3) does not even impose liability, but rather preserves preexisting negligence liability from implied repeal. Article 4(6) imposes strict liability, but only in narrow circumstances. The Hamburg Rules do not expand on that liability.\(^{83}\) The Rotterdam Rules recognizes the bilateral nature of the shipping transaction and also that the shipper is better situated

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\(^{81}\) Ibid.

\(^{82}\) Ibid.

\(^{83}\) See "Possible Future Work on Transport Law", UN Doc A/CN.9/497, para. 33 at p.8.
than the carrier to avoid serious risks incidental to carriage of goods by sea. The
Rules therefore imposes more requirements on shippers, particularly the
obligation to share information, and explicitly imposes liability on a shipper that
breaches the requirements.\textsuperscript{84}

4.5.1. Obligation of the shipper to provide information

The main obligation of the shipper under the Rotterdam Rules is to facilitate
the proper handling and carriage of the goods by the carrier. This is dependent
on the obligation to deliver the goods ready for carriage as laid down in article
27 of the Rules. Before and during the transportation, the carrier may need
information in order to provide proper handling of goods. The obligation of the
shipper to provide such information is found in articles 28 and 29. No derogation
from article 29 is allowed if the parties enter into a volume contract. Also, there
is a specific obligation of the controlling party, which may be concurrent with the
shipper, to provide additional information to the carrier during its period of
responsibility.

During the Working Group sessions, articles 28 and 29 were severely
criticized as examples of provisions where the balance in the draft convention
was perceived to have shifted as between shippers and carriers. The concern was
that the liability of the shipper remaining uncapped whereas the carrier enjoying
capped liability, particularly as the shipper under the draft convention has more
onerous obligations than under previous regimes. The Australian Government
observed: \textsuperscript{85}

‘[T]he discrepancy between the carrier enjoying capped liability and
the shipper being exposed to uncapped liability for breaches of the
same obligation. If the carrier breaches article 28, their liability is
capped under article 59 (1). Were the shipper to breach article 28, their
liability would be uncapped and uncappable. An example would be the
shipper making an erroneous declaration with respect to the goods,
even if in good faith, which results in the vessel being delayed because
the carrier could not comply with local port regulations. Such a
misdeclaration would place the shipper in breach of article 29(b) and
expose the shipper to uncapped liability for the resulting
immobilization of the vessel. The shipper could be liable not only for the
damages due to the detention of the vessel but also, on an indemnity
basis, to the carrier for any compensation claims made by other
shippers of goods on the same vessel.’

\textsuperscript{84} See Michael F. Sturley, ”The UNCITRAL Carriage of Goods Convention: Changes in Existing
\textsuperscript{85} See Comments received from Australia, supra, note 70, paras. 43-45 at p.9.
4.5.2. Other obligations of the shipper

The shipper by agreement with the carrier may undertake the obligation to load, stow etc. under a free in and out clause (FIO or FIOS) on behalf of the carrier. However, the carrier may be relieved of liability for loss of or damage to the goods if it proves that loading etc. according to a FIO or FIOS clause contributed to the loss, damage or delay. The shipper may also be obliged to assist the carrier in performing the obligation of the carrier to deliver the goods to the consignee or the holder. As a rule of thumb, the carrier delivers the goods to the consignee or the holder of the transport document depending on whether or not it is negotiable. However, if the carrier is prevented from effecting delivery, such as in a case where the consignee or the holder does not properly identify itself, then the carrier may turn to the shipper for instructions. The shipper’s failure to give correct information to the carrier may result in a misdelivery. The liability for misdelivery is not specifically dealt with in the Rotterdam Rules, and is consequently presumed to be covered by the principal rule on carrier’s liability in article 17.

4.5.3. Liability of the Shipper

The basic liability of the shipper is dealt with in article 30 of the Rotterdam Rules. This provision does not deal with the burden of proof as in the corresponding provision on liability of the carrier in article 17. The question of burden of proof with respect to the condition of fault in article 30(2) is left to be provided through national law. There was extensive debate in the Working Group as to whether the shipper ought to be liable for economic loss due to delay. As part of the compromise during the third reading of the draft convention in the Working Group, the debate led to an ambiguous provision on delay for the carrier in article 21; the request for a corresponding liability for economic loss due to delay for the shipper was omitted.

The shipper is strictly liable for breach of its obligations under articles 31(2) and 32. No derogation is permissible in a volume contract from article 32 which deals with special rules on dangerous goods. Pursuant to article 33 the liability imposed on the shipper in chapter 7 of the Rotterdam Rules applies also for the documentary shipper. However, the shipper may become liable for breach of all of its obligations under the Rules, but those of the documentary shipper is

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86 See Rotterdam Rules, article 13(2).
87 Ibid., article 17(3) (i).
88 Ibid., articles 45, 46 and 47.
90 See Rotterdam Rules, article 80(4).
91 Article 1(9) of the Rotterdam Rules defines “documentary shipper” as a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.
limited to the obligations under chapter 7, which concern the obligation to
provide information. Pursuant to article 58 if the holder of a negotiable transport
document is not the shipper and does not exercise any rights under the Rules,
such as in the case of a bank, it does not assume any liability under the contract
of carriage solely by reason of being the holder. The fulfilment of the obligation
as controlling party to provide additional information, instructions or documents
to the carrier under article 55 does not impose any liability on the holder. Article
33 makes the shipper liable for his own acts, and also for other persons.

An article on cessation of shipper's liability which was present in an earlier
version of the draft convention was deleted during the Commission session.
There was criticism that the provision ran contrary to the generally permissive
approach of the draft convention to freedom of contract.

The Rotterdam Rules introduces specific provisions on obligations and
liabilities of the shipper which are rather new compared to the existing regimes.
These provisions impose minimal liability on the shipper. Under current regimes
the shipper can be held liable under domestic law. The new provisions appear to
reflect an effort to introduce harmonized rules in this field, and promote
predictability for both carriers and shippers. The major criticism in this regard is
that the liability of the shipper is not subject to limitation. During the Working
Group sessions, this issue was raised in connection with the debate on carrier's
liability for delay. The argument was that if the shipper were to have a
respective liability for economic loss caused by delay, it could be exposed to
a very high level of financial liability. However, the need for such a limitation cap
ceased to exist as no provision on shipper's liability for delay was included in the
Rules as a part of the compromise reached on delay during the third reading.
Regardless of the deletion of shipper's liability for delay, such liability is not
precluded under national law. Also there may be a need for limitation of liability
for loss of or damage to the ship, other cargo or personal injury for which the
shipper is liable under article 30. Shipper's liability is not limited today, and that
does not seem to have caused any problems in practice. However, according to
one commentator, the fact that shipper's liability is regulated through an
international convention may give rise to more claims against the shipper. This
may in turn render limitation of liability for the shipper necessary, preferably at
an international level.92

4.6 Transport documents and electronic transport records

The Rotterdam Rules codifies the contractual relations between the parties to
a contract of carriage regardless of the type of document issued or even if no
document has been issued. The uncoupling of the law related to bills of lading
and the use of a document is a significant feature of the new regime and has been
done to facilitate e-commerce. The use of electronic bills of lading by the

92 See supra, note 89, at p. 306.
shipping industry has existed for sometime now but uncertainty remains over their legal recognition in many jurisdictions. Indeed, the desirability of a new transport convention emanated from the deliberations of UNCITRAL Working Group IV on Electronic Commerce. In the mid nineties, one item in the agenda of Working Group IV was electronification of documents of title. It was concluded that, generally speaking, the virtualization of documents of title was not a feasible proposition because of the formal function of the paper document. Instead, it was viewed that the material functions of documents of title can be incorporated into a structure of electronic messages.\textsuperscript{93}

The emphasis of the Rotterdam Rules is on the contract of carriage and not on the document. The proponents of the contractual approach advocated the adoption of a regime that would be more systematic than the existing Hague, Hague-Visby regimes. In their view, the instrumentality of contract is an integral part of the \textit{lex mercatoria}; the basic principles of which are similar in all jurisdictions.

In the Rotterdam Rules there is no specific reference to the bill of lading; the term used is ‘transport document’. There are provisions governing equivalent ‘electronic transport records’\textsuperscript{94}. Two types of documents are addressed in the Rules, namely, negotiable transport documents\textsuperscript{95} and non-negotiable transport documents\textsuperscript{96}.

Notably, the existing carriage of goods regimes do not have any provisions on electronic commerce because at the time when these regimes were negotiated, there was no commercial need to address the topic. The Rotterdam Rules has made an effort to establish a legal framework which will enable the maritime industry to participate in electronic commerce.

Chapter 3 of the Rotterdam Rules deals with electronic transport records. Article 8 of the Rules emphasises the necessity for consent when the parties use an electronic transport record. The drafters of the Rules have tried to avoid

\textsuperscript{93} See \textit{supra}, note 83 at p. 3.

\textsuperscript{94} Article 1(18) of the Rotterdam Rules defines “electronic transport record” as information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that: (a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and (b) Evidences or contains a contract of carriage.

\textsuperscript{95} Article 1(15) of the Rotterdam Rules defines “negotiable transport document” as a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.

\textsuperscript{96} Article 1(16) of the Rotterdam Rules defines “non-negotiable transport document” as a transport document that is not a negotiable transport document.
imposition of electronic transport records on a party who will need a paper
document for legal reasons, such as, where one of the parties to the carriage
contract is from a state which is not a party to the new convention and whose
law does not recognise the effect of electronic communications. Article 9 of the
Rules further emphasises the role of the parties in setting up a system that allows
electronic recording and communication of data constituting the transport
record. It lays down the minimum requirements for procedures for the use of
negotiable electronic transport records and leaves the rest to the parties. Both
articles 8 and 9 are medium and technology neutral.97 All types of systems,
including any new ones that may be developed in the future, whether or not
based on a registry system, will be recognised as having the desired effect so long
as the minimum requirements stated in articles 8 and 9 are satisfied.98

Chapter 8 of the Rotterdam Rules deals with transport documents and
electronic transport records. Article 35 provides for the issue of a transport
document or electronic transport record by the carrier99 or performing party100.
Such issuance is mandatory upon delivery of the goods for carriage unless the
shipper and the carrier have agreed not to use a transport document or
electronic transport record, or unless it is the custom, usage or practice in the
trade not to use one. Article 36 of the Rules lists the contract particulars101 which
must be included in the transport document or electronic transport record
referred to in article 35. Details are given in article 40 as to how the description
of goods in the contract particulars may be qualified by the carrier, in such a way
that the carrier does not assume responsibility for the accuracy of the
information furnished by the shipper. Article 38 deals with signature. Electronic signature is not separately defined.\textsuperscript{102}

Article 41 deals with the evidentiary value of the transport document or electronic transport record. It provides that it is always \textit{prima facie} evidence of the carrier’s receipt of the goods as described in the contract particulars, but proof to the contrary by the carrier in respect of any contract particulars is not admissible when they are included in a negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith. This is so unless the contract particulars contain a qualifying clause that complies with the requirements of article 40. In such case, the transport document or electronic transport record does not constitute \textit{prima facie} or conclusive evidence to the extent that the description of the goods is qualified by the clause. Thus, the provisions of chapter 8 of the Rotterdam Rules preserve the receipt function of a paper bill of lading in a negotiable transport document or electronic transport record.

To retain the character of the bill of lading as a document of title the Rotterdam Rules deals with symbolic or constructive possession in articles 47 and 51. Article 47 is discussed in detail in this report under the heading ”Delivery of the goods”. The issue of transfer of title to the goods from transferor to transferee of the negotiable document or electronic transport record is not addressed by the Rules. The United States delegation once mentioned that the Rules should not be further complicated as the instant issue is not a matter for transport law but for the law of sale, which is better dealt with under national law.

In the view of one commentator the Rotterdam Rules provides an excellent legal foundation for development of electronic equivalents to bills of lading, by laying down minimum requirements and providing freedom and flexibility to the international maritime community to develop systems for transfer and negotiations that are suited to their needs. Certainty in the law respecting electronic commerce can be achieved by parties to a carriage contract making the law of the new convention applicable to the contract regardless of whether or not the convention itself eventually enters into force.\textsuperscript{103}

Considering the international character of the contract of carriage it is submitted that the acceptance of the Rotterdam Rules will be the first step towards harmonization in the field of electronic alternatives to paper bills of lading.

\textsuperscript{102} See UN Doc A/CN.9/WGIII/WP.56, footnote 147 at p. 34 where a reference is made to the definition of electronic signature in the United Nations Model Law on Electronic Signatures 2001.
\textsuperscript{103} See \textit{supra}, note 98, at p. 163.
4.7  Delivery of the goods

Chapter 9 of the Rotterdam Rules deals with delivery of goods. The most controversial provision in this chapter has been article 47 which deals with delivery when a negotiable transport document or negotiable electronic transport record is issued by the carrier. Pursuant to article 47(2) the carrier can issue a negotiable transport document and has the right to deliver the goods without surrender of that document or an equivalent electronic record. The object of this provision is to solve the practical problems faced by carriers in situations where the cargo owner turns up without the requisite documentation, or does not appear at all.

The critics of this provision have pointed out that the intended remedy undermines the function of a negotiable transport document as a document of title. The system envisaged in this provision allows carriers to seek alternative delivery instructions from the original shipper or the documentary shipper thereby removing the requirement to deliver on the production of a bill of lading.

During the Commission session the Australian delegation along with several other delegations severely criticised article 47(2)(a) expressing the view that the provision will increase the risk of fraud which will impact banks and others that rely on the security offered by negotiable transport documents. The Australian delegation also criticised the statutory indemnity in article 47(2)(c) expressing concern that it will create problems for cargo insurers. The delegation went on to explain that in case of a CIF (cost, insurance and freight) shipment, insurance is arranged by the seller and the policy is assigned to the buyer when the risk of shipment is transferred. If the seller unwittingly provides an indemnity to the carrier by providing alternative delivery instructions, it will impact on any recovery action the insurer might have had against the carrier. This will result in the loss of one avenue for cargo claimants recovering for misdelivery. The delegation went further to state that the combined result of paragraph 2, subparagraphs (a)-(c) of article 47 will be such that a carrier who seeks alternative delivery instructions from a shipper or documentary shipper will be relieved of liability to the holder. Yet the shipper has to give an indemnity to the carrier, a party who has no liability.104

In response to these criticisms, the Dutch delegation emphasized that the regime under article 47 is aimed at reducing or eliminating the abuses caused by fraudulent practices that exist under the current system such as, issuing of multiple bills of lading, forgery of bills of lading and the continued circulation and sale of bills of lading even following delivery. The new regime sets up a system aimed at removing risk for bankers by restoring the integrity of the bill of lading system, which, however, may require some change in the current practices of banks and commodity traders. Furthermore, the new regime will

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104 See Comments received from Australia, supra, note 73, para. 50 at p.10.
provide relief to consignees by drawing an end to the expensive and slow process of obtaining letters of indemnity and bank guarantees.

It was observed that during the Commission session half of the Working Group wanted to delete the text of article 47(2) while the other half preferred its retention. The Chairman explained that in such a case, it is the practice of the Commission to retain the text. Nevertheless, a small drafting group was established to come up with a revised compromise text but even then the critics remained unsatisfied. After the revision, the final text of article 47(2) provides two variants of negotiable transport documents. One is truly negotiable and the other is said to be negotiable but in fact is not, because it will contain a statement to the effect that the goods can be delivered without the surrender of the negotiable document.¹⁰⁵

It will be recalled that the bill of lading which evolved from the register maintained on board ships was in its early days a non-negotiable document. With the growth in international sea borne trade, increase in complexity of business, concern for speed and the need for transferring property in the goods before they arrived at destination gave rise to the practice of transferring ownership of goods by endorsing the bill of lading to the buyer. Thus, the negotiable bill of lading came into existence which by the 18th century became a well established mercantile practice.¹⁰⁶ In contemporary times a negotiable document ensures that the seller may receive from the carrier a document “controlling the disposition of the goods”, which is now incorporated in article 58(2) of the United Nations Convention on Contracts for the International Sale of Goods (CISG)¹⁰⁷. Clause A8 of the INCOTERMS 2000 also requires the seller to provide the buyer with a bill of lading or a seaway bill as proof of delivery when a sale is concluded under a CFR (cost and freight) or a CIF contract.¹⁰⁸ However, Article 47(2) of the Rotterdam Rules diverges from the centuries old mercantile practice by providing the carrier with the right to deliver goods without surrender of the negotiable transport document or an equivalent electronic record.

4.8 Rights of the controlling party

Chapter 10 of the Rotterdam Rules deals with rights of the controlling party. The existing maritime conventions have no provisions dealing with controlling parties or the concept of the right of control. The present law is thus found in domestic law, and may therefore be somewhat different in every jurisdiction.

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¹⁰⁵ See UNCITRAL 41st Commission Session Report, A/63/17, at p. 31.
¹⁰⁶ See supra, note 58 at p. 5.
¹⁰⁷ Article 58(2) of CISG provides that “If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.”
although the broad principles are in fact fairly uniform. The drafters of the Rotterdam Rules submit that the new instrument will not tend to change existing law on this subject in any significant way, but will instead provide a solid and uniform legal basis for issues that have in many legal systems been left to unpredictable practices, particularly when there is no negotiable bill of lading in the transaction. The relevant provisions on the right of control serve to fill a lacuna in the law of many jurisdictions thereby harmonizing and modernizing the international law in this field. Because these provisions are most important when the carrier does not issue a physical piece of paper qualifying as a negotiable bill of lading, which is exactly the situation in an electronic commerce transaction, this chapter constitutes an important part of the Rules’ indirect facilitation of electronic commerce.109

4.9 Financial limits of liability

The primary purpose for the inclusion of limitation of liability of the carrier in the Rotterdam Rules and in other transport conventions is to regulate the relationship between two commercial parties in order to entitle each of them to obtain a benefit. Without this benefit of a limitation on liability, the carrier would be fully liable for all loss or damage, and where such goods were in containers, the carrier would have no knowledge regarding their contents, thus potentially exposing itself to very high and unexpected risks. Rather than bearing expensive insurance costs, and in order to share the burden of that potentially very high risk, the carrier would have to apportion it to every shipper through an increase in freight rates. By allowing for a limitation of the carrier’s liability, this allocation of risk allows the costs to both shippers and carriers to be reduced. The trade-off is that there is no full compensation for high-level losses.

The aim of an appropriate limitation on liability would reduce the level of recovery for some claims to the limitation amount, but it would not limit too many claims. The optimal limitation level would be high enough to provide carriers with an incentive to take proper care of the goods, but low enough to cut off excessive claims, yet provide for a proper allocation of risk between the commercial parties. Many delegations while expressing limitation of liability to be essentially a matter of public policy alluded to the “final word” of the illustrious Lord Denning who made such a statement in the oft-cited case of The Bramley Moore110. In that case he held in reference to a shipowner’s right to limit his liability that “there is not much justice in this rule; but limitation of liability is not a matter of justice, it is a rule of public policy which has its origin in history and its justification in convenience”.

Unlike the language used in article 6 of the Hamburg Rules, the wording under article 59 (1) of the Rotterdam Rules includes “the carrier’s liability for breaches of its obligations under this convention”. The limitation of liability is thus not

109 See, supra, note 84 at p. 262-263.
restricted to loss of or damage to goods or delay in delivery but to all other breaches that can be envisaged under the Rules. The Australian delegation during the drafting process expressed concerns with regard to the new wording considering it to be a significant change compared to the existing international law. Since such wording will cover actions in tort against the carrier, this might disadvantage the shippers. It was explained through an example that if a carrier negligently provided the wrong documents to customs and, as a result, the shipper incurred a heavy fine or other penalty, the carrier would still be covered by a limited liability, even though there may have been no loss or damage to the goods.\textsuperscript{111} The new wording will also allow the carrier to enjoy limitation of liability with respect to misdelivered goods which are considered as “lost” and avoid varied interpretation of courts in different jurisdictions where the carrier is sometimes subjected to unlimited liability. Also under the new wording where a carrier issues a transport document without qualifying the information which he knows is incorrect\textsuperscript{112} he still can limit his liability. The carrier can, however, lose the right to limit pursuant to article 61 of the draft convention.

It is noteworthy that the dual system of limitation is retained in the interests of owners of high value, light weight cargo. Even though the Rotterdam Rules retain the Hamburg Rules wording of packages or shipping units, it is doubtful whether it puts to rest the controversy regarding the use of the phrase “as packed in or on such article of transport or vehicle”. This was the subject of extensive discussion in the Australian case of \textit{El Greco (Australia) Pty Ltd. v. Mediterranean Shipping Company}\textsuperscript{113}. In this case Allsop J. expressed a strong opinion in \textit{obiter} on the meaning of the words “or unit” as contained in Article 4(5)(c) of The Hague-Visby Rules. He was of the view that the words “or units” was intended to cover articles such as cars or boilers which were capable of being carried without packaging thus rejecting the other school of thought according to which the expression “or units” was inserted to cover bulk cargo by reference to freight unit as in the US COGSA.\textsuperscript{114} Whether the addition of the words “shipping unit” clarifies the issue is yet to be judicially confirmed.\textsuperscript{115}

Article 60 of the Rotterdam Rules, which is similar to article 6(1)(b) of the Hamburg Rules provides for limits of liability with respect to delay in the amount equivalent to two and a one-half times the freight payable on the goods delayed and in respect of total loss of the goods concerned.\textsuperscript{116} This amount is not to exceed the limit established pursuant to article 59(1). Article 60 contrasts with

\textsuperscript{111} Comments received from Australia, \textit{supra}, note 73, para 56 at p.11.

\textsuperscript{112} See Rotterdam Rules, article 40(1).

\textsuperscript{113} [2004] 2 Lloyds Rep 537.

\textsuperscript{114} The author is thankful to Judge James Allsop for explaining this position during a personal discourse with the author while the Judge was teaching at the World Maritime University.


\textsuperscript{116} This provision is similar to the article 6(1)(b) of the Hamburg Rules.
the provision in the Hamburg Rules which provides that in no case should the liability for delay exceed the total freight payable under the contract of carriage of goods by sea. Under the draft convention the total freight payable is omitted in favour of the limit as set under article 59(1) i.e., in respect of the total loss of the goods. According to one delegation, article 60 may seem more favourable to cargo interests in terms of striking the requisite balance for the inclusion of provisions on limitation of liability.\(^{117}\) The draft convention thus provides more clarity on the subject.

Third parties engaged by the carrier in the performance of the contract of carriage being entitled to the defences and limits of liability, the draft convention follows the principles laid down in article 4 \textit{bis} (2) of the Hague-Visby Rules as well as article 7 of the Hamburg Rules but the wording used is different; at the same time the multimodal character of the draft convention is retained. Article 18 provides that a “maritime performing party” is entitled to the carrier’s defences and limits of liability provided for under the convention with the necessary qualifications. Detailed provisions are included regarding the circumstances under which the obligations of the maritime performing party would be assumed by the carrier are discussed under the heading “Himalaya clauses” in this report.

Limits of liability are generally discussed at the end of the diplomatic process. During the last three sessions of the Working Group there was considerable effort expended by delegations to reach a compromise figure on limits of liability. The Rotterdam Rules propose a package-based and weight-based limitation system\(^{118}\), as provided under the Hague-Visby and Hamburg Rules.

The Working Group, in considering the limitation of liability provision reviewed the historical and commercial issues along with certain additional factors in the process of choosing an appropriate level for the limitation of the carrier’s liability. During the twentieth session the Working Group proceeded to consider the text on limits of liability\(^{119}\). The Working Group was reminded that any decision on the limits of liability was to be treated as an element of the overall balance in the liability regime provided in the draft convention.\(^{120}\) There was support from a number of delegations for the suggestion made by the delegation of the United States that the consideration of the limit of the carrier’s liability should not be dissociated from certain other provisions in the draft convention, including: the special amendment procedure for the level of the limitation on the carrier’s liability\(^{121}\); the number of countries required for the

\(^{117}\) See supra, note 115 at p.298.
\(^{118}\) See Rotterdam Rules, article 59.
\(^{119}\) \textit{Ibid.}
\(^{120}\) See “Report of Working Group III (Transport Law) on the work of its eighteenth session”, UN Doc A/CN.9/616, para. 171.
\(^{121}\) See A/CN.9/WG.III/WP101, draft article 99, deleted during the twenty first session of Working Group III.
convention to enter into force\textsuperscript{122}; the provisions allowing for the application of other international treaties and of domestic law to govern the liability of the carrier in case of localized damage\textsuperscript{123} and the special rule for non-localized loss or damage which was later deleted as part of the compromise. The view was also expressed that other issues with respect to the overall balance of liabilities in the draft convention could be said to be associated with a discussion of the level of the carrier’s limitation on liability, such as the period of responsibility of the carrier\textsuperscript{124}; the basis of liability of the draft convention\textsuperscript{125}; delay in delivery of the goods\textsuperscript{126}; the period for notice of loss, damage, or delay\textsuperscript{127}; the limitation of the carrier’s liability for delay in delivery\textsuperscript{128}; and the special rules for volume contracts\textsuperscript{129}.

The question of limitation of liability of the carrier was dealt with keenly as the broad acceptability of the convention manifestly depended on the level of this issue. The debate centred on two extreme views. One group favoured Hamburg Rules based figures with limits close to those in the Rules or with a substantial increase; the other supported limits in consonance with the Hague-Visby Rules.

4.9.1. Arguments in favour of liability limits close to those in the Hamburg Rules

The arguments presented below are based on the documentation which emanated from the deliberations of Working Group III.\textsuperscript{130}

As pointed out by participants at the Working Group, the principle of monetary limitation of carrier’s liability had been introduced in the early 20\textsuperscript{th} century as a compromise to ban the practice of carriers unilaterally excluding their liability for cargo loss or damage, at a time when such liability was not subject to a monetary ceiling under most domestic laws. Apart from the transport industry, very few other economic activities enjoyed the benefit of statutory limits of liability. Moreover, sea carriers already enjoyed a double limitation of liability. Indeed, the value of the goods already set the limit for the overall liability of the carrier, including consequential loss or damage caused by loss of or damage to goods. For higher value goods, the carrier’s liability was further limited by the monetary ceiling set forth in the applicable laws or international conventions. The combination of those rules already placed

\textsuperscript{122} See Rotterdam Rules, article 94.
\textsuperscript{123} Ibid., article 26.
\textsuperscript{124} Ibid., article 12.
\textsuperscript{125} Ibid., article 17.
\textsuperscript{126} Ibid., article 21.
\textsuperscript{127} Ibid., article 23.
\textsuperscript{128} Ibid., article 60.
\textsuperscript{129} Ibid., article 80.
\textsuperscript{130} The arguments are produced after gleaning through the “Report of Working Group III (Transport Law) on the work of its twentieth session”, UN Doc A/CN.9/642, paras. 136-143.
carriers in a privileged position, as compared to other business enterprises. The view was expressed that these circumstances should be taken into account when considering adequate monetary liability limits, which should not be allowed to stagnate at a level detrimental to cargo owners.

Delegations which supported higher limitation figures envisaged the increase of limits of the carrier’s liability from previous maritime conventions as a forward step which suitably addressed the realities of commerce and international transport. They aggressively denounced the limits provided for under the Hague-Visby Rules and demanded that the new limits should not be lower than those provided in the Hamburg Rules, namely, 835 Special Drawing Rights (SDR) per package or 2.5 SDR per kilogram of gross weight of the goods lost or damaged.

The proponents of higher limits also argued that the carriers engaged in multimodal transport were exposed to different limits of liability ranging from 8.33 SDR per kilogram for road transport to 17 SDR per kilogram for air transport. These which were considerably higher than the limits established in the Hague and Hague-Visby Rules; therefore as the draft convention had door-to-door coverage, the liability limits established in article 59(1), should not be significantly lower than the limits applicable to other modes of transport. The possibility of applying higher limits for the carrier’s liability to domestic or non localized incidents of loss or damage would propel countries to join the Rotterdam Rules as the offered higher limit would be more acceptable especially when compared to other modes in multimodal transport.

It was pointed out that an increase of liability limits would not likely have a dramatic effect on carriers’ liability insurance given the small relative weight of insurance in freight costs. It was pointed out that studies that had been conducted at the time the Hamburg Rules entered into force had suggested that the increase in the liability limits introduced with the Hamburg Rules would influence liner freight rates, at the most, only by 0.5 per cent of the total freight rate. In some countries, the liability limits for domestic carriage by sea had in the meantime been raised to 17 SDR per kilogram of gross weight, without any adverse effect being felt by the transport industry.

The Swedish delegation indicated that currently a significant volume of high value goods was carried by sea, which for many countries was the only feasible route for foreign trade. A large portion of those goods, such as paper rolls, automobiles, heavy machinery and components of industrial plants, was not packed for transportation purposes, so that the liability limits for gross weight of carried goods under the Hague-Visby Rules were far from ensuring adequate compensation Anecdotal evidence obtained from cargo insurers suggested that they would in most cases absorb the cost of insurance claims without seeking recourse from the carrier’s insurers because the amounts recoverable would be insignificant when compared to the payments made to the cargo owners. Besides
an increase in the per package limitation, the Working Group was invited to consider a substantial increase in the limits per gross weight of cargo, so as to align them with the higher limits currently applicable to road transport under the CMR\textsuperscript{131}, \textit{i.e.}, 8.33 SDR per kilogram of gross weight.

It was also argued that an increase in the carrier’s liability might prevent an increase in transportation costs to be eventually borne by consumers, since mutual associations offering protection and indemnity insurance (“P&I clubs”) were known for working efficiently and might offer extended coverage to their associates at lower rates than commercial insurance companies offered to cargo owners.

Some delegation were not satisfied with the standards of the liability limit set in the Hamburg Rules and they proposed that the draft convention should envisage a substantial increase over and above the amounts set forth in the Hamburg Rules, ideally by raising the per package limitation to 1,200 SDR, or at least to the level provided for in the Multimodal Convention\textsuperscript{132} (i.e. 920 units of account per package of other shipping unit or 2.75 units of account per kilogram of gross weight of the goods lost or damaged).

During the debate surrounding the issue it was evident that persuading domestic legislators and policy makers of 34 countries who had ratified the Hamburg Rules and a number of other countries which aligned the limits of liability provided in their domestic laws with the limits provided for in the Hamburg Rules to accept an instrument where liability limits that were lower than Hamburg Rules in 1978 was a distant vision.

4.9.2. Arguments in favour of liability limits close to those in the Hamburg-Visby Rules

The other view which was voiced in opposition to the substantive increase in the liability limits was that the limits provided in the Hague or Hague-Visby Rules was appropriate. It was suggested on behalf of those who supported this view that the draft convention should aim at setting the limits for the carrier’s liability in the vicinity of the limits provided in the Hague-Visby Rules, namely, 666.67 SDR per package or 2 SDR per kilogram of gross weight of the goods lost or damaged, whichever is the higher, possibly with a moderate increase.

The essential purpose of limitation of liability, it was stated, was to ensure predictability and certainty. The limitation on the carrier’s liability that appeared in article 59(1) of the Rotterdam Rules allows for a limitation level on per package or per kilogram basis, whichever is higher in accordance with the Hague-Visby and Hamburg Rules. It was observed that even under the liability

\textsuperscript{131} See supra, note 48.

\textsuperscript{132} See supra, note 43.
limits set out in the Hague-Visby Rules, about 90 per cent of cargo loss was fully compensated on the basis of either the limitation per package or the limitation per kilogram, since the value of most cargo carried by sea was lower than the Hague-Visby limits. From a similar perspective, it was stated that, since the adoption of the Visby Protocol the freight rates in maritime trade had decreased which had made shipments of very low value cargo feasible.¹³³ This approach can be identified as keeping in tune with the rapid changes in the process of containerization. Earlier most goods were shipped in a crate or a large wooden box that counted as one package, but with the increased use of containers, the per package limitation level was based instead on the number of packages inside the container and not on the container itself which led to an increase in the amounts recoverable from the carrier, as compared with the per kilogram limitation level or what the pre-container per package limitation would have allowed. The freedom to claim on the basis of per package or per kilogram calculation presents an added advantage to the shipper.

It was also observed that it would be incorrect to expect that the liability limits should ensure that any conceivable shipment would result in the value of the goods being compensated in case of damage or loss. It was recalled that paragraph 1 provided for an exception when the “nature and value” of the goods lost or damaged had been declared by the shipper before shipment and included in the contract particulars, or when a higher amount had been agreed upon by the parties to the contract of carriage. Shippers who delivered high value cargo for shipment were expected to be aware of the applicable liability limits and had the option to declare the actual value of the goods against payment of a commensurately higher freight, or to purchase additional insurance to supplement the amounts not covered by the carrier.

In addition, it was reiterated that the liability limits in the Hague-Visby Rules were often much higher in practice than might appear at first sight, and that given the volume of container traffic and the “per package” liability limit set out therein, they were often much higher than those in the unimodal transport regimes, where the liability limits for recovery were based only on weight. By way of example, it was stated that given the typically higher value of cargo carried by air, the liability limits set out in the Convention for the Unification of Certain Rules for the International Carriage by Air, 1999 (Montreal Convention) i.e., 17 SDR per kilogram of gross weight, only covered some 60 per cent of the claims for loss or damage to air cargo. The portion of cargo claims covered by the liability limits provided in the CMR i.e., 8.33 SDR per kilogram of gross weight, was said to be probably even less than 60 per cent.

In further support of the view that the limits of liability provided in the Hague or Hague-Visby Rules were satisfactory, it was said that the limitation levels of

¹³³ This view was expressed by Professor Sturley while intervening on behalf of the United States delegation during the third reading of the draft convention in the Working Group. He also expressed a similar view in his article in the CMI Yearbook. See supra, note 84 at p. 255.
other transport conventions, such as the CMR or the CIM-COTIP\textsuperscript{134}, were not directly comparable to those in the maritime transport conventions, since several of the unimodal transport conventions included only per kilogram limitation levels. Thus, it was said, while the per kilogram limitation level was much higher than the Hague-Visby level, in fact, the level of recovery was much greater under those conventions that allowed for a per package calculation of the limitation level. It was also stated that certain other conventions, such as the Montreal Convention, set a high limitation level in comparison with other transport conventions, but that they also contained provisions rendering their limitation of liability incapable of being exceeded, even in the case of intentional acts or theft, and that the freight payable for the mode of transport covered by those other transport conventions was much higher than under the maritime transport conventions. Further, it was observed that it could be misleading to compare the regimes from unimodal transport conventions, since each convention contained provisions that were particularly geared to the conditions of that type of transport. In this regard, it was noted that it would be helpful to obtain actual figures with respect to recovery in cases of loss or damage to the goods, and to what extent the per package and per kilogram limits had been involved in those recoveries, but that such information had been sought from various sources and was difficult to obtain.

In support of the adequacy of the liability limits of the Hague-Visby Rules, it was suggested that, in the bulk trade, the average value of cargo had not increased dramatically since the time of earlier maritime conventions, and that, in the liner trade, the average value of the cargo inside containers had not increased dramatically either. A note of caution was voiced that setting the limitation level for the carrier’s liability at the level set forth in the Hamburg Rules, which currently governed only a relatively small fraction of the world’s shipping, would represent a significant increase for the largest share of the cargo in world trade, which was currently governed by the lower limits of the Hague-Visby Rules, or even lower limits, as was the case in some of the world’s largest economies. The need to absorb and spread the higher costs generated by an increase in the liability limits would be that lower-value cargo would be expected to pay a higher freight, even though it would not benefit from the increased liability limits, which would mean that shippers of lower-value cargo, such as commodities, would effectively subsidize the shippers of highest value cargo.

4.9.3. Conclusions regarding the limitation on the carrier’s liability:

When the debate reached a point where the Working Group realized that the attainment of a level of harmony between States currently party to the Hague Rules or the Hague-Visby Rules and those which were party to the Hamburg Rules would be desirable, it was recognized and that setting limits of liability at a

\textsuperscript{134} See \textit{supra}, note 49.
common level would contribute greatly to the overall harmonization of the current regimes covering the international carriage of goods by sea. The Working Group expressed concern that a failure to reach agreement in this regard could lead to renewed efforts toward the development of regional and domestic rules regarding the carriage of goods by sea, thus causing further fragmentation of the international scheme. There was support in the Working Group for the pursuit of productive discussions that would lead to a harmonized result.

In the spirit of compromise and bearing in mind the element of the overall balance in the liability regime provided in the draft convention the Working Group agreed on the limitation amount fixed at 875 SDR per package and 3 SDR per kilogram in article 59 of the draft convention. The Working Group also agreed on a figure of 2.5 times for economic loss due to delay in article 60 of the draft convention. The Working Group duly noting that draft article 99 could cause constitutional problems in some states decided to delete it from the text of the draft convention. The Working Group also decided to delete paragraph 2 of draft article 60 and also that no draft article 27 bis would be included in the text providing for a declaration provision to allow a Contracting State to include its mandatory national law in a provision similar to that in draft article 27. The definition of “volume contract” in paragraph 2 of article 1 was accepted as a package deal.

Though the Working Group reached a compromise on the limitation of liability figures under the draft convention, it seems that there still exists a divergent view on adequacy of the increase of such figures. It has been pointed out by the proponents for higher limitation figures that the inflation rate in major industrialized countries from 1968 to 2008 has been calculated to be in the range of 542% while the per package figure has been increased by 25% and the per kilo figure by 33% for the same period. On the other hand Professor Sturley writes that since the Rotterdam Rules provides for higher limitation figures than the existing regimes, it is expected that higher figures would eliminate much of the wasteful litigation pursued solely to “break” the limitation.

4.10 Conduct barring limitation of liability

From the creation of modern limitation regimes it was thought that a shipowner should not be permitted to limit liability if there was any evidence of fault directly on his part or if he had knowledge of the any wrong-doing on the part of the master or crew which had led to the claim in respect of which limitation was being sought. This concept took shape in the form of the “actual fault or privity” doctrine which prevailed in the Hague Rules.

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137 See supra, note 84, at p. 260.
In contrast to the “actual fault or privity” doctrine, a radical change reflecting a significantly new test is found in the Hague-Visby Rules. This new test relating to conduct barring limitation was imported into maritime conventions from instruments in aviation law. Article 4(5)(e) of the Hague-Visby Rules and article 8 of the Hamburg Rules make it virtually impossible for a cargo claimant to “break” the limitation of liability as provided under the Rules. The carrier is liable to pay claims above the limitation amounts only when it has acted deliberately or recklessly. This rule is not so clear under the Hague Rules, with the result that domestic law in some countries following the Hague Rules has made it easier to avoid the limitation provisions. The common law doctrine of deviation is perhaps the best-known example. In the United States, for example, the courts have enunciated the judicial doctrine of “fair opportunity” as a requirement. If the carrier does not give the shipper what the court ultimately determines was a “fair opportunity” to declare the true value of the cargo, and thus avoid the package limitation, then the carrier may not rely on the package limitation.  

Even though article 61 of the Rotterdam Rules follows the intent of the Hague-Visby and Hamburg Rules by using stronger language to make the rule clear even in jurisdictions that currently recognize doctrines that make it easier to break limitation, it now takes cognizance of the fact that the obligations of the carrier are not restricted to “damage” and thus uses the words “loss resulting from the breach of the carrier’s obligation”. The burden of proof is on the claimant, who is expected to prove that the loss was due to “a personal act or omission done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result”.  

4.11 Himalaya clauses

A Himalaya clause is a contractual provision expressed to be for the benefit of a third party who is not a party to the contract. The clause takes its name from a decision of the English Court of Appeal in the case of Adler v. Dickson (The Himalaya). The Himalaya clause is accepted as a “stipulation for another” (“stipulation pour autrui”) under the civil law, without any new law or jurisprudence.

The extent to which negligent third parties can rely on a carrier’s defences and limitations of liability has been a contentious issue for over half a century. At first, the primary question was whether stevedores could benefit from the carrier's package limitation or time-for-suit provision. In recent years, with the

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138 See supra, note 84, at p. 260, footnote 8.
139 For a discussion on the formidable nature of this burden on the claimant see Nugent Killick v. Michael Goss Aviation Ltd. [2000] 2 Lloyd's Rep 222. (Even though this deals with Article 25 of the Warsaw Convention it is very instructive). See also supra, note 115, at p. 299.
growth of multimodal shipments, a much broader range of the carrier’s subcontractors have claimed the benefit of a broader range of the carrier’s defences and limitations of liability, including inland carriers that were unrelated to the maritime aspects of the contract.

The issue first arose under the Hague Rules, which do not explicitly address the problem. Some courts have held under the Hague Rules that when negligent subcontractors are sued in tort, they are entitled to the benefit of the carrier’s defences and limits of liability. Others have held in the same context that negligent subcontractors are not entitled to the benefit of the carrier’s defences and limits of liability unless the contract of carriage explicitly extends the benefit to third parties, which now is generally done in a provision known as a Himalaya clause. The Hague-Visby Rules in article 4bis attempted to extend “Himalaya” protection to at least the carrier’s servants and agents, although not to independent contractors. The provision was ambiguous, however, and there has been disagreement on how broadly it extends. The Hamburg Rules protect the carrier’s servants and agents, without explicit mention of independent contractors. The Hamburg Rules cover stevedores, because the carrier is responsible from port to port under article 4, rather than only from tackle to tackle as under the Hague and Hague-Visby Rules under articles 1(e) and 2. Article 7(2) of the Hamburg Rules also extends Himalaya protection to the carrier’s servants and agents, and article 10(2) effectively extends the protection to “actual carriers”, thus covering subcontractors.

Courts in most jurisdictions have concluded that third parties would be protected if the bill of lading included an adequate “Himalaya clause,” and most carriers now incorporate adequate Himalaya clauses into their bills of lading. The modern doctrine has become more of a trap for the unwary who fail to

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143 See, e.g., Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 301-02 (1959); Midland Silicones v. Scrutons Ltd., [1962] A.C. 446 (H.L.). The Hague and Hague-Visby Rules require an established common law theory, such as the “agency theory” of Lord Reid in Midland Silicones v. Scrutons. Lord Reid’s five conditions for applying that theory to benefit a stevedore are that: 1) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability; 2) the bill of lading makes it clear that the carrier in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore; 3) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice; 4) any difficulties about consideration moving from the stevedore are overcome; and 5) the provisions of the Bills of Lading Act 1855 (now repealed and replaced by the U.K.’s Carriage of Goods by Sea Act 1992, U.K. 1992, c. 50) apply. The Himalaya Clause is validated in English law today under the Contracts (Rights of Third Parties) Act 1999, U.K. 1999, c. 31, secs. 1 and 6(5)(a).
comply with the requirements established by the courts than a means to protect identifiable commercial interests.\textsuperscript{145}

Pursuant to article 4, the Rotterdam Rules provides protection to all of the carrier's employees, agents, and independent contractors to the extent that they are subject to suit under the Rules. Thus “maritime performing parties”\textsuperscript{146}, who assume the carrier’s obligations during their own periods of responsibility, are protected to the same extent as the carrier, whether or not the transport document includes a Himalaya clause. Non-maritime performing parties are not subject to suit under the Rules.

In the view of Prof. Sturley, the inclusion of the equivalent of a Himalaya clause in the Rotterdam Rules reflect a significant change in the law under the Hague Rules; a significant clarification of the law under the Hague-Visby Rules; and a modest clarification of the law under the Hamburg Rules. In practice, the Rules will make very little difference at all. Commercial parties have been achieving the same result by contract for years. If anything, the new convention may cut down on some wasteful litigation.\textsuperscript{147}

\subsection*{4.12 Time for suit}

Under the Hague and Hague-Visby Rules, a cargo claimant is required to file a suit against the carrier within one year before the action is time barred.\textsuperscript{148} The Hamburg Rules extended this time limit to two years\textsuperscript{149}. During deliberations at CMI, it was generally agreed that a one-year period was adequate\textsuperscript{150} but the Working Group at its eighteenth session\textsuperscript{151} agreed that a claim under the draft instrument must be brought in judicial or arbitral proceedings within a two-year limitation period. Theoretically, this will be a significant change for most jurisdictions following the Hague/ Hague-Visby regimes, but there is also a view that this change will simply postpone everything by twelve months. It will also afford some extra time to claimants to gather evidence they need to make their claims. In article 62(3) of the Rotterdam Rules there is provision for counterclaims and set-offs. In such cases of an action by counterclaim the limitation period may extend beyond that provided in article 62(1).

\begin{footnotes}
\textsuperscript{145} See, supra, note 84, at p. 260.
\textsuperscript{146} Article 1(7) of the Rotterdam Rules defines a “maritime performing party” as a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.
\textsuperscript{147} See supra, note 84 at p. 261.
\textsuperscript{148} See Hague Rules, article 3(6); Hague-Visby Rules, article 3(6).
\textsuperscript{149} See Hamburg Rules, article 20(1).
\textsuperscript{150} See Preliminary draft instrument, supra, note 20, article 14.1 adopted a shorter period.
\textsuperscript{151} See supra, note 120, paras. 119-160.
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The Rotterdam Rules contain provisions similar to the Hamburg Rules\textsuperscript{152} whereby the period of limitation may be extended by the party against whom the claim is made.\textsuperscript{153} Comparable provisions were not contained in the Hague Rules, but were added by the Visby Protocol.

4.13 Jurisdiction and arbitration

Forum selection clauses in international maritime contracts have been established as a rule based on several factors including the doctrine of ‘freedom of contract’ and the assumption that commercial people are ‘sophisticated’ parties who do not need special legal protection. As parties from different countries are associated in such an agreement, choice of law and choice of forum clauses are incorporated to eliminate any inherent ambiguities that may exist as to the substantive law to be applied and the appropriate forum for resolving disputes. Arbitration clauses provide parties with additional advantages, such as privacy, expertise, autonomy, reduced expenditure, expedient resolution, etc.\textsuperscript{154}

In order to discuss the proceedings at UNCITRAL on jurisdiction and arbitration it is important to recognize the United States Supreme Court decisions that have direct bearing on the validity and enforceability of forum selection and arbitration clauses in the US courts. In \textit{The M/S Bremen v. Zapata Off-Shore Co.}\textsuperscript{155}, the court upheld the validity of forum selection clauses and placed the burden of demonstrating the unreasonableness or unjustness of the clause on the party resisting its enforcement. The other case is \textit{Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer}\textsuperscript{156}, prior to which, a majority of the federal courts followed the then leading decision of \textit{Indussa Corp v. SS Ranborg}\textsuperscript{157}, which refused to enforce a foreign forum selection clause in cases to which US Carriage of Goods by Sea Act (COGSA)\textsuperscript{158} applied.

In \textit{Sky Reefer}, the Supreme Court held that COGSA\textsuperscript{159} did not prohibit forum selection clauses and therefore contracts for the carriage of goods by sea were subject to the same rule of presumptive enforceability as other contracts. As such, this type of clause is now presumed valid and enforceable, even when appearing in small print at the back of a bill of lading or other document of transport. Understandably, the decision has been mostly criticized by cargo interests and cargo underwriters as depriving them of the possibility of bringing their claim before a US court, while forum selection and arbitration clauses are rarely negotiated and usually imposed on them. When combined with a demise

\textsuperscript{152} See Hamburg Rules, article 20(4).
\textsuperscript{153} See Rotterdam Rules, article 62.
\textsuperscript{154} For the purpose of this work, forum selection clause is used to refer to both jurisdiction and foreign arbitration clause or agreements.
\textsuperscript{155} 407 US, 1 92 Sc 1907, 32 L Ed 2d 513 (1972).
\textsuperscript{156} 515 US 528, 115 SCt 2322, 132 L Ed 2d 462 (1995).
\textsuperscript{157} 377 F 2d 200 (2d Cir 1967)
\textsuperscript{158} 46 app USC §1300 et seq.
\textsuperscript{159} 46 app USC §1303(8), the equivalent of the Hague Rules, article 3(8).
clause, the aforementioned clauses have the effect of forcing cargo claimants to bring a claim in an inconvenient and potentially hostile jurisdiction against a carrier with whom they have never had any contact and who might be in an uncertain financial situation. Ever since the Sky Reefer decision was announced, various segments of the U.S. maritime industry, particularly those representing shippers and cargo underwriters have worked to overturn it. After several years on the domestic front, they shifted focus to the international arena bringing the matter to be resolved by the UNCITRAL Working Group.

Due to institutional reasons regarding competencies within a regional economic grouping, the European Commission has exclusive competency to negotiate jurisdictional questions on behalf of its Member States. Thus the individual delegations from the European Union (EU) Member States were not allowed to speak on the issue of forum selections clauses during the discussions in the Working Group.

During the preliminary discussions on jurisdiction at UNCITRAL, many delegations expressed opposite views. Some delegations showed a preference for forum selection clauses to be enforced in all cases, even if they appeared in the boilerplate clauses of a liner bill of lading. Many other delegations proposed the exclusive forum selection clauses not be enforced ever, thus guaranteeing that cargo interests would have access to convenient forums to resolve their claims against carriers. Most of the negotiations on substantive matters were done during the first and the second reading of the draft instrument. A brief summary of the provisions which culminated after long debates at the Working Group sessions is given below followed by a discussion on the proceedings that took place during the third reading of the draft convention.

The Rotterdam Rules’ jurisdiction and arbitration chapters are based directly on the corresponding provisions of the Hamburg Rules, but they do provide some additional protection for carriers, particularly in the context of volume contracts. As a result, the provisions in these chapters will provoke some changes to existing law even in countries that have adopted the Hamburg Rules. Because the Hague and Hague-Visby Rules do not address jurisdiction and arbitration at all, the existing law in most countries must be found in domestic legislation or national jurisprudence. For countries such as Canada, which have legislation similar to the Hamburg Rules, the Rotterdam Rules would represent a fairly modest change. For countries such as the United Kingdom, whose national jurisprudence strongly favours the enforcement of jurisdiction and arbitration clauses, the Rotterdam Rules would represent a more significant change.\(^{160}\)

The Rotterdam Rules contain provisions dealing separately with jurisdiction\(^{161}\) and arbitration\(^{162}\). A plaintiff who brings an action against the

\(^{160}\) See supra note 84 at p. 258.

\(^{161}\) Chapter 14 of the Rotterdam Rules.
carrier can do so in any of the six places with a reasonable connection to the
dispute: the carrier’s domicile, the place of receipt, the place of delivery, the port
of loading, the port of discharge, or a place designated in a forum selection
clause.\textsuperscript{163} The provision relies on the “domicile” of the carrier which is normally
the place of incorporation, rather than the actual place of business. The actual
place of receipt and delivery, as well as the intended ports of loading and
discharge is not included. The place where the contract is concluded is no longer
relevant, given the modern practice of electronic contracts and communication.
The claimant still has the option to commence action in a court otherwise
designated in the contract of carriage.\textsuperscript{164}

A maritime performing party who is otherwise not a party to the contract of
carriage can only be sued either at its domicile; or at the port of loading or
discharge in case it is an ocean carrier, or at the port where it performs its
activities in case it is a stevedore, terminal operator, etc.\textsuperscript{165} If a single action is
brought against both the carrier and a maritime performing party, then the
action may be instituted only in a court designated pursuant to both articles 66
and 68 which is most likely to be the court of competent jurisdiction at the port
of loading or discharge.\textsuperscript{166} However, the parties can agree to resolve their dispute
in any competent court after the dispute has arisen.\textsuperscript{167}

The Rotterdam Rules provide for a limited exception under article 67 where
an exclusive choice of forum clause would be binding if contained in a volume
contract which is not a contract of adhesion, or contains a prominent statement
that there is an exclusive choice of court agreement and specifies the sections of
the volume contract containing that agreement, and clearly designates the courts
of one or more Contracting States.\textsuperscript{168} The Rules protect third parties by
specifying that such a clause is only enforceable against them if timely and
adequate notice has been given, and the court is located in one of the places
designated under article 66.\textsuperscript{169}

Article 74 of the Rotterdam Rules allow Contracting States at the time of
signature, ratification or acceptance of the convention to declare that they will
not be bound by the provisions of the chapter on jurisdiction, thus leaving the
question of jurisdiction essentially to be determined by national law.

The provisions of the chapter on arbitration of the Rotterdam Rules are
similar to those of jurisdiction. A claimant can choose to assert a claim through
arbitration if the contract of carriage contains an arbitration agreement and the

\textsuperscript{162} Chapter 15 of the Rotterdam Rules.
\textsuperscript{163} See Rotterdam Rules, article 66.
\textsuperscript{164} Ibid., article 66(b).
\textsuperscript{165} Ibid., article 68.
\textsuperscript{166} Ibid., article 69.
\textsuperscript{167} Ibid., article 72.
\textsuperscript{168} Ibid., article 67(1).
\textsuperscript{169} Ibid., article 67(2).
claimant will have the option to do so at any place designated by the arbitration agreement or at any other place pursuant to article 66, even if the arbitration agreement does not specify it.\(^{170}\) Moreover, the arbitration agreement is only binding if contained in a volume contract, and subject to the same safeguards listed above for exclusive choice of forum agreements.\(^{171}\) Similar to the chapter on jurisdiction, at the time of signature, ratification or acceptance, a Contracting State may declare that it will not be bound by the provisions of the chapter on arbitration.\(^{172}\)

During the twentieth session the Working Group took up the discussion on jurisdiction and arbitration from its decisions at the end of the eighteenth session.\(^{173}\) Discussion on substantive matters was very little during the third reading as most grounds were covered during the first and the second readings of the draft instrument. The only interesting discussion was on the application of the chapters on jurisdiction and arbitration.

For the chapter on jurisdiction it was explained that the three variants of draft article 77 as contained in A/CN.9/WG.III/WP.81 corresponded to the options for the Working Group regarding the three alternatives to the application of the chapter on jurisdiction to Contracting States. At its twentieth session the Working Group decided that one of three options, namely, a reservation approach, an "opt-in" approach and a "partial opt-in" approach should be considered. If the reservation approach was chosen, due to institutional reasons regarding competencies, the EU would have to ratify the draft convention on behalf of its member States. Approval by them could be a lengthy process and subject to potential hurdles. On the other hand, the "opt-in" approach as provided in Variant B of draft article 77 would allow EU member States to ratify the draft convention independently, thus allowing for greater speed and efficiency in the ratification process, and avoiding the possibility of the chapter on jurisdiction becoming an obstacle to broad ratification. The Working Group was of the view that, while offering some advantages in terms of increased harmonization, the "partial opt-in" approach was too complex an approach to follow in the draft convention and finally agreed on the "opt-in" approach.

The Working Group had earlier decided to take a parallel approach in the application of the chapter on arbitration to that it would take with respect to the application of the chapter on jurisdiction.\(^{174}\) The purpose of adopting such a parallel approach was to ensure that, with respect to the liner trade, the right of the cargo claimant to choose the place of jurisdiction for a claim pursuant to jurisdiction provisions was not circumvented by way of enforcement of an

\(^{170}\) Ibid., draft article 75(1) and (2).

\(^{171}\) Ibid., article 67(3) and (4).

\(^{172}\) Ibid., article 78.

\(^{173}\) See, supra, note 120, UN Doc A/CN.9/616, paras. 246 to 252

\(^{174}\) See, supra, note 120, UN Doc A/CN.9/616, paras. 268 and 272 to 273
arbitration clause. The Working Group agreed to the “opt-in” approach for the chapter on arbitration. A further proposal that the ability to opt-in to the chapter on arbitration should be tied to opting-in to the chapter on jurisdiction was rejected confirming that, while perhaps desirable, that approach would not be possible due to the differing competencies for the two subject matters as between the EU and its Member States.

4.14 Volume contracts

The prevailing regimes of the Hague Rules, the Hague-Visby Rules and the Hamburg Rules are “one-way mandatory,” which means that the contracts must not derogate from the convention to the shipper’s detriment, but derogation that increases the carrier’s obligations is allowed.\textsuperscript{175} Based on a United States proposal\textsuperscript{176}, the Rotterdam Rules has provisions for volume contracts\textsuperscript{177} that allow the parties to enter into mutually negotiated agreements that contain certain safeguards to derogate from the terms of the Rotterdam Rules, whether such derogation increases or decreases the carrier’s obligations.\textsuperscript{178} Many States have supported the volume contract concept in principle. Others, however, consider the definition of volume contracts to be imprecise and are of the view that it is detrimental to the interest of small shippers and opens up the possibility of abuse by their carriers.

The argument advanced in favour of the inclusion of volume contracts is that the prevailing mandatory regimes were developed in a commercial context that is no longer pertinent, and that they are inadequate to meet present day commercial needs. Some of the opponents of volume contracts expressed preference for a more regulatory approach to trade issues and viewed such an inclusion as a victory for freedom of contract returning the situation to the pre-Hague era for small shippers. The inclusion of volume contract churned the long standing debate over contractual imbalance between carrier and shipper due to “unequal bargaining power”, and whether transport contracts are contracts of

\textsuperscript{175} See in particular article 3(8) of the Hague and Hague-Visby Rules and article 23 of the Hamburg Rules.

\textsuperscript{176} The United States delegation submitted its proposal on the treatment of ocean liner services agreement (OSLAs) suggesting that in respect of such agreements the provisions of the draft instrument should be made non mandatory. See, “Proposal by the United States of America, ‘Ocean liner service agreements’”, UN Doc A/CN.9/WG.III/WP.34, at pp.6-9.

\textsuperscript{177} A volume contract is defined in article 1(b) of the Rotterdam Rules as “a contract that provides for the carriage of a specified quantity of cargo in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.”

\textsuperscript{178} Pursuant to article 80 of the Rotterdam Rules, a volume contract may provide for greater or lesser duties, rights, obligations and liabilities than those set out in the draft convention provided that: the volume contract contains a prominent statement that it derogates from the draft convention; the volume contract is individually negotiated; or prominently specifies the sections of the volume contract containing the derogations. The derogation should not be incorporated by reference from another document; or included in a contract of adhesion that is not subject to negotiation. There can be no derogation from the carrier’s duty to make and keep the vessel seaworthy.
adhesion, which the shipper must take or leave. Fears were also expressed in the Working Group that approximately 90% of the liner trade might be encompassed by volume contracts, leaving only 10% to be fully regulated by the draft convention. The opponents also contended that the reduced freight rates generated by volume contracts would be offset by higher insurance rates and disadvantageous jurisdiction provisions would make legal action more expensive in the case of a dispute with the carrier. Those taking the contrary position including the delegation from the United States together with a few other countries endorsed the requirement for a free-market approach. The United States delegation persistently attempted to persuade the Working Group that the draft convention should be forward-looking, and for it to be successful, must be able to respond to the changing needs of industry. Furthermore, the draft convention should provide, along with a strong framework of generally applicable rules, the flexibility that the commercial parties need.179

Before delving into the intricacies of the discussions at the Working Group sessions on volume contracts, it would be interesting to note that mandatory rules for the carriage of goods law originated through U.S. case law, even prior to the 1893 enactment of the Harter Act.180 The following few paragraphs will aid in the understanding of the evolution of carriage of goods by sea law in the context of its present mandatory nature.

Historically, maritime law held the carrier of goods by sea absolutely liable for cargo loss or damage, whether or not the carrier was negligent, and regardless of the cause of the loss. The carrier would only escape liability if the loss or damage was caused by one of the so-called “common law exceptions” 181. During the

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179 See supra, note 39, at p. 636.

180 For example, see Liverpool & Great Western Steam Co. v. Phenix Insurance Co., 129 U.S. 397, (1889) where the U.S. Supreme Court ruled that the exculpatory clause, which relieved the carrier from liability for its servants’ negligence, was void as against public policy, holding the carrier liable; New Jersey Steam Navigation Co. v. Merchants’ Bank of Boston (The Lexington), 1848 WL 6458 (U.S.R.I.), where the owner of the vessel was held fully liable despite an exculpatory clause and a unit limitation clause; Clark v. Barnwell (The Susan W. Lind) 1851 WL 6637 (U.S.S.C.), where the U.S Supreme Court approved the right of the shippers to defeat the general exculpatory clause with proof of the carrier’s negligence; Propeller Niagara v. Cordes, 1858 WL 9337 (U.S.Wis.), where the U.S Supreme Court enforced the carrier’s continuing obligation of care for the cargo even after the occurrence of a cause of loss excepted in the bill of lading. See also Joseph C. Sweeney, “Happy Birthday, Harter: An Appraisal of the Harter Act and its 100th Anniversary”, 24 Journal of Maritime Law and Commerce, 1993, at 6-7; Zuo Haicong, “A Call for the Restoration of Contractual Freedom in Cargo Shipping”, Unif. L. Rev. 2003-1/2, pp. 309-318.

181 These exceptions are: loss or damage caused by an act of God, a public enemy, inherent vice of the goods, fault of the shipper or if the goods had been appropriately made the subject of general average sacrifice. Even where the loss was caused by one of the common law exceptions the carrier remained liable if he had been negligent or otherwise at fault. The shipper would succeed in his claim if he proved receipt of the goods for carriage in good order and either delivery or non-delivery in bad order, provided the carrier could not show that one of the common law exceptions had caused the loss or damage. In effect, the carrier was a guarantor of the safe arrival, and fault was immaterial. See supra, note 58 at p. 2.
eighteenth century, the carriers using the principle of freedom of contract started inserting “exoneration clauses” or “negligence clauses” to limit contractually the strict liability imposed upon them by maritime law, thereby contracting out of almost every liability of ocean carriage.182 Also during this period competition among carriers increased enormously, and the volume of world trade exceeded the carrying capacity of shipping. Thus, where exoneration clauses were upheld, the position of the carrier became virtually the reverse of that under general maritime law. Instead of being absolutely liable irrespective of negligence, the carrier enjoyed a contractual exemption from liability regardless of negligence, and this contractual exemption became as wide as the carrier’s bargaining position would allow.183

In the face of increasing discontent of shippers, bankers and insurers, carriers were compelled to heed complaints by shippers and negotiated certain arrangements. English carriers adopted model bills of lading, mainly in the bulk cargo trades, which carried express provisions relieving them from liability only if damage resulted from navigational errors but not in cases where the master or crew were at fault in the care and custody of cargo. Other bills of lading were designed which provided for carrier liability in instances where the master or crew were at fault but not in relation to error in navigation or management of the ship. In these two latter cases the carrier would not be liable.

In 1882, at a meeting held in Liverpool a bill of lading was adopted known as the “Conference Form”. In this model, a requirement by the carrier to exercise due diligence to make the ship seaworthy was inserted. Also the limitation of liability of the carrier was set at £100 sterling per package. In 1885 a set of rules based on the above provisions were adopted which were known as the Hamburg Rules of that time. The 1885 commercial law of Spain also contained provisions regarding liability of carriers that were quite rigid. In the same vein, U.S. courts held exculpatory clauses invalid setting a breakthrough precedent overcoming the well-established theory that parties have an absolute right of freedom of contract based on the “due process” clause of the Fourteenth Amendment.184 The carrier’s position under the Japanese practice of designing the bill of lading was unusually onerous. The carrier was not allowed to exempt itself from liability even through express clauses for damage attributable to his own fault, lack of bona fide, unseaworthy condition of the ship or gross negligence of his servants.

The ocean trade of North America including the United States and Canada as well as colonies and territories of Great Britain were mainly carried out on British ships. The carrier interests originally adopted the typical bill of lading which almost exclusively favoured the carriers. Under the changed circumstances described above, British carriers manoeuvred around the legal

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183 Ibid
184 See Liverpool & Great Steam Co. v. Phoenix Insurance Co. and Joseph C. Sweeney, supra, note 181.
impediments by incorporating “forum selection” and “choice of law” clauses, specifying London and English law, respectively. The unlimited freedom of contract produced chaos and abuse against which legislative measures were taken in the United States which were followed by Canada, Australia and other British dominions. The object of these measures was to protect shippers from excessive dominance of British carriers. The United States introduced the Harter Act in 1893; Australia and New Zealand enacted the Sea Carriage of Goods Act of 1904, and the Shipping and Seaman Act of 1908, respectively. In Canada a Water Carriage Act was enacted in 1910. All these legislation contained mandatory provisions governing carrier liability.185

The Harter Act of the United States reflected a compromise between shipper and carrier interests. It prohibited exoneration clauses in favour of carriers and their agents in respect of liability attributed to fault in the care and custody of the cargo. But the Act did not outlaw exemption of the carrier from liability if “due diligence” had been exercised by him, to make the ship seaworthy. There was also no prohibition against the carrier being exempt from liability if there was cargo damage resulting from “faults and errors in the navigation or management of the vessel”. The Act also contained a list of exemptions favouring the carrier. Thus the Harter Act made a distinction between faults in the navigation and management of the vessel and faults in the care and custody of the cargo186, overriding the rule established by the U.S. Supreme Court in Liverpool & Great Western Steam Co. v. Phoenix Insurance Co.187

While the international community generally agreed that further reform of the law was necessary, shipowners from countries with large fleets were apprehensive of being subjected to carrier liabilities which in turn would result in higher freights. Such an eventuality would put them at a disadvantage vis-à-vis their competitors. Thus, in the main they did not favour any erosion of the doctrine of the freedom of contract which was germane to the commercial world. Furthermore, uniformity was necessary for any reform to be useful in a practical way and this could only be achieved through agreement internationally. The global maritime community appreciated the need for both reform and uniformity in the regime of bills of lading and concerted action began on creation of a model that would include minimum standards of carrier liability. Actions in this regard were spearheaded by the CMI and the International Law Association. But progress was slow, at least temporarily because in some quarters voluntary incorporation in bills of lading of a code of rules was favoured. Also there was a move to enact legislation in Great Britain governing rights and liabilities of carriers which fell through. Eventually the maritime community came together

185 See Joseph C. Sweeney, supra, note 181, at p. 30.
186 The same approach was followed in the Hague Rules.
187 For a detailed discussion see Zuo Hacong, supra, note 181, at pp. 311-312. See also supra, note 183.
through various conferences in the 1920’s, the efforts of which culminated in 1924 into the adoption of the Hague Rules.\textsuperscript{188}

The mandatory provisions on carrier liability under the Hague Rules, based on the Harter Act and the British Dominions’ Acts, proved to be a great success as most of the major maritime countries adopted it and incorporated the Rules in their national legislation.\textsuperscript{189} The Hague-Visby Rules amended some of the provisions of the Hague Rules, but retained the basic requirements relating to the carrier’s mandatory obligations.\textsuperscript{190} The Hamburg Rules maintained a mandatory regime but extended its scope of application through the “contractual” approach as opposed to the “documentary” approach which characterized the earlier regimes.\textsuperscript{191} Furthermore, the Hamburg Rules are applicable to non-contracting parties, such as servants and actual carriers.\textsuperscript{192}

Consistent with the approach of the existing regimes, the Rotterdam Rules was originally conceived as a body of law incorporating essentially mandatory rules for all parties.\textsuperscript{193} At the twelfth session of the Working Group, the U.S. delegation made a proposal for allowing more flexibility to the parties by resort to the so-called “Ocean Liner Service Agreements” in the allocation of their rights, obligations and liabilities. In their view, parties should enjoy the freedom to derogate from the provisions of the draft convention, under certain circumstances.\textsuperscript{194} The United States proposal was quintessentially similar to that of “service contracts”\textsuperscript{195} under the draft version of the United States Carriage of

\textsuperscript{188} See CMI, \textit{The Travaux Preparatories of the Hague and Hague-Visby Rules}, at pp. 1-12.

\textsuperscript{189} The United Kingdom incorporated the Hague Rules in its domestic legislation by passing its COGSA in 1924 and ratified the Hague Rules in 1930. The United States adopted its COGSA in 1936 and ratified the Hague Rules in 1937. Other major maritime States such as France, Germany, Japan, Italy, the Netherlands, Belgium and Spain ratified or acceded to it respectively in 1937, 1939, 1957, 1938, 1956, 1930 and 1930.

\textsuperscript{190} Some of the countries already party to the Hague Rules later adopted the 1968 Visby Amendments and the 1978 Protocols and updated their domestic legislation.

\textsuperscript{191} Professor Jan Ramberg, who represented FIATA in the Working Group III sessions, pointed out in one of his articles that “the scope of the mandatory regime of the Hague Rules is limited as it does not cover the contract of carriage as such but only the legal relationship between the bill of lading holder and the carrier. In the Hamburg Rules, the mandatory rules become directly applicable in the relationship between the contracting parties and not only in the relationship between the carrier and the bill of lading holder”; See Jan Ramberg, “Freedom of Contract in Maritime Law”, in Alexander von Zeigler/ Thomas Burckhardt (eds.), \textit{International Rect auf See und Binnengewassern: Festschrift Fur Walter Muller}, Zurich, 1993, at 173-174.

\textsuperscript{192} See arts. 7(2) and 10(2) of the Hamburg Rules.

\textsuperscript{193} See “Preliminary draft instrument, supra, note 20, article 17.1 “... any contractual stipulation that derogates from this instrument is null and void, if and to the extent that it is intended or has as its effect, directly or indirectly, to exclude, [or] limit [, or increase] the liability for breach of any obligation of the carrier, a performing party, the shipper, the controlling party, or the consignee”

\textsuperscript{194} See Proposal by the United States of America, supra, note 173, paras. 18-29, at pp.6-9.

\textsuperscript{195} A “service contract” is defined by the Shipping Act of 1984 (46 U.S.C. App. 1702(21)) as “a written contract, other than a bill of lading or a receipt, between one or more shippers and an individual ocean common carrier or an agreement between or among ocean common carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of
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Goods by Sea Act of 1999 (USCOGSA 99) and emphasized that such flexibility should essentially be granted whenever one or more shippers and one or more carriers entered into agreements providing for the transportation of a minimum volume of cargo in a series of shipments on vessels used in a liner service, and for which the shipper or shippers agreed to pay a negotiated rate and tender a minimum volume of cargo.

Given this background, it is to be noted that extensive negotiations on volume contracts had taken place in the Working Group during all the three readings. The issue of volume contracts was not considered in isolation but as a package as in the view of several delegations it was closely linked with many other provisions of the draft convention which purport to strike a delicate balance between the mandatory character of the draft convention and the concept of freedom of contract. The widening of the scope of the draft instrument to areas of transport law not covered by the existing regimes, such as freight, right of control and transfer of rights, made it necessary for the Working Group to consider whether and to what extent the provisions covering those areas may be made non-mandatory.

During the third reading of the draft convention the special rules applicable to volume contracts were fine tuned to generate general consensus. The provision stipulates that as between the carrier and the shipper, the volume contract may provide for greater or lesser rights, obligations, and liabilities for both parties than those set out in the draft convention, provided that (i) the volume contract contains a prominent statement that it derogates from the convention; and (ii) that it is individually negotiated; or (iii) prominently specifies the sections of the volume contract containing the derogations. Thus, the volume contract could increase or decrease the rights and obligations of both carrier and shipper (for example, the shipper might be responsible for the loading, stowing and discharge of the goods), and may even be a contract of adhesion, provided it contains a prominent statement that it derogates from the convention and that it specifically identifies those sections containing derogations. However, any derogation needs to be set forth in the volume contract and may not be incorporated by reference. Moreover, a volume contract needs to be a stand-alone contract of carriage and may not be a carrier’s public schedule of prices cargo over a fixed time period, and the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of non-performance on the part of any party.” It is to be noted that the definition of volume contract as found in the draft instrument is broader than that of “service contract” under the USCOGSA 99, as it does not require the carrier to undertake any “defined service level” or to commit to a certain rate or rate schedule. Instead, “volume contract” is defined solely by reference to the undertakings of the shipper to provide a certain quantity of goods for shipment.

196 See Rotterdam Rules, article 80(2).
and services, a transport document, an electronic transport record, or similar
document.197

Some level of protection has been added by the Rotterdam Rules, both for the
original parties to the volume contract and for subsequent third parties. First, as
between the parties, no derogation can be made with respect to seaworthiness198, shipper’s obligation to provide information, instructions and
documents199, special rules on dangerous goods200 and loss of the benefit of
limitation of liability201, which are considered core obligations under the draft
convention from which the volume contract cannot depart.202 Second, the
derogations do not bind third parties to the volume contract, except if they
expressly consent to the derogations following notice prominently spelling out
such derogations.203 Third, the party claiming the benefit of the derogations
bears the burden of proof that the conditions for derogation have been
fulfilled.204

Delegations from several countries such as Australia, Canada and from the
African continent had consistently expressed concerns regarding the provisions
on volume contracts as they felt the refined text was a good, but somewhat
insufficient start towards satisfying their concerns on the possible effects of
volume contracts on small shippers. The revised text did not go far enough in
terms of protecting shippers and it was suggested that the inclusion of specific
numbers in the definition of “volume contract” was necessary to avoid any
uncertainty in its interpretation.205 However, the general view of the Working
Group was that the definition and the refined text was an improvement over the
previous text and should be adopted. Most of the delegations from the African
continent accepted that view as part of a compromise. In diplomatic proceedings
uncertainty is sometimes preferred because it is easier to reach a compromise.
The inclusion of the provision on volume contracts in the draft convention was a
“deal breaker” for the United States delegation.

4.15 Final clauses

Article 94 of the Rotterdam Rules is one of the core provisions as it
determines the number of ratifications necessary for its entry into force. The
Working Group discussed a wide range of positions on how many ratifications
would be needed to bring the convention into force ranging from as low as three
to as high as thirty. After an extensive debate, the Working Group determined

197 Ibid., article 80(3).
198 Ibid., article 14 (a) and (b).
199 Ibid., article 29.
200 Ibid., article 32.
201 Ibid., article 61.
202 Ibid., article 80(4).
203 Ibid., article 80(5).
204 Ibid., article 80(6).
205 See, Comments received from Australia, supra, note 70, paras 66-67 at p.12.
that the convention would enter into force one year after ratification by twenty states.
5. SUMMARY AND CONCLUSION

The Rotterdam Rules is anticipated to provide a basis for the creation of a modern harmonized law in the area of international carriage of goods by sea presently fragmented by competing international regimes and several national hybrids. Throughout this decade-long effort, the international maritime community’s aim has been to achieve overall reduction in transaction costs, promote predictability and stability for carriers and shippers and instil greater confidence in international maritime commerce. The UNCITRAL initiative culminating into the adoption of a new comprehensive convention on carriage of goods will, it is hoped, be largely acceptable to the world maritime community.

Despite some pessimism shown by critics of the Rotterdam Rules, there appears to be considerable promise in terms of its eventual success. The Hamburg Rules have often been criticized as being the outcome of political polarization where practical and commercial concerns were often ignored. By contrast, the text of the Rotterdam Rules reflects a concerted effort by the drafters to meet practical and commercial needs. The involvement of CMI in the preliminary drafting process and participation of observers from the leading maritime organizations and associations during the UNCITRAL sessions have ensured that the voice of the commercial world has been heard throughout the deliberations.

The agreement of the commercial interests will determine the prospects for ratifications by states which in turn will dictate the success of the Rotterdam Rules. The endorsement of the text of the Rotterdam Rules by CMI at its annual conference held in October 2008 is a significant indication of support for the new convention which incorporates a multimodal transport regime with a maritime leg. On the other hand some segments of the maritime industry appear to prefer the status quo despite the fragmentation of the law in this area. This attitudinal inertia, if it prevails, is likely to frustrate the efforts to modernize and harmonize a regime that attempts to strike a much needed delicate balance between carrier and shipper interests.

During the preparation of the Rotterdam Rules a frequently used phrase was “balance of risk”. The alleged imbalance at several occasions became the central point of debate for the Working Group III delegations during deliberations on a specific article or a particular issue. The perceived optimal or efficient balancing of risks between carrier and shipper interests were often the result of compromise reached after protracted debates during the Working Group sessions. Such compromises raise a string of questions such as whether the new regime strikes a proper balance of risk between shipper and carrier interests or the balance has unreasonably shifted in favour of any particular interest, or whether the exercise is simply a fine tuning of the existing law.
In this report an attempt has been made to address the above questions in the context of presenting a detailed analytical appreciation of the salient features of the Rotterdam Rules. The examination has revealed that some of the provisions will result in considerable changes to the existing laws of jurisdictions that presently adhere to the Hague/Hague-Visby or Hamburg Rules. A comparative analysis of the draft convention vis-à-vis the existing regimes indicates that the comparisons when applied to different jurisdictions are necessarily relative.

The Rotterdam Rules virtually reflect the fact that contracts of carriage in the current milieu are typically concluded on a door-to-door basis. Therefore, the innovative “maritime plus” approach of the Rules as the governing law makes ample sense as it falls into line with commercial practice. The critics have pointed out that ascertaining whether the carrier has exercised the option to include the carriage preceding and following maritime carriage under the Rules or as an agent would pose problems.

The Rotterdam Rules extend the notion of freedom of contract to volume contracts. Shipments under volume contracts will be subject to the Rules unless the parties take affirmative action to contract out of the Rules. At present, shipments under charterparties are often subjected to the Hague/Hague-Visby Rules through the incorporation of a “clause paramount” which amounts to an affirmative step taken by the parties to contract into coverage by the Rules. To protect small shippers from being abused, the Rotterdam Rules provide additional safeguards in article 80 in relation to volume contracts to ensure that every shipper always has the right to conclude a contract of carriage on the terms of the Rules, and any derogation from the Rules must be clearly expressed.

The provisions on electronic transport records have been generally satisfactory. It is anticipated that the use of electronic transmission of data will in the near future be accepted universally in the same manner as paper documents.

The obligations and liabilities of the carrier under the Rotterdam Rules have been increased in some cases compared with the Hague/Hague-Visby Rules. Some of the perils which relieved the carrier from liability for loss or damage to goods have been eliminated while seaworthiness has been made a continuous obligation. The Rules impose liability on the carrier for delay in delivery of goods, which is absent in the Hague/Hague-Visby Rules. Pursuant to article 21, the Rules recognize delay only when the time for delivery has been agreed. If the time for delivery is not agreed, then there seems to be no liability under the Rules, and the contracting states cannot impose any additional liability under their domestic laws. Thus, states with national laws governing carrier liability for delay will identify this provision in the Rules as a move favourable to the carrier. For jurisdictions which are currently under the Hamburg Rules regime, the provision on delay under the draft convention is clearly in favour of the carrier.
There is a chapter on obligations of the shipper, which so far has been primarily subject to national laws. The provisions have been generally satisfactory apart from the criticism that the liability of the shipper is not subject to limitation while the carrier can limit his liability.

In the Rotterdam Rules higher limitation amounts are provided compared to the extant international regimes. Higher limitation figures were part of a compromise reached by the Working Group which in turn accepted an uncertain definition of volume contract. The scope of liability subject to limitation has been changed; limitation is not restricted to loss of or damage to goods or delay in delivery but to all other breaches that can be envisaged under the Rules. The new wording of article 59(1) will also allow the carrier to enjoy limitation of liability with respect to misdelivered goods which are considered as “lost” and avoid varied interpretation of courts in different jurisdictions where the carrier is sometimes subjected to unlimited liability. Also, under the new wording, where a carrier issues a transport document without qualifying the information which he knows is incorrect under article 40(1), he can still limit his liability. The carrier can, however, lose the right of limitation under article 61.

There are chapters on arbitration and jurisdiction in the Rotterdam Rules based on the corresponding chapters in the Hamburg Rules. The “opt-in” approach allows a contracting state to ratify the convention without accepting the two chapters. While these two chapters offer the prospect of some measure of increased harmonization in the law relating to enforcement of forum selection clauses, the optional character of the chapters will likely give rise to an increase in international legal diversity, at least in the short term.

The future of maritime trade is heavily dependent on a legal regime that is consistent with the interests of both the principal players, namely, carriers and shippers. The lack of an equitable balance between the two interests has for many decades plagued the advancement of global maritime trade as a whole and has engendered uncertainty and fragmentation in the law. In an air of optimism it is contemplated that the Rotterdam Rules will finally emerge as a comprehensive global regime for carriage of goods wholly or partly by sea which will ultimately inure to the benefit of consumers and society as a whole.
ANNEX I

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("Rotterdam Rules")

The States Parties to this Convention,

Reaffirming their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Convinced that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contributes to universal economic cooperation among all States on a basis of equality, equity and common interest, and to the well-being of all peoples,


Mindful of the technological and commercial developments that have taken place since the adoption of those conventions and of the need to consolidate and modernize them,

Noting that shippers and carriers do not have the benefit of a binding universal regime to support the operation of contracts of maritime carriage involving other modes of transport,

Believing that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

Have agreed as follows:
CHAPTER 1. GENERAL PROVISIONS

Article 1. Definitions

For the purposes of this Convention:

1. “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.

2. “Volume contract” means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.

3. “Liner transportation” means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.

4. “Non-liner transportation” means any transportation that is not liner transportation.

5. “Carrier” means a person that enters into a contract of carriage with a shipper.

6. (a) “Performing party” means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.

   (b) “Performing party” does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.

7. “Maritime performing party” means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

8. “Shipper” means a person that enters into a contract of carriage with a carrier.

9. “Documentary shipper” means a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.

10. “Holder” means:

   (a) A person that is in possession of a negotiable transport document; and
   (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or
(b) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.

11. “Consignee” means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.

12. “Right of control” of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.

13. “Controlling party” means the person that pursuant to article 51 is entitled to exercise the right of control.

14. “Transport document” means a document issued under a contract of carriage by the carrier that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

15. “Negotiable transport document” means a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.

16. “Non-negotiable transport document” means a transport document that is not a negotiable transport document.

17. “Electronic communication” means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.

18. “Electronic transport record” means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

19. “Negotiable electronic transport record” means an electronic transport record:

(a) That indicates, by wording such as “to order”, or “negotiable”, or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”; and

(b) The use of which meets the requirements of article 9, paragraph 1.

20. “Non-negotiable electronic transport record” means an electronic transport record that is not a negotiable electronic transport record.
21. The “issuance” of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.

22. The “transfer” of a negotiable electronic transport record means the transfer of exclusive control over the record.

23. “Contract particulars” means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.

24. “Goods” means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.

25. “Ship” means any vessel used to carry goods by sea.

26. “Container” means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.

27. “Vehicle” means a road or railroad cargo vehicle.

28. “Freight” means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.

29. “Domicile” means (a) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation or central registered office, whichever is applicable, (ii) central administration or (iii) principal place of business, and (b) the habitual residence of a natural person.

30. “Competent court” means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.

Article 2. Interpretation of this Convention

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Article 3. Form requirements

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 19, paragraph 2; 23, paragraphs 1 to 4; 36, subparagraphs 1 (b), (c) and (d); 40, subparagraph 4 (b); 44; 48, paragraph 3; 51, subparagraph 1 (b); 59, paragraph 1; 63; 66; 67, paragraph 2; 75, paragraph 4; and 80, paragraphs 2 and 5, shall be in writing. Electronic communications may be used for these purposes, provided that the use of such means is with the consent of the person by which it is communicated and of the person to which it is communicated.
Article 4. Applicability of defences and limits of liability

1. Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:
   (a) The carrier or a maritime performing party;
   (b) The master, crew or any other person that performs services on board the ship; or
   (c) Employees of the carrier or a maritime performing party.

2. Any provision of this Convention that may provide a defence for the shipper or the documentary shipper applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their subcontractors, agents or employees.

CHAPTER 2. SCOPE OF APPLICATION

Article 5. General scope of application

1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:
   (a) The place of receipt;
   (b) The port of loading;
   (c) The place of delivery; or
   (d) The port of discharge.

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

Article 6. Specific exclusions

1. This Convention does not apply to the following contracts in liner transportation:
   (a) Charterparties; and
   (b) Other contracts for the use of a ship or of any space thereon.

2. This Convention does not apply to contracts of carriage in non-liner transportation except when:
   (a) There is no charterparty or other contract between the parties for the use of a ship or of any space thereon; and
   (b) A transport document or an electronic transport record is issued.
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Article 7. Application to certain parties
Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charterparty or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.

CHAPTER 3. ELECTRONIC TRANSPORT RECORDS

Article 8. Use and effect of electronic transport records
Subject to the requirements set out in this Convention:
(a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and
(b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

Article 9. Procedures for use of negotiable electronic transport records
1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:
(a) The method for the issuance and the transfer of that record to an intended holder;
(b) An assurance that the negotiable electronic transport record retains its integrity;
(c) The manner in which the holder is able to demonstrate that it is the holder; and
(d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1 (a)(ii) and (c), the electronic transport record has ceased to have any effect or validity.
2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.

Article 10. Replacement of negotiable transport document or negotiable electronic transport record
1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:
(a) The holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;
(b) The carrier shall issue to the holder a negotiable electronic transport record that includes a statement that it replaces the negotiable transport document; and
(c) The negotiable transport document ceases thereafter to have any effect or validity.

2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:

(a) The carrier shall issue to the holder, in place of the electronic transport record, a negotiable transport document that includes a statement that it replaces the negotiable electronic transport record; and

(b) The electronic transport record ceases thereafter to have any effect or validity.

CHAPTER 4. OBLIGATIONS OF THE CARRIER

Article 11. Carriage and delivery of the goods

The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.

Article 12. Period of responsibility of the carrier

1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.

2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.

(b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.

3. For the purpose of determining the carrier’s period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:

(a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or

(b) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage.

Article 13. Specific obligations

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.

2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the
shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

**Article 14. Specific obligations applicable to the voyage by sea**

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

(a) Make and keep the ship seaworthy;
(b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and
(c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

**Article 15. Goods that may become a danger**

Notwithstanding articles 11 and 13, the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier’s period of responsibility, an actual danger to persons, property or the environment.

**Article 16. Sacrifice of the goods during the voyage by sea**

Notwithstanding articles 11, 13, and 14, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure.

**CHAPTER 5. LIABILITY OF THE CARRIER FOR LOSS, DAMAGE OR DELAY**

**Article 17. Basis of liability**

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier’s responsibility as defined in chapter 4.

2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.

3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

   (a) Act of God;
   (b) Perils, dangers, and accidents of the sea or other navigable waters;
(c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;
(d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;
(e) Strikes, lockouts, stoppages, or restraints of labour;
(f) Fire on the ship;
(g) Latent defects not discoverable by due diligence;
(h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34;
(i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;
(j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
(k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;
(l) Saving or attempting to save life at sea;
(m) Reasonable measures to save or attempt to save property at sea;
(n) Reasonable measures to avoid or attempt to avoid damage to the environment; or
(o) Acts of the carrier in pursuance of the powers conferred by articles 15 and 16.

4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:
   (a) If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies; or
   (b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 18.

5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:
   (a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods; and
   (b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) that it complied with its obligation to exercise due diligence pursuant to article 14.
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6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.

Article 18. Liability of the carrier for other persons

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:
(a) Any performing party;
(b) The master or crew of the ship;
(c) Employees of the carrier or a performing party; or
(d) Any other person that performs or undertakes to perform any of the carrier’s obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.

Article 19. Liability of maritime performing parties

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier’s defences and limits of liability as provided for in this Convention if:
(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and
(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier’s obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

Article 20. Joint and several liability

1. If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this Convention.
2. Without prejudice to article 61, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Convention.

Article 21. Delay
Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed.

Article 22. Calculation of compensation
1. Subject to article 59, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 43.
2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.
3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 of this article except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 16.

Article 23. Notice in case of loss, damage or delay
1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of loss of or damage to the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days at the place of delivery after the delivery of the goods.
2. Failure to provide the notice referred to in this article to the carrier or the performing party shall not affect the right to claim compensation for loss of or damage to the goods under this Convention, nor shall it affect the allocation of the burden of proof set out in article 17.
3. The notice referred to in this article is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the person to which they have been delivered and the carrier or the maritime performing party against which liability is being asserted.
4. No compensation in respect of delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.
5. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.
6. In the case of any actual or apprehended loss or damage, the parties to the dispute shall give all reasonable facilities to each other for inspecting and
tallying the goods and shall provide access to records and documents relevant to the carriage of the goods.

CHAPTER 6. ADDITIONAL PROVISIONS RELATING TO PARTICULAR STAGES OF CARRIAGE

Article 24. Deviation

When pursuant to applicable law a deviation constitutes a breach of the carrier’s obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 61.

Article 25. Deck cargo on ships

1. Goods may be carried on the deck of a ship only if:
   (a) Such carriage is required by law;
   (b) They are carried in or on containers or vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or vehicles; or
   (c) The carriage on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.

2. The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article, but the carrier is not liable for loss of or damage to such goods, or delay in their delivery, caused by the special risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs 1 (a) or (c) of this article.

3. If the goods have been carried on deck in cases other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and is not entitled to the defences provided for in article 17.

4. The carrier is not entitled to invoke subparagraph 1 (c) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic transport record in good faith, unless the contract particulars state that the goods may be carried on deck.

5. If the carrier and shipper expressly agreed that the goods would be carried under deck, the carrier is not entitled to the benefit of the limitation of liability for any loss of, damage to or delay in the delivery of the goods to the extent that such loss, damage, or delay resulted from their carriage on deck.

Article 26. Carriage preceding or subsequent to sea carriage

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier’s period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of
another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier’s activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier’s liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

CHAPTER 7. OBLIGATIONS OF THE SHIPPER TO THE CARRIER

Article 27. Delivery for carriage

1. Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.

2. The shipper shall properly and carefully perform any obligation assumed under an agreement made pursuant to article 13, paragraph 2.

3. When a container is packed or a vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container or vehicle, and in such a way that they will not cause harm to persons or property.

Article 28. Cooperation of the shipper and the carrier in providing information and instructions

The carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party’s possession or the instructions are within the requested party’s reasonable ability to provide and they are not otherwise reasonably available to the requesting party.

Article 29. Shipper’s obligation to provide information, instructions and documents

1. The shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary:

(a) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and

(b) For the carrier to comply with law, regulations or other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.
2. Nothing in this article affects any specific obligation to provide certain information, instructions and documents related to the goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.

*Article 30. Basis of shipper’s liability to the carrier*

1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper’s obligations under this Convention.

2. Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 31, paragraph 2, and 32, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34.

3. When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 34.

*Article 31. Information for compilation of contract particulars*

1. The shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 36, paragraph 1; the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any.

2. The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this article. The shipper shall indemnify the carrier against loss or damage resulting from the inaccuracy of such information.

*Article 32. Special rules on dangerous goods*

When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:

(a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and

(b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.
Article 33. Assumption of shipper’s rights and obligations by the documentary shipper

1. A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 55, and is entitled to the shipper’s rights and defences provided by this chapter and by chapter 13.

2. Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.

Article 34. Liability of the shipper for other persons

The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.

CHAPTER 8. TRANSPORT DOCUMENTS AND ELECTRONIC TRANSPORT RECORDS

Article 35. Issuance of the transport document or the electronic transport record

Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper’s option:

(a) A non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record; or

(b) An appropriate negotiable transport document or, subject to article 8, subparagraph (a), a negotiable electronic transport record, unless the shipper and the carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage or practice of the trade not to use one.

Article 36. Contract particulars

1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper:

(a) A description of the goods as appropriate for the transport;

(b) The leading marks necessary for identification of the goods;

(c) The number of packages or pieces, or the quantity of goods; and

(d) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include:
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(a) A statement of the apparent order and condition of the goods at the
time the carrier or a performing party receives them for carriage;
(b) The name and address of the carrier;
(c) The date on which the carrier or a performing party received the
goods, or on which the goods were loaded on board the ship, or on which the
transport document or electronic transport record was issued; and
(d) If the transport document is negotiable, the number of originals of the
negotiable transport document, when more than one original is issued.

3. The contract particulars in the transport document or electronic
transport record referred to in article 35 shall further include:
(a) The name and address of the consignee, if named by the shipper;
(b) The name of a ship, if specified in the contract of carriage;
(c) The place of receipt and, if known to the carrier, the place of delivery;
and
(d) The port of loading and the port of discharge, if specified in the
contract of carriage.

4. For the purposes of this article, the phrase “apparent order and
condition of the goods” in subparagraph 2 (a) of this article refers to the order
and condition of the goods based on:
(a) A reasonable external inspection of the goods as packaged at the time
the shipper delivers them to the carrier or a performing party; and
(b) Any additional inspection that the carrier or a performing party
actually performs before issuing the transport document or electronic transport
record.

Article 37. Identity of the carrier

1. If a carrier is identified by name in the contract particulars, any other
information in the transport document or electronic transport record relating to
the identity of the carrier shall have no effect to the extent that it is inconsistent
with that identification.

2. If no person is identified in the contract particulars as the carrier as
required pursuant to article 36, subparagraph 2 (b), but the contract particulars
indicate that the goods have been loaded on board a named ship, the registered
owner of that ship is presumed to be the carrier, unless it proves that the ship
was under a bareboat charter at the time of the carriage and it identifies this
bareboat charterer and indicates its address, in which case this bareboat
charterer is presumed to be the carrier. Alternatively, the registered owner may
rebut the presumption of being the carrier by identifying the carrier and
indicating its address. The bareboat charterer may rebut any presumption of
being the carrier in the same manner.

3. Nothing in this article prevents the claimant from proving that any
person other than a person identified in the contract particulars or pursuant to
paragraph 2 of this article is the carrier.
Article 38. Signature

1. A transport document shall be signed by the carrier or a person acting on its behalf.

2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier’s authorization of the electronic transport record.

Article 39. Deficiencies in the contract particulars

1. The absence or inaccuracy of one or more of the contract particulars referred to in article 36, paragraphs 1, 2 or 3, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.

2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be:
   (a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or
   (b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship.

3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them, the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the carrier or a performing party received them.

Article 40. Qualifying the information relating to the goods in the contract particulars

1. The carrier shall qualify the information referred to in article 36, paragraph 1, to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper if:
   (a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is false or misleading; or
   (b) The carrier has reasonable grounds to believe that a material statement in the transport document or electronic transport record is false or misleading.

2. Without prejudice to paragraph 1 of this article, the carrier may qualify the information referred to in article 36, paragraph 1, in the circumstances and in the manner set out in paragraphs 3 and 4 of this article to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper.

3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container or vehicle, or when they are delivered in a closed container or vehicle and the carrier or a performing party actually
inspects them, the carrier may qualify the information referred to in article 36, paragraph 1, if:

(a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or

(b) The carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information.

4. When the goods are delivered for carriage to the carrier or a performing party in a closed container or vehicle, the carrier may qualify the information referred to in:

(a) Article 36, subparagraphs 1 (a), (b), or (c), if:
(i) The goods inside the container or vehicle have not actually been inspected by the carrier or a performing party; and
(ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and

(b) Article 36, subparagraph 1 (d), if:
(i) Neither the carrier nor a performing party weighed the container or vehicle, and the shipper and the carrier had not agreed prior to the shipment that the container or vehicle would be weighed and the weight would be included in the contract particulars; or
(ii) There was no physically practicable or commercially reasonable means of checking the weight of the container or vehicle.

Article 41. Evidentiary effect of the contract particulars

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 40:

(a) A transport document or an electronic transport record is prima facie evidence of the carrier’s receipt of the goods as stated in the contract particulars;

(b) Proof to the contrary by the carrier in respect of any contract particulars shall not be admissible, when such contract particulars are included in:

(i) A negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith; or
(ii) A non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith;

(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any of the following contract particulars included in a non-negotiable transport document or a non-negotiable electronic transport record:

(i) The contract particulars referred to in article 36, paragraph 1, when such contract particulars are furnished by the carrier;
(ii) The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and
(iii) The contract particulars referred to in article 36, paragraph 2.

**Article 42. “Freight prepaid”**

If the contract particulars contain the statement “freight prepaid” or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.

**CHAPTER 9. DELIVERY OF THE GOODS**

**Article 43. Obligation to accept delivery**

When the goods have arrived at their destination, the consignee that demands delivery of the goods under the contract of carriage shall accept delivery of the goods at the time or within the time period and at the location agreed in the contract of carriage or, failing such agreement, at the time and location at which, having regard to the terms of the contract, the customs, usages or practices of the trade and the circumstances of the carriage, delivery could reasonably be expected.

**Article 44. Obligation to acknowledge receipt**

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

**Article 45. Delivery when no negotiable transport document or negotiable electronic transport record is issued**

When neither a negotiable transport document nor a negotiable electronic transport record has been issued:

(a) The carrier shall deliver the goods to the consignee at the time and location referred to in article 43. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier;

(b) If the name and address of the consignee are not referred to in the contract particulars, the controlling party shall prior to or upon the arrival of the goods at the place of destination advise the carrier of such name and address;

(c) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable
effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(d) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary shipper pursuant to subparagraph (c) of this article is discharged from its obligations to deliver the goods under the contract of carriage.

Article 46. Delivery when a non-negotiable transport document that requires surrender is issued

When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The carrier shall deliver the goods at the time and location referred to in article 43 to the consignee upon the consignee properly identifying itself on the request of the carrier and surrender of the non-negotiable document. The carrier may refuse delivery if the person claiming to be the consignee fails to properly identify itself on the request of the carrier, and shall refuse delivery if the non-negotiable document is not surrendered. If more than one original of the non-negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity;

(b) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

Article 47. Delivery when a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the
carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 43 to the holder:

(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a)(i), upon the holder properly identifying itself; or
(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;

(b) The carrier shall refuse delivery if the requirements of subparagraph (a)(i) or (a)(ii) of this paragraph are not met;

(c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity. When a negotiable electronic transport record has been used, such electronic transport record ceases to have any effect or validity upon delivery to the holder in accordance with the procedures required by article 9, paragraph 1.

2. Without prejudice to article 48, paragraph 1, if the negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rules apply:

(a) If the goods are not deliverable because (i) the holder, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, subparagraph 10 (a)(i), or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(b) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph 2 (a) of this article is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;

(c) The person giving instructions under subparagraph 2 (a) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph 2 (e) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;
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(d) A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods pursuant to subparagraph 2 (b) of this article, but pursuant to contractual or other arrangements made before such delivery acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods;

(e) Notwithstanding subparagraphs 2 (b) and 2 (d) of this article, a holder that becomes a holder after such delivery, and that did not have and could not reasonably have had knowledge of such delivery at the time it became a holder, acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

Article 48. Goods remaining undelivered

1. For the purposes of this article, goods shall be deemed to have remained undelivered only if, after their arrival at the place of destination:

(a) The consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in article 43;

(b) The controlling party, the holder, the shipper or the documentary shipper cannot be found or does not give the carrier adequate instructions pursuant to articles 45, 46 and 47;

(c) The carrier is entitled or required to refuse delivery pursuant to articles 44, 45, 46 and 47;

(d) The carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested; or

(e) The goods are otherwise undeliverable by the carrier.

2. Without prejudice to any other rights that the carrier may have against the shipper, controlling party or consignee, if the goods have remained undelivered, the carrier may, at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require, including:

(a) To store the goods at any suitable place;

(b) To unpack the goods if they are packed in containers or vehicles, or to act otherwise in respect of the goods, including by moving them; and

(c) To cause the goods to be sold or destroyed in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.

3. The carrier may exercise the rights under paragraph 2 of this article only after it has given reasonable notice of the intended action under paragraph 2 of this article to the person stated in the contract particulars as the person, if any, to be notified of the arrival of the goods at the place of destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper.
4. If the goods are sold pursuant to subparagraph 2 (c) of this article, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred by the carrier and any other amounts that are due to the carrier in connection with the carriage of those goods.

5. The carrier shall not be liable for loss of or damage to goods that occurs during the time that they remain undelivered pursuant to this article unless the claimant proves that such loss or damage resulted from the failure by the carrier to take steps that would have been reasonable in the circumstances to preserve the goods and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps.

Article 49. Retention of goods

Nothing in this Convention affects a right of the carrier or a performing party that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due.

CHAPTER 10. RIGHTS OF THE CONTROLLING PARTY

Article 50. Exercise and extent of right of control

1. The right of control may be exercised only by the controlling party and is limited to:

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;

(b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and

(c) The right to replace the consignee by any other person including the controlling party.

2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.

Article 51. Identity of the controlling party and transfer of the right of control

1. Except in the cases referred to in paragraphs 2, 3 and 4 of this article:

(a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party;

(b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party; and

(c) The controlling party shall properly identify itself when it exercises the right of control.

2. When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:
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(a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document by transferring the document to that person without endorsement. If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control; and

(b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

3. When a negotiable transport document is issued:
   (a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;
   (b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and
   (c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a)(i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

4. When a negotiable electronic transport record is issued:
   (a) The holder is the controlling party;
   (b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1; and
   (c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

Article 52. Carrier’s execution of instructions

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 50 if:
   (a) The person giving such instructions is entitled to exercise the right of control;
   (b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and
   (c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.

2. In any event, the controlling party shall reimburse the carrier for any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.
3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.

4. The carrier’s liability for loss of or damage to the goods or for delay in delivery resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 17 to 23, and the amount of the compensation payable by the carrier shall be subject to articles 59 to 61.

Article 53. Deemed delivery

Goods that are delivered pursuant to an instruction in accordance with article 52, paragraph 1, are deemed to be delivered at the place of destination, and the provisions of chapter 9 relating to such delivery apply to such goods.

Article 54. Variations to the contract of carriage

1. The controlling party is the only person that may agree with the carrier to variations to the contract of carriage other than those referred to in article 50, subparagraphs 1 (b) and (c).

2. Variations to the contract of carriage, including those referred to in article 50, subparagraphs 1 (b) and (c), shall be stated in a negotiable transport document or in a non-negotiable transport document that requires surrender, or incorporated in a negotiable electronic transport record, or, upon the request of the controlling party, shall be stated in a non-negotiable transport document or incorporated in a non-negotiable electronic transport record. If so stated or incorporated, such variations shall be signed in accordance with article 38.

Article 55. Providing additional information, instructions or documents to carrier

1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to the goods not yet provided by the shipper and not otherwise reasonably available to the carrier that the carrier may reasonably need to perform its obligations under the contract of carriage.

2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions or documents to the carrier, the shipper shall provide them. If the carrier, after reasonable effort, is unable to locate the shipper, the documentary shipper shall provide such information, instructions or documents.

Article 56. Variation by agreement

The parties to the contract of carriage may vary the effect of articles 50, subparagraphs 1 (b) and (c), 50, paragraph 2, and 52. The parties may also restrict or exclude the transferability of the right of control referred to in article 51, subparagraph 1 (b).
CHAPTER 11. TRANSFER OF RIGHTS

Article 57. When a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:
   (a) Duly endorsed either to such other person or in blank, if an order document; or
   (b) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.

2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

Article 58. Liability of holder

1. Without prejudice to article 55, a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.

2. A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.

3. For the purposes of paragraphs 1 and 2 of this article, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:
   (a) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or
   (b) It transfers its rights pursuant to article 57.

CHAPTER 12. LIMITS OF LIABILITY

Article 59. Limits of liability

1. Subject to articles 60 and 61, paragraph 1, the carrier’s liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a
higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

2. When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.

3. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or award 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 that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

Article 60. Limits of liability for loss caused by delay

Subject to article 61, paragraph 2, compensation for loss of or damage to the goods due to delay shall be calculated in accordance with article 22 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable pursuant to this article and article 59, paragraph 1, may not exceed the limit that would be established pursuant to article 59, paragraph 1, in respect of the total loss of the goods concerned.

Article 61. Loss of the benefit of limitation of liability

1. Neither the carrier nor any of the persons referred to in article 18 is entitled to the benefit of the limitation of liability as provided in article 59, or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier’s obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

2. Neither the carrier nor any of the persons mentioned in article 18 is entitled to the benefit of the limitation of liability as provided in article 60 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.
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CHAPTER 13. TIME FOR SUIT

Article 62. Period of time for suit

1. No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under this Convention may be instituted after the expiration of a period of two years.

2. The period referred to in paragraph 1 of this article commences on the day on which the carrier has delivered the goods or, in cases in which no goods have been delivered or only part of the goods have been delivered, on the last day on which the goods should have been delivered. The day on which the period commences is not included in the period.

3. Notwithstanding the expiration of the period set out in paragraph 1 of this article, one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party.

Article 63. Extension of time for suit

The period provided in article 62 shall not be subject to suspension or interruption, but the person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

Article 64. Action for indemnity

An action for indemnity by a person held liable may be instituted after the expiration of the period provided in article 62 if the indemnity action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(b) Ninety days commencing from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.

Article 65. Actions against the person identified as the carrier

An action against the bareboat charterer or the person identified as the carrier pursuant to article 37, paragraph 2, may be instituted after the expiration of the period provided in article 62 if the action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(b) Ninety days commencing from the day when the carrier has been identified, or the registered owner or bareboat charterer has rebutted the presumption that it is the carrier, pursuant to article 37, paragraph 2.
CHAPTER 14. JURISDICTION

Article 66. Actions against the carrier

Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 67 or 72, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:

(a) In a competent court within the jurisdiction of which is situated one of the following places:

(i) The domicile of the carrier;
(ii) The place of receipt agreed in the contract of carriage;
(iii) The place of delivery agreed in the contract of carriage; or
(iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or

(b) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.

Article 67. Choice of court agreements

1. The jurisdiction of a court chosen in accordance with article 66, paragraph (b), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:

(a) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated or (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and

(b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.

2. A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if:

(a) The court is in one of the places designated in article 66, paragraph (a);

(b) That agreement is contained in the transport document or electronic transport record;

(c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and

(d) The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement.

Article 68. Actions against the maritime performing party

The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:

(a) The domicile of the maritime performing party; or

(b) The port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party
or the port in which the maritime performing party performs its activities with respect to the goods.

Article 69. No additional bases of jurisdiction
Subject to articles 71 and 72, no judicial proceedings under this Convention against the carrier or a maritime performing party may be instituted in a court not designated pursuant to articles 66 or 68.

Article 70. Arrest and provisional or protective measures
Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless:
(a) The requirements of this chapter are fulfilled; or
(b) An international convention that applies in that State so provides.

Article 71. Consolidation and removal of actions
1. Except when there is an exclusive choice of court agreement that is binding pursuant to articles 67 or 72, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, the action may be instituted only in a court designated pursuant to both article 66 and article 68. If there is no such court, such action may be instituted in a court designated pursuant to article 68, subparagraph (b), if there is such a court.
2. Except when there is an exclusive choice of court agreement that is binding pursuant to articles 67 or 72, a carrier or a maritime performing party that institutes an action seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum pursuant to article 66 or 68 shall, at the request of the defendant, withdraw that action once the defendant has chosen a court designated pursuant to article 66 or 68, whichever is applicable, where the action may be recommenced.

Article 72. Agreement after a dispute has arisen and jurisdiction when the defendant has entered an appearance
1. After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.
2. A competent court before which a defendant appears, without contesting jurisdiction in accordance with the rules of that court, has jurisdiction.

Article 73. Recognition and enforcement
1. A decision made in one Contracting State by a court having jurisdiction under this Convention shall be recognized and enforced in another Contracting State in accordance with the law of such latter Contracting State when both States have made a declaration in accordance with article 74.
2. A court may refuse recognition and enforcement based on the grounds for the refusal of recognition and enforcement available pursuant to its law.
3. This chapter shall not affect the application of the rules of a regional economic integration organization that is a party to this Convention, as concerns the recognition or enforcement of judgements as between member States of the regional economic integration organization, whether adopted before or after this Convention.

Article 74. Application of chapter 14

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

CHAPTER 15. ARBITRATION

Article 75. Arbitration agreements

1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at:
   (a) Any place designated for that purpose in the arbitration agreement; or
   (b) Any other place situated in a State where any of the following places is located:
      (i) The domicile of the carrier;
      (ii) The place of receipt agreed in the contract of carriage;
      (iii) The place of delivery agreed in the contract of carriage; or
      (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.

3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if the agreement is contained in a volume contract that clearly states the names and addresses of the parties and either:
   (a) Is individually negotiated; or
   (b) Contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement.

4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:
   (a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article;
   (b) The agreement is contained in the transport document or electronic transport record;
   (c) The person to be bound is given timely and adequate notice of the place of arbitration; and
   (d) Applicable law permits that person to be bound by the arbitration agreement.
5. The provisions of paragraphs 1, 2, 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 to the extent that it is inconsistent therewith is void.

Article 76. Arbitration agreement in non-liner transportation

1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the provisions of this Convention apply by reason of:
   (a) The application of article 7; or 
   (b) The parties’ voluntary incorporation of this Convention in a contract of carriage that would not otherwise be subject to this Convention.

2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:
   (a) Identifies the parties to and the date of the charterparty or other contract excluded from the application of this Convention by reason of the application of article 6; and 
   (b) Incorporates by specific reference the clause in the charterparty or other contract that contains the terms of the arbitration agreement.

Article 77. Agreement to arbitrate after a dispute has arisen

Notwithstanding the provisions of this chapter and chapter 14, after a dispute has arisen the parties to the dispute may agree to resolve it by arbitration in any place.

Article 78. Application of chapter 15

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

CHAPTER 16. VALIDITY OF CONTRACTUAL TERMS

Article 79. General provisions

1. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:
   (a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention; 
   (b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or 
   (c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 18.

2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:
(a) Directly or indirectly excludes, limits or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or
(b) Directly or indirectly excludes, limits or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.

Article 80. Special rules for volume contracts
1. Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.
2. A derogation pursuant to paragraph 1 of this article is binding only when:
   (a) The volume contract contains a prominent statement that it derogates from this Convention;
   (b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;
   (c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and
   (d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.
3. A carrier’s public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.
4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 14, subparagraphs (a) and (b), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in article 61.
5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:
   (a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and
   (b) Such consent is not solely set forth in a carrier’s public schedule of prices and services, transport document or electronic transport record.
6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

Article 81. Special rules for live animals and certain other goods
Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:
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(a) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier or of a person referred to in article 18, done with the intent to cause such loss of or damage to the goods or such loss due to delay or done recklessly and with knowledge that such loss or damage or such loss due to delay would probably result; or

(b) The character or condition of the goods or the circumstances and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and that no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

CHAPTER 17. MATTERS NOT GOVERNED BY THIS CONVENTION

Article 82. International conventions governing the carriage of goods by other modes of transport

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

(a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;

(b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;

(c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or

(d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

Article 83. Global limitation of liability

Nothing in this Convention affects the application of any international convention or national law regulating the global limitation of liability of vessel owners.

Article 84. General average

Nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average.
Article 85. Passengers and luggage

This Convention does not apply to a contract of carriage for passengers and their luggage.

Article 86. Damage caused by nuclear incident

No liability arises under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:


(b) Under national law applicable to the liability for such damage, provided that such law is in all respects as favourable to persons that may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.

CHAPTER 18. FINAL CLAUSES

Article 87. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 88. Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States at [Rotterdam, the Netherlands] from [...] to [...] and thereafter at the Headquarters of the United Nations in New York from [...] to [...].

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 89. Denunciation of other conventions

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924; to the Protocol
signed on 23 February 1968 to amend the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924; or to the Protocol to amend the International Convention for the Unification of certain Rules relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979 shall at the same time denounce that Convention and the protocol or protocols thereto to which it is a party by notifying the Government of Belgium to that effect, 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. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978 shall at the same time denounced Convention by notifying the Secretary-General of the United Nations to that effect, 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.

3. For the purposes of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraphs 1 and 2 of this article that are notified to the depositary after this Convention has entered into force are not effective until such denunciations as may be required on the part of those States in respect of these instruments have become effective. The depositary of this Convention shall consult with the Government of Belgium, as the depositary of the instruments referred to in paragraph 1 of this article, so as to ensure necessary coordination in this respect.

Article 90. Reservations
No reservation is permitted to this Convention.

Article 91. Procedure and effect of declarations
1. The declarations permitted by articles 74 and 78 may be made at any time. The initial declarations permitted by article 92, paragraph 1, and article 93, paragraph 2, shall be made at the time of signature, ratification, acceptance, approval or accession. No other declaration is permitted under this Convention.

2. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

3. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

4. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

5. Any State that makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. The withdrawal of a declaration, or its modification where permitted by this Convention, takes effect on the first day of the month following the
expiration of six months after the date of the receipt of the notification by the depositary.

**Article 92. Effect in domestic territorial units**

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. When a Contracting State has declared pursuant to this article that this Convention extends to one or more but not all of its territorial units, a place located in a territorial unit to which this Convention does not extend is not considered to be in a Contracting State for the purposes of this Convention.

4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

**Article 93. Participation by regional economic integration organizations**

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. When the number of Contracting States is relevant in this Convention, the regional economic integration organization does not count as a Contracting State in addition to its member States which are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration pursuant to this paragraph.

3. Any reference to a “Contracting State” or “Contracting States” in this Convention applies equally to a regional economic integration organization when the context so requires.

**Article 94. Entry into force**

1. This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.

2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the twentieth instrument of ratification, acceptance,
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approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State.

Article 95. 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 96. Denunciation of this Convention

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. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at [Rotterdam, the Netherlands], this [...] day of [...], [...], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.
ANNEX II


(Brussels, 25 August 1924)

The President of the German Republic, the President of the Argentine Republic, His Majesty the King of the Belgians, the President of the Republic of Chile, the President of the Republic of Cuba, His Majesty the King of Denmark and Iceland, His Majesty the King of Spain, the Head of the Estonian State, the President of the United States of America, the President of the Republic of Finland, the President of the French Republic, His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, His Most Supreme Highness the Governor of the Kingdom of Hungary, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Latvian Republic, the President of the Republic of Mexico, His Majesty the King of Norway, Her Majesty the Queen of the Netherlands, the President of the Republic of Peru, the President of the Polish Republic, the President of the Portuguese Republic, His Majesty the King of Romania, His Majesty the King of the Serbs, Croats and Slovenes, His Majesty the King of Sweden, and the President of the Republic of Uruguay,

HAVING RECOGNIZED the utility of fixing by agreement certain uniform rules of law relating to bills of lading,

HAVE DECIDED to conclude a convention with this object and have appointed the following Plenipotentaries:

WHO, duly authorized thereto, have agreed as follows:

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 charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.
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(c) “Goods” includes goods, wares, merchandise and articles of every kind whatsoever except live animals and cargo which by the contract of carriage in 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, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

If the loss or damage is not apparent, the notice must be given within three days of the delivery of the goods.

The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

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

7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands, be a “shipped” bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the “shipped” bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article 3, shall for the purpose of this Article be deemed to constitute a “shipped” bill of lading.
8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion 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 due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article 3. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article.

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

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

(b) Fire, unless caused by the actual fault or privity of the carrier.

(c) Perils, dangers and accidents of the sea or other navigable waters.

(d) Act of God.

(e) Act of war.

(f) Act of public enemies.

(g) Arrest or restraint or 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.

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(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 actual 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 connexion with goods in an amount exceeding 100 pounds sterling 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 connexion with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.
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6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damage and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Article 5

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under this Convention, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this Convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of this Convention. 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 the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect.

Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.
Article 7

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connexion 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 sea-going vessels.

Article 9

The monetary units mentioned in this Convention are to be taken to be gold value.

Those contracting States in which the pound sterling is not a monetary unit reserve to themselves the right of translating the sums indicated in this Convention in terms of pound sterling into terms of their own monetary system in round figures.

The national laws may reserve to the debtor the right of discharging his debt in national currency according to the rate of exchange prevailing on the day of the arrival of the ship at the port of discharge of the goods concerned.

Article 10

The provisions of this Convention shall apply to all bills of lading issued in any of the contracting States.

Article 11

After an interval of not more than two years from the day on which the Convention is signed, the Belgian Government shall place itself in communication with the Governments of the High Contracting Parties which have declared themselves prepared to ratify the Convention, with a view to deciding whether it shall be put into force. The ratifications shall be deposited at Brussels at a date to be fixed by agreement among the said Governments. The first deposit of ratifications shall be recorded in a procès-verbal signed by the representatives of the Powers which take part therein and by the Belgian Minister of Foreign Affairs.
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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 instruments of ratification accompanying them, shall be immediately sent by the Belgian Government through the diplomatic channel to the Powers who have signed this Convention or who have acceded to it. In the cases contemplated in the preceding paragraph, the said Government shall inform them at the same time of the date on which it received the notification.

Article 12

Non-signatory States may accede to the present Convention whether or not they have been represented at the International Conference at Brussels.

A State which desires to accede shall notify its intention in writing to the Belgian Government, forwarding to it the document of accession, which shall be deposited in the archives of the said Government.

The Belgian Government shall immediately forward to all 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 the time of signature, ratification or accession declare that their acceptance of the present Convention does not include any or all of the self-governing dominions, or of the colonies, overseas possessions, protectorates or territories under their sovereignty or authority, and they may subsequently accede separately on behalf of any self-governing dominion, colony, overseas possession, protectorate or territory excluded in their declaration. They may also denounced 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 convening the Conference.

DONE at Brussels, in a single copy, August 25th, 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 of lading shall be entitled to establish responsibility for loss or
Annex II

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 single copy, August 25th, 1924.
ANNEX III

The Hague-Visby Rules

The Hague Rules as Amended by the Brussels Protocol 1968

Article I. Definitions

In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say,

(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 water, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;

(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 water;

(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 II. Risks

Subject to the provisions of Article VI, under every contract of carriage of goods by water 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 III. Responsibilities and Liabilities

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;
Annex III

(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 IV, 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 paragraphs 3(a), (b) and (c).

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.

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge
before or at the time of the removal of the goods into the custody of the person
entitled to delivery thereof under the contract of carriage, or, if the loss or
damage be not apparent, within three days, such removal shall be prima facie
evidence of the delivery by the carrier of the goods as described in the bill of
lading.

The notice in writing need not be given if the state of the goods has at the time
of their receipt been the subject of joint survey or inspection.

Subject to paragraph 6bis the carrier and the ship shall in any event be
discharged from all liability whatsoever in respect of the goods, unless suit is
brought within one year of their delivery or of the date when they should have
been delivered. This period may, however, be extended if the parties so agree
after the cause of action has arisen.

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

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.

7. After the goods are loaded the bill of lading to be issued by the carrier,
master or agent of the carrier, to the shipper shall, if the shipper so demands,
be a “shipped” bill of lading, provided that if the shipper shall have previously
taken up any document of title to such goods, he shall surrender the same as
against the issue of the “shipped” bill of lading, but at the option of the carrier
such document of title may be noted at the port of shipment by the carrier,
master, or agent with the name or names of the ship or ships upon which the
goods have been shipped and the date or dates of shipment, and when so
noted the same 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 these Rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving
the carrier from liability.
Annex III

Article IV. Rights and Immunities

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from

(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

(b) fire, unless caused by the actual fault or privity of the carrier;

(c) perils, dangers and accidents of the sea or other navigable waters;

(d) act of God;

(e) act of war;

(f) act of public enemies;

(g) arrest or restraint of princes, rulers or people, or seizure under legal process;

(h) quarantine restrictions;

(i) act or omission of the shipper or owner of the goods, his agent or representative;

(j) strikes or lock-outs 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 and 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 these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

5. (a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

(b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.

The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

(c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or
units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.

(d) The unit of account mentioned in this Article is the Special Drawing Right 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 ratification 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.

(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 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 mis-stated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

*Article IVbis.. Application of Defences and Limits of Liability*

1. The defences and limits of liability provided for in these Rules 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 in tort.

2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.

3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in these Rules.

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
Annex III

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 V. Surrender of Rights and Immunities, and Increase of Responsibilities and Liabilities

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the Rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of these Rules shall not be applicable to charter-parties, but if bills of lading are issued in the case of a ship under a charter-party they shall comply with the terms of these Rules. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

Article VI. Special Conditions

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 the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by water, 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 VII. Limitations on the Application of the Rules

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

Article VIII. Limitation of Liability

The provisions of these Rules 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 vessels.

Article IX. Liability for Nuclear Damage

These Rules shall not affect the provisions of any international Convention or
national law governing liability for nuclear damage.

Article X. Application

The provisions of these Rules shall apply to every bill of lading relating to the
carriage of goods between ports in two different States if:

(a) the bill of lading is issued in a Contracting State, or

(b) the carriage is from a port in a Contracting State, or

(c) the contract contained in or evidenced by the bill of lading provides that
these Rules 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.
ANNEX IV

("Hamburg Rules")

(Hamburg, 31 March 1978)

PREAMBLE

THE STATES PARTIES TO THIS CONVENTION,

HAVING RECOGNIZED the desirability of determining by agreement certain rules relating to the carriage of goods by sea,

HAVING DECIDED to conclude a convention for this purpose and have thereto 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 this Convention are applicable to all contracts of carriage by sea between two different States, if:

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

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

   (c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or

   (d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or

   (e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

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

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

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

Article 3. Interpretation of the Convention

In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity.
PART II. LIABILITY OF THE CARRIER

Article 4. Period of responsibility

1. The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.

2. For the purpose of paragraph 1 of this article, the carrier is deemed to be in charge of the goods

(a) from the time he has taken over the goods from:
(i) the shipper, or a person acting on his behalf; or
(ii) an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment;

(b) until the time he has delivered the goods:
(i) by handing over the goods to the consignee; or
(ii) in cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or
(iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.

3. In paragraphs 1 and 2 of this article, reference to the carrier or to the consignee means, in addition to the carrier or the consignee, the servants or agents, respectively of the carrier or the consignee.

Article 5. Basis of liability

1. The carrier is liable for loss resulting from loss of 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 of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;

(ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.

(b) In case of fire on board the ship affecting the goods, if the claimant or the carrier so desires, a survey in accordance with shipping practices must be held into the cause and circumstances of the fire, and a copy of the surveyors report shall be made available on demand to the carrier and the claimant.

5. With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.

6. The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.

7. Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery, the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.

Article 6. Limits of liability

1. (a) The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of 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 of goods by sea.

(c) In no case shall the aggregate liability of the carrier, under both
subparagraphs (a) and (b) of this paragraph, exceed the limitation which would
be established under subparagraph (a) of this paragraph for total loss of the
goods with respect to which such liability was incurred.

2. For the purpose of calculating which amount is the higher in accordance with
paragraph 1 (a) of this article, the following rules apply:
(a) Where a container, pallet or similar article of transport is used to consolidate
goods, the package or other shipping units enumerated in the bill of lading, if
issued, or otherwise in any 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 of or damage to the goods covered by
the contract of carriage by sea, as well as of delay in delivery whether the action
is founded in contract, in tort or otherwise.

2. If such an action is brought against a servant or agent of the carrier, such
servant or agent, if he proves that he acted within the scope of his employment,
is entitled to avail himself of the defences and limits of liability which the carrier
is entitled to invoke under this Convention.

3. Except as provided in article 8, the aggregate of the amounts recoverable from
the carrier and from any persons 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 the intent to cause such loss,
damage or delay, or recklessly and with knowledge that such loss, damage or
delay would probably result.
Annex IV

2. Notwithstanding the provisions of paragraph 2 of article 7, a servant or agent of the carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

Article 9. Deck cargo

1. The carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations.

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 of or damage to the goods, as well as for delay in delivery, resulting solely from the carriage on deck, and the extent of his liability is to be determined in accordance with the provisions of article 6 or article 8 of this Convention, as the case may be.

4. Carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of article 8.

Article 10. Liability of the carrier and actual carrier

1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.

2. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of paragraph 2 of
article 8 apply if an action is brought against a servant or agent of the actual carrier.

3. Any special agreement under which the carrier assumes obligations not imposed by this Convention or waives rights conferred by this Convention affects the actual carrier only if agreed to by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement.

4. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.

5. The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability provided for in this Convention.

6. Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier.

**Article 11. Through carriage**

1. Notwithstanding the provisions of paragraph 1 of article 10, where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named person other than the carrier, the contract may also provide that the carrier is not liable for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage. Nevertheless, any stipulation limiting or excluding such liability is without effect if no judicial proceedings can be instituted against the actual carrier in a court competent under paragraph 1 or 2 of article 21. The burden of proving that any loss, damage or delay in delivery has been caused by such an 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 SHIPPERS**

**Article 12. General rule**

The shipper is not liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor is any servant or agent of the shipper liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part.
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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 the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

(b) the apparent condition of the goods;

(c) the name and principal place of business of the carrier;

(d) the name of the shipper;

(e) the consignee if named by the shipper;

(f) the port of loading under the contract of carriage by 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 is payable by him;

(l) the statement referred to in paragraph 3 of article 23;

(m) the statement, if applicable, that the goods shall or may be carried on deck;

(n) the date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties; and

(o) any increased limit or limits of liability where agreed in accordance with paragraph 4 of article 6.

2. After the goods have been loaded on board, if the shipper so demands, the carrier must issue to the shipper a “shipped” bill of lading which, in addition to the particulars required under paragraph 1 of this article, must state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any 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 shippers demand for a “shipped” bill of lading if, as amended, such document includes all the information required to be contained in a “shipped” bill of lading.

3. The absence in the bill of lading of one or more particulars referred to in this article does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in paragraph 7 of article 1.
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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 of 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 if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein.

4. A bill of lading which does not, as provided in paragraph 1, subparagraph (k), of article 15, set forth the freight or otherwise 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 a 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 to in paragraph 3 of this article, the carrier is liable, without the benefit of the limitation of liability provided for in this Convention, for the loss incurred by a third party, including a consignee, because he has acted in reliance on the description of the goods in the bill of lading.

Article 18. Documents other than bills of lading

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

PART V. CLAIMS AND ACTIONS

Article 19. Notice of loss, damage or delay

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the carrier not later than the working day after the day when the goods were handed over to the consignee, such handing over is *prima facie* evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition.

2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply correspondingly if notice in writing is not given within 15 consecutive days after the day when the goods were handed over to the consignee.
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3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

4. In the case of any actual or apprehended loss or damage, the carrier and the consignee must give all reasonable facilities to each other for inspecting and tallying the goods.

5. No compensation shall be payable for loss resulting from delay in delivery unless a notice has been given in writing to the carrier within 60 consecutive days after the day when the goods were handed over to the consignee.

6. If the goods have been delivered by an actual carrier, any notice given under this article to him shall have the same effect as if it had been given to the carrier; and any notice given to the carrier shall have effect as if given to such actual carrier.

7. Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the carrier or actual carrier to the shipper not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2 of article 4, whichever is later, the failure to give such notice is prima facie evidence that the carrier or the actual carrier has sustained no loss or damage due to the fault or neglect of the shipper, his servants or agents.

8. For the purpose of this article, notice given to a person acting on the carriers or the actual carriers behalf, including the master or the officer in charge of the ship, or to a person acting on the shippers 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 of the arrest.

3. No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.

4. (a) Where an action has been instituted in a court competent under paragraphs 1 or 2 of this article or where judgement has been delivered by such
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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 actions, is
effective.

Article 22. Arbitration

1. Subject to the provisions of this article, parties may provide by agreement
evidenced in writing that any dispute that may arise relating to carriage of goods
under this Convention shall be referred to arbitration.

2. Where a charter-party contains a provision that disputes arising thereunder
shall be referred to arbitration and a bill of lading issued pursuant to the charter-
party 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 of the defendant 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 2 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 goods in favour of the carrier, or any similar clause, is null and void.

2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention.

3. Where a bill of lading or any other document evidencing 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 of or damage to the goods as well as for delay in delivery. The carrier must, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where 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.
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2. With the exception of article 20, the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.

Article 25. Other conventions

1. This Convention does not modify the rights or duties of the carrier, the actual carrier and their servants and agents provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.

2. The provisions of articles 21 and 22 of this Convention do not prevent the application of the mandatory provisions of any other multilateral convention already in force at the date of this Convention relating to matters dealt with in the said articles, provided that the dispute arises exclusively between parties having their principal place of business in States members of such other convention. However, this paragraph does not affect the application of paragraph 4 of article 22 of this Convention.

3. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964, or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or

(b) by virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as is either the Paris Convention or the Vienna Convention.

4. No liability shall arise under the provisions of this Convention for any loss of or damage to or delay in delivery of luggage for which the carrier is responsible under any international convention or national law relating to the carriage of passengers and their luggage by sea.

5. Nothing contained in this Convention prevents a Contracting State from applying any other international convention which is already in force at the date of this Convention and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than transport by sea. This provision also applies to any subsequent revision or amendment of such international convention.
Article 26. Unit of Account

1. The unit of account referred to in article 6 of this Convention is the special drawing right as defined by the International Monetary Fund. The amounts mentioned in article 6 are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The 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 a national currency, in terms of the special drawing right, of a Contracting State which is not a member of the International Monetary Fund is to be calculated in a manner determined by that State.

2. Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, or at the time of ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as 12,500 monetary units per package or other shipping unit or 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.
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Article 28. Signature, Ratification, Acceptance, Approval, Accession

1. This Convention is open for signature by all States until 30 April 1979 at the Headquarters of the United Nations, New York.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. After 30 April 1979, this Convention will be open for accession by all States which are not signatory States.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 29. Reservations

No reservations may be made to this Convention.

Article 30. Entry into force

1. This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the twentieth 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 twentieth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply the provisions of this Convention to contracts of carriage by sea concluded on or after the date of the entry into force of this Convention in respect 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 25 August 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 23 February 1968 to amend the International Convention for the Unification of certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924.

4. Notwithstanding article 2 of this Convention, for the purposes of paragraph 1 of this article, a Contracting State may, if it deems it desirable, defer the denunciation of the 1924 Convention and of the 1924 Convention as modified by the 1968 Protocol for a maximum period of five years from the entry into force of this Convention. It will then notify the Government of Belgium of its intention. During this transitory period, it must apply to the Contracting States this Convention to the exclusion of any other one.

Article 32. Revision and amendment

1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

Article 33. Revision of the limitation amounts and unit of account or monetary unit

1. Notwithstanding the provisions of article 32, a conference only for the purpose of altering the amount specified in article 6 and paragraph 2 of article 26, or of substituting either or both of the units defined in paragraphs 1 and 3 of article 26 by other units is to be convened by the depositary in accordance with paragraph 2 of this article. An alteration of the amounts shall be made only because of a significant change in their real value.

2. A revision conference is to be 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 all the States signatories of the Convention for information.
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4. Any amendment adopted enters into force on the first day of the month following one year after its acceptance by two thirds of the Contracting States. Acceptance is to be effected by the deposit of a formal instrument to that effect with the depositary.

5. After entry into force of an amendment a Contracting State which has accepted the amendment is entitled to apply the Convention as amended in its relations with Contracting States which have not within six months after the adoption of the amendment notified the depositary that they are not bound by the amendment.

6. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

Article 34. Denunciation

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

Done at Hamburg, this 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 texts are equally authentic.
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