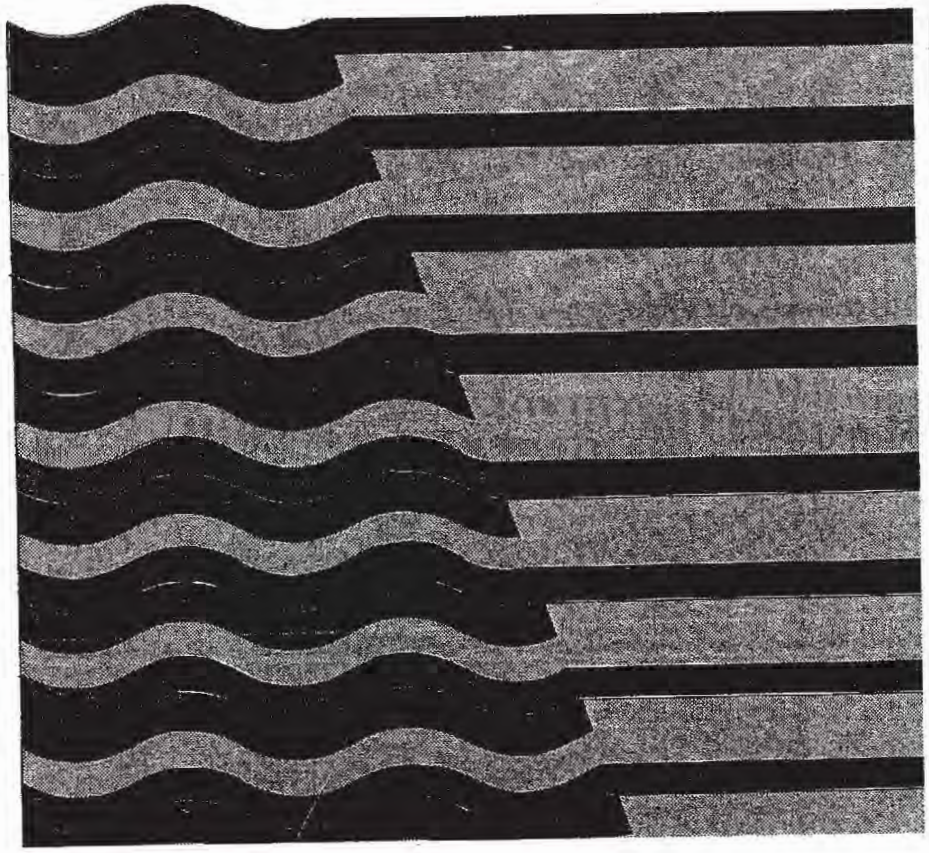
UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

THE ECONOMIC AND COMMERCIAL IMPLICATIONS OF THE ENTRY INTO FORCE OF THE HAMBURG RULES AND THE MULTIMODAL TRANSPORT CONVENTION

UNITED NATIONS



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UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
Geneva

THE ECONOMIC AND COMMERCIAL IMPLICATIONS OF THE ENTRY INTO FORCE OF THE HAMBURG RULES AND THE MULTIMODAL TRANSPORT CONVENTION

Report by the UNCTAD secretariat

UNITED NATIONS
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CONTENTS

List of abbreviations

BIMCO	Baltic and International Maritime Council
C & F	cost and freight
CFS	container freight station
CIF	cost insurance and freight
CIP	cost insurance and freight
CMI	Comité Maritime International
CPT	carriage paid to
CT	combined transport
CTO	combined transport operator
CY	container yard
ESC	European Shippers' Councils
FBL	FIATA bill of lading
FCL	full container load
FIATA	Federation Internationale des Associations de Transitaires et Assimiles (International Federation of Freight Forwarders Associations)
FOB	free onboard
FRC	free carrier (named point)
ICC	International Chamber of Commerce
IFF	Institute of Freight Forwarders (United Kingdom)
IMO	International Maritime Organization
INSA	International Shipowners' Association
IPG	Intergovernmental Preparatory Group
IRU	International Road Transport Union
LCL	less than container load
MT	multimodal transport
MTO	multimodal transport operator
NVOCC	non-vessel operating common carrier
NVO-MTO	non-vessel operating multimodal transport operator
OTT	operator of transport terminals
P & I Club	protection and idemnity association
SDR	special drawing rights (of the International Monetary Fund)
UCP	uniform customs and practices for documentary credits

List of conventions cited in the text

Arrest Convention	International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships (Brussels, 10 May 1952);
Athens Convention	Convention relating to the Carriage of Passengers and their Luggage by Sea (Athens, 13 December 1974);
Brussels Convention	International Convention relating to the Limitations of the Liability of Owners of Sea-going Ships (Brussels, 10 October 1957);
CIM	International Convention concerning the Carriage of Goods by Rail (CIM) (Bern, 7 February 1970);
CMR	Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956);
COTIF	Convention concerning International Transport by Rail (COTIF) (Bern, 9 May 1980);
COTIF-Appendix CIM	Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM), Appendix B to the Convention concerning International Transport by Rail (COTIF) (Bern, 9 May 1980);
Arbitral Awards Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958);
Guadalajara Convention	Convention supplementary to the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air performed by a Person Other than the Contracting Carrier (Guadalajara, 18 September 1961);
Hague Protocol	Protocol to amend the Warsaw Convention of 12 October 1919 for the Unification of Certain Rules relating to International Carriage by Air (The Hague, 28 September 1955);
Hague Rules	International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 25 August 1924);

London Convention	Convention on Limitation of Liability for Maritime Claims, 1976 (London, 19 November 1976);
MT Convention	United Nations Convention on International Multimodal Transport of Goods (Geneva, 1980);
Vienna Convention	Convention on the Law of Treaties (Vienna, 23 May 1969);
Visby Protocol	Protocol to amend the Brussels International Convention of 25 August 1924 for the Unification of Certain Rules of Law relating to Bills of Lading (23 February 1968);
Warsaw Convention	Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw, 12 October 1929);
York-Antwerp Rules 1974	York-Antwerp Rules 1974 (Hamburg, 4 April 1974);
1979 Protocol	Protocol (SDR) amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924, as amended by the Protocol of 23 February 1968 (Brussels, 21 December 1979);
1990 Protocol	Protocol to amend the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (Athens, 13 December 1974).

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Introduction

(i) In its resolution 55 (XI), paragraph 8, the Committee on Shipping requested the UNCTAD secretariat "to prepare a study on the economic and commercial implications of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) and the United Nations Convention on International Multimodal Transport of Goods (the MT Convention), including present insurance practices, and to submit a brief document, in the form of a booklet, explaining the provisions of the conventions and the implications of becoming contracting parties thereto."[1] This study - submitted in two parts to the thirteenth and the fourteenth sessions of the Committee on Shipping - has now been combined in this booklet.

(ii) The booklet has been prepared by UNCTAD in collaboration with the International Trade Law Branch of the United Nations Office of Legal Affairs, which is the secretariat of the United Nations Commission on International Trade Law (UNCITRAL). The UNCTAD secretariat wishes to express its gratitude to the UNCITRAL secretariat for its valuable contributions to the parts of the booklet dealing with the Hamburg Rules.

(iii) This booklet is not intended as a text book. As a consequence, the article-by-article discussions of the two Conventions do not contain the number of citations normally associated with legal works.[2] As it is intended to serve as a guide for all States members of UNCTAD, care has been taken not to favour one country's interpretation of liability rules over another. Readers are reminded that not all Governments may support all of the conclusions presented.

(iv) Throughout the text, reference to articles in the Hague Rules have been numbered in capital Roman numerals, while those of the Hamburg Rules and other conventions cited have been numbered in Arabic numerals.

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1 Report of the Committee on Shipping on its eleventh session (TD/B/1034), annex I.

2 These article-by-article discussions do not have juridical status.

Summary and conclusions

1. The United Nations Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules), was adopted at the United Nations Conference on the Carriage of Goods by Sea in Hamburg, Federal Republic of Germany, in March 1978 with the participation of 78 States, including many developing countries. It updates the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924, and its two protocols, the so-called Visby Protocol, 1968, and the so-called 1979 Protocol. The object of the Hamburg Rules was to strike a fairer balance between carriers and shippers in the allocation of risks, rights and obligations with regard to liability. The Hamburg Rules improve the limit of liability, solve the question of the unit limitation value of packages stowed in containers, make certain the carrier's right to unit limitation for the torts of his employees, eliminate litigation concerning the validity of choice of law and choice of forum clauses, develop the concept of arbitration, solve the question of on-deck cargo and cargoes for which no bill of lading has been issued, strengthen the carrier's fire exemption and remove the nautical faults defence. They shift the balance of liability slightly from the shipper to the carrier, but without radically changing the established liability system.

2. After adoption of the text, it was nevertheless predicted in some quarters that the entry into force of this Convention would have a considerable impact on the transport industry. Shipping, however, has always been a dynamic industry where change is continous. After the United Nations Conference in Hamburg, the 1979 Protocol to the Hague-Visby Rules was negotiated and has come into force. Likewise, two other new conventions dealing with liability, namely the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, and the Convention on Limitation of Liability for Maritime Claims, London, 1974, have both entered into force. The former has recently been amended by the 1990 Protocol which considerably increases the limits of liability under the Convention. The International Chamber of Commerce's (ICC) INCOTERMS and Uniform Customs and Practices for Documentary Credits have also both been updated to take into account new trading practices and to allow banks to negotiate documents other than "on-board bills of lading". Furthermore, modern methods of communications, such as electronic data interchange (EDI), have reduced the need for bills of lading in many trades, while at the same time increasing the need for a system which allows other types of transport documents to be used. In addition, some shipowners may now be ready to accept the abolition of the nautical faults defence and simultaneously agree to an increase in the limits of liability even exceeding those of the Hamburg Rules. Finally shippers are uniting to press for the earliest entry into force of the Hamburg Rules.

3. Many of the original arguments against the Hamburg Rules have lost their relevance because of changed perceptions of the importance of certain issues. Rather than perservering with the shortcomings of the current Hague-Visby Rules, carriers and their lawyers in one country, for example, have suggested the adoption of a modified version of the Visby Protocol which is very close to the text of the Hamburg Rules. Such a step would, however, require a new diplomatic conference to amend the Hague-Visby Rules adding a fourth liability system to the already confused situation. Instead, adoption of the Hamburg Rules and consequential denunciation of the Hague-Visby Rules system would accomplish the same aim with fewer complications.

4. The Hamburg Rules are modeled on conventions relating to land and air carriage elaborated after the Hague Rules, particularly the Convention on the Contract for the International Carriage of Goods by Road (CMR) and the Warsaw Convention, both of which have passed the test of practical applicability. As well as incorporating aspects of the United States Harter Act, many parts of the Visby Protocol's text have been incorporated virtually *verbatim* into the text of the Hamburg Rules. Arguments that the text or its liability rules are "new" are consequently not valid, unless seen from a narrow "maritime" point of view.

5. The United Nations Convention on International Multimodal Transport of Goods, 1980 (the MT Convention), adopted at the United Nations Conference on International Multimodal Transport of Goods in Geneva, Switzerland, in May 1980 with the participation of 84 States, including 51 developing countries, is intended to create a measure of uniformity in multimodal transport. It has roots in the draft convention which went under the abbreviation "TCM" (for *transport combiné de marchandises*), the ICC Uniform Rules for a Combined Transport Document (the ICC Rules), the Hague-Visby Rules and the Hamburg Rules. Its liability system is a modified network system. Exceptions embodied in its articles restrict its mandatory application.

6. Owing to world-wide inflation, *de facto* limits of liability of all transport conventions have been severely eroded, resulting in poorer protection for shippers. Consequently, the actual limits of liability provided by the Hamburg Rules, although nominally higher than those, for example, of the 1979 Protocol to the Visby Rules, were already in 1983 slightly below the real values of the 1979 Protocol, when that protocol was originally negotiated, and are today almost 25 per cent below real 1979 values for limits of liability. Even the actual limits of the MT Convention

are today 7 or 8 per cent below the 1979 Protocol's real value. It may thus be said that the entry into force of the Hamburg Rules and the MT Convention will go some way towards restoring the balance of risk that existed between shippers and carriers, if not to the level achieved in 1924 when the Hague Rules were agreed, then at least towards 1979 levels. The graph below shows the relative levels of limits of liability of selected transport conventions.

7. The analysis of the economic and commercial consequences of the entry into force of the two conventions has drawn heavily on existing material. From this material it would be possible to select arguments which would show that the entry into force of the conventions would be either for or against the best interests of modern seaborne trade. However, all commentators agree that until they actually come into force, only assumptions can be made about the conventions' economic and commercial consequences. While all steps have been taken to make the present analysis objective, these efforts have been hampered by the lack of data from the insurance industry.[3]

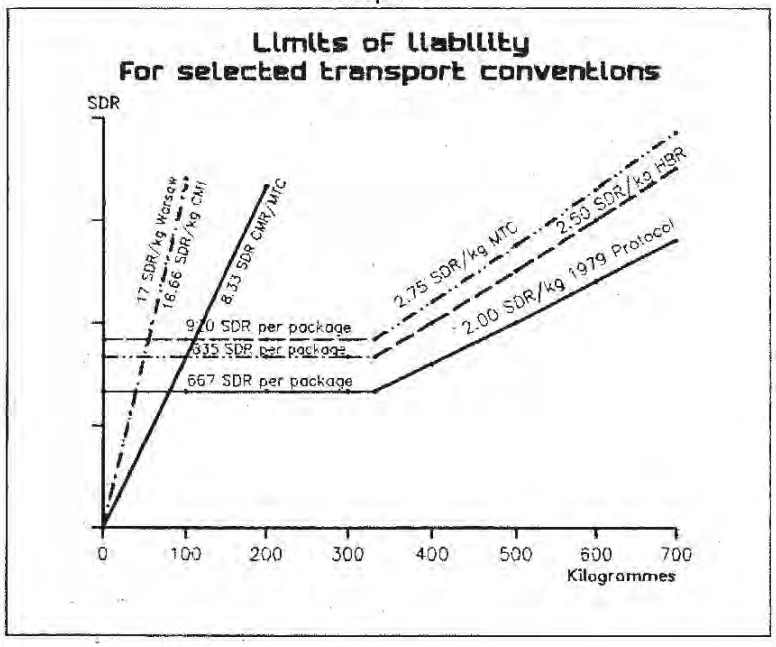
8. With these *caveats*, the following short lists of conclusions has been reached:

The ***Hamburg Rules:***

- Will not diminish the need for cargo insurance;
- May reduce cargo insurance expenses through greater use of recourse action, provided this is carried out not through litigation, but through commercial negotiations;
- May result in a more cost-effective insurance system, because the slight increase in the liability of shipowners will induce greater cargo care in order to avoid increased liability premiums;
- Are likely to result in some short-term additional litigation, but this is not expected to continue in the long term;
- Will cover the movement of goods by transport documents other than bills of lading, giving the shippers who use, for example, waybills the same measure of protection afforded those who use the bill of lading system;

3 During the negotiation of the Hamburg Rules where the concerns of the cargo insurers were made well known, their observations were "not supported by data or other specific information." E. Selvig, "The Hamburg Rules, the Hague Rules and Marine Insurance Practices", *Journal of Maritime Law and Commerce,* Vol. 12, No. 3, April 1981, pp. 314-315.

Graph 1



- Will encourage the present movement towards the abolition of the nautical faults defence;
- Will not have major economic consequences;
- Will result in better protection of shippers' interests compared with the present system; and
- Will encourage a rapid move away from the Hague Rules and the Hague-Visby Rules to the new Convention, thus promoting uniformity of law.

The ***MT Convention:***

- Leaves the shipper to choose between segmented and multimodal transport;
- Is closely modelled on the ICC Rules and uses language similar to those rules and the Hamburg Rules;

- Creates a semblance of order out of the chaos of liability systems now in force for multimodal transport;
- Has a flexible approach to its so-called "mandatory applicability";
- Has a system of liability where the rules are uniform, but the limits vary depending on the mode where damage occurred;
- Institutionalizes what most responsible multimodal or combined transport operators (MTO/CTO) are already doing;
- Simplifies claims procedures for shippers;
- Exposes the MTO to potentially higher liability if the Convention is in force in parallel with the Hague Rules or the Hague-Visby Rules;
- Gives the MTO practically full liability for most goods;
- Is unlikely to introduce massive insurance premium increases or giant new claims, and will allow liability insurance to be provided without too much difficulty or expense;
- Does not go beyond established practice in respect of the "powers" it assigns to governments to regulate multimodal transport operations at the national level;
- Will not contradict many of the present commercial practices;
- Makes it possible for multimodal transport insurance to be paid outside the country of the MTO;
- Enhances the banks' ability to recoup advances made under documentary credits; and
- Goes some way towards the restoration of the balance of risk that existed at the time of the Brussels Conference in 1924 (which adopted the Hague Rules) between carriers and shippers although already in 1987 its limits of liability had fallen below the real (1979) values of the limits specified in the 1979 Protocol.

Consequently, it may be concluded that,

- The legal consequences of the entry into force of both the Hamburg Rules and the MT Convention will be a streamlining of the multitude of liability regimes which currently purport to govern ocean and combined transport;
- The economic consequences of the entry into force of the two conventions will be limited;
- The commercial consequences of the entry into force of the two conventions will be to endorse many of the present commercial practices;
- Their entry into force will result in a better protection of shippers' interests compared with the present system; and
- The transport industry should be able to adjust itself to the new regimes with little difficulty.

Chapter I

The historical background to the Hamburg Rules

9. Historically, maritime law held the carrier absolutely liable for loss of or damage to cargo, whether or not he was negligent and (with a few exceptions) regardless of the cause of loss. For centuries, a sort of maxim or fundamental principle existed in maritime commerce "that between the shipowner and marine insurance underwriters the goods' owner ought to be kept harmless against all losses, except those of the market. The rule was that, once properly packed goods were placed on board a vessel so as to be fit for carriage, and were fully insured against all risks, the owner of them by either the contract of affreightment or insurance must be made to feel secure."[4]

10. However, by the end of the last century ocean carriers had managed to limit their liability for the carriage of goods by sea to a degree that finally became unacceptable to cargo interests, i.e. shippers and consignees. In the United States this resulted, in 1893, in the so-called "Harter Act" being passed. This act placed certain minimum but mandatory liabilities on the carriers in order to offer the merchants at least some protection.

11. This law did not, however, end the controversy, and at the beginning of the second decade of this century negotiations were held, resulting in a diplomatic conference with 26 participating countries, including a few developing countries,[5] which adopted, in Brussels in August 1924, the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, commonly known as the Hague Rules.

12. The Hague Rules were welcomed by most shippers[6] and consignees although they were adopted against the wishes of shipowners who opposed the increase in their liability under this new Convention. One of the arguments against accepting the rules was that (as now raised against the

4 Paper by Richard Lowndes "Report of the Committee on an International Law of Affreightment and Bills of Lading," printed in the *Report of the Ninth Annual Conference of the Association of the Reform and Codification of the Law of Nations*, Cologne, 16-19 August 1881.

5 Argentina; Belgium; Chile; Cuba; Denmark; Estonia; Finland; France; Germany; Hungary; Italy; Japan; Latvia; Mexico; Norway; Netherlands; Peru; Poland; Portugal; Romania; Serbia, Croatia and Slovenia; Spain; Sweden; Uruguay; United Kingdom; United States. The British Dominions, India, and Ireland were represented by the United Kingdom and Iceland by Denmark.

6 Except e.g. the French shippers who reportedly pressed for yet stricter controls of carriers at the domestic level. (M.A. Clarke, *Aspects of the Hague Rules*, Martinus Nijhoff, The Hague, 1976, p. 5).

Hamburg Rules) insurance premiums would increase owing to the increased carrier liability.

13. The Hague Rules entered into force in 1931. Today there are 77 Contracting Parties, including a large number of developing countries.[7] The list with the corresponding year of adhesion to the Convention shows that quite a number of these countries are Contracting Parties simply because they inherited the Hague Rules from their time as colonies. Some of these countries accepted the Hague Rules, while others are no longer Contracting Parties to them. Cameroon, for example, rejected the Convention,[8] while the United Republic of Tanzania, when it acceded to the Convention in 1962, specifically stated that it "adhered to the Convention of its own volition and did not inherit [it]".

14. The coverage of the Hague Rules is, however, wider than the number of Contracting Parties would indicate, since most bills of lading incorporate the Hague Rules into their text. This is in spite of the fact that there are large areas of the world, in particular among the developing countries, which do not adhere to the Rules.[9]

15. A number of major trading nations and territories are not contracting parties to the Hague Rules. These include Bangladesh, Canada, Chile, China, Greece, India, Indonesia, Iraq, Philippines, Republic of Korea,

7 Algeria (1964); Angola (1952); Antigua & Barbuda (1930); Argentina (1961); Australia (1955); Bahamas (1930); Barbados (1930); Belgium (1930); Belize (1930); Bolivia (1982); Cape Verde (1952); Côte d'Ivoire (1961); Cuba (1930); Cyprus (1930); [Denmark (1938)]; Dominican Republic (1930); Egypt (1943); Ecuador (1977); Fiji (1970); [Finland (1930)]; France (1937); Gambia (1930); Germany (1953); Ghana (1930); Grenada (1930); Guinea-Bissau (1952); Guyana (1930); Hungary (1930); Iran, Islamic Republic of (1966); Ireland (1962); Israel (1959); [Italy (1938)]; Jamaica (1930); Japan (1957); Kenya (1930); Kiribati (1930); Kuwait (1969); Lebanon (1975); Madagascar (1965); Malaysia (1930); Mauritius (1970); Monaco (1931); Mozambique (1952); Nauru (1955); [Netherlands (1956)]; Nigeria (1930); [Norway (1938)]; Papua New Guinea (1955); Paraguay (1967); Peru (1964); Poland (1937); Portugal (1931); Romania (1937); Sao Tome and Principe (1952); Senegal (1978); Seychelles (1930); Sierra Leone (1930); Singapore (1930); Solomon Islands (1930); Somalia (1930); Spain (1930); Sri Lanka (1930); St. Kitts and Nevis (1930); St. Lucia (1930); St. Vincent and the Grenadines (1930); [Sweden (1938)]; Switzerland (1954); Syrian Arab Republic (1974); Tonga (1930); Trinidad & Tobago (1930); Turkey (1955); Tuvalu (1930); [United Kingdom (1930)]; United Republic of Tanzania (1962); United States of America (1937); Yugoslavia (1959); Zaire (1967). (Source: *Conventions de droit maritime*, Ministère des affaires etrangèrs, du commerce extérieur et de la cooperation au développement de Belgique, Direction des traites, 13-I-1987, pp. 30-40. Countries shown in square brackets have denounced the Hague Rules and are Contracting States through the Visby Protocol.)

8 See *Conventions de droit maritime, op. cit.* p. 33.

9 There are, however, some major liner operators from countries which are not Contracting Parties to the Hague Rules which have not incorporated the Hague Rules' provisions in their bills of lading.

Saudi Arabia, Taiwan (province of China), Thailand, Union of Soviet Socialist Republics, Venezuela, *et al.* However, some of these, for example, Canada, have nevertheless incorporated the text of the Hague Rules into their national legislation.[10]

16. The Hague Rules represented some progress towards clarifying the liability régime covering ocean bills of lading by taking a major step towards a world-wide agreement on cargo liability for damage to goods carried by sea. The Rules were, however, susceptible to a number of developments, and events were soon to overtake them.

17. One of problems the Hague Rules set out to solve was the limit of liability per package or unit. This was fixed at £100 sterling gold value. However, already by the following year, 1925, the pound was to lose its convertibility into gold. This upset the carefully negotiated system of the carrier's liability. As a result, each contracting State converted the £100 in its own way, leading, after the Second World War, to totally conflicting limits. Despite their various shortcomings, the Hague Rules had served world ocean transport reasonably well for over 40 years. Eventually, however, it became obvious that technological progress had made it necessary to amend the Rules. So, in the late 1950s, the first attempts to update them were made when the Comité International Maritime (CMI) met in 1959 (at Rijeka) to consider reforms to the Convention.

18. Some time later, containerization began to take on a steadily increasing role in world cargo transport, thereby accelerating the need for corrections. The results of containerization were manifold. Firstly, with containerization the size of general cargo liner vessels increased from about 10,000/12,000 dwt to over 50,000 dwt, with a consequential increase in the cost of the vessels. Larger vessels, however, also carry larger quantities of cargoes, and it is today quite common for the value of the cargo carried by a large container vessel to exceed the value of the vessel by far. Secondly, containers move from door to door, and these moves are increasingly being organized by the carrier, who issues a door-to-door, multimodal or combined transport document. In addition, the use of ocean bills of lading is rapidly diminishing in modern container transport owing to a number of shortcomings in the bill of lading system itself.

19. A second CMI meeting was held in 1963 in Stockholm, and finally a diplomatic conference was held in Brussels in 1967-1968. This conference was attended by 53 countries and territories, of which approximately

10 See the Canadian Water Carriage of Goods Act, 1936.

half were developing.[11] Twenty-three countries sent observers.[12] In order to resolve the most glaring shortcomings of the Hague Rules, the negotiations over their modernization were initially aimed at a general overhaul, but this was deemed too radical an approach. As a consequence only a few points were "modernized" and no attempt was made to touch, for example, the "nautical fault concept". The problems caused by palletization and containerization could not be similarly ignored, however. The Hague Rules could be (and are) interpreted to mean that a pallet or a container could be counted as one package only, no matter how many packages it contained. This made it possible for the carrier to pay damages of only £100 per container, should it be proven that he was liable for the damage. Consequently, the conference in the end adopted a "Protocol to amend the International Convention for the unification of certain rules of law relating to Bills of Lading", also called the Visby Protocol. This protocol contains a so-called "container clause". This clause enables the shipper to claim the allowed monetary compensation for each package inside a container or pallet if listed on the bill of lading. However, as inflation had risen and the limit remained fixed at £100, the limit itself had become progressively less acceptable. So, at the same time, the limit of liability was increased to 10,000 francs Poincaré per package or unit.[13] As an innovation, a second choice for the shipper was added; he could now choose, instead of the 10,000 francs per package, a limit of 30 francs Poincaré per kilogramme. This rather dramatic increase from £100 to 10,000 francs Poincaré, which amounted to an increase of over 100 per cent when calculated in British pounds,[14] was accepted without serious opposition from the carriers. The protocol, which amended five of the original 16

11 Algeria; Argentina; Australia (1st part only); Austria (1st part only); Belgium; Bulgaria; Cameroon; Canada (1st part only); Congo; Denmark; Ecuador; Egypt; Finland; France; Germany, Federal Republic of; Ghana (2nd part only); Greece; Holy See; India; Ireland; Iran, Islamic Republic of (1st part only); Israel (1st part only); Italy; Japan; Lebanon; Liberia; Madagascar (1st part only); Morocco; Mauritania; Monaco; Netherlands; Nicaragua; Nigeria; Norway; Paraguay (2nd part only); Peru; Philippines; Poland; Portugal (1st part only); Republic of Korea; Spain; South Africa; Sweden; Switzerland; Taiwan (Province of China); Thailand; Togo; United Kingdom; United States; Uruguay; USSR; Venezuela (1st part only); Yugoslavia.

12 Australia (2nd part only); Brazil; Chile; Columbia; Côte d'Ivoire; Cuba; Dominican Republic (1st part only); Ghana (1st part only); Guatemala (1st part only); Iceland (2nd part only); Indonesia (2nd part only); Iraq; Israel (2nd part only); Pakistan (2nd part only); Panama (2nd part only); Madagascar (2nd part only); Mexico (1st part only); Senegal (2nd part only); Sudan (2nd part only); Saudi Arabia (2nd part only); Turkey; Tunis; Venezuela (2nd part only).

13 The franc Poincaré is an imaginary unit being equal to 65.5 milligrammes of gold of 900/1000 fineness.

14 To approximately £235 or $US 662 according to the proceedings of the CMI Stockholm Conference of 1963, Comité Maritime International, *XXVI^e Conférence, Stockholm*, (hereafter called "Stockholm Conference"), Comité Maritime International, Antwerp, 1963, p. 80.

articles and entered into force in June 1977, has 18 Contracting Parties, including seven developing countries, and is also in force in some British colonies or territories.[15] All the present Contracting Parties to the Visby Protocol were also Contracting Parties to the Hague Rules, and the Protocol's entry into force thus did not increase the number of Contracting Parties to the Hague Rules. The Visby Protocol, together with the Hague Rules, created a liability system which is generally known as the Hague-Visby Rules.

20. The list of Contracting Parties to the Visby Protocol is interesting, more for the countries which are not parties to the Protocol than for those which are. This is particularly so since the debate over the respective merits or otherwise of the Hague-Visby Rules *versus* the Hamburg Rules has re-emerged. The countries and territories not parties to the Protocol include: Brazil; Canada; China; Germany; India; Iran, Islamic Republic of; Iraq; Japan; Mexico; Nigeria; Republic of Korea; Saudi Arabia; Taiwan (Province of China); United States of America; Union of Soviet Socialist Republics; and Venezuela. Among them they account for half of world trade in terms of both value and weight. One may ask why there has been such reluctance to implement the Visby Protocol. It may be because it contains some obvious disadvantages. These have been discussed, for example at a Lloyd's of London Press Seminar on the Hague-Visby Rules and the [United Kingdom] Carriage of Goods by Sea Act, 1971,[16] where a speaker wondered if there would be "any real likelihood that [a] consensus can be based in the long run on the Hague-Visby Rules." The coverage of the Visby Protocol is actually quite restricted. Although many bills of lading refer to the Visby Protocol, they often do so only in a way which limits its application strictly to the small number of States which are Contracting Parties to the Protocol. A common "back clause" reads:

> "... the Carrier and the Merchant shall, as to the liability of the Carrier, be entitled to require such liability to be determined ... in respect of any carriage by sea by any national law, making the Hague Rules, or the Hague Rules as amended by the protocol signed at Brussels on 22nd February 1968, (the Hague-Visby Rules) compulsorily applicable. *If no such national law shall be compulsorily applicable, the Carrier shall be entitled to the benefits of all privileges, rights and immunities contained in the Hague Rules (as set out in the Convention of 25th August 1924 in its unamended form.)*"[17]

15 The Contracting Parties are: Belgium (1987); Denmark (1975); Ecuador (1977); Egypt (1983); Finland (1984); France (1977); Italy (1985); Lebanon (1975); Netherlands (1982) including Aruba (1986); Norway (1974); Poland (1980); Singapore (1972); Sri Lanka (1981); Sweden(1974); Switzerland (1975); Syrian Arab Republic (1974); Tonga (1978); United Kingdom (1976) including Bermuda, Hong Kong, and other dependencies (Source: *Conventions de droit maritime, op. cit.* pp. 42-43).

16 A. Diamond, QC, "The Hague-Visby Rules", *The Hague-Visby Rules and the Carriage of Goods by Sea Act, 1979 - a one day seminar organized by Lloyd's of London Press Ltd.*, (hereafter called the "HVR Seminar"), London, December 1977, pp. Diamond 27-28.

In other words, the Visby Protocol applies only when cargo is shipped from a State which has become Contracting Party to the Visby Protocol. Because of the limited number of Contracting Parties to the Visby Protocol, large parts of world trade are not covered by the Protocol, but only by the original Hague Rules. It is therefore misleading for people to say that the Hague-Visby Rules are in force "worldwide". This could be misinterpreted by shippers or consignees not well versed in the finer details of maritime law to mean that they are protected according to the Visby Protocol, while in very many cases the bill of lading only allows the Hague Rules or national law.

21. Unfortunately, the international monetary system's bench-mark, the Bretton Woods system, broke down soon after the Visby Protocol was negotiated, and it became necessary again to amend the monetary limits. A new diplomatic conference was consequently held in Brussels. This was attended by 37 countries,[18] of which a number were developing, and a new protocol was elaborated, the 1979 Protocol to the Visby Protocol. Seven countries sent observers.[19] The new Protocol replaced the unit of 10,000 francs Poincaré by 666.67 special drawing rights (SDR). It came into force in February 1984 and has 11 Contracting Parties, none of which is a developing country.[20] By becoming Contracting Parties to the two protocols, States also become Contracting Parties to the Hague Rules and/or the Visby Protocol. To recapitulate, although the Hague Rules have a total of 70 Contracting Parties including those which are Contracting Parties through the Visby Protocol, the two protocols have met with limited success and have not had the impact their proponents had envisaged.

22. In ocean transport it may be said that the limits have gone from £100 in several steps to the present limits. The last increase was made under the 1979 Protocol which changed the previous limits of 10,000 franc Poincaré to SDR 666.67. Since then, however, the value of the SDR has declined because of world-wide inflation. The International Monetary

17 Italics added.

18 Algeria; Argentina; Belgium; Chile; Denmark; Ecuador; Egypt; Finland; France; Germany, Federal Republic of; Greece; Holy See; Hungary; Israel; Italy; Japan; Kenya; Lebanon; Liberia; Madagascar; Mauritius; Monaco; Netherlands; Nigeria; Norway; Peru; Poland; Portugal; Senegal; Singapore; Spain; Sweden; Switzerland; Syrian Arab Republic; Turkey; United Kingdom; United States.

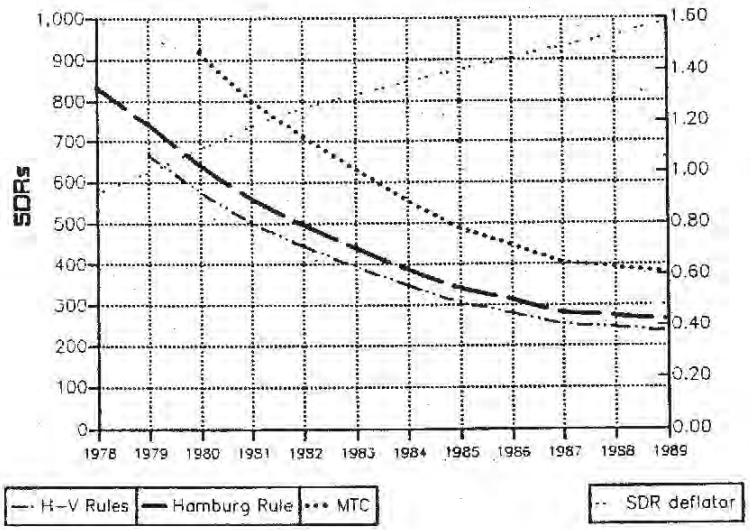
19 Angola; Brazil; Canada; Cuba; Paraguay; Uruguay; Yugoslavia.

20 Belgium (1983); Denmark (1983); Finland (1984); France (1986); Italy (1985); Netherlands (1986); Norway (1983); Poland (1984); Spain (1982); Sweden (1983); United Kingdom (1983) including Bermuda, Hong Kong and other dependencies. (Source: *Conventions de droit maritime, op. cit.* pp. 46-47).

Fund's (IMF) deflator based on the relative value of the currencies making up the SDR basket, had gone from 1 in 1979 to 1.4936 in 1987.[21] In other words, the 1979 Protocol's SDR 667 were, at the end of 1987, only worth SDR 447 measured in 1979 SDRs or only 67 per cent of the original value. Similarly, the values under the Hamburg Rules' and the MT Convention's limits of liability have been reduced to 62 and 73 per cent of their original value (to 518 and 674 SDRs). The MT Convention's limits of liability in 1987 were thus similar in real value as had been those of the 1979 Protocol when it had been negotiated. Continuing inflation has brought this value, in mid-1990, to below the 1979 Protocol's original value.[22] There should consequently be no grounds for rejecting a change to either of the two new Conventions "because their limit of liability is too high".

Graph 2

Effects of Inflation on Limits of Liability



21 Source: *International Financial Statistics 1988*, IMF, Washington, D.C.

22 See also S. Martin, "Insurance of goods and bills of lading", *Bills of Lading Course*, (Course held at the London Marriott Hotel, hereafter called the "Marriott Course"), Legal Studies & Services Ltd., n.p. (London), n.d. (1988), p. 15.

23. Regrettably, for the shippers, since most combined transport bills of lading or CT documents carefully limit the applicability of the 1979 Protocol to countries where it is mandatorily in force, the limits apply only to outbound traffic from those 11 countries that have ratified it. In the absense of such applicability, most documents revert to the original Hague Rules limits, i.e. £100, which in early 1991 were equivalent to SDR 135 only. In this connection, attention is drawn to the fact that the Visby Protocol is not in force in the British Channel Islands which remain Contracting Parties to the Hague Rules only.

24. However, even when the Visby Protocol or the 1979 Protocol nominally seemed to have increased the limits of liability, in many cases they have had quite the opposite effect. Three factors are responsible for this situation:

(a) The introduction of containers, which has resulted in a reduction of the average package weight to not more than 50 kilogrammes;
(b) The introduction of the per kilogramme limitation;[23] and
(c) The introduction of combined or multimodal transport.

25. These three developments combine to work towards a direct reduction in carriers' liability in cases of concealed damage. Almost all existing CT documents limit the carrier's liability in case of concealed damage to the 1979 Protocol's SDR 2 per kilogramme, or sometimes even only $US 2 per kilogramme. This works out to only from SDR 60 to 100 per package (or even from $US 60 to 100) or only 40 to 87 per cent of the Hague Rules' limits.

26. To compensate for the monetary burden of liability imposed on the shipowners by the Hague Rules, those Rules contain, in article IV, a list of exceptions from liability. One of the major complaints about the Hamburg Rules is that, except for fire, this list of defences has been eliminated. The most vocal complaint has been over the elimination of the nautical faults defence. This defence was originally included in the Hague Rules because the so-called "maritime adventure" of ocean transport in the

23 M. Graham, "The economic and commercial implications of the multimodal transport convention," *MT - the 1980 UN Convention papers of a one day seminar*, Southampton University, Faculty of Law, (hereafter called the "Southampton Seminar"), 12 September 1980, p. F7. For a package weighing 49 kilogrammes, the SDR 2.75 per kilogramme limitation will amount to only SDR 134.75 which will bring the claimant to use the unit limitation amount of SDR 920. If the damage is localized land damage, the limit will be only 49 x SDR 8.33 = SDR 408.17. In other words, only for packages weighing more than 110 kilogrammes will the per kilogramme limitations be more attractive.

past was indeed an uncertain affair fraught with danger. However, there is a vast difference between the perils of trading under sail without modern navigational aids and today's highly sophisticated vessels using the latest techonological aids. That safety has increased dramatically can be seen, for example, in the shipowners' push for fewer and fewer crew members per vessel. Over the past 30 years, crews have progressively been reduced from between 30 and 40 persons per vessel to less than 20, with moves in some countries to reduce this even further to only about eight. Such reductions would seem to indicate that shipowners believe that safety at sea has increased dramatically. Modern satellite communications, telex and telephone access put owners in daily contact with their vessels. Few masters would take an important decision without first having consulted their head office. This lessening of risk was also confirmed in a seminar on the subject:

> "hazards of a merchant adventure have become less as the technology of seafaring has improved: lighthouses and buoys, and better charts in the early ninteenth century, followed by steamships, radio and more recently radar, all reduced hazards of the sea...the container revolution...has radically changed the situation yet again... The result has been a dramatic improvement in the quality of services and a corresponding reduction in loss and damage."[24]

Consequently, the Hamburg Rules' elimination of the "errors in navigation" defence is no longer unreasonable. Many leading maritime lawyers have also concluded that there is no reason to be concerned over the loss of this defence, and this view is shared by some carriers. Furthermore, in some much-used charter parties, which do not incorporate the Hague Rules or the Hague-Visby Rules into the contract, the term "errors of navigation" is construed in a much more restricted manner than in the convention itself.[25] Similarly, the retention of the defence of fault or neglect of the master, servants and agents is no longer credible.

27. Under the Hague Rules, cargo which is shown on the bil of lading as being carried on deck is not considered as "goods" according to the definition in article I (c). If cargo is carried on deck but this is not so stated on the bill of lading and this bill of lading is transfered to a third party (e.g. the consignee), then the carrier is fully liable for all damage without any limitations (except for loss caused by act of God, acts of war or inherent vice.) This is a situation which is neither good for the carrier nor for the shipper, particularly when over half of the world's containers are transported on deck rather than under deck. For this reason, many carriers' bills of lading consider containers stowed on deck as "under deck" cargo. However, there are some bills of lading which, while in general applying

24 M. Graham, *op. cit.*, p. F3.

25 See *Charter parties*, (TD/B/C.4/ISL/55), paras. 93-95, 365 and 384.

the Hague-Visby Rules, actually apply only the Hague Rules to deck cargo. This means that the Visby Protocol's container clause becomes inoperative. In other words, while the carrier's liability for cargo stowed in containers under deck would be 10,000 francs Poincaré per package inside the container, or SDR 667 if the 1979 Protocol rule applies, which is the case only in carriage from the 11 Contracting Parties,[26] the carrier's liability for cargo stowed in containers on deck would be only 10,000 francs Poincaré (SDR 667) for the entire container. In many cases where the wording of the bill of lading is even more restrictive, the provisions of the Visby Protocol may not even apply, so that the damage to deck cargo is simply not covered by the carrier.

28. Traditionally, buyers and sellers of goods requiring sea transport had focused their interest at the port of loading or discharge of the goods. They developed trading systems which located the division of responsibility for the goods and their transport at the "ship's rail", the so-called "critical point". This was because shippers would normally deliver their cargo in the port, on the dock, underneath the ship's hook. They would do so because ocean freight covered only the movement of goods from port to port, or, as it was known, "hook-to-hook" (also known as "tackle-to-tackle" or "rail-to-rail"). The carrier had nothing to do with the cargo before it was loaded on board his ship or after it had been discharged from it. A set of international commercial trade terms were developed to allow buyers and sellers of goods, through the use of these terms, to determine exactly the point where responsibility for the goods would be transfered from seller to buyer. These terms are today known as the INCOTERMS and include such expressions as FOB (free on board), C & F (cost and freight) and CIF (cost insurance and freight), all terms which attach the critical point of division of risk to the ship's rail in the port of loading or discharge.

29. With the introduction of door-to-door transport (regardless of whether the goods have been containerized or kept in another transport unit such as a road vehicle), this "critical point" moved ashore. The shipper no longer delivered his goods "under the hook", but at the carrier's container freight station (CFS) for consolidation and stuffing into the carrier's container, or he stuffed his goods into a container at his own premises. He then either delivered the container to the carrier's container yard (CY) near the port, or else the carrier took delivery of the container right at the shipper's factory. This move reduced the suitability of the traditional INCOTERMS, and new trade terms, more suitable to modern cargo transport, were developed under the auspices of ICC. In the 1980 revision of the INCOTERMS, a modern variant of the old FOB trade

26 See footnote 20.

term was introduced with the term "free carrier - named point" (FRC). By this new trade term, sellers and buyers can name the relevant point for the division of responsibilities and risks, thus replacing the ship's rail under the traditional term of FOB. Similarly, the traditional trade terms C & F and CIF can be replaced by "carriage paid to" (CPT) and "carriage and insurance paid to" (CIP), where the critical point of division is no longer the ship's rail but instead the point where the goods are taken in charge by the first carrier. INCOTERMS have again been updated in a 1990 revision.

30. These developments have also influenced documentary practice. For sales under FOB, C & F and CIF terms, an on-board bill of lading makes the critical point the ship's rail, while the modern combined or multimodal transport documents must reflect the point at which the goods are received by the carrier and, so to speak, where they enter into the transport system. That point, in most cases, will be placed ashore at a CY or a CFS location or even at the shipper's factory.

31. This shift initially led to some confusion regarding the financing of such sales under documentary credits, since banks were accustomed to the traditional on-board bill of lading and looked askance at the modern combined or MT documents. However, in the 1974 revision of the ICC Rules for Documentary Credits, the Uniform Customs and Practices for Documentary Credits (UCP), a particular article (article 23) dealing with combined transport documents (CT documents) was added. And in the 1983 revision of these rules, the stage was reached where banks would accept "any transport document" as long as it had been issued by a carrier assuming carrier liability for the transport (article 25) unless, of course, the parties had instructed the bank to accept only another type of document, such as a traditional on-board bill of lading. The 1983 ICC revision of the UCP also allow "on deck" bills of lading, but it must be noted that this is an agreement only between the bank and the merchant, not between the merchant and the carrier. The latter relationship continues to be governed by the Hague Rules, the Hague-Visby Rules or national law, as the case may be.

32. The new UCP also allow a "received for shipment bill of lading" to be accepted by the banks in line with the new INCOTERMS, but this does not free the carrier, under the Hague Rules, to issue an "on-board bill of lading". In this connection, it must be remembered that under the Hague Rules liability régime a carrier who issues a "received for shipment bill of lading" is not liable for damages before the cargo is actually loaded on board the vessel, even if he issues the bill of lading only after having received the cargo in the port. A new revision of the UCP will appear in 1991.

33. In summing up, it may be said that commercial circles have been compelled to develop new rules and trading systems in order to deal with the demands of modern trade and transport with respect to cargo handling and documentary practices, but these changes clearly show that even the various amendments made to the Hague Rules in one form or another can no longer hide the fact that technological developments have rendered those Rules outdated. Furthermore, it was felt by many States that their interests as shippers' countries were not sufficiently covered by the existing rules. In 1968, this realization led the second session of UNCTAD to recommend to the Trade and Development Board that it instruct the Committee on Shipping to establish a Working Group on International Shipping Legislation. The Conference decided that among the points to be taken up by the Working Group would be "amendments to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924".[27] Consequently, the Trade and Development Board so instructed the Committee on Shipping in its resolution 46 (VII), and the Committee on Shipping subsequently established the Working Group by its resolution 7 (III) of April 1969. The law of international carriage of goods by sea is an integral part of international trade law, since most goods sold from one country to another are carried by sea. One of the aims of the United Nations Commission on International Trade Law (UNCITRAL) is to promote wider acceptance and, if necessary, revision of international conventions in the field of international trade law. At its first session, the Working Group decided to include the study of bills of lading in its programme of work[28] in co-operation with UNCITRAL.

34. As a result, in 1970 the General Assembly, by its resolution 2635 (XXV), recommended that UNCITRAL should give priority to international shipping legislation, and UNCITRAL therefore undertook a review of the Hague Rules. It established a working group consisting of 21 member States representing most legal systems and geographical regions of the world. This group elaborated a draft convention on the carriage of goods by sea. The draft was adopted by UNCITRAL and sent for comments to Governments and to the many international organizations, governmental and non-governmental, which had all actively participated in the work of the group.

35. The draft was then submitted to a United Nations diplomatic conference which took place in Hamburg, Federal Republic of Germany, in March 1978 (the "Hamburg Conference") with the participation of 78 States, including many developing countries, and eight governmental and seven non-governmental organizations. The Conference, on 31 March

27 Conference resolution 14 (II), 1 (b) (iii).

28 TD/B/C.4/ISL/L.4, para 1.

1978, adopted the final act of the United Nations Conference on the Carriage of Goods by Sea, with 68 votes in favour, none against and three abstentions.[29]

36. The objectives of the extensive negotiations which eventually led to the Hamburg Rules were to improve on the Hague Rules. As is the case when many different interest groups meet, there was a certain amount of disagreement on how these objectives should be attained. Negotiations led to a "package solution" which, broadly speaking, consisted of the following elements:

- The carrier's liability would be determined on the principle of "presumed fault or neglect";
- There would be no exemption in case of fault of the carrier's servants or agents in the course of the navigation or management of the vessels;
- Relatively low limits of liability (compared to other existing transport conventions, e.g. the Warsaw Convention) would apply in case of loss or damage to goods;
- It would be difficult to break this limitation, namely only where the carrier personally acted recklessly with the knowledge that damage would probably occur, or with the intention to cause damage;
- The carrier would be liable in case of fire, but the burden of proof would be reversed (i.e. the claimant would have to prove the fault or neglect of the carrier or his servants or agents);
- The carrier would be liable for deck cargo; and
- The carrier would be liable for delay in delivery.

This "package deal" was adopted by 60 votes to three, with nine abstentions.[30]

37. In addition to this important agreement, a number of other details are worth mentioning. Some of the most outstanding are:

29 See *United Nations Conference on the Carriage of Goods by Sea*, (United Nations publication, Sales No. E.80.VIII.1).

30 See *United Nations Conference on the Carriage of Goods by Sea, op. cit.*

- That it is possible to use transport documents other than bills of lading. This is significant in view of the diminishing role of the bill of lading;
- That, under the Hamburg Rules, the carrier is liable from the time he has taken over the goods in the port of loading until the time he has delivered the goods at the port of discharge. In other words, the "rail-to-rail" (or tackle-to-tackle) limitation has been extended to cover the port area as well;
- That liability lies not only with the contracting carrier, but also with the actual carrier. This is in line with the Warsaw Convention;
- That there are specific rules dealing with letters of guarantee, notice of damage, jurisdiction and arbitration.

38. The Convention requires 20 Contracting Parties before it enters into force. As of 31 May 1991, it had 19 Contracting Parties.[31] Of these at least four (Barbados, Egypt, Morocco and Tunisia) had incorporated the Convention into their maritime legislation, giving it the status of national law. In those four countries at least the Hamburg Rules are already in force. None of the four countries has reported any increased incidence in the number of cases brought before the courts. A fifth country, Chile, has also written the Convention into its national legislation, but has suspended the Hamburg Rules' basis for liability (the deletion of the nautical fault defence),[32] and the reversed liability for fire[33] until such time as the Convention enters into force internationally.

31 Barbados (1981); Botswana (1988); Burkina Faso (1989); Chile (1982); Egypt (1979); Guinea (1991); Hungary (1984); Kenya (1989); Lebanon (1982); Lesotho (1989); Malawi (1991); Morocco (1981); Nigeria (1988); Romania (1982); Senegal (1986); Sierra Leone (1988); Tunisia (1980); Uganda (1979); and United Republic of Tanzania (1979).

32 Law no. 18.680, article 984.

33 *Ibid.*, article 987.

Chapter II

The historical background to the Multimodal Transport Convention

39. The first efforts to establish a legal régime for multimodal transport were made by the *International Institute for the Unification of Private Law* (UNIDROIT) and date back to the 1930s. At that time, these efforts were considered more theoretical than practical in commercial circles. Those early theoretical efforts suddenly became, in the 1960s when containerization of cargoes primarily for carriage by sea was introduced and developed, important as there was a very practical reason for trying to solve the problems surrounding the regulation of multimodal transport. Goods stowed in the unit - the container - could be placed on different means of transport such as ships, railway wagons, road vehicles or aircraft - and thus proceed from point of origin to point of final destination without any need for the goods themselves to be touched after their initial stuffing into the container and prior to stripping at the final destination. Similarly, the goods could be carried on a road vehicle which could roll on and off a ferry without any need to discharge the goods from one means of transport or re-load them on another (so-called "roll on/roll off" or "ro/ro" traffic). Under such a system it was natural for one and the same operator to undertake responsibility for the entire transport from point of origin to point of final destination. This problem had already been treated in some international conventions, such as the international conventions for carriage of goods by road and rail (CMR and CIM/COTIF, respectively) which, however, with some exceptions, have been ratified only by European countries. These two conventions contain a specific regulation of at least some of the types of transport just cited (CMR article 2 and CIM article 63).

40. The main problem for the regulation of multimodal transport arose from deficiencies of international and national regulations of transport law and the proliferation of the law into specific branches. Indeed, if rules and regulations regarding transport had been general and uniform in nature, irrespective of the specific mode used for the carriage of goods from one point to another, then there would have been no need for any specific regulation of multimodal transport. However, as matters stood, under international conventions and national law, each specific mode, carriage by air, road, rail, sea and inland waterways, was - and indeed still is - subject to a specific legal unimodal régime. Further, these different legal régimes vary to a considerable degree, particularly for carriage by sea as compared with carriage by other modes of transport. The consequence

of this was that the application of statutory rules to each mode during multimodal transit was fragmentary, unpredictable and varying widely in different countries so that the carrier/trucker/shipper might not be covered by the same liability. For this reason, an overriding structure became necessary whenever one and the same operator combined different modes of transport in one and the same contract.

41. Any regulation that attempts to govern several modes of transport must address the problem of deciding the extent to which the underlying rules for the specific modes, wholly or partly, should also govern the multimodal transport. Such problems highlight the increased need for (i) a single transport document covering the total transport from door to door, and (ii) a single operator (or carrier) responsible for the same total transport.

42. In order to avoid a proliferation of different liability systems, CMI in 1965 undertook the task of developing a suitable legal régime for multimodal transport (then still known as "combined transport"). This resulted, in 1969, in the so-called Tokyo Rules. Subsequently, following a series of round-table meetings under the auspices of UNIDROIT, which had produced a draft called the "Rome Draft", the TCM draft convention was presented in 1971. The TCM, however, never went beyond the drafting stage. Several factors contributed to its failure. While its proposed liability régime was supported by most countries in Europe, the United States of America and some other countries felt that it was entirely unsatisfactory.[34] Furthermore, at that time work had already begun in UNCTAD on what was subsequently to become the MT Convention.

43. The need for an international instrument on multimodal transport having been established, the Economic and Social Council of the United Nations in 1973 created an Intergovernmental Preparatory Group (IPG) under the auspices of UNCTAD to draft a convention on international multimodal transport. At the outset, the developing countries wanted a convention which would protect them against adverse effects of multimodal transport as well as serve their economic needs in a positive way, but as "the IPG was in fact exposed to the combined effects of controversies already developed in the context of both the Code of Conduct for Liner Conferences and the Hamburg Rules as among the western countries... a much narrower concept prevailed: the convention should only address private law matters, that is, deal with the legal aspects of contracts for

34 E. Selvig, "The influence of the Hamburg Rules on the work for a convention on international multimodal transport", *The bill of lading conference*, New York, November 29/30, 1978, organized by Lloyd's of London Press Ltd.; New York 1978, p. Selvig 4.

multimodal carriage."[35] The IPG held six sessions between 1973 and 1979 and drew up a draft convention which was submitted to a United Nations conference that met twice in Geneva in 1979 and 1980. A total of 85 States,[36] 15 specialized agencies and intergovernmental organizations, and 11 non-governmental organizations took part in the deliberations. The negotiations in connection with the MT Convention were long and arduous, but were crowned by success when 81 States[37] on 24 May 1980, by consensus, adopted the final act of the United Nations Conference on a Convention on International Multimodal Transport of Goods. While this Convention is to a large extent based on the Hamburg Rules, it also draws heavily on the TCM draft and the ICC Uniform Rules for a Combined Transport Document (the ICC Rules). It is probably fair to state that without the earlier negotiations which resulted in the Hamburg Rules and the ICC Rules, agreement on the MT Convention would have been much more difficult to achieve. In this connection it has been said that the Convention "is interesting and important not only for the principles it establishes, but also for its symbolic significance to the developing countries, irrespective of how soon it may come into force."[38]

44. The task of drafting the Convention, however, took longer than was acceptable to the commercial parties, and a number of combined transport documents (CT documents) were consequently developed in different commercial circles. The first such document was introduced by the International Federation of Freight Forwarders Associations (FIATA) and called the FIATA Combined Transport Bill of Lading or FBL for short. This was soon followed by a similar document introduced by the Baltic

35 *Idem.*, p. Selvig 6.

36 In addition to those States listed in footnote 37 , the following States participated in the first part of the Conference: Bangladesh; Bolivia; Central African Republic; Côte d'Ivoire; Dominican Republic; Guinea; Jordan; Liberia; Luxembourg, Rwanda. Furthermore, Cyprus, Pakistan and Yemen took part in the second part of the Conference only, but did not sign the final act.

37 Algeria; Argentina; Australia; Austria; Belgium; Brazil; Bulgaria; Burundi; Byelorussian Soviet Socialist Republic; Cameroon; Canada; Chile; China; Colombia; Cuba; Czechoslovakia; Denmark; Ecuador; Egypt; El Salvador; Ethiopia; Finland; France; Gabon; German Democratic Republic; Germany, Federal Republic of; Ghana; Greece; Honduras; Hungary; India; Indonesia; Iraq; Ireland; Israel; Italy; Jamaica; Japan; Kenya; Lebanon; Libyan Arab Jamahiriya; Madagascar; Malawi; Malaysia; Malta; Mexico; Morocco; Netherlands; New Zealand; Nigeria; Norway; Panama; Peru; Philippines; Poland; Portugal; Republic of Korea; Romania; Saudi Arabia; Senegal; Somalia; Spain; Sri Lanka; Sudan; Sweden; Switzerland; Syrian Arab Republic; Thailand; Trinidad and Tobago; Tunisia; Turkey; Uganda; Ukrainian Soviet Socialist Republic; Union of Soviet Socialist Republics; United Kingdom; United Republic of Tanzania; United States of America; Uruguay; Venezuela; Yugoslavia; Zaire.

38 W. J. Driscoll, "The world's first international multimodal transport Convention", *Transcript of seminars on international intermodal cargo liability, Course VI*, Shippers National Freight Claim Council, Fordham University School of Law and Golden Gate University, San Francisco, September 1980, p. 174.

and International Maritime Council (BIMCO) and the International Shipowners' Association (INSA). Further, the ICC, in round table meetings between parties representing shippers and the carriers by different modes, developed the above-mentioned ICC Rules which led to some minor amendments of the documents just mentioned. In the absence of any other international régime, these documents were all based upon the main principles of the CMI Tokyo Rules and the UNIDROIT-TCM draft text.

45. The Convention requires 30 contracting parties before entry into force. As of 31 May 1991 it had five Contracting Parties.[39] Of these, two (Chile and Mexico) have incorporated parts of the Convention into their national legislation, while Malawi, for example, has not done so because the transit countries surrounding it have not yet become contracting parties to the Convention. The reasons for the limited number of contracting parties to the Convention up to now are explained below.

46. To look at modern international transport in a narrow "maritime" context cannot be deemed reasonable today when the transport of cargoes is increasingly arranged from door to door. This was acknowledged in the TCM, the ICC Rules and the MT Convention. In a traditional (unimodal) through bill of lading used for carriage of goods by sea (by two or more ocean carriers) where the contracting shipping line (the "contracting carrier") in its bill of lading covers not only that part of the carriage performed by itself, but also a part performed by some other carrier (the "actual carrier"), the contracting carrier traditionally disclaims any responsibility for the part of the carriage not actually performed by itself. When combined transport was introduced, CT documents issued to cover such moves often retained this disclaimer of liability for sub-carriers' faults. However, as containerization of cargo increases the possibilities of controlling the cargo during the whole transit and reduces the risks of loss or damage, particularly in the dangerous transhipment stages, shipping lines have gradually abandoned their traditional disclaimers of liability and instead voluntarily accept genuine door-to-door (multimodal or combined transport) liability.[40] This development has also been accepted by several States.[41] For example, in the USSR, article 160 in chapter VIII of the Merchant Shipping Act of 1968 reads: "...liability under this article *shall*

39 Chile (1982); Malawi (1984); Mexico (1982); Rwanda (1987); and Senegal (1984).

40 See, for example, *The Merchants Guide*, P & O Containers Limited, Beagle House, Braham Street, London, fourth edition, December 1987, Section 19, p. 44, which reads in part: "In the preamble the Carrier undertakes to act as principal throughout...this means that the Carrier is personally liable to the merchant...at all times throughout Carriage, and is at no time in an agent only position unless specifically provided for elsewhere."

41 See the *CMI Stockholm Conference, op. cit.*, p. 88.

arise the moment the goods are received for carriage and shall continue until the moment of their delivery."[42] Another example is the maritime law of 1974 of the Sultanate of Oman which, in Title Eleven, article 11-1.03 (c) the carrier would appear to be liable "after receiving the Goods into his charge..." In Chile, the carrier is liable by law for the cargo for "the period during which it is under his custody, be this ashore or during its actual transport."[43] Similarly, under the FIATA FBL, the carrier (the freight forwarder) voluntarily accepts door-to-door transport liability.[44] Increased competition between container operators has also encouraged this development.

47. The connection with ocean transport has, however, been difficult to break. There is at present still some confusion concerning the most suitable way in which to describe the various concepts and documents of transporting goods on one document by more than one mode of transport. Without claiming to be all-inclusive, it might be useful to suggest the following set of definitions:[45]

- ***Unimodal transport*** - the transport of goods by one mode of transport by one or more carriers. If there is only one carrier, he issues his own transport document, e.g. a bill of lading, an airwaybill, a consignment note, etc. If there is more than one carrier, for example, carriage from one port via another port to a third port with transhipment at the intermediate port, one of the carriers may issue a *through bill of lading* covering the entire transport. Depending on the back clauses of this through bill of lading, the issuing carrier may be responsible for the entire port-to-port transport or only for that part which takes place on board his own vessel.[46]

- ***Intermodal transport*** - the transport of goods by several modes of transport from one point or port of origin via one or more interface points to a final port or point where one of the carriers organizes the whole transport. Depending on how the responsibility for the entire transport is shared, different types of transport documents are issued:

  - ***Segmented transport*** - if the carrier that organizes the transport takes responsibility only for the portion he performs himself, he may issue an intermodal bill of lading.

  - ***Combined transport/-Multimodal transport*** - if the carrier organizing the transport takes responsibility for the entire transport, he issues a combined or MT document.

42 Italics added.

43 Law No. 18.680, article 982.

44 FIATA FBL 8.87, article 6. A.1) reads: "The Freight Forwarder shall be liable for loss of or damage to the goods occurring between the time when he takes the goods into his charge and the time of delivery."

45 Adapted and expanded from, "Multi-modal carriage: a Club view", by Stephen Martin, *Lloyd's List*, London, 23 June 1988, p. 8.

46 This definition is consistent with e.g. N. Samson, "Containerization and through bills of lading", *the Marriott Course, op. cit.*, p. 2.

48. The definitions of combined transport and multimodal transport (in the ICC Uniform Rules for a Combined Transport Document and the MT Convention) are virtually identical. The ICC Uniform Rules' definition of combined transport is,

> "...the carriage of goods by at least two different modes of transport, from a place at which the goods are taken in charge situated in one country to a place designated for delivery situated in a different country."

while the MT Convention's definition of multimodal transport is,

> "...the carriage of goods by at least two different modes of transport...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."

The new UNCTAD/ICC Rules on Multimodal Transport Documents do not define multimodal transport *per se*, only the MT document.

49. At the end of the 1980s it became obvious that the MT Convention would not enter into force in the immediate future. The main reason cited for this was that as long as the Hamburg Rules were not in force, there was no point in bringing the MT Convention into force since this would create too big a gap between the liability of the MTO and that of the subcontracting ocean carrier who would still be liable only under the Hague Rules or the Hague-Visby Rules.

50. At the same time, the ICC felt a need for the ICC Rules to be updated. The identification of this need coincided with a decision by the Committee on Shipping to ask the UNCTAD secretariat to elaborate "...model provisions for MT documents in close co-operation with the

commercial parties..."[47] The UNCTAD secretariat and the ICC subsequently created a working group which drafted a new set of rules for MT documents intended to replace the existing ICC Rules. The new rules, called the UNCTAD/ICC Rules on Multimodal Transport Documents, were finalized in April 1991 for entry into force by the end of 1991. From then on the commercial parties are free to use the new rules if they so wish.

51. The new rules, while being based on the existing unimodal liability régimes, facilitate multimodal transport; they can be modified without great difficulty to accommodate the Hamburg Rules once they enter into force. When, one day, the MT Convention also enters into force, the UNCTAD/ICC Rules on Multimodal Transport Documents can be retired.

47 Committee on Shipping resolution 60(XII) 3.

Chapter III

Economic and commercial consequences of the entry into force of the Hamburg Rules and the MT Convention

52. The intention of this chapter is to analyse some of the more prominent arguments that have been put forward by shipowners, shippers, insurers and legal experts on the likely economic and commercial consequences of the entry into force of the Hamburg Rules and the MT Convention. In its research on this subject, the secretariat has held informal consultations with commercial parties on their views and taken these into account in the preparation of this chapter.

A. The Hamburg Rules

53. The opponents of the Hamburg Rules question the need to replace the Hague Rules, yet even they admit that the original 1924 Hague Rules were soon seen to be less than perfect. As one observer noted: "the years ... since 1924 [have] thrown up both technical defects in the Hague Rules and also a number of new commercial problems to which those Rules provided either no answer at all or no satisfactory answer."[48] These problems increased, as was described above, after the Second World War, when the Hague Rules were amended first by the Visby Protocol and then by the 1979 Protocol. Both of these Protocols updated the Rules somewhat, but did not change the underlying liability system. The amendments were intended to take care of some of the problems inherent in the Hague Rules, but it has been said that, "the extent of the application of the Rules ... is that they work by being incorporated into bills of lading contracts. If no such contract is expressed, or can be implied, between the parties to the action, then the substance of the Rules does not apply. This, coupled with the rigid notion of privity of contract which applies in English law, may well subvert many of the changes made by the [Visby Protocol], and unless the privity doctrine is itself altered by statute, it is difficult to see how any redrafting of the [Hague] Rules will make any difference." See paragraph 19 above.[49]

48 A. Diamond, QC, "Part One of a legal analysis of the Hamburg Rules", *The Hamburg Rules - a one day seminar organized by Lloyd's of London Press Ltd.* (hereafter called the "London Seminar"), London, 28 September 1978, p. Diamond 1.

49 P. Todd, *Modern Bills of Lading*, Collins, London 1986, p. 106 at 6.03.

54. Opponents of the Hamburg Rules also support another view expressed at the HVR Seminar, namely that "the great merit of the Hague Rules ... lay in their pragmatism - that is to say that they focus on relatively few essential subjects and achieve their objective with economy of effort and in traditional language which is well known to maritime law."[50] The same speaker went on to note, however, that "to those brought up in the civil law countries - what was often more in evidence were the anomalies inherent in the Hague Rules and their lack of comprehensiveness".[51] This is the reservation that seems to influence the proponents of the Hamburg Rules. They agree with the assessment of the basic flaws in the Hague Rules and generally take the view that the Hague Rules are so biased in favour of the carrier that the new convention cannot come into force soon enough, although, when CMI in 1979 held a colloquium on the Hamburg Rules in Vienna, the sole shippers' representative present expressed some misgivings about the usefulness of the Hamburg Rules,[52] but it is obvious that shippers are now voicing a different opinion. Indeed, a total of 22 shippers' groupings from countries representing 63 per cent in value of world trade have unanimously stated that they are "in favour of the earliest coming into force of the Hamburg Rules." This is a clear indication of their attitude towards the new convention. In fact, the UNCTAD secretariat has received confirmation from the European Shippers' Councils (ESC) that "there is one unanimous view supported by all member-Councils, which is in favour of early ratification of the Hamburg Rules by our governments and indeed by non-European governments."[53]

55. To counter the opponents' criticism of the "new" language of the Hamburg Rules, the proponents also claim that the Hamburg Rules, apart from containing to a large extent wording from the Hague-Visby Rules, have been modeled on the Harter Act of 1893, and the Warsaw Convention, with their voluminous amount of case law, and on the CMR, with which carriers, insurers and cargo owners have lived for over 30 years without major controversy and with very little litigation. It has also been suggested that "shipowners have benefitted as much as they have suffered"[54] from the new Hamburg Rules. Consequently, the proponents claim that there is no reason to assume that a switch to the Hamburg

50 Diamond, the HVR Seminar, *op cit.*, p. Diamond 2.

51 *Ibid.*

52 R. Schilling, "The effect on international trade of the implementation of the Hamburg Rules from the point of view of the shipper", Comité International Maritime, *Colloquium on the Hamburg Rules*, Vienna, (hereafter called the "Vienna Colloquium"), January 1979, pp. 15-20.

53 Quotation from a letter received by the UNCTAD secretariat from ESC.

54 W. Tetley, *The Hamburg Rules on the Carriage of Goods by Sea*, edited by S. Mankabady, Sikthoff-Leyden/Boston 1978, p. 197.

Rules will introduce the massive amount of litigation dreaded by carriers and insurers. The fact that both sides in a dispute prefer a claim to be settled out of court whenever possible also adds weight to this argument.

56. At present three or more liability systems operate in parallel, creating something which some commentators have claimed approaches commercial chaos. Although the Hague Rules have a nominal limit of £100, the interpretation of this amount in various jurisdictions varies greatly. There is first of all the variation between the interpretation of the £100 amount by various countries. This stretches from the strict £100, via the "gold clause's" £400, to the individual Contracting Parties' interpretation of these sums. These figures in turn range from the equivalent of approximately SDR 42 in Spain to the strict Hague Rules' £100 (SDR 125) or $US 500 (SDR 385) in the United States[55] and about SDR 730 in Switzerland to between SDR 154 and SDR 2,307 in Italy. Secondly, there are the variations in the limits of liability of the 1968 Visby Protocol, namely 10,000 francs Poincaré, and the 1979 Protocol's SDR 667. The Visby Protocol's 10,000 francs Poincaré is not a fixed sum either. Some use the rate of exchange set every few years by the Government of the United Kingdom, but certain shippers have claimed that it is the market value of gold which should be used.[56] In a recent ruling of the Admiralty Court in London the value of £100 was set by Mr. Justice Hobhouse as the value in gold.[57] The effect of this ruling was that the package limitation was set at £6,630 or approximately SDR 7,300.[58] The 1979 Protocol tries to simplify this confused situation by using special drawing rights, as do the Hamburg Rules, but until the Hamburg Rules become the primary convention in force, the 1979 Protocol simply adds one more limitation amount to the others listed above.

57. In this connection CMI, which is concerned primarily with uniformity of law, has stated that it does not matter whether it is the Hague

55 This is an approximation of the dollar equivalent of the £100 according to the exchange rate in force between the pound sterling and the United States dollar (£1 = $US 4.87) when the United States ratified the Hague Rules.

56 Diamond, *op cit.*, p. Diamond 18.

57 "Gold value in Hague Rules was gold value of pound", *Lloyd's List*, London, 3 September 1988, Queen's Bench Division (Admiralty Court), 21 July 1988, The "ROSA S".

58 See S. Martin, *Marriott Course, op. cit.*, p. 15. See also V. R. Kolambekar's "Limitation of sea carriers liability under Indian law," *Cargo Claims Analysis*, Kluwer Law Publishers, London, Vol. 5, Issue 6, July 1988, pp. 87-89 which shows that it is not only in the United Kingdom that the gold value may be used, and Paul B. Larsen, "Unraveling intermodal carrier defenses", *Course VI, op. cit.*, p. 144: "the shipper may successfully argue that the market value of gold applies to claims for damages presented in countries which have not converted the limit into national currency. There is foreign case law supporting this argument."

Rules or the Hamburg Rules that are in force as long as there is only one system in operation. CMI would, for example, not look with favour on a situation where both the Hague Rules and the Hamburg Rules operated in parallel for any longer than the time it would take to make a practical change-over from one system to the other. It might be deduced that, since the present system is far from uniform, the earliest possible change-over to the Hamburg Rules should be welcomed.

58. All parties seem to agree that the economic consequences of the entry into force of the Hamburg Rules, in spite of all arguments, will not be significant. Even statements by opponents support this view, as, for example:

- "The overall financial effect of the Hamburg Rules, as compared with the Hague Rules, is a moderate though conservative shift in the balance of risk from cargo to ship."[59]

- "Because the Hamburg Rules involve only ... liability for cargo, their implication on liability insurance is for that reason limited."[60]

- "The total number and the total amount of cargo claims, expressed in percentages of the volume and value respectively, may be expected to remain at the same level as today. ... Although there may be reductions in cargo insurance premiums due to recoveries."[61]

- "The uncertainties and ambiguities in the Hamburg Rules will certainly lead to litigation, though there are differences of opinion among P & I Managers about whether the cost of this litigation will be a relatively small item in the overall total of costs and claims or whether on the other hand it will ha 'e a considerable impact on overall costs, [but] ... the effect on the overall costs of liability insurance would probably not be very great."[62]

- Group 1 of the Vienna Colloquium concluded, regarding the extension of the period of responsibility, that it "did not expect the Hamburg Rules to have a serious financial effect in this respect".[63]

59 Diamond, *op cit.* p. Diamond 3.

60 W.R.A.B. Reynardson, "The implications on liability insurance of the Hamburg Rules", *London Seminar, op. cit.*, p. Reynardson 1.

61 K. Schalling, "The practical and economic effects of the Hamburg Rules from the view of a cargo underwriter", *Vienna Colloquium, op. cit.*, p. 23.

62 C. Goldie, "Effect of the Hamburg Rules on shipowners' liability insurance", *Vienna Colloquium, op. cit.*, pp. 26-27.

63 *Vienna Colloquium op. cit.*, Report of Group 1, p. 44.

59. Courts the world over have been occupied with interpreting the Hague Rules since they came into force more than half a century ago. Through this a number of their controversial points have been extensively tested, giving the transport industry a good understanding of the Rules. However, shippers' councils confirm that such understanding is restricted to experienced shippers and consignees with access to very competent maritime lawyers, an advantage not always readily available to the greater number of smaller shippers around the world. Even after all this time, new cases still come before the courts, since the testing of rules and regulations is an ongoing process where time and new points of view may prevail over earlier judgements. This is also the case with the Hague Rules where old arguments have been reopened with new and startling results.[64] The Hamburg Rules will similarly be tested in court. Whether the number of cases will increase significantly is a moot point, however.

60. In an economic context, the question is how many *additional* court cases will be fought worldwide because of the introduction of the Hamburg Rules and if this will result in an *overall increase* of transport costs. That cases will be fought is probably correct, but will they cost more than the current steady stream of Hague Rules litigation, or will there in fact be fewer cases tested because of the changed language of the Hamburg Rules compared with the acknowleged deficiencies of the Hague Rules? Four points of reference are worth considering:

- Existing case law based on the Harter Act, the Warsaw Convention, the CMR, and the Hague-Visby Rules themselves;

- The situation after the modernization of the language in the Lloyd's Ship and Goods Insurance Policy Form and the Standard Institute Clauses;

- The results of the adoption by British freight forwarders of a new and much higher level of liability;[65] and

- The steadily increasing cost of litigation.

64 Even inside the same country similar cases do not necessarily result in identical judgements, and even British judges disagree on the interpretation of the Hague Rules. Lord Diplock has for example thrown doubt on Lord Wright's reasoning in the *Vita Food* case, see Todd, *op cit.*, p. 111 at 6.06.

65 British freight forwarders went from virtually nil liability to liability based on the ICC Rules for the cargoes for which they issued CT documents.

61. Opponents of the Hamburg Rules claim that each new phrase or word not identical to those found in the Hague Rules must be retested at great expense. Mr. Justice Mustill has said, for example, "the problems of textual analysis [seem] to have been multiplied rather than diminished by the formulation of the new text. [But] perhaps it is simply that we have all grown used to the structure and wording of the familiar Hague Rules, and feel uncomfortable when faced with something new."[66] However, not only is it estimated that about 50 per cent of the text of the Hamburg Rules was drawn directly from the Hague-Visby Rules,[67] hence at least that part of the Hamburg Rules presumably need not be retested, but much of the remaining text has been taken from the Warsaw Convention and the CMR or the Athens Convention. The Warsaw Convention is almost as old as the Hague Rules and has often been the subject of interpretation in courts. The considerable reservoir of judgements on this Convention will be available for consultation if questions arise on Hamburg Rules' wording which may have been taken from the Warsaw Convention. The CMR, on the other hand has had, as was mentioned above, a relatively untested life. This would tend to support the view that court cases would not necessarily increase in number with the introduction of the Hamburg Rules.

62. For the second point enumerated in the list, the consequence of modernization of the language appears to have been no increase or maybe even a decrease in litigation, despite radically new language having been introduced,

63. The third point concerns a practical example of a change far more dramatic than the change from the Hague Rules to the Hamburg Rules. In the United Kingdom the main freight forwarders association adjusted its recommended liability régime *from* what was effectively a "nil liability régime" dependent on proof by the shipper of "wilful neglect" *to* one where the freight forwarder is now liable for the carriage, subject to a limited list of exceptions such as defective packing by the shipper. This is a considerably greater leap than that expected of shipowners when changing from the Hague Rules to the Hamburg Rules, yet the industry reports that "not only have rates to shippers not increased, but the reliable and reputable freight forwarders have not suffered any increase in liability insurance premiums."[68]

66 Mustill, "A legal analysis of the Hamburg Rules", *Vienna Colloquium, op. cit.*, pp. 30-31.

67 D. Richter-Hannes, "Current legal problems of international multimodal transport", *Fiata Information*, December 1986, p. 12, item 2.

68 M.D. Booker, *European shippers view on the Hamburg/Visby controversy*, paper presented to the Shippers National Freight Claims Council at its 13th National Conference at New Orleans on 4 March 1987.

64. The fourth point highlights the fact that both shippers/cargo insurers and shipowners/P & I Clubs have come to realize that in the present very competitive economic climate, where profit margins are paper thin, everyone concerned would want to avoid lengthy and costly litigation. For this reason there has been a growing tendency to settle out of court, even when, for example, shipowners felt that they had a very good case for claiming non-liability. This trend will probably continue after the entry into force of the Hamburg Rules.[69]

65. It is also possible that once the Hamburg Rules come into force, a number of representative test cases will be brought before the courts. Whether they will be followed by a stream of less important cases is, however, a different issue, and the second part of the question "will the rulings of the courts result in an overall increase of transport costs?" must therefore also be answered. Transport insurance can, for the sake of simplification, be either cargo insurance taken out by cargo interests with cargo insurance companies or liability insurance bought by carriers mainly through their mutual P & I Clubs. In practice, loss of or damage to cargo is in the first place indemnified by the cargo insurer and the role of the liability régime is mainly to determine the right of recourse of the insurer against the carrier. As the carrier insures his cargo liability with his P & I Club, this system is often referred to as "overlapping insurance". Overlap is, however, limited since negotiated insurance rates take full account of both the carrier's and other people's liabilities.[70] Furthermore, there are many cases where the liability insurer will not be involved because the carrier is not liable, or because the particular risk is not covered by the P & I Club.[71] It is also possible for the shipowner to become insolvent when a claim is filed for which the P & I Club does not cover him. Cargo insurance, on the other hand, covers specified events irrespective of any liability towards a third party. However, there are also cases where the cargo owner has not taken out cargo insurance.[72] In case of loss, this means that the cargo owner must either recover from the carrier or bear the loss himself. For this reason, there may be doubt as to the real extent of overlap, with some experts claiming that it actually is limited.[73] It may

69 See, e.g., A. Nichols, "Conciliation the key word in Chinese arbitration", *Fairplay*, London, Vol. 306, issue 5467, 21 July 1988, pp. 19-20.

70 R. Porter, "A Committee of Experts", *Is it time for a change?*, Proceedings of a symposium on cargo insurance and transporter's liability, 18-19 September 1973, United States Department of Commerce/Maritime Administration, Washington, D.C., September 1973, p. 74, (hereafter called the "Washington Symposium").

71 P & I insurance only covers a shipowner in respect of his liability for tort, breach of contract or other obligations to compensate a third party.

72 For example on certain short-sea routes.

73 Selvig, "The Hamburg Rules, the Hague Rules and Marine Insurance Practice", *op cit.*, p. 308.

therefore be more correct to speak of a "dual system of insurance" than of an overlapping one. The extent to which the replacement of the Hague Rules by the Hamburg Rules will change present practices has been much debated, but both shippers and carriers seem to agree that overlapping will not be eliminated by the Hamburg Rules.

66. The Hamburg Rules do not make the shipowner liable for all cargo loss or damage without any limitation. For this reason it is most likely that cargo interests will continue to insure with their cargo insurers. In other words, there would seem to be no reason to expect any dramatic reduction in the amount of insurance written by the cargo insurers. The cargo insurers are well aware of this, if for no other reason than the fact that the relationship between cargo interests and their insurers is a good one. Cargo insurance is one of the few industries where a claimant's claim is paid with admirable efficiency. Shipowners, on the other hand, are notoriously slow in accepting liability, and it would be surprising if cargo owners wanted to be bothered with the task of fighting directly with shipowners any more in the future than they have in the past. Instead they would leave it to their cargo insurers to seek recourse against the shipowner. Most disputes, therefore, end up being between insurance companies: cargo insurers against liability insurers.[74] It will be the number of disputes and the results of awards that will influence the level of insurance premiums, and it will be the changes in those levels, from cargo insurance to liability insurance, that will become the major economic consequence of the entry into force of the Hamburg Rules. However, to put the question of insurance premiums into perspective, it must be remembered that the amount of premiums comes to only about one fourth of one per cent of the landed value of the goods shipped.[75] So, will the premiums go up, will they go down or will they remain more or less as before?

67. The cost of insurance (i.e. premiums and related expenses) is the key issue, yet during the negotiations of the Hamburg Rules where the concerns of the cargo insurers were made well known, they were "not supported by data or other specific information."[76] To eliminate this lacuna, shippers have directly asked insurers to justify their negative attitude towards the Hamburg Rules with specific data but have been told that no such data exist.[77]

74 J. Honour and M. Newbery, the West of England Shipowners Mutual Insurance Association, "Rights of recourse against shipowners - a P & I Club Manager's view", *Marine Insurance '79*, Conference organized by Lloyd's of London Press Ltd., Sponsored by Lloyd's Underwriters' Association and the Institute of London Underwriters, Cargo Conference, London Press Centre, November 29/30, 1979, pp. 6-7.

75 E. Spitz, Sea-Land Service, *Washington Symposium*, *op. cit.*, p. 86.

76 Selvig, *op cit.*, p. 314.

68. The coming into force of the Hamburg Rules will not change the total risk, nor will it result in more loss of, or damage to, cargo. It might actually result in less damage, since shipowners might be induced to take better care of their cargoes owing to the increase in their liability. Consequently, the total compensation paid will either remain unchanged or will decrease with the lower amount of damage. It is, however, generally accepted that the Hamburg Rules may encourage the cargo insurers to use their subrogation rights in greater use of recourse action. In the worst case, "the total number and the total amount of cargo claims, expressed in percentages of volume and value respectively, may be expected to remain at the same level as today."[78] The debate focuses, therefore, not so much on the amount but on who will pay.

69. Opponents of the Hamburg Rules claim that because of the slight change in the balance of liability, the number of claims against carriers will increase. If this turns out to be correct, then, obviously, carriers' claim-handling costs will go up; if so, then the result will be not only higher costs for the shipowners' claims departments but also possibly higher liability (P & I) insurance costs. If the claims are successful, then shipowners' liability insurers, the P & I Clubs, may have to pay such claims and may then need to increase their premiums (calls) to the shipowners, but should costs go up, then the management of both shipping companies and P & I Clubs will probably pay more attention to the causes and try to force the costs down again through improved loss prevention measures and better standards of cargo care.[79] In that case, cost increases are likely to be temporary. It has, for example, been shown that increased liability for some American truckers, voluntarily adopted at the suggestion of one of the largest shippers in the world, E.I. DuPont and Nemours, "gave the truckers the incentive they needed to improve their

77 Selvig said, when commenting on the discussions at the Hamburg Conference, "the lack of even approximate estimates of the size and relative importance of the cost elements - also under the present system - caused the discussion to become mainly an exchange of points of view based on assumptions and beliefs." E. Selvig, "The Hamburg Rules", *Marius*, Nr. 31 B, Nordisk Institut for Sjørett, Oslo, August 1978, p. 6.

78 Schalling, *op cit.*, p. 23.

79 See, e.g., G.N. Yannopoulos, "The economics of 'flagging out'", *Journal of Transport Economics and Policy*, the London School of Economics and Political Science and the University of Bath, Bath, May 1988, p. 198. See also "Australian Marine Cargo Liability, A Discussion Paper", Department of Transport & Communications, n.p. (Canberra?), September 1987, at 7.12: "It appears to the Department of Transport and Communications that there is a growing national concern over the adequacy of, and accountability for, control of cargo care during shipment."

operations and tighten their safety standards."[80] This in turn had the result that "productivity increased and ***insurance premiums went down***".[81] Although it has been argued that more claims will increase administrative expenses of the P & I Clubs,[82] it has also been said that P & I Club management fees and expenses paid "remain remarkably steady when analysed as percentages of total claims paid in each policy year, and it is unlikely that the advent of the Hamburg Rules will so increase the volume of claims as to affect the figures significantly."[83] Furthermore, even assuming an increase in cargo claims in the order of say 25 per cent, "this would produce only a relatively small increase in the overall total of cargo claims payable by the liability underwriter and on this basis the effect on the overall cost of liability insurance would probably not be very great".[84]

70. Herein lies one of the main concerns, if not the main concern of the opponents of the Hamburg Rules, be they shipowners or insurers. It was shown above that the real debate over the economic consequences of the Hamburg Rules may be reduced to the question of who in the future is going to pay cargo claims, i.e. the cargo insurers or the P & I Clubs. The shipowners and their P & I Clubs, which in essence are owned by the shipowners, fear that because of the "moderate though conservative shift in the balance of risk from cargo to ship",[85] the P & I Clubs will have to bear a greater share of this expense; the cargo insurance companies fear that this will be true and that they consequently will be faced with a reduction in premiums. On the other hand, an often used argument against the Hamburg Rules has been that while the P & I costs will go up, cargo insurance premiums will not go down and that this will increase the total transport cost. Only one of these arguments can be correct. Either the cargo insurance premiums will go down or they will remain the same, but they cannot do both at the same time.

71. Although the shipowner's defences in many jurisdictions may be quite restricted, owners and their P & I Clubs often succeed in settling many claims, for which in theory they would be liable, through negotiations with the cargo insurers. This practice is likely to continue after the entry into force of the Hamburg Rules, but it may be that the cargo insurers will be able to extract somewhat better settlements from the P & I Clubs owing to the changes in the liability system. This will increase the cost to the latter but decrease it to the former.

80 R. Knee, "General Average Outmoded?" *American Shipper*, April 1990, p. 16.

81 *Idem.*

82 Reynardson, *op cit.*, p. Reynardson 4.

83 Goldie, *op cit.*, p. 26.

84 *Idem.*, p. 27.

85 Diamond, *op cit.*, p. Diamond 3.

72. The shipowners and their P & I Clubs will not face much greater expense unless claims covering the increased liability are successful. In the relatively few cases where cargo owners have not taken out cargo insurance, it is likely that cargo owners will file claims against the shipowners for all liability covered by the Hamburg Rules. However, when the cargo owners have insured with their cargo insurance company, the cargo owners will claim, not against the shipowner, but against their cargo insurer. The onus is then on the cargo insurer to make recourse against the shipowners. In this connection it is worth noting first of all that smaller claims constitute the vast majority of all claims. The Claims Manager of Sea-Land Services has said, for example, that, "I can tell you from handling approximately 30,000 cargo claims on an average year that the question of the $500 package limitation comes up very rarely."[86] Secondly, it would appear that cargo insurers do not at present utilize their recourse possibilities to the extent possible. This is particularly the case with smaller claims, where the recourse procedure would exceed the cost of the claim. This would seem to indicate that the amount of future recourse may be limited and that the P & I Clubs' costs may not increase as much as feared. For this and other reasons, many shippers deny the certainty of higher costs and say they are so sure that costs will not go up that they are prepared to face the prospect of higher freight rates should they be proven wrong. However, if claims costs do increase, shipowners face the question of whether they will be able to recover such higher costs through higher freight rates, and they fear that competitive market pressure will not allow them to recoup costs. For shippers and Governments concerned with the national economy rather than with that of individual companies, a relevant question to ask in this connection may be whether the shift in liability will increase or decrease total insurance costs and how much any change will influence the ***total*** transport cost.

73. Shipowners believe that a large percentage of claims arise from so-called "nautical faults" from which the Hague Rules' article IV, rule 2 (a), protect them and which the Hamburg Rules will eliminate. However, it must be noted that there is a trend worldwide towards imposing greater liabilities on shipowners for loss of, or damage to, cargo whether or not there is recourse to the nautical faults defence. It has been said that: "the defences available to the carrier in many if not most jurisdictions are already in practice very restricted, whatever the letter of the law may say. It is difficult to see how there could be any considerable increase in the incidence of liability following adoption of the Hamburg Rules."[87] According to another commentator, "the nautical fault and fire defences are inconsistent with the principles of vicarious liability as embodied in the

86 Spitz, *op cit.*, p. 91.

87 Goldie, *op cit.*, p. 24.

law of most countries."[88] It would thus seem that the elimination of the various defences will not in reality change carriers' liability much. It has also been said that, "it is likely that over the coming years the volume of claims will increase whether or not the Hamburg Rules are adopted."[89] In other words, it would be wrong to attribute the full extent of any possible increase in total insurance costs to the advent of the Hamburg Rules. Furthermore, it should be borne in mind that P & I Clubs cover claims other than those for cargo loss or damage and these claims also increase from year to year.[90] These two facts are relevant to an assessment of the real impact of the entry into force of the Hamburg Rules. The four main types of risks covered by P & I Clubs are:

(a) Liability for loss of life and personal injury;
(b) Liability for loss of or damage to cargo;
(c) One-quarter collision liability;[91] and
(d) Wreck removal, damage to fixed objects, oil pollution, etc.[92]

Of the risks covered by P & I Clubs, the payment of cargo claims amount to about 30 per cent of the total.[93] Since cargo risks play such a relatively limited role in the total risks assumed by the P & I Clubs, their implications for liability insurance are limited. If it is assumed that the Hamburg Rules, for example, would increase cargo claims by say 20 to 30 per cent, then the "total claims reimbursed to shipowners will be increased, overall, by 6 to 9 per cent."[94]

74. Shipowners' insurance costs vary depending on a number of factors. A United States Department of Transport study estimated, for example, that the net cost of the United States ocean carriers' insurance system was only 0.15 per cent of their freight revenue, and the total cost (claims and premiums) came to only 2.05 per cent of the freight revenue.[95] Another study indicated that it may amount to between 8 and 25 per cent of the running costs for a liner vessel.[96] This can be converted to between 3 and 5 per cent of the average liner freight rates. An increase in liability insurance costs of 6 to 8 per cent will therefore influence liner rates only by a factor ranging from ($^{3}/_{100} \times {}^{106}/_{100}$) to ($^{5}/_{100} \times {}^{108}/_{100}$) or 0.2 to 0.4 per cent of the total freight rate. Even if the insurance component of liner rates was 10 per cent, and the increase of insurance costs went up by 15 per cent, this would affect the total liner rates by only 1.5 per cent. In this connection, the international transportation procurement manager for DuPont has suggested that "vessel operators, like motor carriers, might find that by accepting responsibility, instead of using negligence as an excuse, they might make each voyage less of a 'maritime adventure' and ultimately find a hitherto neglected source of cost reduction."[97]

88 Selvig, "The Hamburg Rules, the Hague Rules and Marine Insurance Practice", *op cit.*, p. 310.

89 Goldie, *op cit.*, p. 27.

90 *Ibid.*

91 The last three quarters are covered by hull and machinery insurance.

92 Reynardson, *op cit.*, p. Reynardson 1.

93 *Ibid.*

94 *Ibid.*

95 *Cargo Liability Study*, Final Report, prepared by Office of Facilitation, Office of the Assistant Secretary for Environment, Safety, and Consumer Affairs, United States Department of Transportation, Washington, D.C. June 1975, p. 78.

96 B.G. Nilson, "Risk allocation in practice today - a shipowner's view", *Apportionment of risk in maritime law*, Comité International Maritime, Seminar in Aix-en-Provence (France), 9-11 September 1976 (hereafter called the "*Aix Seminar*"), p. 3.

97 M. Berzon in "General Average Outmoded?" *op. cit.*, p. 16.

75. It must also be borne in mind that P & I Clubs in general are more cost effective, being mutual and non-profit-making, than cargo insurance companies. Administrative costs of P & I management accounted in 1979 for about 3.5 per cent of total claims cost,[98] while the Clubs utilize 85 to 90 per cent of their calls (premiums) for the payment of compensation.[99] An United States study, on the other hand, indicates that little more than half of cargo insurance companies' premiums go to payment of compensation, one third covers cost of administration, and the rest is profit.[100] European cargo insurance companies appear to operate with corresponding proportions of 75-20-5 per cent.[101] In this connection it has been reported that cargo insurance profits rose from £27 million in 1984 to £52 in 1985.[102] Seen from a purely economic point of view, it would seem that P & I Clubs are the more efficient type of organization. Risks may be covered relatively more cheaply under P & I insurance than under cargo insurance and the limited shift in liability acknowledged by all as being inherent in the Hamburg Rules may result in either no change or a reduction in total insurance costs.

76. On the other hand, the coming into force of the Hamburg Rules will also mean that cargo insurance companies will have greater access to recourse against carriers. A study by the International Union of Marine Insurers (IUMI) in 1978 has shown that a European average of 10 to 15 per cent of claims paid by cargo insurers were recovered from carriers through recourse action. The corresponding figure seems to be somewhat

98 Reynardson, *op cit.*, p. Reynardson 4.

99 Selvig, *op cit.*, p. 308.

100 *Cargo Liability Study, op. cit.*, p. 65.

101 N. Kihlbom, "The Hague Rules and the UNCITRAL Draft", *Scandinavian Insurance Quarterly*, 1977, 31, at 32-34.

102 *Fairplay*, London, vol. 307, issue 5475, 15 September 1988, p. 3.

higher in the United States.[103] It was said above that cargo insurers calculate a certain level of successful recourse actions when they set their rates. If successful recourse actions increase after the entry into force of the Hamburg Rules, such actions will result in the return of some additional monies to the cargo insurers who can then use this income either to improve profitability or to reduce the actual premiums without reducing existing profit margins.

77. Nevertheless, increased recourse action will mean increased costs of fighting such actions, and some of the savings mentioned in the preceeding paragraph will then be spent in this way. It has been stated, for example, that: "the effect of the new [Hamburg] Rules will be that the number of recourse actions will increase and the number of cases in which claims will have to be calculated or adjusted twice, each time on a different basis of liability and value, will multiply."[104] This opinion, however, conflicts with that of cargo underwriters who have observed: "... the cost of dealing with recoveries is rather limited for the cargo insurer as well as for the carrier and his liability insurer."[105] Investigation by sample has, for instance, led to the view that the cost of recourse actions is low and varies from about 0.15 per cent to 2 per cent of gross cargo premium volume.[106] As the average rate of cargo premiums is about 0.25 per cent, this means that cargo insurers' recourse expense normally varies from $US 0.30 to $US 5 per $US 100,000 insured value. The cargo insurance market is also very competitive, something confirmed by a leading American cargo insurance underwriter, who said, when discussing the repercussions of the greatly increased carrier liability caused by the planned United States Oil Spill Pollution Act, "whether rates go up will depend on international competition."[107] For these reasons, most commentators are of the opinion that "it is highly doubtful ... whether the alteration of the Hague Rules system will result in any increase of the total insurance and transport costs,"[108] or if "... the effect on the overall cost of liability insurance would probably not be very great."[109]

103 Schalling, *op cit.*, p. 21.

104 Crump, "The Influence of the Hamburg Rules on Average Adjustment", *London Seminar, op. cit.*, p. Crump 5.

105 Schalling, *op cit.*, p. 21.

106 N. Kihlbom, "The cargo owner's view and his insurance requirements", *Aix Seminar, op. cit.*, p. 5.

107 J.A. Hickey in "Pollution Act Vexes Industry," *Journal of Commerce*, New York, 11 September 1990, p. 7A.

108 Selvig, *op cit.*, p. 316.

109 Goldie, *op cit.*, p. 27.

78. As was stated above, only a minor proportion of the claims paid by cargo insurers is ultimately transferred to the carrier by way of recourse[110] and the P & I Clubs may be correct in their forecasts, predicting only small increases in the recovery rate after the entry into force of the Hamburg Rules. If this is so, then the increases would not be at all dramatic, with a recovery rate of 20 per cent increasing the total claims bill by no more than 10 per cent.[111] Even if this were translated directly into an increase of liability premiums of 10 per cent, then the influence on freight rates, as was shown above in paragraph 74 would amount to only about one per cent. However, in this connection it must be remembered that P & I calls (premiums) are primarily based on the shipowners' statistical loss ratio, so that the P & I premiums will go up only if and when payments made by P & I Clubs increase. In other words, there would not necessarily be an automatic increase of P & I premiums when the Hamburg Rules enter into force, just as there would be no immediate decrease in cargo insurance premiums because of the prospect of greater recourse recoveries. It has been noted that, "the P & I Club is not likely to anticipate the probable effect of adoption of the Hamburg Rules by increasing the contributions required of shipowner members of the Association to cover the likely increase in liability for cargo claims. The Hamburg Rules will not be universally adopted overnight but will no doubt come into effect gradually, and quite apart from that it will be some years before the effect on cargo claims experience of adoption of the Rules becomes clear."[112] P & I Clubs might increase their calls at first to guard against the increased liability because of the elimination of the nautical faults defence, but if this defence is given up by the shipowners voluntarily,[113] the implementation of the Hamburg Rules will not change anything in this respect and the cost increase will consequently not be attributable to the new Convention.

79. A final note on this subject is the reminder that when the Hague Rules were being negotiated, they were also strongly resisted by shipowners who feared the increase in their liability. This is a natural reaction of any business to any matter which may affect costs, and hence profits.

110 Kihlbom, *op cit.*, p. 5.

111 Goldie, *op cit.*, p. 27.

112 *Ibid.*, pp. 27-28.

113 See below under section C. *Economic and commercial implications of the Hamburg Rules and the MT Convention.*

B. The MT Convention

80. This section analyses some of the more prominent arguments that have been put forward by various parties including multimodal transport operators, shipowners, shippers, freight forwarders, insurers and legal experts on the likely economic and commercial consequences of the entry into force of the MT Convention. Where possible, it draws conclusions therefrom.

81. The position before the entry into force of the MT Convention is that one or more segments of a multimodal transport operation may be governed by the mandatory provisions of some statutory law, but that there are generally no mandatory provisions governing the whole of a multimodal transport.[114] Moreover, the application of statutory rules to each mode of transport or segment of a multimodal transport is fragmentary, unpredictable and widely different in different countries.[115] It has, for example, been said that even when there is an applicable international convention, the limits of its application are often problematic and uncertain. This applies not only to the CMR, for example, but equally to the Hague Rules or the Hague-Visby Rules, and it is quite common to find that a unimodal convention is applied or interpreted very differently in different countries.[116] It is not only the ocean transport industry that complains about conflicting liability régimes. A spokesman of the International Road Transport Union (IRU) said in 1984 that "roll-on roll-off operators were losing business because of 'insurmountable' discrepancies" (in "liability regulations").[117] Moreover, "the simultaneous application of these two legal systems [the International Carriage of Dangerous Goods by Road (ADR) and the IMO dangerous Goods Code] results in non-identical sums being due to the injured party in case of loss or damage occurring during the sea crossing."[118] Hence "the IRU expressed the wish that solutions be found rapidly to these problems so that multimodal transport operations, which are particularly favourable for the protection of the environment and growth of economic activity in general, will be able to expand as they merit."[119] Similarly, it has been noted that "the insurance of multimodal risks requires an indifference to the means of carriage used and to the blurring which also takes place between the traditional classification of insurance risks."[120]

114 See also paragraph 39 above.

115 Diamond, "Legal aspects of the Convention", *Southampton Seminar, op. cit.*, p. C2.

116 *Ibid.*, pp. C2-3.

117 "Intermodal transit 'hit by liability differences'", *Lloyd's List*, London, 29 September 1984, p. 3.

118 *Ibid.*

119 *Ibid.*

82. The MT Convention sets out to unify the present multitude of liability systems in use for combined or multimodal transport. However, in so doing it retains a remarkable degree of flexibility. Although, according to article 2, the Convention will apply to all contracts of multimodal transport if the place of taking-in-charge or the place of delivery is located in a Contracting State, it should be borne in mind that the mandatory provisions of the Convention mainly concern compensation for loss of, or damage to, the goods as well as compensation for delay in delivery, while the more dangerous risks for commercial and uninsurable losses, e.g. the risk of freight increases, liberties to reroute the transport or to cancel the contract in case of hindrances and *force majeure*, are left outside its mandatory régime. Furthermore, the preamble to the Convention emphasizes, *inter alia*, that the Convention should not affect the application of any international convention or national law relating to the regulation and control of transport operations; and gives shippers the freedom of choice between multimodal and segmented transport. In this way, the Convention allows for a number of exceptions which, taken together, reduce its mandatory application.

83. In other words, according to the preamble (c) and to article 3 (2), there is first of all the "freedom" of the consignor to choose between multimodal transport and segmented transport. Secondly, there are the other types of multimodal transport operations which fall outside the Convention. These are:

- Operations which according to article 1 (1) can be defined as "pick-up and delivery of goods";
- Operations which fall under the CIM and the CMR, according to article 30 (4); and
- Operations where multimodal transport takes place between two States of which only one is a Contracting State, if "both these States are at the time of entry into force of this Convention equally bound by another international convention" according to article 38.

84. These exclusions have the following consequences:

(1) To exclude practically all "pure" air cargo transport with its associated ground moves to and from airports;

120 A.M. Stirling, "Insurance coverage for multimodal transport risks - new developments", *6th ICC Shipping Conference, Liner Shipping in the 1990s*, ICC, Hamburg, 25 June 1990, Section C., p. 3.

(2) To expand the concept of "pick-up and delivery" from air to other transport modes;[121]

(3) To allow the shipper to select segmented transport instead of multimodal transport;[122]

(4) To exclude all transport which moves under the CIM or CMR.[123]

(5) To allow other conventions already in force preference over the MT Convention in certain cases;

(6) In addition, it has been argued that the list contained in article 30 of the Convention is non exclusive and that the omission of the Hague Rules from that list has been an over-interpretation.[124]

85. Yet, the mandatory application of the Convention, when a multimodal transport contract has been concluded in accordance with article 2, has created strong opposition to the Convention in some circles. A leading commentator worried, for example, back in 1980,[125] that it might not be possible, at the time the contract was made, to tell whether the transport would be subject to the Convention. His argument was that some containers might move from port to port, others inland in transit and others again in true multimodal transport moves. This multitude of choices still exists, of course, but it is doubtful that a carrier today would not know in advance which container would go where. Developments of multimodal transport over the last decade have clearly been in the direction of door-to-door transport with the number of containers handed over to the consignee at the port of discharge being limited. In any case, the carrier would know with a considerable degree of certainty when he takes the container in charge how it is going to be handled at the o her end of the ocean transit. Hence any doubt over whether a certain transport operation will be subject or not to the Convention would evaporate. It has also been suggested that it would be possible to issue documents that contain two sets of provisions, one to apply if the relevant sea convention is held to govern the transit, the other to apply if the MT Convention will be applicable.[126] Such types of documents are already in common use.[127] In any case, for objections regarding the mandatory applicability (in certain cases) of the Convention to be relevant, one would expect the same opponents to be similarly opposed to all other international conventions that are mandatorily applicable, for instance, the CMR (article 41), the Warsaw Convention (articles 23 & 32), the Hague Rules (article III (8)) etc., yet the transport world has lived harmoniously with these conventions for quite some time. This is so despite of the fact that the CMR, for example, in some cases imposes liabilities on the carrier considerably more stringent than those under the Hague Rules.

121 How the courts are going to treat such interpretation of the concept of "pick-up and delivery" is, of course, a matter of speculation, but the possibility would appear to exist.

122 This possibility is not likely to have a great impact on the scope of application of the Convention in view of the continuing trend towards fully integrated transport.

123 See, for example, M. Booker, "The effect of the multimodal convention on international shippers", *Southampton Seminar, op. cit.*, p. E7, which gives an example of the magnitude of this exclusion, saying that in terms of CMR alone this excludes some 64 per cent by value of the United Kingdom's transport with other countries in Europe.

124 K. Nasseri, "The Multimodal Convention", *Journal of Maritime Law and Commerce*, Vol. 19, No. 2., April 1988, p. 248, footnote 86. The correctness of this view is, however, questionable.

125 Diamond, *op. cit.*, p. C28.

86. It has also been said that because the Convention empowers a contracting party "to regulate and control *at the national level* multimodal transport operations and multimodal transport operators..."[128] it restricts the liberty of transport operators. However, Governments have always had a sovereign right "to regulate at the national level" and the mere reminder of this in article 4 alters nothing.[129] Similarly, it has been said that this power may deprive MTOs of their choice of transport mode,[130] but, the choice of route and consequently of modes, according to article 8 (1) (m) which requires the "intended journey route, mode of transport and places of transhipment" to be recorded on the MT document only "if known at the time of issuance of the MT document," rests with the MTO.

87. It has been argued that when the Convention comes into force "its imprecise language" might create problems. Others have countered this saying that "this perception is basically a result of lack of familiarity with the text of the Convention".[131] Nevertheless, it must be admitted that there are passages which at least leave open the possibility of a number of different interpretations. One example would be article 1 (1) on pick-up and delivery, where no attempt has been made to define exactly what

126 *Ibid.*, p. C29.

127 See e.g. P & OCL's CT document which has one set of rules for segmented and another for combined transport.

128 Italics added.

129 See also *Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR)*, (ECE/TRANS/14), chapter II.

130 Fédération française des commissionaires et auxiliaires de transport commissionaires en douane, transitaires, agents maritimes et aériens, "58ème assemblée générale, Bordeaux, 2 and 3 June, 1988," Paris, 1988, *Report of the Maritime and Multimodal Transport Commission*, p. 10, item IV, para 6.

131 Nasseri, *op. cit.*, p. 249.

constitutes such pick-up or delivery, so that it is impossible to determine when the subsidiary transport function of a pick-up, for example, ceases to be subsidiary and becomes a second (major) transport leg in the whole transport. This argument has been countered by another commentator who observed that even though "the language of this provision is not particularly elegant, the intention is very clear."[132]

88. Another point of contention has been what is referred to as the Convention's *uniform liability system.* Damage to goods can be either localized, i.e. it is possible to determine on which mode of transport the damage occurred, or non-localized or "concealed," i.e. it is impossible to detemine where the damage occurred. In the preparatory work to the MT Convention, two fundamentally different approaches with respect to the relation between multimodal transport and the underlying unimodal transport stages were considered. One approach was to incorporate the precise rules relating to the specific modes into the multimodal transport contract whenever loss of, or damage to, the goods could be localized to a specific segment. In that case, the claimant would be placed in the same position as he would have been if he had entered into a specific contract for that part of the transport. This is called the "network" principle, since the multimodal transport contract relies on the underlying network of rules governing the specific modes of transport. This principle had been favoured until the adoption of the MT Convention and is reflected in most current combined or multimodal transport documents. However, it should be observed that any application of the network liability principle requires that loss or damage can be localized to a specific segment of the transport. Although some say that up to 80 per cent of claims occurrences are known loss/damage,[133] others have said that "a high percentage of cargo damage...is 'non-localized,'"[134] and "container claims nearly always involve concealed damage, and there is generally little proof as to who or what caused the damage."[135] A leading commentator said, 'in practice, nearly all claims are settled without any recourse to the network system, particularly as recourse to it has no practical effect upon the liability of the CTO..."[136] Furthermore, the network system, "despite its limited operation in practice, has the commercial disadvantage that neither the

132 E. Selvig, "Background to the Convention", *Southampton Seminar, op. cit.*, p. A3.

133 M. Graham, "The economic and commercial implications of the multi-modal convention", *Southampton Seminar, op. cit.*, p. F6.

134 Selvig, *op. cit.*, p. A14.

135 J. Betz, "Too many cooks has intermodal in a stew", *Distribution*, Chilton Co., Radnor, PA 19089, Vol. 86, No. 1, January 1986, p. 46.

136 Lord Diplock, "The Genoa Seminar on Combined Transport," *Seminario sui transporti combinati* (hereafter called the "Genoa Seminar"), Università di Genova, Stabilimento Tipografico "Pliniana", Selci Umbro (Perugia), 1974, p. 8.

owner of high-value goods nor his insurer can know in advance how the risk of any loss or damage to them will in fact be allocated; nor does it appear in practice to have any compensating economic advantages in reducing the "risk cost" of intermodal transport."[137] In any event, it will in many cases not be possible to pinpoint where the damage took place, since loss or damage ordinarily cannot be ascertained before the goods have arrived at their destination and it will then remain unknown where and under what circumstances the loss or damage has occurred. In such cases it will not be possible for the MTO to recover from his subcontractors what he might have to pay to his customer. This fact (inability to recover from a subcontractor because the mode where the damage took place cannot be identified) represents by far the greatest risk for the MTO. It exists equally under the Hague Rules, the Hamburg Rules, the MT Convention and the ICC Rules for that matter.

89. The pure network principle poses certain difficulties for the parties to anticipate and assess their respective risk exposures.[138] Since present levels of liability range from an arbitrary per-kilogramme limit imposed by some CT documents or SDR 2 per kilogramme for sea transport under the 1979 Protocol, through SDR 17 per kilogramme for air cargo, to £100 ***in gold*** per package under the Hague Rules (or £100 per package for sea transport under the Hague Rules if the "Rosa S" ruling referred to in footnote 57 does not apply), with lower levels existing for some land modes, it is, under the network system, impossible to predict before the transit commences which limit will be applicable in case of localized loss or damage.

90. The pure uniform system, on the other hand, provides one uniform set of rules on liability with uniform limits. A pure uniform system with limits based on those operating at sea, be they the Hague Rules, the Hague-Visby Rules, or the Hamburg Rules, would thus deprive shippers of taking advantage of the higher limits of liability available under other modal conventions, such as the Warsaw Convention, the CIM or the CMR. One participant of the Genoa Seminar was of the opinion that "liability should be uniform and certain,"[139] and another confirmed that insurers would find "greater economies in a uniform system with its higher level of liability than with a fluctuating system with increased administrative costs."[140] At the same Genoa Seminar a third participant believed that

137 *Idem.*

138 Particularly when the MTO reserves himself the liberty of performing the multimodal transport as he pleases, and perhaps chooses maritime transport instead of air transport, the protection which the shipper enjoys might be considerably lower than expected.

139 Diplock, *Genoa Seminar, op. cit.*, p. 214.

140 Verbatim records, *Genoa Seminar, op. cit.*, p. 220.

"the future lies with a uniform law."[141] To accommodate both of these views, the MT Convention has adopted a mixture of the two systems in that it has uniform rules of liability, but varying limits of liability depending on a number of factors. Furthermore, in setting a limit of liability for non-localized claims, the MT Convention differentiates between multimodal transport moves which include a maritime segment, and those that do not. In the first case, a limit which is only slightly over that set by the Hamburg Rules is established. In the second case, the lowest internationally recognized land transport convention limit in force, that of the CMR, is used. This reflects the basic idea behind the network principle. The network principle has also been incorporated in order to permit the claimant to invoke, with respect to localized loss or damage, the ***higher*** limit of liability which would be provided under any "applicable international convention or mandatory national law" relating to the mode of transport used during the particular stage of the multimodal transport to which the loss or damage could be localized (article 19). A similar principle is used by the new UNCTAD/ICC Rules on Multimodal Transport Documents (Rule 6.4).[142] The 8.87 version of the FIATA FBL, which is subject to the (old) ICC Rules, has a similar clause[143] except that the ICC Rules did not foresee the possibility of a non-maritime multimodal transport move. The new UNCTAD/ICC Rules on Multimodal Transport Documents do (in Rule 6.3).

91. It can be said that the MT Convention institutionalizes what most responsible MTOs are already doing. This is because of the close relationship between the Convention and the ICC Rules. For example, in both the ICC Rules and the MT Convention:

- The CTO/MTO acts as a principal for the entire transport;[144]
- The CTO/MTO is liable from door-to-door;[145]

141 *Ibid*, Professor Malintoppi, p. 223.

142 The UNCTAD/ICC Rules on Multimodal Transport Documents: Rule 6.4 reads, "When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the MTO's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.

143 FIATA FBL clause 6.B. reads, "When in accordance with clause 6.A.1 the Freight Forwarder is liable to pay compensation in respect of loss or damage to the goods and the stage of transport where the loss or damage occurred is known, the liability of the Freight Forwarder in respect of such loss or damage shall be determined by the provisions contained in any international Convention or national law...."

144 ICC Rule 5 (a); UNCTAD/ICC Rule 2.2.

145 ICC Rule 2 (a); UNCTAD/ICC Rule 4.1.

- The CTO/MTO is allowed to issue either a negotiable or a non-negotiable MT document;[146]
- The possibility of derogating from the Rules/the Convention is denied;[147]
- A uniform minimum limit of liability for non-localized damage is imposed;[148]
- A different limit of liability in case of localized damage is allowed;[149]
- Licencing by Governments of CTOs/MTOs is permitted;[150]
- Governmental regulation of certain aspects of multimodal transport is permitted;[151]
- The CTO/MTO is liable for delay;[152]
- The CTO/MTO is responsible for the acts of his servants and agents;[153]
- The burden of proof of knowledge on the part of the CTO/MTO of the dangerous nature of cargo is placed on the merchant;[154]
- The merchant is allowed to treat the cargo as lost if not delivered 90 days after the expiry of an agreed time limit;[155]
- An unbreakable limit of liability is imposed unless the CTO/MTO has recklessly caused damage to the cargo; and[156]
- A time-bar for suits is imposed (nine months for the ICC Rules and the UNCTAD/ICC Rules on Multimodal Transport Documents; six months for the MT Convention).[157]

92. During the transition period from 30 April 1991 when the Commission on Sea Transport of the ICC approved the new rules and at least until they officially come into force, most current CT documents will continue to be ruled by the old ICC Rules. They will, however, gradually be replaced by new MT documents drawn up in accordance with the new UNCTAD/ICC Rules on Multimodal Transport Documents.

146 ICC Rules 3 & 4; UNCTAD/ICC Rule 4.3.

147 ICC Rule 1 (c); UNCTAD/ICC Rule 1.2.

148 ICC Rule 11 (c); UNCTAD/ICC Rules 6.1 and 6.3.

149 ICC Rule 13; UNCTAD/ICC Rule 6.4.

150 ICC Rule 2 (b); UNCTAD/ICC Rules: no such rule exists.

151 ICC Rules 8, 12 (g), 13, and 14; UNCTAD/ICC Rules 6.4 and 13.

152 ICC Rule 5 (f); UNCTAD/ICC Rule 5.2.

153 ICC Rule 5 (b); UNCTAD/ICC Rule 12.

154 ICC Rule 8; UNCTAD/ICC Rule 5.1.

155 ICC Rule 15; UNCTAD/ICC Rule 5.3.

156 ICC Rule 17; UNCTAD/ICC Rule 7.

157 ICC Rule 19; UNCTAD/ICC Rule 10.

93. However, by no means do all current combined transport or multimodal transport operators follow the ICC Rules; for those that do not, the entry into force of the MT Convention will indeed introduce a number of changes with effects varying depending on the wording of their present documents. The Convention will, however, have one distinct advantage over the existing situation: it will create a semblance of order out of the present chaos of liability systems now in force and thus "achieve a measure of uniformity in the field of combined transport liability."[158] As an example of this chaos, it has been said that the "variations in US domestic railroad liabilities are bewildering,"[159] because the liability for a given multimodal transport movement inside the United States currently varies depending on which railroad moves the cargo. One American commentator has written: "the broadening scope of middlemen and the overlap in activities and responsibilities among them [the parties to a combined transport contract] (permitted by deregulation), when combined with deregulation of direct carriers, leave the customer in a quandary as to what liability rules may apply. Until the dust settles and some of these questions are resolved in Congress or in the courts, shippers must take special care."[160] Transport by air is equally confusing, since, although there are at least 114 contracting parties to the Warsaw Convention[161] there are also over 40 different versions of this Convention applying in different countries.[162] Introduction of a single liability multimodal transport régime will eliminate these variances. This, in particular, will assist smaller shippers who often lack the sophistication necessary to protect themselves.[163]

94. Compared with segmented transport including transport on "intermodal" bills of lading, where the shipper, in case of localized damage, must often claim against individual sub-carriers whom he does not know, rather than against the carrier with whom he has made the transport contract, the MT Convention simplifies claims procedures in that the shipper in all cases claims against the MTO. This greatly reduces the administrative cost of shippers' claims handling.

158 Diamond, *op. cit.*, p. C27.

159 J. Betz, "The intermodal liability mess", *Distribution*, Chilton Co., Radnor, PA 19089, Vol. 86, No. 12, December 1987, pp. 28-33.

160 J.H. Mahoney, *Intermodal Freight Transport*, Eno Foundation for Transportation, Inc., Westport, Connecticut, 1985, p. 75.

161 *Principal Instruments of the Warsaw System*, 2nd edition, 1981, IATA Legal Department, Canada, pp. 70-77.

162 ICC Business World, Paris, April-June, 1985, p. 22.

163 J. A. Cooke, "Intermodal Claims: Is the solution finally at hand?" *Traffic Management*, n.p., November 1987, p. 67.

95. With respect to localized loss or damage, it is often far from certain that the MTO or CTO or freight forwarder acting as a carrier will have any significant possibilities of recovering what he might have to pay to the claimant. This is particularly true with respect to any loss or damage occurring in the intermediate stages between the different transport segments. Warehousing and cargo handling enterprises usually disclaim liability or, in any event, reduce their liability by even lower limitation amounts than those which apply to any one type of transport. Furthermore, in many countries, domestic transport may not be subject to mandatory law or, alternatively, may allow greater reductions of liability than under the international conventions dealing with the different modes of transport. The entry into force of the MT Convention will not alter this situation.

96. What it may alter, however, is the freight forwarder's perception of himself. Before the MT Convention came into being, freight forwarders were content with being agents, never carriers in their own right, even though they might have undertaken all the duties of a carrier including issuing a house bill of lading. On that house bill of lading they would, however, carefully note that they were acting "as agent for the shipper" and not as a carrier. This left the freight forwarding industry in its traditional place, and with its traditional role as a relatively minor player in the transport chain. The advent of non-vessel operating common carriers (NVOCCs) in the United States initiated a change. In 1984, the United Kingdom's Institute of Freight Forwarders (IFF) published a new set of standard trading conditions reflecting the world-wide trend for forwarders to take on the role of CTOs and to "abandon their traditional role of paper-pushing agents."[164] In taking on this role as CTOs, the IFF "insisted on adequate through transport liability insurance cover as evidence of an applicant's respectability, or, otherwise stated, his suitability to become an IFF member, or indeed to remain one."[165] This more active role is also clear from the wording of the backclauses on the FIATA FBL and in the very positive and active role played by FIATA in the promotion of combined or multimodal transport

97. One reason often cited in opposition of both the Hamburg Rules and the MT Convention has been that their limits of liability are too high. It has, however, been said that "in the past limits of liability have usually been generous to claimants at the time that they were agreed [but that] the absense of a regular subsequent review of those limits, coupled with the progressive inflation of all currencies, ... has rendered them often inade-

164 "Liability insurance strikes a mutual note", *Containerization International*, London, December 1984, p. 55.

165 *Ibid.*

quate."[166] This lack of a suitable mechanism for reviewing the limits has resulted in very infrequent adjustment. Nevertheless, the limits have been increased on several occasions.[167] To facilitate future amendmends to the limits of liability, the MT Convention has been equipped with a method that allows revisions of the limitation amounts (article 39). However, the requirement of a two-thirds majority for the adoption of any such amendment precludes frequent changes.

98. The MT Convention sets out to restore the balance that existed between carriers and shippers in 1924 by restoring the per package limitation to its traditional prominence and attempts to redress the declining purchasing power of the limits of liability. That continued world-wide inflation will work to reduce even this improvement is evident. Nevertheless, in most cases, the MT Convention's limits of liability are higher than those in force for most other modes of transport. Whether the limits are also above the Hague Rules' limits of £100 depends on the interpretation of the latter amount. If considered to be £100 *in gold*, then the Hague Rules' limits are of course far higher than those of the MT Convention. The effect of the "Rosa S" ruling referred to in footnote 57 was that the package limitation was set at £6,630.[168] But, of course, with the Hague Rules also come the many defences open to the carrier under that Convention. That the Hague Rules' limits in any case are inadequate today can be seen from the fact that one United States owner has decided unilaterally to increase the limits of liability from $US 500[169] to $US 1,000.

99. If no sea or inland waterway leg is included in the transit, the limit of liability under the MT Convention for non-localized damage is, as mentioned above, set to that of the lowest land convention in force, the CMR, i.e. SDR 8.33 per kilogramme. In this case there is no package limitation. Owing to the limitation in force for multimodal transport which includes a sea leg, i.e., either SDR 920 per package or SDR 2.75 per kilogramme, the land per kilogramme limit may in some cases result in a lower limit of liability for localized land damage, for the reasons described in footnote 23 above, than that which the shipper might have obtained had the damage been concealed.

100. In cases of localized damage, that is when it has been possible to determine during which mode the damage took place, the MTO's liability will depend on the level of limits of liability in force for that particular

166 Diamond, *op. cit.*, p. C24.

167 See paragraph 56.

168 See paragraph 56.

169 The United States equivalent to the Hague Rules' £100.

mode if "an applicable international convention or mandatory national law provides a higher limit of liability than the limits" that were referred to above. While several international conventions have higher per kilogramme limits than the MT Convention, the package limitation of the MT Convention may effectively produce a higher limitation amount than those of the other conventions for the reasons described above. The result of this will be that the MTO's liability is likely to exceed that of his subcontractor. This will presumably encourage MTOs to select their subcontractors with great care and take extra precautions to reduce or avoid loss or damage.

101. It may, in this connection, be well to remember that the MT Convention does not apply to claims which the MTO may have against one of his sub-contracting carriers. Such claims are governed by the appropriate unimodal convention or national law in force for that leg of the multimodal transport. Consequently, when the limits of liability of the MTO, according to the MT Convention, exceed those of his subcontractor under, for example, the Hague-Visby Rules and the Hamburg Rules, the MTO will not be able to recover as much from his subcontractor as he may be required to pay to a claimant. To cover this liability, the MTO will have to turn to a liability insurer.

102. Furthermore, where the MT Convention is in force in parallel with the Hague Rules or the Hague-Visby Rules, cases may occur where the MTO is liable, but the ocean carrier, because of the article IV defenses, is not. In such cases the MTO will have to bear the entire liability. For this reason States that become contracting parties to the MT Convention should also consider becoming contracting parties to the Hamburg Rules. However, even under the Hamburg Rules there could be situations where the subcarrier may not be liable while the MTO is. That would, for example, be so in the case of fire, where the shipper was unable to prove fault or neglect of the (ocean) carrier according to the Hamburg Rules' article 5 (4). As there is no similar rule on fire in the MT Convention, the MTO could be liable without being able to seek recourse against his subcontractor. For non-localized damage, however, there is "relatively little to affect costs"[170] and while the limits are higher than the existing ones, it has been said that the extra cover needed would "perhaps not be expensive to provide."[171]

103. This statement has been supported by a leading maritime lawyer, who said that the "financial impact of the Convention seems ... to be nei-

170 M. Marshall, "Insurance and the Multimodal Convention", *Southampton Seminar, op. cit.*, p. D7.

171 *Ibid.*

ther inequitable nor, in the last resort, very important."[172] A leading insurance expert has also said that "it [the MT Convention] is unlikely to lead to massive premium increases, or for that matter to giant new claims."[173] As the same person further stated, when discussing the problem of extra insurance required to cover the difference in limits of liability between the MTO and his subcontractors, "provided there is no exemption under the unimodal régime, the extra liability protection may be provided without much difficulty or expense."[174] A Canadian study on the consequences of the entry into force of the MT Convention states that "cargo insurance premiums ought to fall, but this would not happen until claims experience against MTOs under the Convention [has been] developed and assessed."[175] Further, it has been said that "the whole subject of liability has to be put into a proper perspective, the amounts paid out by efficient MTOs on cargo liability claims do not present one of the major problems in the through transport industry today."[176] It must also be borne in mind that "whether the various carriers or bailees accept a greater or lesser liability or even no liability at all does not in the ultimate affect the total premium."[177]

104. Owing to the higher limits of liability of the MTO, it has been suggested that the shippers' need for cargo insurance would diminish, but not disappear, even though the "MTO has full liability for most goods under the Convention."[178] On the other hand, a leading mutual insurance expert recently stated that: "The demand for one-stop shopping subverts traditional insurance distinctions between marine and non-marine, cargo and liability, personal and corporate [insurance]."[179] The MTO is not unlike the road hauliers, or rail carriers in the United States, who are virtual insurers of the goods they transport unless the shipper has chosen a "release" (reduced) freight rate.[180] On the other hand, some United States rail carriers offer their customers "a package including full liability, door-to-door responsibility, claims protection on intermodal concealed damage of unknown cause or unlocated occurrences and simplified loading standards"[181] for a limited fee of $US 8-12 per trailer. Similarly, some VO-MTOs are offering the same kind of service at "highly competitive rates."[182] Thus the idea that the carrier may be able and willing to cover full liability for goods in his custody is not new. In this connection, it may be useful to note that the Canadian study referred to above had estimated that "approximately 80 per cent of the commodities in Canada's international maritime trade will be covered by the [Convention's] limits."[183] It further stated that "the more stringent basis and higher levels of liability under the MTC work to the banks' advantage"[184] since "banks will have an enhanced ability to recoup advances made under documentary credits whether directly as owners of the goods or indirectly as the result of successful claims by the importer himself."[185] This has led Canadian banks to "look favourably upon the Convention."[186]

105. Owing to the international character of multimodal transport, inability by the MTOs' insurers to settle claims in foreign exchange may render national MTOs uncompetitive and thus be counter-productive in a country's export drive. One consequence of this is that national insurance companies wishing to underwrite MTOs' liability must be prepared and able to settle claims in foreign exchange. Insurance companies or brokers with international connections would have an advantage in such a case. This is the reason why the Canadian marine insurance industry, for example, opposes the Convention since it, *inter alia*, "forsees the potential of a loss of business by small Canadian insurance agents."[187] In addition to these examples, much of what was said above in paragraphs 50 to 76 on the Hamburg Rules applies equally to the MT Convention.

106. In this connection, it may be relevant to quote from the United States Department of Transport Cargo Liability Study, carried out in 1974-75 "to broaden our understanding of today's cargo liability system in order that future domestic legislation and international conventions may

172 Diamond, *op. cit.*, p. C28.

173 Marshall, *op. cit.*, p. D1.

174 *Ibid*, p. D6.

175 *The Multimodal Convention, the effect on Canadian shipper and traffic service industry trade procedures*, Study no. 3, McMillan, Binch, Barristers & Solicitors; n.p., n.d. (1982?), (hereafter called "Study no. 3."), p. 56.

176 Graham, *op. cit.*, p. F10.

177 J. Isaacs, "Cargo Insurance in relation to through transport", *Through Transport: problem areas, documentation and insurance*, a two-day seminar organized by Lloyd's of London Press Ltd., The London Press Centre, London, June 15/16, 1978, p. Isaacs 1.

178 Graham, *op. cit.*, p. F8. See also Diamond, *op. cit.*, p. C28.

179 Stirling, *op. cit.*, p. 8.

180 "One law for them..." prepared by the law firm Grove, Jaskiewicz, Gilliam and Cobert, Washington DC., *Cargo Systems*, ICHCA, London, Vol. 13, No. 4, April 1986, p. 37.

181 J. Betz, "The intermodal liability mess", *Distribution*, Chilton Co., Radnor, PA 19089, Vol. 86, No. 9, September 1987, p. 58.

182 "TFL Will Sell Cargo Insurance", *The Journal of Commerce*, New York, 19 September 1988, p. 1B. See also "Full liability could still become an issue", *Containerization International*, London, August, 1985, p. 55.

183 *Study no. 3, op. cit.*, p. 51.

184 *Ibid*, p. 45.

185 *Idem*.

186 *Study no. 3, op. cit.*, p. 47.

187 *Ibid*, p. 53.

better serve the needs of commerce."[188] Appendix I of this study lists the effects of [an] international multimodal transport convention on the Department of Transportation cargo liability study goals. The appendix states, *inter alia*:

(1) "A multimodal convention would improve the indemnification protection for the cargo interest because they would no longer be in doubt about the applicable liability system.

(2) The cargo interest would know more about the risk of carriage and the protection they would be able to expect because concealed loss and damage would be covered by a multimodal convention.

(3) A multimodal convention would expedite settlements because the law governing such settlements would be known. In concealed loss and damage situations, interested parties would no longer be able to avoid responsibility by claiming that the applicable law was unknown.

(4) A multimodal convention would expedite settlements because only one interest, the MTO, would be responsible for the entire movement of the cargo.

(5) Greater uniformity of law would reduce the cost of legal services because expertise in a variety of legal systems would be less necessary.

(6) Under a multimodal convention, the [United States] cargo interests would have the advantage of improved protection...thereby offering an inducement to enter overseas markets.

(7) New cargo interests might be induced to export or import because they would be able to pass the responsibility of transportation to the MTO, who could be more easily reached than various carriers scattered throughout the world.

(8) Under a multimodal convention, industry understanding of the characteristics and benefits of multimodal transport would be increased. Under the present modal régimes, industry interests are confronted by varying legal systems and risks of carriage. A multimodal convention would provide a much less complex system of carriage.

(9) Industry and government understanding would be increased by a multimodal convention because they, as cargo interests and carriers, would have the added protection of international law in their multimodal carriage. They would no longer have to rely on private contracts to determine all consequences of multimodal transport".[189]

188 *Cargo liability study, op. cit.*, (paragraph 106), Technical Report Documentation Page, item 16.

These conclusions, which were reached before the MT Convention was completed, are nevertheless very interesting and serve as a good basis for a further brief review of some issues.

C. Economic and commercial implications of the Hamburg Rules and the MT Convention

107. Below some of the more important commercial consequences of the entry into force of the Hamburg Rules and the MT Convention are discussed. Some of these also have direct economic consequences, but they are included below for the sake of convenience. A more in-depth discussion of the various aspects of the two Conventions can be found in chapters IV and V.

Abolition of the list of defences

108. Apart from the nautical faults and the fire defences (see below), the list of the other exemptions in the Hague Rules has long been considered to be of little practical value. The exemptions in article IV, rule 2 (c) to (p), do not add anything of substance. Nevertheless, these exemptions can be said to have been retained implicitly in article 5 (1) of the Hamburg Rules.[190] Their "elimination" is thus unlikely to have serious commercial consequences.

Arbitration

109. The provisions on arbitration in the Hamburg Rules and the MT Convention are an enlarged version of a provision already found in the Visby Protocol. They may assist those shippers or consignees who do not insure their goods with cargo underwriters and who consequently are forced to recover their losses directly from the carriers. For those cargo owners who have taken out cargo insurance, this provision may not be of great significance and might not materially alter existing practices, yet

189 *Ibid.*, Annex I.

190 Tetley, *op cit.*, p. 204.

the provision may help reduce the costs of the disputes which will inevitably occur.

Basis of liability - the principle of fault or neglect

110. In the Hague Rules, the Hamburg Rules and the MT Convention, liability is based on the principle of fault or neglect. The only difference between them is that the principle has been incorporated into the two new Conventions in the affirmative form of liability for presumed fault or neglect. It is a principle of fault liability and not of strict liability. In practice the cargo owner will still have to establish whether the damage took place while the cargo was in the care of the carrier and then lodge his claim.

Burden of proof

The Hamburg Rules

111. It is said that the burden of proof under the Hamburg Rules has been reversed so that it is the carrier who must prove that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. Article 5 (1) must here be seen together with the "common understanding" annexed to the Convention. It would appear that the standard of care required of the carrier under article 5 (1) will be similar to that required under the "due diligence" and other faults or neglect concepts in the Hague and Hague-Visby Rules. Consequently, it is considered that existing case law will provide valuable guidance.[191] In view of the practice in various jurisdictions of placing the burden of proof on the shipowners even under the Hague Rules, it is not likely that this will result in any great departure from the present interpretation.[192] Nevertheless, some commentators claim that there is considerable ambiguity in the text and that this is likely to lead to an increase in claims and litigation.

191 Report of Group 2, *Vienna Colloquium*, p. 46.

192 See McGovern, "The practical and economic effects of the Hamburg Rules from the point of view of a shipowner," *Vienna Colloquium, op. cit.*, p. 10; Goldie, *op cit.*, p. 24, and Diamond, *Vienna Colloquium, op. cit.*, p. Diamond 10.

The MT Convention

112. The burden of proof under the MT Convention rests with the carrier, i.e. the MTO. In this the MT Convention copies the ICC Rules (rule 12 (g)), CMR (article 18), COTIF (article 36) and CIM (article 37). This is a reversal of the Hague Rules' procedure. However, according to Study no. 3, "the Convention does not by this means impose a more onerous standard of care upon MTOs."[193] The Canadian Study goes on to say that "in many situations, this reversal of the burden of proof will not alter the ultimate disposition of a shipper's claim."[194] Contrary to the Hamburg Rules, the MT Convention does not incorporate the Hamburg Rules' revised burden of proof on fire contained in article 5 (4) of that Convention. This means that there is only one type of burden of proof within the Convention, which must be considered an advantage.

Basis of liability - the principle of fault or neglect

113. As in both the Hague Rules and the Hamburg Rules, the liability of the carrier (the MTO), according to the Hamburg Rules and the MT Convention, is based on the principle of fault or neglect. The Conventions incorporate this principle in the affirmative form. While different from the Hague-Visby system, this is close to the basis of liability provided for in the conventions for carriage by air, road and rail.[195]

Carrier and actual carrier

114. The Hague Rules deal only with one type of carrier, namely the shipowner who contracts to carry a cargo from port A to port B. When the Hague Rules were negotiated this was adequate since the shipowner would bring the cargo from the port of origin to the port of destination. This is no longer so and a considerable amount of feedering often takes place at either end of a major ocean voyage. For this reason, most bills of lading today have a clause covering liberty to subcontract and a provision that the contracting (ocean) carrier shall not be liable in respect of subcontracted carriage. This means that the cargo owner, in case of loss of or damage to the cargo, will have to claim against someone who is not

193 *Study no. 3, op cit.*, p. 21.

194 *Ibid.*

195 E. Selvig, "The background to the Convention", *The Southampton Seminar, op. cit.*, p. A16.

party to the contract of carriage, the second or "actual" carrier, whose liability must be determined by national law. The Hamburg Rules make the contracting carrier liable for the performance of the carriage undertaken by a subcontracting carrier, the actual carrier. This in turn allows a cargo owner to claim both against the carrier with whom he made the contract and against the actual carrier, should there be a need to do so. This offers a considerable advantage to the cargo owner. Under the MT Convention there is only one carrier, the MTO, and it is against this person that the claimant must seek redress.

Claims and actions

115. The Hamburg Rules improve on the deficiencies of the Hague Rules (and the United Kingdom 1855 Bills of Lading Act) as regards the problem of right to sue. It would appear that these innovations are very satisfactory.[196] Who can be sued is also dealt with, and this is not only the contracting carrier, but also the actual carrier. In practice, however, it will probably be easier to sue the contracting carrier rather than the actual one.

116. Under some CT documents, the claimant may have to sue directly not the CTO but the sub-carrier used by the CTO.[197] This may create great difficulties for the claimant since, in many cases, it may be difficult to identify the CTO's subcontractor or where he may be found. The MT Convention clarifies this situation by having the MTO assume responsibility for the entire transport operation regardless of which sub-carrier may have been responsible for a certain localized damage. Should a claimant, nevertheless, decide to sue a sub-carrier according to other applicable rules, the sub-carrier is still entitled to rely on the defences or invoke the limits of the MT Convention.

Content of the bill of lading

117. If a bill of lading is issued it must, under both the Hague Rules and the Hamburg Rules, contain a certain number of items, but the Hamburg Rules' list is more detailed than that of the Hague Rules. This is an effective provision. Under the Hague Rules it was common for the carrier to use such reservations as "said to contain", "weight unknown", etc. It

196 R.J.L. Thomas, "A legal analysis of the Hamburg Rules, Part III," *London Seminar, op. cit.*, pp. Thomas 6-8.

197 This is not the case under the ICC Rules, since there, as under the MT Convention, the CTO is responsible for the entire transport, see ICC Rules, rule 5.

has been argued that under the Hamburg Rules such reservations will be permitted only if the carrier at the same time states why he could not, for example, count the cartons in the container.[198] The reservation might thus read, "shipper's load and count, shipper's sealed container, said to contain...".

Contents of the multimodal transport document

118. With very few exceptions, bills of lading are used only for maritime transport, the reason being that transport by air, road or rail is too fast to be compatible with the rather slow procedure involving bills of lading. Considerable time may be needed to pass a paper document through Customs or other controlling authorities, banks, forwarders, etc., before it reaches its destination where it is required for the release of the goods. In addition, mail service is not always sufficiently fast to ensure the arrival of the documents ahead of the goods. Furthermore, there is always the risk that the document needed for the release of the goods at their destination gets lost and cannot be retrieved. This explains the common practice of issuing bills of lading in more than one original copy. This multiplicity of copies serves the purpose of solving the problem for the sea carrier, since the chance that at least one original will appear at the destination is greater than if only one single original had been issued. The carrier is relieved of the burden of taking the goods into safe custody pending time-consuming mortification procedures whereby a court of law or other authority declares the bill of lading lost and a particular person entitled to the goods. Nevertheless, the issuance of more than one original bill of lading must be considered a serious malpractice that facilitates maritime fraud. This is evidenced statistically by the number of frauds performed using bills of lading.

119. Since transit times for trans-ocean carriage of goods are shrinking it happens very frequently that the ship arrives before any original bill of lading has succeeded in reaching its destination. Although, in such situations, most national maritime laws require the sea carrier to take the goods into safe custody pending the arrival of the bill of lading, this is in practice often far too complicated and in some cases, such as in tanker trade, quite impossible. For this reason, goods are frequently delivered to persons - sometimes named as consignees in the bill of lading - who allege that the bill of lading is under way and will soon come into their hands. In most cases, the carriers then demand bank guarantees which will indemnify them should it turn out that the goods have, in fact, been de-

198 Thomas, *op cit.*, p. Thomas 2.

livered to the wrong person. This procedure is another form of malpractice under the bill of lading system. It constitutes a breach of the carrier's fundamental promise not to deliver the goods except in return for an original bill of lading duly endorsed. The carrier must therefore safeguard himself by requiring a bank guarantee without any limit or, at least, of a sufficiently high amount, which may be well above the invoice value of the goods. A fundamental breach of contract could deprive the sea carrier of every possible limitation of liability and would probably lead any law court to assess damages generously in favour of any party suffering from the carrier's breach of contract.

120. This is not the most serious aspect of the malpractice, however. Under most national laws, the bill of lading has been acknowledged as also representing title to the goods. This means that if the seller goes bankrupt after the surrender of the bill of lading to the buyer, then the buyer, when in possession of the bill of lading, is effectively protected against the seller's creditors. However, if in a particular trade it could be ascertained that the bill of lading is no longer necessarily the document actually used for the release of the goods, then it would probably no longer be recognized as controlling title to the goods and hence the buyer, although in possession of an original bill of lading, would not be protected against the seller's creditors.

121. These are the reasons why it is no exaggeration to say that there is now a sort of "bill of lading crisis". This fact has accelerated another natural development in the present era of electronic and computer techniques. While, traditionally, a paper document would be essential to store important information, this can now be done by electronic devices and computers. By these means, it is possible to convey information over the ocean in less than one second and, if needed, to obtain at the destination a print-out of computer data containing all the required information customarily included in bills of lading and other transport documents.

122. Consequently, with respect to transport documentation, the old bill of lading system is successively being replaced by other documentary procedures. The first step in this development is evidenced by the replacement of the bill of lading by other kinds of transport documents, the ***non-negotiable*** waybills for carriage of goods by air, road, rail and now also frequently by sea. In the latter case, these documents are called "liner waybills", "sea waybills", "ocean waybills", "cargo quay receipts", "data freight receipts" and the like. Such documents, as distinguished from bills of lading, have the advantage that no paper document is needed at the destination for the release of the goods. The goods are released to the person named as consignee in the transport document. Nevertheless, there are also disadvantages connected with the use of such non-negotiable documents. First, the carrier faces the problem of identification. How can

he know that the person demanding the goods is identical with the person named as consignee? In most cases, the consignee is a legal entity and this raises the difficult problem of deciding whether a physical person claiming the goods would be authorized to receive them. Normally, the practice of notifying the person named as consignee of the arrival of the goods would constitute sufficient security and carriers using the waybill system do not seem to incur significant losses on account of wrongful delivery of the goods at destination. However, it should be observed that no system is actually fool-proof.

123. As has already been said, the MT Convention does not fully deal with the legal problems connected with non-negotiable MT documents. In particular, the Convention does not provide for an "estoppel" function by a specific regulation of duplicate non-negotiable transport documents as, for example, in the Warsaw Convention and the CMR and CIM. Under some international conventions, the waybill system requires the carrier to issue a duplicate waybill or a copy intended for the shipper. These copies fulfil the important function of preventing the shipper-seller from instructing the carrier to change the route or deliver the goods to somebody else before they have reached the originally agreed destination stated in the waybill unless the shipper could, when giving such instructions to the carrier, present the relevant document (duplicate or shipper's copy). By these rules, a buyer, having paid for the goods against a duplicate waybill or a shipper's copy, is assured that the seller does not interfere with the transport. Such security is presently not available under the current "sea waybills". Efforts to remedy this situation were crowned when the CMI world conference in Paris in June 1990 approved the *"CMI Uniform Rules for Sea Waybills"*.

124. The MT Convention has taken the developments just mentioned into proper account. It follows from articles 6 and 7 that the MT document can be either negotiable (article 6) or non-negotiable (article 7). However, it is important to remember that the MT Convention does not contain any particular provision purporting to strengthen the position of the consignees when non-negotiable MT documents under the Convention have been issued. Thus, in these cases, caution is required whenever payment is made in advance before the goods have reached their destination.

Conflict of conventions

125. This subject is particularly pertinent as regards the MT Convention where a great deal has been said about the possibility of conflict of conventions. As far as the Hamburg Rules are concerned, readers are re-

quested to consult chapter IV where the subject is covered under the discussion of the individual articles of the Convention. The MT Convention deals with other conventions in a number of ways. First of all, it gives priority to, or excludes from its provisions, conventions relating to limitation of liability of vessels, nuclear damage and, in limited circumstances, jurisdiction and arbitration. Secondly, as already mentioned above, it gives priority to the provisions of CMR and CIM by excluding carriage under these conventions from the Convention, provided that States parties to the Convention are bound to apply the rules of those conventions. In certain situations, however, even when the cargo seems to be covered by the CMR or the CIM, this may in fact not be the case. This could occur, for example, if a consignment note has been issued between a carrier (road hauler) and another party which is not one of the two contracting parties to the multimodal transport contract. Furthermore, certain types of transport, such as those under a postal convention, or household goods, fall outside the CMR. Carriage by road or rail within only one State does not fall under the CMR or the CIM. Thirdly, as mentioned above, it excludes pick-up and delivery. However, when two States are both Contracting Parties to the MT Convention, the provisions of the Convention are, according to article 37, with the above exceptions, mandatorily applicable.

126. In cases where only one State is a contracting party and both are equally bound by another convention in force when the MT Convention comes into force, article 38 allows a court or arbitral tribunal of a Contracting State the power to apply the provisions of that other convention in specific circumstances.[199] Further, national law may also enact either expressly or implicitly, generally or specifically, rules regarding priority of treaty obligations so that a court by its national law would be bound to apply the earlier convention.[200] A conflict may arise, in connection with article 20, if the MT Convention provides defences which a sub-carrier does not already have under another convention or allows limitation of liability to a greater extent than that convention. In such cases, the sub-carrier would probably invoke the defences and limits referred to in article 20.[201] It has been said that article 20 will be of benefit to sub-carriers "mainly in cases where the liability vis-à-vis the transport customer is governed by national law."[202] The question of conflict between the Hamburg Rules and the MT Convention also remains. While it may be assumed that in cases where the ocean carrier and the MTO are two different entities no conflict may exist, the same cannot be said in cases where

199 D.C. Jackson, "Conflict of conventions," *Southampton Seminar, op. cit.*, p. G8.

200 *Ibid.*

201 Selvig, *op cit.*, p. A5.

202 *Idem.*

the ocean carrier is also the MTO. Here the relationship between the shipper and the carrier is governed by both the Hamburg Rules article 1 (3) and the MT Convention 1 (5). Although it may be that the Vienna Convention on the Law of Treaties 1969, articles 30 and 32, may help to resolve such conflicts, some experts are of the opinion that such may not be the case.[203]

Deck cargo

127. Under the Hague Rules, shipowners are not liable for cargo carried on deck under a bill of lading which clearly states that the cargo is so carried. In the Hamburg Rules this has been changed so that the carrier is entitled to carry cargo on deck if this is so stated on the bill of lading, or is the custom of the trade or is required by statutory rules or regulations in which case he is liable for cargo so carried. In modern container trades it is certainly the "custom of the trade" to carry containers on deck. Shipowners have acknowledged this by stating in their bills of lading that "goods carried stowed in containers ... may be carried on or under deck without notice to the merchant. Such goods ... shall be deemed to be within the definition of goods for the purposes of the Hague Rules."[204] Such a clause, which in some jurisdictions may not be admissible,[205] may, where admissible, mean that cargo which otherwise might have been covered under the Hague-Visby Rules will only be covered by the Hague Rules' £100 package provision. Under the Hamburg Rules it is at least certain that the unit limitation also applies to each package inside the container, when it is carried on deck. While it has been said that the article 9 of the Hamburg Rules is actually less favourable to cargo interests than the Hague Rules,[206] it can be said that in some jurisdiction the cargo owners' position has been improved. In general it is unlikely that commercial practices in this connection will be influenced by the entry into force of the Hamburg Rules. The question of deck cargo is not considered in the MT Convention and there is thus no exclusion of liability for cargo stowed on deck under this Convention.

203 Article 30 of the Vienna Convention deals with the application of successive treaties relating to the same subject-matter, while article 32 regards as admissible in the interpretation of conventions the "*travaux préparatoire*" of conventions, in other words, all the negotiations which have been recorded in the official records of the meetings and negotiating conference(s) that lead to the the convention in question.

204 Quote from a current bill of lading by a major container operator.

205 Tetley, *op cit.*, p. 199.

206 *Idem.*

Delay in delivery

128. Although the concept of delay has not been included in the Hague Rules, it might be implied in article III, rule 2. The concept of liability for delay in delivery was, however, introduced in 1929 by the Warsaw Convention (article 19) and has also been incorporated in the CIM (article 36 (1)), and the CMR (article 17 (1)). Subsequently, in some countries, for example England and the Scandinavian countries, it has been decided that "the Hague Rules govern the carrier's liability for delay in delivery."[207] Shippers that ship under an intermodal transport contract which passes through a country that is a Contracting Party to these conventions thus already have the possibility to claim for delay in delivery even without the Hamburg Rules or the MT Convention being in force. The concept of delay in delivery was subsequently taken up by the ICC Rules[208] and later incorporated in the Hamburg Rules and the MT Convention. However, the ICC Rules are rather timid in their definition of delay, allowing compensation to be paid only "when the stage of transport where the delay occurred is known".[209] The Hamburg Rules and the MT Convention, on the other hand, confirm the shipowner's liability for delay in delivery. Since it is quite possible for a number of independently insignificant delays eventually to add up to one long delay, where it would be difficult to determine exactly "where the delay occurred", the Hamburg Rules/MT Convention solution would seem an improvement over the ICC Rules in this regard. Both Conventions have a notice period of 60 days. While, in theory, this might deprive the MTO of any chance of claiming against the ocean carrier under the Hamburg Rules, in fact, the MTO will know very well if the cargo has been delayed under the ocean carriage, and he will thus be able to claim against the ocean carrier under the Hamburg Rules, should that Convention be in force, even before he himself receives a claim from the shipper. With the Hague Rules/Hague-Visby Rules in force, the situation of the MTO will be much more difficult to determine and will differ from one jurisdiction to another.

129. It is important to observe that both the Hamburg Rules and the MT Convention, like other international conventions regulating the carrier's liability, deal only with liability for loss of or damage to goods and delay in delivery. Applicable national law may well allow compensation for other types of damage such as for delay other than "delay in delivery", for example, delay in providing the means of transport or in the taking in charge of goods, non-performance or consequential loss other than such

207 Selvig, "The Hamburg Rules, the Hague Rules, and Marine Insurance Practice", *op cit.*, p. 322.

208 ICC Rules, rules 14 and 15.

209 ICC Rules, rule 14, first paragraph.

loss which may follow from physical loss of or damage to the goods themselves. Since such types of damage would fall outside the two conventions, the provisions relating to limitation of liability will be likewise inapplicable. Usually, the carriers are aware of this and will therefore provide for exceptions from or limitations of such liability in their conditions of carriage and transport documents. The interests of the carrier are safeguarded by a rather low limitation of liability for delay (article 6 (1) (b)). The specific inclusion of this concept in the Hamburg Rules has been variously berated as unrealistic or lauded as long overdue, although some shippers expect its "effect to be little more than academic."[210] Regardless of how this stipulation is viewed, carriers will no doubt see to it that this provision will not unduly influence their liability. This they will probably do by inserting rather generous delivery dates in their transport documents. The result of such action will, in effect, be to render the provision of limited commercial consequence, although shippers may see the penalty for delay as an educative element and the redress as something symbolic.[211] This also seems to be confirmed by an analysis of the Convention in which doubt was expressed that the new provision for delay "will significantly affect the cost of P & I insurance."[212]

Deviation

130. The Hamburg Rules do not deal with deviation. This may either mean that the doctrine of deviation has been abrogated by the Rules and that deviation is only relevant under the Rules if and to the extent that it causes loss of or damage to the cargo, or if delay in delivery results. Alternatively, it may be that, as deviation is not dealt with, national rules of law on the subject are not inconsistent with the Rules and so remain unaffected by them.[213]

131. As far as the MT Convention is concerned, the text of article 20 (1) would appear to make deviation relevant only insofar as it causes loss, damage or delay in delivery of the goods. In this the wording may be clearer than the Hamburg Rules' article 7 (1) and as such "wide enough to alter the law on deviation."[214] However, it has been said that it is

210 Schilling, *op cit.*, p. 17.

211 *Ibid.*, p. 18.

212 J.P. Honour, "The P & I Clubs and the new United Nations Convention on the Carriage of Goods by Sea 1978", *The Hamburg Rules on the Carriage of Goods by Sea*, edited by S. Mankabady, *op. cit.*, p. 244.

213 Diamond, *op cit.*, p. Diamond 16.

214 Diamond, *Southampton Seminar, op. cit.*, p. C21.

questionable whether the "traditional view...that deviation is likely to be regarded by courts in England and elsewhere as beyond the scope of the voyage for which terms have been agreed, and thus the contractual defences and exclusions from liability cannot be invoked"[215] survives intact following some late judgements.

Documents other than bills of lading

132. A major innovation of the Hamburg Rules, compared to the Hague Rules or the Hague-Visby Rules, is that the Convention is not limited to covering bills of lading. This is because, in liner trades, increasing use is made of waybills or other types of non-negotiable documents. In some trades this type of document has come to account for 30-50 per cent of all the transport documents issued. Such documents are not covered by the Hague Rules or the protocols. Under the Hamburg Rules not only will shippers be protected when they have been issued a waybill, but shippers using, for example, short-haul sea ferries, such as those crossing the Channel where no bill of lading is issued, will also be protected.

Entry into force

133. The Hague Rules did not require any minimum number of Contracting Parties before entry into force. This was left up to the depository of the Convention, the Belgian Government, which, as was provided: "after an interval of not more than two years from the day on which the convention is signed, ... 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."[216] The Visby Protocol required 10 Contracting States to come into force, while the 1979 Protocol required only five. The Hague Rules came into force on 2 June 1931, one year after the United Kingdom, with its colonies and dependencies, had ratified it. Belgium, Hungary and Spain ratified at the same time. Even more than 12 years after the Hague Rules had been negotiated in Brussels, the Convention had only six Contracting States.[217] It took 32 years for it to reach 20 Contracting States. Nine years passed before the Visby Protocol came into force, and it should be remembered that a number of European transport conventions and

215 Martin, *op cit.*, p. 17.

216 Hague Rules, article XI.

217 Belgium; Hungary; Monaco; Portugal; Spain; United Kingdom.

agreements negotiated many years ago have not yet come into force, one not even after 33 years, while others, more than 12 years old, are languishing with only one or two Contracting States.[218] It is now 13 years since the Hamburg Rules were negotiated, yet the Convention already has 19 Contracting States. Had the Hamburg Rules only required 10 Contracting States, as did the Visby Protocol, the new Convention would have come into force already in 1984. Instead there has been a struggle to reach 20 Contracting States. The latest indications (as of early 1991) are that the requirement of 20 Contracting Parties will be reached during the first half of 1991 for entry into force of the Convention in 1992.

134. The MT Convention requires 30 Contracting States to enter into force and, as mentioned above, only has five at present. The elevated number of Contracting Parties was part of the package deal which resulted in the Convention being adopted by consensus; however, it means that it will take even longer for this Convention to enter into force than for the Hamburg Rules. In the 11 years that have passed since the MT Convention was negotiated, it might have been expected that more countries would have become Contracting Parties to it than has, in fact, been the case. This is because it has been judged futile or even counter-productive to push the entry into force of the MT Convention while the Hamburg Rules are not yet in force. One reason for holding this view is that the MTO's limits of liability (SDR 920/2.75) may be considerably higher than the level imposed by the Hague Rules or the Visby Protocol (always subject of course to the way in which the calculation of the £100 limitation is interpreted) and that the MTO may be liable where the shipowner may escape liability owing to the list of defences contained in the Hague Rules' article IV. Once these impediments have been removed, with the entry into force of the Hamburg Rules, it is likely that the number of Contracting Parties will increase at a more rapid pace.

Errors in navigation

135. One of the most hotly debated issues involving the Hamburg Rules is the elimination of the so-called *nautical fault defence*. Article IV of the Hague Rules contains a long list of situations where the carrier would not be responsible, including the famous rule 2 (a) which states that the carrier shall not "be responsible for loss or damage arising or resulting from act, neglect or default of master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship". The nautical default

218 See *Agreements and conventions of interest to countries of the ECE region* (TRANS/R.246).

defence has frequently been used by carriers to deny responsibility, and the fact that it will no longer be available to them has been used as an argument against the Hamburg Rules.

136. It is undeniable that many claims have in the past been connected with loss due to error in navigation. An insurance study in the United Kingdom showed, for example, that in 1977 a little more than 40 per cent of the about £400 million paid out in non-oil cargo claims was due to errors in navigation.[219] However, according to a paper presented to the Vienna Colloquium, "there is an 'anti-shipowner' trend world wide towards restricting the defences available to the carrier. In the context of the Hague Rules this means that in many countries it is increasingly difficult for the carrier to prove the exercise of due diligence to make the ship seaworthy, and it is also more difficult for him to rely on some of the exceptions listed in article IV, rule 2..."[220]

137. It is probable that the battle to retain the nautical defence has already been lost, Hamburg Rules or no Hamburg Rules.[221] This may, for example, be deduced from the P & I Clubs' recent demand that pilots be liable for their mistakes[222] and the American Bar Association's request to the United States Government that it "consider further changes in the Hague-Visby Rules such as...the elimination of the nautical fault defence."[223] Consequently, opposition to the Hamburg Rules on these grounds is no longer relevant, and it can be said that the loss of this defence will have no commercial or economic influence on costs insofar as the Hamburg Rules are concerned.

Fire

138. The fire exemption has been retained in the Hamburg Rules in a slightly strengthened form so that the shipowners are actually better off than under the Hague Rules. However, as the shippers very seldom possess any evidence which would permit them to take action against the carrier, it would seem that the *status quo* will be maintained. There is no fire exemption in the MT Convention.

219 Schalling, *op cit.*, p. 22.

220 Goldie, *op cit.*, p. 24.

221 See 88 *supra*.

222 *"Make pilots accountable, P & I Club demands"*, Lloyd's List, London, July 1987; *"Regulating the pilot"*, Fairplay, London, 13 August 1987.

223 American Bar Association, Section of International Law and Practice, *Report to House of Delegates regarding international conventions relating to ocean shipping*, mimeographed, n.p., p. 1.

139. The removal of the nautical faults defence and the strengthening of the fire defence in the Hamburg Rules were both part of a trade-off at the Hamburg Conference. It is quite probable that the shipowners were already then aware of the limited use of the nautical defaults defence and were prepared to live without it, so its demise is not likely to pose great difficulties for modern cargo transport.

Freedom of choice between segmented and multimodal transport

140. The MT Convention categorically enshrines, both in the preamble and in article 3 (2), the shipper's freedom of choice between segmented and multimodal transport. It would, of course, be possible for States to introduce national legislation which would require national shippers to utilize, for example, the services of a national MTO, but while this would be legal, it certainly would go against the spirit of the Convention and contracts entered into under such a system might be open to challenge in foreign courts. Implicitly, of course, the same freedom of choice between segmented and multimodal transport rests with the carrier providing the transport services. It is up to the MTO to choose whether he wishes to offer multimodal transport to his customers.

141. Similarly, it has been said that the carrier may contract with a shipper to perform a unimodal carriage in his own name or through subcontracting, and may additionally guarantee the performance of other carriers involved in other parts of the transit according to the conditions of their respective transport documents, without triggering the application of the Convention.[224] This may, however, be questionable, unless the carrier clearly states that he undertakes this function ***as an agent*** and not as a carrier.

General average

142. The concept of general average represents an old tradition in maritime law. There is no international convention dealing with general average. However, rules on general average have been elaborated under the auspices of CMI. They are called the York-Antwerp Rules. The latest version dates from 1974. Transport documents (bills of lading or MT documents) incorporate these rules in the contract of carriage by reference. Alternatively, they govern through national law by reference to the rules

224 *Study no. 3, op cit.*, p. 19.

in the maritime codes (for example, the Scandinavian Maritime Codes) or by international custom. The definition of a general average act under these rules follows from *Rule A* which reads: "There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure".

143. The concept of general average basically rests upon the reasonable and practical consideration that a sacrifice made for the benefit of different parties should be borne fairly by these parties in proportion to the benefit which they may have reaped from the sacrifice. But general average also represents a particular risk distribution in maritime trade which is reflected by the particular defences which the shipowner still enjoys under the Hague Rules (the defences of error in navigation and management of the vessel as well as of fire). Broadly speaking, the concept of general average holds that the risks which may emerge after the ship has left the port in a seaworthy condition should be shared by the cargo interests. Thus, such incidents as collisions, strandings, fire and distress of the ship caused by perils of the sea may give rise to a sacrifice which would bring into play the rules relating to general average as well as the carrier's defences just mentioned.

144. The effects of the alterations in the liability régime will be that there will be more "general average situations" where the carrier is liable and where, consequently, the contribution by cargo interests has to be covered by the P & I insurer instead of by the cargo insurer.[225] Some have seen the introduction of the Hamburg Rules as the beginning of the end for the concept of general average. However, in recent years cargo interests have more and more often refused to pay general average contributions alleging the ship to be unseaworthy. Such unrecoverable general average contributions only amount to between 0.25 to 2 per cent of the total claims paid in each policy year.[226] It would therefore appear that although the cargo interests' position will be strengthened by the Hamburg Rules, it is overly pessimistic to assume that the notion of general average would disappear. It is also a view which the Vienna Colloquium found not to be correct.[227]

145. Whenever a maritime segment is included in the multimodal transport contract, the rules relating to general average may become relevant. For this reason the MT Convention in article 29 contains a reminder to this effect (see further below). The Convention copies the text of the Hamburg Rules concerning general average.

225 Goldie, *op cit.*, p. 27.

226 *Ibid.*, p. 26; Reynardson, *op cit.*, p. Reynardson 3.

227 See, "Report of Group 2", *Vienna Colloquium, op. cit.* p. 47.

Jurisdiction

146. The Hague Rules make no provision for jurisdiction. Some shipowners have consequently introduced exclusive jurisdiction clauses in their bills of lading. In many countries such clauses are not valid. The Hamburg Rules follow the practice of these countries by disallowing reference, for example, to the domicile of the carrier in bills of lading if that is not the place where the contract was made. The Hamburg Rules clearly indicate where the plaintiff may sue. This can be done in:

(a) The principal place of business or residence of the defendant;
(b) The place where the contract was made;
(c) The port of loading; or
(d) Any additional place designated for that purpose in the contract of carriage.

Although the commercial effects thus may be limited, this specificity is nevertheless considered useful from the shippers' point of view.

147. The jurisdiction provisions of the MT Convention, corresponding to those of the Hamburg Rules, purport to give the claimant more options to institute actions than would have been possible under the Hague Rules or the Hague/Visby Rules, so that he may avoid the inconvenience of having to bring his claims only in the MTO's own country. However, it should be observed that the claimant should ascertain that the MTO has assets in the country in which a judgement is obtained or, alternatively, that such a judgement is enforceable in a country where the MTO has assets. The MT Convention does not contain any rules on enforceability of awards. The only remedy, should it prove impossible to enforce the award obtained, would be to start a new action in a different forum (see further below).

Liability of the shipper/consignor

148. Under the Hamburg Rules and the MT Convention, the shipper/consignor is responsible for the accuracy of particulars supplied to the carrier, but he is only liable for loss sustained by the carrier or his ship if this has been caused by the fault or neglect of the shipper, his servants

or agents. The existing positions would not be changed under the Hague Rules.

Liability of the Multimodal Transport Operator

149. As has already been indicated, it is important to underline the *mandatory liability* imposed upon the MTO not only with respect to his own acts or omissions at the managerial level but also for servants, agents and independent contractors which he may employ to fulfil the multimodal transport contract. This clearly distinguishes the multimodal transport contract from a (pure) freight forwarding contract, where the freight forwarder acts only as an agent, and contracts for carriage of goods by sea under intermodal bills of lading, where the sea carrier disclaims liability except for the part of the carriage performed by himself (see Hamburg Rules, article 11). In this respect, the MT Convention reflects the very essence of transport integration following from multimodal transport contracts and fully developed so-called "door-to-door" traffic, where the operator assumes liability for the carriage of the goods from the door of the shipper in the country of origin to the door of the consignee in the country of destination.

150. In this connection it may be noted that there is no internationally recognized definition of a freight forwarder. In any case, when a freight forwarder issues a MT document under the MT Convention, he is, under the terms of the Convention, not a freight forwarder, but an MTO.

151. Under the MT Convention, no operator is compelled to enter into a multimodal transport contract. But if he does, and the Convention is in force for that particular transport, he will be subject to its mandatory liability provisions. This means that the contracting parties are completely free to choose. They may choose segmented transport, in other words, the traditional combination of two or more contracts, each dealing with transport by a particular mode (defined as "unimodal transport" in paragraph 47 above), if this would better suit their purposes. Although, theoretically, this distinction should be quite clear, it may be difficult to distinguish between multimodal and unimodal contracts in practice. It has already been said that some international conventions, although dealing with unimodal transport, include provisions for or references to multimodal transport as well. This is evidenced not only by the conventions for carriage of goods by road or rail already mentioned (CMR article 2 and CIM, article 63) but also by the Hamburg Rules article 1 (6). The latter provision only purports to limit the régime of the Hamburg Rules to sea carriage as such, when the contract includes transport by another mode than carriage of goods by sea.

152. It is not easy to determine the extent to which carriage and cargo-handling before or subsequent to the main carriage should be considered "transport by another mode" or merely as ancillary operations to the main carriage. In the latter case, there would be no multimodal transport contract but only a contract for unimodal transport. In particular, air carriers frequently undertake to transport goods to and from airports in so-called "pick up and delivery" services and it would be complicated and undesirable to encroach upon the traditional legal régime of air transport by including such arrangements under the MT Convention. For this reason, this type of service has been excluded from the MT Convention by article 1 (1).

153. It is frequently suggested that the MT-contract is a contract of its own kind as far as the relationship between the MTO and the shipper is concerned, and that such a contract should not be subject to the legal régimes dealing with unimodal transport or, indeed, not even be affected by the rules and regulations for such transport. Consequently, when the MTO performs international multimodal transport, in the absence of any regulation of multimodal transport, such an approach may be used to circumvent the mandatory effect of such rules and regulations pertaining to unimodal transport which may have been enacted in order to protect the interests of shippers and other parties in the countries concerned. Hence the need emerged for adopting uniform rules to be applied mandatorily to international multimodal transport.

154. As has been said, the different principles and rules governing the law of transport relating to the different specific modes of carriage by air, rail, road and sea make it very difficult to obtain an efficient and reasonable "synchronization" of these rules in a multimodal transport contract. The differences concern not only the fundamental question of the basis of the carrier's liability (whether it should be a more or less strict liability or a liability for negligence) but also the extent of such liability (different schemes and amounts relating to limitation of liability). Further, there are a number of other differences relating to the nature of the transport documents previously dealt with (see above) as well as periods for notice of claims and bringing of action, in addition to jurisdiction and several other matters. Presently, the greatest difference lies between maritime transport on the one hand, and transport by other modes, on the other hand. In this context, it will suffice to *identify* these particularities. Thus, particular to maritime transport are the rules relating to :

- The overall (global) limitation of the shipowner's liability for maritime claims (relating both to non-contractual and contractual claims);
- General average;

- The bill of lading which is negotiable and said "to represent the goods";
- The particular defences of error in navigation and management of the ship as well as of fire;
- The "unit" or per package limitation of liability; and
- Liability for delay.

Limits of liability

155. The limits of liability in the Hamburg Rules are intended to unify the present commercial chaos. Although, initially, the Hamburg Rules' limits of liability were cited as one of the main obstacles to their general acceptance, this seems no longer to be true. The Visby Protocol's increase in the limits of liability from £100 to 10,000 francs Poincaré/SDR 667 has not been deemed a hindrance to the adoption of those protocols, yet the increase is well over 100 per cent. The further increase from SDR 667 to SDR 835 is only about 25 per cent, which hardly offsets inflation since the Visby Protocol was negotiated. In some places, for example, in Italy, the Hamburg Rules may actually result in a reduction compared to the current national interpretation of the Hague Rules' £100.

156. In any case, the increase is not the issue in the debate. The opponents of the Hamburg Rules have recently seen the entry into force of other new international conventions that increase the carriers' limits of liability by a far greater margin than the Hamburg Rules. These instruments are the Convention on Limitation of Liability for Maritime Claims, the so-called London Convention, and the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. The London Convention generally increases the limits of liability by over 140 per cent compared with the previous convention,[228] while the Athens Convention increases the shipowner's liability by 25 per cent for cabin baggage and 67 per cent for vehicles and luggage therein, with a 12.5 per cent increase in the carrier's liability for loss of or damage to other articles.[229] The Athens Convention, which operates with the same system of presumed fault or neglect as do the Hamburg Rules, came into force only on 28 April 1987, but it has been part of British law since 1 January 1981 insofar as passenger tickets are concerned. This Convention originally limited the shipowner's liability for loss of or damage to cabin baggage to SDR 833, or virtually the same as the Hamburg Rules, but the 1990 Protocol to the Convention increased this to SDR 1,800. Loss of or damage to vehicles and luggage in such vehicles was at first set at SDR 3,333 per vehicle, while loss of, or damage to, other articles was limited to SDR 1,200 per passenger, but these values were increased by the 1990 Protocol to, respectively, SDR 10,000 and SDR 2,700. There were, as of 1 March 1991, 13 Contracting Parties to the Athens Convention,[230] while there were 18 Contracting Parties to the London Convention.[231] The 1990 Protocol does not as yet have any Contracting Parties. Support for the fact that it is not the limited increase in liability that is the bone of contention can also be found in the fact that the American Bar Association requested the United States Government "to consider further changes to the Hague-Visby Rules such as adopting the limits of liability set forth in the U.N. Convention on International Multimodal Transport of Goods...".[232] Graph 3 shows the present confused situation.

157. The limits of liability may, under the Hamburg Rules, be determined with certainty and the value of the amount as converted into national currency will at all times be the same in all Contracting States. Cargo claims remain subject to a global limitation of the shipowner's liability, and actual recoveries may consequently be less than the Rules' limit. If the shipowner is not liable or if the loss exceeds the limit of liability, the cargo owner either cannot recover his losses from the carrier or cannot recover that part of his losses which exceeds the carrier's limit of liability. This is identical to the situation under the Hague Rules. The actual limits have been extensively discussed above. The Hamburg Rules' moderate limits of liability (SDR 835/2.50) will not have any commercial or economic implications as they are of similar magnitude (except for the slight increase in the sums) to those used by the 1979 Protocol to the Hague Rules. Compared with the Hague Rules themselves, this is a general improvement of the situation for volume cargo. If the package or unit weighs less than 334 kilogrammes, the limit will be SDR 835. If the package or unit weighs more than 334 kilogrammes, it will be SDR 2.50

228 *The International Convention Relating to the Limitation of Owners of Seagoing Ships* (Brussels, 10 October 1957).

229 Compared with the limits of the *International Convention for the Unification of Certain Rules Relating to the Carriage of Passengers by Sea*, Brussels, May 1967.

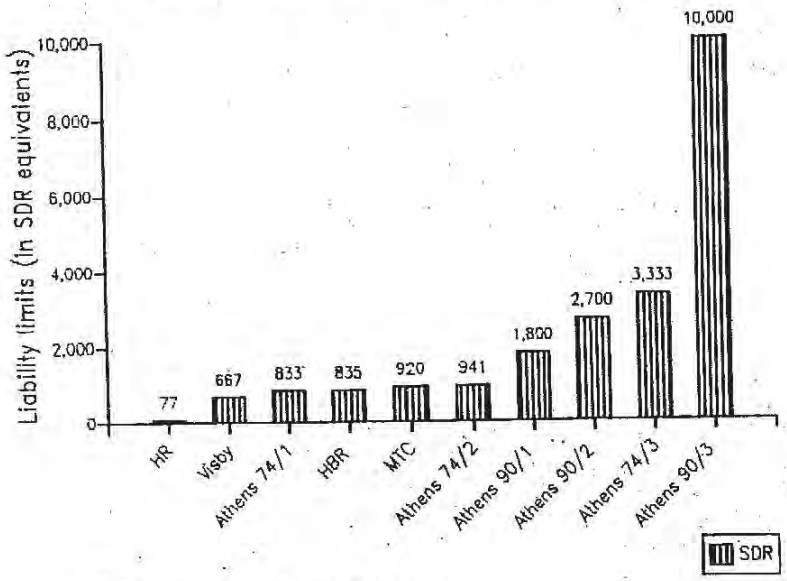
230 Argentina; Bahamas; Belgium; Liberia; Luxembourg; Poland; Spain; Switzerland; Tonga; United Kingdom (and on behalf of Bermuda, Gibraltar, Hong Kong and Isle of Man, among others); USSR; Vanuatu; Yemen.

231 Bahamas; Belgium; Belize (provisionally); Benin; Denmark; Egypt; Finland; France; Germany; Japan; Liberia; Netherlands; Norway; Poland; Spain; Sweden; Switzerland; United Kingdom (and on behalf of Bermuda, Gibraltar, Hong Kong and Isle of Man, among others); Yemen.

232 American Bar Association, Section of International Law and Practice, *Report to House of Delegates regarding international conventions relating to ocean shipping*, *op. cit.* p. 1.

Graph 3

Examples of limits of liability



HR = Hague Rules
HBR = Hamburg Rules
MTC = MT Convention
Athens /1 = cabin luggage
Athens /2 = other luggage
Athens /3 = passenger cars

times the gross weight in kilogrammes of the goods lost or damaged. The rule on packages or shipping units is identical to that of the Visby Protocol and solves the serious problem of numerous packages loaded into one container only being counted as one package, as they can be under the Hague Rules or the United States Carriage of Goods by Sea Act (USCOGSA). Group 3 at the Vienna Colloquium did not feel that the problem was of great practical significance.[233]

233 "Report of Group 3", *Vienna Colloquium, op. cit.*, p. 48.

158. The entry into force of the Hamburg Rules will replace the present multitude of limitation amounts with one fixed, easily convertible amount. This may result in reduced litigation.

Limitation of shipowners' liability

159. Claimants may find it difficult to obtain satisfaction of their claims by directing their action against the shipowner personally (action *in personam*) as the shipowner may well be inaccessible in a foreign country, if he has any attachable assets at all. For this reason claimants frequently have to turn against the ship itself (action *in rem*). Similarly, they may obtain security in the ship by maritime liens which rank in a certain order. Historically, shipowners could, as a practical means of limiting their liability simply abandon the ships for the satisfaction of all claims arising out of the operation of the ship (this is called the "abandon" principle).

160. These rules were later replaced in international conventions (1924, 1957 and 1976) by a "per-tonnage rule" meaning that the amount to which the liability was limited would be computed by multiplying a certain monetary unit with a certain number of tons reflecting the size and carrying capacity of the ship. A specific régime with respect to civil liability for oil pollution has also been introduced whereby the shipowner's liability for such non-contractual claims (liability "in tort") has been made strict and the limitation amounts increased (the 1969 Civil Liability for Oil Pollution Convention with the 1971 so-called Fund Convention, both having been revised and awaiting a sufficient number of ratifications needed for their coming into force in their amended version).

161. Although the rules mentioned relate to the limitation of the liability for the operator ***in his capacity as shipowner***, it is important to observe that they may also come into play ***when shipowners act as MTOs*** because, as has been said, the limitation concerns not only non-contractual claims, but also, in principle, all contractual claims arising from the operation of the ship. For this reason the MT Convention, in article 30 (1), specifically refers to the international conventions relating to limitation of liability of owners of seagoing ships just mentioned (see further below as well).

Live animals

162. Live animals were excluded from the Hague Rules, but are included in the Hamburg Rules. However, as the carrier is not liable for loss, damage or delay in delivery resulting from various causes attributable to

such risks, it would appear that the situation has not changed greatly. Since the MT Convention does not mention live animals, it is questionable whether the Convention deals with live animals at all. In any case, it has been estimated that the carrier's responsibility for live animals will not "materially affect" the P & I Clubs' expenditure.[234]

Loss of right to limit liability

163. All branches of transport law contain provisions for the limitation of the carrier's liability but with the additional provision that the shipper may obtain a higher limit if he declares a higher value of the goods to the carrier. The various limits of liability purport to establish an average value of the goods which can form the basis of compensation, unless specific information is given to the carrier.

164. Under the Hague-Visby Rules, independent contractors are excluded (in the English translation of the authentic French text) according to article IV bis (2) while both the Hamburg Rules and the MT Convention include servants and agents and other persons for whose acts the sea carrier or the MTO may be liable.[235] This includes also stevedores hired by a sub-carrier, etc. In dealing with this issue, the MT Convention copies the wording of the Hague-Visby Rules' article IV (5) (e) except that the concept is extended also to cover servants or agents as in the Hamburg Rules' article 8 and the ICC Rules' numbers 17 and 18. (In this connection it may be worth mentioning that UNCITRAL has prepared a text for a convention covering the liability of operators of transport terminals (OTT). This Convention was adopted by a diplomatic conference in April 1991.) Not surprisingly, these limits of liability are lower for the carriage of goods by sea, than by other modes of transport, owing to the fact that the average value of such goods is considerably less than the value of goods carried by air, rail or road. For these reasons the carrier's right to limit his liability is usually upheld unless any error or omission causing the loss or damage has resulted from particularly blameworthy behaviour on his part. It has been said that the drafting of the Hamburg Rules' article 8 and the MT Convention's article 21 leaves room for disputes. However, the wording of these two articles is almost identical to that of article 13 of the Athens Convention which is now in force. Furthermore, it has been stated that "these clauses merely reiterate the policy introduced

234 Honour, *op cit.*, p. 244.

235 As do the CMR (article 3), the CIM (article 50) and the ICC Rules (rule 5 (b & c)).

by the Brussels Protocol" (i.e. the 1968 Visby Protocol).[236] In the international conventions relating to carriage by road and rail (CMR and CIM) the expression "wilful misconduct" is used for such blameworthy behaviour as that which leads to a loss of the right to limit liability. In the Hamburg Rules (article 8 (1)) and the MT Convention (article 21 (1)), the language is more precise:

> *"...if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier (MTO) 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".*

Although not expressly mentioned in the text cited, it is considered that the blameworthy behaviour must be attributed to the *carrier himself*, that is be placed at the managerial level. Under the Hague Rules/Hague-Visby Rules system claimants try, with some success, to circumvent the carrier's limits of liability. Similarly, under the Hamburg Rules and the MT Convention, if the claimant proves that the loss, damage or delay in delivery was caused "with the intent to cause damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result" then, but only then, will the carrier, his servants or agents, etc., lose their right to limit liability. However, it is very difficult to prove such "recklessness or intent" and the result of article 21 will probably be that the limits of liability will be virtually unbreakable. Seen from a carrier's point of view, this is an improvement over the Hague Rules system, and, in view of the identical wording of the ICC Rules, an improvement already established by the commercial parties. The wording of this paragraph will consequently not alter existing practices.

165. Because of the cargo handling techniques for carriage of goods by sea, the limitation units have traditionally been related to each package or, if the goods cannot be carried in packages, as is the case of bulk cargo, the limit is "a freight unit".

Nautical faults

166. The question of nautical faults under the Hamburg Rules was discussed above. The MT Convention does not deal with the subject of nautical faults. The consequence of this is that if the Convention is in force together with the Hague Rules or the Hague-Visby Rules, and the

236 J.F. Wilson, "Basic Carrier Liability and the right of limitation", *The Hamburg Rules on the Carriage of Goods by Sea*, edited by S. Mankabady, *op cit.*, p. 150.

ocean carrier cannot be held liable for loss of or damage to the goods because of the "nautical fault defence", the MTO will be liable without recourse against the ocean carrier for any such damage. For this reason it has often been said that countries must ratify the Hamburg Rules before or at the same time as the MT Convention so as to avoid too big a gap in the liability régimes under the two conventions. However, it has also been argued that since the MT Convention leaves any unimodal convention governing ocean carriage unaffected, the Convention could "arguably be a short-cut to the achievement of the modernization objectives of the Hamburg Rules and to the elusive compromise that would resolve some of the irreconcilable differences that have characterized the Visby/Hamburg debate."[237]

Period of responsibility

167. The carrier's period of responsibility under the Hamburg Rules has been extended from "tackle-to-tackle" to "port-to-port". This is intended to solve the problem of responsibility during cargo handling, which is unclear under the Hague Rules and the Hague-Visby Rules. It has been suggested that "the increased period of responsibility should reduce the cost of recovering losses ... between the taking in charge of the goods by the carrier and the commencement of loading, and between the completion of unloading and delivery."[238] The extension is also in line with modern cargo transport, where shippers normally deliver their containers into the carrier's container yard which is normally not located immediately opposite the quay. Although the Hamburg Rules do not solve this problem fully, the extension - which is already a fact under existing law in certain countries including, for instance, France and the United States - has been taken into account in many shipowners' bills of lading. The commercial consequences are likely to be negligible.[239]

168. Under the MT Convention, the period of reponsibility has been extended to cover the entire period during which the goods are in the charge of the MTO. In this the Convention quite naturally follows the ICC Rules (rule 5 (a)) as well as the law of, for example, the USSR and many combined or MT documents already in use. It can be said that the Convention simply brings the legal régime into line with current commercial practice.

237 Nasseri, *op cit.*, p. 247.

238 F. Berlingieri, "The apportionment of risk between ship and cargo under bill of lading", *Aix Seminar, op. cit.*, p. 9.

239 Honour, *op cit.*, p. 246.

Signature

169. Both the Hamburg Rules and the MT Convention allow for modern methods of transmission of data, including that of the signature on the document of carriage. In practice it is far from easy to decide when the "in writing" requirement of the Hague Rules has been fulfilled. Must a signature be made in handwriting, or will a message by telegram or telex suffice? Under the Conventions, the signature need not necessarily be in handwriting; it may also be printed in facsimile, perforated, stamped or, indeed, made by electronic means unless the law of the country where the document is issued sets more stringent requirements. Commercially, this is a considerable improvement over the present unclear situation and it will greatly facilitate the use of electronic means of communication, particularly for non-negotiable documents.

Scope of application

The Hamburg Rules

170. Although it is said that the Hague Rules apply to all bills of lading issued in any of the Contracting States provided the voyage is international, "only a few countries (for example, France and Italy) have given their Hague Rules legislation this wide scope of application. This has meant, for instance, that a bill of lading, although issued in a Hague Rules state, would not as a matter of law be governed by the Rules if action was brought in another Hague Rules state."[240] The Hamburg Rules, on the other hand, apply to all contracts of carriage by sea (not only to bills of lading) between two States if the port of loading or the port of discharge or the optional port of discharge or the place where the document of contract has been issued is located in a Contracting State, or if the contract of carriage specifies that the Hamburg Rules apply. This will increase the Hamburg Rules' scope of application compared to the existing situation. This is particularly important for short sea routes where, as a rule, bills of lading are not issued and where consequently shippers are extremely poorly protected. It will also allow computer-generated documents such as waybills to be covered. Charter parties are not covered unless a bill of lading has been issued and transferred to a third party other than the charterer, in which case the Rules apply to such bills of lading. The commercial consequence of the increased scope will be to bring much

240 Selvig, *op cit.*, p. 320.

more of world ocean transport within the coverage of the Convention much faster than was the case for the Hague Rules.

The MT Convention

171. Immediately after the Convention had been negotiated, there was some doubt as to the feasibility, before transit began, of determining whether the Convention would be applicable or not. While this doubt might have been legitimate at the time, development of multimodal transport over the ensuing period has considerably lessened the relevance of this question. FCL cargoes move, today, almost exclusively on a point-to-point or door-to-door basis on a multimodal or CT document or on a sea waybill. Once such documents are issued there is no longer any doubt that the cargo will move multimodally, hence no doubt as to the applicability of the Convention. Should doubt nevertheless remain, it would appear quite possible to issue documents that contain two sets of provisions: one to apply if the relevant sea convention is held to govern the transit; the other to apply if the MT Convention will be applicable.[241] This type of document is already in common use.[242]

Short deliveries - break bulk cargoes

172. The shipowner is in many cases liable under the present system, and it is unlikely that this situation will change much with the introduction of the Hamburg Rules.

Time bar

173. The Hamburg Rules establishes a 15-day notice period for damage to the goods after these have been handed over to the consignee. The time bar has been extended to two years from the Hague Rules' one year. This is similar to limits in several other conventions, for example, the Athens Convention and the Warsaw Convention. It would appear to be wide enough to cover any action by cargo interests for delivery of goods without production of the bill of lading "thus removing the doubt left in the

241 See Diamond, *op cit.*, p. C29.

242 See, for example, P & OCL's CT document and footnote 127.

Hague-Visby Rules,"[243] which provide that "this period [one year] may, however, be extended if the parties so agree after the cause of the action has arisen."[244] It is thus not expected to pose a serious commercial problem.

174. The MT Convention establishes a six-day notice period for non-localized damage, less than the seven-day limit provided for by the CIM, the shortest period in operation under any of the unimodal conventions. Limitation of actions under the MT Convention operates with a two-tier system, six months for written notice and two years for the action itself. It has been said that "this is of great benefit to cargo assureds because it gives them a better opportunity to fulfil one of the basic conditions of their insurance policy in safeguarding their rights."[245] In this it also reverses, for example, the unsatisfactory situation which currently exists in the United States where VO-MTOs having issued their multimodal/CT documents subject to the Hague Rules or the Hague-Visby Rules or the United States Carriage of Goods by Sea Act, have a one-year time bar, while the railroads, under the Carmack Amendment, operate with a time bar of only nine months.

Uniformity of law and interpretation

175. A major argument against the Hamburg Rules has been that they would destroy the present uniformity of law. The Hague Rules did create some degree of uniformity of law, but as shown above (for example, under limits of liability) the situation today is no longer uniform. This has been widely acknowledged by most commentators.[246] Difference in the interpretations of the Hague Rules/Hague-Visby Rules seems to have increased

243 Thomas, *op cit.*, p. Thomas 8.

244 In cases coming under the Gold Clause Agreement the time limit under the Hague Rules or the Hague-Visby Rules is also two years provided notice of claim has been given within one year; Honour and Newberry, "Right of recourse against shipowners - a P & I Club Manager's view", *op. cit.*, p. 7.

245 Marshall, *op cit.*, p. D7.

246 See Goldie, *op cit.*, "when the Hague Rules are applied they are interpreted in different ways in different countries, identical facts will produce wide variations in result depending on the jurisdiction." p. 24; Clarke, *op cit.*, pp. 20 to 46; Selvig, *op cit.*, "even for carriage within the area covered by the Hague Rules there has, because of jurisdiction clauses, forum shopping and the like, existed uncertainty as to whether a particular carriage would actually be subject to the Hague Rules" p. 320, and "actions relating to international shipping may quite often be brought in more than one jurisdiction, and the lack of uniformity of law even on the most important matters governed by the Hague Rules adds to this uncertainty," p. 322; Todd, *op cit.*, "the common law can still apply where the [Hague] Rules do not - as, for example, in inbound voyages to the U.K. from Buenos Aires." p. 104; and footnote 49.

over the last quarter of a century. There certainly have been variations in the interpretation of what is required to discharge the obligation to exercise due diligence under the Hague Rules. With regard to these variations, according to a paper presented at the Vienna Colloquium, it might "be that that reflected the reluctance of judges to allow shipowners to escape vicarious liability for the faults of their servants and agents in the navigation and management of their ships"[247] possibly because the Hague Rules were thought to be "an ideal instrument for anyone wanting to make difficulties even in simple cases in order to obtain a better settlement than he should have."[248]

176. Since complete uniformity of application is an elusive ideal, it remains to be seen to what extent the Hamburg Rules will be able at least to improve uniformity of law. Here the Convention contains two elements that should assist in this direction:

(a) Firstly, article 3 urges Contracting Parties to have "regard ... to its international character and to the need to promote uniformity;"

(b) Secondly, article 31 instructs Contracting Parties to denounce the Hague Rules to ensure that only one of the two conventions apply.

177. As regards the first point, it has been said that while it would appear that this need to promote uniformity may not have to be interpreted in a way that would force courts in different countries to follow previous rulings by other courts on similar cases elsewhere, there is clearly a need to take such earlier rulings into consideration before final judgement is given. It is possible that this will result in a convergence of Anglo-Saxon juridical systems and those of civil law tradition. It may be that the exhortation contained in article 3 of the Hamburg Rules will assist in reducing these differences in interpretation.

178. As for the second point, article 31 (4) allows a transitional period of five years "from the entry into force of this convention". In other words, a State may become a Contracting Party to the Hamburg Rules and still continue to use the existing legal régime from the date of its ratification or accession until five years after the Convention has actually come into effect. The denunciation of the Hague Rules/Hague-Visby Rules may be expected to accelerate the move towards uniformity of law.

247 Diplock, *Vienna Colloquium, op cit.*, p. 56.

248 Selvig, *op cit.*, p. 323.

249 Diamond, *op cit.*, p. C27.

179. There appears to be agreement that once the MT Convention enters into force, it will "remove the defect in the present régime"[249] since, "where no unimodal convention or national law [would] be applicable to govern liability, then there is a considerable divergence between the terms employed by different multimodal operators."[250] The present situation is that the (vessel-operating) CTO/MTO may well be faced with heavier duties and fewer defences than under the Hague Rules.[251] This interpretation is supported by the Canadian study which states that the legal régime established by the MT Convention will be "a significant change from the present lack of uniformity at the international level in the liability of transportation enterprises providing MTO services."[252] The same study also suggests that "there is no reason to consider the MT Convention as a bonanza for lawyers."[253]

Vicarious liability

180. The Hamburg Rules refer to "actions of agents or servants" in several places. One of these appears in article 5 (1). This has generated apprehension that the famous *Muncaster Castle* case might have to be refought, at least in the United Kingdom, in order to determine the degree of a shipowner's responsibility for his servants or agents. However, as has been suggested, albeit with some reservations, "in general the same result would probably be reached as regards negligent work by subcontractors in making a ship seaworthy whether under the Hague Rules or under the Hamburg Rules... but ... in practice [the Hamburg Rules] will cast a somewhat less onerous duty on shipowners than did the Hague Rules."[254]

181. The MT Convention makes the MTO responsible for his servants, agents and "persons of whose service he [the MTO] makes use for the performance of the multimodal transport contract". This precision, compared to the uncertainties raised by the Hamburg Rules text, must be deemed a definite improvement on that text.

182. However, the MTO's subcontractors may or may not be liable under certain conditions according to the relevant international convention or mandatory national law. Even in situations where such legislation may

250 *Idem.*

251 Martin, *op cit.*, p. 8.

252 *Study no. 3., op cit.*, p.1.

253 *Ibid*, p. 3.

254 Diamond, "Part One of a legal analysis of the Hamburg Rules", *London Seminar, op. cit.*, p. Diamond 14.

render them not automatically liable, there may be cases where a claimant may succeed in proving the subcontractor's liability. For this reason subcontractors should take out their own liability insurance.

C. Conclusions

183. Many arguments have been made both for and particularly against the Hamburg Rules. Those opposed to the new Convention appear to be influenced by common law traditions, while commentators from civil law countries have taken a more positive view of the Hamburg Rules. Those in favour are first and foremost the shippers who, with increasing force, have demanded that their Governments take steps to become Contracting Parties to the Convention; those against are the shipowners and their liability insurers. Some, but not all, of the cargo insurers are also fearful of the consequences of the new Convention and for this reason opposed to it. However, the insurers' arguments are not supported by facts. Many of the original arguments against the Hamburg Rules have lost their relevance because of changed perceptions of the importance of certain issues. This is particularly the case with the nautical faults defence and the limits of liability. Carriers and their lawyers in one country have suggested the adoption, by their Government, of a modified version of the Visby Protocol which is very close to the Hamburg Rules' text. This would mean adding a fourth liability system to those already existing. To avoid utter confusion, a new diplomatic conference to amend the Hague-Visby Rules would be necessary. Adoption instead of the Hamburg Rules and consequential denunciation of the Hague-Visby Rules system would accomplish the same result with much fewer problems.

184. The Hamburg Rules will undoubtedly shift liability slightly from cargo owner to carrier and in this way better protect shippers the world over. However, it is a mild shift, considered by most commentators - regardless of whether they favour even such a minor shift or not - to have minimal economic and commercial consequences.

185. Although some emotional views against the entry into force of the MT Convention have been expressed, even going beyond those voiced against the Hamburg Rules, the secretariat has been unable to document most of them. Indeed, one leading mutual insurer has said that "...today, door-to-door operators offer to customers a coherent standard of liability which is not reflected in the laws of most countries".[255] While some of the objections to the Convention may be valid, others, particularly those that

255 Stirling, *op. cit.*, p. 2.

argue against the "mandatory" nature of the Convention and those in opposition to "the uniform liability régime introduced by it" appear either misplaced or erroneous. In general, the two opposing camps comprise very much the same parties as those concerned with the Hamburg Rules: shippers on one side; ocean carriers and insurers on the other. In multimodal transport there is a third group, the NVO-MTOs, and here the picture is much less clear.

186. There was, initially, a considerable reluctance, in particular on the part of some European freight forwarders, to look favourably at the MT Convention, but some of the French *"commissionaires de transport"*, for example, did not have the same hesitation, and even introduced their own MT document by which they offered full cargo insurance to the shippers, thereby implicitly accepting the higher level of liability which the MT Convention seems likely to impose on the MTO. A growing number of VO-MTOs are doing likewise with increasing success.

187. For aspiring MTOs, such as freight forwarders from developing countries, the MT Convention offers an opportunity for "legitimacy", "respectability" and recognition as a carrier on the same level as that which is claimed by VO-MTOs. In view of the limited size of developing countries' liner fleets, this opportunity may in turn allow transport companies from these countries to participate more equitably in the organization of transport from and to their countries.

188. As regards the actual entry into force of the MT Convention, the date would appear to be quite some years hence; yet, as the world moves inexorably towards total physical distribution of general cargoes, the need for a common liability régime becomes more and more evident such that the number of Contracting States to the MT Convention will increase in the coming years.

189. Comparing the situation today with that which will prevail in the future when the MT Convention enters into force, it may be said that if no damage to or delay in delivery of goods takes place little if anything will change from a commercial point of view. Any differences will only show up if such damage or delay in delivery occurs.

190. The major commercial advantage from the entry into force of the MT Convention is that the shipper will be better protected under the Convention than according to current practices based on the existing liability régime(s). Shippers will be better protected because the carrier, when the multimodal transport includes an ocean leg, will no longer have the many exemptions allowed under the Hague Rules/Hague-Visby Rules system. They will also be better protected because the limits of liability will be equal or higher than those now available. Furthermore, because

of the language of the Convention and the relatively limited weight per package of most containerized cargoes which constitute the vast majority of multimodal transport shipments (see paragraph 24 above) the shipper will know with certainty exactly what will be the limit of liability in force, namely that of the SDR 920 package limitation. Under current practices this precision is not possible.

191. Because of the higher limit of liability, it must be assumed that transport companies wishing to offer multimodal transport services will do so only when they are well aware of the risks involved and are reasonably certain that they have full control over the transport chain on which they rely, such that the cargoes they carry are unlikely to suffer accidental damage. In other words, the MT Convention will create more conscientious carriers.

192. Insofar as insurance premiums are concerned, the effects of the higher limit of liability for the carrier could be assumed to result in correspondingly higher premiums; however, the greater attention accorded to cargo care and the consequent reduction in damage might very well obviate such increases.

193. One place where some very concrete economic changes might occur would be in the area of settlement of claims for localized land transport damage in a country not a contracting party to the CMR or the CIM. Under some current multimodal or CT documents (for example, COMBIDOC paragraph 11 (a) or FBL paragraph 6 B) such settlements are to be made according to national law, which in most cases will impose a certain limit payable in the national currency. In countries where shippers need special authorization to obtain foreign exchange to pay for goods and freight in foreign currency, the carrier would then have to pay compensation only in local currency, even though the merchant, an importer, for example, had paid for the goods and the transport in foreign exchange. He would then not only have lost his goods, but would also be compensated only in a non-convertible currency. In some countries the merchant might find it very difficult, and in some cases impossible, to obtain a new permit for the purchase of foreign exchange. Under the MT Convention such settlements could be made in SDRs, making repurchases easier to carry out and resulting in direct foreign exchange savings.

194. Should a shipper depend on his cargo insurance for compensation, the higher limits of liability under the Convention would allow the cargo insurer to seek recourse against the carrier and obtain a better settlement than is possible at present, again including a possible foreign exchange saving. Furthermore, as the risk of the multimodal transport operator is higher under the MT Convention than at present, the risk for the cargo insurer is correspondingly lower and this should result in lower cargo insurance premiums.

195. Carriers (and their liability insurers) argue that both the Hamburg Rules and the MT Convention impose onerous limits of liability; however, as it has been shown above, in paragraph 22, the limits today are lower than those agreed to in the 1979 Protocol to the Hague-Visby Rules. It must, consequently, be concluded that this argument is unfounded.

Chapter IV

Article-by-article commentary on the Hamburg Rules

196. This article-by-article commentary analyses the articles of the United Nations Convention on the Carriage of Goods by Sea (the Hamburg Rules) in the order in which they appear in the Convention. The discussion of each article will be arranged in up to three sections. The first presents the article of the Hamburg Rules. Where appropriate, a second section presents the corresponding provisions of the Hague Rules and the Hague-Visby Rules, while a third section compares and evaluates these parallel provisions, where necessary, together with other related conventions or agreements.

Part I: General Provisions

Article 1: Definitions

General remarks

(1) The Hamburg Rules' definitions are designed for general application. They provide a sound basis for interpretation and application and will be given greater precision through judicial interpretation.

(2) The concept and drafting of the Hague Rules were derived, to a large extent, from clauses which over the course of many years had come to be included in bills of lading. They are based on common law principles. The definitions in the Hamburg Rules, and the Rules as a whole, are based on civil-law principles, to a larger extent than the Hague Rules, and thus should be familiar to lawyers from civil law countries. They also follow approaches contained in other international conventions, such as the CMR and the Warsaw Convention. Those conventions were drafted to suit a variety of different legal systems, common law as well as civil law. Nevertheless, the departure from the language of the Hague Rules, which was familiar to lawyers in common law countries, has sometimes led to concern in such countries as to the clarity of the Hamburg Rules.

(3) Article 1 (1-6) of the Hamburg Rules provides broader definitions of the contract of carriage than do the Hague Rules or Hague-Visby Rules. Definitions in the Hamburg Rules are clearer and more complete than those in the Hague Rules. They will therefore improve the position of the shipper, for whom the uncertainties under the present legal régime often result in greater exposure to risk and higher transport costs.

Paragraph 1: Contractual carrier

(1) The definition of "carrier" in article 1 (1) of the Hamburg Rules is very general. It stipulates that every person entering into a contract of carriage shall be deemed a carrier, regardless of whether he is an owner or a charterer. The test is merely whether the person contracted with the shipper to transport the goods by sea. Thus, a carrier would include a freight forwarder who contracts with the shipper to transport the goods by sea or a multimodal transport operator subcontracting with an ocean carrier to perform the sea leg of the carriage.

(2) The definition of "carrier" in article I (a) of the Hague Rules is narrower. It "includes the owner or the charterer who enters into a contract of carriage with the shipper". The use of the word "includes" may give rise to questions as to whether the reference to the owner or charterer is exhaustive or merely illustrative.

(3) The definition of "carrier" in the Hamburg Rules avoids any possible misunderstanding in this respect. Although the carrier's identity might be unclear in certain concrete cases, the Hamburg Conference was unwilling to adopt a more precise definition. The definition is more logical in that it treats any person who has undertaken to carry the goods as a carrier.

During the diplomatic conference in Hamburg at which the Hamburg Rules were adopted, discussions were held about contracts concluded in the "name" of the carrier. The use of the term "name" reflects the civil-law concept of direct representation, and covers contracts in which a carrier's legal and authorized representative enters into a contract for the carriage. The use of the term "on behalf of" the carrier might perhaps have been more acceptable in common law countries. However, it was not employed because under civil law it could cover too many situations, for example, where a party, such as a freight forwarder, concluding a contract of carriage acts commercially for someone else but legally binds only himself.

Paragraph 2: Actual carrier

(1) Article 1 (2) defines the term "actual carrier". Article 10 makes this actual carrier jointly liable with the contracting carrier for loss, damage or delay in delivery attributable to the actual carrier.

(2) The Hague Rules do not deal with the question of who is liable when the contracting carrier entrusts the carriage to an actual carrier. Thus, they do not define "actual carrier". To resolve that question, reference must be made to national laws, which often differ in their approaches to the question.

(3) The concept of joint liability of the contractual and actual carriers follows the air-law pattern found in the Convention supplementary to the Warsaw Convention for the unification of certain rules relating to international carriage by air performed by a person other than the contracting carrier (Guadalajara, 18 September 1961) (the "Guadalajara Convention"). This Convention adopted the joint liability solution for two reasons also applicable to ocean transport. The first was to strengthen the shipper's position while at the same time safeguarding the carrier's right to limit liability. The second was to adopt one international standard. Earlier, different countries provided different answers to the question of who was liable for damage to cargo when a contractual carrier entrusted carriage to an actual carrier. These different answers increased costs of litigation and provided different statutes of limitation. Hence, one answer accepted by all signatories was necessary. Although the later Convention on Carriage of Passengers by Sea (Athens, 13 December 1974) (the "Athens Convention") utilizes the term "performing carrier", the same concept is intended. This is confirmed by the Hamburg Rules' reference to "performance" in the definition of "actual carrier" and by the use of the term "*transporteur substitué*" to translate "performing carrier" in the French version of the Athens Convention.

Paragraph 3: Shipper

(1) The definition of "shipper" in article 1 (3) is rather broad, covering any person "by whom or in whose name or on whose behalf" a contract of carriage by sea is concluded or whose goods are delivered to a carrier under such a contract. The most significant use of the term in the Hamburg Rules is in articles 12-13.

(2) The Hague Rules do not define "shipper" although the term is used in the Rules.

(3) After a thorough discussion at the Hamburg Conference, it was decided to adopt a broad definition of "shipper" so as to safeguard all persons who could derive rights under the contract of carriage against the carrier or who could be exposed to claims by the carrier.

It might seem unnecessary, in some legal systems, to refer specifically both to the person on whose behalf the contract is concluded and the person on whose behalf the goods are delivered to a carrier, however, some legal systems draw a distinction between those two categories of persons. Even though the Hamburg Rules' definition refers to both persons, it treats them identically. That approach facilitates commerce by making it unnecessary for the carrier or his agent to check whether the delivering party is the contracting party or his representative.

The definition of "shipper" in the Hamburg Rules may require judicial clarification in some cases. For example, when the contracting party and the person delivering the goods to the carrier are different, a question may arise as to which party has the right to ask for the bill of lading under article 14 (1).

Paragraph 4: Consignee

(1) The definition of "consignee" in article 1 (4) was debated during the preparatory work by UNCITRAL. It does not add much to the situation under existing law, since the question of which person is entitled to take delivery of the goods will continue to depend on the contract of carriage and the transport document. Furthermore, the definition does not deal with assignees of the cargo. Thus, the rights of an assignee will have to be resolved under national law.

(2) The Hague Rules do not contain a definition of "consignee" since they apply only to contracts covered by a bill of lading, and any holder of a bill of lading, whether the named consignee or any other person, may demand delivery.

Paragraph 5: Goods

(1) The Hamburg Rules' definition of "goods" is merely illustrative; it does not purport to define all possible types of goods. The definition assumes that the term "goods" is self-explanatory; it specifically incorporates in the definition only certain items which otherwise might be called into question.

(2) Article I (c) of the Hague Rules expressly mentions "goods, wares, merchandise and articles of every kind whatsoever". Because of the generality of the words "articles of every kind whatsoever", this definition is generally self-explanatory. The definition specifically excludes live animals, leaving them to special agreement. It also excludes deck cargo when the contract of carriage states that the cargo should be carried on deck and in fact it was so carried.

(3) The definition of "goods" in the Hamburg Rules is broader than that in the Hague Rules and thus gives greater protection to the shipper. It includes live animals and deck cargo (see article 5 (5) and 9, respectively).

The Hamburg Rules' definition also includes as goods "a container, pallet or similar article of transport". These are specifically mentioned in order to ensure that compensation is payable for their loss, damage or delay in their delivery to the same extent as other goods. Under the Hague Rules whether or not such items were "goods" is an open question as they are not included in the definition of that term.

Paragraph 6: Contract of carriage by sea

(1) The Hamburg Rules define "contract of carriage by sea". As only a few national legal systems draw a clear distinction between carriage by sea and by inland waterway, the term "by sea" should not be interpreted too restrictively. Likewise, the phrase "from one port to another" in the Hamburg Rules' definition should not be interpreted too restrictively. The purpose of those words is to support the reference to sea transport. Thus, a "port" may include a port on an inland waterway.

(2) The Hague Rules define only "contract of carriage". Under that definition a contract of carriage is one "covered by a bill of lading or similar documents of title".

(3) Whether the sea portion of such through transport should fall within the scope of the Hamburg Rules was much debated at the Hamburg Conference. Many delegations feared the possibility of the Hamburg Rules' encroaching on the MT Convention, which was in preparation at that time. A proposal to provide an exception in the Hamburg Rules for the transport covered by the MT Convention was not adopted, and the Hamburg Conference decided to subject the sea part of a multimodal transportation operation to the Hamburg Rules. One consequence of this decision is that a recourse

action by a multimodal transport operator against the sea carrier will be governed by the Hamburg Rules.

Paragraph 7: Bill of lading

(1) The Hamburg Rules' definition of "bill of lading" contains only a general description of the document. Articles 14 to 16 contain additional provisions on bills of lading.

(2) The Hague Rules do not define a bill of lading even though the entire system of liability under the Hague Rules is dependent upon the issuance of one. However, article III, rules 3 and 4, sets forth requirements as to the contents of a bill of lading and its evidentiary effect. The Visby Protocol adds a second paragraph to article III, rule 4, which protects parties who acquire the document in good faith.

(3) A bill of lading evidences the contract of carriage and the taking over or loading of the goods on board the ship by the carrier. This is also true of other types of documents, such as sea waybills (see article 18).

A bill of lading has the following additional important functions:

(a) It is negotiable, i.e. title to the goods passes upon transfer of the bill of lading; and
(b) It obliges the carrier to deliver the goods only to the legitimate holder of the bill of lading.

A "straight bill of lading" as used in the United States is not a document of title. It therefore does not fall within the definitions of bill of lading, but is included among the other documents dealt with in article 18.

Paragraph 8: Writing

(1) Article 1 (8) states that writing "includes, *inter alia*, telegram and telex". By using the word "includes" the drafters intended the reference to telegram and telex to be merely illustrative and not an exclusive listing of all items considered as "writing". There was some doubts at the Hamburg Conference as to whether a telegram and telex should be regarded as "writing" because they can be easily forged. However, they were included for practical reasons. For example, article 19 requires that, to avoid that the handing over is considered *prima facie* evidence of delivery in good condition, the consignee must give the carrier a written notice of apparent loss or

damage not later than the working day after the day the goods were handed over. If a consignee is located a considerable distance from the carrier, he may not be able to rely on notice sent through the post, and may have to give notice by telegram or telex. It was therefore necessary to ensure that notice by those means is valid.

(2) The Hague and Hague-Visby Rules do not contain a definition of "writing". As a result, there is great doubt as to the meaning of the term. These doubts can give rise to serious questions, for example, concerning the validity of the notice of loss or damage given by telegram or telex.

(3) During the preparatory work for the Hamburg Conference there was discussion of definitions of other terms, in particular "harbour" and "ship". However, a decision was made that definitions of those terms were not necessary. The Hague Rules define "ship" in article I (d) as: "any vessel used for the carriage of goods by sea". That definition has raised the question of whether loss incurred during lightering operations or on carriage with inland-waterway craft falls within the scope of the Rules. Under the Hamburg Rules, however, the question would not arise, since the carrier is responsible for the goods while they are in his charge in the ports of loading and discharge, whether or not they are on a seagoing ship or any other craft.

Article 2: Scope of application

General remarks

Article 2 covers three aspects relative to the scope of application of the Rules: geographical (article 2 (1)), personal (article 2 (2)) and substantive (article 2 (3-4)).

Paragraph 1: Geographical scope

(1) The Hamburg Rules are applicable only to international carriage of goods. This means that carriage between two States is required for the Hamburg Rules to apply. Each Contracting State is, of course, free in its national law to extend these rules to domestic sea carriage as well.

The international carriage of goods need not occur between two Contracting States. It is sufficient that one of the States involved is a Contracting State. The following situations are covered:

(a) Either the port of loading or the port of discharge mentioned in the contract is situated in a Contracting State; or,

(b) An optional port of discharge mentioned in the contract of carriage which becomes the actual port of discharge is situated in a Contracting State; or,

(c) The bill of lading or other document evidencing the contract is issued in a Contracting State; or,

(d) The bill of lading or other document evidencing the contract of carriage provides for application of the Hamburg Rules or any national legislation giving effect to the provisions of the Hamburg Rules.

(2) The geographical scope of the Hague Rules has been one of the most controversial points. The Hague Rules contain just one simple geographical rule: according to article X, the Rules apply to all bills of lading issued in a Contracting State. This means that practically all outgoing shipments from a Contracting State are subject to the Hague Rules because the bill of lading is normally issued in the port of departure. Furthermore, cross-trade between non-Contracting States is also subject to the Hague Rules if the bill of lading is issued in a Contracting State.

National legislation implementing the Hague Rules has not, however, always complied with this rule. Some Contracting States subject all outgoing transport to the Hague Rules while a small number apply the Rules to both incoming and outgoing shipments.

The Visby Protocol had attempted to remedy this unsatisfactory situation by revising article X. Under the revised article, the Rules apply to "every bill of lading relating to the carriage of goods between ports in two different States" if:

(a) The bill of lading is issued in a Contracting State;
(b) The carriage is from a port in a Contracting State; or,
(c) The bill of lading spedifies that the Hague Rules; or, corresponding national legislation will govern the contract.

The revised article also allows a Contracting State to apply the provisions of the Convention to bills of lading other than those just mentioned, i.e. to bills of lading which are outside the scope of the Convention. Such a provision is unusual in an international convention, because a State is normally free to apply a convention beyond its stated scope of application. The inclusion of this provision shows that the authors of the Visby Pro-

tocol foresaw the need for the wider scope ultimately given in the Hamburg Rules.

(3) By covering practically every carriage by sea touching a Contracting State, the Hamburg Rules have broad geographical scope. This wide scope was favoured by large majorities of States within UNCITRAL and of States participating in the Hamburg Conference. One reason was that, since ratification of or accession to the Hamburg Rules by 20 States is required for the Convention to enter into force, the geographical coverage of the Rules would be far-reaching immediately upon their entry into force. This will create momentum for replacement of the Hague Rules' system with the Hamburg Rules' system, and thus lead towards achieving international uniformity of law.

Paragraph 2: Personal scope

(1) Article 2 (2) provides that the Hamburg Rules be applicable "without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person".

(2) Article X (c) of the Hague-Visby Rules contains a similar provision.

(3) The Hamburg Rules must be applied to all carriage within the geographical scope of the Rules, irrespective of whether there is any other national interest. The Hague Rules are vague in this respect. They leave open a possible interpretation that the Convention must be observed only where interests of Contracting States' nationals or residents are at stake.

The Hamburg Rules avoid unnecessary complications, especially as carriage affecting one Contracting State usually also affects the economic interests of another Contracting State or its nationals.

Paragraph 3: Substantive scope: Non-application to charter parties

(1) Article 2 (3) excludes charter parties from the scope of the Hamburg Rules. However, the Rules apply to bills of lading issued pursuant to a charter party when the bill of lading governs the relations between the carrier and a holder of the bill of lading other than the charterer.

The third party holder of a bill of lading issued pursuant to a charter party should have the same protection given to third party holders of other bills of lading, because the person acquiring such a bill of lading is often unable to check the contractual relationship between carrier and shipper.

(2) The Hague Rules contain a similar provision concerning bills of lading issued pursuant to charter parties.

(3) During the preparatory work and at the Hamburg Conference itself, a minority of States favoured extending the Convention to charter parties, or at least to voyage charters. However, there was insufficient support for this proposal; the majority felt that because charter parties were normally individually negotiated in great detail and were much less standardized than ordinary contracts of carriage of goods by sea, it would be inappropriate to subject them to the mandatory rules of an international convention drafted with the needs of liner trades in mind.

As to the question of whether the liability régime of the Hamburg Rules should be made applicable to voyage charters, participants at the Hamburg Conference felt that the most urgent need was to protect shippers in liner trade. They were exposed to the stronger bargaining powers of shipping lines and, in particular, to shipping conferences and their standard general conditions. It was considered preferable not to intervene in charter trade where the bargaining strength of the parties and other circumstances were different; overloading the new Convention would reduce its chances of entering into force.

Paragraph 4: Substantive scope: A series of shipments

(1) Article 2 (4) deals with contracts of carriage in which the carrier undertakes the future carriage of goods in a series of shipments during an agreed period. The paragraph simply states that in such a situation the Hamburg Rules are applicable to each shipment unless the shipment is made under a charter party, in which case the provisions of article 2 (3) apply.

(2) The Hague-Visby Rules do not contain a similar provision, but they do not need one. They apply only if a bill of lading has been issued. In such a case the Rules apply for the period covered by it.

(3) The Hamburg Rules apply to each single shipment rather than to the whole of the contract. Because the period of responsibility, according to article 4, is applicable to every shipment, the carrier's liability for damage to each shipment runs from the moment of handing over the goods constituting each shipment in the port of loading to the carrier until the carrier delivers them at the port of discharge. The Rules

cannot apply to an entire contract for future shipment of goods, but only to the individual shipment under the contract. This, however, should make no practical difference to the shipper in respect of his rights against the carrier.

Article 3: Interpretation of the Convention

(1) Article 3 of the Hamburg Rules is an innovation in international transport law. It encourages the Contracting States to promote uniformity of interpretation. Uniform interpretation of internationally agreed uniform rules is, of course, essential if the aim of unification of law is to be reached.

(2) The Hague Rules do not contain a similar rule. On the contrary, the Protocol of Signature allows the Contracting States to "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". Thus, the Hague Rules allow the Contracting States a certain amount of liberty to deviate from the agreed rules when incorporating them into national maritime codes. Many Contracting States have in fact done so, and the result has been a lack of uniformity not only from country to country but even within the same country. The main examples of this lack of uniformity can be seen in the differing application of the limitation amount.

(3) Rules of interpretation of international conventions differ among various legal systems. Some guidance can be found in the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) (the "Vienna Convention"), but they are not very explicit.

Article 3 does not provide detailed uniform principles of interpretation. Nevertheless, the article is useful and necessary. Implicit in the article is the hope that, in ruling in particular cases, courts will take into account earlier rulings in similar cases by other courts. It is important that article 3 does not demand that such earlier rulings be followed: it requires only that "regard shall be had ... to the need to promote uniformity."

The manner in which a Contracting State incorporates the Hamburg Rules into national law can affect the extent to which uniformity is achieved. The greatest degree of uniformity will, of course, be achieved if the State applies the Hamburg Rules directly as a self-executing convention or incorporates them textually into its maritime code. However, if in incorporating the Hamburg Rules into national law, a Contracting State alters the text in any way, perhaps even without expressly mentioning the rule of interpretation in article 3, the State will, in addition to violating its obligations under the Convention, prejudice the achievement of uniformity.

With respect to the objective of uniformity there is one problem inherent in many multilateral conventions which deserves attention: the fact that the Hamburg Rules have been concluded in six languages, each being equally authentic. Given differences in concepts and terminology in the various legal systems as well as linguistic differences, divergences between the various language versions are practically unavoidable. The question will arise as to how those divergences should be resolved. A possible solution may be found in the Vienna Convention which states that "when a comparison of the authentic text discloses a difference of meaning which the application of articles 31 and 32 [the general interpretation rules] do not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

In interpreting the Hamburg Rules, it must be borne in mind that they are not a complete code of maritime law. They are meant only to unify the major aspects of the law relating to contracts of carriage by sea. As to other questions not dealt with by the Hamburg Rules, e.g., when non-cargo damage is caused by the carrier or regarding how compensation for such loss should be calculated, it will be necessary to refer to national law.

Part II: Liability of the carrier

Article 4: Period of responsibility

Paragraph 1: Principle

(1) Article 4 holds the carrier responsible for the goods during the period in which he is in charge of them. It defines this period as being "from the time he has taken over the goods at the port of loading ..." until the time he has delivered the goods "at the port of discharge". This definition was debated at the Hamburg Conference. The wording is intended to avoid interference with multimodal transport and to limit the application of the Hamburg Rules to transport by sea. It corresponds to the principle in article 1 (6) that only the ocean part of the carriage is covered by the Hamburg Rules. Thus, if the ocean carrier

takes charge of the goods at an inland location, packs them into his container and brings them by rail, road or inland waterway to his vessel at the port, the Hamburg Rules do not apply until arrival of the goods at the port where his ship is loading.

(2) The period of responsibility under the Hague Rules is a particularly crucial point. Article I (e) of the Hague Rules states that the period of carriage of goods covers the time from when the goods are loaded on board until the time they are discharged from the ship. Article VII supplements this rule by permitting the carrier to contract out of his mandatory responsibility for the time prior to the loading on board and subsequent to the discharge from the ship. However, many national laws mandatorily extend the liability régime of the Hague Rules to cover those periods as well, and some even subject the carrier to heavier liability during those periods.

The interpretation of these provisions in the Hague Rules has caused and still causes difficulty, even after over 50 years of application. The prevailing opinion is that responsibility under article VII begins with the taking over of the goods by the ship's tackle and ends when the goods are released from the ship's tackle. If the cargo, as today is often the case, is loaded and discharged by shore cranes, responsibility begins and ends when the cargo crosses the ship's rail. This period is very narrow compared with the period of responsibility under the Hamburg Rules. Moreover, the "tackle-to-tackle" interpretation is not of much assistance in cases where cargo is loaded or discharged by hose or in connection with lightering operations.

(3) The period of responsibility under the Hamburg Rules is both wider and clearer than that under the Hague Rules. The remaining problems in borderline cases (e.g. those involving carrier and bailee custody in the port) may be solved by courts on the basis of article 4 (2). Pursuant to article 23 of the Hamburg Rules, the period of responsibility cannot be restricted or reduced.

Paragraph 2: Carrier deemed in charge of goods

(1) Article 4 (2) is intended for the clarification of the period during which the carrier is in charge of the goods. Mention is made first of the situations - i.e. where the carrier or his servant or agent takes over the goods from the shipper or a person acting on his behalf and where he delivers them to the consignee.

With regard to delivery, article 4 (2) (b) (ii) expressly mentions the situation where the goods are not received by the consignee but are

placed at the disposal of the consignee in accordance with the contract, local law, or usages of the particular trade. The justification for adding this situation is that, if the consignee does not fulfil his obligation to take delivery, the carrier should be relieved of his liability under the Hamburg Rules. This does not mean that he is free of all responsibility for the goods; for example, under national law he may be required to exercise reasonable care over them.

Article 4 (2) (a) (ii) and (b) (iii) deals with an important point concerning the taking over and delivery of the goods. These provisions concern port authorities or other third parties to whom the goods must be handed over before shipment or after discharge in accordance with the laws or regulations of the loading or discharge ports. National laws or regulations frequently grant monopolies to State-owned or private warehouses or docks for handling and storage of goods, particularly in connection with Customs procedures. The policy of these provisions is that, if the carrier is not free to choose such a facility, he should not be liable for damage to the goods caused by the facility. Article 4 (2) (b) (iii) states that he is not in charge of the goods in those circumstances.

(2) The Hague Rules do not contain a similar definition. This has led to considerable divergences of interpretation.

(3) While the provisions of article 4 (2) (a) (ii) and (b) (iii) of the Hamburg Rules seem sound, they may result in difficulties where local law allows a shipper or carrier to choose between two or more authorized facilities to handle the goods.

During the preparation of the Hamburg Rules there was no internationally accepted set of rules for liability of terminal operators. In fact, the preparation of the Hamburg Rules pointed out the need for work in this field. In 1983, UNCITRAL decided to undertake work on the preparation of uniform legal rules on the liability of terminal-operators based in part on work in that area performed by the International Institute for the Unification of Private Law (UNIDROIT). The existence of such uniform rules could diminish the economic importance to cargo interests of the question of whether the goods were in the custody of the carrier or the terminal operator when loss, damage or delay in delivery occurred.

Paragraph 3: Agents and servants

Article 4 (3) clarifies that reference in the article to the carrier or consignee includes servants or agents acting on his behalf. Article 4 (2) (a) (i) applies the same principle in respect of the shipper.

Articles 5-8: Preliminary comment

Articles 5 to 8 constitute a compromise reconciling divergent views expressed during preparation of the Hamburg Rules as to the carrier's liability. A minority favoured retaining the exception in article IV, rule 2 (a), of the Hague Rules as to the liability of the carrier for the "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". The vast majority, however, felt that this exception for so-called "nautical fault" was no longer justified, particularly since it had no parallel in other fields of law relating to transport. The compromise between these points of view was to delete the nautical fault exception but to set the limits of liability of the carrier at relatively low amounts (only slightly above those of the Visby Protocol) and to allow the limits of liability to be broken only in case of the carrier's serious misconduct. Another element of the compromise was to create an exception to the "presumed fault" with respect to the carrier's liability by requiring the claimant to prove the carrier's fault or neglect in the case of loss, damage or delay in delivery caused by fire.

Article 5: Basis of liability

Paragraph 1: Principle

(1) Article 5 adopts the principle of presumed fault or neglect. The carrier is liable for loss resulting from loss or damage to the goods or delay in delivery in respect of the goods if the occurrence causing the loss, damage or delay in delivery took place while the goods were in the care of the carrier, unless the carrier proves that he, his servants and agents took all measures which they could reasonably be required to take in order to avoid the occurrence which caused the loss, damage or delay in delivery and its consequences.

(2) Article III, rule 1, of the Hague Rules requires the carrier to exercise due diligence to make the ship seaworthy and properly to man and equip it before and at the beginning of the voyage. Article III, rule 2, requires the carrier to "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried".

These two provisions taken alone or together have led to many uncertainties in interpretation, for example, as to when the voyage begins and whether the carrier is bound to exercise due diligence to make the ship seaworthy again at an intermediate port of call. These questions are obviously of great importance for liner services in general and for modern container transport in particular. It has been argued that even if a crew knows when leaving a port of call (as distinguished from the port of loading) that the ship is unseaworthy, the carrier is not liable under the Hague Rules.

The legal régime established under the Hague Rules is made even more complicated by the Hague Rules' technique of listing various situations in article III and seventeen exceptions in article IV. The list in article IV was discussed at length within UNCITRAL. The conclusion was reached that the list was merely poor drafting since, except for two exceptions in article IV, rule 2 (a-b), (i.e. nautical fault and fire exceptions), the list added nothing to an understanding of the basis of liability. It was regarded as superfluous to state, in article IV, rule 1, that the carrier shall not be liable for damage resulting from unseaworthiness, unless caused by want of due diligence, because this follows already from the positive statement in article III, rule 1. The same considerations apply to other exceptions such as acts of God, war and public enemies (article IV, rule 2 (d-f)), since in all those situations the carrier and his servants were not at fault. Article IV, rule 2 (q), of the Hague Rules adds a final, all-embracing exception. This exception is rather confusing as it repeats earlier exceptions and rules on burden of proof: it exempts the carrier and the ship from liability for loss or damage arising or resulting from any cause other than those listed in article IV, rule 2 (a-p), "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...." This technique of listing rules and exceptions has caused many difficulties which, even today, cannot be considered resolved despite repeated testing in the courts. This structure emerged because the drafters of the Hague Rules essentially incorporated into article IV clauses taken from bills of lading in use at the beginning of the twentieth century. From time to time new exemptions had been added to them without attention being paid to whether or not they were legally necessary.

(3) The Hamburg Rules follow the language of transport conventions negotiated after the Hague Rules. The new language corresponds more to civil law legislation than to common law. As a result, the Hamburg Rules have the advantage of fitting much better into the overall framework of transport law conventions. This will facilitate

the resolution of problems arising in connection with multimodal transport.

Paragraph 2: Delay

(1) Since article 5 (1) makes the carrier liable not only for loss of or damage to the goods but also for "delay in delivery", it was necessary to establish what constituted delay. Article 5 (2) provides that delay in delivery occurs, firstly "when the goods have not been delivered ... within the time expressly agreed upon...." Non-compliance with an agreed delivery date term is thus obviously non-fulfilment of the contract by the carrier. Secondly, article 5 (2) also provides that if the contract does not mention an exact delivery time or period, the goods must be delivered within "the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case".

(2) The Hague Rules do not provide rules on liability for delay. The extent to which the carrier is liable depends on national law. It is therefore uncertain whether or not the rules on limitation of liability under the Hague Rules apply to liability for delay.

(3) The Hamburg Rules' concept of delay seems flexible enough not to burden the carrier too severely. The concept, moreover, corresponds to international conventions in other fields of transport, such as in article 19 of the Warsaw Convention and article 17 of the CMR (see also article 27 of the CIM). Article 6 (1) (b) of the Hamburg Rules safeguards the carrier's interests by establishing a rather low limit of liability for delay in delivery. Similarly, article 3 (3) of the Athens Convention says, "fault or neglect of the carrier or of his servants or agents ... shall be presumed, unless the contrary is proven."

In some situations, questions may arise as to whether a carrier or his agents or servants could have avoided a delay and its consequent loss or damage. The Hamburg Rules deal with only one such situation: article 5 (6) expressly states that the carrier is not liable for loss, damage or delay in delivery resulting from measures to save life or from reasonable measures to save property at sea. For situations other than those just mentioned, such as strikes and deviations, the test is whether the carrier could have been reasonably required to avoid the occurrence which caused the delay. This will have to be decided by the courts in particular cases.

Paragraph 3: Option to treat the goods as lost

(1) Article 5 (3) deals with a situation that is also dealt with in most other transport conventions. A cargo owner claiming against a carrier for the loss of the goods may encounter a problem in proving that the goods were lost, rather than merely delayed. For such situations, article 5 (3) provides that if the goods have not been delivered within 60 days from the time when they should have been delivered, they may be treated as lost.

(2) The Hague Rules do not contain a similar rule.

(3) The problem dealt with in article 5 (3) is not of the greatest practical importance, since it is possible for the carrier to provide for very generous delivery dates in his bill of lading. To be sure, the rule facilitates formal claims. However, it does not provide a solution to the problems occurring when the goods are found later on. Other conventions have dealt with this problem. For example, article 30 of the CIM provides that in such a case the consignee may insist upon delivery after repayment of the compensation already made by the carrier.

Paragraph 4: Fire

(1) Pursuant to article 5 (4), when loss, damage or delay in delivery results from fire, the presumption of fault on the part of the carrier or his servants or agents provided in article 5 (1) does not apply.

(2) Article IV, rule 2 (b), of the Hague Rules exempts the carrier from liability in case of fire unless caused by his actual fault or privity.

(3) When fire occurs on a ship, proof of its origin and of fault often cannot be definitively determined since it may be difficult to reconstruct the circumstances surrounding the outbreak of the fire. The Hamburg Conference decided that, to give adequate protection to the carrier, the burden of proof of fault on the part of the carrier or his servants or agents should be shifted to the cargo interests. The burden of proof can be satisfied by proving that either the fire (article 5 (a) (i)) or the loss, damage or delay in delivery (article 5 (a) (ii)) resulted from the fault or neglect of the carrier.

To assist the party who bears the burden of proof, article 5 (b) provides for the possibility of requiring a survey in accordance with shipping practices to clarify as soon as possible the cause and circumstances of the fire.

The Hamburg Rules' provision constitutes a compromise. The Hamburg Conference agreed that the carrier should be liable in case of fire if he or his servants or agents were at fault. No valid reason could be found why he should be relieved from liability for the fault of his servants or agents. However, a majority of participants at the Hamburg Conference thought it reasonable to place the burden of proof of fault on the claimant, especially as fires aboard ship frequently originate from the cargo. This view was adopted in the context of the overall compromise, referred to above, with respect to the system of liability under the Hamburg Rules.

Paragraph 5: Live animals

(1) Article 5 (5) deals with the carriage of live animals. It exempts the carrier from liability for any loss, damage or delay in delivery resulting from any special risk inherent in the carriage of live animals. If the carrier establishes that he complied with the shipper's special instructions and there is no proof that the loss or damage resulted from the carrier's fault or neglect, it will be presumed that any loss, damage, or delay in delivery resulted from those special risks. If the presumption is not rebutted by contrary proof, the carrier will be exempt from liability for the loss, damage or delay in delivery. In other cases, the ordinary rules on liability set forth in article 5 (1) apply.

(2) Article I (c) of the Hague Rules excludes live animals from coverage under the Convention.

Paragraph 6: Salvage measures

(1) Article 5 (6) provides that the carrier will not be liable, except in general average, for loss, damage or delay in delivery resulting from measures to save life. However, in the case of measures to save property, the measures taken must be reasonable if the carrier is to be exonerated from liability.

(2) A similar rule can be found in the Hague Rules' article IV, rule 4, although that rule does not state that measures to save property must be reasonable.

Paragraph 7: Causation of damage

(1) Pursuant to article 5 (7) the carrier is not liable under the Hamburg Rules to the extent that he proves that the damage or a part thereof is not attributable to his (or his servants' or agents') fault or neglect. In practice, however, this may cause difficulties in interpretation because different legal régimes adopt different theories on joint causation.

(2) The Hague Rules do not contain a similar rule. As a result, the interpretation of identical or similar circumstances under the Hague Rules is left to national law.

(3) The Hamburg Rules' provision may not give clear guidelines when the proportion of damage attributable to one or another cause cannot be definitely identified. However, the provision gives general guidance to courts and arbitral tribunals as to how to deal with the problem.

Article 6: Limits of liability

Paragraph 1: Principle

(1) Article 6 (1) (a) establishes limits of liability of the carrier for loss of or damage to the goods. The claimant is limited to the higher of two alternatives under the Hamburg Rules' liability limitation system. The first alternative is based on the package or other shipping unit; here the maximum liability is an amount equal to 835 "units of account" per package or other shipping unit. The second alternative is based on the gross weight of the goods lost or damaged; here the maximum liability is an amount equal to 2.5 "units of account" per kilogramme of gross weight of the goods. Article 26 provides that the "unit of account" mentioned in article 6 is, for most States, the special drawing right (SDR) as defined by the International Monetary Fund.

Article 6 (1) (b) establishes the limits of liability of the carrier for delay in delivery equal 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. Pursuant to article 6 (1) (c), the total liability of the carrier for loss, damage and delay in delivery may in no case exceed the maximum limit for the total loss of goods under article 6 (1) (a).

(2) The Hague Rules' limit the liability of the carrier to £100 sterling in gold per package or unit, regardless of its weight. When the pound

sterling was detached from the gold standard in 1924, national courts and legislatures employed disparate methods of converting the £100 limit into national currencies. To remedy this situation, the Visby Protocol replaced the limits expressed in pound sterling with limits expressed in the franc Poincaré, which was at that time frequently used in international conventions. The 1979 Protocol subsequently replaced (in those countries that are contracting parties to that protocol) the franc Poincaré with the SDR as the unit of account for expressing the limits of liability of the carrier. The limits established by the 1979 Protocol are SDR 666.67 per package or unit or SDR 2 per kilogramme, whichever is higher.

Because the Hague-Visby Rules do not provide for liability for delay, they contain no provisions corresponding to article 6 (1) (b) or (c) of the Hamburg Rules.

(3) Article 6 (1) (a) maintains the dual per package/per kilogramme system established by the Visby Protocol. Because of the relatively low value of most goods transported by sea, the Hamburg Conference decided to keep the maximum amount of liability per kilogramme low when compared to similar maximum amounts for other means of transport. The package/unit limitation was retained so as better to protect small, relatively light-weight packages having a high value.

Although the Hamburg Conference agreed that because of inflation the limitation amounts in the Hamburg Rules for loss or damage should be higher than those established by the Visby Protocol, the size of the increase was a subject of debate. The limits finally agreed upon are only about 25 per cent higher than those established in the 1979 Protocol, an amount which since has been overtaken by inflation.

Paragraph 2: Application of the per package rule

(1) Article 6 (2) (a) sets forth a rule for determining the number of packages or shipping units for the purpose of applying the per package limitation in article 6 (1) (a). If a container, pallet or similar article of transport is used to consolidate goods, the packages or shipping units are those enumerated in the document evidencing the contract of carriage by sea. Under article 6 (2) (b), the container itself is considered an additional separate shipping unit if it is not owned or otherwise supplied by the carrier. Thus, if a bill of lading enumerates ten packages in a shipper-supplied container, and all ten packages as well as the container are damaged, eleven units are considered to have been damaged.

(2) The Visby Protocol added, as article V (c), a rule to the Hague Rules on which the Hamburg Rule has been shaped. This Visby Protocol article has however given rise to diverse interpretations as it does not make clear who has to enumerate the packages in the bill of lading. Usually, it is the shipper who prepares the bill of lading and who enumerates the number of packages thereon. If the container is a "shipper packed container" which has been sealed by the shipper, then the carrier has no means of checking whether the number of packages on the bill of lading is correct.

(3) Although the divergence of interpretations after the introduction of the Visby Protocol has been exaggerated, since both parties must agree on the contract's contents including whether or how to enumerate packages in a container, article 6 (2) of the Hamburg Rules will help considerably to overcome this problem. The carrier may insert his reservations in the bill of lading by a clause stating, for example, "shipper's load, count and seal. Carrier has had no means of checking number of packages."

Paragraph 3: Unit of account

Article 6 (3) merely refers to article 26 where the unit of account, usually the SDR, is defined.

Paragraph 4: Agreements

(1) The Hamburg Rules allow the carrier and shipper to agree to limits of liability which are higher than those provided for in the Rules. Article 6 (4) reflects the general principle set out in article 23 (2) that the carrier may increase his responsibilities and obligations under the Hamburg Rules. This provision was inserted because agreements to increase the limit of liability are found in practice, although they are rather unusual because of the existence of cargo insurance.

(2) Article IV, rule 5, of the Hague Rules also allows parties to agree to a higher limit, while article V prohibits them from decreasing the limit. A declaration of value under article IV, rule 5, of the Hague Rules also has the result of increasing the limits of liability to which the carrier is subject. A declaration of value allows the shipper to ask for higher limitation, which normally leads to higher freight rates.

Article 7: Application to non-contractual claims

Paragraph 1: Actions against the carrier

(1) Contractual clauses providing for specific liabilities, limits and defences fulfil their purpose only if a claiming party is unable to make additional claims based on national tort law or other national laws. Under article 7 (1), the defences and limits of liability specified in the Rules apply to any claim for loss, damage or delay in delivery in respect of goods covered by the contract of carriage, whatever its nature.

(2) Article IV*bis*, rule 1, of the Hague-Visby Rules contains a similar rule although it refers only to actions founded in contract or tort, and it does not mention claims "otherwise" founded, as do the Hamburg Rules.

(3) The rule in article 7 (1) is necessary to preserve uniformity and to ensure that the Hamburg Rules are not abrogated by claims brought under national laws that conflict with the Hamburg Rules. Other international conventions contain similar rules (e.g. article 24, Warsaw Convention; article 28 (1), CMR; and article 51, COTIF-Appendix CIM).

Paragraph 2: Himalaya clause

(1) Article 7 (2) extends to agents and servants of the carrier the benefits of the defences and limits of liability which are available to the carrier under the Hamburg Rules when they act within the scope of their employment by the carrier. Claims against servants and agents of the carrier are normally actions in tort, because the servants and agents are not parties to the contract. This rule is intended to protect the carrier. Without such a provision, cargo interests could be entitled to claim compensation under national law from agents and servants of the carrier in cases where the carrier would be able to disclaim liability owing to his ability to invoke defences under the Hamburg Rules; or, the cargo interests might be able to claim higher amounts of compensation than could be recovered from the carrier under the Hamburg Rules. The carrier might be bound under his contract with the agents or servants to hold them harmless from claims by the cargo interests. Thus, without a provision such as that in article 7 (2), the carrier could be indirectly subject to liabilities beyond those contained in the Hamburg Rules.

(2) The English text of Article IV*bis*, rule 2, of the Visby Protocol contains a similar provision, but stipulates that this applies provided that the servant or agent are not independent contractors. The French text does not mention independent contractors.[256]

(3) The Hamburg Rules do not specifically exclude independent contractors because to do so was regarded as superfluous and even ambiguous. "Independent contractor" is primarily a common law term; however, in the common law systems, servants and agents are never independent contractors.

Paragraph 3: Aggregate of amounts recoverable

(1) If the carrier and his servants or agents are jointly liable for loss, damage or delay in delivery, the total amount recoverable by a claimant cannot exceed the limits of liability provided for in the Hamburg Rules.

(2) Article IV*bis*, rule 3, of the Hague-Visby Rules contains the same provision.

(3) Without such a provision, a claimant might be able to obtain multiple recoveries - from the carrier and from his servants and agents. A carrier who agrees to hold his servants and agents harmless against claims by cargo interest would thus be exposed to liability for loss, damage or delay in delivery in excess of the amounts stipulated in the Hamburg Rules.

Article 8: Loss of right to limit responsibility

Paragraph 1: Right of the carrier

(1) According to article 8 (1), the carrier may not invoke limitation of liability if the loss, damage or delay in delivery resulted from the carrier's act or omission done with intent to cause such loss, damage or delay or done recklessly and with knowledge that such loss, damage or delay in delivery would probably result (hereinafter referred to as "serious misconduct").

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256 Contrary to the Hague Rules where only the French text is authentic, the English and French texts of the Visby Protocol are equally authentic.

(2) The Hague-Visby Rules, article IV, rule 5 (e), contain an almost identical rule.

(3) It may be questioned whether the carrier should also lose his right to invoke the limits of liability when the loss, damage or delay in delivery has resulted from the serious misconduct of his servants or agents. Article 8 (1), which favours the carrier, was part of the overall compromise at the Hamburg Conference on the issue of carrier's liability (see discussion of article 5 above).

Paragraph 2: Right of servants or agents

(1) Since article 7 (2) gives servants and agents an independent right to invoke limitation of liability under the Rules, article 8 (2) provides that they lose the right to invoke the limits in the event of their own serious misconduct.

(2) Article 8 (2) corresponds to the Hague-Visby Rules article IV*bis*, rule 4. However, article IV*bis*, rule 4 of the Hague-Visby Rules deprives servants and agents of the carrier of the right to invoke, not only the limits, but also the defences available to them under the Hague-Visby Rules.

Article 9: Deck cargo

Paragraph 1: Principle

(1) Carriage of cargo on deck exposes the cargo to higher risks of damage than carriage below deck. Therefore, article 9 (1) provides that the carrier is entitled to carry goods on deck only in accordance with an agreement with the shipper or the usage of the particular trade or if required by statutory rules or regulations (e.g. regulations requiring the carriage of dangerous goods on deck). In such cases, the carrier is liable in accordance with article 5 (1) and is entitled to raise the defence that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence causing the loss, damage or delay in delivery and its consequences. If, however, the carrier is not allowed to carry the goods on deck, he will be liable for loss, damage or delay in delivery resulting solely from the carriage on deck; he will not be entitled to raise the defence just mentioned, but his liability will be limited in accordance with articles 6 and 8.

(2) Article I (c) of the Hague Rules excludes coverage for cargo carried on deck when the contract of carriage states that it shall be carried on deck and it is so carried. But, if the cargo is carried on deck without this having been expressly stated on the bill of lading, this may constitute a breach of contract and deprive the carrier of the defences and limits under the Hague Rules.

(3) Contrary to the Hague Rules, deck cargo under the Hamburg Rules is subject to the same liability régime as all other kinds of cargo. The Hamburg Rules greatly contribute to clarifying when the carrier will be entitled to carry goods - in particular, containers - on deck. Clauses in the contract of carriage by sea permitting him so do will be sufficient.

With respect to deck cargo, the Hamburg Conference decided not to impose on the cargo interests the burden of proving the fault or neglect of the carrier, his servants or agents, as it had done in article 5 (5) for carriage of live animals. For containers, the carrier must prove that he or his crew exercised the degree of diligence specified in article 5 (1).

Paragraph 2: Proof of agreement

(1) Article 9 (2) adds certain rules relative to an agreement between the parties that goods shall or may be carried on deck. The carrier must insert a statement of the agreement in the bill of lading or other document evidencing the contract of carriage by sea. In the absence of such a statement, the carrier has the burden of proving the existence of such an agreement. Such an agreement cannot be invoked against a third party. However, under article 9 (1), even if a statement of the agreement has not been inserted, the carrier may carry cargo on deck if such carriage is in accordance with the usage of the particular trade or is required by statutory rules or regulations.

(2) The Hague Rules do not provide for a particular kind of evidence of the agreement but require, in article I (c), an express statement in the contract that cargo is carried on deck. Such a statement will normally result in an entry in the bill of lading.

(3) The Hamburg Rules' provision regarding proof of agreement to carry cargo on deck meets the requirements of modern container transport better than do the Hague and Hague-Visby Rules. In modern container transportation, an option to carry cargo on deck is frequently needed for both operational and economic reasons.

Paragraphs 3 and 4: Liability

(1) As discussed above, liability for loss, damage and delay in delivery in respect of deck cargo is the same as liability for all other kinds of cargo (i.e. in accordance with articles 5, 6 and 8). However, article 9 (3) and (4) provides exceptions where carriage on deck has not been justified.

Article 9 (3) raises two issues. First, it points out that, if the carrier was not entitled to carry the goods on deck according to article 9 (1), he is liable for all loss and may not raise the defence under article 5 (1). Second, it limits his liability in accordance with the provisions of articles 6 and 8. Article 9 (4) states that if the carriage of goods is contrary to express agreement to carry the goods below deck, the carrier is not entitled to invoke the limitation of liability provided under article 6.

(2) Under the Hague Rules, the consequences of carriage of goods on deck without or against agreement are not clear. Some authors contend that a carrier should benefit from the limit of liability in the Hague Rules even in the case of carriage against explicit instructions. Such a situation, however, may be regarded as a serious breach of contract.

(3) The Hamburg Rules provide a much needed clarification in respect of deck cargo.

Article 10: Liability of the carrier and actual carrier

Paragraph 1: Contracting carrier

(1) According to article 10 (1), if the carrier who contracts with the shipper (the "contracting carrier") entrusts the carriage, or part of it, to another carrier (the "actual carrier"), the contracting carrier remains liable for loss, damage or delay in delivery in respect of the goods during the entire carriage regardless of his agreement with the actual carrier. Moreover, the contracting carrier is responsible for the acts or omissions of the actual carrier, his servants and agents acting within the scope of their employment.

(2) Under the Hague Rules, the liability of the contracting carrier for carriage by the actual carrier is not expressly discussed. However, contracting carriers, in their bills of lading, often attempt to exclude their liability for carriage by the actual carrier. The validity of such clauses, through various "Identity of Carrier Clauses", that differ under various national legal regimes, is not clear.

Paragraph 2: Actual carrier

(1) Article 10 (2) makes the actual carrier, in respect of the carriage performed by him, liable to the cargo interests to the same extent as the contractual carrier. This principle is of great practical importance. Pursuant to article 10 (4), the liability of the contracting carrier and the actual carrier is joint and several. This follows the pattern of air law set out in the Guadalajara Convention.

The liability of the actual carrier does not depend on specific stipulations to that effect in the contract of carriage or transport document; it is derived from the Hamburg Rules themselves.

(2) Since the Hague Rules do not deal with liability of the actual carrier (see article I (a)), in order to resolve that issue reference must be made to national law. However, as a result of various clauses in the contract of carriage, the identity of the party who contracts with the shipper is often difficult to ascertain. Very often the shipper only learns shortly before court proceedings commence that the person who issued the bill of lading is not his contracting party.

(3) The resulting uncertainties are extremely undesirable. In some jurisdictions problems are avoided somewhat by the possibility of the claimant bringing action *in rem*. Under the Hamburg Rules, even if contractual clauses continue to obfuscate the identity of the shipper's contracting party, cargo interests will be protected by the joint liability of the actual carrier, who usually can be located and action brought against him more easily than against the contracting carrier.

The actual carrier is responsible only for that part of the carriage entrusted to him. The Hamburg Conference decided against making the actual carrier jointly responsible with the contracting carrier for the entire carriage, since this would have gone too far. Therefore, so as to hold the actual carrier liable under the Hamburg Rules, the cargo interest must prove that the loss occurred during the portion of the carriage performed by the actual carrier.

Paragraphs 3 to 6: Other provisions

Article 10 (3) to (6) contain additional rules of a more technical nature. Article 10 (3) indicates that any special agreement under which the carrier assumes obligations not imposed by the Hamburg Rules, or waives rights

conferred on him by the Rules, will not affect the actual carrier unless he so agrees expressly and in writing. Article 10 (4) states that where and to the extent that both the contracting and actual carriers are liable, their liability is joint and several. According to article 10 (5) the maximum amount recoverable from both the contracting and actual carriers shall not exceed the limits of liability under the Hamburg Rules. Article 10 (6) provides that nothing in article 10 shall prejudice any right of recourse between the contracting and actual carriers. Thus, under the Hamburg Rules, the contracting and actual carriers are free to agree as to how to allocate between themselves their joint responsibility to the cargo interest.

Article 11: Through carriage

Paragraph 1: Principle

(1) Article 11 (1) enables the contracting carrier, in the contract of carriage, to exclude his liability for loss, damage and delay in delivery attributable to the actual carrier in certain cases of transport, i.e., performance of the carriage by two or more successive sea carriers. The contract of carriage by sea must explicitly provide that a specified part of the carriage is to be performed by someone other than the carrier. Moreover, the actual carrier must be expressly named in the contract, and it must be possible to institute judicial proceedings under the Hamburg Rules against the actual carrier in a court competent under article 21 (1) and (2). The burden of proving that the loss, damage or delay in delivery was caused by an occurrance during the actual carriage rests with the carrier.

(2) There is no counterpart to this provision in the Hague Rules.

(3) Article 11 is an exception to article 10. It does not deal with multimodal transport. Article 11 will help safeguard cargo interests for several reasons. First, it maintains the liability of the contractual carrier in respect of periods of transport when the actual carrier is not in charge of the goods, for example, during transhipment or temporary storage within a port. Secondly, it requires the actual carrier to be expressly named in the contract, thus enabling the cargo interests to identify him. Thirdly and most importantly, it ensures that the contracting carrier can exclude his liability only if the claimant can institute proceedings against the actual carrier.

Paragraph 2: Liability of actual carrier

Article 11 (2) makes the actual carrier responsible in accordance with the provisions of article 10 (2) for loss, damage or delay in delivery caused by an occurrence taking place while the goods are in his charge. This completes the scheme of joint and several liability of the contractual and actual carriers, and is a useful clarification.

Part III: Liability of the Shipper

Article 12: General rule

(1) Article 12 regulates the liability of the shipper for loss sustained by the contracting or actual carrier, for damage to the ship. Like the carrier's liability, the shipper's liability is based on fault or negligence committed by himself, his servants or agents.

(2) Article IV, rule 3, of the Hague Rules contains a similar rule.

(3) The Hague liability rule has not led to difficulties in practice. Other provisions of the Hague Rules and the Hamburg Rules deal with the liability of the shipper. Article III, rule 5, of the Hague Rules provides that the shipper is deemed to have guaranteed to the carrier the accuracy of certain information. Article 17 of the Hamburg Rules includes a comparable provision. Furthermore, article IV, rule 2 (i), of the Hague Rules expressly states that neither the carrier nor the ship shall be responsible for loss or damage arising from an act or omission of the shipper or owner of the goods or his agent or representative. The latter rule has not been expressly included in the Hamburg Rules as it was deemed to be self-evident.

Article 13: Special rules on dangerous goods

General remarks

Because the types and numbers of dangerous goods have increased drastically since 1924, the Hamburg Rules provide more explicit provisions concerning them than do the Hague Rules.

Paragraph 1: Labelling of dangerous goods

(1) Article 13 (1) states that the shipper must mark or label dangerous goods as dangerous. This must be done in a suitable manner. Rules concerning the marking and labelling of dangerous goods are imposed in international conventions on the subject and in national law.

(2) The Hague Rules do not contain a similar rule.

Paragraph 2: Shipper's duty to inform the carrier of dangerous cargo

(1) Article 13 (2) requires the shipper to inform the carrier of the dangerous character of the goods and, if necessary, of the precautions to be taken. In case of non-compliance with this requirement, the carrier is entitled to recover compensation from the shipper for any loss sustained as a result of carrying the dangerous cargo, as well as to unload, destroy or render innocuous the cargo without payment of compensation.

(2) The Hague Rules, article IV, rule 6, contain a similar rule.

Paragraph 3: Carrier's knowledge of the dangerous nature of the cargo

(1) Article 13 (3) states that the carrier may not invoke the rights under article 13 (2) if he took over the goods with knowledge of their dangerous character. This provision is useful because it clarifies that the carrier may not benefit from those provisions if, at the time he takes over the goods, he has knowledge from any source of their dangerous character, even if the shipper failed to give him complete particulars pursuant to article 13 (1).

(2) Under the Hague Rules, article IV, rule 6, the carrier is not similarly restricted, but may land, destroy or render innocuous dangerous cargo that has become a danger to the ship, without liability except in general average.

Paragraph 4: Carrier's right to take action

(1) The carrier may unload, destroy or render innocuous dangerous goods if they become an actual danger to life or property. In such situations the carrier need not pay compensation unless he is liable under article 5 for fault or has an obligation to contribute in general average.

(2) The Hague Rules contain basically the same provisions.

(3) Nothing is said in the Hamburg Rules about the carrier's right to ask for payment of freight in these cases. The Hamburg Conference considered that a provision to that effect was unnecessary as most legal systems hold the shipper liable for freight and expenses where the non-performance of the contract is caused by a failure of the shipper to provide relevant information to the carrier or by specific characteristics of the cargo. Moreover, provisions in the contract relating to freight govern the situation; such clauses are not affected by the Hamburg Rules which do not interfere with contractual provisions which are not in conflict with the Rules.

Part IV: Transport documents

Article 14: Issue of bill of lading

Paragraph 1: Right to demand bill of lading

(1) Article 14 (1) requires the carrier to issue to the shipper a bill of lading when so demanded by the shipper. If the shipper does not demand a bill of lading, the carrier may issue another document (e.g. a sea waybill).

(2) Under article III, rule 3, of the Hague Rules, the carrier, master or agent of the carrier must issue a bill of lading on demand of the shipper.

(3) To strengthen the shipper/consignee's position, articles 15 to 17 of the the Hamburg Rules contain detailed, stricter provisions on bills of lading than do the Hague Rules.

Paragraph 2: Signing of the bill of lading

(1) While the first sentence of this paragraph is self evident, the second sentence adds a useful rule of interpretation: 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. This may help to clarify situations which under present practices are uncertain.

(2) The Hague Rules do not contain a specific rule as to this point. Thus, the master must be guided by provisions of the contract of carriage (e.g. the identity of the carrier clause), which may be given

different legal effects in different States, as well as by national laws, which are not uniform.

(3) Article 14 (2) of the Hamburg Rules will contribute to greater clarity on this issue. This clarification will be especially useful in cases where the contracting carrier entrusts part or all of the carriage to an actual carrier.

Paragraph 3: Signature

(1) Article 14 (3) attempts to clarify the term "signature" by giving a list of examples. These extend the meaning of "signature" to cover, in addition to handwritten signatures, signatures by any other means, mechanical, electronic or otherwise, so long as they are not inconsistent with the law of the country where the bill of lading is issued.

(2) The Hague Rules and the Visby Protocol do not have a similar rule.

(3) This provision facilitates the transfer of documents, including their "signature", by electronic means, a fact which is becoming increasingly important given the greater use of electronic data interchange.

Article 15: Contents of bill of lading

Paragraph 1: List of contents

(1) Article 15 (1) provides a list of items which "must" be included in the bill of lading.

Article 15 (3) modifies somewhat the use of the term "must" in article 15 (1), since failure to include one or more of the particulars mentioned in article 15 (1) will not affect the legal character of the bill of lading. To do so would put too great a burden on commercial transactions. The term "must" in article 15 (1) means only that if a bill of lading does not contain the required particulars, the carrier is in violation of the contract of carriage. As will be discussed in connection with article 16, the omission of certain particulars may also have certain evidentiary effects.

(2) Article III, rule 3, of the Hague Rules lists only three categories of items which must be shown on a bill of lading.

(3) The main differences between the Hague and Hamburg Rules in this regard are the following:

- The Hamburg Rules, article 15 (1) (a), require that the number of packages or pieces as well as the weight of the goods be shown on the bill of lading, whereas the Hague Rules, article III, rule 3 (b), require only one of these particulars. The Hamburg Rules' provision has been criticized as being impractical, but the objections do not seem justified. Since the weight of the goods and the number of packages are essential elements in determining the limits of liability, they should be stated on the bill of lading. In practice there may be no means available of checking the weight of the goods; in such cases the carrier must make a reservation under article 16 (1) specifying the absence of reasonable means of checking. Such a reservation will not affect the commercial value of the bill of lading or render the bill of lading "unclean" in the sense of the rules on documentary credit.

- Article 15 (1) (c) requires the inclusion in the bill of lading of the name and principal place of business of the carrier. This is to identify the issuer of the bill of lading, since it is important that the bill of lading identify as clearly as possible the contracting party and where he can be found. Indicating the principal place of business of the carrier will also establish one of the places in which a claim can be brought against the carrier in accordance with article 21 (1) (a) and 21 (3). Of course, a "shipped" bill of lading will identify the ship, which may provide sufficient information to the shipper, at least for the purpose of action *in rem*. However, a carrier may issue a "received for shipment bill of lading" which, under the Hamburg Rules, has the same economic value as a "shipped bill of lading". Such a "received for shipment bill of lading" usually does not identify the ship on which the goods will be carried.

- Article 15 (1) (f) requires the inclusion in the bill of lading of the port of loading and date of the carrier's taking in charge. Such particulars are normally shown on a bill of lading for commercial purposes: a person who acquires a bill of lading needs to know where and when the carrier took the goods in charge.

- Article 15 (1) (k) requires the inclusion in the bill of lading of a statement of the freight to the extent this is payable by the consignee. There was some discussion during the preparation of the Hamburg Rules of requiring the bill of lading to state the amount of freight payable by the consignee. However, since it is not always possible to show the exact amount of freight that was not prepaid, it is sufficient, under the Hamburg Rules, to indicate, in the bill of lading, that freight is payable by the con-

signee. That should give sufficient protection to a transferee of the bill of lading. Under article 16 (4), if the bill of lading does not indicate that freight is payable by the consignee, this is *prima facie* evidence that no such freight is payable by him. Moreover, proof that freight is payable is not admissible against a good faith transferee of the bill of lading who relied on the absence of an indication in the bill of lading that freight was payable.

- Article 15 (1) (l) requires inclusion in the bill of lading of a statement that the contract is subject to the Hamburg Rules which nullify any stipulation detracting therefrom to the detriment of the shipper or the consignee. The requirement that the bill of lading indicate that the carriage is subject to the Hamburg Rules will help to ensure that the provisions referred to in that statement will govern the carriage even in States that are not parties to the Rules. The requirement in article 15 (1) (l) is somewhat similar to provisions in other international conventions. For example, article 8 (c) of the Protocol to amend the Warsaw Convention of 12 October 1919 for the unification of certain rules relating to international carriage by air (The Hague, 28 September 1955) (the "Hague Protocol") requires a statement to the effect that the Warsaw Convention may be applicable to the air carriage and imposes, in article 9 (which has not been adopted in the Hamburg Rules), that in the absence of that statement, the carrier may not invoke the limits of liability under the Convention. The CMR also requires a statement that the carriage is subject to that convention. Under article 7 (3) of the CMR, the carrier is liable for all expenses, loss and damage sustained by the person entitled to dispose of the goods as a result of the omission of the statement. The sanction under the Hamburg Rules (article 23 (4)) for failure to include the statement is that the carrier must compensate the claimant to the extent provided for under the Hamburg Rules if the claimant incurs a loss as a result of the omission of the statement. In addition, the carrier must compensate the claimant for the cost incurred by him in exercising his rights to compensation under the Hamburg Rules where, for example, the Rules have not been applied owing to the omission of the statement.

Paragraph 2: Shipped bill of lading

(1) If the shipper demands a "shipped" bill of lading after the goods have been loaded, the carrier must issue one. If the carrier has already issued a "received for shipment" bill of lading or other document of title with respect to the goods, the shipper must surrender that document in exchange for a shipped bill of lading if the carrier so requests. Instead of issuing a separate, new document, the carrier may amend the previously issued bill of lading (e.g. by stamping "shipped on board the vessel"), provided that such a bill of lading would include all the information required for a "shipped" bill of lading.

(2) Article III, rule 7, of the Hague Rules contains, in substance, the same rule.

(3) The importance of a "shipped" bill of lading will probably decrease under the Hamburg Rules because, unlike the Hague Rules, the carrier will be liable from the moment he has taken the goods in charge in the port of loading. Although, traditionally, a "shipped bill of lading" added the important commercial fact that the goods had been taken on board a specified ship, this need will diminish with the greater use of the new ICC Uniform Documentary Practices, which no longer require a "shipped bill of lading".

Paragraph 3: Validity

(1) Article 15 (3) provides that the absence of one or more of the particulars listed in article 15 (1) does not affect the legal character of a bill of lading provided that it meets the requirements referred to in article 1 (7).

(2) The Hague Rules do not contain a similar provision.

(3) Application of the provision in article 15 (3) will be rare. However, it will serve to clarify the present situation since, in the absence of a provision in the Hague Rules stating the minimum requirements for the validity of a bill of lading, the issue is decided in accordance with national law.

Article 16: Bill of lading: reservations and evidentiary effect

Paragraph 1: Reservations

(1) Article 16 (1) requires the carrier to insert a reservation if:

(a) he knows or has reasonable grounds to suspect certain inaccuracies in the bill of lading description of the goods taken over or loaded, or

(b) he had no reasonable means of checking such particulars. The reservation must specify the inaccuracies, grounds of suspicion or absence of reasonable means of checking.

(2) The last sentence of article III, rule 3, of the Hague Rules deals with the same matter, although somewhat differently.

(3) One difference is that the Hamburg Rules, unlike the Hague Rules, require the carrier, master or carrier's agent to specify the grounds for suspicion as to the accuracy of the particulars and the absence of reasonable means of checking. For example, if there are no facilities for weighing the cargo, this must be stated. Another difference is that the Hamburg Rules require the insertion of a reservation, while the Hague Rules provide only that the suspect or unknown particulars need not be stated in the bill of lading. Since most bills of lading in practice are prepared by the shipper and presented to the carrier for signature, the carriers customarily insert reservations, when they have no means of checking the correctness of the particulars shown on the bill of lading. Thus, the Hamburg Rules are more in keeping with current practices on this point than are the Hague Rules.

The Hamburg Rules' wording is an improvement on the Hague Rules's text, but the difference between the two versions does not seem to be significant. The Hamburg Rules require specification of the grounds for suspicion as to inaccuracies and the absence of reasonable means of checking. If there are no possibilities of examining, for example, the weight of the cargo, this must be stated. However, requiring a reservation is to the advantage of the carrier, who bears the burden of proof under both conventions. A difference is that the Hamburg Rules speak of reservations, whereas the Hague Rules state that if the carrier has reasonable grounds to suspect that the details of the cargo received from the shipper do not accurately represent the goods actually received, he is not bound to show such entries on the bill of lading. In current practice, however, reservations are also used.

The wording of the Hamburg Rules' provision - i.e. that the carrier "must" insert the reservation - may be somewhat misleading, as there is no direct sanction if he does not conform with this requirement. However, if no reservation is stated, the bill of lading is *prima facie* evidence of taking over or loading of the goods described therein. Proof that the goods were not in fact as stated in the bill of lading will not be 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 in the bill of lading.

Paragraph 2: Presumption of apparent good condition

Article 16 (2) provides that if the bill of lading does not note the apparent condition of the goods, it is deemed to note that they were in apparent good condition. This provision answers a question which, under the Hague Rules, is sometimes uncertain.

Paragraph 3: Evidence

(1) Except in respect of reservations permitted under article 16 (1), a bill of lading is *prima facie* evidence of taking over or, as the case may be, loading of the goods described in the bill of lading. Article 16 (3) (b) provides that proof to the contrary by the carrier is not admissible if a bill of lading has been acquired by a third party who has in good faith acted in reliance on the description therein.

(2) Article III, rule 4, of the Hague-Visby Rules contains a similar provision. The Visby Protocol adds that proof to the contrary is not admissible against a third party transferee of the bill of lading acting in good faith.

(3) The Hamburg Rules therefore contain no basic change from the Hague-Visby Rules in this area.

Paragraph 4: Evidence of payment of freight

Article 16 (4) provides that, if the bill of lading does not indicate that freight is payable by the consignee, as required in article 15 (1) (k), or set forth demurrage incurred at the port of loading payable by the consignee, the bill of lading is *prima facie* evidence that no such freight or demurrage is payable by the consignee. Proof to the contrary is not admissible against a third party transferee who in good faith has acted in reliance on the absence in the bill of lading of any indication as to freight payable.

Article 17: Guarantees by the shipper

Paragraph 1: Guarantee of accuracy of indications

(1) Under article 17 (1), the shipper is deemed to have guaranteed to the carrier the accuracy of certain particulars furnished by him for insertion in the bill of lading. The shipper must indemnify the carrier against losses resulting from inaccuracies in such particulars. This includes, for example, extra costs incurred by the carrier as a result of the improper stowage or delivery of the goods owing to wrong information in the bill of lading. Losses by the carrier arising from wrong information concerning dangerous goods are dealt with in article 13.

(2) Article III, rule 5, of the Hague Rules contains substantially the same wording as article 17 (1) of the Hamburg Rules on those points. However, under the Hamburg Rules, there is the additional provision that the shipper remains liable even if he has transferred the bill of lading to someone else.

Paragraphs 2 to 4: Letters of guarantee

(1) In practice, shippers sometimes demand a "clean bill of lading" (i.e. one without reservations), even though the carrier may have grounds to question the accuracy of the information supplied by the shipper for insertion in the bill of lading or may have no reasonable means of checking that information, or may have discovered defects in the condition of the goods. If this is the case, the shipper may, in return, offer to provide the carrier with a letter of guarantee indemnifying the carrier against loss suffered by him as a result of issuing the "clean" bill of lading. Such guarantees serve a commercial purpose by enabling sales transactions requiring a "clean" bill of lading to take place and by promoting the movement of goods. The prevailing view at the Hamburg Conference was that such guarantees ought to be given legitimacy. However, provisions were included as protection against the use of such letters of guarantee to defraud the consignee. Article 17 sets forth the following principles:

(a) Article 17 (2) makes a letter of guarantee by the shipper to the carrier without effect against a third party. This principle probably did not need to be expressed because the third party obviously is not a party to the contract of guarantee. Nevertheless, it was set forth for the sake of clarity.

(b) Article 17 (3) contains perhaps the rule of main importance: a letter of guarantee is valid against the shipper unless the carrier, by omitting a reservation, intends to defraud a third party who acts in reliance on the description of the goods in the bill of lading. Furthermore, if the omitted reservation relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier loses his right of idemnity against the shipper for loss resulting from inaccuracies in those particulars.

(c) Article 17 (4) adds another sanction against the carrier acting with intent to defraud: the carrier is liable for loss incurred by a third party acting in reliance on the description of the goods in the bill of lading, and the carrier is not entitled to invoke the limits of liability under the Hamburg Rules.

(2) The Hague Rules do not contain rules on letters of guarantee.

(3) Questions arise where the carrier may not have had actual knowledge of a fraud committed by the shipper, but should have known of the fraud. The Hamburg Rules do not expressly deal with this situation because many delegations feared that to subject a carrier to sanctions in such cases could interfere with normal trade practices and usages.

In those national jurisdictions that treat letters of guarantee even more strictly than do the Hamburg Rules, present national law will obviously conflict with the Hamburg Rules. In respect of article 17 (3), it may become necessary to adopt a broad interpretation of the words "intent to defraud" so as to ensure that only guarantees or undertakings given in a wilful intention of fraud will become invalid.

Article 18: Documents other than bills of lading

(1) Article 18 deals with documents other than bills of lading issued by the carrier to evidence the receipt of the goods to be carried. The provision subjects those documents to the same evidentiary rules as are contained in article 16 (3) by stating that such documents are *prima facie* evidence of the conclusion of the contract and the taking over of the goods described in the documents.

(2) The Hague Rules deal only with bills of lading or "similar documents" and consequently have no parallel provision.

(3) Article 18 was included because of the increasing use in maritime transport of transport documents other than bills of lading, such as waybills. Since there are several types of documents within this category, article 18 is rather general. By according transport documents

other than bills of lading certain important effects, not granted under the Hague Rules, the Hamburg Rules give increased legal security to shippers and carriers alike and promote the use of such documents.

Part V: Claims and actions

Article 19: Notice of loss, damage or delay

Article 19 deals not only with notice by the consignee to the carrier for loss of or damage or delay to the goods (article 19 (1) to (6)), but also with the carrier's notice of loss or damage to the consignee (article 19 (7)).

(1) Article 19 provides that handing over of the goods by the carrier will be *prima facie* evidence of the delivery of the goods in good condition unless notice of loss or damage is given by the consignee not later than the working day after the day the goods were handed over to him. The notification has to specify the general nature of the loss or damage.

Article 19 (1) specifies that notice has to be given by the consignee. The notice may be addressed to the carrier (article 19 (1)), the actual carrier (article 19 (6)), or any other person acting on behalf of either the carrier or the actual carrier, including the master or the officer in charge (article 19 (8)).

If the loss or damage is not apparent, article 19 (2) extends the notice period to 15 consecutive days after delivery. Article 19 (2) also specifies a notice period of 60 consecutive days after delivery for a written notice for loss resulting from delay in delivery. Article 19 (3) specifies that the notification has to be made in writing unless there has been a joint survey or inspection by the parties. Under article 19 (4) both parties must give all reasonable facilities to each other for inspecting and tallying the goods when there has been damage or loss.

Article 19 (7) requires a carrier or actual carrier who suffers loss or damage attributable to the shipper to give written notice thereof to the shipper within 90 consecutive days after the occurrence which caused the loss or damage or after delivery of the goods to the consignee, whichever is the later. Failure to give such notice is *prima facie* evidence that the carrier or actual carrier suffered no loss or damage owing to the fault or neglect of the shipper, his servants or agents. This obligation imposed on the carrier balances the obligation of notice imposed on the consignee under article 19 (1).

"Consecutive days" includes holidays and unifies the running of the period in different legal régimes with different national holidays.

Article 19 (8) states that notices can be given to persons acting on behalf of the carrier, the actual carrier or the shipper, and that notices given to these persons are deemed to have been given to the carrier, the actual carrier or the shipper himself.

(2) Article III, rule 6, of the Hague Rules provides that such notices must be given to the carrier or his agent at the port of discharge before or at the time when the goods are transferred into the custody of the person entitled to delivery or, if the damage is not apparent, within three days after such transfer. The consequence of a failure to give the notice is the same as in the Hamburg Rules: *prima facie* evidence of delivery as described in the bill of lading. As in the Hamburg Rules, notice need not be given if there has been joint survey or inspection.

The Hague Rules contain no provisions as regards the carrier's right to give notice of damage to the shipper or consignee. They hold the shipper liable for damage caused by dangerous goods (article IV, rule 6), but do not deal with damage caused by non-dangerous goods.

(3) The main difference between the two Conventions, apart from the greater explicitness and clarity of the Hamburg Rules, is the length of notice periods. At the Hamburg Conference, the requirement, in article 19 (1), that notice of apparent damage be given not later than one day after delivery of the goods gave rise to discussions. It was concluded that such a requirement would be preferable to that under the Hague Rules, which require notice to be given immediately. The longer notice period under the Hamburg Rules is not unduly onerous to the carrier since the giving of notice itself creates no presumption but merely precludes the presumption in favour of the carrier that the goods were delivered in proper condition.

The sanction for late notice is not a severe one. It probably does not shift the burden of proving that loss had occurred during the transport, since the Hamburg Rules, like the Hague Rules, do not deal with that question. It will continue to be settled by national law. In most legal regimes the consignee must prove the fact of loss. Other international conventions contain much more severe sanctions (e.g. article 57, COTIF-Appendix CIM).

Both conventions have in common that, if the goods have not been handed over to the consignee, there is no need to give notice of loss, damage or delay in delivery. In such cases only the time bars found

in article 20 of the Hamburg Rules and the Hague-Visby Rules, articles VI and VI*bis*, limit the claims of the consignee.

Article 20: Limitation of action

(1) Article 20 (1) and (2) provides that actions relating to carriage of goods under the Hamburg Rules are time-barred if judicial or arbitral proceedings have not been instituted within a period of two years from the day the goods were delivered or should have been delivered. Article 20 (3) excludes from the limitation period the day on which the limitation period commences.

Article 20 (4) allows the person against whom a claim is made to extend the running of the limitation period by notice in writing to the claimant, while, pursuant to article 7 (1), the limitation period applies to all claims of either party, whether in contract or tort or otherwise.

Under article 20 (5), a party held liable under the Hamburg Rules has an additional period of time after the expiration of the two-year period to institute an action for indemnity against another party who may be liable to him, if instituted within the time allowed by the law of the State where proceedings are instituted.

(2) Article III, rule 6, of the Hague Rules provides a prescription period of one year after the goods have been delivered or should have been delivered. The Visby Protocol's article VI*bis* allows an action for indemnity to be brought against a third person even after the expiration of the one-year period, so long as it is brought in the period permitted by the court hearing the case. This period shall not be less than an additional three months.

(3) The two-year limitation period was adopted in the Hamburg Rules to safeguard the interests of the shipper, since the one-year period in the Hague Rules very often turned out to be too short in practice. The Hamburg Conference brought the time limit into line with that of some other transport conventions, e.g. the Athens Convention (article 16) and the Warsaw Convention (article 29), in order to safeguard the interests of the shipper.

The Hamburg Rules contain additional relevant provisions. Firstly, the limitation period is made clearly applicable not only to judicial but also to arbitral proceedings. It is debatable whether the prescription period in the Hague Rules also applies to arbitral proceedings. Secondly, article 20 specifies that the limitation period is not a prescription period but a time bar and therefore subject to

suspension or interruption. Under the Hague Rules, national legal systems are not consistent in their treatment of the question of whether the period is subject to suspension or interruption.

Although the Hamburg Conference did not agree on express rules concerning suspension and interruption of the limitation period, there will not necessarily be doubt on this issue. In practice, the most common basis for extending the period is the agreement of the person sued, and this is expressly provided for in article 20 (4).

Article 21: Jurisdiction

Paragraph 1: Optional jurisdictions

(1) Article 21 sets out a list of places where judicial proceedings, at the option of the plaintiff, may be instituted. Article 21 (1) lists four places:

(a) the principal place of business or residence of the defendant; or

(b) the place where the contract was made, provided the defendant has a representative in that location; or

(c) the port of loading or discharge; or

(d) any additional place designated for that purpose in the contract.

Article 21 (1) (d) points out that these jurisdictions may be extended by contract. However, in accordance with article 23, they may not be restricted by contract.

The courts mentioned in article 21 (1) do not derive their competence over a claim from the Hamburg Rules. Article 21 (1) merely sets forth the jurisdictions in which a claim may be brought. The competence of a country's courts depends on the national law of that country.

Jurisdiction in the sense of article 21 refers to litigation on the merits of a claim. The rules concerning jurisdiction do not cover proceedings for provisional or protective measures which therefore may be brought anywhere if in accordance with applicable national law.

(2) The Hague-Visby Rules do not contain jurisdiction provisions.

(3) The Hamburg Conference debated whether or not the Convention should contain rules with respect to jurisdiction under the Conven-

tion. The majority held the view that rules were necessary to protect the shipper against onerous jurisdiction clauses in bills of lading. Such clauses frequently require claims against the carrier to be brought in the place where he does business, which may be far away from the claimant's location. Consequently, article 21 (1) stipulates several jurisdictions where the claim may be brought and leaves to the claimant the choice of bringing his claim in one of them. In addition, a uniform rule on jurisdiction was considered desirable because the validity and effect of jurisdiction clauses in bills of lading held uncertainty and were treated differently in various legal systems. These places are similar to those in article 17 of the Athens Convention.

Included among the jurisdictions mentioned in article 21 (1) (d) is any jurisdiction designated in the contract for carriage by sea. Thus, a certain flexibility is accorded to the parties to add additional jurisdictions beyond those specifically indentified in the article. Pursuant to article 23, the optional jurisdictions available to a claimant may not be restricted by contract.

One purpose of unifying the law relating to the carriage of goods by sea is to eliminate the relative advantages or disadvantages of bringing a claim in a particular forum. However, the Hamburg Rules allow such a wide variety of optional jurisdictions that forum shopping by the claimant is still possible, owing, for example, to differences in the size of awards, time and cost of litigation, procedural rules and enforceability of awards.

The Hamburg Conference discussed restricting the optional jurisdictions to courts in Contracting States. In favour of that approach, it was argued that courts in non-Contracting States would apply national laws which liffered from the Hamburg Rules. The majority opposed that approach as it would restrict too much the claimant's choice. Moreover, as a result of the statement to be inserted in the bill of lading pursuant to article 23 (3), even courts in non-Contracting States were apt to apply at least some of the Hamburg Rules.

Paragraph 2: Arrest

(1) In addition to the jurisdictions mentioned in article 21 (1), an action may be brought in the courts of a Contracting State where the carrying vessel or another vessel owned by the carrier is arrested. However, in order to protect the defendant, the claimant is required to remove the litigation to one of the jurisdictions mentioned in article 21 (1) if the defendant so desires. There are shortcomings to such a requirement. As it is not technically possible for a claimant to remove his case from a court in one country to a court in another, he must withdraw his action in the jurisdiction where the vessel was arrested and institute new proceedings in the other jurisdiction.

Prior to the removal of the action, the defendant must furnish security sufficient to ensure payment of any judgement awarded to the claimant. The sufficiency of the security will be determined by the court at the place of arrest. If the defendant does not ask for removal of the action, the court in the place of arrest will remain competent. Permitting the action to be brought in the place of arrest only if it is located in a Contracting State is in contrast to article 21 (1), which does not require the places mentioned to be in Contracting States.

(2) The Hague Rules do not contain rules on arrest.

(3) There may be potential conflict between the jurisdiction provisions in the Hamburg Rules and those of the International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships (Brussels, 10 May 1952) (the "Arrest Convention"), particularly article 1 (7) of this Convention. Participants in the Hamburg Conference were aware of the potential conflict on this point, and tried to keep it to a minimum.

Paragraphs 3 and 4: Additional provisions

Article 21 (3) and (4) contains additional procedural provisions supplementing the jurisdictional rules in article 21 (1) and (2).

Article 21 (3) makes it clear that the jurisdictions mentioned in article 21 (1) and (2) are exclusive: the claimant may not bring a claim in any other jurisdiction. However, courts of a non-Contracting State cannot be bound by this rule except by virtue of the statement contained in the bill of lading pursuant to article 23 (3).

Article 21 (4) (a) prohibits a new action on the same grounds between the same parties while litigation is pending in a competent court or when judgement has been delivered by such a court, unless the judgement is not enforceable in the country where the new claim has been brought. It is possible for a judgement issued in one country to be unenforceable in another because the Hamburg Rules do not provide for mutual enforcement of judgements.

Article 21 (4) (b) and (c) mentions two procedures that are not to be considered as the starting of a new action: first, institution of measures

with a view to obtaining enforcement of the earlier judgement; second, removal of a case to a different court in the same country or to a court in another country in accordance with article 21 (2) (a).

Paragraph 5: Later agreement

Notwithstanding article 21 (1) and (2), article 21 (5) states that any agreement between parties, after a claim has arisen, designating the place where the claimant may bring an action, is effective. Therefore, parties may agree upon the bringing of an action in a jurisdiction other than one of those mentioned in article 21 (1) and (2). Under most national laws, such an agreement will be implied when both parties take part in the proceedings without claiming that the court lacked jurisdiction.

Article 22: Arbitration

Paragraphs 1 and 2: Principle

(1) The Hamburg Rules deal with arbitration as an alternative to judicial proceedings. Article 22 (1) provides that the parties may agree to submit their disputes under the Hamburg Rules to arbitration. Such an agreement must be in writing. Article 22 (2) provides that an arbitration clause contained in a charter party does not bind a third party who in good faith acquired the bill of lading issued under that charter party, unless the bill of lading expressly refers to the arbitration clause.

(2) The Hague Rules have no rules on arbitration, but the Hague-Visby Rules contain, in article VIII, certain provisions on arbitration.

(3) Charter parties, unlike bills of lading, normally contain arbitration clauses. Under present law the question of the effect of such clauses on transferees of a bill of lading issued pursuant to a charter party is of great practical importance. Since the question is resolved differently in different national jurisdictions, article 22 (2) will contribute to a uniform resolution of this problem.

Paragraph 3: Place of arbitration

The Hamburg Rules require arbitration proceedings to be instituted, at the option of the claimant, in one of the places listed in article 22 (3). These

places correspond with the places mentioned in article 21 (1), where judicial proceedings must be brought.

Article 22 (3) (b) refers to "any place designated...", while article 22 (1) (d) refers to "any additional place designated..." Although this drafting difference might cause uncertainty, it is clear from the context of article 22 (3) that the wording intended is that of article 21 (1) (d), i.e. "any additional place designated". Like article 21 (5), article 22 (6) provides that nothing in article 22 can affect the validity of an agreement relating to arbitration made after a claim has arisen.

Paragraph 4: Application of the Hamburg Rules

Article 22 (4) requires the arbitrator or arbitration tribunal to apply the Hamburg Rules. That provision is supplemented by article 22 (5), which provides that the provisions of article 22 (3) and (4) shall be deemed part of every arbitration clause or agreement.

An arbitration award that does not comply with the Hamburg Rules will normally nevertheless be enforceable. However, non-compliance with the Hamburg Rules will be grounds for judicial review of the award in countries where arbitration awards are subject to judicial review.

Paragraphs 5 and 6: Additional provisions

The two last paragraphs of article 22 contain some additional rules. Article 22 (5), as already mentioned, deems the rules of article 22 (3) and (4) to be part of every arbitration clause even if not so agreed and expressly stated. By virtue of article 23 (3) the rules of article 22 (3) and (4) are deemed to be in the agreement even when not so considered by the parties.

Like article 21 (5), article 22 (6) provides for freedom of agreement regarding arbitration when the agreement is made after the claim has arisen.

Part VI: Supplementary provisions

Article 23: Contractual stipulations

Paragraphs 1 and 2: Mandatory rules

(1) Article 23 (1) makes null and void any stipulation in the contract of carriage or transport document that derogates directly or indirectly from the obligations under the Convention. Article 23 (2) leaves open, however, the possibility of increasing the carrier's liability.

(2) Article V of the Hague Rules also protects the shipper, although not as explicitly as do the Hamburg Rules. Article V requires any surrender by the carrier of his rights or immunities under the Hague Rules and any increase in his responsibilities and obligations to be embodied in the bill of lading.

(3) Article 23 (1) states expressly that the nullity of a stipulation in a contract of carriage or transport document does not affect the validity of other provisions of the contract or document. This resolves a question that is unclear under the Hague-Visby Rules. Article 23 (1) expressly renders one type of clause null and void: a clause assigning to the carrier the benefit of any insurance on the goods.

Paragraph 3: Statement of application of the Convention

(1) Article 23 (3) requires the bill of lading or other document evidencing the contract of carriage to state that the carriage is subject to the provisions of the Hamburg Rules which nullify any stipulation derogating therefrom to the detriment of the shipper or consignee. The aims of this provision are twofold. Firstly, to make the shipper aware that the contract of carriage is governed by the Hamburg Rules, and secondly to foster the application of the Hamburg Rules even in non-Contracting States.

(2) The Hague Rules do not contain a similar rule. Nevertheless, clauses incorporating the provisions of the Hague or Hague-Visby Rules are common in bills of lading. This is particularly so because carriers consider the Hague or Hague-Visby Rules systems more favourable than many national laws.

National laws in some States that are parties to the Hague Rules or the Hague-Visby Rules require the carrier to include a notice in the bill of lading that it is subject to the Hague Rules as implemented by the law of that country. Such a clause is aimed at achieving the widest possible application to bills of lading issued in that country of the version of these conventions as implemented by national legislation.

Paragraph 4: Indemnity

(1) Under article 23 (4) the carrier must compensate a claimant who incurs loss as a result of the omission of the statement referred to in article 23 (3) or the insertion of stipulations which are null and void under article 23. The loss may be caused by the claimant's having been misled by an incorrect insertion in the bill of lading or by failure of a court in a non-Contracting State to apply the Hamburg Rules when it would have done so if the statement had been inserted.

(2) The Hague Rules do not contain a similar rule.

(3) Article 23 (4) was adopted by the Hamburg Conference because of the concern that cargo interests were often misled into not claiming against carriers or were discouraged from bringing such claims by clauses in bills of lading that were in fact null and void under the applicable law.

Article 24: General average

(1) Article 24 (1) allows application of provisions in the contract of carriage by sea or in national law regarding the adjustment of general average.

Article 24 (2) provides that, with the exception of the rules set forth in article 20 concerning the limitation period, the provisions of the Hamburg Rules 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 a consignee who has made contributions or paid salvage. Thus, if the carrier is liable to the shipper under the Hamburg Rules for loss of or damage to the goods, the carrier may not ask for contribution and security in general average.

(2) The Hague Rules do not prevent the insertion in a bill of lading of any lawful provisions regarding general average.

(3) Although article 24 (2) maintains the traditional relationship between the contract of carriage and general average, it may produce some changes. For example, if the consignee is asked to contribute in general average he will in practice be required to provide a bond before taking delivery of his cargo, even though he may be entitled to claim damages from the carrier (cf. rule D of the 1974 York-Antwerp Rules).[257] Owing to the changed liability system, more situations may occur under the Hamburg Rules than under the Hague Rules when the carrier will be liable (e.g. because he can no longer claim defence for errors in navigation) and thus will be unable obtain contributions from the consignee.

Article 25: Other conventions

General remarks

Article 25 grants preference to some other conventions which already exist.

Paragraph 1: Rights and duties of the carrier according to other conventions

(1) Article 25 (1) states that the Hamburg Rules do not modify the rights or duties of the carrier, actual carrier and their servants and agents provided for in international conventions or national laws relating to the limitation of liability of owners of seagoing ships.

(2) This provision corresponds to article VIII of the Hague Rules.

(3) At present, the right to limit the liability is normally governed by the Brussels Convention, the London Convention or similar national legislation.

The Hamburg Conference decided that the Hamburg Rules should be subordinate even to national laws permitting a carrier to invoke an overall limit of liability because the right to do so is accepted worldwide. It should be noted, however, that national laws may provide for very low limitation sums.

257 Rule D of the York-Antwerp Rules reads as follows: "Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault."

Paragraph 2: Mandatory provisions of other conventions

(1) Article 25 (2) states that the provisions on jurisdiction and arbitration (articles 21-22) do not prevent the application of the mandatory provisions of other existing multilateral conventions on those subjects, if the disputes involved are exclusively between parties having their principal place of buiness in Contracting States of the other conventions. An example of such a convention is the Recognition and Enforcement of Foreign Arbitral Awards Convention (New York, 10 June 1958) (the "Arbitral Awards Convention"). Because such conventions deal with matters of procedure rather than substance, the application of the Hamburg Rules to a dispute covered by those conventions (e.g. pursuant to article 22 (4) of the Hamburg Rules) would not conflict with the provisions of those conventions.

(2) The Hague Rules contain no similar provision.

Paragraph 3: Nuclear damage

(1) Pursuant to article 25 (3), no liability arises under the Hamburg Rules for damage caused by a nuclear incident if the operator of the nuclear installation is liable either by virtue of two specifically named international conventions or by national law equally as favourable to the victims of such incidents as those two conventions. The reason for this provision is that losses arising from nuclear damage are normally much higher than losses usually suffered under the carriage of goods by sea, and the provisions of the international conventions and national laws dealing with liability for nuclear damage are better suited than the Hamburg Rules to the protection of victims of nuclear incidents.

(2) Article IX of the Hague-Visby Rules contains a similar provision.

Paragraph 4: Liability for loss, damage or delay to luggage

(1) Article 25 (4) provides that no liability shall arise under the Hamburg Rules in respect of luggage for which the carrier is responsible under an international convention or national law relating to the carriage of passengers and their luggage by sea. This provision was required because luggage is very often considered to be goods. It is more appropriate for passenger luggage to be covered by conventions such as the Athens Convention or by national law specifically relating to passenger luggage rather than by the Hamburg Rules.

(2) The Hague Rules contain no similar provision.

(3) The carriage of passenger luggage is thus usually governed by the Athens Convention or by national law. Limits of liability under the Athens Convention are considerably higher than under the Hamburg Rules.

Paragraph 5: Other conventions already in force

(1) Article 25 (5) states that nothing in the Hamburg Rules prevents a Contracting State from applying any other existing international convention which applies mandatorily to contracts of carriage of goods primarily by modes of transport other than transport by sea as well as to future revisions or amendments of those conventions.

(2) The Hague Rules contain no similar provision.

(3) Conventions such as the CMR would be covered by this article, as would COTIF Appendix CIM, as a revision of the CIM. The carrier's liability under those conventions is much heavier than under the Hamburg Rules.

Article 26: Unit of account

(1) Article 26 provides that the unit of account to be used in the Rules to express the limits of liability be, in most cases, the SDR of the International Monetary Fund. This is, at present, the most satisfactory unit of account for expressing financial amounts which are to have worldwide application.

Article 26 (2) provides a special rule for those States that are not members of the International Monetary Fund and whose national laws do not allow them to calculate the limits of liability by reference to the SDR. Those States may fix the limits of liability applicable in their territory in franc Poincaré. This is the same unit of account found in article IV, rule 5 (d), of the Hague-Visby Rules and in article II of the 1979 Protocol. The franc Poincaré is based on a defined amount and fineness of gold; however, there is no longer a fixed relationship between national currencies and gold. Therefore, the Hamburg Rules, in article 26 (4), leave to the discretion of the Contracting States the conversion of the amounts expressed in francs Poincaré into their national currency in such a manner as to correspond as closely as possible to the same real value for the liability limits set forth in article 6 of the Hamburg Rules.

(2) The unit of account used in the Hague Rules - the gold value of the pound sterling - became problematic when the pound sterling lost its automatic convertibility into gold. Since then, application of that unit of account differed from State to State. The Visby Protocol tried to remedy the situation by substituting the franc Poincaré as the unit of account. However, soon after the Visby Protocol was adopted, the International Monetary Fund ended the fixed relationship of national currencies to gold and adopted the SDR. This rendered application of the franc Poincaré difficult and resulted in disparities in the value of the limitation amounts in national currencies. For this reason, the additional (SDR) Protocol was adopted in December 1979 at the Brussels Conference on the Hague Rules to substitute the SDR as the unit of account in the Hague-Visby Rules.

To the extent that this 1979 Protocol has entered into force, the difficult situation under the Hague-Visby Rules has been attenuated. Unfortunately, however, the 1979 Protocol has been ratified by only 11 States. Unless one unit of account which can be universally applied becomes more widely used, the disparities in the application of the limits of liability under the Hague-Visby Rules will increase in future.

(3) In 1982 UNCITRAL adopted a sample unit of account provision for use in international transport and liability conventions. The sample provision, which was based upon article 26 of the Hamburg Rules, adopts the SDR as the unit of account. The United Nations General Assembly, in resolution 37/107 of 16 December 1982, recommended that the sample provision be used in new international conventions containing limitation of liability provisions or in revisions of existing conventions.

The Hamburg Rules, in article 26, achieve the maximum possible uniformity with respect to the value of the limits of liability, not only by adopting the SDR as the unit of account, but also by establishing a uniform rule as to the time when the conversion into national currencies is to be made. That time is either the date of judgement or the date agreed upon by the parties. The establishment of this rule clarifies a question which has frequently arisen under the Hague-Visby Rules and to which differing solutions have been reached. However, additional legislation is required from States not members of the International Monetary Fund. For those States, legislation must provide the basis for converting the SDR or the franc Poincaré, as the case may be, into their national currencies.

Part VII: Final clauses

Article 27: Depositary

Pursuant to article 27, the depositary of the Hamburg Rules is the Secretary-General of the United Nations. Thus, a State wishing to become a contracting party to the Hamburg Rules must deposit its instruments of ratification or accession with the Secretary-General.

Article 28: Signature, ratification, acceptance, approval, accession

The Convention was open for signature from 31 March 1978 until 30 April 1979. During that period, it was signed, subject to ratification, by a total of 27 States.[258]

By article 28 (2) States which had signed the Convention (before 30 April 1979) may ratify, accept or approve it.

Pursuant to article 28 (3), the Hamburg Rules have, since 1 May 1979, been open for accession by all States which are not signatory States.

Article 28 (4) specifies that instruments of ratification, acceptance, approval or accession must be deposited with the Secretary-General of the United Nations.

Article 29: Reservations

(1) Article 29 provides that no reservations may be made to the Hamburg Rules.

(2) The Hague Rules do not contain a similar provision and a number of Contracting States have made several reservations to that Convention. The making of reservations by Contracting States to an international convention reduces the effectiveness and uniform application of the convention.

258 Austria; Brazil; Chile; Czechoslovakia; Denmark; Ecuador; Egypt; Finland; France; Federal Republic of Germany; Ghana; Holy See; Hungary; Madagascar; Mexico; Norway; Pakistan; Panama; Philippines; Portugal; Senegal; Sierra Leone; Singapore; Sweden; United States of America; Venezuela; Zaire.

Article 30: Entry into force

The Hamburg Rules will enter into force one year after ratification or accession by 20 States. As of 31 May 1991, a total of 19 States had ratified or acceded to the Hamburg Rules.[259]

Article 31: Denunciation of other conventions

Paragraph 1: Denunciation of the Hague Rules

Article 31 (1) requires a State becoming party to the Hamburg Rules to denounce the Hague Rules by so notifying the Belgian Government, which is the depositary of the Hague Rules. This denunciation must include a declaration that the denunciation is to take effect as from the date when the Hamburg Rules enter into force in respect of that State.

Paragraph 2: Advice to the depositary of the Hague Rules

Article 31 (2) requires the Secretary-General of the United Nations, upon entry into force of the Hamburg Rules, to notify the Belgian Government of the date of entry into force and the names of the Contracting States in respect of which the Hamburg Rules have entered into force.

Paragraph 3: Advice to the depositary of the Visby Protocol.

Article 31 (3) provides that the provisions of article 31 (1) and (2) apply correspondingly in respect of the Visby Protocol.

Paragraph 4: Delay of denunciation of the Hague Rules/Visby Protocol

In order to allow a gradual transitional period for the changeover from the Hague or Hague-Visby Rules systems to the Hamburg Rules system, article 31 (4) allows a Contracting State, if it so deems desirable, to defer its denunciation for a maximum period of five years from the entry into force of the Hamburg Rules. Nevertheless, during that period the State must apply the Hamburg Rules in respect of other States parties to the Hamburg Rules.

259 See footnote 31.

While such a transition period may be reasonable, it will nevertheless be desirable for the changeover from the old Hague Rules or Hague-Visby Rules systems to the new Hamburg Rules system to be achieved as rapidly as possible in order to minimize the parallel existence of different legal régimes governing the carriage of goods by sea.

Article 32: Revision and amendment

(1) Article 32 establishes procedures for revising or amending the Hamburg Rules. As is common in international conventions, the depositary is required to convene a revision conference at the request of one third of the Contracting States.

(2) Article XVI of the Hague Rules gives each Contracting State the right to call for a revision conference.

(3) Should a State become a Contracting Party to the Hamburg Rules after the entry into force of an amendment to it, the Convention, as amended, is deemed to apply to that State.

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

(1) Of particular importance is the simplified procedure set forth in article 33 for revising the limits of liability or changing the unit of account used in the Hamburg Rules. Revision of the limits of liability might become necessary, for example, in the event of a change in the international monetary system. The depositary must convene a revision conference upon the request of at least 25 per cent of the Contracting States. Amendments are to be adopted by the conference by a two-thirds vote of the States participating in the conference. The depositary is to communicate any such amendment to all Contracting and Signatory States for acceptance by the former and for information of the latter. Amendments enter into force on the first day of the month following one year after acceptance by two thirds of the Contracting States. Acceptance of an amendment is to be effected by the deposit of a formal instrument of acceptance with the depositary. After an amendment enters into force, a Contracting State which has accepted the amendment may apply it in respect of Contracting States which have not, within six months after adoption of the amendment, notified the depositary that they are not bound by it.

(2) The Hague Rules and the Hague-Visby Rules contain no similar mechanism for revisions of their limitation amounts.

(3) In the past, revision of other international conventions has proved to be necessary because of a decrease of the purchasing value of currencies or a change in the international monetary system. This has been one of the great shortcomings of the Hague Rules and the Hague-Visby Rules. The London Convention contains (in article 21) a similar method of revision of limitation amounts.

Article 34: Denunciation

Paragraph 1: Time and manner of denunciations

(1) Pursuant to article 34 (1) a Contracting State may at any time denounce the Convention by notice in writing to the depositary.

(2) Article XV of the Hague Rules contains a similar rule.

(3) This procedure is similar to that adopted by other transport conventions, e.g. the Athens Convention or the Warsaw Convention.

Paragraph 2: Date of effect of denunciation

(1) Article 34 (2) provides that a denunciation shall take effect on the first day of the month following the expiration of one year after notification of the denunciation has been received by the depositary. However, the article allows the Contracting State to specify a longer period in the notification if it so wishes.

(2) Article XV of the Hague Rules provides for a similar procedure.

Concluding paragraphs

Languages

(1) The concluding paragraph of the Hamburg Rules states that the Rules were done "in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic".

(2) The sole official language version of the Hague Rules is French.

(3) Most modern conventions are done in more than one language or in one language with an official translation. For example, the London Convention is in English, French, Russian and Spanish; the Athens Convention is in English and French with official translations into Russian and Spanish. It has been argued that this multitude of languages may complicate the application of the Convention. However, this argument can equally well be used against other multi-language conventions.

Bearing in mind the various legal and linguistic systems and terms which the languages represent, some divergences between the language versions are unavoidable. The question will arise as to how those divergencies can be resolved. A possible solution may be found in article 33 (4) of the Vienna Convention which states that "when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 [the general interpretation rules] do not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted". Article 32 of the Vienna Convention provides that, if the text permits more than one interpretation, courts have to look at the preparatory work; if this does not provide a solution, they must look to the purpose of the Convention to provide a reasonable interpretation. In addition to those provisions, article 3 of the Hamburg Rules, which stresses the need for uniformity in interpretation, will assist in resolving divergences among the different language versions.

Common Understanding adopted by the United Nations Conference on the Carriage of Goods by Sea

In addition to the text of the Hamburg Rules, the Diplomatic Conference adopted a *Common Understanding* as to the nature of the carrier's liability under the Convention, i.e. that his liability was based on the principle of presumed fault or neglect. This common understanding is discussed above in connection with article 5.

Chapter V

Article-by-article commentary on the Multimodal Transport Convention

Introductory note

197. This article-by-article commentary analyses the articles of the United Nations Convention on International Multimodal Transport of Goods (MT Convention) in the order in which they appear in the Convention. Where appropriate, comments on individual paragraphs have been made.

Part I: General Provisions

Article 1: Definitions

The MT Convention, in article 1, contains a number of important definitions which facilitate the reading and understanding of the Convention. These definitions also reflect the fundamental principles upon which the provisions of the Convention are based.

Paragraph 1: International multimodal transport

This definition contains several important elements. The first element follows from the word "multimodal", meaning that there must be at least two different modes of transport. The second element requires that the transport must be performed "on the basis of a multimodal transport contract" meaning that the mere fact that more than one mode of transport is involved is insufficient. There must be a multimodal transport contract covering at least two of the modes to be used, but in reality probably the whole transport. The third element follows from the word "international" meaning that the transport must proceed from a place in one country where the goods are taken in charge by the MTO then convey them to a place situated in a different country where the goods are delivered. Finally, the fourth element clarifies that a "pick-up and delivery service" under a unimodal transport contract would not be considered a multimodal transport.

Paragraph 2: Multimodal transport operator

The MTO is any person who "performs" himself or who "procures the performance" of the whole or part of the multimodal transport. Consequently, the MTO can either be identical with the person actually performing the carriage (the "actual carrier" or the "performing carrier") or, alternatively, a person who merely concludes a multimodal transport contract not as an agent but as a principal.

Further, the MTO must "assume responsibility" for the performance of the contract. A shipping line issuing a door-to-door bill of lading or CT document disclaiming liability for the on-carriage is ***not*** an MTO. Nevertheless, if in spite of this a shipping line were to call itself an MTO in the transport document or otherwise, the line would probably fall under the mandatory regime of the MT Convention and the clause in the contract disclaiming liability would be disregarded.

Paragraph 3: Multimodal transport contract

This definition reflects the fact that the contract could either concern the very performance of the multimodal transport or the mere procurement of such performance by somebody else. Further, gratuitous contracts would fall outside the Convention since there must be a "payment of freight".

Paragraph 4: MT document

This definition underlines not only that the document must evidence a multimodal transport contract, but also the fact that the goods have been taken in charge by the MTO and, further, that the MTO has undertaken to deliver the goods in accordance with the terms of the contract.

Paragraph 5: Consignor

This definition rests upon the following principles :

- First, it is not necessary that the consignor conclude the contract himself; this can be done by somebody acting on his behalf as an agent. Further, the contract can also be entered into in the name of the consignor and, in such a case, the person in whose name the contract has been entered into becomes the "consignor" even if he has contracted for the account of some other person. This manner of concluding the contract - in one's own name but for the account of somebody else - is known in the civil law systems as acting as a "commission agent" which is a common procedure for freight forwarders on the European continent and in Scandinavia. It should be underlined that, in these cases, the "consignor" would be identical with the person "in whose name" the contract has been entered into, irrespective of the fact that he acted on somebody else's account.

- Second, the contracting party of the consignor must be identical with the MTO.

- Third, even though the consignor would not be a contracting party of the MTO, he could still be considered as such if the goods have ***actually been delivered*** to the MTO under the multimodal transport contract either by himself, in his name or by somebody else on his behalf. Thus, the definition of "consignor" reflects, on the one hand, customary contracting practices and on the other hand the practice that the contracting party of the MTO is not necessarily identical with the person actually delivering the goods to the MTO. This, for instance, would be the case under a "free on board' (FOB) or "free carrier (named point)" (FRC) contract, where the seller delivers the goods to the carrier while the buyer concludes the contract of carriage. Both the seller and the buyer would then come under the definition of consignor.

Paragraph 6: Consignee

This definition refers to the person who is entitled to take delivery of the goods but it does not go further than this. Consequently, it is necessary to decide who, in practice, would have such authority. This must be clarified in the MT document itself. If that document is negotiable, and issued to "bearer" or "to order", then the document must be presented and surrendered to the MTO in at least one original in order to obtain the release of the goods at their destination. The person so presenting the MT document duly endorsed is entitled to take delivery of the goods in his capacity as consignee. If the document is ***non-negotiable***, then the person entitled to take delivery would be the person "named as consignee" in the MT document and the document as such would not need to be presented and surrendered to the MTO in order to obtain the release of the goods. Documentary procedures are further explained below.

Paragraph 7: Goods

This definition may perhaps seem superfluous but it does make clear that not only the cargo itself, but also any equipment used for carriage of

goods, such as containers, pallets or similar articles of transport or packaging, will, if supplied by the consignor, be considered as goods. If such articles of transport are carried empty they could, of course, hardly be excluded from the definition of "goods". But it is also important to note that they are considered as "goods" even when being used for the carriage of goods, because, in these cases, the article of transport is considered as a separate unit for the purpose of calculating the "per package limitation" (see below).

Paragraph 8: International convention

The definition of international convention is needed because of the articles of the MT Convention referring to this expression (articles 19, 30, 38). The definition itself is self-explanatory.

Paragraph 9: Mandatory national law

According to the definition the word "mandatory" means that the contracting parties are compelled to accept the provisions so designated and that they cannot contract out of mandatory provisions to the detriment of the consignor. The last words are important, since there are international conventions whose provisions are absolutely mandatory so that no derogations are valid even though they would be "to the benefit of" the consignor (e.g., CMR for the carriage of goods by road, article 41). This means that, under the MT Convention, it is possible for the contracting parties to agree on an extension of the liability of the MTO and to make the protection against risk of loss of, or damage to, the goods under the multimodal transport contract equivalent to the customary cover under a cargo insurance.

Paragraph 10: Writing

The last definition concerns the word "in writing". In practice it is far from easy to decide when the "in writing" requirement has been fulfilled. Is it necessary that a signature be made in hand-writing? The definition makes it clear that this is not necessary. Even a message sent in a telegram or a telex would comply with the "in writing" requirement. The words *"inter alia"* mean that the definition is not conclusive. So a signature in facsimile could be considered to fulfil an "in writing" requirement. Whether this is the case is not specifically mentioned in the definition and would, therefore, have to be decided under the applicable national law.

Article 2: Scope of application

This article determines the geographical scope of the application of the MT Convention. The international element which is required for the Convention to apply appears from the requirement that the multimodal transport must proceed between places in two different States. It should be noted that only one of these two States need be a Contracting State. It is enough that ***either*** the place for the taking in charge of the goods by the MTO according to the multimodal transport contract ***or***, alternatively, that the place for delivery of the goods according to the multimodal transport contract be located in a Contracting State. If, for example, it appears that the goods have been lost or damaged during the transit and a claim is brought in the State where the place for delivery of goods is situated, and that State has not adhered to the MT Convention, the court in that State where the action is brought must decide on the applicable law. If it is decided that the applicable law is the law of the Contracting State where the goods were taken in charge by the MTO, then the MT Convention applies. However, the MT Convention could also be made applicable in a non-Contracting State, if the MT document as provided in article 8 (1) (n) contains a reference to the MT Convention (this is required whenever the MT Convention is compulsorily applicable, article 28 (3)). It is possible that MTOs may use the same MT document regardless of the particular route in each individual case, because it would be complicated to operate with different documents and restrict the reference to the MT Convention to situations where it would apply according to article 2 of the MT Convention. For this reason, it is reasonable to expect that the MT Convention would apply in many cases because of a voluntary contractual stipulation even though it would not have applied according to article 2 in the absence of such a stipulation.

Article 3: Mandatory application

International conventions governing each specific mode of transport generally apply mandatorily, depriving the parties of freedom of contract. This makes any stipulation derogating from such mandatory provisions null and void. However, such invalidity only extends to the actual invalid provision and not to the contract as a whole which, therefore, continues in effect.

As has already been said, there must be a multimodal transport contract for the Convention to apply. This is further clarified by article 3 (2) reminding the parties of the fact that they can choose one or more "segmented" transports instead of a multimodal transport contract covering the whole transit. The word "segmented" means that the parties may contract for each mode of the transport that otherwise together could have formed

the basis for a multimodal transport contract. To take an example: a transport from or to the interior of one country to or from another country separated from the first by the ocean could be covered by an MT contract. Alternatively, the parties are free to conclude a string of unimodal contracts covering transports by road, rail and sea or they may even conclude a unimodal air transport contract should they so wish. Such unimodal contracts will not be governed by the MT Convention, but by the individual liability regimes in force for each mode, even though they cover the same total transport.

Article 3 (2) stipulates that the consignor has the right of choice. However, this stipulation must not be understood to mean that a "potential" MTO is always compelled to accept the choice. The duty of the carrier to act in one capacity or another follows from his status as common carrier under applicable regulatory arrangements. Thus, if the operator includes multimodal transport services as well as unimodal services in his enterprise, then he may well in his capacity as a common carrier have the duty to accept whatever his customers might prefer. If, on the other hand, the operator does not offer multimodal transport services, he need not accept a consignor's demand for a multimodal transport contract, and the consignor is of course free to take his business elsewhere.

Article 4: Regulation and control of multimodal transport

This article really only constitutes a reminder. Traditionally, public and private law aspects of transport law regulation have been distinguished from one another. In fact, it is unusual to deal with public law questions in international conventions primarily purporting to determine the contents of the contract of carriage. Public law provisions are not to be found in the Warsaw Convention or the Hague Rules or the Hamburg Rules. Nevertheless, article 4 intends to give effect to the public and commercial aspects of the MT Convention evidenced by its introductory preamble.

In particular, article 4 (2), by referring to consultations between the interested parties before the introduction of new technologies and services, purports to avert circumvention of the provisions of the Code of Conduct for Liner Conferences.

Article 4 (2), also mentions the possibility of licensing MTOs. Whether or not licensing is required depends on the policy of the State concerned. Since the underlying unimodal transport would require a license, or in many countries a permit, the addition of a license for MTO services may possibly not be needed. Nevertheless, it may well be that some countries will choose to regulate transport services generally and include also multimodal transport services in a general or specific license.

Traditionally, States have focused on the regulation of unimodal transport; it is frequently included in bilateral or multilateral agreements between States. In current practice, that is, even before the MT Convention comes into effect, every MTO will have to ascertain whether he is indeed able to extend his services into foreign countries. This is necessary because, although only very few countries at the moment regulate multimodal transport, the regulation of transport in different countries may well constitute an effective hindrance for the development of multimodal transport services and transport integration. Nevertheless, such regulation may be extended to include multimodal transport services as well. The MT Convention does not compel the Contracting States to adopt a specific regulatory policy but, in article 4 (3), it reminds the MTO of the necessity to comply with the applicable law of the country in which he operates. Indeed, failure to comply with such regulations may well subject the MTO to severe penalties and restrictions of trade.

Part II: Documentation

Article 5: Issue of a MT document

General remarks

The MT Convention has taken the developments mentioned in chapter V into proper account. It follows from articles 6 and 7 that the MT document can be either negotiable (article 6) or non-negotiable (article 7). However, it is important to remember that the MT Convention does not contain any particular provision purporting to strengthen the position of the consignees when non-negotiable MT documents under the Convention have been issued. Thus, in these cases, caution is required whenever payment is made in advance before the goods have reached their destination.

The duty of the MTO to issue a MT document, negotiable or non-negotiable, is set forth in article 5.

Paragraph 1: Issuance of a MT document

It follows from article 5 (1) that the consignor may choose, and that the MTO has the duty to accept this choice, to have either a negotiable or a non-negotiable MT document. The reason for this provision stems from the circumstances just described explaining that a non-negotiable document is not a sufficient guarantee for the buyer-consignee that the seller-

shipper will not interfere with the transport after the goods have been paid for unless, of course, some arrangement is made by private agreement outside the scope of the MT Convention. On the other hand, it may well be difficult for an MTO, who customarily offers only non-negotiable documents, to issue negotiable documents in individual cases. However, there is no provision in the MT Convention which would prevent the MTO, in such cases, from charging his customer an amount corresponding to the extra administrative costs caused by his request to receive a document which is outside the ordinary routine of the MTO. Nevertheless, an excessive surcharge for negotiable MT documents may exceptionally be considered a circumvention of the provisions of article 5 (2), since it could effectively deprive the consignor of his option to choose between the different types of transport documents.

Paragraphs: 2 and 3 Signing of the MT document

Article 5 (2) stipulates that the documents must be signed either by the MTO himself or by someone having his authority to sign, that is, his agent. According to paragraph 3, the signature need not necessarily be in handwriting, it can also be printed in facsimile, perforated, stamped or, indeed, be made by electronic means, unless the law of the country where the document is issued contains more stringent requirements.

Paragraph 4: Mechanical recording of non-negotiable MT documents

In article 5 (4), with respect to non-negotiable MT documents, the practice of storing the relevant information by "mechanical or other means" has been recognized. It is sufficient that the MTO, when he has taken the goods in his charge, delivers a readable document containing the relevant particulars to the consignor. This document is then the equivalent of a MT document. The wording in article 5 (4) recognizes, the practice of obtaining print-outs of documents from computers only with respect to non-negotiable MT documents.

Article 6: Negotiable MT documents

Under most national laws, and according to international custom, negotiable instruments are either issued "to bearer" or "to order". If they are issued "to bearer", anyone possessing the negotiable instrument is entitled to receive whatever may be stated therein, provided that the party honouring the instrument acts in good faith and does not suspect that the bearer is the wrong person or that he has no right to receive what the instrument calls for. When the instrument is issued "to order", the person

to whom the instrument has been issued - ***i.e. the first holder of the document*** - has the same entitlements as the person holding an instrument issued "to bearer", but if the document has been surrendered to another person it is necessary that the first holder will evidence this by his signature indicating the person to whom he may have assigned his right under the document. In other words, he "orders" the issuer to fulfil the promise to such a person. Usually such an assignment is made on the back of the document which is then said to be duly endorsed. Successive assignments can be made in this manner always indicating the assignee. However, it is also customary that a document may be endorsed in blank without indicating the assignee; the first holder simply writes his signature on the back of the document. Subsequently, the document serves as a document issued "to bearer" and anyone possessing the document is entitled to receive what is promised therein simply by surrendering the document to the issuer. This principle is the basis for the text of article 6.

What is stated in article 6 (1) (d) reflects the common practice, or rather malpractice, of issuing negotiable transport documents in several originals. In such cases, it is of vital importance for the holder of the document to know how many originals have been issued so that he can take measures to prevent an original from coming into the wrong hands thus increasing the risk of fraud or that another person obtains the goods before him at the destination by presenting one original to the carrier. Article 6 (3) sets forth the generally recognized principle that, even where more than one original document has been issued, it is enough that one original be surrendered at the destination. After this has been done the other originals become void as is frequently expressly stated in the document itself. It happens, albeit rather seldom, that two persons each with one original document simultaneously call for delivery of the goods. In such a case, the carrier cannot deliver the goods to either of them until it has been determined which of them has the right to the goods.

Article 7: Non-negotiable MT document

General remarks

Although most transport documents contain information concerning the person expected to be entitled to delivery, e.g., by mentioning him as a consignee or under the heading "notify address", one would not know at the time of the issuance of a negotiable MT document if any assignment of the document will take place and who will be entitled to receive the goods in return for an original document until someone appears with the document at the destination.

Paragraph 1: Name of consignee on non-negotiable MT documents

With non-negotiable documents, the situation is entirely different. Here, as stipulated in article 7 (1), the document must indicate ***a named consignee.***

Paragraph 2 Delivery of goods

In article 7 (2) such a named consignee is the only person entitled to the goods at the destination although he may, in turn, authorize other persons to act on his behalf. In practice, the consignee will in most cases be a legal entity which will, therefore, simply have to authorize somebody to act on its behalf. Although it would certainly be preferable if such authorization were "in writing", article 7 (2) contains only a recommendation to this effect. This follows from the words "as a rule". Consequently, authorization may also be implied and may frequently follow from a previous relationship between the parties. In many countries, delivery cannot take place directly from the MTO but only from the Customs authorities.

Article 8: Contents of the MT document

Paragraph 1: Contents of the MT document

In order to fulfil its function as a receipt for the cargo delivered to the carrier as well as evidence of the contract, the MT document must contain a number of particulars. These are spelled out in article 8 (1). According to article 8 (1) (a) the "general nature" of the goods should be mentioned as should any leading marks needed for the proper identification of the goods. Further, the number of packages or pieces and the gross weight of the goods or their quantity otherwise expressed must be noted. In practice these particulars are furnished by the consignor. If the goods have dangerous propensities these must also be mentioned in the document. In this respect the applicable rules and stipulations relating to dangerous goods must be observed according to the specific provisions in article 23 of the Convention.

It must be observed that, even though it is the consignor who would furnish most of the information regarding the goods, the MTO cannot refuse to insert such information in the MT document even if he thinks some may not be correct. However, it follows from article 9 of the Convention, that the MTO has the right to enter his reservations in the MT document in cases where he has no means of checking the information furnished by the consignor or has any reason to suspect that the information is incorrect. In practice, carriers have the possibility to check only the outer condition of the goods, since carriers are not supposed to open up packages in which the goods have been stored. This is indicated in article 8 (1) (b) by the word "apparent". Current transport documents always contain expressions to this effect, usually "shipped onboard (or received) in apparent good order and condition".

The names of the interested parties must be included in the MT document according to article 8 (1) (c) (the MTO) (d), (the consignor), and (e) (the consignee) if he has been named by the consignor. Likewise, the principal place of business of the MTO must be included. This information might be important when it has to be decided at what place a legal action may be brought against the MTO in accordance with article 26.

Further, the places for the taking in charge of the goods and for their delivery have to be mentioned (article 8 (1) (f) and (g) respectively). Regarding the taking in charge, the date has also to be mentioned. This is of particular importance when the seller may receive payment under a documentary credit, where banks would always be instructed not to honour the documents after a specified date. Even in other cases it might be essential for a seller to know when the goods have been taken in charge by a carrier in order to ascertain that the seller has fulfilled his obligation to send the goods not later than a specific date. Similarly, the date when the MT document was issued must appear. One might think that the date for the taking in charge of the goods, which must be mentioned in the MT document according to article 8 (1) (f), would suffice but it may also be important to know whether or not the MT document has been issued and signed by the MTO at the same time or on another date. Only seldom is it acceptable to issue the document before the goods are taken in charge although, in practice, it could well happen that MT documents are issued before and signed subsequent to the taking in charge of a shipment. This information is therefore essential and should appear in the MT document (article 8 (1) (j)).

The MT document must, of course, be signed by the MTO or by someone acting under his authority (article 8 (1) (k)). In practice, MT documents are signed either by an employee of the MTO or by someone acting as an agent for the MTO. Rarely are transport documents signed by the consignor, in spite of the fact that the consignor is responsible for most of the document's contents regarding the goods.

In some cases, it might also be important to know at which time the goods are expected to arrive at their destination. If there is an express agreement between the parties that the goods will arrive at a certain time or within a certain period of time then, but only then, must such information be included in the MT document. Such information is as yet rather unusual,

but so-called time-guaranteed transport may become more frequent in the future, particularly when there is a reliable transport service. However, also in such cases, exceptions from the guarantee would usually be made in case of abnormal occurrences (*force majeure* and the like).

It must appear from the MT document whether it is negotiable or non-negotiable. Article 8 (1) (i) stipulates that there must be a "statement" to this effect in the document. It is recommended that this statement should appear conspicuously in the very heading of the document. It is also possible to ascertain the nature of the document by reading the text dealing with the release of the goods. If the goods may only be released against the surrender of an original document, then it is clearly a negotiable document. If, on the other hand, the goods may be released to a named person, then the document is non-negotiable. However, this text in itself would almost certainly not suffice as a "statement" with regard to the nature of the document to be either negotiable or non-negotiable.

Under most national laws, the fact that the consignee exercises his right to claim the goods from the carrier brings him into a contractual relationship with the carrier and subjects him to the obligations under the contract of carriage, particularly with respect to the payment of freight and other charges. For this reason, the amount of freight payable by the consignee must appear in the document itself. At least, the document must indicate if freight is payable by the consignee ("freight collect") in order to avoid any misunderstanding that freight has already been collected in advance ("freight paid in advance"). It is seldom of interest for the parties to the contract of carriage to know the extent of freight relating to each mode of transport under a multimodal transport contract. Indeed, one of the advantages with a multimodal transport contract is that a "through freight" can be offered and the consignor would normally not be interested to know how this freight covering the whole transit has been composed. For this reason, it is not necessary for the freight for each mode of transport to be mentioned unless this has been expressly agreed between the parties (article 8 (1) (l)).

It is not always that the MTO knows, at the time of the issuance of the MT document, exactly how the transport from point of origin to point of destination will be performed. Most MT documents therefore contain so-called "liberty clauses", whereby the carrier reserves the right to perform the MT transport in any manner which he deems fit. For this reason, article 8 (1) (m) requires that only if the intended journey route, the modes of transport and places of transhipment are known at the time of the issuance of the MT document do they need to be mentioned in that document.

Finally, the MT document must contain a statement that it is governed by the MT Convention (according to article 28 (3), see below) as well as any other particulars which the parties may find useful to include in the MT document provided that such information is permitted in the country where the document is issued.

It has been seen that article 8 (1) places quite important obligations on the issuer of the MT document. Nevertheless, an obligation tends to become a mere recommendation if it is not supported by a sanction in case of non-fulfilment. What then is the sanction which could be used against the MTO if he fails to insert the mandatory information into the MT document? In this case sanctions may include the invalidation of the document or the loss of the issuer's right to limit his liability. However, the first mentioned of these sanctions would work to the detriment of the innocent consignor/consignee and the last would be much too harsh on the issuer. For this reason, article 8 (2) declares that the absence of any of the mandatory particulars do not affect the legal character of the document as a MT document if it fullfills the requirements according to the definition of such a document in article 1 (4). Instead, an omission of the required particulars may subject the issuer to a liability to pay compensation according to article 28 (4) of the MT Convention (see below).

Article 9: Reservations in the MT document

As has already been said, the MTO must take care not only to enter reservations into the MT document if he knows or has reason to suspect that the information supplied by the consignor is incorrect, but he must also mention specifically if and why he has no reasonable means of checking the particulars regarding the goods. If he fails to make this entry, he is deemed to have noted on the MT document that the goods were in apparent good condition and this could make him liable also for pre-shipment loss or damage, short-shipments and the like, either because of the evidentiary effect of the information in the MT document, or by preventing him (through "estoppel") from disproving such information when a negotiable MT document has been transferred to a third party in good faith.

Although, in the interest of international trade, the provisions of article 9 and the following articles 10 and 11 purport to safeguard the interests of consignees, these parties should certainly avoid relying too much on the MTO's possibility of checking the information included in the MT document. First, it should be observed that such a control of the goods only concerns their apparent condition. It may in many cases be necessary to engage special firms and surveyors for pre-shipment inspection in order to ascertain that the goods meet the specifications of the contract of sale.

Second, where the multimodal transport contract concerns the transport of a container loaded with homogeneous goods and delivered loaded (and normally also sealed) to the MTO (a so-called FCL for "full container load"), the MTO will in practice have no possibilities of checking anything at all except the outer condition of the container itself. However, if the MTO receives parcels of cargo from different consignors to be stuffed into a container, his means of checking increase correspondingly, since he can check the outer condition of each parcel.

Article 10: Evidentiary effect of the MT document

General remarks

The most important function of the MT document, or for that matter of any document given in return for goods or money, is to serve as a receipt and evidence of the nature of the goods when received by the issuer of the document. If there are no reservations in the document with respect to the particulars mentioned therein, the document will have full weight as such evidence. This is dealt with in article 10.

Sub-paragraph a: Prima facie evidence of the taking in charge

It follows from article 10 (a) that the MT document's evidentiary effect is not absolute. Counter evidence might be available which could disprove the information in the MT document. However, the MT document must be accepted as full evidence of the taking in charge by the MTO of the goods as described in the document unless the contrary is proven. This is expressed by the words *"prima facie* evidence". In practice, it may be very difficult for the MTO to obtain such counter evidence but it may be possible to ascertain from packing lists and the like that the goods were not delivered to the MTO at all at the point of origin or to conclude from the type of damage found that it simply could not have occurred before the goods were in the charge of the MTO.

Sub-paragraph b: Reliance on the description of the goods

In order to strengthen the position of third parties having received a negotiable MT document, usually buyers at foreign destinations, who may also have paid for the goods in advance relying in good faith on the description of the goods in the document, the MTO is *estopped* from disproving the information in the MT document in such cases. This means that the MTO will have to pay compensation to third parties, even

if it can be ascertained that he never took the goods into his charge or that the goods had been lost or damaged beforehand. His right to turn against the consignor in such cases is dealt with in article 12 below. The phrase in article 10 (b) "third party, including a consignee" might be difficult to understand. However, the words "including a consignee" purport to protect a consignee even if he is not strictly speaking a third party. If, for instance, a transport is arranged under a FOB sale it is for the buyer to make the contract of carriage and he would then not be a "third party" in relation to the carrier but a contracting party. Nevertheless, he is entitled to the same protection as for instance a CIF buyer who would, indeed, be a "third party" in relation to the MTO, since under such a sale the contract of carriage is made by the seller.

Article 11: Liability for intentional mis-statements or omissions

Unfortunately, the wishes of consignors to receive transport documents without any reservations or notations (i.e. documents said to be "clean"), frequently induce them to ask for such clean transport documents, even though the carrier should have entered reservations in the document. In some cases, it may well be that the carrier is over-ambitious and unduly suspicious. In other cases, shippers and carriers may dispute the number of parcels tendered for carriage while the consignee insists that his information is, indeed, correct. Or there might be outer damage on boxes, drums and bags but it may well be questioned whether this is evidence of the condition of goods inside. In current practice such situations are considered to be fairly "innocent" but, nevertheless, it is hardly correct to withhold relevant information to the detriment of the consignee.

More serious are cases where the carrier knows that the information is incorrect, as for instance when the MT document is ante-dated or some parcels are clearly missing or damaged, but the MTO is nevertheless induced to issue a clean document. In all these cases, it is common practice for the consignor to give the issuer of the clean document a letter of indemnity (a so-called "back-letter") where the consignor promises to hold the issuer fully harmless of any consequences which might follow from the fact that the information in the document is incorrect. The validity of such back-letters is a much-debated issue. In the Hamburg Rules (article 17) efforts are made to distinguish between "innocent" and "fraudulent" situations and in the latter case the back-letter is declared to be void and without effect not only in relation to the consignee, which for that matter is self-evident, but also in relation to the consignor. This difficult distinction has not been made in the MT Convention. However, if the MTO has included false information in the MT document "with intent to defraud" and such false information concerns the general nature or the apparent condition of the goods (the particulars mentioned in article 8 (1)

(a) and (b) or reservations under article 9), then article 11 declares that the MTO will lose the benefit to limit his liability under the Convention in relation to third parties who have acted in reliance on the description of the goods in the document.

In most cases, the consignee might prefer to claim against the MTO *as if* the goods had been lost or damaged in transit although, perhaps, the information in the MT document is incorrect and, in fact, the goods were in the same condition when delivered to the MTO as when they were delivered to the consignee. If it is found that the information is incorrect, and that it was included by the MTO with the intent to defraud the consignee, then, according to the Convention, the MTO cannot limit his liability. However, if the consignee prefers, he may well choose to claim compensation from the MTO for the financial loss which he might have incurred owing to the false information in the MT document. Parties suffering such loss may be able to recover according to the applicable national law and the liability of the MTO would then most probably be without any limit whatsoever. It should be observed that article 18 dealing with limitation of liability only concerns "loss resulting from loss of or damage to the goods themselves" (see further below) and does not deal with liability for financial loss following from incorrect information in the MT document.

Article 12: Guarantee by the consignor

As has been said, it is common practice that the consignor issues guarantees in favour of the carrier whenever he receives a clean transport document, although the issuer knew or had reason to suspect that the information was incorrect (the "back-letter problem"). However, it must not be forgotten that most of the information in the transport document is included upon the initiative of the consignor himself. In practice, the carrier's transport document forms are frequently supplied in advance to consignors or freight forwarders and the relevant information is inserted into the document by them whereafter the transport document is merely signed by the carrier. In any event, the information is given to the carrier by the consignor. This is why the consignor must be responsible for the information in relation to the MTO. It follows from article 12 (2) that the consignor must indemnify the MTO against any loss which the MTO might incur owing to inaccuracies or inadequacies of the particulars submitted by the consignor and that this liability must remain even after the MT document has been transferred by the consignor to another party. However, the consignor's guarantee has nothing whatsoever to do with the MTO's liability to other parties and article 12 (2) contains a reminder to this effect.

Article 13: Other documents

Any international transport may give rise to a considerable amount of documentation and to a number of documents which are not transport documents. This is evidenced by article 13. Needless to say, any document issued must be in accordance with applicable international conventions or national law. Article 13 *in fine* also contains a reminder that no documents competing with the MT document must be issued. If this nevertheless has been done, such other documents will not affect the legal character of the MT document.

Part III: Liability of the multimodal transport operator

Article 14: Period of responsibility

General remarks

As has been said, the MT Convention has adopted the principle that the operator is responsible during the whole period while the goods are in his charge. This principle follows from article 14.

Paragraph 1: Period of responsibility

Although the main principle expressed in article 14 (1) is clear enough, its practical application may cause difficulties, since the goods are often taken in charge by the MTO from a person other than the consignor and delivered at their destination to a person other than the consignee. This disposition might follow from agreements between the consignor/consignee and persons acting on their behalf.

Paragraph 2: Definition of the principle of reponsibility

Thus, if a person is appointed to act on their behalf and loss of or damage to the goods occurs during the time when the goods are in the custody of such a person, then the occurrence would not have taken place within the MTO's period of responsibility (article 14 (2) (a) (i) and (b) (ii)). In case of delivery at destination to a person other than the consignee, it may follow from the multimodal transport contract itself that the goods should be placed at the disposal of the consignee in a certain manner either by delivery to a person appointed by him or by placing them geographically in a certain location. If this is so, and the provisions of the multimodal

transport contract are fully complied with, then the period of the MTO's responsibility would have come to an end.

Particular problems arise where the parties to the multimodal transport contract have been deprived of their freedom to decide on the modalities of cargo handling and storage in the country of origin or destination, or when particular usages apply at the place of destination. Thus, regulations applicable at the place of taking the goods in charge, requiring authorities or other third parties to intervene, are recognized in article 14 (2) (a) (ii), and such periods when the goods are in the charge of such authorities or third parties are excepted from the MTO's period of responsibility. Also, the same principle applies at destination where, for that matter, the exception would have much more practical importance than at the place where the goods are taken in charge by the MTO. Normally, authorities - particularly Customs authorities - do not interfere except at destination. In these cases, when losses or damages occur outside the scope of the MTO's period of responsibility, the consignor or the consignee have to rely on whatever liability rules apply to such authorities or third parties having the goods in their custody when loss or damage occurs. Unfortunately, it is only seldom that mandatory rules apply to the liability of such other parties and, therefore, they frequently exercise their statutory power or freedom of contract to reduce considerably their liability. For this reason, a text to an international convention dealing with the liability of so-called "operators of transport terminals" (so-called "OTTs") was adopted in 1991.

Paragraph 3: Servants and agents

It should be stressed that servants or agents, or any other persons acting for the performance of the multimodal transport contract on behalf of the MTO, will not be considered "third parties" in the meaning intended in the provisions of article 14. Conversely, servants or agents acting for the consignor or the consignee in delivering the goods into the charge of the MTO or accepting delivery of the goods at destination are identified with the consignor and the consignee. Article 14 (3) contains a reminder to this effect.

Article 15: The liability of the multimodal transport operator for his servants, agents and other persons

This article expresses the fundamental principle that the MTO must not only be mandatorily liable for the acts and omissions of his own servants or agents but also for "any other person of whose services he makes use for the performance of the multimodal transport contract".

The vicarious liability expressed in article 15 presupposes that the servants or agents are "acting within the scope of (their) employment" and that any other person, who is not a servant or agent of the MTO, usually a sub-contractor, acts "in performance of the contract". Acts or omissions of such persons are considered to be identical to acts or omissions of the MTO himself. The MTO's liability for his own servants or agents is somewhat broader than his liability for other persons. For liability to arise it is necessary that such other persons must have acted "in the performance of the multimodal transport", while liability for servants or agents would arise when there is a sufficient connection between their acts or omissions and the employment. In practice it may well be difficult to decide precisely what constitutes a sufficient connection. In most countries, the carrier would be responsible for malicious acts or omissions or intentional damage caused by his servants or agents, when the employment would put these persons in a position where misbehaviour could occur more frequently than in the case of "outsiders". To take an example: employment status would normally make it much easier for the employee to gain access to steal cargo also outside normal working hours, and for this reason it has been held in some jurisdictions that the carrier ought to be liable for such thefts, although the persons concerned have certainly not been employed to steal the cargo !

In a sense it may be said that article 15 reflects the very fundamental distinction between a multimodal transport contract and a traditional intermodal transport contract, where the carrier's contract may also cover the whole transit but where he would normally disclaim liability for the part of the transport performed by other persons and merely undertake to arrange for such pre-carriage or on-carriage, referring the consignor or consignee to turn against such other parties having performed the additional carriage.

Article 16: Basis of liability

Paragraph 1: Basis of liability

The basis of the MTO's liability is almost identical with the basis of liability of the sea carrier under article 5 of the Hamburg Rules. It should be observed that the type of loss or damage referred to in article 16 (1) is limited to:

(1) Loss of or damage to the goods themselves (that is "physical" loss or damage);

(2) Financial loss following from physical loss or damage but not other financial loss resulting without any physical loss or damage having occurred; and

(3) Loss resulting from delay in delivery.

The type of loss or damage ***not*** covered by article 16 (1) and the MT Convention would be subject to the applicable national law which may or may not restrict the carrier's freedom of contracting out of such liability. Usually, the standard terms of the various contracts of carriage contain a general disclaimer of any liability for financial loss ("consequential loss", "indirect damage" or similar terms). If no such disclaimer of liability appears, the liability of the MTO is unlimited, since it does not come within the provisions of the MT Convention on limitation of liability (see further article 18 below).

The basis of the MTO's liability rests upon negligence and vicarious liability for the acts of his servants, agents and other persons for whom he must respond according to article 15; the liability relates to the period of responsibility defined in article 14. However, the burden of disproving negligence rests on the MTO. It is for him to prove "that he, his servants or agents or any other person referred to in article 15 took all measures that could reasonably be required to avoid the occurrence and its consequences". The word "reasonably" indicates that the same assessment should be made as when applying the general principle of negligence. In other words, if the MTO does not do what is reasonable to expect from a diligent MTO for the purpose of avoiding occurrences, and consequences of such occurrences, which may cause loss or damage, then compensation must be paid.

Paragraphs 2 and 3: Delay in delivery

Liability for delay, according to article 16 (2), is restricted to "delay in delivery". Traditionally, it has been difficult in maritime transport to predict the exact time of arrival of cargo at destination because of a number of unforeseeable circumstances, such as adverse weather conditions, which might delay the ship. For this reason, bills of lading frequently contain provisions whereby the sea carrier disclaims any liability whatsoever for delay. It is a debated question whether the mandatory Hague Rules provide for a liability for delay (this depends on the interpretation of the expression "to or in connection with goods"). The far more sophisticated vessels in service today, however, make the question of delay much less an issue and the Hamburg Rules, in article 5 (1), therefore make it clear that the sea carrier is also mandatorily liable for delay. The limitation of liability with respect to delay is ususally related to the freight amount. The

only exception is to be found in the law of air transport, where the same limit relates to loss of or damage to the goods and to delay in delivery. In road carriage, under the CMR, the limit corresponds to the amount of the freight and in rail transport under the CIM to double the amount of the freight. In the Hamburg Rules and the MT Convention, an amount equivalent to two and a half times the freight payable for the goods delayed has been chosen (article 6 (1) (b) and article 18 (4) respectively), but not exceeding the freight amount for the whole consignment.

It is important to observe that both the Hamburg Rules and the MT Convention, as with other international conventions regulating the carrier's liability, deal with liability only for loss of or damage to the goods and for delay in delivery. Applicable national law may well allow compensation for other types of damage such as for delay other than "delay in delivery", for example, delay in providing the means of transport or in the taking in charge of the goods, non-performance or consequential loss other than such loss which may follow from physical loss of or damage to the goods themselves. Since such types of damage would fall outside the two conventions, the provisions relating to limitation of liability will become inapplicable as well. Usually, the carriers are aware of this and will therefore provide for exceptions from or limitations to such liability in their conditions of carriage and transport documents. Thus, any delay occurring before the goods have been taken in charge by the MTO falls outside this liability provision. Such delay may well occur in the country of origin owing to late delivery of the cargo to the MTO or, at worst, by total failure of the cargo to arrive and of taking the goods in charge, that is non-performance of the contractual obligations. Any liability of the MTO for financial loss suffered by his contracting party in these cases would depend upon the applicable national law. The applicable national law would also determine if, and to what extent, liability for such delay and non-performance could be limited by contractual stipulations.

Delay in delivery could occur in two situations:

(a) The parties might have agreed that the goods will be delivered within a time expressly agreed upon (so-called "time-guaranteed transport"); or

(b) The delivery time might exceed the time which it would be reasonable to require of a diligent MTO.

However, when performing this test of reasonableness, regard should be had for the "circumstances of the case". This means that the MTO would avoid liability if he took all reasonable measures to ensure timely arrival of the goods. In other words, more or less the same test which is set out in article 16 (1) would have to be made. If the delay is caused by "ex-

ternal" contingencies, such as labour disturbances, interference by authorities or other third parties, adverse weather conditions, war, warlike operations or civil commotions and the like, the MTO would be liable for delay. Even in case of time-guaranteed transport, the guarantee would frequently contain certain exceptions from the undertaking.

The difficult problem of deciding precisely at what time a pending delay, at the option of the claimant, could be "converted" into a physical loss has been resolved somewhat differently in the MT Convention as compared with the Hamburg Rules. The time starts to count when the goods are considered overdue according to article 16 (2) and the days are then counted consecutively, i.e. no interruption is made for Sundays and holidays. Most probably interruptions would not even be made if, during this period of 90 consecutive days, a *force majeure* situation arose which would prevent delivery of the goods before the claimant's option to treat the goods as lost became valid. However, this is a difficult question to decide and it may well be resolved differently in different jurisdictions.

In some countries, one might be inclined to follow the principle in the law of demurrage, meaning that once demurrage has started to run it continues to run even if situations occur which otherwise would have been excepted from the counting of the lay time (the principle "once on demurrage, always on demurrage"). Under general principles of law, the theory is that once liability has arisen, for instance because of negligence, the right of compensation may also include loss caused by occurrences which otherwise would have been excepted from liability *(casus mixtus cum culpa)*.

For instance, a case may be considered of a stranding of a ship for which the carrier is responsible under both 16 (1) and 16 (2). As a result of the stranding, the ship must be taken to a port of refuge for provisional repairs. This results in a delay exceeding the time permitted under article 16 (3); the question then arises of whether the claimant would have the option to treat the goods as lost, although they obviously exist, but in the wrong place. The question should probably be answered in the affirmative, since the MTO has not been diligent in avoiding the stranding and, therefore, must answer for any subsequent delay, including the risk that the claimant could choose to treat the goods as lost according to article 16 (3).

To take another example - a case where, after the time when delay has already occurred according to article 16 (2), a collision subsequently occurs where the ship engaged by the MTO is free from any liability for the collision which has been solely caused by another ship. Would the claimant also in this case have the right to treat the goods as lost according to article 16 (3)? According to the exact wording of this provision, the answer would seem to be yes, since no contingency whatever may interrupt the

running of the "90 consecutive days". Nevertheless, national law may well over-ride the principles mentioned earlier or, by the application of the principles of causation, deem that the real cause for the extended delay not to be the "initial" delay but rather a quite new occurrence beyond the responsibility of the MTO. The proximate cause of the extended delay is the collision, for which the MTO is not to blame. Any argument that article 16 (3) can then not be applied, whenever it is proven that the goods have in fact not been lost, would run counter to the very wording of article 16 (3) where no such exception from the conversion rule can be found.

Article 17: Concurrent causes

Owing to the fact that the principles of different national laws vary with respect to the extent of liability when loss or damage has resulted from different causes - but where liability is attached only to ***one*** and not ***all*** of these causes - the MT Convention provides an answer to such situations.

It appears from the text that the MTO to some extent may escape liability in cases of "concurrent causes" of a loss or damage. However, this is only possible if he succeeds in proving that loss, damage or delay in delivery is only partly caused by his own "fault or neglect". Although, theoretically, this provision might be understood easily, its practical application may well pose considerable difficulties. Let us suppose that the goods have been packed inadequately and that the ***consignor would be liable*** for packing according to articles 22 or 23 of the MT Convention and that, in addition, the MTO has not taken all measures which could reasonably be required to avoid exposing the same goods to an event which inflicts or aggravates damage to the goods. If, in such a case, a survey report would show that part of the goods had been damaged because of inadequate packaging, while another part of the goods were damaged because of lack of care on the part of the MTO in the custody and protection of the cargo, it may be possible for the MTO to escape liability for the first part mentioned. The quewtion arises as to what would be the situation if it were not possible so to distinguish a separate cause for each separate part of the damage. Would it also then be possible to divide the damages because negligence has occurred both on the part of the consignor and on the part of the MTO? Should the loss following from the damage to the cargo be divided in proportion to the degree of fault on each side, or perhaps be divided equally, in the same manner as would follow by applying the principles of contributory negligence? Under legal systems accustomed to applying principles of contributory negligence, the answer might be affirmative but under systems of law which tend to divide damages by applying rules on causation, the answer may well be different.

Article 18: Limitation of liability

General remarks

As has been said, one of the difficulties of establishing a legal regime for multimodal transport stems from the fact that limitation techniques and amounts differ for the different modes of transport. Basically, there are two considerations. First, a suitable limitation level for the MTO must be found whenever loss, damage or delay in delivery cannot be attributed to a particular segment of the multimodal transport. Second, it has to be determined if and to what extent the limitation figures which apply to the different modes should influence the liability of the MTO when loss, damage or delay in delivery could be attributed to a specific mode of transport (so-called "localized damage"). Bearing in mind that the multimodal transport could consist of any combination of two or more modes - rail/road, rail/sea, rail/air, road/sea, road/air and sea/air - one would have to decide whether or not the limitation level for the MTO should be based on a reasonable "average" between the limitation amounts applying to these specific modes or whether, alternatively, one should choose limitation amounts from one or more of the specific modes. In the MT Convention the latter alternative was chosen. As a main rule, the limitation amount applicable to sea transport prevails but whenever no sea transport is involved in the multimodal transport contract, then the considerably higher limitation amount applicable under the international convention for carriage by goods by road (CMR) prevails Thus, for an assessment it is necessary in every case to establish whether the multimodal transport would involve sea transport or not. Article 18 of the MT Convention is based upon these fundamental principles.

Paragraph 1: General limitation amounts

In article 18 (1) the main rule is set forth. It embodies the dual technique of establishing the limitation amount which applies to sea transport (see article 6 of the Hamburg Rules). First, the limitation amount is to be calculated with a certain figure for each "package or other shipping unit" or alternatively, a certain limitation figure per kilogramme of gross weight of the goods lost or damaged. The claimant may choose whichever is more favourable. One might well ask why it is necessary to have such a dual limitation technique instead of a pure kilogramme limitation. The reasons are two-fold. Traditionally, only the per package limitation applied to carriage of goods by sea (the per kilogramme limitation was added in the 1968 Visby Protocol to the Hague Rules). Secondly, the per package limitation may be of importance for light-weight cargo, whereas the

per kilogramme limitation would lead to a low limitation (the per package limitation becomes more favourable whenever the unit weighs less than 34 kg).

Paragraph 2: Choice of limitation amount

The problem of goods stowed in containers, on pallets or similar articles of transport has been resolved in the same way as in the Hamburg Rules and in the Visby Protocol to the Hague Rules. These conventions use a formula by which the packages or other shipping units inside the article of transport, as well as the article of transport itself, must be multiplied with the limitation unit whenever the packages or other shipping units have been enumerated in the MT document.

The limitation amount is expressed in so-called "units of account". For States which are members of the International Monetary Fund that unit of account is the SDR as defined by the Fund. For other Contracting States, reference is made instead to a certain quantity of gold of a certain fineness (see further article 31 below). It should be borne in mind that the SDR does not account for world inflation, which means that one would have to reckon with a successive decrease of the limitation amount in real value. This might explain why the limitation amounts are slightly higher in the MT Convention compared with the Hamburg Rules, the increase representing about 10 per cent. The per package limitation represents 920 units of account per package or other shipping unit while the per kilogramme limitation is 2.75 units of accounts per kilogramme of gross weight of the goods lost or damaged.

Particular problems might arise when computing the per kilo limitation. If, for instance, only part of the goods have been lost or damaged, the per kilogramme limitation should ***not*** be computed on the full weight of the whole package or shipping unit but only on the part lost or damaged. Nevertheless, one cannot carry the application of this principle too far, for example, to investigate how many pieces of sugar might have been damaged inside a small package. Furthermore, any part which has been lost or damaged might have a functional relationship to the remaining undamaged units, as for instance in the case of loss of or damage to the tyres or the engine of a car. In such cases, it might be reasonable to take the weight of the whole consignment into account when computing the per kilogramme limitation.

Paragraph 3: Limitation when no sea-leg is involved

The principle of applying a higher limitation amount to multimodal transport not including carriage of goods by sea or by inland waterways is expressed in article 18 (3). In these cases, the per package limitation has been dropped while the per kilogramme limitation has been raised from 2.75 units of account to 8.33 units of account (the latter limitation amount being identical to that in the CMR.)

Paragraph 4: Limitation for delay in delivery

The liability of the MTO for loss resulting from delay in delivery is subject to a particular limitation amount. Since there is a functional relationship between the freight and the time for the transport - the quicker the transport, the higher the freight rates - it has been deemed reasonable to refer the limitation amount to the freight payable for the goods delayed. This is the technique applicable in the international conventions for carriage of goods by rail and by road (CIM and CMR). However, no such particular limitation applies to liability for delay in delivery under the international conventions for carriage of goods by air (Warsaw Convention) or by sea (the Hague Rules and/or as amended by the Visby Protocol) until the introduction of the freight-limitation technique in the Hamburg Rules. The limitation amount corresponds to two and a half times the freight payable for the goods delayed but it never exceeds the total freight payable under the multimodal transport contract. This means that, when the delivery of more than two-fifth of the goods covered by the multimodal transport contract has been delayed, the maximum figure representing an amount equal to the total freight will normally be reached. Difficulties might arise in applying this principle to situations where the total freight payable under the multimodal transport contract cannot be appropriated *pro rata* to the different consignments in the contract. This would often occur when the MTO has charged a lump sum for freight, for example, a full container with heterogeneous cargo, so-called LCL-container (for "less-than-container load"). Normally, the delay would involve the whole container but partial delay may well occur when some of the units have been shortshipped. In such cases, the particular limitation of 2.5 times the freight payable for the goods delayed may have to be computed arbitrarily.

It is important to note that the limitation of liability for delay relates only to delay in delivery. Financial loss resulting from other types of delay, such as delay in taking the goods in charge for the transport, or liability for non-performance is not subject to any limitation whatsoever, unless this follows from the applicable law or if the multimodal transport contract contains valid contractual stipulations to such an effect.

Paragraph 5: Aggregate liability

When the goods have become damaged, delay might also occur as a result of the same contingency causing damage to the goods or by subsequent events resulting from the damage to the goods (such as measures taken to avoid aggravation of the damage, surveys and the like). In these cases, the MTO could be liable for damage as well as delay, however, such "combined liability" (aggregate liability) may not exceed the limit of liability which would have applied to a total loss of the goods.

Paragraph 6: Extended limits of liability

As has been said, the mandatory character of the MT Convention does not prevent the parties from agreeing on an extended liability in favour of the consignor. The limits of liability expressed in article 18 may, therefore, be raised to higher levels by agreement between the MTO and consignor. Whenever the consignor or the consignee has taken out cargo insurance, it is rare that such agreements are made in practice, since the amount charged by the carrier would normally exceed whatever rebate the cargo insurer would be prepared to give on the cargo insurance premium in return for the increased possibility to claim against the MTO. However, the possibility of agreeing on a limitation amount corresponding to the full value of the goods or, which is often the case, the invoice value plus 10 per cent representing imaginary profit could well be chosen as an alternative to cargo insurance. But this presupposes that the MTO would be prepared to pay the way a cargo insurer would have paid. Thus, it is necessary that his liability would cover the same period as cargo insurance would have covered and also that he forfeit his defence to disprove negligence and respond as well for the "misfortune" risks occurring during the transport (see further below).

Paragraph 7: Units of account

This paragraph simply states that the "unit of account" in this article is the same mentioned in article 31.

Article 19: Localized damage

A peculiar situation would arise if the liability of the MTO were to be *lower* than the liability of his sub-contractor responsible for the loss of or damage to the goods. It may then be that the consignor or the consignee would, in such a case, have the possibility of recovering amounts up to the higher limit of liability applicable to the sub-contractor by way of a so-

called direct action and in spite of the fact that reference could not be made to his own contract with the sub-contractor. Alternatively, it might be possible for the MTO to assign his contractual right against the sub-contractor, according to the theory that he would have made the contract with his sub-contactor for the account of the consignor/consignee to the extent that the sub-contractor's liability would exceed his own.

National laws may well differ with respect to these possibilities and in order to avoid that the lower liability of the MTO would serve as a shield for the sub-contractor, since the MTO cannot recover from the sub-contractor more than he has paid himself for the loss or damage, the MT Convention stipulates a higher limit of liability for the MTO when loss or damage can be localized to a particular stage of the multimodal transport and a higher limit of liability applies under an international convention or mandatory national law to such a stage of the transport. The rationale behind this provision is that the claimant should be in the same position as he would have been if he had concluded the contract directly with a carrier representing the specific mode of transport where limitation of liability might be higher than under the MT Convention. This could be the case with respect to air, rail or road transport, particularly if the multimodal transport contract included a maritime segment.

However, the literal wording of article 19 may give rise to difficulties of interpretation, since to the extent to which international conventions or mandatory national laws would be "applicable" to the multimodal transport may well be disputed. The MT Convention is based on the notion of a contract in principle independent of contracts for unimodal transport of goods. Therefore, it would be illogical to admit that international conventions and mandatory national law for unimodal transport could ever apply to the multimodal transport contract. If article 19 is interpreted literally however, it becomes entirely redundant; it is, therefore, submitted that it should be interpre ed so that effect is given to its obvious purpose.

It should be observed that article 19 refers only to loss of or damage to the goods and ***not to delay*** although a higher limitation amount may well apply to delay (for example, under the Warsaw Convention where the same limit applies to delay as to loss of or damage to the goods or according to CIM where the total limit corresponds to the dual freight amount). However, it is somewhat impracticable to relate delay occurring during a total transit to a particular segment, since any delay occurring before the transport has come to an end may well be avoided by speeding up the remainder of the transport. Therefore, one would not know whether or not delay has occurred until the transport has been performed.

Article 20: Non-contractual liability

General remarks

It is a well-known problem in the law of carriage of goods, primarily because the exceptions from and limitations to the carrier's liability, that claimants refrain from basing their action on the contract provissions and instead seek redress on a legal basis other than the contract of carriage itself ("non-contractual liability"). If such a choice were permitted, the very purpose of the defences and limits of liability would be undermined. Moreover, claimants might try to improve their possibilities of recovery by directing their action not against the carrier but against his servants and agents. Transport documents, such as bills of lading and general conditions of carriage, usually contain particular clauses purporting to restrict such possibilities of circumventing the lawful protection which the carrier should enjoy (so-called identity of carrier, and Himalaya-type clauses). However, under some national systems of law the legal effects of such clauses are uncertain. So as to solve these problems, most recent international conventions on carriage of goods include particular provisions corresponding to article 20 of the MT Convention.

Paragraph 1: Defenses

The provision barring the claimant from obtaining higher compensation by choosing another basis for action than the contract of carriage is set out in article 20 (1).

Paragraph 2: Protecti. 1 of servants and agents

The protection of the MTO's servants and agents is achieved by article 20 (2). In practice, the protection is really intended for the MTO himself since he might be obliged to hold his servants and agents harmless in case the claimant would proceed against them. It is only when the MTO's servants or agents act within the scope of their employment, that the MTO himself would have to respond (article 15 of the MT Convention, see above). Consequently, if the MTO's servants or agents would cause loss or damage ***outside*** the scope of their employment the protection ceases to operate. Further, the protection is also intended for parties ther than the MTO's servants or agents, namely for "any other person of whose services he makes use for the performance of the multimodal transport contract", the reason being that the MTO's liability also extends to acts or omissions of such other parties ("vicarious liability").

The question of whether it is reasonable to extend the protection to such other parties (so-called "independent contractors") is much debated. As a result of article 20 (2), a direct action against such other parties, if at all permitted, would serve no purpose except where the MTO could not be reached or would fail to honour the claim because of insolvency. Also, one should observe the relation between article 20 (2) and article 19 permitting an extended recovery against the MTO when loss or damage can be localized to a particular stage where a higher limit of liability would apply. The latter provision becomes particularly important since, according to the principle of article 20 (2), the liability of the independent contractor could be reduced in cases where his own liability would exceed that of the MTO under the MT Convention.

Paragraph 3: Maximum amounts recoverable

It is not possible for the claimant to obtain a better recovery by multiple actions against both the MTO and his servants or agents or sub-contractors, since the total amount of recovery from all these parties is in any case limited to the limitation of liability applicable to the MTO himself under the MT Convention. However, this principle presupposes that none of the potentially liable parties have lost their right to limit liability under article 21.

Article 21: Loss of the right to limit liability

General remarks

It must be borne in mind that the purpose of according the carrier the right to limit his liability is based on the principle that he cannot be taken to know the value of the goods unless it has been disclosed to him and, for this reason, the maximum liability must be determined according to an assessment of the standard value of the goods represented by the limitation amount. In other words, the limitation is not primarily based on a principle of liability. Further, the limitation of the carrier's liability makes it easier for him to obtain a suitable insurance cover for his potential liability through liability insurance, since knowledge of his maximum liability exposure is needed for the correct assessment of liability insurance premiums. Thus, the very purpose of the limitation of the carrier's liability would fail if he were to lose the right to limit liability whenever a court of law or arbitral tribunal considered this reasonable under the circumstances. Therefore, the modern trend in the law of carriage of goods runs

in the direction of making the carrier's right to limitation of liability "unbreakable".

Nevertheless, exceptions must be made. In principle, these exceptions should coincide with the usual exceptions from insurance cover in cargo insurance and carrier's liability insurance conditions. First, the carrier will lose his right to limit liability if he himself had caused the loss, damage or delay in delivery, although he must be taken to have known that, as a result of such a failure, the loss, damage or delay in delivery would probably result. Servants or agents of the MTO, as well as other persons whom he might engage to perform the multimodal transport contract, would also retain their right to limit liability and could lose it only according to the same rules which apply to the MTO himself. These principles are reflected in article 21.

Paragraph 1: Omissions with the intent to cause loss

The problem of identifying acts or omissions attributable to the MTO himself rather than to his servants, agents or other parties is a much-debated issue. In the law of torts, it is customary to draw a distinction between liability for acts or omissions which can be attributed to a person or a legal entity as such, as distinguished from vicarious liability for acts or omissions by other parties. It becomes particularly difficult to draw a line where the liability of legal entities is concerned and this, of course, is the normal situation in the law of carriage of goods. Generally speaking, as such, the acts or omissions in order to be attributed to the legal entity must take place on the managerial level, that is,it should be possible to blame the managers of the company for failure to establish proper administration and routines in their company and for failure properly to choose and supervise their employees. Since the liability of the MTO according to article 15 includes the vicarious liability for servants, agents and sub-contractors, it is not easy to observe the distinction between acts or omissions attributable to the MTO as such, as distinguished from acts or omissions attributable only to servants, agents and sub-contractors for the purpose of applying article 21. One has to return to article 15 where it may be noted that there is, indeed, an exception to the vicarious liability of the MTO when determining such acts or omissions which would result in a loss of his right to limit liability. This appears from the introductory words to article 15: "subject to article 21".

Paragraph 2: Independent contractors

The loss of the right to limit liability occurs in the same manner for the MTO's servants or agents as for other persons engaged in the performance

of the multimodal transport contract. This means that independent contractors may well come into a better position than would have been the case by the application of the rules which would have applied if the claimant would have made an independent contract with them. The wording of article 8 of the Hamburg Rules is slightly different from the wording of article 21 when read in conjunction with article 15 of the MT Convention, since no distinction is made in the Hamburg Rules between acts or omissions of the carrier himself as distinguished from acts or omissions of his servants or agents. Further, no reference is made in the Hamburg Rules to independent contractors but only to servants or agents (article 7 (2)). Nevertheless, it is reasonable to assume that the carrier would ***not*** lose his right to limit liability under the Hamburg Rules unless the blameworthy behaviour could be attributed to someone on the managerial level, that is the MTO "himself". This issue was much debated during the preparatory meetings with UNCITRAL and a majority view restricting the loss of the right to limit liability as aforesaid can be found in the minutes of these meetings.

However, it is not certain how the matter will be resolved in different jurisdictions, since the inclination to interpret the text of an international convention by reference to the preparatory work may well vary from country to country. Nevertheless, the modern trend towards "unbreakable" limits may also contribute and result in an interpretation of the Hamburg Rules in the same manner as that which follows from the MT Convention. Such an attitude would contribute to achieving consistency between the two conventions. With respect to the difference regarding the position of independent contractors, it is probable that the factual difference between the Hamburg Rules and the MT Convention will remain, at least to a certain extent. While some independent contractors may well be offered the same protection with respect to liability as the carrier himself under the Hamburg Rules, such protection may perhaps not be extended to include every person which the carrier might engage in order to perform his contract for carriage of goods by sea, particularly if that contract were extended to include warehousing and services ancillary to the carriage of goods by sea. On the other hand, it follows from the very nature of the multimodal transport contract, and from the concept of transport integration, that no distinction should be made between the personnel employed in the organization of the MTO and other persons employed for the performance of the contract. If claimants were permitted to direct their claims against the subcontractors of the MTO and upon other terms than those stipulated in the multimodal transport contract itself, this would indeed lead to intolerable complications.

Part IV: Liability of the consignor

Article 22: Liability of the consignor - the main principle

It has already been said that the consignor is responsible for the information submitted to the MTO for the purpose of completing the MT document and that he has a duty to indemnify the MTO for any financial loss which the MTO might incur through claims resulting from the consignee having relied on the correctness of the information in the document. As stipulated in article 12, this is a guarantee by the consignor; liability arises even though the consignor might have acted in good faith believing that the information was correct. He cannot avoid liability by proving that no fault or neglect has occurred on his part or on the part of his servants or agents. Article 22 of the MT Convention contains, in addition, a general rule on the liability of the consignor for any loss sustained by the MTO.

The primary purpose of article 22 is to protect the MTO from physical damage which might occur as a result of the condition of the goods. In many jurisdictions, the consignor is taken to have guaranteed not only the correctness of the information relating to the goods but also their fitness for carriage (implied warranty). However, article 22 of the MT Convention makes it clear that the liability of the MTO is not based on such a warranty but on the general principle of negligence. Thus, any stipulation in the multimodal transport contract purporting to make the consignor strictly liable for physical damage resulting from the nature of the goods would be invalid unless the goods could be considered dangerous by their nature (see further the comments to article 23). The same principle of negligence which applies to the liability of the consignor himself also governs the liability of his servants or agents in case a direct action is instituted against them. Under most jurisdictions, the result would have been the same by the application of general principles of non-contractual liability (liability in tort).

It should be observed that the consignor or his servants or agents do not enjoy any limitation of liability. At first sight, this might seem unjust considering the fact that the liability of the MTO is limited. However, the liability of the MTO relates to specific circumstances, such as the assumed value of the goods and the expected transit time, while the potential liability of the consignor is impossible to determine in advance. This means that the liability of the consignor might reach very high levels, as for instance in the case when a ship has sunk as a result of inadequate stowage of the goods by the consignor inside a container which came loose and

penetrated the ship's hull. It is, therefore, of vital importance for the consignor to cover himself by adequate insurance. In some cases, general insurance cover for liability to third parties might suffice (this depends on the exact wording of the clauses of such an insurance contract), while in other cases, special insurance would normally be purchased.

Article 23: Special rules on dangerous goods

General remarks

While the consignor's liability, according to the general rule on liability in article, 22 is based upon the general principle of negligence, article 23 introduces a principle of strict liability with respect to loss resulting from dangerous goods. In many jurisdictions, hazardous - or at least ultra-hazardous - activity would give rise to such a strict liability based on the theory that the enterprise carrying on such an activity should also fully accept the negative consequences following therefrom, which, it is thought, could be set off against the benefits. This principle has to some extent influenced liability rules between neighbours as well as those for the protection of the environment and potential traffic victims. In a sense it could be said that the particular liability rules for dangerous goods within transport law is a specific branch within the wider area of product liability. Efforts to establish a particular legal regime during the carriage of so-called hazardous and noxious substances (HNS) have resulted in draft conventions which have been elaborated under the auspices of the International Maritime Organization (IMO) (carriage of dangerous goods by sea) and by UNIDROIT/ECE (carriage by other modes of transport). During the preparatory discussions on these draft texts, efforts were made to distribute fairly between shippers and carriers the risk for loss or damage caused by HNS. These efforts have not yet been successful, partly owing to the difficulties in reaching agreement between the various interests involved, partly owing to technical problems. The particular liability regime for oil pollution has, however, resulted in two international conventions, namely the 1969 Civil Liability for Oil Pollution Convention (CLC) and the 1971 Fund Convention. These two conventions have recently been revised through protocols, and although the two conventions are in force, the protocols are not.

Detailed administrative regulations apply to carriage of dangerous goods by the various modes. Unfortunately, these regulations differ, as a particular set of rules would apply to each specific mode. This could create particular difficulties for multimodal transport operations, since all the different rules applying to the modes covered by the multimodal transport

contract may have to be observed. Article 23 of the MT Convention expresses a fairly general principle in the law of carriage of goods.

Paragraph 1: Labelling of dangerous goods

Article 23 (1) sets forth the general obligation of the consignor to mark or label the goods "in a suitable manner". This means that, whenever particular regulations apply to the marking or labelling of the goods for individual modes of transport, such regulations must be thoroughly observed.

Paragraph 2: Need to inform the carrier of the nature of the goods

The purpose of the consignor's obligation appears even more clearly in article 23 (2), which stipulates that the consignor has a duty to inform the carrier and, further, a duty to indicate any precautions that might have to be taken with respect to the dangerous goods. Such precautions will frequently take the form of a particular card which should be available to the carrier so that he would know what to do if something goes wrong. If the MTO, as a result of the consignor's failure to inform him properly, does not know that the goods are dangerous, the consignor will be strictly liable to the MTO for all loss that might result from the shipment of the dangerous goods (article 23 (2) (a)). Further, the goods may at any time be unloaded, destroyed or rendered innocuous when this is necessary in order to avoid that loss occurs or becomes aggravated. In this situation, the MTO would avoid paying compensation for what may have happened to the dangerous goods.

Paragraph 3: Carrier's knowledge of the nature of the goods

If, however, the MTO or some other person has taken the goods in his charge with knowledge of their dangerous character, then the consignor's liability will not be engaged and the goods may not be unloaded, destroyed or rendered innocuous without the duty of such a person to pay compensation. In some jurisdictions, such knowledge on the part of the person concerned would constitute a fact - a *novus actus interveniens* - which would break the causal relation between the consignor's failure to inform and the loss or damage.

Paragraph 4: Obligation to contribute to general average

Article 23 (4) deals with the situation where actual danger to life or property arises as a result of the dangerous goods. Needless to say, actions must then be taken to prevent injury, loss or damage from occurring and, for this purpose, the dangerous goods may be unloaded, destroyed or rendered innocuous. In such cases, the saved interests (ship, freight and cargo) would have to pay their respective *pro rata* amounts (general average). However, this does not preclude that compensation might be payable by way of the MTO's liability in accordance with the liability provisions of the MT Convention.

Part V: Claims and actions

Article 24: Notice of loss, damage or delay

General remarks

It is common practice to require comparatively short periods within which notices of various claims should be given to the carrier. Also, in current transport documents, it is quite usual to stipulate that late notice will result in a loss for the claimant to claim against the carrier, for example, the same effect which follows from the lapse of the time required for the institution of legal action against the carrier. In the same manner as in the Hamburg Rules, the MT Convention by article 24 protects the claimant by stipulating that a late notice will only result in *prima facie* evidence that no loss or damage has occurred. Since the burden of localizing loss or damage to the carrier's period of responsibility lies with the claimant anyway, the *prima facie* rule is a rather modest sanction for late notice. Even without such a provision, it would go without saying that the claimant, in most cases, would find it difficult to convince the carrier or a court of law that damage or loss is attributable to the carrier rather than to circumstances which might have occurred subsequent to the delivery of the goods. It is, however, important to note that in two cases a late notice may result in a loss of the right to claim against the carrier. Firstly, there is a special rule with respect to loss resulting from delay in delivery where no compensation is payable if notice has not been given within a 60-day period (see further below the comments to article 24 (5)). Secondly, notification stating not only the general nature of loss or damage but also the main particulars of the claim must be given within a six-month period and if this has not been done the claimant will lose his right to claim (see further the comments on article 25 below).

Paragraphs 1 and 2: Notice of loss or damage

In article 24 (1 and 2), a distinction is made between cases where the loss or damage is apparent and where it is not. In the former case, a notice specifying the general nature of the loss or damage should be given in writing to the MTO not later than the working day following the day when the goods were handed over to the consignee. In the latter case, notice should be given within six consecutive days after the day when the goods were handed over to the consignee. It should be observed that under the Hamburg Rules the period is extended to 15 days. The shorter period in the MT Convention was deemed necessary in order to give an MTO not being identical with the actual carrier the possibility to pass on notice in time to the actual carrier who may be responsible for the loss or damage.

Paragraphs 3 and 4: Surveys

In article 24 (3) the "in writing requirement" is suspended when the goods at the time of delivery have been subjected to a joint survey or inspection of their state. In article 24 (4), the parties are required to co-operate so that reasonable facilities are made available for inspection and tallying of the goods.

Paragraphs 5 and 6: Notice of loss resulting from delay

The particular stipulation with respect to loss resulting from delay in delivery appears in article 25 (5). Here, a notice in writing to the MTO is required within 60 consecutive days. If this stipulation has not been observed, "no compensation shall be payable" for such loss. In fact, this is the most important provision in article 24, since failure to observe the other notice requirements only results in a *prima facie* evidence that no loss or damage has occurred engaging the liability of the MTO. The 60-day period is counted either from the time when the goods were handed over to the consignee or, if no such transfer has taken place, from the time when the consignee has been notified that the goods have been placed at his disposal (article 14 (2) (b) (ii)) or have been delivered to an authority or other third party (article 14 (b) (iii)).

In cases where the MTO wishes to claim for loss or damage against the consignor, he is also required to give notice in writing. Such notice shall be given not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with the delivery provisions of article 14 (2) (b), whichever is later. It may be debatable what is meant by "occurrence" of loss or damage. If loss or damage occurs while the goods are in the possession of the MTO - for

example, dangerous cargo inflicting damage on the MTO's property - then the time of this casualty starts the running of the 90 days period. If the MTO is held liable by third parties, however, it is not quite clear whether "occurrence" refers to the financial loss caused to the MTO by the claim or, alternatively, to the occurrence of the physical loss or damage. If such claims from third parties are notified later than 90 consecutive days after the delivery of the goods to the MTO, the time for the notice of loss or damage by the MTO to the consignor has elapsed. Anyway, this results only in *prima facie* evidence that the MTO has sustained no loss or damage engaging the liability of the consignor. With respect to claims from third parties against the MTO it should be possible for the MTO to present evidence necessary for idemnification by the consignor, since such evidence would be necessary for the claim brought by the third party concerned.

Paragraph 7: Termination on a non-working day

The periods mentioned in the article are consecutive and are not interrupted by holidays. However, if the period expires on a day which is not a working day at the place of delivery then it is extended to the next working day, according to article 24 (7).

Paragraph 8: Notices to others

Notices can be given not only to the MTO or the consignor himself but to other persons authorized to receive notices on his behalf. The article does not specify how such authorization should be established but presumably it would suffice that notices be sent by letter or telex to the address of the MTO or the consignor, as the case may be. Caution is required when notices are sent to other persons under the assumption that they will be deemed authorized according to article 24 (8). Anyway, since the failure to give notice, except with respect to claims for loss resulting from delay in delivery, results only in a *prima facie* evidence effect, the fact that notice has been given, although to the wrong person, may carry some weight as evidence presented in order to rebut the *prima facie* effect.

Article 25: Limitation of actions

Paragraph 1: Time bar

As in the Hamburg Rules, the MT Convention stipulates a two-year period within which legal proceedings have to be instituted in order to keep

the claim from being time-barred. Under the Hague Rules and the Hague/Visby Rules, the corresponding period is only one year, this is also the normal period under the international conventions relating to carriage of goods by road and rail (CMR and CIM). The two-year period corresponds to the provisions regarding a time bar under the Warsaw Convention for Carriage of Goods by Air. While the Hague Rules and the Warsaw Convention contain time bar provisions only with respect to claims against the carrier, the Hamburg Rules and the MT Convention refer to "any action" relating to the carriage concerned; this, therefore, would include also claims ***by*** the carrier against the consignor, for example, claims for freight money. Thus, in the rather frequent situation where the consignor withholds payment of freight, invoking his alleged claim for loss or damage as a counter-claim, he would not risk that the latter claim becomes time-barred or that he would lose his right to offset such a claim against his obligation to pay freight.

Paragraphs 2 and 3: Limitation period

However, it should be observed that the "action" must relate to international multimodal transport under the MT Convention and nothing else. In article 25 (2), it is stipulated that the limitation period commences to run on the day after the day when the MTO has delivered the goods or, where goods have not been delivered, on the day after the last day on which they should have been delivered.

As is customary in transport law, institution of legal proceedings is required in order to break the time bar. Such proceedings may be either before ordinary courts of law or an arbitral tribunal (see further below). Actions which do not relate to the multimodal transport under the MT Convention fall outside he time bar provision. This means that, if the MT Convention does not apply, the action may come under another legal regime providing for a different period, for example, the one-year period of the Hague or Hague-Visby Rules. If no mandatory provisions apply, the parties are free to agree on an even shorter period, provided it is not unreasonably short, in which case it may be set aside under the applicable national law as an unconscionable contract term (see, for a shorter period the FIATA negotiable combined transport bill of lading where the period is nine months). It is very important to observe that in order to preserve the claim, a notification in writing is required stating the main particulars of the claim. Such notification has to be given within six months. Although, under the MT Convention, the claimant has a number of optional places where legal action might be instituted, it may happen that the action is instituted before the wrong forum. It has been much debated whether such an action would be sufficient to break the time bar under the theory

that the MTO has at least been duly notified of the claim. The answer may differ in different jurisdictions.

The parties may agree to extend the limitation period but this must be done by an agreement in writing. Since this is a concession by the person against whom a claim is made, the MTO or the consignor as the case may be, it is sufficient that he would make such a declaration of extension unilaterally to the claimant. The period may then be further extended by similar declarations. In some jurisdictions, it has been held that an agreement on the extension of the time bar could be implied through the conduct of the party against whom a claim is made, for example, an acknowledgement that the claim has been received and a promise to respond with an answer. The "in writing requirement" would seem to forestall such assumptions. It should be observed that the mere fact that a claim has been made, without having been rejected by the person receiving such a claim, does not interrupt the running of the period (for a contrary solution, see CMR article 32).

Paragraph 4: Limitation periods for actions against sub-contractors

Under a multimodal transport contract, it is quite frequent that the MTO would use a number of other parties as sub-contractors. If such a sub-contractor is protected by a time bar, which may well have a shorter period than that under the MT Convention, it may happen that the MTO, when a claim is made on him within the two-year period, would have lost his opportunity to claim indemnification from his sub-contractor. For this reason, article 25 (4) provides that a recourse action should be possible even after the expiry of the limitation period under the MT Convention, provided there is such a possibility under the applicable law. Contracting States must observe that the additional period for recourse action is not less than 90 days. This period commences either when the person exercising his right of recourse has settled the claim or been sued. It should be observed that the MT Convention does not extend limitation periods which may apply according to other applicable international conventions. Article 25 (4), in its introductory phrase, contains a reminder to this effect. The practical case for an extension of the applicable period under the MT Convention in order to allow a recourse action is the case where a non vessel-operating MTO, having contracted for a multimodal transport with a vessel-operating MTO, would institute a recourse action against him, since in such a case both would fall under the MT Convention as contracting and actual carriers respectively.

Article 26: Jurisdiction

General remarks

General conditions of carriage frequently contain jurisdiction clauses whereby claimants are restricted to bringing action against the carrier only in the carrier's principal place of business. Such jurisdiction clauses are not always upheld by courts of law since it is feared that the clauses may sometimes be used to circumvent mandatory law.

Paragraph 1: Place of forum

It follows from article 26 (1) that the claimant has no less than four options of places in which to institute proceedings, namely:

(a) the defendant's principal place of business;

(b) the place where the contract was made, provided that the defendant has a place of business there through which the contract was made;

(c) the place of taking the goods in charge for the international multimodal transport or the place of delivery; and

(d) any other place agreed upon provided it is evidenced in the MT document.

Paragraphs 2 and 3: Additional fora

Article 26 (2) provides that the claimant is restricted to the options mentioned in the text. However, the claimant may address himself to the jurisdiction of the Contracting States for provisional or protective measures, for example, seizure of property belonging to the defendant. After a claim has arisen, the parties are free, according to paragraph 3, to agree on another place for the institution of an action than those provided for in article 26 (1).

Paragraph 4: Restriction of actions

In order to prevent multiple actions in different places, article 26 (4) provides that no new action can be instituted between the same parties on the same grounds where an action has already been instituted in accordance with article 26 *(lis pendens)*. However, as has been said, if a judgement

in the first action is unenforceable in a particular country, new proceedings might be started elsewhere. Article 26 (4) (b), clarifies that it is not considered a new action when measures are taken to obtain enforcement of a judgement or when an action within one and the same country is removed from one court to another.

Article 27: Arbitration

General remarks

Arbitration clauses are rather unusual in multimodal transport contracts. However, there is a growing trend in international transport to refer cases to arbitration. This is partly owing to the necessity for courts of law to give priority to matters of greater public concern over the settlement of disputes between private parties. For this reason, the MT Convention allows arbitration clauses in the same manner as the Hamburg Rules. However, arbitration clauses must not be used to circumvent the protection intended for the claimant under article 26 dealing with jurisdiction. For this reason, the same options available to the claimant according to article 26 are also available under article 27.

Paragraphs 1, 2 and 3: Arbitration agreement

According to article 27 (1), the arbitration agreement must be in writing, but it does not have to be a separate agreement. Such an agreement may be contained in the general conditions of carriage or in the MT document. There is no specific need to state in the MT document that the arbitrators shall apply the MT Convention, since article 27 (3) provides that they are called upon to do so. The provisions contained in article 27 (2) and (3) are deemed to be a part of every arbitration clause or agreement.

Paragraphs 4 and 5: Validity of arbitration

If there are terms in such clauses or agreements which are inconsistent with the provisions mentioned, then such terms shall be considered null and void. However, the arbitration agreement as such is still valid although modified so as to conform with the provisions of article 27. Most procedural rules on arbitration provide that the arbitration award is final and without appeal unless there has been some grave fault committed during the proceedings such as refusal to offer a party proper opportunities to present his case, insufficient notification, failure to rule on an essential point or ruling on points which have not been raised by the parties or an

award contrary to public policy. The New York Convention of 1958 similarly restricts the possiblity to set aside an arbitration award merely because the arbitrators might have applied the law incorrectly. Thus, as far as the application of the law of substance is concerned, the arbitration award is without appeal in most countries. This raises the question of what the effect would be if the arbitrators fail to observe the provision in article 27 (3) that they should apply the provisions of the MT Convention. Most probably this would not be sufficient to shake the finality of the award. If, exceptionally, the award were considered contrary to public policy in the country of enforcement, this may result in an unenforceable award. The party adversely affected by such unenforceability would probably then be permitted to seek a remedy under article 26 on jurisdiction. Again, one is then faced with the problem of deciding whether the institution of the action before the arbitrators, which led to an unenforceable award, at least should be considered sufficient to break the time bar. It is submitted that this must be so. Otherwise, the claimant would be denied his remedy, since he could not be presumed to know that the arbitrators would apply the MT Convention incorrectly.

In the same manner as stipulated in article 26 (3), the parties may agree on arbitration in any place which they find suitable after the claim has arisen.

Part VI: Supplementary provisions

Article 28: Contractual stipulations

General remarks

Although mandatory conditions prevail within the field of transport law, clauses contrary to such stipulations exist. Article 28 sets forth some of the fundamental principles according to which one should deal with invalid clauses.

Paragraphs 1 and 2: Invalid clauses

First, in article 28 (1), it is stipulated that the fact that there are invalid clauses in a transport document would not affect the validity of the other provisions of the contract or of the document itself. Since the stipulations of the MT Convention are mandatory, it follows automatically that contrary provisions can be given no effect. It is not possible to circumvent mandatory law by a so-called "benefit of insurance clause" stating that re-

course actions by companies having insured the relevant claim are disallowed. If such clauses were upheld it would mean that, in fact, the defendant would obtain a benefit from the other party's insurance without having paid anything for this benefit. However, there is nothing to prevent agreements between the insurer and the potential defendant that he should be co-insured in the other party's insurance. In fact, such an arrangement may well be recommended in order to facilitate claim settlements. It is also quite possible for the MTO himself to arrange for insurance on the goods and offer this as a package deal to the consignor who could then dispense with insurance during the period when the MTO has the goods in his charge. Such protection is offered in some countries under the name of "transport guarantees".

Another method of improving protection for the consignor could be voluntarily to increase the responsibilities and obligations of the MTO under the convention, for example, by raising the limits and/or by removing defences to the claim.

Paragraph 3: Mandatory adherence to the MT Convention

In article 28 (3), it is stipulated that the MT document must contain a statement that the international multimodal transport is subject to the provisions of the Convention. Until the MT Convention has obtained status as the main, if not exclusive, legal regime covering international multimodal transport, this provision may cause some practical difficulties. It may well be that competing legal regimes would contain the same requirement which may result in a kind of conflict between reference clauses. A possibility of avoiding such conflict would be to refer to the MT Convention only when it applies compulsorily, but this would in turn defeat the aim of the MT Convention of becoming applicable even when it does not apply except by reference. For this reason, it is recommended that the reference clause contained in the MT document should be "clean" and unrestricted.

Paragraph 4: Sanctions for not complying with the Convention

A much-debated issue concerns the appropriate sanctions where the stipulations of article 28 have not been observed. That an invalid clause is invalid goes without saying, but should there be other sanctions? And what about the case when the MTO has failed to refer to the MT Convention as stipulated in article 28 (3)? In article 28 (4), sanctions are introduced against the failure to observe the stipulations of article 28 (1) and (3). The first sentence of article 28 (4) merely says that an invalid clause is invalid. The second sentence has more substance. An invalid clause

may in exceptional cases cause a claimant to take measures under the false assumption that the clause is valid. This may result in unnecessary costs which could be reclaimed according to article 28 (4).

Article 29: General Average

General remarks

The classic example of a general average act is the jettison of cargo in order to take a ship off ground by reducing its draught. In this case, the ship is saved to the benefit of its owner and for that reason the loss suffered by the cargo owner, although not engaging the liability of the shipowner, must be distributed fairly between the cargo and the ship according to values. Another example would be that the ship after an incident or casualty becomes unseaworthy or cannot proceed owing to breakdown of its machinery. In this case, it might be necessary to proceed to the nearest convenient port for temporary repairs before continuing the voyage. The extra costs arising because of this would be to the benefit of the ship and the cargo and will consequently be similarly distributed according to the respective values. Whenever a maritime segment is included in the multimodal transport contract, the rules relating to general average may become relevant.

Paragraph 1: Reminder that general average may be declared

As has been said, the parties to an international multimodal transport contract may well, in the same manner as parties to a unimodal contract for carriage of goods by sea, be subject to the law of general average. For this reason, MT documents and general conditions of carriage frequently contain clauses referring to the 1974 York/Antwerp Rules on general average; the MT Convention contains, in article 29, a reminder to this effect.

Paragraph 2: Inapplicability of the time bar according to article 25

It should be noted that the MT Convention does not contain any regulation on general average but merely a reminder that such adjustment may take place. The York/Antwerp Rules, in Rule D, determine that a party having had to pay general average contributions may recover these from any liable party. If the MTO is the liable party, his liability follows from the provisions of the MT Convention and these will then also determine to what extent he may "refuse contributing in general average". This, in a sense, is incompatible with the law of general average which would first

require the party to pay and then seek indemnification if liability exists. In this respect, the MT Convention supersedes the normal principles of general average. The introductory phrase to article 29 (2) "with the exception of article 25" signifies that the particular provisions on a time bar do not apply to the defence against contributing in general average which would prevail even when the two-year period has expired.

Article 30: Other conventions

General remarks

As has already been said above, a number of other conventions may apply even though a contract for international multimodal transport has been made. This is evidenced by article 30.

Paragraph 1: Convention on limitation of liability

In article 30 (1), reference is made to the right of owners of seagoing vessels to limit their liability according to the applicable conventions of 1924, 1957 and 1976 as well as according to the particular convention of 1973 relating to owners of inland navigation vessels. Where States have not ratified those conventions, but still apply the same principles according to their national law, the provisions of such national law shall also apply.

Paragraphs (2) and (3): Conventions dealing with arbitration

In article 30 (2) reference is made to international conventions dealing with jurisdiction and arbitration to which States may be parties. In these cases, the provisions of such conventions have to be respected, although the main principle that arbitrators shall apply the provisions of the MT Convention should always govern (see also discussion concerning the legal effect of a failure to observe this obligation above). In article 30 (3) an exception has been made with respect to liability arising under conventions dealing with liability for nuclear damage.

Paragraph 4: CMR and CIM

Although it is disputed to what extent a conflict of conventions exists between the provisions of the MT Convention and the unimodal conventions dealing with carriage of goods by road and rail (CMR and CIM, respectively), article 30 (4) explicitly provides that unimodal contracts according to those conventions will not be considered as international multimodal transport subjecting the contract to the MT Convention. As has been said above, the question of whether a particular contract of carriage should be considered unimodal or multimodal will depend on an analysis of the express provisions of the contract and, failing such expression, of the presumed intention of the contracting parties.

Article 31: Unit of account or monetary unit and conversion

In article 31 the unit of account used for assessing the limitation amount which the MTO may invoke has been specified. Normally, that unit of account is the Special Drawing Right as defined by the International Monetary Fund.

It should be observed that the Special Drawing Right only serves to convert the unit of account into the respective national currencies and that it does not, as a particular quantity of gold, reflect the deterioration of the value of money owing to inflation. As stipulated in article 31 (1), States which are not members of the International Monetary Fund must themselves determine the manner in which the unit shall be converted into their national currencies. Further, such States may alternatively by reservation declare that the unit of account should instead correspond to 13,750 monetary units per package or other shipping unit or 41.25 monetary units per kilogramme, or with respect to non-maritime multimodal transport, 124 monetary units. These montary units, according to article 31 (3) incorporate the so-called Poincaré franc referring to a certain quantity of gold.

Part VII: Customs matters

Article 32: Customs transit

Since it is of vital importance for multimodal transport that the goods may proceed to destination without being interrupted for Custom inspection purposes upon the entry into the country of destination, Contracting States undertake to observe the rules and principles in the articles contained in the Annex to the Convention. This obligation, however, is subject to whatever national law or regulations or intergovernmental agreements which such States may already be subject.

Although, as stipulated in article 32 (2), Contracting States do not have to denounce any international Customs conventions or modify their national law or regulations, they should observe the principles expressed in

the Annex when introducing new laws or regulations in respect of Customs transit (article 32 (3)).

Part VIII: Final clauses

Article 33: Depositary

Pursuant to article 33, the depositary of the MT Convention is the Secretary-General of the United Nations. Thus, a State wishing to become a contracting party to the MT Convention must deposit its instruments of ratification or accession with the Secretary-General.

Article 34: Signature, ratification, acceptance, approval, accession

The Convention was open for signature until 31 August 1981. During that period it was signed, subject to ratification, by a total of six States.[260]

By article 34 (2) States which had signed the Convention (before 31 August 1981) may ratify, accept or approve it.

Pursuant to article 34 (3), the MT Convention has, since 1 September 1981, been open for accession by all States which are not signatory States.

Article 34 (4) specifies that instruments of ratification, acceptance, approval or accession must be deposited with the Secretary-General of the United Nations.

Article 35: Reservations

Article 35 provides that no reservations may be made to the MT Convention. In this the Convention follows the Hamburg Rules. The making of reservations by Contracting States to an international convention reduces the effectiveness and uniform application of the convention.

Article 36: Entry into force

The MT Convention will enter into force one year after ratification or accession by 30 States. As of 31 January 1991, five States had ratified or acceded to the Convention.[261]

260 Chile; Mexico; Morocco; Norway; Senegal; and Venezuela.

261 See footnote 39.

Article 37: Date of application

The MT Convention contains an article which makes the provisions of the Convention mandatorily applicable to all multimodal transport contracts concluded after the entry into force of the Convention in each Contracting State. There is therefore an obligation to amend such national rules, whatever their source, which conflict with it.

Article 38: Rights and obligations under existing conventions

This article deals with situations where juridical or arbitration proceedings are brought in a Contracting State relating to multimodal transport subject to the Convention taking place between two States of which only one is a Contracting State, but where both States at the time of the entry into force of the Convention are also bound by another international convention. It has been said that this article is an "escape route" for those who believe that there may be a conflict of conventions. The ability of courts or arbitrary tribunals to give effect to such other conventions is facultative.

Article 39: Revision and amendment

Paragraph 1: Amendment to the Convention

Article 39 establishes procedures for revising or amending the MT Convention. As is common in international conventions, the depositary is required to convene a revision conference at the request of one third of the Contracting States. Contrary to article 32 (1) of the Hamburg Rules, article 39 (1) of the MT Convention allows the Secretary-General of the United Nations to call such a revision conference only *after* the Convention has entered into force.

Paragraphs 2 and 3: Majority required

The provisions of this article are considerably more detailed than those of article 32 of the Hamburg Rules. Paragraph 2 specifies, for example, that amendments can be decided only by a two-thirds majority of the States present and voting while paragraph 3 provides that an amendment enters into force only in those States which have accepted it.

Paragraph 4: Changes in the liability amounts

Paragraph 4 deals with changes in the amounts of limits of liability and the units of accounts.

Paragraphs 5 and 6: Instruments of amendments

Paragraphs 5 and 6 say that acceptance of amendments must be effected by the deposit of a formal instrument to that effect with the depositar and that such instruments shall apply to the Convention as amended. Should a State become a contracting party to the Hamburg Rules after the entry into force of an amendment to it, the Convention, as amended, is deemed to apply to that State.

Article 40: Denunciation

The text of this article is almost identical to article 34 of the Hamburg Rules.

Concluding paragraphs

Languages

The concluding paragraph of the Convention states that the Rules were done "in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic". For a discussion of the merits or shortcomings of this procedure, please see the comments under article 34 of the Hamburg Rules above.

Annex

The Annex to article II sets forth that Contracting States shall grant freedom of transit to goods in international multimodal transport and that, as a general rule, such goods should not be subject to Customs examination during transit to their ultimate destination. For this purpose, according to article III, the Contracting States should take measures to ensure that the goods, as a rule, could be cleared at a Customs office of the destination of the goods or, at least, they should endeavour to carry out such clearance at a place as near as possible to the place of final destination of the goods. According to article IV, the goods should not be subject to payment of import/export duties and taxes or deposits in transit

countries. In order to avoid excessive documentation, it is recommended that Customs authorities of transit countries accept the MT document as sufficient description of the goods concerned (article IV).

Notwithstanding these recommendations, it is reiterated many times that the recommendations do not infringe upon obligations which might follow from applicable law and regulations in the States concerned.

Chapter VI

Implications of becoming contracting parties to the Hamburg Rules and the Multimodal Transport Convention

198. This chapter touches on some practical aspects of States becoming contracting parties to the two conventions. By becoming a contracting party to either or both of the conventions, a State indicates quite clearly that it participates in the generally recognized move towards greater uniformity of international transport law. Years of careful work and negotiations have preceded the preparation of the two conventions. Many countries participated in this work and with considerable foresight have adopted the texts in recognition of the shortcomings of the existing liability regimes governing ocean and multimodal (or combined) transport.

199. The procedures for becoming a contracting party to an international convention are well known, yet there appear to be instances where countries have carried out the necessary procedures but where the *Depositary*[262] has not received the instruments of ratification, accession, approval or adherence. This would point towards some incomplete procedures somewhere along the communications chain between capitals and the United Nations headquarters in New York. It may be useful for some countries to review their procedures and to take appropriate action as required. The annex contains a table summarizing the status as of 31 May 1991 for both conventions. Of a total of 26 States which had signed the Hamburg Rules subject to ratification, five have subsequently ratified it. In addition to those five States, fourteen have become contracting parties to it by accession and 21 may still ratify it.[263] As for the MT Convention, six States signed the Convention subject to ratification and, of these, three have subsequently proceeded to ratify it. Another two States have become contracting parties through accession, and three may still ratify it. All other States can only become contracting parties to the two conventions by accession.

200. In the years that have passed since the adoption of the two conventions the ideas underlying their texts have generally become more and more acceptable to the industry; yet, as of mid-1991, neither convention had entered into force. What, then, are the implications for a country wishing to adhere to either of the two conventions?

262 For both conventions, the depositary is the Secretary-General of the United Nations.

263 Only States that, during the period when a convention is open for signature, have signed it "subject to ratification" may do so.

201. An international convention becomes international law only on the day that the convention enters into force. For both the Hamburg Rules and the MT Convention this will happen one year after the day on which the necessary number of contracting parties has been reached, respectively, 20 for the Hamburg Rules and 30 for the MT Convention. Since the Hamburg Rules were open for signature on 31 March 1978, a total of 19 States have become contracting parties to the Convention or about 1.46 contracting parties per year. If this rate of adherence continues, the necessary number of 20 should be reached within 1991 and the Convention will enter into force in 1992. A similar calculation for the MT Convention would show this Convention not coming into force until well into the next century. However, such extrapolation could be erroneous since many countries have held back on the ratification procedure in the belief that there would be no point in accelerating the entry into force of the MT Convention unless the Hamburg Rules were already in force. It may consequently be assumed that the ratification process of the MT Convention will speed up once the Hamburg Rules have entered into force.

202. In order to be able to advise potential contracting parties of specific actions taken by States already contracting parties to either or both of the conventions, the secretariat had asked the contracting parties what specific actions they had taken to incorporate the texts of the two conventions into their national legislation. Unfortunately, responses have been limited, and it is thus not possible, at this stage, to discern a definite pattern. However, it is the understanding of the secretariat that for the States which have become contracting parties to either or both of the two conventions, different procedures have been adopted. Some have already incorporated the conventions into their national maritime codes either by reference or by copying their text in the appropriate law; others have incorporated parts of the texts; and still others have incorporated the texts but have added a suspension clause that continues the previous liability regime until the Convention(s) become(s) international law, that is when they come into force internationally. Finally, some countries have done nothing as yet towards incorporating the texts into their national legislation.

203. These various approaches reflect the different policies of the countries concerned and may serve as a guide for other countries contemplating becoming contracting parties to the conventions.

204. Although a convention becomes international law only on the day that it enters into force, individual legislation can make a convention applicable in trades from and to a country, should the country so desire.[264] In the case of the Hamburg Rules, this had happened already on 1 January

264 It is of course also possible to make a convention applicable by contract by incorporating a suitable wording in the contract of carriage (the MT document).

1981 when the Barbados Carriage of Goods by Sea Act came into force. This Act incorporates, in its chapter 307, the full text of the United Nations Convention on the Carriage of Goods by Sea. Similarly, Tunisia, on 17 January 1981, Morocco, on 14 November 1986, and Egypt, on 3 November 1990, incorporated the full text of the Convention in their respective national legislation. Chile, on the other hand, has incorporated most, but not all of the Hamburg Rules as well as articles 1 and 5 of the MT Convention in its Law No. 18.680. Furthermore, Chile's Law No. 18.680 contains two "transitory articles" which have the effect of retaining the Hague Rules' article IV exemptions until the Hamburg Rules enter into force internationally.

205. The immediate implications of becoming a contracting party to either or both of the conventions will thus to some extent depend on the consequent action taken by the government of the contracting State. The situation differs depending on which convention a country decides to adopt.

(1) If it ratifies or accedes to both conventions then it may proceed along one of three paths:

   (a) It may incorporate the text of the conventions in its national legislation and bring the Conventions into force immediately;
   (b) It may incorporate the text of the conventions in its national legislation but suspend all or part of their provisions until the Convention(s) enter(s) into force internationally; or
   (c) It may do nothing, awaiting the entry into force of the Convention(s) internationally;

(2) If a country becomes a contracting party only to the Hamburg Rules it will have the same three choices outlined above, but it will then also have to consider whether at a later stage it should become a contracting party to the MT Convention. There is no practical reason why a country could not very well adhere only to the Hamburg Rules and not to the MT Convention;

(3) If it becomes a contracting party only to the MT Convention it must, apart from having the three choices outlined above, seriously consider the consequences of not having become a contracting party to the Hamburg Rules described above in paragraphs 102 and 167 above.

206. The consequences of the first choice suggested above will at first be that initially the legal regime of the country may differ from that of most other countries. However, as soon as the convention in question

enters into force internationally, the situation will change as more and more countries adopt the new legal regime.

207. The ramifications of the second choice will be more limited, depending on the extent to which parts or all of the Convention have been suspended.

208. The consequences of the third choice will be that nothing will change. The existing liability regime will continue until such time as the MT Convention enters into force internationally. On that day, it may be possible to claim, even though the country in question has not altered its national legislation, that the Convention is in force, at least between that country and another contracting party thereto. This would certainly be the case between such a country and a country that had implemented the Convention, for example, Barbados. In all other trades the current liability regime(s) will continue in force; however the country concerned will have given a clear indication of its interest in the modernization of the present liability regime(s). The third option will also allow a country time to adjust its internal procedures to make the new Convention an efficient instrument in its legal machinery.

209. It may be relevant to mention here that there are some countries which, though they have no intention of becoming contracting parties to the two conventions at present, have nevertheless incorporated parts of one or both conventions into their current maritime legislation.

210. Since the entry into force of the Hamburg Rules in the near future is certain, both contracting parties and countries trading with contracting parties to the Convention should review their maritime legislation in order to prepare for the new situation. The UNCTAD secretariat is prepared to assist with this task, within its available resources, to help ensure the greatest possible uniformity of law.

Annex
Status of the Hamburg Rules and the Multimodal Transport Convention

STATE	United Nations Convention on the Carriage of Goods by Sea ("the Hamburg Rules")		United Nations Convention on International Multimodal Transport of Goods	
	Signature (subject to ratification)	Ratification (R) Acceptance (A) Approval (AA) or accession (a)	Signature (subject to ratification)	Ratification (R) Acceptance (A) Approval (AA) or accession (a)
Austria	30.04.79			
Barbados		02.02.81(a)		
Botswana		16.02.88(a)		
Brazil	31.03.78			
Burkina Faso		30.03.89(a)		
Chile	31.03.78	09.07.82(R)	09.07.81	07.04.82(R)
Czechoslovakia	06.03.79			
Denmark	18.04.79			
Ecuador	31.03.78			
Egypt	31.03.78	23.04.79(R)		
Finland	18.04.79			
France	18.04.79			
Germany	31.03.78			
Ghana	31.03.78			
Guinea		23.01.91(a)		
Holy See	31.03.78			
Hungary	23.04.79	05.07.84(R)		
Kenya		30.07.89(a)		
Lebanon		04.04.82(a)		
Lesotho		26.10.89(a)		
Madagascar	31.03.78			
Malawi		18.03.91(a)		02.02.84(a)
Mexico			11.02.82	31.03.78(R)
Morocco		12.06.81(a)	25.11.80	
Nigeria		07.11.88(a)		
Norway	18.04.79		28.07.81	

Annex (continued)

STATE	United Nations Convention on the Carriage of Goods by Sea ("the Hamburg Rules")		United Nations Convention on International Multimodal Transport of Goods	
	Signature (subject to ratification)	Ratification (R) Acceptance (A) Approval (AA) or accession (a)	Signature (subject to ratification)	Ratification (R) Acceptance (A) Approval (AA) or accession (a)
Pakistan	08.03.79			
Panama	31.03.78			
Philippines	14.06.78			
Portugal	31.03.78			
Romania		07.01.82(a)		
Rwanda				15.09.87(a)
Senegal	31.03.78	17.03.86(R)	02.07.81	25.10.84(R)
Sierra Leone	15.08.78	07.10.88(R)		
Singapore	31.03.78			
Sweden	18.04.79			
Tunisia		15.09.80(a)		
Uganda		06.07.79(a)		
Tanzania		24.07.79(a)		
United States	30.04.79			
Venezuela	31.03.78		31.08.81	
Zaire	19.04.79			

United Nations Convention on the Carriage of Goods by Sea (the Hamburg Rules), Hamburg 1978

Entry into force: with 20 contracting parties
Status as of 31 May 1991: 19 contracting parties.

United Nations Convention on International Multimodal Transport of Goods, Geneva 1980

Entry into force: with 30 contracting parties
Status as of 31 May 1991: 5 contracting parties.

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