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Bills of lading

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Bills of lading

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ABBREVIATIONS

Organizations

ALAMAR	Asociación Latinoamericana de Armadores (Latin American Shipowners' Association)
CMI	Comité maritime international
ECE	Economic Commission for Europe
IMCO	Inter-Governmental Maritime Consultative Organization

Other abbreviations

A.C.	Appeal Cases
A.M.C.	American Maritime Cases
B.Y.I.L.	British Yearbook of International Law
CIF	Cost, insurance and freight
C.L.R.	Columbia Law Review
COGSA	Carriage of Goods by Sea Act(s)
Com. Cas.	Commercial Cases
Dir. Mar.	Il diritto marítimo
D.M.F.	Droit maritime français
Fed. Rep.	Federal Reporter
FOB	Free on board
J.B.L.	Journal of Business Law
J.P.A.	Jurisprudence du port d'Anvers
K.B.	English Law Reports, King's Bench
Ll.L.R.	Lloyd's Law Reports
N.J.A.	Nytt Juridiskt Arkiv (Supreme Court of Sweden)
N.Z.L.R.	New Zealand Law Reports
P.	English Law Reports, Probate Division
P and I	Protection and Indemnity
Q.B.	English Law Reports, Queen's Bench Division
Y.L.J.	Yale Law Journal

INTRODUCTION

1. The Committee on Shipping, at its third session in April 1969, by resolution 7 (III) established a Working Group on International Shipping Legislation. At its first session, held at Geneva in December 1969, the Working Group adopted its work programme and an order of priorities among the different items. The first priority was given to a study on bills of lading, which, it was agreed, should be considered by the Working Group at its second session, not later than February 1971.[1]

2. The topics for the programme of work on the first priority item, bills of lading, as given in the work programme of the Working Group,[2] are:

"The Working Group shall review the economic and commercial aspects of international legislation and practices in the field of bills of lading from the standpoint of their conformity with the needs of economic development in particular of the developing countries and make appropriate recommendations as regards, *inter alia*, the following subjects:

"(*a*) Principles and rules governing bills of lading, including:
- (i) Applicable law and forum including arbitration;
- (ii) Conflict of laws between conventions and national legislation;
- (iii) Responsabilities and liabilities in respect of carriage of goods;
- (iv) Voyage deviation and delays;

"(*b*) Study of standard forms and documentation, including an analysis of common terms;

"(*c*) Trade customs and usages relating to bills of lading;

"(*d*) Third party interests at ports of call."

3. The list of topics appears to call for the examination of four distinct elements:

(*a*) General problems arising from the functioning of international legislation and practices concerning bills of lading, in particular those relating to the points listed in paragraph 2 above;

(*b*) The more specifically economic and commercial aspects of the problems;

(*c*) The extent to which the international legislation and practices conform with the balancing of equities between the owners and carriers of cargo, with particular concern for the position of the developing countries;

(*d*) The specific provisions the International Convention for the Unification of certain Rules relating to Bills of Lading (The Hague Rules)[3] and associated national laws which seem to give rise to difficulties.

4. In response to the Working Group's wishes, the UNCTAD secretariat has prepared the report which follows. Bearing in mind the misgivings of many countries as to the trends which they discern in the existing maritime laws (e.g., possible bias in favour of any of the parties to the contract of ocean carriage), the secretariat has attempted in this report to clarify the needs and aspirations of shipowners and cargo owners as to their expectations from the contract of ocean carriage in a historical, commercial and economic context. Wherever practicable, attention has been drawn to the special needs of developing countries. Two principal issues required examination:

(*a*) When goods are lost or damaged in the course of ocean carriage, is it always known in which cases the carrier has to pay and in which the loss remains where it falls[4] (on the shipper or his successor (the holder of the bill of lading) or on the underwriter), or is there uncertainty?

(*b*) What conditions of sea carriage are most consonant with public policy and economic needs? This issue could perhaps be broken down into several sub-questions. Should the carrier or the cargo owner bear all of the risk—or should the risk be apportioned between them? If so, how? How fair is the present apportionment of the risk of loss or damage to goods carried by sea? Is the legal protection given to affected interests in contracts of carriage consonant with what these interests may expect today? Are the existing laws so framed that they tend to prejudice the interest of the developing countries? And to what extent can the existing balance of liabilities and immunities under the Hague Rules be changed without causing detrimental economic distortions?

5. It might be helpful at the very beginning to put the issues in realistic terms. Ocean carriers sell a service—transportation—for a reward or price, which is the freight. In calculating the freight for the carriage of the goods, ocean carriers must be assumed to have considered the allocation of liability and the apportionment of risk for their loss as between themselves and the owners of the goods.[5] Among the other relevant factors considered by ocean carriers when they fix freight rates are hull insurance and protection and

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[1] See report of the Working Group on International Shipping Legislation on its first session in *Official Records of the Trade and Development Board, Ninth Session, third part, Annexes*, agenda item 7, document TD/B/289, paras. 17, 26, 27 and 58.

[2] *Ibid.*, para. 31.

[3] The text of the Convention is reproduced in annex I below.

[4] Attention will be drawn in various parts of his report to "uncertain" areas of liability in maritime laws and practices.

[5] Although, where carriers had quoted rates which were said not to cover any "insurance risk" but were "simply for freight", it has been held that they were not thereby relieved from the ordinary liability of carriers (see *Sutton v. Ciceri* (1890) 15 A.C., p. 144). See also T. G. Carver, *Carriage of Goods by Sea*, 11th ed. (London, Stevens and Sons Limited, 1963) vol. I, para. 143.

indemnity (P and I) costs.[6] The problems posed by introducing insurance into the relationship between carriers and cargo owners remain classic in their simplicity, but have proved complex and obdurate of solution. Upon whom do the risks of loss or damage to goods from default, accident or negligence fall—upon the carriers or upon the cargo owners? If they fall upon cargo owners, they cover it by their insurance policy on the goods; if they fall upon carriers (unless they choose to act as their own insurers) they are protected by their Protection and Indemnity Association. The price of the risk is broadly measured by the premium. If the carrier takes the risk, its price will ordinarily be included in the freight. The freight will not only be the carrier's compensation for actually transporting the goods, but will also contain a notional insurance premium element for the risks of carriage undertaken by him.

6. If the "premium" content in the freight overlaps partly or wholly with a cargo insurance premium paid by the cargo owner, so that each covers to some extent the same risk, there will be a double payment for insurance by the cargo owner.[7] Theoretically, the liability of the carrier and cargo underwriter ought to be successive and not co-extensive; where this is not so, economic waste is caused.

7. In this report, the historical development of the status of the ocean carrier and the cargo owner will be examined to see how the present apportionment of their risks and liabilities arose and has changed in the course of time. The practical processes involved in cargo claims settlement procedures will also be examined so as to clarify what happens in the day-to-day handling of claims of carriers and cargo owners against each other. Unless these processes are clearly understood, the interests involved on the one side will not understand the difficulties of the other, or the legal disciplines to which, willingly or unwillingly, they are subject.

8. The method adopted to examine the present position arose from the needs of the situation. What was required was to identify those provisions of the Hague Rules[8] which, through their impact on the distribution of the risks of ocean carriage, as expressed in modern bills of lading, produced an apportionment of equities between carrier and cargo owner that might be considered to be inequitable or unfair. Clearly, in order to do this, information had to be collected from as many interested sources as possible. At the same time, the question had to be considered to what extent national legislation incorporating the Hague Rules, or alternatively, going beyond, or setting aside, certain provisions of those Rules, affected the position. It was also necessary to examine the Rules in their entirety and in detail in order to determine precisely which parts of the Rules were responsible for the difficulties discovered as a result of the inquiries made.

9. This is not meant to be a comprehensive report on bills of lading as such. The object of the present report is to identify aspects of bills of lading that could be considered ripe for review and change. The reason for choosing this particular approach is that well-known and easily accessible textbooks already sufficiently cover the general field of shipping law. To duplicate such textbooks or to get involved in details of technical aspects would have obscured the principal issues.

10. In order to obtain the required information, the UNCTAD secretariat sent questionnaires to Governments, private and public carriers, shippers and consignees, insurers and maritime law associations. Different questionnaires were used, the structure of each depending on the information which the recipient was thought able to supply. The response to these questionnaires was excellent. It was clear that the respondents had made considerable efforts to supply the information requested. However, much of the information needed to satisfy all the purposes of the study could not be supplied because respondents stated that they did not collect or compile the type of information asked for. This kind of answer was received in particular to questions concerning the nature and volume of cargo claims.

11. For the purpose of determining the impact of national laws on the international position, studies by consultants were commissioned. These were designed, on the one hand, to illustrate the differences between countries with a basic civil law tradition and those with a common law tradition. On the other hand, they were also designed to cover different geographical regions. In practice, it was not possible to obtain all of the studies which were desired. Of the thirteen contemplated, only eight could be commissioned, and hence there are inevitably some gaps. However, since two basic studies covering countries with civil law and common law traditions were secured, it was possible to complete the report without any serious lacunae.

12. Material gathered through the channels referred to in paragraphs 10 and 11 above formed the basis for a detailed review of the Hague Rules, including the 1968 amendments. Since these amendments have not yet come into operation, their possible effect had to be assumed and it may be that in practice their effectiveness in removing difficulties will differ from what has been assumed in the report. However, the purpose of the report does not call for the presentation of a detailed analysis of all parts of the Rules. This is the proper function of a textbook on the subject, and in the select bibliography (see annex IV) a number of leading textbooks are cited. In the report, in order to concentrate attention on the possible needs for a

[6] Insurance of the risk of loss or damage to the ship is called "hull" insurance; insurance of the liability of carriers to cargo owners, to crew members and to other third parties is called "Protection and Indemnity" cover (commonly called "P and I" insurance) usually underwritten by shipowners' "Clubs".

[7] i.e., the cargo owner may be paying (*a*) freight which includes the right to claim compensation from the carrier in respect of loss caused by certain risks, and (*b*) a cargo insurance premium which gives the right to claim compensation from the cargo insurers in respect of loss attributable to the same risks.

[8] The Hague Rules (rather than individual *Carriage of Goods by Sea Acts* (COGSA) of different States) were chosen for review because they are the most convenient uniform set of regulations generally applied or understood in most countries.

revision of the Rules, analysis is restricted in two ways. First, it does not cover Rules which in their operation do not appear to give rise to difficulties. Secondly, within the Rules considered it covers only those particular aspects which create difficulties. For example, no attempt is made to cite all leading cases, nor to examine the subtleties of the effects of different judicial decisions.

13. The list of topics for consideration further calls for a review of the "Applicable law and forum, including arbitration", and of the "Conflict of laws between conventions and national legislation". Neither consultants nor respondents to the UNCTAD questionnaire could provide information on the extent of loss caused by the operation of clauses relating to arbitration, jurisdiction or choice of law. Cargo interests, however, stressed that arbitration and jurisdiction clauses caused hardship and inconvenience. While it is self-evident that loss and hardship can be caused to both carrier and cargo interests by the operation of such clauses, these adverse effects could not be assessed in economic terms without information about the frequency of arbitration and litigation, and about the magnitude of loss. Problems caused by the operation of arbitration and jurisdiction clauses are discussed in paragraphs 300 to 304 and 320 to 322. No specific grievances were reported by respondents to the UNCTAD questionnaires in connexion with the topic "Conflict of laws between conventions and national legislation", and therefore this topic is not examined in this report.

14. The list of topics also includes a "Study of standard forms and documentation, including an analysis of common terms" and "Trade customs and usages relating to bills of lading". Respondents to the UNCTAD questionnaires did not point out any specific major difficulties in this regard, and customs, usages, common terms and documents are amply commented upon in the standard textbooks and periodicals. The subject is not, therefore, covered in this report.

15. Two specific points arise from the topics listed for study. The first of these concerns the commercial aspects of the bill of lading. The secretariat was specifically called upon to consider this question. As will be seen from the report, it was concluded that in practice no significant difficulties arose in this regard. However, as a study on this aspect had been specifically called for, an exception was made to the general principle outlined in paragraph 12 above that Rules presenting no difficulties should not be discussed. A specific study was also called for on the economic aspects of the bill of lading. This has been carried out in so far as it was possible. However, it is in this area that major difficulties were encountered, since the statistical data required are not collected by any of the bodies interested in the subject. Consequently, while it became apparent that an economic problem exists, the actual dimensions of the problem could not be determined.

16. Lastly, the report was expected to take into account "the needs of economic development, in particular of the developing countries". From an examination of the replies to the UNCTAD questionnaire, it did not appear that the expressed grievances of cargo interests in developing countries were materially different from those in developed countries. But the economic impact of the existing laws and practices would obviously be greater on developing than on developed countries. The reason, apart from purely economic reasons—for the countries affected are in fact developing countries—is that they are predominantly ship-using and cargo-owning countries and hence more markedly affected by the working of international maritime laws and practices which have retained a ship-owner orientation.[9] There does not appear to be any way in which the developing countries alone could be assisted in this field through international legislation. Laws might be revised internationally to reimpose greater liability on carriers so that goods originating in developing countries might secure greater protection while in transit, but such changes would equally benefit cargo interests from developed countries.

17. The secretariat is grateful for the assistance it has received in the preparation of this report from many Governments, maritime law associations, shipping lines, insurance organizations, and shippers in many countries who answered the questionnaires and provided information by correspondence. Considerable guidance and help was also received from CMI, the International Institute for the Unification of Private Law, the International Chamber of Commerce, the International Chamber of Shipping, the Baltic and International Maritime Conference, the International Union of Marine Insurance and major Protection and Indemnity clubs, the Indian Institute of Foreign Trade, the Asian-African Legal Consultative Committee, the International African Law Association, the Japan Shipping Exchange Inc., and the Asociación Latino-americana de Armadores (ALAMAR).

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[9] In the discussions which led to the formulation of the Hague Rules, many delegations wished to delete the whole "catalogue" of exceptions from the proposals. They were retained in their present form, however, because the catalogue was defended "so energetically that it amounted to an ultimatum" (see S. Brackhus, "The Hague Rules Catalogue" in *Six Lectures on the Hague Rules* (Göteborg, Akademiförlaget Gumperts, 1967) p. 21. At the Brussels Conference in 1922, Sir Norman Hill, spokesman of British shipowners at many international conferences, said "If it (i.e. the Hague Rules) is to go through, we have to get it accepted by the shipowners, and I would despair of ever getting it accepted by the shipowners unless I could point to their old familiar exceptions" (see the Hague report 1921, p. 145). This was confirmed by the evidence of Sir Leslie Scott, who told the same Conference: "This enumeration (i.e. the catalogue of exceptions) contains nothing but the exception clauses which figure in nearly all bills of lading in the world . . ." (*Procès-verbaux 1922*, p. 147). A revealing example of how the adjudication of interests between carrier and cargo owners is susceptible to the prevailing commercial and judicial climate in different countries is pointedly conveyed by the following remarks: ". . . the United States of America have not been, except in some exceptional periods, a ship-owning country, and they have approached shipping matters from the point of view of the cargo owners. I cannot think that their decisions, while treated with great respect, should necessarily control the shipping decisions of the Courts of the greatest shipping country in the world", per Lord Justice Scrutton in *Gosse Millard v. Canadian Government Merchant Marine Ltd.*, 29 Ll. L.R., 101.

PART I

THE BILL OF LADING IN MODERN COMMERCE

CHAPTER I

THE BILL OF LADING

A. Definition

18. The words "bill of lading" normally define a document evidencing the loading of goods on a ship.[10] The corresponding expressions in Spanish *(conocimiento de embarque)* and in Italian *(polizza di carico)* mean the same thing. The corresponding words used in some other languages (French: *connaissement,* Dutch: *cognossement,* and German: *Konnossement*) mean merely a receipt without also implying the simultaneous placing of goods on board a ship. The Scandinavians speak of *utenriks* (or foreign going) *konnossement,* which conveys the idea of transportation. These different terms accordingly reflect varying ideas as to when and where liability begins and ends and what is the nature of the legal liability during the successive stages of the transaction. The Hague Rules do not define the meaning, of the term "bill of lading" or "*connaissement*".[11]

19. The modern form of the bill of lading[12] may be described as:

(*a*) A receipt signed by or on behalf of the carrier and issued to the shipper acknowledging that goods, as described in it,[13] have been shipped in a particular vessel to a specified destination or have been received in the shipowner's custody for shipment;

(*b*) A memorandum of the terms and conditions of the contract of carriage, which will, in fact, almost invariably have been concluded much earlier than the signing of the document (see paras. 23-26 below);

(*c*) A document of title to the goods which enables the consignee to take delivery of the goods at their destination or to dispose of them by the endorsement and delivery of the bill of lading.[14]

20. "The principal purpose of the bill of lading today is to enable the owner of the goods, to which it relates, to dispose of them rapidly", although the goods are no longer in his hands but already in the custody of the carrier.[15] Its importance lies in its role as "the foundation of overseas trade" by reference to which the responsibilities and rights of both carriers and shippers are determined, and on the basis of which is established, through bankers, the credit necessary for the financing of mercantile contracts.[16]

21. The sequence of events in the life of a bill of lading[17] may be summarized as being:

(*a*) The shipper's description of the goods, with his own name and that of the consignee inserted on the carrier's form; particulars of the total gross weight and the measurement, for freight calculation purposes, and where necessary, the value of the goods, are also inserted by the shipper;

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[10] The bill of lading is used in land transport in some countries, e.g. in the United States of America, but its use is confined in this study to ocean carriage.

[11] For this first paragraph, see A. W. Knauth, *The American Law of Ocean Bills of Lading,* 4th ed. (Baltimore, American Maritime Cases Inc., 1953), pp. 133 *et seq.*

[12] The functions of a bill of lading are described here as simply as possible and in lay language. Standard texts may be consulted for fuller details.

[13] Article (3) paragraph 3, of the Hague Rules states what the bill of lading must contain. Besides stating the number of packages or pieces, quantity or weight of the goods, marks and their apparent order and condition, the carrier is not apparently required to indicate any other particulars in the bill of lading. "Accordingly, it shall be perfectly valid to state on the bill of lading that the quality, nature, value, contents and technical specification of the goods are unknown; the bill of lading would not thereby be rendered 'unclean'" (see S. Dor, *Bill of Lading Clauses and the International Convention of Brussels, 1924 (Hague Rules),* 2nd ed. (London, Witherby and Co. Ltd., 1960), p. 90).

[14] See T. E. Scrutton, *Charterparties and Bills of Lading,* 17th ed. (London, Sweet and Maxwell, 1964), section XIII, art. 3, p. 413 and T. G. Carver, *op. cit.,* vol. I, p. 61.

[15] See C. M. Schmitthoff, *The Export Trade,* 4th ed. (London, Stevens and Sons, 1957), p. 306.

[16] See S. D. Cole, *The Hague Rules 1921 Explained* (London, F. Effingham Wilson, 1922), p. 9.

[17] See *British Shipping Laws* (London, Stevens and Sons, 1969), vol. 13, p. 306.

(*b*) The lodging of the bill of lading at the office of the shipowner or his agent or broker;

(*c*) The completion and checking of the contents of the bill of lading by the shipowner or broker against tallying details taken at the time of loading the cargo;

(*d*) The freight calculation;

(*e*) The signature of the bill of lading by or on behalf of the carrier or the ship's master and by such other parties as may by law be required to do so in different countries;

(*f*) The release by the shipowner or his agent of the signed bill of lading to the shipper against payment of freight if the freight is prepaid;[18] and, where appropriate, a mate's receipt or equivalent document;[19]

(*g*) The dispatch of the bill of lading by the shipper to the buyer or consignee or its lodgement with a bank when a letter of credit is involved;

(*h*) The surrender of the bill of lading by the consignee to the shipowner's agent at the port of discharge in order that he may obtain delivery of his goods.

22. Further particulars of the general practice relating to bills of lading are given below:[20]

(a) *Consignee.* Bills of lading are drawn either to order, when negotiated against a letter of credit, or to the name of the party to whom the goods are consigned and who has direct claim to the goods as soon as he is in possession of a signed "negotiable" copy of the bill of lading. The word "order" means that the document is more than a receipt for the goods and more than the contract to carry the goods. By the use of the words "to the order of" a named party, the bill of lading acquires its third characteristic of a document of title,[21] and the legal ownership in the goods can be transferred from the named consignee to other persons and by them in turn to others. The name of the expected consignee is usually inserted on "order" bills of lading. The carrier usually advises the parties to be notified when their goods are due, but he is not obliged to do so in some countries.

(b) *Port of loading.* The port of loading is usually the port at which the goods are loaded into the ocean vessel, but in some trades through bills of lading are issued at small out-ports from which a coaster carries the goods to the main port for transhipment to the ocean vessel. The main port and the out-port are usually both named in such bills of lading.

(c) *Ship.* The name of the vessel in which the cargo is loaded. In the case of transhipment cargo carried on through bills of lading, the first and second carriers are usually named.[22]

(d) *Port of discharge.* This is the port where the ocean vessel discharges the goods and where its responsibility usually ends, unless through bills of lading have been issued for ports for which transhipment is necessary.

(e) *Bill of lading date.* This is usually the date when the bill of lading is signed. Shippers often require that the date should be the day on which the goods are loaded, which is earlier than the date of signature. Bills of lading are customarily given an earlier date in some trades, provided that by that date the goods have been delivered alongside the vessel, which has started to load. If shippers require proof of delivery for shipment by a certain date, this requirement is usually met by issuing a "received for shipment" bill of lading.

(f) *The number of signed negotiable copies.* The bill of lading must state how many negotiable copies have been signed. Two or three such copies are usual.

(g) *The terms and conditions of carriage.* This is a relatively modern innovation (see chapter II below).

(h) *Release of cargo at destination.* This is usually effected by issuing a delivery order to the receivers in exchange for an original bill of lading and payment of freight[23] or by rubber-stamping a currently endorsed bill of lading. The "released" bill of lading or the delivery order is then presented by the receivers to the authority competent to deliver the goods at the port and surrendered to that authority in exchange for the goods.

B. The contract of affreightment

23. The contract of affreightment or carriage is usually expressed by a bill of lading in cases where the goods of a shipper form only part of the cargo which a ship is to carry.[24] It depends on the facts of each case whether the bill of lading contains the whole of the actual contract or reference is necessary to other evidence to determine the full details of the contract.

24. The shipper reserves space on the vessel and is instructed by the carrier when and where to deliver the goods at the dock. A receipt is issued to him when he has done so,[25] and from this point usually the carrier has the charge of the goods, loading them aboard (often using the services of a stevedoring company operating in the port) and issuing a bill of lading in place of the receipt. The bill of lading then serves as written evidence of the terms of the contract of carriage, as a receipt for the goods and as a document of title. By virtue of this fact, it plays a vital part in the financing of the sale of the goods; it is usually forwarded through a bank to the buyer together with a draft for the price of the shipped goods, and the insurance policy; on

[18] Freight may also be collected from the receiver at destination in exchange for a delivery order to enable him to receive the goods.

[19] See foot-note 27 below with further reference to these documents.

[20] See *British Shipping Laws, op. cit.*, pp. 297 *et seq.*

[21] See A. Knauth, *op. cit.*, p. 384. See also R. Rodière, *Traité général de droit maritime* (Paris, Librairie Dalloz, 1968), vol. II, para. 482.

[22] See paras. 305-309 below for further information about transhipment.

[23] Unless the freight has been paid on shipment, in which case the fact is usually endorsed on the bill of lading.

[24] When the agreement is for the carriage fo a complete cargo of goods, or for the provision of a ship for that purpose, the contract is almost always contained in a document called a "charter-party". Contracts of affreightment expressed in charter-parties are not discussed in this report.

[25] It will be a dock receipt if the goods are delivered to a dock authority or warehouse, or a mate's receipt if delivered on board the vessel.

buying or accepting the draft, the buyer obtains the other papers. Meanwhile the goods are on their way and, after whatever calls the ship must make, are discharged at the port of destination and delivered to the holder of the bill of lading.[26]

25. The bill of lading is not considered to be the contract itself but evidence of its terms after it has been accepted by the shipper. The actual contract usually comes into being when shipping space is reserved, before the bill of lading is signed by the carrier, and its terms must be inferred from the carrier's sailing announcements and the arrangements made before the goods are shipped.

26. Besides being a receipt, the bill of lading can also be a "negotiable" document by which the goods described in it may be transferred from the shipper to the consigne (see para. 134 below). This is made possible usually by statute or the general law.[27] When a bill of lading has been issued, it is to be taken as the expression of the contract governing the entire transaction. For instance, the exceptions of risk stipulated in it apply to the stowage of the goods, even though the stowage may have been completed before the bill of lading was delivered.[28]

C. How cargo claims arise and are settled

27. It will be useful to examine how cargo claims arise and the processes and issues involved in their settlement or rejection. The procedure is described in the simplest terms (the position varies in different countries). The cargo owner, or his representative, collects his goods from the shipowner, or his agent, on the arrival of the carrying vessel at the port of destination. In practice, he collects the goods from a public or privately owned wharf, a port authority or some other depository[29] into whose custody the ship will have delivered the goods under local laws of custom.

28. The cargo owner usually finds his goods in apparently sound outward condition when he proceeds to take delivery from the carrier or his agent at port of destination,[30] but he may also find that (*a*) the goods are not available, i.e. "short-landed",[31] or (*b*) they are damaged, so far as he can tell from outward appearance. The warehouse usually issues an "out-turn" report, or certificate purporting to state the condition of the goods as received from the vessel, or certifying their "short-landing". This document, either alone or together with the survey report (see para. 30 below), forms the basic "bad-order" document(s) on which the claimant then bases his claim for compensation.

29. The usual procedure in regard to situation (*a*) is that the cargo owner, on obtaining his "bad-order" or "short-landing" certificate, claims for the loss of his goods against the carrier. The carrier then institutes general inquiries as to whether the goods were shipped at all, whether they were mis-stowed on the vessel, landed at earlier ports of call or over-carried to subsequent ports.[32] It may take many months before any kind of a definite answer as to the location and condition of his goods can be given to the cargo owner. The nature of the contract of carriage is such that the carrier is, in such cases, entitled to make investigations and searches before agreeing to consider the claim,[33] and cargo owners should expect a reasonable period of time (consonant with modern methods of communication) to be consumed in this process.

30. The usual procedure in regard to situation (*b*) is for the cargo owner to call for a survey of the apparently damaged goods,[34] to be conducted in the presence of a representative of the carrier, and such other observers as may be required by local laws or regulations. A survey report is issued after the damage has been itemized and valued, and an opinion given, wherever possible, as to the cause. Now whilst this document—"the survey report"—constitutes only one item of evidence in most jurisdictions,[35] it nevertheless

[26] See G. Gilmore and C. L. Black, *The Law of Admiralty* (Brooklyn, The Foundation Press, Inc., 1957) p. 13.

[27] The British Bills of Lading Act, 1855, an the United States Federal Bills of Lading Act, 1916 (known as the Pomerene Act) are typical enactments relating to bills of lading. See (1920) 26 Com. cas: ". . . What is meant by the expression 'Contract of Affreightment'? In my opinion, to satisfy the requirements with reference to contract of affreightment, the seller must bring into existence a contract embodied in a form capable of being transferred to the buyer and which when transferred will give the buyer two rights: (*a*) a right to receive the goods, and (*b*) a right against the shipowner, who carries the goods, should the goods be damaged or not delivered". Bills of lading are interpreted by the courts in the same manner as other contracts, but any ambiguity or doubt raised by their terms is usually interpreted against the carrier; see *Alcon S.S. Co. v. United States of America* (1948), A.M.C. 1421, at p. 1430.

[28] See T. G. Carver, *op. cit.*, para. 52.

[29] For reasons of convenience, the term "warehouse" will be used during the rest of this section to indicate the port authority, warehouse or other public or private depository.

[30] Any failure on his part to reserve his position at the time of delivery (or within three days in cases of undetectable damage (see article 6, para. 3, of the Rules)) will usually have the effect of placing on him the burden of proving loss or damage.

[31] This might mean they have not been landed at all, or that they have been mis-delivered, misplaced or stolen.

[32] The claimant must usually furnish *prima facie* proof that the loss or damage took place while the goods were in the charge of the carrier by establishing that clean bills of lading were issued and that defective receipts were granted on discharge. He may, if he can, alternatively prove that, notwithstanding statements on the bills of lading, receipts, etc., damage to the goods occurred while they were in the charge of the carrier.

[33] Once the claimant establishes a *prima facie* case against the carrier, the onus of proof shifts him to contradict, if he can, the case made out against him by the statements in the bills of lading, receipts and other evidence brought forward by the claimant. The question of the burden of proof and its recurrent "shifts" back and forth between claimants and carriers, while often decisive in the settlement of the claim, are not examined in greater detail in this report, because not only is this too technical a topic to be examined satisfactorily in a general study but also it is usually governed by the procedural law of the country where the dispute is litigated.

[34] The survey is usually held by an official local authority, or an internationally recognized organization such as Lloyd's. Sometimes carrier's and cargo owner's surveyors, or their insurers, draw up a mutually agreed survey report.

[35] Its status and probative value differ in different countries.

usually forms the basis—together with the "out-turn" report—for any critical examination of a particular dispute about a claim in respect of a particular cargo. It is essential, for the purpose of establishing liability, to determine the cause, time and place of the loss or damage. Most of the differences and misunderstandings between cargo owners and shipowners arise at this point, precisely because it is difficult to establish where, how and when the loss or damage occurred, and the burden of proof on the parties—all vital considerations for establishing liability. From the cargo receiver's point of view, if goods are short-landed or damaged,[36] he has suffered loss while they were entrusted to the carrier. He is not usually readily amenable to the carrier's explanations as to why he cannot obtain immediate relief, particularly when it is argued that the loss or damage occurred when the goods were not in the carrier's custody or arose from negligence in the management of the ship, or in navigation, or from perils of the sea, etc.[37] When cargo owners are faced with such arguments,[38] they tend to take the view that it should not be any concern of theirs that the shipowner has parted with custody of the goods in such a manner as to prevent the cargo owner from exercising his rights, or has negligently managed his business and employed mariners who failed to care for the goods or were unable to cope with the perils of the sea and navigation risks. Cargo owners hold that carriers, who are directly concerned with the business of ship management and the craft of seamanship and navigation, should well be able to cope with most situations arising in the course of transport without having to shelter behind the immunities conferred by article 4 of the Rules.[39]

31. The cargo owner also becomes frustrated if, having claimed against the carrier—the only party with whom he understands himself to be in a legal relationship—he is told to apply instead to a third party, the warehouse, to which the carrier, under local regulations, has delivered his goods. He is then usually faced with the warehouse's answer that it is protected by its own by-laws and regulations, either exempting or limiting its liability or imposing unreasonably short time limitations. Another source of frustration may be the shipowner's insistence on a full set of original claim papers, i.e. invoice, bill of lading, certificate or origin or of value, insurance certificate, etc., and tallying documents appropriate to a particular port.[40] Cargo owners often find great difficulty in presenting this complete set of papers quickly to shipowners in support of a claim. This is an added source of criticism and adds to the delay in settling claims.

32. The replies received to the UNCTAD questionnaires show that the cargo owner, when faced by such substantive and procedural complications, often stops pursuing the claim further against the carrier and either absorbs the loss or claims against his insurers.[41] Many of the respondents also complain that, in consequence of this lengthy procedure, with its acknowledged further result of blurring the cogency of evidence or lightening its weight, claims often become barred by the expiry of the statutory period within which proceedings must be instituted.

33. It will be readily apparent by now that in order to establish his case the cargo owner, like any other claimant, faces the hurdle of the procedural laws of the country in which he prosecutes his claim. Hence, the amendment of the Rules will not *per se* resolve all the claimant's difficulties.[42]

34. Whether he is discussing his claim with the carrier concerned or is involved in litigation, a prime difficulty faced by the cargo owner concerns the burden of proof upon him to establish his claim against the carrier. When does it rest upon him, to what extent, and when and to what extent is it cast upon the carrier? In this necessarily simplified account of cargo claims procedure, it is assumed that the burden of proof rests initially upon the claimant. The sequence of events that follows when he proceeds against the carrier for loss or damage of his goods is briefly given below.

35. Generally, the order of the procedure is:[43]

(*a*) The claimant must first prove his loss;

[36] It is not possible to claim compensation for every shortage or damage. Many commodities suffer a normal minor loss during a voyage, which is accepted in many trades, e.g. loss in bulk shipments (wine); minor damage through normal handling to some commodities packed in cases and bags; minor scratches to unpacked automobiles, etc. For details, see W. Tetley, *Marine Cargo Claims* (Toronto, The Carswell Company Ltd., 1965, and London, Stevens and Sons Ltd., 1965), pp. 73 *et seq.* See also R. Rodière, *op. cit.*, vol. II, para. 639.

[37] See list of exceptions and immunities afforded the shipowner in article 4 of the Hague Rules.

[38] The arguments are supported by the Hague Rules and carriers are perfectly justified in raising them when the facts appear to bring the incident within the exceptions. The fact is, however, that, as the party against whom the claim is made, the carrier is initially the sole judge as to whether he should or should not plead the exemption. If he does so on slender or tenuous grounds, while his misjudgement may be corrected by subsequent litigation, he has meanwhile injured the cargo owner by delaying settlement of his claim.

[39] This paragraph and the following paragraph are based on information obtained from respondents to the UNCTAD questionnaires.

[40] A great number of complaints were received from cargo interests to the effect that shore authorities seldom accept full liability for goods delivered into their custody before re-delivery to receivers. Complaints also were made about the unsatisfactory nature of many of their "receipts" and "out-turn" reports, which were often so qualified as to make it almost impossible for cargo owners to establish their claims, either against the carriers or the shore authorities.

[41] It is usually much easier and quicker for him to recover a claim from his insurer, to whom he has merely to prove loss against a covered risk, than from the carrier, against whom, as explained earlier, he must also establish liability.

[42] All questions of procedure—including ordinarily those regarding evidence—are usually decided according to the national law of the court in which suit is brought. The rules relating to burden of proof are generally considered to be in an intermediate position, forming part of both the substantive and the procedural laws, although they are almost invariably treated in textbooks as part of procedure.

[43] The sequence has generally followed that given by W. Tetley, *op. cit.*, pp. 34 and 35.

(*b*) The carrier must then prove (i) the cause of the loss, (ii) that due diligence was exercised to make the vessel seaworthy to guard against the loss, and (iii) that he is not responsible by virtue of at least one of the exculpatory exceptions of the Rules;

(*c*) The claimant must then put forward any relevant arguments in rebuttal;

(*d*) Finally, there is a middle ground where both parties may produce various additional proofs.

36. Initially, the burden is on the claimant to prove:

(*a*) That he is the owner of the goods and/or is the person entitled to make the claim;

(*b*) The contract or the tort/delict, i.e. either that a contract of carriage existed, or the negligence of the person sued;[44]

(*c*) That the person against whom the claim is made is the responsible person (the claimant sometimes has difficulty in deciding whom to sue, in cases involving charters, for example);

(*d*) That the loss or damage occurred while the goods were in the carrier's possession (usually the claimant will attempt to prove the condition of the goods when they were received by the carrier and the condition at the time of their discharge);

(*e*) The physical extent of the damage or the loss;

(*f*) The actual monetary value of the loss or damage.

37. To avoid liability, the carrier must prove:

(*a*) The cause of the loss;

(*b*) The exercise of due diligence to make the vessel seaworthy at the beginning of the voyage and to guard against the loss;

(*c*) His right to invoke one of the valid immunities stipulated in the bill of lading, as may be appropriate in different jurisdictions.

38. It is then open to the claimant to allege:

(*a*) Negligence on loading;

(*b*) Negligence in stowing;

(*c*) Failure to take care of the cargo;

(*d*) Negligence on discharge.

This stage may be followed by the exchange of other arguments, proofs and related evidence between the parties.

39. The cargo owner should not ordinarily find it too difficult to establish his loss or damage in a straightforward case against a reasonable carrier, if he can produce clean bills of lading and unqualified "bad-order" discharge receipts. He would ordinarily secure compensation, unless his claim was barred by a valid limitation or exemption clause in the bill of lading or warehouse deposit conditions. Should the burden of proof, however, then pass back to him, he would normally face very great difficulty in trying to establish how, where and when the loss or damage occurred, as most of the necessary supporting information would be in the possession either of the carrier or of the warehouse, or would be unavailable. In case of pilferage or unobserved specific acts of negligence or default on the part of anyone, the claimant's position becomes difficult. These difficulties are mentioned here because they illustrate the practical difficulties usually faced by the cargo owner when he attempts to establish his claim.[45]

40. Under modern trading conditions, it is seldom possible to carry out a careful physical ship-side tally at the time of the loading and discharge of the goods. The tally after discharge, which also serves as the tally for entry of the goods into the warehouse, is, as often as not, prepared several days after the actual discharge of the goods from the vessel. Specific reservations are frequently inserted on tally sheets or out-turn reports about the quantity, quality or condition of the goods. These "speak" against the ship. This will be so even though the ship may, in fact, have discharged the goods in sound condition, and they were lost or damaged while in transit, or when in the warehouse, before the warehouse tally took place. The period of liability of the carrier is thems apparently extended beyond the "discharge" period as defined in the Hague Rules. The cargo owner should be able in such cases to hold the carrier *prima facie* responsible unless the carrier can produce incontrovertible evidence that, in fact, the goods had been discharged in sound condition and the loss or damage occurred later. In most cases, however, the carrier then points to exonerating clauses in the bill of lading which provide that his liability ceases as soon as the goods have passed over the ship's rail or after they have been "discharged".[46] When this happens, the cargo owner must then either go to the extreme of litigation or else claim against the warehouse. The warehouse, particularly if it is owned or administered by a public authority, usually has such stringent exoneration and limitation-of-time clauses in its conditions of deposit that the cargo owner can proceed no farther except to collect his loss from his insurer, if he has insured the goods.

41. When the "in-tally" sheets of the warehouse contain—as they often do—indeterminate observations and qualifications as to the quantity or condition of the goods, such as "subject to delivery", or "About . . . [packages]",[47] etc., the cargo owner is again placed in the dilemma of not being able to obtain compensation,

[44] Most jurisdictions take the position that the existence of the contract with the carrier excludes the action in tort (i.e., for damages) against the carrier. Some jurisdictions, however, have allowed the claim in contract to be joined with the claim in tort in the same action. An action in tort is sometimes, however, brought against the carrier's servants, agents or independant contractors with whom the claimant has no direct contractual relationship.

[45] Ordinarily, production of a clean bill of lading should suffice to establish his *prima facie* claim. See D.M.F. (1961), Tribunal de commerce de Dunkerque (Tyrifford, 23 janvier 1961) p. 678. See also *Dent v. Glen Line*, 67 Ll. L.R. 12.

[46] The status and validity of various exonerating clauses used by carriers is examined in paras. 293 *et seq.* below.

[47] To judge by cargo owners' replies to the UNCTAD questionnaires, this vagueness has been a recurrent source of complaint.

either from the ship or (with even less chance of success) from the warehouse.

42. There would seem to be a pressing need to ensure that uniform local regulations and practices should exist in ports to make the cargo owner's position secure. He should be placed in such a position that he can obtain recompense for loss or damage from either the carrier or the warehouse without unduly strict limitation and exonerating clauses barring or delaying settlement of his claim. Such a solution would equally assist carriers, since the line of demarcation between their responsibility and that of the warehouse would be more effectively drawn, and a clearer definition of risks should ordinarily tend to reduce insurance rates in the long run.

43. Alternatively, so far as the cargo owner's recourse for compensation is concerned, the carrier alone should be made responsible to him for the care of the goods until delivery. Any loss or damage which occurred after discharge from the vessel and before delivery to the cargo owner could be settled between the carrier and the warehouse under separate agreements between them. These agreements could be standardized for all ports and carriers.

CHAPTER II

HISTORICAL DEVELOPMENT OF THE BILL OF LADING

44. Maritime law grew out of the business customs of early seafaring traders.[48] Legal problems, whether so called or not, must have arisen from the earliest days, as for example disputes between cargo owners and masters of ships as to exactly what goods had been delivered on board.[49] Custom took shape thereafter, to govern conduct with a view to avoiding trouble. Today little is known of the legal provisions that performed this function in ancient times. No formal sea code has survived from Greek or Roman antiquity, and "the few glimpses we get of the working of what might today be called maritime law could at the most serve as bases for reconstructions of doubtful validity".[50]

45. The pattern of modern shipping and the associated law has been traced to the practice of the Italian city-states of the eleventh century.[51] From this origin, the maritime law "grew up and came of age under the tutelage of the civil law[52] and it still bears the imprint thus acquired, even when administered in the courts of common law countries".[53] As the great national States arose in Europe, the international law of the sea came to be assimilated into national law, or at least to be re-stated in authoritative codifications.[54]

46. Because of its common origin as general law in the Mediterranean region, the developing maritime law retained a remarkable likeness in all countries, and even until the late nineteenth century "a large part of the corpus of maritime law applied by the courts of various nations was regarded as supra-national".[55] This similarity persists today and is advanced by several widely ratified conventions applicable to various aspects of maritime law. In many if not most instances, the developing countries have modelled their national maritime laws on the law of a developed country, frequently that of their former metropolitan Powers.

47. "Since this more or less uniform body of maritime law has been shaped by developed nations, and most particularly by nations with shipping interests, it may be vested with a bias unsuitable to less-developed nations. To the extent that maritime law favours carrier interests over cargo interests, it is inimical to less-developed countries because, by and large, less-developed countries do not have substantial merchant fleets. . . . In any event, those countries which do not choose to develop a substantial merchant fleet have an obvious interest in seeing that their law does not discriminate against cargo interests".[56]

48. Today, discussion of whether the maritime law is fairly balanced between cargo and carrier interests often focuses upon one central question: how losses arising from the carriage of goods by sea should be borne.[57]

49. Historically, maritime law held the carrier absolutely liable for loss or damage to cargo, whether or not he was negligent and (with the exceptions noted below) regardless of the cause of the loss.[58] He could only escape this liability if the loss or damage was caused by an act of God, a public enemy, inherent vice even until the late nineteenth century " a large part of been appropriately made the subject of a general average sacrifice.[59]

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[48] See G. Gilmore and C. L. Black, *op. cit.*, p. 2.

[49] See C. B. McLaughlin, Jr., "The evolution of the Ocean Bill of Lading", 35 *Yale Law Journal*, 1925.

[50] See G. Gilmore and C. L. Black, *op. cit.*, p. 2 *et seq.*

[51] Exemplified in their codification, *Ordinamenta et Consuetudo Maris de Trani* (1063); Tables of Amalfi (1131); *Constitutum usus* (1161) cited in G. Ripert, *Droit maritime*, 4th ed. (Paris, 1950-1953), vol. I, para. 89. These codes " could hardly state much living law for the concerns of modern shipping" (see G. Gilmore and C. L. Black, *op. cit.*, p. 7).

[52] Civil law is here given the general meaning of systems based on the Roman law as distinguished from the common law systems which arose out of Anglo-Saxon systems.

[53] See G. Gilmore and C. L. Black, *op. cit.*, pp. 7 and 8.

[54] L'ordonnance sur la marine, 1681; Ordinance of Bilbao (1737); Ordinance of Sweden (1750); Codice per la Veneta mercantile marina (1786); Algemeines Landrecht (1794) cited in G. Ripert, *op. cit.*, vol. I, para. 91.

[55] "Less developed countries' and developed country law: problems from the Law of Admiralty", by R. Hellawell, in vol. 7 of *Columbia Journal of Transnational law*, No. 2, 1968, p. 205.

[56] *Ibid.*, p. 206.

[57] This is a relatively recent question. Records show that as late as the early nineteenth century this question was not of pressing importance. The only available vessels were small sailing ships, and cargoes were not usually of a perishable nature. Probably a certain amount of damage was expected as an incident of every ocean voyage and very little litigation found its way to the courts until the mid-nineteenth century. Further, until the advent of steam the absence of the modern need for the speedy dispatch of vessels in port bred tolerance of more leisurely methods of cargo handling and tallying ashore. This factor in turn afforded greater opportunity for more careful ship-side tallies than is perhaps possible today, thus reducing that fertile area of disputes as to where and when any loss or damage was caused to the goods.

[58] See G. Gilmore and C. L. Black, *op. cit.*, p. 119. For the position under French law, see R. Rodière, *op. cit.*

[59] See T. G. Carver, *op. cit.*, paras. 9-20.

50. Even where the loss was caused by one of these "common law exceptions" the carrier remained liable if he had been negligent or otherwise at fault. The shipper would succeed in his claim if he proved receipt of the goods for carriage in good order and either non-delivery or delivery in bad order, provided that the carrier could not show that one of the "common law exceptions" had caused the loss or damage. In effect, the carrier was a warrantor of safe arrival, and fault was immaterial.[60]

51. In addition, in all contracts of carriage of goods by sea there were implied, in the absence of expressed stipulations to the contrary, undertakings by the carrier (*a*) that the carrying vessel was seaworthy, and (*b*) that the ship would commence and carry out the contractual voyage with reasonable diligence without unjustifiable deviation (see paras. 256-264 below). Cargo owners, or charterers, could repudiate the contract of carriage and claim compensation for any damage suffered as a result of the breach of these undertakaings as defeating the commercial purpose of the voyage.

52. The carrier was thus liable for any loss or damage occasioned to cargo carried on his vessel if it occurred either through his own negligence or through the unseaworthiness of the vessel. Even the exceptions implied by the law did not, it would seem, avail the shipowner unless they were expressly stipulated in the bill of lading.[61] Therefore, the shipowner's liability under both the common law and the civil law codes was in theory strict.

53. The advent of marine insurance[62] in the twelfth century introduced a further element of sophistication into the usages of sea carriage.[63] Originally marine insurance was simply a mutual protection among individual shipowners themselves and its customs "became somewhat standardized before they were articulated in extant codes" in the Middle Ages.[64] The earliest known codes date from the early fifteenth century. They attempted to regulate the practices of marine insurance, which became established as a business by about 1600.

54. For centuries, a sort of maxim or fundamental principle existed in maritime commerce "that between the shipowner and marine insurance underwriter 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".[65] This ideal of security in maritime trade presupposed, however, that the bill of lading was always in such a form that, when accompanied by the insurance policy or certificate, it would be regarded by merchants and bankers as connoting possession of the goods, i.e. that the liabilities of the carrier and underwriter were conterminous. The shipowner undertook to deliver the goods, accidents of navigation excepted, the accidents being covered by the underwriter.

55. Not all risks were, or are, insurable, and at first underwriters would not assume any of the risks of personal injury or damage to cargo[66] and, as described in paragraph 58 below, carriers came in time to exempt themselves from most, if not all of their liability by inserting specific clauses in their bills of lading. This practice served to impair the value of the bill of lading and insurance policy when taken together as evidence of the security of the goods. It was to protect themselves from uninsured risks that shipowners devised and organized mutual protection clubs which developed into the modern type of P and I clubs in the late nineteenth century and which came to give the shipowner protection against his liability for damage to the cargo

[60] See G. Gilmore and C. L. Black, *op. cit.*, p. 120.

[61] The bill of lading was the document which came in time to specify the goods at risk and the basis for any claim for non-delivery or damage. The merchant did not at first need a custody-of-cargo receipt from his carrier while his business arrangements (i.e., in modern terms, his "contract of carriage") remained part of the customary arrangements for dividing the expenses and the profits of the venture. For so long as the merchants travelled with the goods, particulars were merely entered in a "book" or register which was part of the ship's papers. When the merchant ceased to accompany his goods, the necessity arose for a separate document which was at first a receipt and later embodied the terms on which the carrier would transport and deliver the goods. At first these were customary terms which came in time to be incorporated into the common law of England and the commercial codes of continental Europe. Thus was born in the twelfth century the primitive precursor of the modern bill of lading. The "book" gave way to a "bill" in the fourteenth century, when excerpts from it were delivered to the shipper who received in this form what was akin to the modern document.

[62] A contract of insurance is a contract of indemnity whereby the assured pays a certain sum, called the premium, to the underwriter, who in consideration thereof takes upon himself the risks insured against and undertakes to make good to the assured any loss which he may sustain by reason of the named peril. A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured against marine losses, e.g. the losses incident to maritime adventure. See H. Holman, *A Handy book for shipowners and Masters*, 16th ed. (London, Ed. M. R. Holman, 1964), p. 529.

[63] "The procurement of marine insurance results in the sharing by the ultimate consumer of the losses that overtake property in commerce, and the reduction of uncertainty in ocean carriage. The underwriter charges a premium for the insurance of the risks that he underwrites. This premium charge becomes one of the items in the invoice for the sale of the goods, and in the freight rate, which is also an item in the invoice, and thus it becomes indirectly included as part of the cost of insuring the hull of the vessel. In this way cost of insurance becomes part of the price of goods and is an indirect charge on the consumer". (See W. D. Winter, *Marine Insurance*, 3rd ed. (New York, McGraw Hill, 1952), p. 96.)

[64] See G. Gilmore and C. L. Black, *op. cit.*, p. 49. The basic insurance policy of apparently Italian origin which came to be generally used (and has with slight changes come down to this day) originally did service for both hull (i.e. the ship itself) and cargo risks that were frequently insured together. (Ship and cargo are seldom insured together in modern times, but the basic phraseology in the Lloyds policy suggests that it does insure both, and this can easily mislead the uninitiated.)

[65] 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 for the Reform and Codification of the Law of Nations*, Cologne, 16-19 August 1881.

[66] See W. D. Winter, *op. cit.*, p. 274.

he carried. Similarly, the cargo owners sought wider cover from the marine insurance market for the risks of sea carriage.

56. The market responded to this need by covering new perils as commerce developed but it does not afford protection against every type of marine loss that may arise in the course of a voyage. The principal risks insured are enumerated in the "perils" clause of the policy, which are either supplemented[67] or restricted by further clauses.[68]

57. Underwriters often pay cargo owners' losses first and attempt to recoup later from carriers sums paid out in respect of losses or damage for which carriers are liable. In this way the insurer may pay for damage to goods caused, for example, by improper stowage, although the carrier of the goods is at the same time liable to the consignee for such damage.[69] Cargo owners are therefore much attracted by the wide cover afforded by modern insurance policies and by the speed with which most underwriters pay claims as contrasted with the "slowness and resistance of private parties, including carriers, in dealing with claims".[70]

58. The bill of lading became in time the basic shipping document, embodying (or evidencing) the contractual relationship betwen carrier and shipper, and forming the basis for all claims arising from the transportation of goods by sea.[71] It was originally a "straight" or non-negotiable bill of lading. But in due course, with the spread of commerce and the increasing complexity of business and in consequence of the concern for speed, the need was felt for transferring the property in the goods before they arrived at destination. Hence, the practice arose of transferring the ownership of the goods by endorsing the bill of lading to the buyer. By the eighteenth century, this practice was well established and the "negotiable" bill of lading was in common use. The early bills of lading did not contain any exceptions at all.[72] The earliest qualifications to be introduced were either of a general type, such as the "danger of the sea only excepted" or "said to be" clauses.[73] However, as a result of eighteenth century judicial decisions, shipowners began generally to amend their bills of lading not only to stipulate the old common law exceptions but also to exempt themselves from liability in respect of all perils of the sea and of navigation "of whatever nature and kind". Through such provisions inserted in their bills of lading (known as "exoneration clauses" or "negligence clauses"), carriers began to limit contractually the strict liability imposed upon them by maritime law. Their use of freedom of contract principles expressed in both common law[74] and civil law created a situation whereby the carrier was enjoined on the one hand to strict liability by maritime law, but could, on the other, contract out of almost all liability by appropriately framing the clauses in the bill of lading.

59. Carriers were permitted by law to extend these principles of freedom of contract and did so to such effect that they came to exempt themselves from practically every liability of ocean carriage.[75] No sooner did a court decision go against them than their legal advisers inserted a fresh clause in their bill of lading to nullify this result in the future.[76] Bills of lading came to include stipulations to the effect that the carrier was not to be liable for the results of his own negligence or that of his employees. The reasons which originally led carriers to disclaim liability for their servants' actions relating to stowage and misdelivery of the goods were said to be bound up with "the infancy of steam navigation".[77] Competition among shipowners was increas-

[67] E.g., to cover land risks before shipment and after discharge from the vessel, usually underwritten on a "warehouse to warehouse" basis.

[68] It has not been considered necessary to give an account here of the various clauses in insurance policies. The current position is summarized by C. M. Schmitthof, *op. cit.*, pp. 268 *et seq.*

[69] See G. Gilmore and C. L. Black, *op. cit.*, p. 85. The question of "overlapping" insurance and the interrelation between cargo insurance and P and I cover are discussed in paras. 154-165 below.

[70] See G. Gilmore and C. L. Black, *op. cit.*, p. 86.

[71] See A. Knauth, *op. cit.*, p. 376 *et seq.* Also, see W. P. Bennet, *History of the Bill of Lading*, (Cambridge University Press, 1914). See also R. Rodière, *op. cit.*, vol. II, para. 438. For a more complete discussion of bills of lading, see chap. I above.

[72] In the early simple form of bills of lading there was no indication, beyond vague phrases such as "the accidents of navigation excepted", as to what was to be done, or what the respective rights of the parties were, in any of the situations that might lead to the voyage not being successful. The exception was taken to mean perhaps no more than the negative proposition that in the event of such accidents the shipowner was not bound to perform an impossibility.

[73] A "said to be" clause is one which qualifies either the quantity or the weight of goods, as stated in the bill of lading, for example, "received (five) packages of . . . said to weigh (five) tons".

[74] Cargo interests considered "freedom of contract" in regard to bills of lading as being more technical than real. See *Report of the Imperial Shipping Committee on the Limitation of Shipowners Liability by Clauses in Bills of Lading and on Certain Other Matters relating to Bills of Lading* (H.M. Stationery Office, Cmd. 1205, 1921). Also " . . . the shipper and the carrier are not upon equal terms and the shipper is at the mercy of the carrier unless protected by the law". See *F. S. Strauss and Co. v. Canadian Pac. Ry.*, 245, NY, 407, 411, 173. N.E. 564, 566 (1930).

[75] See A. N. Yiannopoulos, *Negligence Clauses in Ocean Bills of Lading* (Louisiana University Press, 1962), p. 4.

[76] See report of the International Law Association, 22nd Conference, 1905, p. 187. Competition between different shipping lines accelerated this development. One line would introduce far-reaching exemption clauses, and perhaps later reduce its freight rates to attract business. Competition then induced other lines to insert similar clauses into their bills of lading.

[77] See paper by Richard Lowndes, a report of the International Law Association Conference, 1881, p. 109 *et seq.* Lowndes, the great authority on general average, ascribed the reasons advanced by steamship owners for taking this action to the "peremptory necessity" for steamers to effect quick dispatch, and described it as a "crude device" for shaking off responsibility for careless cargo handling. He felt that these reasons were likely to lose in time most, if not all, of their force. From his remarks, it appears that no sooner were the old deliberate ways "which served for sailing ships" abandoned than the necessity for dispatch led to a great deal of hurry and confusion in the loading and discharging of steamships. He felt that it was not realized sufficiently in the early years of steam that dispatch was not incompatible with strict precautions against error.

ing enormously, and the volume of world trade exceeded the carrying capacity of shipping. Thus, where exoneration clauses were upheld, the position of the carrier became virtually the reverse of that under general maritime law. Instead of being absolutely liable irrespective of negligence, he enjoyed a contractual exemption from liability regardless of negligence, and this contractual exemption became as wide as the carrier's bargaining position would allow.[78] Generally speaking, in what might be termed "cargo-oriented" countries, the views of cargo interest largely prevailed and stricter liability was imposed upon carriers than in shipowning countries where carriers continued to enjoy "an almost unlimited freedom of contracting".[79]

60. In view of the growing dissatisfaction of the shippers, bankers and underwriters, the shipowners were forced to negotiate and to meet some of the shippers' complaints about the situation. In England, some shipowners agreed to adopt model bills of lading[80] which expressly stipulated that they would be relieved from liability only in cases of errors in navigation and not in the case of fault on the part of the master or crew in the care and custody of cargo.[81] Under other model bills of lading, the shipowner was held liable for faults committed by the master or crew unless these related to navigation and to the management of the ship.[82]

61. A simultaneous development took place in the United States and the British Dominions, whose ocean trade depended heavily on United Kingdom shipowners. It was, in these countries, therefore, that the struggle between shipowning and cargo interests came to a head[83] and legislation was demanded "to remove the chaos and abuse produced by unlimited freedom of contract".[84] After considerable negotiation, the demand of the shippers for legislation was acceded to in the form of a compromise. The Harter Act[85] was enacted in the United States in 1893, followed by the Australian Carriage of Goods by Sea Act (COGSA) in 1904, the New Zealand Shipping and Seaman Act in 1908, and the Canadian Water Carriage Act in 1910.

62. The need for further reform was generally felt, but shipowning countries feared that the re-imposition of liabilities upon their carriers would increase their freight charges and place them "at a disadvantage by comparison with others".[86] They did not relish the idea of abridging the principle of freedom of contract which formed a fundamental feature of their legal systems. It also came to be realized that a solution would have to be based on an international agreement in order to be of any practical value in international trade. Moves towards the reform and unification of the law thus began to concentrate on the creation of an international model bill of lading which would establish certain world-wide minimum standards with respect to the shipowner's liability. International conferences were held, mainly under the auspices of the International Law Association and CMI. The trend towards uniform legislation[87] was temporarily halted, however, by a movement in favour of the preparation of a code of rules defining the rights and liabilities of sea carriers which would be voluntarily incorporated in bills of lading. The project for uniform legislation was later revived. Events came to a head "when the British Government, under the pressure of the Dominions, insisted that the shipowners reach an agreement".[88] After considerable discussion among the representatives of leading shipowners, underwriters, shippers and bankers of the big maritime nations,[89] a set of rules was finally drafted by the Maritime Law Committee of the International Law Association at a meeting held at The Hague in 1921 and came to be known as the Hague Rules,[90] but the Rules were not

[78] The Harter Act prohibited clauses exonerating the carrier also R. Rodière, *op. cit.*, vol. II, para. 576.

[79] "The unification of private maritime law by international conventions", by A. N. Yiannopoulos in *Law and Contemporary Problems* (Durham, N. Carolina, 1965) vol. 30, p. 370.

[80] See S. Dor, *op. cit.*, p. 16. Model bills of lading apparently related mostly to bulk cargo trades, e.g., the 1890 Grain bills of lading of the Black Sea, of the Azov Sea, an the Danube. Other model bills of lading were introduced in the coal and timber trade (1898), and in the ore trade (1901).

[81] A "Conference Form" bill of lading was adopted at a meeting at Liverpool in 1882; it was the first to admit the concept of "due diligence" and to fix a limit to the shipowner's liability of £100 sterling per package. The "Conference Form" bill of lading became the basis for the Hamburg Rules adopted at Hamburg in 1885 (see S. Dor, *op. cit.*, p. 19).

[82] In Japan, the position was so strict that the shipowner could not even by express agreement exempt himself from liability for damage to the goods caused by his own fault, by bad faith, by the gross fault of his employees, or by unseaworthiness of the vessel. See Imperial Shipping Committee Report, p. 8. The Spanish Commercial Law of 1885, section 618, was also very strict in its provisions concerning the liability of shipowners.

[83] See A. N. Yiannopoulos, *op. cit.*, p. 4, foot-note 7: "The world was virtually divided into carriers' countries and shippers' countries".

[84] See Fletcher, *The Carrier's Liability*, 1932, p. 224.

[85] The Harter Act prohibited clauses exonerating the carrier or his agents from liability for faults in care and custody of the cargo, but the carrier was not to be held liable, if he had exercised "due diligence", to make his ship seaworthy and if the damage caused to the cargo resulted from "faults and errors in the navigation or management of the vessel". A list of "excepted clauses" further favoured the carrier. The Harter Act "established an important principle which later inspired the Hague Rules and the Brussels International Convention: it settled the problem of the carrier's liability by making a distinction between faults in the navigation and management of the vessel and faults in the care and custody of the cargo" (see S. Dor, *op. cit.*, p. 17). The Dominions Acts contained provisions broadly similar to those of the Harter Act.

[86] See S. Dor, *op. cit.*, p. 18.

[87] For the use of this term, see *International Legislation on shipping* by T. K. Thommen (United Nations publication, Sales No.: E.69.II.D.2); and the note by the UNCTAD secretariat entitled "Working paper on international shipping legislation" (TD/B/C.4/ISL/2 and Add.1).

[88] See S. Dor, *op. cit.*, p. 19. See also R. Rodière, *op. cit.*, vol. II, para. 577.

[89] See S. Dor, *op. cit.*, p. 19.

[90] "The Hague Rules and the Carriage of Goods by Sea Act adopted the compromise between the conflicting interests of *the carrier and* the cargo owner which was effectuated in the Harter Act" (see "Ocean Bills of Lading and Some Problems of Conflict of Laws", Notes, note 18, p. 214, *Columbia Law Review*, vol. 58, 1958.

immediately adopted.[91] The Rules were amended at the London Conference of CMI in 1922. Agitation for legislative action on the lines of the Rules continued, and a diplomatic conference on maritime law was held in Brussels in 1922. A draft convention drawn up at that conference was amended at Brussels in 1923, and in due course an international Convention was ultimately signed there by the most important trading nations on 25 August 1924.[92] Each State was expected to give the Hague Rules statutory force with regard to all outward bills of lading as soon as the Convention became effective, on 2 June 1931.

63. The Brussels Convention was not conceived as a comprehensive and self-sufficient code regulating the carriage of goods by sea,[93] but was intended merely to unify certain rules relating to bills of lading. Its most important effect perhaps was that the carrier could no longer contract out of certain defined responsibilities and was given specific rights and remedies.[94]

64. The Convention "was based on the principle of the carrier's liability, which was lessened through a system of immunities and statutory limitations".[95] The principles of the Convention have been well summarized as follows: "The Convention establishes the carrier's minimum obligations, his maximum immunities and the limit of his liability."[96]

65. Under the Rules, the carrier was not held responsible for the unseaworthiness of the ship, providing that this unseaworthiness was not caused by lack of due diligence on his part before and at the beginning of the voyage, nor for the consequences of acts, neglect or faults of the master or his other agents in the navigation or management of the ship. A series of exceptions was then listed, fully exempting the carrier from liability unless proof of his liability was provided.

66. Finally, if the carrier was held liable, the amount to be paid per package or unit was not to exceed £100 sterling, unless the nature and value of these packages or units had been declared by the shipper prior to loading and stated in the bill of lading. It must be added, however, that while the carrier did not have the right to lessen the liability he incurred, he was at liberty to enlarge, in part or in whole, any of his liabilities.[97]

67. Shippers' dissatisfaction with the allocation of liability for loss or damage to goods in ocean transport was not entirely silenced by the adoption of the Hague Rules, but continued to be expressed intermittently in varying degrees of intensity by private trade organizations in different countries. International concern with the subject, particularly among developing countries, found expression in due course in UNCTAD in the mid-1960s. Earlier, however, a suggestion that the Hague Rules should be re-examined arose in a report of the Sub-Committee on Conflicts of Law of CMI recommending the amendment of article 10,[98] which was considered at the Rijeka Conference of CMI in September 1959. The Conference, after having discussed whether it was desirable to amend article 10, adopted a resolution on its future work instructing its Sub-Committee "to study other amendments and adaptations to the provisions of the International Convention".[99]

68. There were many divergent views among the national maritime law associations as to the desirability of amending the Hague Rules. Some delegations felt that only a limited number of amendments to the Rules would be desirable in order not to upset the agreement reached in 1924. Others thought that a substantial revision had become necessary after 40 years of usage. It was against this background that the suggestion was made that the Hague Rules should be amended by way of a protocol, so as not to upset the general scheme of the Convention.

69. In 1963, the Stockholm Conference of CMI reached agreement on the text of the amendments that should be submitted to the Diplomatic Conference on Maritime Law.[100] The main recommendation of the Conference was in effect the overruling of two British judicial decisions.[101] The *Muncaster Castle* case[102] had resulted in the decision that a carrier was liable for lack of due diligence to make a ship seaworthy, even if he had selected with the greatest care a surveyor to ensure that it was seaworthy. The decision in the

[91] "The Hague Rules were drafted in the form of a uniform Bill of Lading in the hope that the great shipping companies would adopt them voluntarily and that similar enterprises would soon follow suit. The shipping companies, however, were not prepared to give up their extensive immunities under the then existing laws of several countries and it became apparent that legislative action was necessary to make the uniform rules part of bills of lading" (see A. N. Yiannopolous, *op. cit.*, p. 5).

[92] The Rules adopted by this Convention are popularly known as the "Hague Rules", because they were originally drafted at The Hague in 1921. The terms "Brussels Convention" and "Hague Rules" are sometimes used interchangeably, to indicate those rules which were approved at the 1924 Conference.

[93] J. Devlin in *Chandris v. Isbrandtsen—Moller* (1951) 1 KB. 240, 247. "It was not meant altogether to supplant the contract of carriage but only to control, on certain topics, [full] freedom of contract, which the parties would otherwise have".

[94] See C. J. Colombos, "The Unification of Maritime International Law in Time of Peace" in *British Yearbook of International Law* 1944, vol. XXI, p. 101.

[95] See S. Dor, *op. cit.*, p. 20.

[96] See C. Smeesters and G. Winkelmolen, "The Rules of Article 91" in *Droit maritime et Droit fluvial*, 2nd ed. (Brussels, Ferdinand Larcier, 1933) vol. II, paras. 625 *et seq.*, at para. 676.

[97] Under article 6 of the Hague Rules.

[98] Article 10 states that the provisions of the Convention shall apply to all bills of lading issued in any of the contracting States.

[99] CMI *24th Conference-Rijeka, 1959, Proceedings*, p. 430.

[100] Draft Protocol on International Convention to amend the International Convention for the Unification of certain Rules relating to Bills of Lading. CMI, *Conference-Stockholm 1963*, 221/222.

[101] See R. P. Colinvaux, "Revision of The Hague Rules relating to bills of lading", *Journal of Business Law* (1963-1964), p. 341.

[102] *Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd.* (1961), A.C. 807.

second case, Scruttons v. Midland Silicones Ltd.,[103] had implied that servants of a shipowner should not be able to avail themselves of the benefits of the exceptions in the Hague Rules.

70. The other important amendments (discussed at the Stockholm Conference concerned the following:

(*a*) Statements in the bill of lading (article 3, paragraph 3 (*a*) (*b*) and (*c*) of the Rules) to be *prima facie* evidence of the receipt by the carrier of the goods;

(*b*) Extension by agreement of the one-year time limit for bringing suit against the carrier;

(*c*) Actions for indemnities by the carrier against third parties;

(*d*) The limitation of liability at a higher monetary limit;

(*e*) The rate of exchange to be used for conversion of the sum awarded by a court;

(*f*) Application of the Hague Rules to both "inward" and "outward" bills of lading, regardless of the law governing such bills of lading or the nationality of the parties.

71. The twelfth Diplomatic Conference met at Brussels in two sessions in May 1967 and February 1968 with the Stockholm draft protocol before it for approval. At the first session, the Conference rejected the amendment intended to overrule the *Muncaster Castle* decision. Moreover, several countries criticized the amendments relating to the limitation of the carrier's liability and application of the Hague Rules, which led the Conference to postpone its deliberations for further discussions between delegations.[104] At its second session in February 1968, the Conference finally reached agreement on the final text of the amendments to the Hague Rules, known as the Protocol.[105]

[103] (1962), A.C. 446.

[104] See C. Legendre, "*La Conférence diplomatique de Bruxelles de 1967*" (D.M.F. 1967), pp. 515 and 520.

[105] Text reproduced in annex II to this report. The Protocol will come into force when ratified by ten countries, five of which should have a fleet, sailing its own flag, of more than 1 million tons.

CHAPTER III

THE NEED FOR REVISION OF THE HAGUE RULES

A. Introduction

72. The evidence of the need for the revision of the Hague Rules, beyond what was done in the 1968 amendments, which have not yet become operative, comes from several sources. These are, first, the complaints made in response to the inquiries by the UNCTAD secretariat;[106] secondly, a study of standard texts and periodicals; and thirdly, the result of the analysis of the commercial and economic aspects and consequences of the present position and of the analysis of the Hague Rules themselves.

73. The main grounds for concern are:

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

(*b*) The continued retention in bills of lading of exoneration clauses of doubtful validity, and the existence of restrictive exemption and time limitation clauses in the terms under which cargo is deposited with warehouses and port authorities;

(*c*) Exemptions in the Hague Rules which are peculiar to ocean carriage, in cases where the liability should logically be borne by the ocean carrier, such as those which excuse him from liability in respect of the negligence of his servants and agents in the navigation and management of the vessel, and in respect of perils of the sea, etc.;

(*d*) The uncertainties caused by the interpretation of terms used in the Hague Rules, such as "reasonable deviation", "due diligence", "properly and carefully", "in any event", "subject to", "loaded on", "discharge";[107]

(*e*) The ambiguities surrounding the seaworthiness of vessels for the carriage of goods;

(*f*) The unit limitation of liability;

(*g*) Jurisdiction and arbitration clauses;

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

(*i*) Clauses which apparently permit carriers to divert vessels, and to tranship or land goods short of or beyond the port of destination specified in the bill of lading at the risk and expense of cargo owners;

(*j*) Clauses which apparently entitle carriers to deliver goods into the custody of shore custodians on terms which make it almost impossible to obtain settlement of cargo claims from either the carrier or the warehouse.

B. Commercial aspects

74. The commercial aspects would include the part played by the bill of lading in the course of maritime trade as a document of title to and a receipt for goods as well as a memorandum containing either the contract of carriage or its evidence. What requires consideration is whether the bill of lading as at present formulated satisfies the expectations of the seller, the carrier, the receiver, the banker and the cargo insurer, all of whom depend upon its contents for their respective needs.

75. This aspect is examined in chapter IV of the present report. This analysis, together with the evidence received in response to the inquiries made, suggests that commercial practice has largely adapted itself to operating with the bill of lading as it exists. There would apparently be no immediate need to amend the Hague Rules if the sole object of amending them were to improve the operation of the bill of lading as a commercial instrument, except perhaps in regard to its status as a receipt for the goods.

76. At this point, it is relevant to point once again to the need to ensure that local regulations and practices in ports are revised to make the cargo owner's position more secure (see paras. 42 and 43 above).

C. Economic aspects

77. The discussion of the economic aspects relates to the consequences of a breakdown in the relationship between cargo owner[108] and carrier in ocean carriage. An examination of the sequence of the events that

[106] For previous discussion of the need for the revision of the Rules see e.g., T. K. Thommen, *op. cit.*, and the report of the Working Group on International Shipping Legislation on its first session.

[107] See article 4, para. 4; article 3, para. 1, 2 and 6; and article 1 (*e*) of the Rules. The uncertainties created by these terms are aggravated by the practical difficulty of determining precisely where and how a loss or damage occurred.

[108] As a "negotiable" document a bill of lading may pass through several hands. The term "cargo owner" is used to cover all of these holders of the bill.

follow when goods subject to ocean carriage are lost or damaged provides the best way of approaching the economic aspects.

78. What requires initial investigation is whether the loss lies where it falls, or is specifically imposed upon one of the parties to the contract of ocean carriage. This will depend on the way in which the risks of ocean carriage are distributed by the functioning and interpretation of the applicable maritime law.

79. Cargo owners usually make a money claim against the carrier for loss or damage, and the claim is either rejected or settled partially or fully on the basis of the distribution of risks and the limitation of liability sanctioned by the existing law. Cargo owners either accept the carriers' decision or dispute it through arbitration or litigation. The loss suffered by the cargo owner and uncompensated by the carrier represents the initial economic impact which may be said to be "sanctioned" or permitted by the working and interpretation of the existing laws. It does not represent the full or real economic impact, since many additional factors require consideration (see paras. 172-175 below).

80. The analysis in chapter V of this report shows that there is a significant uncompensated loss. In part, this arises from the fact that through both specific provisions and omissions, the Hague Rules provide what appears to be an excessive number of opportunities for the shipowner to avoid, legally, liability for loss of cargo and so to reject the claim made by the cargo owner. In part also, it occurs because of the unit limitation, whereby the liability of the shipowner, even where full responsibility is admitted, is limited to a fixed amount irrespective of the actual value of the goods lost (see paras. 265-284 below).

81. A further subject for consideration is the extent to which "overlapping" or "double insurance" is effected by cargo owners, who may be forced, because of the uncertainty in the apportionment of risks and burden of proof, to insure risks which in fact are borne by carriers. This aspect is treated in paragraphs 154-165 below.

82. The next point for investigation is how this uncompensated loss and the extent of double insurance would be affected if the risks of ocean carriage were redistributed by a change in the laws, bearing in mind also the effect of any consequential changes in the freight and insurance rates. It is concluded (see para. 164 below) that there is no reason to expect that, if risks were so redistributed as to eliminate uncertainty and, hence, the need for double insurance, there would be any over-all increase in the combined cost of freight and insurance, as is often feared. Indeed, there should be a reduction in the over-all costs borne by the cargo interests. Further, the elimination of uncertainty which would follow a change should reduce the frequency of recourse to arbitration and litigation, and so reduce expenses in that respect.

83. Very few pertinent statistical data were found available to enable the secretariat to measure in quantitative terms, even tentatively, the impact of the economic aspects of the laws of ocean carriage on trade and development. The position is outlined in chapter V below, where it is shown why no conclusions can be reached. However, although the economic cost of the present Rules could not be measured precisely in quantitative terms, there is no doubt that this cost could be reduced by suitable changes in the Rules.

D. The Hague Rules

84. As pointed out earlier (see para. 9 above), the analysis of the Hague Rules in chapter VI below has been restricted to those sections which, as a result of the research carried out, appear to present problems and to be in need of revision in the interests of trade and development. No attempt at a complete analysis has been made, since well-known texts cover the subject adequately.

85. Not every standard clause found in most bills of lading has been examined. For example, there are the "Both to blame collision clause" and the "Jason" and the "New Jason" clause, which are often criticised. They are not discussed, because not only did replies to the UNCTAD questionnaire not raise these problems, but also their discussion would have enlarged the limited scope of this report to embrace collision regulations and general average.

86. Similarly, there are problems raised by container traffic and the "sea-leg" of combined transport operations which have been extensively discussed in recent years,[109] also the interest shown in the proposal to introduce an insured bill of lading; these topics are not treated in this report, although they closely concern bills of lading.

87. In considering the Hague Rules in relation to the needs of the present international trading situation, the following criteria may be adopted:

(*a*) Balancing of equities between carriers and cargo interests;

(*b*) Commercial efficacy;

(*c*) Economic considerations;

(*d*) Clarification of the law and practices, particularly as to allocation of liability for loss or damage to cargo;

(*e*) Removal of anachronisms.

88. The analysis in chapter VI below based on the criteria stated above indicates that the operation of certain parts of the Rules is unsatisfactory. The areas of concern which have been identified, together with brief reasons for the concern, are given in paragraphs 91 to 122 below. A more detailed consideration of each case appears in chapter VI. This appears to provide strong grounds for revising the Rules or for the establishment of a new international convention.

[109] A draft combined transport (TCM) convention is at present under consideration by the ECE Inland Transport Committee. Joint IMCO/ECE meetings are studying the draft convention.

89. Revision of the articles of the Hague Rules along the lines indicated would, in the main, have the effect of redistributing the risks of ocean transport, the risks borne by the carriers being increased and those borne by the cargo owners reduced. It should be observed that the allocation of risks has not been constant since ocean transport first started. Before the eighteenth century, the carriers bore most of the risks (see para. 49 above). In the nineteenth century and in the first half of the twentieth century, the distribution of risks was changed to the disadvantage of the cargo owners. Thus, any movement to redistribute risks to the advantage of cargo owners does not create a new situation, but is only a movement in a field in which change has been frequent in the past, and towards a situation which, in the past, worked.

90. It will also be apparent that the changes which might be made in the law require attention at some or all of three levels:

(*a*) Internationally, through new conventions or amendments to existing ones;

(*b*) Nationally, through local legislation or regulation;

(*c*) By the wider usage of uniform contracts, model clauses, etc.[110]

91. The first concern is article 1 (*a*) regarding the definition of the term "carrier" (see paras. 180-185 below). This raises two uncertainties: (*a*) whether other persons, such as shipping and forwarding agents who issue bills of lading, might be considered "carriers" for the purpose of the operation of the Rules; and (*b*) whether the shipowner or the charterer is liable as "carrier" when a ship has been chartered and the bill of lading contains a "demise clause". The first question could be resolved by amending the definition of "carrier". Because charterers can now limit their liability in the same way as shipowners, the demise clause has become a confusing anachronism, and the Rules might be amended to state clearly that "demise clauses" are invalid.

92. In article 1 (*b*) (see para. 186 below), the phrase "in so far as such document relates to the carriage of goods by sea" would have to be amended if it should be decided to extend the Rules to the period when the goods are in the carrier's custody before loading and after discharge.

93. The definition of the term "goods" in article 1 (*c*) (see paras. 187 and 188 below) excludes deck cargo and live animals, so that the Rules do not apply to those items. There appears to be no justification for maintaining this exclusion; if it were abolished, carriers would still be protected adequately by the exceptions in the Rules and the limitation of liability. Moreover, a large number of containers are now carried on deck, and it appears reasonable that the same principles should apply to containers carried on deck as to those carried below deck. The definition of the term "goods" might, therefore, be amended to include all goods, whether carried on deck or not, including live animals.

94. It is doubtful whether in article 1 (*d*) (see para. 189 below) the definition of a "ship" includes barges and lighters which are used to load and discharge vessels. It seems desirable that the Rules should apply to lightering operations in case where the carrier owns or operates the barges of lighters as part of his contract of carriage. If so, the definition of the term "ship" could be amended to include such craft.

95. In article 1 (*e*) (see paras. 190-202 below), problems arise over the definition of the period of carriage during which the Hague Rules are to apply. This is usually considered to extend ". . . from the time . . . goods are loaded on" until "they are discharged from the ship". This part of article 1 raises several problems. For example, one major problem is that the Rules are interpreted in many countries so as not to apply to periods when the goods may be in the carrier's custody of under his control before loading and after discharge; during those periods, the carrier may contract out of liability to the extent allowed by local law. The second problem is that the terms "before loading" and "after discharge" are not sufficiently precise to define the moments at which the Rules begin and cease to apply. There appears to be no sufficient justification for allowing carriers to escape liability for loss or damage to goods under their control before and after the "carriage of goods" period. Both the problems noted above could be resolved if the Rules were amended to apply during the entire period that the goods are under the control of the carrier.

96. If the period during which the Rules apply is not extended, then it might be clarified that the terms "loading" and "discharge" mean the handling of goods from shore or ship's tackle in the port of loading to shore or ship's tackle in the port of discharge, in all cases in which the carrier is responsible for loading and discharging the goods. If this alternative were adopted, it would still be difficult for cargo owners to recover for loss or damage caused when the goods were in the custody or under the control of shore bailees. Therefore, the need would exist to prevent, uniformly, shore

[110] Some examples of "model" bills of lading designed for liner trades are: (*a*) The Conline bill of lading drafted by the Baltic and International Maritime Conference (for text, see annex III, below); (*b*) the model bill of lading originally prepared by a leading P and I club for the use of its members, and since used either in its original or an amended form as a model for individual bills of lading by different shipping lines (for text, see annex III, below); (*c*) the model bill of lading drawn up by ALAMAR (for text, see annex III, below).

The Conline bill of lading has the merit of brevity and does not include most of the redundant clauses found in other standard bills of lading. It is, however, subject to the Hague Rules. The P and I recommended bill of lading is also subject to the Rules and drafted so as to exonerate the carrier from any liabilities beyond those specified in the Rules as interpreted by him. This model also avoids many of the usual redundant or notoriously invalid clauses. The Alamar bill of lading is significant as a model prepared by a regional group of developing countries, and is also based on the Hague Rules. Many shipping companies from most developing countries use bills of lading which are basically similar to those used by their colleagues, whether from developed or developing countries, in common trades. They have tended in recent years to use the P and I model as a basis.

bailees from limiting their duty of care, or from contracting out of liability for the full value of the goods.

97. In many countries, interpretations of the phrase "before and at the beginning of the voyage" in article 3, paragraph 1 (see paras. 203-206 below), have led to an unreasonable result: the term "voyage" is interpreted as a single bill of lading voyage, regardless of the number of stops the ship may make at ports along the way. Thus, a carrier whose ship takes on cargo at ports A, B and C, and then, for example, sinks because it was unseaworthy upon leaving port C is liable only to cargo owners who shipped from port C, and not to those who shipped from ports A and B, provided that the vessel was seaworthy when it left those ports. This rule would be more simple and reasonable if it were amended to require the carrier to exercise due diligence to provide a seaworthy vessel upon leaving every port of call, and throughout the voyage, and to make the carrier liable for all cargo, regardless of where it is loaded, if he fails to comply with this rule.

98. There is uncertainty over the interaction between the carrier's duty towards the goods under article 3, paragraph 2, and the catalogue of exemptions in article 4, paragraph 2.[111] This uncertainty is complicated by the statement in article 3, paragraph 2, that it is "subject to the provisions of article 4". This problem might be relieved if article 3, paragraph 2, were amended to state clearly that the carrier must comply with its requirements to escape liability, and that these requirements are not affected by the article 4, paragraph 2, exception.

99. It is not clear in article 3, paragraph 6 (see paras. 212-219 below), whether the one-year limitation period begins to run from "delivery" or from "discharge", when those operations occur at different times. If the Rules were amended to apply to the entire period during which the goods are in the carrier's custody, as discussed in paragraph 95 above, then the time limit would begin to run from "delivery" and the uncertainty would be resolved. But if the Rules were not amended in this way, it would still be useful to amend article 3, paragraph 6, to clarify that "delivery" means the moment when the consignee receives, or should receive, the goods. Article 3, paragraph 6, might be amended further to state that it would be sufficient for suit to be brought in any jurisdiction having a reasonably close connexion with the contract of carriage (such as the country of shipment or of destination), and that the claimant would not be restricted to bringing suit in a particular jurisdiction.

100. There is some question whether the word "suit" in article 3, paragraph 6, includes arbitration proceedings. To include arbitration proceedings could be unfair to consignees when the bill of lading has been issued under a charterparty. Article 3, paragraph 6, might, therefore, be amended to exclude arbitration proceedings from the term "suit".

101. In some jurisdictions, the one-year period of limitation ceases to apply when the contract of carriage has been nullified by an unjustifiable deviation from the itinerary; in others, it continues to apply because of the words "in any event". The meaning of the words "in any event" may be in need of clarification.

102. The exception in article 4, paragraph 2 (*a*), with negligence in "the navigation or in the management of the ship" (see paras. 222-227 below) is an anachronism, which today causes great confusion and much litigation over what is "management of the ship" as opposed to care of the cargo. It allows carriers to escape liability for the negligence of their servants in a large number of cases. This exception requires reconsideration.

103. The exception in article 4, paragraph 2 (*b*) (see paras. 228 and 229 below), which exempts the carrier from liability for loss or damage caused by fire (unless caused by the actual fault or privity of the carrier), raises three problems, which might be resolved by amendments:

(*a*) Should the exceptions be eliminated, or at least limited severely, in view of the fact that modern ships are required by law to carry extensive fire protection equipment, and can maintain radio contact with shore authorities and other vessels at sea?

(*b*) Should the Rules be amended to prevent local fire statutes in various countries from granting to the carrier a wider immunity in case of fire than he would enjoy under the Rules?

(*c*) Should the Rules be amended to make it clear that the burden is upon the carrier to show how the fire was caused, and to bring himself within the exception? The carrier might remain liable if the cause of the fire could not be established.

104. The exception in article 4, paragraph 2 (*c*), concerning "perils . . . of the sea" (see paras. 230-232 below) is stated in vague terms and is subject to widely varying interpretations. It has perhaps become an anachronism, for the same reasons as those given in paragraph 102 above with regard to negligent navigation. If the exception is maintained, the meaning of the term " perils of the sea " might be defined more strictly.

105. The exception in article 4, paragraph 2 (*i*), with respect to "act or omission of the shipper" (see para. 233 below) might be defined more precisely, in order to prevent carriers from disclaiming liability on this ground when there has been merely a misdescription of the goods or some other trivial lapse on the shippers' part, quite unconnected with the cause of loss or damage to cargo.

106. There have been complaints that carriers take advantage too readily of the exception in article 4, paragraph 2 (*j*), concerning strikes (see paras. 234-236 below), in order to justify route deviations in situations which are not in fact sufficiently serious to warrant deviation. The Rules might be amended to provide guide-lines for determining in what cases a strike is

[111] See paras. 207-211 and 220-255 below for a fuller discussion, and para. 111 below on the burden of proof with respect to the catalogue of exceptions in article 4, paragraph 2.

sufficiently serious to justify a deviation from the itinerary, and to ensure that the interests of all parties are considered in making this determination.

107. The burden and method of proving "inherent vice" under article 4, paragraph 2 (*m*) (see paras. 237 and 238 below) might be clarified by amendment. Moreover, the Rules might mention specifically the customary tolerances with respect to "inherent vice" by reason of which the carrier is excused from liability.

108. It is not clear in what circumstances carriers can claim exemption for "insufficiency of packing" under article 4, paragraph 2 (*n*) (see paras. 239-247 below), nor is it clear precisely what type of notation in the bill of lading is effective for claiming this exemption. It would be useful to clarify these points by amendment.

109. The exception for "latent defects", in article 4, paragraph 2 (*p*) (see paras. 248-251 below), might be eliminated, so that it could be claimed, if at all, only under the "catch-all" exception provided in article 4, paragraph 2 (*q*) (see paras. 252 and 253 below). It would appear that the concept of "latent defects" could be included in the carrier's obligation to provide a seaworthy vessel. This has been done by interpretation in several countries, and some countries have not mentioned latent defects as a specific excepted peril.

110. There are a number of other exceptions under paragraph 2 of article 4, namely those in sub-paragraphs (*d*), (*e*), (*f*), (*g*), (*h*), (*k*), (*l*) and (*o*), the implications of which have not been considered in detail. Most of these exceptions could be eliminated, since the circumstances to which they refer can be covered by paragraph 2 (*g*).

111. As noted above, the problem of the interaction between the provisions in article 3, paragraph 2, regarding the carrier's duties and the catalogue of exemptions in article 4, paragraph 2, has not been resolved satisfactorily, so that it is often uncertain what each party must prove in order to prevail. This uncertainty could be removed through appropriate amendments to clarify the burden of proof. It appears reasonable that the carrier should be required to prove both his compliance with article 3, paragraph 2, and his exemption under one of the provisions of article 4, paragraph 2.

112. The Rules neither define the tem "deviation", as expressed in article 4, paragraph 4 (see paras. 256-264 below), nor state the consequences of an "unreasonable deviation". As a result, the whole subject is clouded with uncertainty and it is extremely difficult for cargo owners to prove that an "unreasonable deviation" caused their loss. There are at least two ways in which this problem could be clarified and simplified: (*a*) the Rules might be amended to state that a deviation is presumed to be unjustified unless the carrier proves that compelling conditions forced him to deviate for the benefit of the ship and the cargo; and (*b*) clauses similar to those found in the United States COGSA might be added to article 4, paragraph 4.

113. Article 4, paragraph 5 (see paras. 265-284 below), limits the carrier's liability to £100 sterling per package or unit. The phrase "per package or unit" has caused considerable uncertainty, principally because; (*a*) there are significant departures from the model Rules in the COGSA of several countries; (*b*) it is not clear whether "unit" should mean a unit of goods or the weight or volume unit by which freight is calculated; (*c*) the term "package or unit" does not always fit the wide variety of forms in which goods may be shipped, and in some cases the number of packages may differ from the number of units; and (*d*) it is not clear whether a container or pallet constitutes a single "Package".

114. These difficulties could be relieved somewhat if the Rules were amended to define the terms "package" and "unit" more precisely. For the reasons given in paragraph 113 above, it is believed that merely to increase the limitation amount is not sufficient to resolve the problems and remove uncertainties of article 4, paragraph 5.

115. Article 5 (see para. 285 below), which states that the provisions of the Rules are not applicable to charter-parties, but goes on to say that they apply to bills of lading issued with charter-parties, appears to need clarification. Difficulties are encountered by charterers, shippers, carriers and receivers in identifying their liabilities when the terms of charter-parties are incorporated in bills of lading.

116. Article 6 (see paras. 286 and 287 below) under the Rules does not apply to "non-negotiable receipts", provided that certain conditions are fulfilled. One of these conditions is that the carriage must not be an "ordinary commercial shipment made in the ordinary course of trade". This phrase is rather vague, and might be clarified by amendment.

117. The measure of damages, even in the 1968 amendments (see paras. 288-290 below), depends upon market value or "normal value", which are often difficult to establish and the determination of which may involve litigation. This uncertainty would be removed by the adoption of more precise standards of measurement, such as CIF value plus a percentage for profit, or invoice value plus freight, insurance and a percentage for profit.

118. The Rules are silent on the question of damages for delay (see paras. 291 and 292 below), but courts generally have held that a carrier is liable for loss or damage arising from a delay caused by his fault as legally defined. However, losses due to delay are often difficult to establish precisely, and carriers frequently deny liability for such losses. It would remove considerable uncertainty on this point if the Rules were amended to confirm that delay is included within the concept of "loss or damage", so that carriers would be liable for delay arising through their fault or negligence.

119. Many bills of lading contain a number of "liberty" clauses (see paras. 294-299 below) purporting to grant the carrier rights and immunities which he would not otherwise enjoy, but which in fact are invalid because they conflict with the Hague Rules. Such clauses may mislead cargo owners into dropping valid claims, they may prolong negotiation over claims which

otherwise might have been settled promptly, and they encourage unnecessary litigation. It would therefore be desirable to end the practice of including invalid clauses in bills of lading. One means of doing this might be to include in the Rules specific references to many commonly used invalid clauses, as examples of clauses prohibited by the Rules.

120. Two examples of frequently invalid liberty clauses are "freight clauses" and "refrigeration clauses." A "freight clause" is one which states that the freight shall be earned and payable regardless of whether the vessel and goods are lost. If there is a loss for which the carrier is legally responsible, then such a clause is invalid as a lessening of the carrier's liability in violation of article 3, paragraph 8. "Refrigeration clauses" are those which attempt to relieve the carrier from liability for defective functioning of the refrigeration machinery. Such clauses are generally invalid under article 3, paragraph 8, for they lessen the carrier's liability under both paragraph 1 (*c*) and paragraph 2 of that article.

121. Carriers often insert "jurisdiction" clauses (see paras. 299-304 below), specifying that any dispute arising under the bill of lading shall be decided in a particular country, or that a particular country's law should apply to such disputes. The validity of jurisdiction clauses is non-uniform and uncertain, and at present the Rules are silent on the subject. The 1968 amendments to the Rules did not, as earlier proposed, extend the scope of the Rules to both inward and outward bills of lading. It would be extremely helpful to have a uniform rule on jurisdiction. Perhaps it would be both certain and fair to stipulate that jurisdiction lies, *inter alia,* in either the country of shipment or that of destination, at the option of the party claiming in respect of the loss.

122. "Transhipment" clauses (see paras. 305-309 below) often state that each carrier along a route is to be responsible for the goods only while they are in his possession. If valid, such clauses raise problems because: (*a*) the extent of the different carriers' liabilities is difficult to determine precisely; (*b*) goods may be transhipped at a port where the Hague Rules are not in force, with the result that the Rules may not apply to the on-carriage period; and (*c*) the transhipment clause may state that each carrier's bill of lading is to apply while the goods are in that carrier's hands. A further question is whether jurisdiction clauses in each bill of lading along the route are valid; if they are, a cargo owner might have to sue different carriers under different jurisdictions. These problems might be solved by stipulating in the Rules that the original carrier shall be responsible for the entire through transit, and that the Rules shall apply to the entire transit.

PART II

ANALYSIS OF THE FUNCTIONING OF THE BILL OF LADING

CHAPTER IV

COMMERCIAL ASPECTS

123. From the preceding chapters, it has been seen that the bill of lading is a commercial document with a long history, and that it has meant different things at different times (see chapter II above). Beginning as a bailment receipt for goods, it has developed into a receipt containing the contract of carriage and acquired in time a third characteristic, that of a negotiable document of title.

124. Changing methods of trade led to great shifts in the legal theory underlying the bill of lading. Initially, the important element was possession. Who had possession of the goods when the litigated question arose, the seller or the buyer? This was particularly important at times when possession at sea was often determined by force, in the age of pirates and privateers. After piracy and privateering had been eliminated in the nineteenth century in Europe, the legal emphasis began to shift from possession to title (or, as the Sales Acts and Codes put it, to property).[112] The question began to be, who had title to (or property in) the goods when the crucial incident occurred—was it the seller, or the buyer, or a middleman? It became important to determine at what moment title changed. In the early nineteenth century, some French court decisions began to stress the importance of documentary title to sea-borne goods. English decisions expressing the same idea followed. Title and documents thus became more significant than possession of the goods at sea, and early forms of CIF sales contracts appeared in the late 1880s. The bill of lading, insurance policy, invoice, etc. together formed a freely transferable "unit" or set of documents which could be bought and sold not merely once but repeatedly while the ship was at sea, representing the goods that were in the ship and protecting the principal risks of their non-arrival or arrival in bad order.

125. A further legal development set in about 1900, when the important question was conceived to be not who had the title to the goods, but who had the risk as to the goods and the whole transaction.[113] The ultimate question when goods were sold and bought overseas on CIF terms thus became: who bears the risk of any loss? On the other hand, possession, or title to the goods, became less important.

126. These changes in the commercial and legal basis of the bill of lading have made it a flexible document based partly on general maritime law and partly on the special clauses introduced by the parties, as controlled to a greater or lesser extent by various statutes, international conventions and usages, together with local procedural systems that come to regulate its provisions in the course of its world-wide currency.[114]

127. The commercial aspects of the bill of lading must, therefore, be examined against this complex background when the commercial role of the bill of lading is evaluated as "one of the indispensable documents in financing the movement of commodities and merchandise throughout the world.[115]

128. The commercial aspects of bills of lading within the context of the present inquiry broadly include its role in the course of trade as a document of title, a receipt for the goods and a memorandum containing either the contract of carriage or its evidence. What requires examination is how well or indifferently the bill of lading as at present constituted performs these commercial functions. In other words, does it satisfy the needs of the seller, the shipper (if he is a different person from the seller), the carrier, the receiver, the buyer (if he is a different person from the receiver), the banker and the cargo underwriters, all of whom depend upon its contents for their respective needs?

129. The principal matters of concern to some or all of these parties would include:

[112] See A. W. Knauth, *op. cit.*, p. 377.

[113] *Ibid.*, p. 379.

[114] *Ibid.*, p. 134.

[115] See G. Gilmore and C. L. Black, *op. cit.*, p. 87.

(*a*) The negotiability of the bill of lading;[116]

(*b*) The efficacy of its role in the sale of goods as regards the passage of property and risk of loss, and within the operation of the terms of shipment (e.g., FOB, CIF, etc.);

(*c*) Its role in documentary sales;[116]

(*d*) Its role in bank letters of credit;[116]

(*e*) Its efficacy as a receipt for goods;

(*f*) Its status as a contract of carriage;[117]

(*g*) Its status as a document of title.[116]

130. The relationship between the sales contract for the goods and the bill of lading will be examined briefly. The buyer needs the bill of lading in order to receive the goods, and also in order to be in a position to prosecute any claim against the carrier, or to transfer his rights to subsequent purchasers. Sales contracts contain the terms on which the goods have been sold, e.g. on FOB or on CIF or other terms. These terms[118] are the product of the customs and usages of merchants rather than of legislation. "The shipment terms serve several functions: (1) They determine the point at which property in the goods passes from seller to buyer, and consequently which party bears the risk of loss and what remedies are available to either party on breach by the other; (2) They determine what performance by the amounts to a tender which will put the buyer, who thereafter refuses to accept delivery, in breach; (3) They are a widely used means of quoting price".[119] The economic impact of the use of these terms was examined in the report by the UNCTAD secretariat entitled *Terms of shipment*. No specific complaints related to the legal impact of these terms has been received. Consequently, it has not been considered necessary to investigate the subject further.

131. In consequence of the spread of the practice of financing international trade by documentary letters of credit, the performance of the sales contract by the seller is completed upon presentation of the required documents to the bank.[120] Problems of property transfer between seller and buyer have thus lost most of their former significance. The seller's interest is to be paid as quickly as possible for goods which he has sold. The "clean" bill of lading[121] is the only acceptable supporting documentary proof he can provide that the goods (of the description specified in the contract) have been shipped by the due dates and in apparent good order and condition.

132. Most modern ocean bills of lading are "order" bills of lading, by which the carrier undertakes to deliver the goods at the port of destination to the named consignee or to his "order". The word "order" gives to the bill of lading its legally and commercially important characteristic of a document of title. The authority for conferring his status on order bills of lading is contained in national laws.[122]

133. The legal ownership or possession of the goods can be transferred from the named consignee to other persons without the need for any of them to see or have the goods in their physical possession, for at the time of the transfer the goods are on the high seas. Ownership or possession of the goods is transferred[123] initially when the named consignee signs his name on the bill of lading. The document may then pass to other parties until the last holder presents it to the carrier as his demand for delivery of the goods at the port of destination. The various indorsees and holders of the bill of lading are entitled legally to rely upon the "tally" and upon the statements of "apparent (good) order and condition" in the bill as being correct, and may hold the carrier liable under the applicable law for the accuracy of these statements (see para. 26 above).

134. For practical purposes, order bills of lading are usually treated as fully "negotiable".[124] The shipper, the consignee and all intervening parties holding negotiable order bills of lading wholly depend on the bill of lading for the following three vital statements:

(*a*) The statement as to the accuracy of the loading tally with respect to whether the goods were shipped or received on board;

(*b*) The statement as to the correctness of the "clean" outward appearance and condition of the cargo;

(*c*) The statement as to the correctness of the date of loading. (Confirmed documentary credits are restricted by time limitation; unless the goods have been delivered to the ship by the specified date, the credit conditions will not be satisfied.)

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[116] No major complaints appear to have been raised as to the negotiability of the bill of lading (except in connexion with its status as a receipt), its role in documentary sales, in bank letters of credit or as to its status as a document of title. No comments are therefore called for in respect of these topics.

[117] Chapter VI below is devoted to the problems raised by the bill of lading as a contract of carriage.

[118] The International Chamber of Commerce in its Brochure 166, Paris, 1953, has defined these terms, which are in general use under the code name "Incoterms 1953". See also *Terms of shipment: report by the secretariat of UNCTAD* (United Nations publications, Sales No.: E.69.II.D.14).

[119] See G. Gilmore and C. L. Black, *op. cit.*, p. 96.

[120] See D. M. Sassoon, "CIF and FOB contracts", para. 172 (*British Shipping Laws*, vol. 5). A carrier who has issued a "non-negotiable" bill of lading ordinarily fulfils his obligations by deliving the goods to the consignee named in the bill of lading. Contra, the carrier who has issued a "negotiable" bill of lading does so by delivering the goods to the holder of the bill of lading. In the former case it may not be necessary to produce or even be in possession of the bill of lading, while in the latter its production is "indispensable"; see G. Gilmore and C. L. Black, *op. cit.*, pp. 89-91.

[121] To be "clean", the bill of lading must have no reservations on it as to the condition of the goods which would prevent them from being readily marketable. See paragraphs 135 to 138 below.

[122] The account given here of transfer and negotiation has been considerably simplified in order to present a general picture. The position in practice varies in different countries according to their national laws.

[123] Whether it is ownership or possession which is transferred depends upon the law governing the contract contained in the bill of lading.

[124] See T. G. Carver, *op. cit.*, paras. 1045-1057, as to fine distinctions that are sometimes drawn between bills of lading and bills of exchange in regard to negotiability.

135. The carrier faces problems raised by provisions in the sales contract when the shipper requests a clean bill of lading for goods which are obviously not as represented. The shipper undertakes in return to indemnify the master, ship and carrier for making, what is, in fact, an incorrect statement.[125]

136. Requests for clean bills of lading are of two kinds. The shipper either wants a receipt for a certain number of bags, bales or other cargo units, although the tally shows a lesser number, or he wants an acknowledgement that the goods were received in apparent outward good order and condition when the apparent outward condition may not be so.

137. It is the shipper's responsibility to deliver to the vessel sufficient cargo in a condition that entitles him to a bill of lading which is "clean" enough to support his sales or credit terms. Neither the vessel nor its master nor the carrier are ordinarily directly concerned with the terms of sale. Their only obligation under maritime law is to issue to the shipper, on demand, a true bill of lading stating the quantity and apparent outward condition of the goods.[126] They are, of course, in general responsible to *bona fide* endorsees and purchasers of the order bill of lading for the truth of the tallies as to quantity and whatever representation is made in the bills of lading as to the apparent condition of the goods.

138. When cargo is found to be damaged or is lost, the claimant is almost always a purchaser of the goods on terms which include the "negotiation" of the bill of lading. The law in most countries usually provides that a buyer of goods who acquires an order bill of lading which is endorsed to him or in blank and for which he has paid value in good faith obtains a title superior to that of the original shipper. The reason is that the *bona fide* purchaser may rely on the "clean"[127] face of the bill of lading and would not usually be affected or limited in his rights against the carrier by what his shipper may know concerning the goods being short-delivered or in bad order. The carrier who issues a clean bill of lading for goods known to be short in amount or in "unclean" condition must therefore settle the inevitable claim for shortage or damage at the port of destination, and it is for him to indemnify himself *vis-à-vis* the shipper on the basis of the letter of indemnity.

139. Sometimes, sales contracts provide that statements in bills of lading as to shipment and date will be accepted as being conclusive. Such clauses, which may be unknown to the carrier, make it more important than ever that the bill of lading should be as accurate as the carrier can make it.

140. The material available to the UNCTAD secretariat suggests that, so far as the commercial aspects of bills of lading are concerned, the main problem is that of the status and function of document as a receipt, for it is this status which frequently affects its negotiability. To begin with, a carrier's obligation to answer for one or more of the basic characteristics of the goods may differ in different countries.[128] He may mention either the weight or the quantity or both, and may be liable or excused for discrepancies quite arbitrarily according to different laws in the different countries where disputes may arise. This situation causes uncertainty in the minds of cargo owners, bankers, underwriters and others who depend upon the bill of lading for reliable information as to the quantity, condition and description of the goods carried.

141. Likewise, the bill of lading must attest that the shipment corresponds as to quantity to the quantity specified in the invoice.[129] The description of the goods mentioned in the bill of lading may, however, sometimes differ materially from what appears in the supplier's invoice or credit requirements: ". . . each of the documents will contain a description and it will be a careful and lucky seller who can ensure that the several descriptions match exactly."[130] Unless the bill of lading is skilfully filled in by the shipper and by the carrier to make the description of the goods tally with the goods and the documentary or credit sales requirements, the bill of lading suffers from defects which impair its negotiability or the transferability of the goods.

142. These uncertainties as to the accurate description of the quality and weight (or quantity) of the goods tend to reduce the value of the bill of lading, both as a negotiable document and as an acknowledgement of what goods were in fact shipped.

143. It is not possible to deal with these two topics —negotiability and the status of the bill of lading as a receipt—separately. It would appear that, first, it must be agreed what essential characteristics should be specifically acknowledged by the carrier as attaching

[125] Letters of indemnity are considered fraudulent documents in many countries, depending upon the circumstances of issue. See, for example, J. C. Carver, *op. cit.*, para. 474, and R. Rodière, *op. cit.*, vol. II, para. 470, for jurisprudence in French, German, United States, United Kingdom, Greek, Italian and Belgian courts.

[126] See article 3, paragraph 3, of the Rules.

[127] See International Chamber of Commerce publication No. 223 (1963) *The Problem of Clean Bills of Lading*. As no grievances of a serious nature were raised on this topic by respondents to the UNCTAD questionnaire, the matter has not been dealt with in any detail in the present report. The negotiability of "claused" or "unclean" bills of lading may, of course, be impaired; in this connexion, see paragraphs 140 and 141 below.

[128] Article 3, paragraph 3 (*b*), of the Hague Rules requires that the carrier mention on the bill of lading "either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper". In some countries, the carrier must also answer for the quality of the goods, although he can exempt himself doing so.

[129] See D. M. Sassoon, " CIF and FOB contracts ", para. 71, in *British Shipping Laws*, vol. 5. See also judgement of MacNaghten J. in *Liban Wood Co. v. H. Smith and Sons Ltd.* (1930) 37 Ll. L. R. 296, 300: "If there is an invoice for a specified quantity and the bill of lading is for either an unknown quantity of goods or a quantity of goods substantially different from that in the invoice, the bill of lading would not be a proper bill of lading which the buyer would be compelled to accept".

[130] See G. Gilmore and C. L. Black, *op. cit.*, p. 106.

to the goods received, and he would then be unqualifiedly liable for the goods in the condition in which he received them.

144. For example, in regard to machinery, a brief description of the machines and the quantity shipped would usually suffice. It would not be necessary in most cases to acknowledge, for instance, the weight or specifications, nor would the carrier be held liable for any discrepancy in weight or measurements detected at destination. In the case of other cargoes, weight may be a decisive factor, as it often seems to be where bulk shipments (e.g. grain) are concerned. Consideration may be given to the idea that the carrier should be liable for the weight, subject to customary tolerances (see para. 109 above) in the case of such shipments. It has to be appreciated, however, that whenever the carrier is liable for delivery of goods by weight, he has to exercise his discretion whether to weigh the goods himself, or not, prior to shipment. If rigid laws unreasonably compelled him to guarantee delivery of goods by weight, his operating costs would rise because of the time occupied in weighing the goods. This might induce him to raise his freight rates. The introduction of strict liability on the part of carriers for weight of goods or other characteristics should be viewed with these possible undesirable consequences in mind.

145. Although difficulties exist affecting the function of the bill of lading in satisfying its commercial functions, in fact, and despite the inherent weaknesses in the situation, commercial practice appears to have largely adapted itself to the situation, and as a result the problems are minimal.[131]

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[131] The 1968 Brussels Protocol improved somewhat the status of the bill of lading as a receipt. Article 1 of the Protocol amended paragraph 4 of article 3 of the Rules by adding to that paragraph a sentence, in italics in the revised text of the paragraph reproduced hereunder:

"4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3, (*a*) (*b*) and (*c*). *However, proof to the contrary shall not be admissible when the Bill of Lading has been transferred to a third party acting in good faith*".

CHAPTER V

ECONOMIC ASPECTS

A. Introduction

146. The bill of lading is a commercial document performing a complex set of functions. So far as its commercial aspects are concerned, the question is how these functions are defined, and how effectively they are performed. As has been seen in the previous chapter, by and large, except for certain weaknesses as a receipt, the bill of lading fulfils its function reasonably effectively. This conclusion does not, however, express any opinion concerning the costs imposed on trade by modern practice relating to the bill of lading. In other words, commercial effectiveness and economic efficiency are different things.

147. Clearly, there must be an economic cost. The organization of trade and the related documentation, the making and settling of claims for lost and damaged cargo and all the other activities connected with the facilitation of trade involve costs. Hence, the pertinent question is not whether the bill of lading imposes costs on trade. The answer to that question is clearly that it imposes costs, and even the most perfect commercial instrument which could be devised would impose costs. The pertinent question which has to be asked consists of two parts. First, what is the level of the economic costs imposed in relation to the commercial function performed (that is, the cost effectiveness)? Secondly, on whom do the costs fall? This second question is relevant, whether or not the economic costs are shown to be reasonable in the circumstances.

148. The present chapter is concerned with these two questions and it shows that the bill of lading as at present constituted fails on the grounds of cost effectiveness—that is, the costs imposed are too high in relation to the commercial functions performed—and that the costs fall more heavily on the cargo owner than seems to be justified.

149. Most of the difficulties to be discussed arise when cargo is lost or damaged and the cargo owner lodges a claim with the carrier for compensation. To give a qualitative perspective to the discussion, the UNCTAD secretariat endeavoured to obtain information regarding cargo claims for a recent year. It hoped to be able to show the total value of cargo carried by ocean transport during the particular year and, in relation to this, to show the value of cargo claims made. The figures would then have indicated the magnitude of the losses suffered by cargo owners as a result of loss, damage or delay to cargo. The secretariat hoped to break down the figure of cargo claims to show what percentage of these was accepted in full by the carriers, what percentage of the claims was settled by compromise and what percentage was rejected.

150. Had these specific data been available, not only would a valuable perspective have been given, but the extent to which claims were rejected would have been a first indication of the impact of the exceptions listed under article 4, paragraph 2, of the Hague Rules, which permit carriers to avoid liability for cargo damage in a large number of circumstances. Similarly, the value of the claims settled by compromise might have provided some indication of the uncertainty inherent in the functioning of the Rules. The data could have been no more than indicative, and certainly no definitive judgement as to whether the economic costs were excessive or not could have been based on the results.

151. Questions were asked of bodies such as the International Chamber of Shipping, and in the questionnaire sent by the secretariat to shipping lines and to insurers in order to obtain the required information. Global figures could not be obtained, since no organization collects the data. Although a good deal of information was obtained regarding the experience of individual insurers, P and I clubs and shipping lines, this did not enable the secretariat to calculate the desired magnitudes. With regard to the settlement of claims, the experience reported by different respondents was so diverse that no meaningful indications could be derived. In some cases, for example, up to three-quarters of the claims made were accepted by the carriers, while in other cases the proportion of claims accepted was as low as 20 per cent.

152. In consequence, a quantitative perspective which would be in any sense useful cannot be given. It must be stressed, however, that the lack of sufficient quantitative information in no way prevents economic judgements from being made. Indeed, even if it had been obtained, the information would have been indicative only, a useful background, but nothing approaching a "proof" of the scale of the problem. In fact, there are many aspects of economic performance in the world which are, by their nature, not quantifiable, and the cost effectiveness of the bill of lading is one of these.[132]

[132] For example, most of the major maritime Powers accepted, by ratifying the Hague Rules or adopting similar legislation, a system of liability and distribution of risks which was not based upon any quantitative evaluation of the economic issues involved. Nor is there evidence that such evaluation preceded recent changes in national legislation, in both developed market economy and developing countries, extending the scope of the Hague Rules to increase carriers' liabilities.

This inability to quantify the problem is inherent in the situation, not simply attributable to lack of data.

B. Cost effectiveness of the bill of lading

153. The question of the cost effectiveness of the bill of lading resolves itself primarily intho that of where the risk for loss lies and who bears the costs of insuring against that risk. There are other less important points, some of which will be considered briefly.

Overlapping insurance

154. Cargo owners insure those risks of loss or bill of lading resolves itself primarily into that of where damage to their goods which they feel obliged to cover either because liability for such risks is not accepted by carriers or because the risks are uncertainly allocated between the parties concerned or, by not being specified, apparently fall on the cargo owner. Ideally, cargo owners should not need to insure against the risk of loss or damage to their goods which is covered by the liabilities falling upon the carrier under the contract of carriage. These risks and liabilities are spelt out in article 3 of the Rules, which provides, *inter alia*, that, apart from the carrier's obligation to make the ship seaworthy, he is required, subject to article 4 (which specifies his rights and immunities), to "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried".

155. It will be seen from the analysis in chapter VI below that the apportionment and definition of risks and liabilities are not at all clearly demarcated in the Rules, and that the position is further complicated by the uncertainties concerning such matters as the burden of proof, and procedure. Thus, it often happens that cargo owners have no alternative but to over-insure, lest they be exposed to the incidence of risk for which carriers might not compensate them, even though carriers may be liable to do so under the Rules.

156. The extent of the insurance cover is a matter of individual preference on the part of the cargo owner.[133] If he purchases the maximum cover—e.g. an all-risks policy—he will almost certainly be over-insured, since it will include liabilities for which the carrier would ordinarily be responsible. Alternatively, he can insure under a limited form of policy, e.g. against total loss of cargo only, in which case, in the event of less-than-total loss, he would be under-insured, in that this less-than-total loss is not covered. Insurance policies are not usually issued for individual risks. The assured generally enters into a "package deal", and among the risks covered by the premium paid by the cargo owner will be included those for which his contract of carriage places the liability on the carrier. Thus, the additional insurance by the cargo owner includes insurance against risks for which the carriers are already responsible. In this way, insurance policies overlap, since both carrier and cargo owner are insuring against the same risks.[134]

157. It might be useful to illustrate how ambiguity in the definition of risks can lead to overlapping insurance. One can take as an example the risk of perils of the sea, in respect of which the carrier is immune from liability under his contract of carriage and against which the cargo owner can insure. Overlapping insurance can arise in this way: the immunities can be construed, in one sense, ". . . as a list of possible causes for loss of or damage to cargo for which the carrier cannot be blamed. As such, the catalogue has of course no legal significance—there are obviously a number of other causes which might be relied upon by a carrier to exculpate himself".[135] This means that until a cargo owner accepts a statement by the carrier that a peril of the sea caused the loss, and that the loss is therefore unrecompensable, or it is so decided by arbitration or litigation, the words of the immunity clause have no operative legal force of their own but are of uncertain effect. Accordingly, the cargo owner has to continue insuring against "perils of the sea", even though there may be circumstances in which the carrier would be liable to him for loss caused by perils of the sea.

158. It was precisely this type of uncertainty in the working of the law which was in the mind of Sir Norman Hill, the principal spokesman for British shipowners in many international conferences, when he said". . . those doubts and uncertainties have for 50 years burdened overseas commerce with the cost of double insurance in respect of many of the risks incident to the voyage".[136] Although these statements were made before the Hague Rules came into general operation, the position is not markedly different today.

159. If cargo owners could be certain of being covered against some risks by the carrier under the contract of carriage, and if they could be assured that they could recover the full value of their claims, they would have no need to go outside their terms of carriage

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[133] "Cargo is carried uninsured to a much greater extent than should be expected" (see K. S. Selmer, *The Survival of General Average* (Oslo, Oslo University Press, 1958), pp. 192 and 193). The position varies in different trades.

[134] "Cargo insurance . . . insures against some losses for which the ship is responsible, for the cargo underwriter pays on many claims, even though negligence of the ship has been a concurrent cause of the loss" (see G. Gilmore and C. L. Black, *op. cit.*, p. 169). It is often said that, since carriers insure against liabilities and cargo interests insure against risks of physical loss of or damage to their cargoes, it is difficult to speak of "duplication" in a technical sense. The belief held in many leading insurance markets is that the insurance coverage available (i.e. carriers' liability and cargo insurance) are intended not to duplicate or overlap each other but to satisfy the separate needs and responsibilities of the respective parties. On the other hand, there is a certain sophistry in this argument, since the "event" being insured against is the same, namely, loss or damage to cargo.

[135] See S. Brackhus, "The Hague Rules Catalogue", in K. Grönfors, *Six Lectures on the Hague Rules, op cit.*

[136] See p. 20 of his evidence before the Joint Select Committee on Carriage of Goods by Sea, in the report published by H.M. Stationery Office in 1923. Sir Norman also said later in his evidence "One of the objects of the (Hague) Rules is to safeguard oversea commerce against the burdens of the cost of double insurance: that is, of insurance with both the shipowners an the underwriters".

and pay premiums to cargo insurers to cover the same risks. Under existing laws and practices, this does not seem to be possible. They must, therefore, pay unnecessary premium for so long as the uncertainty remains.

Shifting the risk as a measure of economic effectiveness

160. Overlapping insurance arises because of uncertainty as to where the risk for loss or damage lies. Such uncertainty is inevitable when the division of the risks between the carrier and the cargo owner is not clear, as is the case under the Hague Rules. The uncertainty can be reduced by clearly demarcating the respective risks of the parties concerned, but since even in that situation argument could arise about the physical circumstances of the loss, uncertainty can be eliminated only by shifting all of the risks on to either the carrier or the cargo owner. Thus to determine whether the present economic costs are or are not excessive, one has to compare the present level of costs with what that level would be if all risks were clearly moved on to either the carrier or the cargo owner.

161. For the sake of argument, the problem of overlapping insurance will be assumed to be non-existent. It will be assumed that through insurance by the carrier and the cargo owner all risks are exactly covered, no more, no less. If this were the position, then there is no reason to believe that a redistribution of risks would necessarily lead to any increase in the over-all cost of insurance. What would happen if, for example, risks were redistributed so that the carrier bore more is that freight rates quoted to include insurance in a CIF sales contract would rise, but their rise would be exactly matched by a fall in the insurance costs borne by the cargo owner. Similarly, if all the risks were shifted towards the cargo owner, freight rates, where they include insurance, should fall, while the cargo owner's insurance costs would rise. There are three circumstances in which it appears that this might not happen.

162. The first circumstance is where there was a marked difference in the costs of the insurance bought by the carrier and that bought by the cargo owner. In this case, if more risks were attributed to the party for whom the insurance was the more expensive, then total costs would rise. However, it is more logical that risks should be shifted towards the carrier than that they should be shifted towards the cargo owner. Generally, the carrier rather than the cargo owner will have the benefit of lower insurance costs because he operates on a larger scale. Therefore, the likelihood of a rise in costs in this circumstance is remote. An advantage of shifting the risk to the cargo owner is that he may have a clearer idea of the value of the cargo than the shipowner and may thus more easily avoid any costs of over-insurance which might be incurred if the carrier arranged all the insurance.

163. The second circumstance is that in which a shift of the risks might lead to more insurance being bought than was previously the case. It was assumed above that all risks were exactly covered by insurance. In fact, the cargo owner may at present undertake no more insurance than that which is implied in the CIF contract. In this case, if the carrier takes on more liabilities, he will insure against them, and the insurance element in the freight rate will rise correspondingly. The cargo owner will thus be paying more than before, because his goods will be covered by additional insurance, which presumably he would prefer to do without, this preference being inferred from the fact that he did not formerly take out such additional insurance. However, he is only in this position so long as he is forced to accept a CIF contract and unable to find a C and F contract. If any redistribution of the risks was associated with a provision to the effect that no cargo owner should be forced to accept a CIF contract if it stipulated more insurance than he wished to buy, then no extra cost would arise. Even if extra costs were involved, it must be emphasized that this extra cost would arise not because the cost of the same amount of insurance had risen but because more insurance was being bought.

164. The third circumstance in which costs might rise would occur if P and I clubs took a very pessimistic view of the volume of claims to be met and increased contributions from their members very sharply to cover a larger volume of claims. The shipping lines would then increase their freight rates to cover the extra P and I insurance. At the end of the year, when the P and I clubs found that they had over-provided, the shipping lines would not necessarily reduce their freight rates and certainly would not return to shippers the excess insurance costs which they had charged to them. This chain of events is probably a fairly unlikely one. It implies that all P and I clubs extract from their members at the beginning of a period enough money to cover all the claims that may arise during the period. If, in practice, they receive a contribution from their members at the beginning of the period and then ask for supplementary contributions as experience during the period is gained and the exact volume of losses is known, then the course of events outlined above does not occur. Further, there is not in fact any additional economic cost, since the extra cost to the cargo owner (i.e. the higher freight rate) is exactly matched by an extra gain to the carrier. There will have been a changed incidence of cost, but no change in costs.

165. Thus, it can be seen that action to shift all risks towards the carrier would not increase the overall costs of exactly covering these risks. Clearly, therefore, the economic cost of the present régime is excessive, the excess being exactly indicated by the extent of overlapping insurance which arises because of uncertainty.

Delay in settlement

166. One economic cost arises from delay in the settlement of claims. If there is no uncertainty as to who bears the risks, then, when once the fact of loss or damage has been proved, there is no reason why cargo claims should not be settled immediately. In the situation of uncertainty, however, the settlement of claims is frequently very protracted. For example, one ship-

ping line reported to the UNCTAD secretariat that by the end of 1969 over one-third of the claims made in 1968 had not been dealt with. There is a clear economic cost here, only partly offset by the savings in interest cost on the part of the carrier, who enjoys the use of funds belonging to the cargo owner during the period until settlement is made.

Arbitration and litigation

167. There are two aspects to this question. Owing to complexities and uncertainties, more claims go to arbitration or result in litigation than if the procedures were more clear-cut. Arbitration and litigation manifestly impose costs, including the indirect or unpaid element of the time which carriers and cargo owners spend in preparing for and attending proceedings. The cost of travelling to attend arbitration and litigation proceedings is also high. Carriers usually stipulate in their bills of lading where such proceedings will occur, which in practice usually means that it is the cargo owner who has to travel to attend the proceedings. For the present, however, the concern is only with the fact of the cost of travelling and attendance, which is the same whichever party bears it.

C. The incidence of the costs

168. There can be no dispute concerning the incidence of the costs of overlapping insurance. It is the cargo owner who must take and pay for the extra insurance (or stand the loss of his goods if he does not). He cannot shift the incidence on to the carrier and hence he has to bear this burden. It is also clear that the economic burden of delays in settlement falls entirely on the cargo owner; indeed it is to the carrier's advantage to delay settlement. Also, where carriers determine the venue of arbitration, the costs of attending fall more heavily on the cargo owner than on the carrier.

Unit limitation of liability

169. Even where carriers accept full responsibility for loss or damage to cargo and settle a claim, it is subject to the unit limitation of liability.[137] The cargo owner receives the limited sum from the carrier; the carrier is reimbursed to a similar extent by his P and I club, less the applicable deductible. The only case in which the cargo owner does not lose is that where he has himself insured the cargo.

170. How important is this question of limitation of liability? One major shipping line informed the UNCTAD secretariat that, had there not been any per package limitation, then in 1965, for an unstated proportion of the claims paid, the amount paid out would have risen from $1.25 million to around $6 million. On the other hand, one respondent with nearly 3,000 claims for 1968 stated that the unit limitation applied to only 12 of these. These two pieces of evidence are clearly contradictory. Other evidence obtained by the secretariat was not sufficiently conclusive to enable the contradiction to be resolved. Thus, there is no way of knowing definitely whether unit limitation is a major or a minor problem.

171. Whatever the dimension of the problem, its incidence falls on the cargo owner, not on the carrier. If the problem is small, it could be removed without difficulty or hardship to carriers. If the problem is serious, then the need to deal with it is the greater as the incidence is not shared but falls entirely on the cargo owner.

D. The position of developing countries

172. It has been shown that the bill of lading fails the test of cost effectiveness. It has also been shown that the incidence of the costs of the present régime lies heavily on the cargo owner, and this is true wherever the cargo owner is situated. It remains to be seen whether these factors have any special and undue impact on the developing countries.

173. Where there is an inequitable incidence of costs, no international transfer of income occurs in cases where both parties are in the same country. Where, however, the parties are in different countries, the inequitable incidence of cost leads to a real income transfer between the two countries. Since the developing countries are more important as cargo owners than as carriers, the present system is unfavourable to them and gives rise to a real income transfer from poor countries to rich ones. It needs to be noted that there is exactly the same real income transfer from non-shipowning developed countries.

174. Payments for exports are usually made against production of clean bills of lading after shipment, and any cargo claims are raised against the carrier at destination by importers. It is importers who are affected by the present position. With respect to the exports of developing countries, so long as the importers are in developed countries any loss falls on them. Thus, in so far as their exports are concerned, the present legal position regarding bills of lading appears to have relatively little direct economic impact on exports from developing countries.

175. The value of cargo claims arising on imports into developing countries represents the value of the goods lost or damaged, i.e. monetary loss, plus the loss of the use of the goods until replaced. The effect of the loss of the use of the goods exceeds in most cases the effect of a similar loss affecting developed countries. Inventory holdings in developing countries are usually minimal because of shortage of working capital, while many countries are distant from their sources of supply, with the consequence that the time taken to replace lost or damaged goods represents a serious practical

[137] It is subject to that limitation under the Hague Rules (if applicable) or under other limitations if the law applied contains limitations provisions. The limitation is usually disregarded if the carrier is in breach of some of the Rules (see S. Dor, *op. cit.*, p. 49). The unit limitation of liability is £100 per unit or package, according to the Rules, and comparable stipulated amounts in various countries.

and economic problem for them. Except in the simplest cases, compensation from carriers and insurers usually takes considerable time.[138] The re-ordering of the goods, the cost and problems of securing additional foreign exchange before the claim for loss is settled, the transit time of the goods re-ordered, all add up to additional economic waste and considerable hardship. As an indicator of real loss, the bare monetary figure of cargo claims is inadequate, and the additional indirect adverse economic impact must not be overlooked.

[138] This contrasts with the tradition of the prompt settlement of claims for the loss of ships and aircraft in first-class insurance markets. Except for the simplest cargo claims, most claims take from six months to a year or more for settlement. Many claims disputes drag on for several years.

E. Conclusion

176. The conclusions of this discussion can be stated in the form of four simple propositions:

(*a*) The bill of lading as at present constituted fails the test of cost effectiveness;

(*b*) The incidence of the costs involved is mainly on the cargo owners and only to a limited extent on the carriers;

(*c*) There is a real income transfer from countries which are more important as cargo owners than as carriers to those which are important as carriers;

(*d*) The developing countries as a group are among the losers in the real income transfer.

CHAPTER VI

REVIEW OF RELEVANT ARTICLES OF THE HAGUE RULES

A. Introduction

177. The principal articles of the Hague Rules of relevance to this report are examined below, with a view to identifying those of their provisions which have caused uncertainty and difficulty in their operation and interpretation. This approach has been adopted in preference to an analysis of national laws, because shipping problems are basically similar in all countries, and because the Hague Rules are applied in most maritime trading countries.[139]

178. One provision of the Hague Rules deserves special attention. At the time when the Brussels Convention was adopted, a central obligation was the requirement of article 3, paragraph 2, that the carrier should "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried". Considered alone, this brief rule imposes extremely stringent obligations upon the carrier. However, article 3, paragraph 2, was made subject to the provisions of article 4, and the duties specified in article 3, paragraph 2, have tended to be obscured by the long list of exceptions available to the carrier, by the limitation of his liability, by the rules relating to the burden of proof and other procedural provisions. As a result, article 3, paragraph 2, has not proved to be so important an instrument for protecting cargo owners as it might at first sight appear to be.

179. Perhaps it would lead to a more equitable balance between carriers and cargo owners if article 3, paragraph 2, were restated more forcefully, declaring that carriers must comply with its requirements before they could claim the benefit of any exemptions granted to them under the Rules.[140] Moreover, in cases of loss or damage, it would appear to be more equitable if the carrier were initially presumed to be in breach of his duties under article 3, paragraph 2, and thus were required to prove that he had in fact "properly and carefully" loaded, handled, etc. the cargo. The carrier normally has greater access to information concerning the cause of loss or damage; a presumption against him would require him to offer whatever evidence he might have, and prevent him from escaping liability when the cause of loss was not explained.

B. Definitions—Article 1

Article 1, paragraph (a) *("carrier")—the "demise" clause*

180. The definition in paragraph (*a*) states that the "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper. It raises two points for consideration: (*a*) whether any person other than the owner or the charterer can be a carrier, for example a shipping and forwarding agent; (*b*) who is liable as "carrier" when vessels are chartered.

181. On the first point, the word "includes" suggests that the designation of owners and charterers is not exhaustive, and that others might be considered carriers. In order to remove any doubt on the matter, the definition of "carrier" might be clarified to confirm that "carrier" includes the owner, the charterer or any other person who enters into a contract of carriage with a shipper.

182. On the second point, suit can be brought against a charterer whenever there is a demise charter or whenever the charterer contracts in his own name with the shipper and issues a bill of lading. There is uncertainty, however, where a vessel is time or voyage chartered and a bill of lading is issued with the name of the charterers heading the document which contains a so-called "demise" and "identity of carrier" or "agency" clause, and which is signed for the master of the vessel.

183. Most modern bills of lading contain "demise" clauses to the effect that if the ship is not owned by, or chartered by demise[141] to, the shipping company or line by which the bill of lading is issued, the bill of lading shall take effect as a contract with the shipowner

[139] It was estimated in 1955 that about four-fifths of world tonnage was under flags of countries which adhere to the Convention or Rules or which, without adhering thereto, have enacted national legislation incorporating the Rules (see Stoldter, "Zur Statuten-Kollision im Seefrachtvertrag", in *Liber Amicorum of Congratulations to Algot Bagge*, 220, 225 (1955)).

[140] This is not intended to suggest a sequence of proof in litigation, which is, of course, a matter of procedural law. Instead, it is suggested that, as a matter of substantive law, compliance with the duties specified in article 3, paragraph 2, should be in every case a prerequisite to the carrier's escaping liability under any other provision.

[141] A demise charter is a charter whereby the charterer becomes the owner of the ship during the currency of the charter, and the master and crew become his servants to all intents and purposes. See H. Holman, *op. cit.*, p. 123. See also R. Rodière, *op. cit.*, vol. I, paras. 139, 270 and 289.

or demise charterer and not with the charterer who has dealt directly with the shipper. A typical demise clause reads as follows:

"If the ship is not owned or chartered by demise to the company or line by whom this bill of lading is issued (as may be the case notwithstanding anything that appears to the contrary), this bill of lading shall take effect only as a contract with the owner or demise charterer as the case may be as principal, made through the agency of the said company or line who act as agents only and shall be under no responsibility whatsoever in respect thereof." [142]

The practice of inserting demise clauses in bills of lading is said to have arisen in order to restrict the contract of carriage to one solely between the shipowners and the bill of lading holder, in cases where the vessel was chartered and the charterers were not allowed to limit their liability under the British Merchant Shipping Act, 1894.

184. Injustice has often been caused to the shipper or consignee when courts in some countries have held that the shipper or consignee cannot sue the owner of the ship because he is not considered to be the "carrier", and charterers have been permitted to evade liability because they were not considered to be "carriers" either. Cargo owners expecting a shipping line to carry their goods find instead that, by the use of demise clauses, the bill of lading terms allow the line to substitute a new carrier. They find that the line has not agreed to carry their goods at all, but merely to find a suitable carrier. The result is that shipping lines, using bills of lading on their own forms and with their own headings, escape liability against shippers or consignees who have no reasonable means of believing other than that the shipping line is the real carrier of their goods.[143]

185. The conflict and uncertainty surrounding the effect of the "demise" clause could be relieved if, in addition to expanding the definition of "carrier" as suggested above, the Rules were further amended to put beyond doubt the invalidity of such a clause. In any case, the original reason for the clause has now largely disappeared because of changes in the law relating to limitation of liability.[144] Moreover, the limitation of liability that is now of most practical importance vis-à-vis cargo owners is not that relating to the shipowner's total liability, based on the ship's size or value, but the package and unit limitation in the Hague Rules.

Article 1, paragraph (b) *("contract of carriage")*

186. The phrase "in so far as such document relates to the carriage of goods by sea" would have to be amended if it should be decided to extend the Rules to the period when the goods are in the carrier's custody before loading and after discharge (see paras. 190-202 below).

Article 1, paragraph (c) *("goods")*

187. Deck cargo and live animals do not come within the present definition of "goods";[145] consequently, carriers may contract out of liability for such cargoes by means of exemption clauses. Since large quantities of cargo are carried on deck, carriers derive considerable advantages from the narrow scope of this definition.[146] Moreover, the large increase in the carriage of containers on deck emphasizes the importance of the law relating to deck cargo.

188. In order to avoid the present conflicts among the laws of different countries, and also to do justice to cargo owners, deck cargo and live animals might be included in the definition of "goods", so that the Rules would apply to them as to other cargo.

Article 1, paragraph (d) *("ship")*

189. This paragraph states that "ship" means any vessel used for the carriage of goods by sea, which raises the question whether the Rules apply to barges or lighters when used for loading or discharging vessels. If barges or lighters are not to be considered as "ships" within the meaning of article 1, paragraph (*d*), then the Hague Rules may not apply during the time when goods are on board such barges or lighters.[147] It seems desirable that the Rules should apply to lightering operations when the carrier owns or operates the barges or lighters as part of his contract of carriage. If so, the definition of the term "ship" could be amended to include such craft.

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[142] See, for example, the model P and I bill of lading in annex III below.

[143] For example, in N.J.A. 1960, 742: the *Lulu* (a Lebanese vessel) was chartered to the Swedish SVEA Line, which arranged for goods of a Swedish shipper to be loaded into the *Lulu* and the bill of lading was signed by the agent of the line, allegedly "for the master", and was headed by the printed name of the line. A Dutch receiver bought the goods, which arrived short of destination. The Swedish court held that the SVEA Line, being only the carrier, was not liable, although a Lebanese court had meanwhile declared that the Lebanese shipowner could not be sued because he was not the carrier.

[144] Under the International Convention relating to the Limitation of Liability of Owners of Sea-going Ships, October 1957, the benefit of limitation of liability now extends to the charterer (for the text of the Convention, see Nagendra Singh, "International Conventions of Merchant Shipping" in *British Shipping Laws* (London, 1963), vol. 8).

[145] This is the case so long as certain conditions are satisfied, *viz:*

(*a*) The carrier must be authorized to carry the goods on deck by express agreement with the shipper; if a carrier stows goods on deck when he is not authorized to do so, then he loses the benefit of the exemption clauses in the bill of lading;

(*b*) The cargo must be stated in the contract of carriage as being carried on deck. The bill of lading must expressly state that the cargo is carried on deck. See cases and commentary, W. Tetley, *op. cit.*, pp. 192-197. See also R. Rodière, *op. cit.*, vol. II, para. 521.

[146] The exports of many developing countries must necessarily be stowed on deck, e.g. timber, livestock.

[147] See the discussion below of article 1, paragraph (*e*), which states that the Rules shall apply "from the time . . . goods are loaded on" until "they are discharged from the ship".

Article 1, paragraph (e)
("carriage of goods")—article 7

190. Article 1, paragraph (*e*), is generally considered to establish the period during which the Hague Rules apply as running ". . . from the time . . . goods are loaded on" until "they are discharged from the ship".[148] Article 7 states that the parties may enter into any agreement regarding the carrier's responsibility for the goods "prior to . . . loading on, and subsequent to . . . discharge".

191. In this context, the following questions are among the principal ones that have caused uncertainty:[149]

(*a*) When does loading begin and discharge cease?

(*b*) What is the legal position before loading and after discharge?

192. "The common practice has been to apply the Rules from ship's tackle to tackle";[150] that is, from the moment when the ship's tackle is hooked on to cargo at the port of loading until the moment when the cargo is laid down and the hook of the tackle released at the discharge port.[151] This does not cause difficulty when proper cargo tallies can be taken at ship's side, but this is seldom possible.[152]

193. When shore tackle is used, the Rules have been traditionally held to apply in most countries as from the moment when cargo crosses the ship's rail.[153] However, in several cases the "tackle-to-tackle" rule has been held to apply when the carrier has undertaken to load and discharge and shore tackle is used.[154] When goods are being loaded from or on to lighters, loading is considered in some countries to commence when the goods are hooked into the tackle,[155] and discharge not to cease until the process of unloading all goods into the lighter has been completed.[156]

194. There are so many different methods of cargo handling that it is difficult to generalize on this topic. For example, in the case of loading or discharging through a chute or pipe, it would appear that loading commences when the cargo reaches the ship's end of the chute or pipe, and that discharge is complete at the last flange supplied by the ship.[157]

195. As noted above, article 7 of the Rules allows freedom of contract in respect of the period before loading and after discharging.[158] Unless debarred from doing so by domestic law,[159] the carrier can insert

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[148] " . . . three different periods must be distinguished: the period prior to loading the goods on board, the period of ocean carriage itself, and, finally, the period subsequent to discharging the goods" (see S. Dor., *op. cit.*, p. 107). R. Rodière distinguishes five periods, see *op. cit.*, vol. II, para. 589). See also G. Schaps-Abraham, *Das Deutsche Seerecht*, 2nd ed. Berlin, Walter de Gruyter, 1962), vol. II, para. 606.

[149] Much of the uncertainty arises from the difficulty experienced by many courts and commentators in reconciling the term "loaded on" in article 1, paragraph (*e*), with other terms such as "in relation to . . . loading" (article 2), and "carrier shall . . . load" (article 3, para. 2). Most of these difficulties would be overcome if one of the two solutions suggested in para. 202 below were adopted.

[150] See W. Tetley, *op. cit.*, p. 159. See also R. Rodière, *op. cit.*, vol. II, para. 584.

[151] See A. W. Knauth, *op. cit.*, pp. 144, and 145, for further descriptions of terms used and methods employed in loading and discharge of cargo. See also G. Schaps-Abraham, *op. cit.*, vol. II, para. 663; also, see R. Rodière, *op. cit.*, vol. II, para. 586.

[152] Most of the difficulties are caused by the fact that a port depository frequently takes charge of the goods before loading and after discharging. The tally sheets are often prepared several days before loading or after discharge. This causes uncertainty as to the condition and quantity of goods when loading began and discharge ceased. These difficulties, however, arise mostly at the port of discharge. At the port of shipment, usually a " mate's receipt " or equivalent document issued by or on behalf of the carrier evidences the condition of the goods on loading.

[153] See W. Tetley, *op. cit.*, p. 159. Less often, it has been held that loading does not commence until the sling of cargo is laid within the ship, and that discharging is complete when the sling is lifted from the ship's hold or deck. See also R. Rodière, *op. cit.*, vol. II, para. 584.

[154] See *Pyrene Company, Ltd., v. Scindia Steam Navigation Company Ltd.* (1954), Ll.L.R. 321 and *Hoegh Lines v. Green Truck Sales, Inc.* (1962), A.M.C. 431, where the judgements cover this topic extensively.

[155] In the *Pyrene* case (see foot-note 154), the court held that if the contract requires the carrier to undertake the entire loading operation, then the Hague Rules apply to all of that operation, regardless of whether or not the goods have crossed the ship's rail. Although application of the Hague Rules begins with loading and ends with discharge, the parties are free to stipulate by contract the part that each will play in those operations. At whatever point the carrier's obligation to load begins, that is the point when the Rules begin to govern his performance and to limit his liability. See also *Renton v. Palmyra Trading Corporation of Panama* (1956), Ll.L.R. 379.

[156] In *Goodwin, Ferreira and Co. Ltd. v. Lamport and Holt, Ltd.* (34 Ll.L.R., 192), it was held that specific cargo was not discharged into a lighter until all other cargo was discharged into the lighter. This decision was followed in the *Hoegh Lines* case (see foot-note 154), where cargo already loaded into a lighter was damaged when struck by other cargo being discharged. It was held that the Rules applied and the carrier's liability was limited to $500 per package.

[157] The interpretation of the terms seems to call for some physical act of possession or dispossession associated with transfer of risk between ship and shore interests. See A. W. Knauth, *op. cit.*, p. 145, in regard to loading. See also R. Rodière, *op. cit.*, vol. II, para. 586.

[158] The following is a typical clause in liner bills of lading: "Neither the Carrier . . . nor the vessel shall be liable for any loss, detention or damage to the goods howsoever caused while in the custody of the Carrier . . . prior to loading on or subsequent to discharge from the vessel even though such loss, detention or damage be caused by the negligence of the Carrier . . . and even though the goods are in the custody of the Carrier . . . as warehousemen or otherwise howsoever, and the goods prior to loading or subsequent to discharge . . . are at the sole risk of the Owner of the goods." In *Anselme Demavrin v. Wilson's Shipping Co.* (39 Ll.L.R. 289), the following clause was held valid:

"When goods are . . . awaiting . . . removal after discharge, or are carried at through rates or consigned from or to a place beyond the port of . . . discharge, the shipowner is not liable for damage thereto or loss thereof, notwithstanding any negligent or wrongful act of default of any person whatsoever in his employ."

[159] The French law of 1966, for example, extends the carrier's responsibility from the time goods are "taken in charge" until "delivery", and prohibits carriers from contracting out of this responsibility. See *Loi n° 66-420 du 18 juin 1966 sur les contrats d'affrètement et de transport maritime*, articles 27 and 29 (*Journal officiel*, 24 June 1966).

wide exemption clauses to contract out of his duty as bailee while goods are in his custody or under his control during the above-mentioned period.

196. In the United States of America, as a result of the Harter Act,[160] the carrier's liability would appear to be broader when the goods are in his custody or under his control before loading and after discharge than it is under the Rules. The reason is that under the Rules the carrier would have the benefit of the exceptions and limitations in article 4, paragraphs 2 and 5.[161] The Harter Act also requires "proper delivery" of the goods by the carrier.[162]

197. The questions where loading commences and where discharge ceases are central to an understanding of the law of ocean carriage. The uncertainties focus attention on what has been called "the Before and After problem",[163] that is who remains responsible, and to what extent, for the care of cargo before loading and after discharge, it being understood that after loading and before discharge the goods will be in the custody and care of the ocean carrier.[164]

198. The carrier is primarily interested in carrying cargo from, say, port A to port B. If he uses his own tackle, he does not ordinarily object to accepting responsibility from the point at which he picks up the item of cargo at port A until he releases it ashore at port B. This is the "tackle-to-tackle" situation. Fine distinctions that are sometimes drawn—e.g. the proposition that the carrier's responsibilities are restricted to the period "from ship's rail to ship's rail"—would not appear to have much practical importance today, and serve perhaps only to confuse the matter further.

199. If shore gear is used, the carrier would prefer to restrict his responsibility to the period elapsed from the time when the item of cargo was laid down in his vessel (at tho port of shipment) and his servants or agents began to handle it, until the time when his servants or agents placed the item of cargo in position to be lifted out of the vessel by the shore gear at the port of destination. This would be the situation in cases where the carrier was not responsable under his contract of carriage for loading or discharging the goods.

200. In most situation, particularly in the liner trades, the carrier includes in his freight rate the cost of loading and discharging the goods. Whether shore or ship's gear is used, he is the person to whom the cargo owner would look for compensation should the goods be lost or damaged after the cargo owner had handed over the goods for shipment. However—and this is the source of most of the confusion—the transfer of the goods from the cargo owner to the carrier seldom takes place directly between the two of them. The goods must often be handed over to an authority designated by local laws at the port of shipment as competent to accept the goods, store them in its premises and then load them into the carrying vessel. The goods are usually consigned to the order of the carrier or his agents in loading documents while they are in the custody of the warehouse, which usually has its own terms of bailment and stipulates its own clauses disclaiming responsibility.[165] Similarly, at the port of destination, the goods are usually delivered to a designated warehouse (usually a statutory body), which then in turn delivers the goods to the receivers. At the discharge end, the goods are consigned in the bailment documents sometimes to the care of the receivers and sometimes to the care of the carrier or his agent.[166]

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[160] See para. 61 above; see also A. W. Knauth, *op. cit.*, pp. 163-169. This Act states *inter alia* that it shall not be lawful for the manager, agent, master or owner of any vessel . . . to insert in any bill of lading . . . any clause . . . whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise committed to its or their charge . . .".

[161] The carrier's minimum duties after discharge have been generally considered to include the following:

(*a*) To notify the consignee of the time and place of discharge;

(*b*) To make the goods available for inspection;

(*c*) To choose a careful warehouseman;

(*d*) To care for the goods, or see that they are cared for, for a reasonable period until delivery, i.e. to allow the consignee a reasonable period in which to pick up the goods;

(*e*) To receive proper receipts from the warehouse to prove delivery if the warehouse is managed by an independent body, e.g. port authority, independent contractor.

See W. Tetley, *op. cit.*, pp. 177 and 178.

[162] The interpretation of "proper delivery" by the United States courts has been such as to make it sometimes difficult for carriers to satisfy this duty of proper delivery. In *Tan Hi v. United States of America* (1951), A.M.C. 127, and earlier cases, it was held that proper delivery is a delivery in accordance with the usage or law of the port of destination and that delivery to Customs or other authorities does not relieve the carrier of responsibility for cargo if such authorities are not actually charged by law or usage with the duty to receive cargo and distribute it to the consignees or if such authorities take control of cargo only because the carrier negligently fails to comply with Customs regulations. In *Caterpillar Overseas, S.A. v. American Export Lines* (1963), A.M.C. 1662, the Court of Appeals held that such clause was invalid under the Harter Act since the carrier had not made a proper delivery; in their opinion, a port-to-port contract ordinarily required the carrier to deliver the goods into the possession of the consignee, or at least to place the goods upon a fit wharf at the port of destination. See also *Monsieur Henri Wines, Ltd. v. S.S. Covadonga and Others* (1965), A.M.C. 740.

[163] See A. W. Knauth, *op. cit.*, p. 141. See also R. Rodière, *op. cit.*, vol. II, paras. 582-590.

[164] One of the main conclusions to which the Stockholm Chamber of Commerce came to when it conducted an impartial investigation in 1959 as regards the situation in Sweden would be applicable to that prevailing in many other countries today, *viz.* ". . . in spite of the multiplicity of persons involved, there are still situations where nobody is responsible for damage to or loss of the goods" (see note by K. Grönfors, in *Journal of Business Law* (1960), p. 120).

[165] The extent to which such bailees as port authorities, warehouses, Customs agents, wharfingers, etc. are permitted to escape liability is often governed by the local law instead of the maritime law. In some countries, the bailee of goods is permitted to contract out of all liability; in others, he can escape some liability or shift the burden of proof; in still others, he is not permitted to limit his responsibilities. The cargo owners' most serious grievance against shore bailees is the short time within which the cargo owner must bring his claim. Often such a claim is time-barred within a few months of discharge.

[166] In some ports, the shore bailee is considered to be the shipper's agent, in others the carrier's agent, and in others the agent of both shipper and carrier.

The carrier has no control over the security of the goods once they are within the custody of the warehouses at the ports of shipment and discharge.

201. It seems clear, therefore, that on the basis of article 7 the carrier could claim that he should have no responsibility for the goods before loading and after discharge and that he is entitled to disclaim liability for such periods. Similarly, the cargo owner would appear to have a legitimate grievance, in that he cannot, on the basis of existing laws and practices, pinpoint responsibility for loss of or damage to the goods after having consigned or received them as directed by the carrier.

202. This impasse arises from the fact that the words "loading" and "discharge", as used in the Rules, simply do not fit the widely varying procedures followed in different ports. The problem could be solved in either of two ways. First, the Rules could be amended to make it clear that the carrier is liable from the moment the goods are delivered in accordance with his instructions to the competent depository at the port of shipment until they are delivered to the cargo owner at the port of destination; if this were the solution adopted, the carriers would work out, with the depositories at the two ports, cross-indemnity arrangements which should not concern the cargo owner. Alternatively, the Rules might be clarified in such a way that "loading" and "discharge" would be defined to mean the handling of goods from shore or ship's tackle to shore or ship's tackle whenever the carrier was responsible for loading and discharging the goods.[167] The risk of loss before loading and after discharge would remain with the cargo owner, but when he was compelled to use shore bailees, then, logically, the law in all countries should uniformly prevent such bailees from limiting their duty of care or contracting out of liability for the full value of the goods. A realistic period of limitation should also be set down.

C. Duties of the carrier—Article 3

Article 3, paragraph 1—seaworthiness

203. If a ship sails in an unseaworthy condition[168] which causes loss or damage to goods, the carrier can avoid liability under the Rules by proving that he exercised "due diligence before and at the beginning of the voyage" to make the ship seaworthy. The vessel may sometimes be found unseaworthy because of some latent defect not discoverable by due diligence, and in such cases cargo owners fail in their claims against carriers.[169]

204. Recent judicial decisions in some countries have made it more difficult than before for the carrier to prove that he exercised due diligence, because this duty is considered to be a personal obligation that cannot be delegated;[170] if there has been negligence by anyone employed by the carrier, including an independent contractor, then the trend of current jurisprudence is to make the carrier liable.[171] This jurisprudence led to the CMI proposal in 1963 to amend the Rules, which would have relieved the carriers of liability for unseaworthiness providing they exercised due diligence to appoint ship repairers of repute (see para. 69 above). The move eventually failed for lack of support.[172]

205. The *Muncaster Castle* rule that the carrier is liable for unseaworthiness caused by the negligence of his employees or independent contractors appears to be in line with decisions in many countries, and appears to be fair because carriers retain their right to claim

[167] When the carrier was not responsible for the loading and discharge of the goods, his liability could be restricted to the time from which he gave a receipt for the goods until he re-delivered them to the competent person entrusted with the discharge of the goods.

[168] The ship must also be "cargo-worthy" to be seaworthy. Seaworthiness is not confined to security of the "hull" of the vessel. See R. Rodière, *op. cit.*, vol. II, para. 619.

[169] The decision in *Union of India v. N.V. Reedery Amsterdam (The Amstelot)* (1963), 2 Ll.L.R., 223, is a good illustration on this point. The House of Lords held that a ship was unseaworthy at the beginning of the voyage, but that the cause of unseaworthiness was a fatigue crack in the reduction gear, which was unknown and not detectable by visual examination. It was further found that an examination was carried out properly and carefully in accordance with the standard required by Lloyd's Register, and therefore that the shipowner had exercised due diligence, not because he had employed skilled and competent persons but because those skilled and competent persons had carried out all the necessary examinations in a careful and competent manner. On the failure of the carrier to apply the magnaflux test (which would have shown the crack), it was held that the carrier was not liable merely because precautions were not taken which subsequent experience showed might have detected or avoided the unseaworthiness.

[170] See W. Tetley, *op. cit.*, p. 100, "The carrier may employ some other person to exercise due diligence, but if the delegate is not diligent, then the carrier is responsible". The official version of the Rules in French provides for *diligence raisonnable*, i.e. it is not absolute, and what is due diligence or *diligence raisonnable* is a pure question of fact, to be decided in each case on its merits; see *Schade v. National Surety Corp.* (1961), A.M.C. 1225. See also R. Rodière, *op. cit.*, vol. II, para. 619.

[171] *Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd., (The Muncaster Castle)* (1961), A.C. 807. In this case, which disturbed many shipowners, the ship was placed in the hands of reputable ship repairers for special survey and repairs. The House of Lords held that the carrier had not discharged the burden of proving that he had exercised due diligence to make the ship seaworthy, since a carrier was not safeguarded by the fact that the negligence in repairing the ship was that of an independent contractor, and the obligation imposed on the carrier in the work of repair was one of due diligence by whomsoever it might be done, even when the work delegated to the independent contractor called for technical and special knowledge or experience, and the negligence was not apparent to the shipowner.

[172] The representatives of many countries at the CMI Stockholm Conference said that case-law and authoritative opinion in their legal system tended to agree with the *Muncaster Castle* decision. It was "also objected . . . that for practical reasons it would be preferable for the shipowner to bear the responsibilities also for the negligence of independent contractors" appointed by him, as it would be difficult or impossible for cargo interests to sue a shipyard with which they had had no earlier connexion; see O. Riska, "Shipowner's liability for damage caused by the negligence of an independent contractor performing work for the ship" in *Six Lectures on the Hague Rules, op. cit.*, 88 at p. 95.

indemnity from their independent contractors.[173] This rule does not apparently apply to negligence in the building of a ship; a carrier will not be liable for negligence by a shipbuilder so long as he takes all appropriate steps to satisfy himself by surveys and inspections that it is fit for the service in which he employs it.[174]

206. It is clear that the interpretation of the words "before and at the beginning of the voyage" in article 3, paragraph 1, has often created difficulties and caused injustice. In many countries, the term "voyage" is construed to mean the bill-of-lading voyage,[175] and the common law doctrine, whereby the carrier is under a duty to provide a seaworthy ship at the commencement of each stage of the voyage, does not apply. The Rules would appear more rational if the duty under article 3, paragraph 1, were maintained throughout the voyage.

Article 3, paragraph 2—care of cargo

207. This paragraph states that "subject to the provisions of article 4" (these words are excluded in the United States legislation) the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

208. There have been uncertainties in interpreting the terms "properly and carefully" in some countries. It has been held that "properly" has a meaning slightly different from that of "carefully", and that it means that, "in addition to taking care",[176] the carrier must adopt a system which is sound in the light of all the knowledge which he has or ought to have about the nature of the goods. The meaning of the word has been described as "tantamount to efficiency".[177]

209. In one case illustrating the strength of article 3, paragraph 2, despite the court's view that conditions at sea were sufficient to constitute a "peril of the sea" (an exception available to the carrier under article 4, paragraph 2), the shipowner was held liable for damage to goods because the stowage was deficient within the meaning of article 3, paragraph 2.[178]

210. If the full weight of such decisions interpreting the words "properly and carefully" could be incorporated in an amendment to the Rules, it would greatly assist shippers.[179] This is particularly important as regards the safe carriage of products which require special attention in handling and stowage, e.g. ventilation and special care.

211. There is also the question of the burden of proof in regard to article 3, paragraph 2.[180] The main issue appears to be whether ". . .the effect of the provisions laid down in the Rule "is" to place an absolute duty on the carrier to fulfil its requirements . . .", or whether this duty is to be "modified or lessened by the immunities granted under article 4, paragraph 2".[181] In other words, the immunities should not be treated "as excuses for failure to perform correctly the stipulated operations",[181] but as being incidents "basically unrelated to this over-all duty to care for the cargo. They exist to cover the events where the carrier is not in breach of his duties and where in the main it would be unfair to place responsibility for the loss or damage upon him".

Article 3, paragraph 6—time limit

212. This paragraph states that "in any event" suit must be brought "within one year after delivery of the goods or the data when the goods should have been delivered". This provision has given rise to the following questions:

(*a*) What constitutes "delivery" in order to start the one-year period running?[182]

(*b*) Does "brought within one year" mean brought anywhere within one year, or brought before a particular court within that time?

(*c*) Does the word "suit" include arbitration?

(*d*) What is the significance of the phrase "in any event"?

(*e*) May the parties extend the time limit by agreement?

213. The limitation period begins to run upon "delivery" or "when the goods should have been delivered". The use of the word "delivery" instead of "discharge" appears to be intentional, because "discharge" is used elsewhere in the Rules (for example, in article 2 and article 3, paragraph 2). "Delivery" ordinarily would mean the moment when the consignee receives the goods from the party competent to deliver them,[183] but some courts have held that the limitation period begins to run before that time.[184] It might be

[173] Since the *Muncaster Castle* decision, carriers have frequently asserted that they are no better off under the Rules in respect of seaworthines than they were under the common law, which imposed on them an absolute duty to provide a seaworthy ship.

[174] Such was the decision in *Angliss v. P. and O. S.N. Co.* (1927), 2 K.B. 456, and this decision was apparently not overruled in the *Muncaster Castle* case.

[175] See *The Makedonia* (1962), 7 Ll. L.R. 316; 190.

[176] *Albacora S.R.L. v. Westcott and Laurance Line Ltd.* (1966), 2 Ll.L.R. 58, per Lord Pearce, p. 62.

[177] *Ibid.*, p. 64.

[178] *Blackwood Hodge Limited v. Ellerman Lines Ltd.* (1963), Ll.L.R. 454.

[179] In some countries, shippers have to contend with weaker judicial constructions of these words.

[180] This problem is well summarized in "Care of Cargo under the Hague Rules" by F. J. J. Cadwallader in *Current Legal Problems* (London, 1969), p. 41.

[181] *Ibid.*

[182] There are variations of the one-year period in some countries.

[183] See Tribunal de commerce de Marseille (*Loch Dee*, 3 February 1948) D.M.F. (1949) 485, where it was held that "delivery" takes place the day the last piece of cargo has been discharged, separated, and is available for delivery.

[184] In *C. Tenant Sons and Co. v. Norddeutscher Lloyd* (1964), A.M.C. 754, it was held that the time limit began to run from the time discharge was completed "whether it be by complete transfer of the possession and control of the goods to the consignee, or . . . by constructive delivery to the consignee's duly authorized agent". *In Automatic Tube Co. Pty. Ltd. v. Adelaide Steamship Company Ltd.* (1967),

(*Continued on next page*)

desirable to amend article 3, paragraph 6, to confirm that "delivery" means the moment when the consignee receives, or should receive, the goods.

214. It is also uncertain whether a suit in one country stops the running of the one-year period in other countries. In at least one English case, it has been held that a suit was barred because it was not brought in England within one year, although it had been initiated previously in another country.[185] This judgement has been criticized.[186]

215. If the object of the time limit is to make cargo owners give prompt notice of claims to carriers, this could be suitably accomplished, without causing the present anomalies, by permitting commencement of an action in any jurisdiction having a reasonably close connexion with the contract of carriage.

216. The question has also arisen whether arbitration proceedings are to be considered "suits"[187] for the purposes of the one-year time limitation. If so, the result could be harsh for consignees when the bill of lading has been issued under a charter-party containing an arbitration clause. In such cases, the charter-party is usually incorporated in the bill of lading by reference, and the consignee does not know its contents. As a result, the consignee may begin legal proceedings within one year, only to find out later, after the one-year period has expired, that he is without a remedy; his legal suit failing because he did not first arbitrate, and his arbitration failing because he did not appoint an arbitrator within one year.[188] To clarify this point and to avoid the result described above, the meaning of the word "suit" might be defined as excluding arbitration proceedings.

217. Another point that requires clarification is whether, if "suit" is taken to exclude arbitration, and parties in fact submit to arbitration, this means that the parties have thereby waived the requirement that "suit" must be brought within one year.[189]

218. There is a conflict among the common law countries as to the effect of the words "in any event". Under English law, an unjustifiable deviation nullifies the contract of carriage, and the Hague Rules, including the one-year time limit, cease to apply.[190] In the United States, however, the one-year time limit continues to apply, even in cases of unjustifiable deviation, because of the words "in any event".[191] This conflict might be resolved by an amendment clarifying whether the one-year time limit applies when the contract of carriage is nullified.

219. It is common practice for parties to extend the time limit.[192] Article 5 allows the carrier to surrender any of his rights and to increase any of his responsibilities, provided that any such surrender or increase is embodied in the bill of lading, but there has been doubt whether article 5 applies to an agreement extending the time limits. In order to clarify this situation, the amendments (the Visby Rules) to the Rules agreed to in 1968 (but not yet in force)[193] state that the time limit period may be extended if the parties so agree, even if they do so after the cause of action has arisen.

D. Rights and immunities of the carrier—Article 4

Article 4, paragraph 2—the "catalogue of exceptions"

220. This paragraph is extremely important because it contains the "catalogue"[194] of exceptions which are available to the carrier. It begins by stating that "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:" and goes on to enumerate in sub-paragraph (*a*) to (*q*) the specific exceptions. In the following analysis of article 4,

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1 Ll.L.R. 531, the Supreme Court of Western Australia held that delivery was made either when the goods were landed on the wharf and freed from the ship's tackle or, at the latest, when the goods were placed in a depository's premises and became immediately available to the consignee. See also Cour de Cassation (*Matelots Pillier et Peyrot*, 20 July 1959) D.M.F. (1959), p. 661.

[185] *Compañia Colombiana de Seguros v. Pacific S.N. (The Salaverry) Co.* (1963), 2 Ll.L.R. 479. The bill of lading provided for exclusive English jurisdiction, but suit was first brought in New York.

[186] See note on "The 'Time Bar' of the Hague Rules", by R. P. Colinvaux in *Journal of Business Law* (1963/1964) p. 171. The judgement rejected a proposition in T. E. Scrutton, *op. cit.* "If suit is brought within a year in one jurisdiction, it is submitted that this should be sufficient to satisfy the paragraph (i.e. article 3, paragraph 6, of the Rules) and would justify the goods-owners proceeding in a suit started after a year in another jurisdiction".

[187] The French text of the Rules says "*à moins qu'une action ne soit intentée*", which would appear to exclude arbitration. The word "suit" is not a term of art in English law, although it has varying technical meanings in different contexts. In its dictionary meaning in the sense being discussed, it appears to be restricted to legal process.

[188] This apparently was the result in the English case of *The Merak* (1964) 2 Ll.L.R., 527.

[189] The remarks of R. P. Colinvaux, in *The Carriage of Goods by Sea Act, 1924* (London, 1954), p. 176, are penetrating on this point: ". . . if the learned judge was right in *The Salaverry* [case], the result would be [that it would be] impossible to comply with the 'requirement' (i.e., the bringing of a 'suit' within one year) in every case in which the parties had submitted to arbitration. It would be no use the claimant issuing a writ within one year, because those proceeding would not be before the arbitrator. Nor could waiver be inferred of a liability on [the part of] the carrier, which must necessarily be discharged if the dispute is determined . . . by arbitration. That astonishing result—that the claimant in an arbitration must inevitably lose *in limine*—follows [inexorably] from *The Salaverry* judgement; *ergo*, it is submitted [that judgement] cannot be sustained".

[190] Instead, the six-year common law time bar applies.

[191] See *Atlantic Mutual Insurance Company v. Poseidon Schiffahrt* (1963), A.M.C. 65. This question also arises in connexion with the limitation of liability under article 4, paragr 5 (see paras. 265-284 below).

[192] Such an extension seems to be valid in most jurisdictions. See *Benz Kid Co. v. Kawasaki Kisen Kaisha* (1954), A.M.C. 130, 403, 2236; Cour de cassation (*Ligne Scandinave v. London Assurance*) D.M.F. (1959) 34, and cases cited in W. Tetley, *op. cit.*, pp. 198-202.

[193] In the text, see annex II below.

[194] See S. Brackhus, "The Hague Rules Catalogue", in *Six Lectures on the Hague Rules, op. cit.*, p. 15.

paragraph 2, the following points will be considered:

(*a*) The use of several individual exceptions;

(*b*) The burden of proof;

(*c*) The position of servants and agents in relation to the exceptions.

221. Several of the exceptions are redundant, for they are included within the broader exception in respect of "perils of the sea" sub-paragraph (*c*) or under the "catch-all" exception of sub-paragraph (*q*). Examples are the exceptions in respect of "act of God" (sub-paragraph (*d*); "act of war" (sub-paragraph (*e*)); "act of public enemies" (sub-paragraph (*f*)); "arrest or restraint of princes, rulers . . ." or seizure of persons under legal process (sub-paragraph (*g*)); "quarantine restrictions" (sub-paragraph (*h*)); "riots and civil commotions" (sub-paragraph (*k*)); and "saving or attempting to save life or property at sea" (sub-paragraph (*l*)). These exceptions will not be considered individually. The exception in respect of "insufficiency or inadequacy of marks" (sub-paragraph (*o*)) has not been considered, since no serious problems regarding it were raised with the UNCTAD secretariat.

Paragraph 2 (a)—*negligence in navigation or management*

222. This exception is probably the most important in the "catalogue", since it exempts the carrier for loss or damage arising or resulting from 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.[195]

223. The exception has been severely criticized by cargo interests. Some courts have interpreted it so broadly that carriers have escaped liability even for defective stowage of goods resulting from a technical fault of the master which impaired the ship's stability. The master's action has been interpreted as a fault in the navigation and management of the ship and not a fault in the care and custody of the cargo.[196]

224. Much uncertainty has arisen over the distinction between "management of the ship" and care of cargo when the exception is read in conjunction with article 3, paragraph 2. In one case, the distinction was expressed as follows:

"If the cause of the damage is solely, or even primarily a neglect to take reasonable care of the cargo, the ship is liable, but it the cause of the damage is neglect to take reasonable care of the ship, or some part of it, as distinct from the cargo, the ship is relieved from liability; for if the negligence is not negligence towards the ship, but only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved"[197].

225. In most border-line cases, the test has been: "Was there want of care of the cargo or was there want of care of the vessel indirectly affecting the cargo?" If it is the former, then the carrier is liable because he has infringed article 3, paragraph 2, but if it is the latter then he is not liable under article 4, paragraph 2 (*a*). If the loss or damage arises from both unseaworthiness and defective management of the vessel, the carrier remains responsible unless he can separate the losses.[198]

226. The trend of cases may be summarized as follows: "An error in the navigation of the ship or in her management is an error fundamentally affecting, primarily, the ship. Error in the navigation and management of the ship might be defined as an erroneous act or omission the original purpose of which was primarily directed towards the ship, her safety and well-being, or towards the venture generally. An error in the care of the cargo is an erroneous act or omission directed principally towards the cargo."[199] The carrier is frequently exempted if both ship and cargo have been affected by the same error, even when bad seamanship has been equated with errors in navigation and management.[200] It would also appear that carriers have escaped liability for damage to cargo resulting from many ordinary acts of seamanship, such as the berthing of ships,[201] also, damage or delay caused by bunkering may in some circumstances be brought within the exception unter the heading of defective "management of the ship".

227. Each case must be decided on the basis of its own facts. This rule causes uncertainty and considerable confusion in attempting to form any conclusions to guide carriers and cargo owners as to where exactly the line is drawn between what does and what does not constitute an error of navigation and management of the ship within the meaning of the exception. Its existence is considered to be an anachronism by cargo interests in most countries; either one or both parts of

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[195] In 1969, 1,624 vessels of 500 gross tons and upwards were involved in collisions, while 854 were stranded. The exception in respect of negligence in the navigation of the ship would have been open to carriers in most of these incidents in refuting cargo claims.

[196] See S. Dor, *op. cit.*, p. 126. Decisions in some countries exonerating carriers for liability for defective stowage have in the course of time been legislated against nationally, but the wording of the expression "management of the ship" still leaves scope for favouring the carriers. See also generally G. Schaps-Abraham, *op. cit.*, vol. II, para. 607 Anm. 15, 16, 17 and R. Rodière, *op. cit.*, vol. II, paras. 620-625.

[197] *Gosse Millard Ltd. v. Canadian Government Merchant Marine* (1929), A.C. 223. (Dissenting opinion in the Court of Appeal), confirmed by the House of Lords. Some civil law countries contain the distinction of *Gosse Millard* in their codes, e.g. *Federal Republic of Germany*, Article 607, Al. 2 H.G.B.: *Greece*, Article 138, Al. 2, C.M.H.

[198] *The Walter Raleigh* (1952), A.M.C. 618: Cour de cassation, *Oceanic* (1951), D.M.F. 1951, 533. Where, however, the single error is both in the management of the ship and in the care of the cargo, the carrier is ordinarily not considered responsible, because the error is, in effect, related to the whole venture (see W. Tetley, *op. cit.*, p. 104). But where there are two separate errors, the carrier must be able to separate the damage done by each, otherwise he will be responsible for all the damage. See Tribunal de commerce de la Seine, *Sainte Mère l'Eglise*, 30 April 1952, D.M.F., 1952, 488.

[199] See W. Tetley, *op. cit.*, p. 103.

[200] *Hershey Chocolate Corp. v. Mars* (1959), A.M.C. 2035.

[210] Tribunal de commerce de Sète (*Prosper-Schiaffino*), 19 July 1960, D.M.F. 1961, 45.

the exception might with profit be removed or they might be redefined more narrowly.[202]

Paragraph 2 (b)—*fire*

228. By this exception, the carrier is exempt from liability for loss or damage resulting from fire, unless the fire was caused by the actual fault or privity of the carrier. The fault and privity of the carrier is taken in some countries to mean the fault of the carrier himself and not merely of an employee or agent.

229. The principal questions appear to be:

(*a*) Should this exception be retained, despite the fact that carriers are expected to install up-to-date communications, fire protection and extinguishing equipment?

(*b*) If the exception is retained, is it possible to co-ordinate its operation with that of the "fire statutes" existing in some countries so that uncertainty arising from overlapping may be avoided?

(*c*) Should it be clarified in the Rules that the carrier must show how the fire was caused? (If the cause cannot be established, then perhaps the carrier should remain liable.)

Paragraph 2 (c)—*perils of the sea*

230. This clause is perhaps the defence most frequently raised by carriers, and usually it is contended that the clause covers accidents resulting from the impact of waves or other dangers inherent in navigation, such as violent storms, fog, sand banks, collisions, and stationary or moving obstacles encountered by the vessel. Every vessel must be sufficiently strongly built and prepared to withstand such dangers, but if a carrier can prove that the damage or loss suffered by the ship or the cargo was caused by maritime hazards beyond his control,[203] he can escape liability for the loss.[204] The definition of "perils of the sea" is, therefore, crucial, "because more fact than law is involved."[205] In some jurisdictions, the clause has been very strictly interpreted, in the sense that the peril must have been "something so catastrophic as to triumph over those safeguards by which skilful and vigilant seamen usually bring ship and cargo to port safely".[206] It must also have been one that would not have been expected in the area of the voyage at that time of year.[207]

231. Courts in some countries have taken a more lenient view of the terms of the exception. One, for example, has stated that ". . . to constitute a peril of the sea the accident need not be of an extraordinary nature or arise from irresistible force. It is sufficient that it be the cause of damage to goods at sea by the violent action of the wind and waves, when such damage cannot be attributed to someone's negligence".[208]

232. Although this exception is one of the oldest in the carrier's armoury, it may now be anachronistic for the same reasons as those suggested in paragraphs 222-227 above in regard to negligence in navigation. The exception could be omitted, or it might be amended in accordance with the stricter judicial interpretations mentioned above.

Paragraph 2 (i)—*act or omission of the shipper*

233. No serious difficulties were raised about this exception. Carriers pleading this exception have sometimes succeeded on the ground that shippers had misdescribed goods when offering them for shipment, even though the misdescription had no connexion with the cause of loss or damage to cargo. This exception may therefore require further definition.

Paragraph 2 (j)—*strikes*

234. This exception states that the carrier shall not be liable for loss or damage resulting from strikes[209] or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general.[210] The strike exception is used frequently and forms a source of recurring complaint by cargo interests. It is frequently raised in connexion with article 4, paragraph 4, when the carrier decides to change his ports of call either to avoid a strike-bound port or to sail from such a port to another to discharge the goods. If the carrier can prove the reasonableness of the deviation, the courts of

[202] There are two precedents that might be followed in considering the elimination of this exception. At least one leading maritime Power has dispensed with it in its domestic sea trades. Secondly, the International Convention for the Unification of Certain Rules of Law relating to the Transport of the Luggage of Passengers by Sea, 1967, under articles 3 and 4, imposes liability on the carrier for loss or damage "due to the fault or neglect of the carrier or his servants or agents acting within the scope of their employment". See "Conventions on Maritime Law (Brussels Convention)", Ministère des affaires etrangères et du commerce extérieur de Belgique, *Service des Traités* (1968), p. 80. Except in regard to the carriage of vehicles, there is no exception in the Convention for errors in the navigation or management of the ship.

[203] The burden being upon him to bring himself within the terms of the exception. Even when the weather has been rough enough to constitute a peril of the sea, a carrier cannot utilize the benefit of the exception if he has been in breach of article 3, paragraphs 1 and 2, of the Rules and the breach(es) caused or contributed to the loss or damage.

[204] See S. Dor, *op. cit.*, p. 119; for examples of the jurisprudence of French courts, see R. Rodière, *op. cit.*, vol. II, para. 631.

[205] See W. Tetley, *op. cit.*, p. 117.

[206] *The Rosalia*, 264 Fed. Rep. 285.

[207] Tribunal de commerce de la Seine, *Hildegard-Doerenkamp* (25 février 1965), D.M.F. 1966, p. 225.

[208] *Keystone Transports Ltd. v. Dominion Steel and Coal Corp.* (1942), S.C.R. 495, at p. 505.

[209] Useful definitions of strikes are given in T. G. Carver, *op. cit.*, para. 645, T. E. Scrutton, *op. cit.*, pp. 230 and 231, and C. Smeesters and G. Winckelmolen, *Droit maritime et Droit fluvial*, 2nd ed. (Brussels, 1938), No. 100.

[210] This is the case unless, of course, he has infringed article 3, paragraph 1 or 2, and the infringement caused or contributed to the damage. A carrier may lose the benefit of the exception if he does not exercice his right to deviate in order to avoid a strike-bound port (in order to mitigate the damages, because, on general principles, the carrier is always bound to mitigate the loss; see W. Tetley, *op. cit.*, p. 204).

most countries confirm that he is within the exception and has not committed a breach of his obligation to the cargo owner not to deviate from the contract voyage.[211] There is then said to be no "deviation", only a "change of voyage".[212] Disagreements usually arise between carriers and cargo owners about the time carriers take to assess the situation and about the merits of their assessment of the situation. Cargo owners usually consider that carriers should not decide as quickly as they do that a situation is serious enough to warrant sailing the ship to another port or to discharge the goods in an unsuitable place at the risk and expense of cargo owners. The trend of most court decisions, in cases concerning both strikes and deviation, is that carriers, in attempting to bring themselves within the exemption with respect to strikes (and reasonable deviation), should ensure that the measures they take are in the interests of all the parties concerned and also take into account all the surrounding circumstances, the terms of the contract, the benefits to be deriven from and the increase of risks that may be occasioned by the proposed action.[213] This should be clarified in any reconsideration of the Rules.

235. Cargo owners further complain that when a strike causes goods to be discharged (or abandoned) at a different port from that mentioned in the bill of lading, they must bear the risk and expense of forwarding the goods to their destination. This is the result of court decision allowing carriers to discharge goods when a strike has forced the vessel to deviate. What needs to be clarified is that the carrier, although authorized to deviate from the itinerary in certain circumstances, must continue to comply with his duties of care toward the goods, specified in article 3, paragraph 2, while carrying them to the alternative port.

236. Moreover, there would seem to be some doubts as to what is expected from the carrier also after discharging the goods at the alternative port of discharge. S. Dor states that ". . . the master shall take all required measures to preserve and forward the goods he has discharged"[214] and cites a case which was said to interpret the United States COGSA as obliging the carrier to insure cargo landed at the alternative port.[215] However, he also cites other cases, which appear to give a different impression, and since the Rules are silent on this point, clarification would also appear to be necessary.

[211] See cases cited by S. Dor, *op. cit.*, p. 46.

[212] *Renton v. Palmyra* (1955) (2) Ll.L.R. 722, affirmed by the House of Lords (1956) 2 Ll.L.R. 379. This case clarified the rule that carriers, having constructively completed performance of the contract of carriage, were not liable for the cost of carrying the goods from the alternative port of discharge to the port stipulated in the bills of lading.

[213] *The West Point* (1951), A.M.C. 1505, affirmed 1952, A.M.C. 942: *The Manx Fisher* (1954), A.M.C. 177. It was held in *The Wilwood* (1943), A.M.C. 320, that cargo owners are entitled to expect not an infallible but a pondered and motivated decision.

[214] *Op. cit.*, p. 69.

[215] *Ibid.*, foot-note 2.

Paragraph 2 (m)—*inherent vice*

237. This exception states that carriers shall be immune from responsibility for loss or damage resulting from "wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods".[216] It is applied frequently to the deterioration of perishable goods "when these changes are the results of ordinary processes going on in the things themselves, without the aid of causes introduced by the shipowner".[217] Sometimes the insufficiency of packing contributes to the inherent vice of cargo, and in such a case the carrier has been held not liable.[218] Both the burden and the method of proving inherent vice are somewhat uncertain, and might be clarified by amendment.[219]

238. Moreover, many disputes arise because cargo owners often fail to recognize that it is natural for some products—principally those shipped in bulk—to suffer during carriage a small deterioration which is not the carrier's fault. It might avoid unnecessary waste of time and money if the Rules mentioned, as a specific illustration of what the term "inherent vice" signifies, the customary tolerance for which the carrier is excused from liability. The extent to which carriers should be charged with a knowledge of the nature and stowage requirements of the goods also needs clarification.

Paragraph 2 (n)—*insufficiency of packing*

239. This is another extremely important exculpatory exception.[220] Normal or customary packing in a trade—"which invariably prevents all but the most minor damage under normal conditions of care and carriage"[221]—is generally considered to be sufficient packing.[222]

[216] This exception has been used frequently by carriers in recent times. Through their P and I associations, they have gone to considerable expense by employing biochemists to show that damage to goods had arisen through the inherent vice of the goods and not through any fault on their part.

[217] For many applications, see T. G. Carver, *op. cit.*, p. 15; W. Tetley, *op. cit.*, p. 136; R. Rodière, *op. cit.*, vol. II, para. 635 foot-note (6). The exception particularly bears on loss or damage affecting major exports of many developing countries, such as perishables and primary commodities.

[218] See Cour d'appel d'Alger (*Lilois*, 20 December 1958), D.M.F. (1960) p. 473. If a "clean bill of lading" is issued, the carrier may be prevented (i.e. "estopped"), against a third party relying on the clean bill of lading, from proving that there was any defect in packing. This matter arises more often in connexion with the exception in respect "insufficiency of packing".

[219] i.e., so that the loss or damage must be shown to be due to inherent quality or vice of the goods, and it must be further shown that the carriers have taken all reasonable measures in the care of the cargo.

[220] See W. Tetley, *op. cit.*, p. 140. See also R. Rodière, *op. cit.*, vol. II, para. 643.

[221] *Ibid.*

[222] See *Continex Inc. v. SS. Flying Independent* (1952), A.M.C. at p. 1503: sheets of steel were packed in steel envelopes, and the carrier tried to plead the exception of insufficiency of packing. The court held the carrier responsible:

(*Continued on next page*)

240. Some damage can be expected, even where normal packing is used. Packing capable of preventing even the most minor damage it not practicable or expected in the case of the carriage of some commodities, just as care by carriers in avoiding minor damage is not practicable or expected in the case of certain commodities. The needs of carriers and cargo owners must therefore be assessed according to some rule of reasonableness to determine the degree of packing required, the care to be taken, and the minor damage expected.[223]

241. Carriers also frequently insert in their bill of lading clauses such as the following: "Without responsibility for the possible deterioration of cargo insufficiently packed" or "Unpacked crate, no responsibility for breaking". Both clauses have been held valid in some jurisdiction, although the former was said to be within the scope of the exception[224] and the latter not.[225]

242. The status of these "insufficiency of packing" clauses is uncertain. It is not clear what effects the different types of clauses have, and to what extent, if at all, they validly exonerate carriers, affect the burden of proof, or are invalid by virtue of article 3, paragraph 8.[226] Court decisions are confusing, particularly when they attempt to distinguish between notations on bills of lading which are said to be valid as notes of insufficiency of packing but invalid as "non-responsibility" clauses.

243. Furthermore, although the exceptions with respect to inherent vice and insufficiency of packing are broadly similar, the burden of proof is different. In the case of insufficient packing, the carrier often has difficulty in contradicting his clean bill of lading,[227] but this is usually not so in the case of inherent vice.

244. The carrier often uses this exception when the damage or loss is attributable to wear and tear of stowage or strains and stresses incident to transportation.[228] This might be considered reasonable, but carriers frequently also attempt to use the exception improperly to excuse themselves where goods have been pilfered, when in fact it has been held inapplicable.[229]

245. Considerable confusion has also been caused in many trades by carriers' attempts to use the exception in respect of goods packed in cartons or second-hand bags, sacks, etc., and the position is not at all clear. In order to forestall this exception, the cargo owner must use diligence to pack his cargo adequately, either because "he has to know that the goods will suffer damage"[230] or "it had become customary in the trade to wrap this type of cargo"[231] or "he should take into account the nature of the voyage and the means of loading and unloading used in the ports.[232]

246. Most of the cargo owner's problems arise from the uncertain effects of the qualifications as to alleged insufficiency of packing which carriers insert in their bills of lading, and over the burden of proof. It would appear that clarification is necessary as to the burden of proof and the exacts status of notations in regard to packing as inserted on bills of lading.

247. It seems necessary also to clarify that the carrier will not benefit from the use of this exception unless he shows that the loss or damage arose solely out of the insufficiency of packing, and did not arise out of, and was not in part attribuable to, any fault, failure or neglect on the part of the carrier, his agents or servants.

Paragraph 2 (p)—*latent defects*

248. This exception, which relieves the carrier from liability for loss or damage arising from latent defects in the ship not discoverable by due diligence, must be considered in relation to article 3, paragraph 1, and article 4, paragraph 1. It would appear that the degree of due diligence required in this exception is the same diligence as that required under article 3, paragraph 1, and article 4, paragraph 1, except that, because there is no mention of "before and at the beginning of the voyage", due diligence must be exercised on every occasion when inspection should reasonably be made.[233]

"It makes no difference whether that exception be allowed here or not, because proof clearly showed that the packing was such as is customarily used."

[223] *Bache v. Silver Line (Silversandal)* (1940), A.M.C. 731, at p. 734. Judgement of Judge Learned Hand: " To stow the goods as the libellants insist was required would impose a loss upon the ship; to case them, a loss upon the shipper. Moreover, it is as legitimate an answer for the ship to make to the shipper, that if he delivers the bales, knowing that the customary stowage may damage them, he cannot insist that the stowage is bad, as it is for the shipper to make to the ship, that if the ship accepts them uncased, it is bad stowage not to limit the tiers. The greater part of the law is made up of the compromise of such conflicts of interest; and this is no exception. In the carriage of goods, the trade must always come to some accommodation between ideal perfection of stowage and entire disregard of the safety of the goods; when it has done so, that becomes the standard for that kind of goods. Ordinarily it will not certainly prevent any damage, and both sides know that the goods will be somewhat exposed; but if the shipper wishes more, he must provide for it particularly ". See also Cour d'appel de Rouen (*Herenger*, 30 October 1959, D.M.F. (1960), p. 481) and Cour d'appel d'Aix (*Saint-Tropez*, 24 February 1960, D.M.F. (1960), p. 406), where the rule of reason with respect to packing and care was applied.

[224] Cour d'appel d'Abidjan (*Saint Marc*, 6 and 27 July 1956), D.M.F. (1957), p. 358.

[225] Cour d'appel de Paris (*Quiberon*, 31 May 1958), D.M.F. (1958), p. 725.

[226] Tribunal de commerce du Havre (*Ville de Fort Dauphin*, 7 December 1956), D.M.F. (1957), p. 547.

[227] *Silver v. Ocean Steamship Co.*, 35 Ll.L.R. 48, at p. 55. D.M.F. (1960), p. 406.

[228] Cour d'appel d'Aix (*Saint-Tropez*, 24 February 1960).

[229] *A. E. Potts and Co. Ltd., v. Union Steamship Co. of New Zealand, Ltd.* (1946), N.Z.L.R. 276.

[230] Cour d'appel de Paris (*Port-Navalo et Pont-Aven*, 27 November 1959), D.M.F. (1960), p. 223.

[231] Cour d'appel de Rouen (*Ile Maurice*, 15 January 1960), D.M.F. (1960), p. 669.

[232] Tribunal de commerce de Marseille (*Estrella*, 22 April 1953), D.M.F. (1953), p. 576.

[233] See W. Tetley, *op. cit.*, p. 150. See also R. Rodière, *op. cit.*, vol. II, paras. 648-650.

The latent defect is usually a defect in construction and is rarely due to wear and tear.[234]

249. A definition usually relied upon in common law countries states that a latent defect is "a defect which could not be discovered by a person of competent skill and using ordinary care".[235] A representative definition in civil law countries is a defect "which an attentive examination does not discern".[236] The complicated nature of the exception, and of its burden of proof, underlines, perhaps, its description as "one of the less understood of the exculpatory exceptions".[237]

250. In most legal systems, the carrier must first prove that a latent defect caused the loss, and then, as in other exceptions, that he exercised due diligence to make the vessel seaworthy—in respect of the loss—and that the defect was not discoverable by reasonable diligence or an attentive examination. Since there is no mention of "before and at the beginning of the voyage", the exercise of due diligence would appear to be required on every occasion when inspection should reasonably be made.

251. Restrictive interpretations of the exception by courts[238] usually assist claimants, but not invariably. Claim settlements are frequently said to be delayed for long periods while the carrier attempts to prove the existence of latent defects, the exercise of due diligence, etc. The exception, originating as it does in some undetectable flaw in the construction or material of the carrying vessel, concerns the responsibility of the carrier so basically and touches that of the cargo owner so remotely that it might perhaps be discarded more easily than others. Latent defect is not mentioned as a specific excepted peril in the national legislation of many States. It would appear appropriate that consideration should be given to omitting this exception.

Paragraph 2 (q)—any other cause

252. This "catch-all" exception has raised questions as to what the words "any other cause" were intended to cover, but "there seems to be no doubt that the intentions of the framers of the Rules were to protect the carrier from responsibility for loss or damage, of whatever nature not already specifically covered by the Rules, unless arising with the fault or privity of the carrier or with the fault or neglect of the agents or servants of the carrier".[239] The exception is not so widely used as its language might indicate. The reasons for this can be summarized as follows:

(*a*) Carriers tend to use the exceptions in article 4, paragraphs (*a*) to (*p*), whenever possible, because when they are used the cargo owner has the burden of proving default or negligence on the part of the carrier;[240] whereas, in order to benefit from the "catch-all" exception, the burden is upon the carrier to show that neither his own default or privity nor neglect by his agents or servants[241] contributed to the loss or damage.

(*b*) Because of the large number of exceptions listed in article 4, paragraphs (*a*) to (*p*), there are, in practice, very few "other causes". One such cause is pilferage.[242]

253. The case-law bearing on the question whether the carrier must show how the loss occurred has been described as "vague and apparently faulty, in particular because virtually all the information, if available at all, is available to the carrier alone. To exculpate a carrier when the cause of the loss is unknown is to make it beneficial for carriers not to discover the cause".[243]

254. The exemptions in article 4, paragraph 2, have not been extended to carrier's servants and agents in those countries where there is a fundamental legal principle that only a party to a contract can take benefit of its terms. Servants and agents can be sued in such jurisdictions for negligence, and their liability is broader than that of the carrier,[244] but this facility is usually of dubious value to cargo owners. Carriers have often

[234] The *Walter Raleigh* (1952), A.M.C. 618 at p. 637.

[235] See *Dimitrios N. Rallias*, 13 Ll.L.R. 363 at p. 366.

[236] Cour d'appel de Rouen (*Guinée*, 8 November 1952), D.M.F (1953), p. 84.

[237] See W. Tetley, *op. cit.*, p. 150.

[238] e.g., Tribunal de commerce du Havre (*Paul-Emile Javary*, May 1953), D.M.F. (1953), p. 707.

[239] See W. E. Astle, *Shipowners' Cargo Liabilities and Immunities*, 2nd ed. (London, 1954), pp. 161 and 162. See also the explanation of exception (*q*) in R. Rodière, *op. cit.*, vol. II, para. 767.

[240] *Pendle and Rivet Ltd. v. Ellerman Lines Ltd.*, 29 Ll.L.R. 133 at p. 136. The details of what the carrier must prove to benefit from this exemption are well summarized by W. Tetley, *op. cit.*, pp. 154-158.

[241] Stevedores, although independent contractors, were held to be "servants" of the carrier in *Hourani v. T. and J. Harrison*, 28 Ll.L.R., 120. *Heyn v. Ocean S.S. Co.*, 27 Ll.L.R., 334 is to the same effect.

[242] *The City of Baroda* (1926) 25 Ll.L.R. 437: *Leesh River Tea Co. Ltd. v. British India S.N. Co. Ltd. (The Chyebassa)* (1966), 2 Ll.L.R., 193. In the latter case, goods were damaged by sea water owing to the carrier's stevedores stealing a storm valve cover plate during unloading and loading at Port Sudan. The Court of Appeal held unanimously that the removal of the plate was in no way incidental to the process of discharge and loading, that the act of the thief was that of a stranger who was performing no duty at all for the carrier. Since the stevedore was acting outside the scope of his employment and the theft could not have been prevented by any reasonable diligence on the part of the shipowners, the carrier was held entitled to the benefit of the catch-all exception. This finding was apparently based on a common law doctrine that the master is not to be blamed for what his servant does while off "on a frolic of his own". What circumstances would come within such a "frolic" would be a matter for individual judgement. It is, however, arguable that surely the cargo owner should not suffer because the carrier employed a thief he had himself introduced into the vessel. There would appear to be room for amending the terms of this exception so as to regulate the relationships between cargo and carriers in such a way as to ensure that the cargo owners' interests are not prejudiced by the actions of persons employed by the carriers, or at least to give the benefit of any doubt to cargo owners, who are in no position to control events.

[243] See W. Tetley, *op. cit.*, pp. 155 and 156. Cases appear at times to favour and at others penalize carriers.

[244] See *Adler v. Dickson* (1955), Q.B. 158; and *Scruttons v. Midland Silicones* (1962), A.C. 446; *Herd v. Krawill*, 359 US 297: *Wilson v. Darling Island Stevedoring Co.*, (1956), 1 Ll.L.R. 346.

inserted clauses into their bills of lading extending the exceptions in article 4, paragraph 2, to their servants or agents. The value of such clauses has not, however, been tested conclusively in the courts.[245]

255. Servants or agents through whom the carrier performs his contract have been given the benefit of the same exceptions and limitations as the carrier in the amendment to the Rules on this point (article 4 *bis*) in the 1968 Brussels Protocol.

Article 4, paragraph 4—deviation

256. This paragraph states:

"Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

257. The United States version of the Rules adds the following words: "provided, however, that if the deviation is for the purpose of loading or unloading cargo or passengers it shall, *prima facie*, be regarded as unreasonable".[246]

258. Deviation is usually defined as departure from the customary or contractual route, or delay "whereby the character and incidence of the voyage are altered".[247] There must be a departure from both the customary route and the contractual route, if the two are different.[248] The Rules neither define deviation as such, nor do they indicate the consequences of an unreasonable deviation.[249] The resulting uncertainty has been a recurrent subject of complaint by cargo interests.

259. A leading case[250] contained the following test to ascertain whether a deviation is reasonable.[251]

The true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interest of all parties concerned, but without obligation to consider the interests of any one as conclusive.

260. The burden of proof is a second source of uncertainty in cases of deviation. It as usually held that, because the carrier has greater access to the facts, he has the burden of proving what was the contractual route[252] and that the loss took place while the vessel was on that route. The claimant must then prove the deviation or the unreasonable change in the route.[253]

261. A third uncertainty arises from the fact that, as a result of a deviation, goods often are discharged somewhere other than at the port of destination. In such cases, it is uncertain who must bear the risk and expense of bringing the goods into the destination port.[254]

262. Furthermore, in common law systems, where unjustified deviation is considered to nullify the contract of carriage, with the consequence that liabilities are then based not on the Rules but on common law principles, it is not altogether certain whether all or only some of the Rules are affected. This uncertainty would also appear to require clarification.

263. These problems might be clarified and simplified if deviations were presumed to be unjustified, and carriers were held liable for all the risk and expense of bringing the goods to the destination port, unless they could prove that compelling conditions for the benefit of both ship and cargo forced them to deviate.

264. Alternatively, uniformity could be secured by following the United Stades approach of raising a rebuttable presumption that any deviation for the purpose of loading or unloading cargo or passengers is unreasonable.

Article 4, paragraph 5—limitation of liability

265. Article 4, paragraph 5, limits the liability of carriers to £100 per package or unit of the goods. The cases show that usually "the limitation amount bears no relation to the actual damage sustained by the cargo owner".

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[245] It has been held effective in the United States case of *Carle and Montari Inc. v. American Export Isbrandtsen Lines, and John McGrath Corporation* (1968), 1 Ll.L.R. 260.

[246] The courts have held that the carrier must overcome the presumption contained in these words.

[247] See H. Holman, *op. cit.*, p. 170; some United States courts have considered the term to include such occurrences as overcarriage, mis-delivery, carriage on deck, when not permitted under the contract or by custom, etc.

[248] *Ibid.*, p. 169.

[249] The Convention only provides thay any deviation for the purpose of saving or attempting to save life or property or any reasonable deviation is not to be considered a "breach of the contract".

[250] *Foscolo, Mango and Co. Ltd., v. Stag Line Ltd.*, 41 Ll.L.R. 165.

[251] S. Dor takes the view that the word "reasonable" in this connexion is incapable of any precise definition. He states "as there is no indication of the proper test to apply, the courts of different countries may admit a different solution for a similar case, though it seems that the interest of the cargo owner should be considered predominant" (*op. cit.*, p. 48).

[252] The bill of lading normally states only the ports of loading and discharge; if it mentions a specific route or other ports of call, this would in effect be the agreed route. The real geographical route would probably only be found from a study of: (*a*) the customary routes taken by the line in the past; (*b*) the notices and advertisements before the voyage; (*c*) the booking-note, and (*d*) the bill of lading itself.

[253] "Nevertheless, the burden of proof in questions of deviation does not sit squarely on the shoulders of either party. Rather, deviation appears to be one of those legal questions in which each party is obliged to (and to protect its interests, should) do everything that he can to make proof of his own contentions. If, however, a rule of burden of proof exists as to deviation, it is probably, that the carrier must prove the geographic route of the contract and that the loss took place on the route. The deviation must then be proven by the claimant, and the reasonableness of the deviation must, at that point, be proven by the carrier" (see W. Tetley, *op. cit.*, p. 209.)

[254] This problem is also discussed in para. 235 above, on the subject of strikes.

266. Limitations of liability evolved historically in different forms from sixteenth century statues in Western Europe designed initially to encourage investment in shipping. They were enunciated in their present form in the Rules to impose a mandatory minimum liability on carriers to prevent them from "limiting their liability to ridiculously low amounts" on the plea that they wished to exempt themselves "from liability on packages containing goods of unanticipatedly high value".[255]

267. Shipowner representatives at the 1921 Hague Conference stressed that carriers should be protected against "excessive and quite unanticipated cargo claims". The view that the right of limitation was available only in respect of high value packages was rejected eventually at the final conference at which the Hague Rules were agreed, and article 4, paragraph 5, was adopted to invalidate bill of lading clauses that had come to limit carriers' liabilities to "almost . . . . . nominal charges".[256]

268. The word "unit" was subsequently added to extend the limitation of liability to goods not shipped in packages.[257] Article 4, paragraph 5, was made to apply irrespective of "the nature or value of the cargo" and it was this feature of the rule that came in time to be considered "likely to be decidedly awkward and arbitrary in its application, frequently leading to results which in the concrete case are felt as unjust or unreasonable".[258]

269. The limitation of liability is composed of two elements:

(*a*) The stipulated amount;

(*b*) The quantitative unit of the goods by which to calculate the carrier's maximum liability.

270. The first element raises the straightforward question whether the present limitation is too low, and should be raised. The proper basis for calculation raises more complex questions, however, because the terms "package" and "unit" have not been interpreted uniformly. One reason is that the COGSA of several countries depart significantly from the Hague Rules in their provisions on limitation of liability. For example, the United States version of the Rules states "packages . . . or in the case of goods not shipped in packages, per customary freight unit".[259] Article 158 of the Polish Maritime Code uses the expression "one package of cargo or any other unit of cargo as by custom used in trade". The Czechoslovak Maritime Law states "per package or customary freight unit of cargo".

271. A second reason for difficulty in calculating the limitation is that the terms "package" and "unit" are not sufficiently precise to fit various shipping practices.[260] The word "unit", especially, has been called "flagrantly ambiguous".[261] It may refer to the physical shipping unit (for example, an unboxed car or item of machinery, a bale, barrel or sack, etc.), i.e., a "unit of cargo",[262] or it may mean the unit on the basis of which the freight is calculated, i.e. the "freight unit".[263]

272. Because the amount of freight is usually based on the weight or volume of the cargo (even for cargo consisting of shipping units), the total amount of damage recoverable will vary according to whether liability is limited on the basis of shipping units (packages) or freight units. Usually calculations based upon freight units will cause the limitation to be higher than those based upon shipping units.

273. There is also doubt as to whether the carrier's liability for bulk cargoes is subject to the limitation.[264] The prevailing view seems to be that the rule applies

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[255] See E. Selvig "Unit Limitation and Alternative Types of Limitation of Carrier's Liability" in *Six Lectures on the Hague Rules, op. cit.*, p. 120. The Liverpool bill of lading form (1882), clause 3, provided that the carrier was "[n] ot accountable for goods of any description which are above the value of £100 *per package*, unless the value be herein expressed and a special agreement made". This reference to a "per package limitation" was adopted in the Canadian Water Carriage of Goods Act 1910, and later used as a model for the Hague Rules, article 4, paragraph 5, but with the addition of the words "or unit".

[256] See E. Selvig, *Unit Limitation of Carrier's Liability* (Oslo, Oslo University Press, 1960), p. 28.

[257] *Ibid.*, p. 38. The word "unit" replaced "per cubic foot . . . or per cwt . . . whichever shall be least . . . of the goods carried", which appeared in an earlier draft of the Rules.

[258] *Ibid.*, p. 29.

[259] For example, in the case of *Gulf Italia v. American Export Lines* (1958), A.M.C. 439, a tractor, weighing 43,319 lb, was shipped without skids but with superstructure partly encased with wooden planking and was delivered in a damaged condition. The carrier attempted to limit his liability to $500, contending that the tractor was a package, but the District Court held that the carrier's liability for damage could only be limited to $500 per measurement ton (on which basis the freight was computed); and since the tractor weighed < 34.6 measurement tons, the limitation figure was 34.6×500=$17,300. Thus, when freight units are in excess of the shipping unit, the United States rule is more favourable to the cargo owner than that of the other common law countries. But the United States version of the rule will militate against cargo owners if the freight unit is the same as the shipping unit. In *The Edmund Fanning* (1953), A.M.C. 86, which concerned the loss of ten locomotives and tenders which were uncrated and, therefore, could not be defined as packages, the Court of Appeal held that, since the freight rate was calculated at $10,000 per unit of locomotive and tender, the carrier's liability was limited to $500 per unit of locomotive and tender, or $5,000 in all. This case illustrates the immense benefit to carriers of article 4, paragraph 5.

[260] Difficulties have arisen, for example, in attempting to determine how much packing or covering is required to establish that the goods constitute a package. The French "colis" and the Scandinavian "kollo" do not appear to fit precisely within this definition of "package", as they would include goods shipped in wrapping or containers that may not appropriately be called packages. United States decisions apparently support the view that a "package" under the Rules need not be completely covered, wrapped or packed (see E. Selvig, in *Six Lectures on the Hague Rules, op. cit.*, p. 116).

[261] See E. Selvig, *Unit Limitation of Carrier's Liability, op. cit.*, p. 42.

[262] Italian Naval Code, Art. 423, S.M.C. 122; and USSR Maritime Code, Art. 118.

[263] United States COGSA, Art. 4(5); and Swiss Maritime Code, Art. 105.

[264] Tribunal de commerce d'Oran (10 August 1950), D.M.F. (1951), p. 444.

to all types of cargo,[265] but it might be as well to clarify in future amendments whether the freighting unit (i.e. weight or volume) or the weight or volume unit in which the goods are described in the bill of lading should apply to bulk cargoes.

274. Anomalous decisions have also arisen in cases where freight was quoted as a lump sum for one shipping unit, and as a lump sum for a consignment consisting of several shipping units.[266]

275. Problems also arise in applying this rule to containers and pallets, which were unknown when the Hague Rules were drafted.[267] It is not clear whether a container or pallet constitutes a "package", for which the carrier's liability is limited to £100, regardless of the number of smaller packages stowed inside the container or strapped to the pallet.

276. In one case, 54 cartons each containing 40 television tuners were strapped to 9 separate pallets, and the question for the court was whether the number of packages was 9 or 54. The court held that, because each pallet constituted an integrated unit, capable of, and intended for, handling, there were only 9 packages and that the carrier could limit his liability to $500 per pallet.[268]

277. However, the result is different where carriers group goods belonging to different persons in one container and issue separate bills of lading for the individual shipments. In this situation, the container clearly cannot constitute a single package.

278. The limitation of liability applies " unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading". This apparent option to the shipper to secure a more complete protection has had little practical effect. Shippers have rarely declared cargo values in bills of lading,[269] since this can have the effect of attracting additional *ad valorem* freight rates. Carriers claim that the *ad valorem* charge protects them against declarations of excessive value by cargo owners. As the *ad valorem* freight rate is usually a high percentage, cargo owners generally find it cheaper to obtain their own insurance than to declare value.[270] As a result, cargo owners rarely declare value, and consequently the limitation upon carrier's liability normally applies.

279. There is uncertainty as to the type of losses to which the unit limitation of liability applies. The prevailing view seems to be that direct as well as indirect damage is subject to limitation of liability.[271] However, it would seem that in some cases "the carrier's liability for loss because of wrongful delivery without presentation of the bill of lading or to a person not empowered by the bill of lading to take delivery, is not a liability subject to limitation according to article 4, paragraph 5",[272] nor is the liability of the carrier apparently limited for misrepresentations in the bill of lading, if it is proved that no loss or damage has occurred whilst the goods were in the custody of the carrier.[273] This problem certainly require clarification, since many of the cases are confusing.

280. The apparently absolute form of the words "in any event" in article 4, paragraph 5, appears to need clarification, since "it has been felt somewhat unjust that the carrier should be protected by this limitation of liability irrespective of the nature of the breach or of the faults which caused the loss or damage ".[274] In some countries, the carrier can apparently take advantage of the limitation when he is in breach of article 3, paragraphs 1 and 2, even if the act or omission of the carrier is done recklessly or with intent to cause damage. In others, the proposition is evidently established that the carrier cannot rely on article 4, paragraph 5, when the damage is imputable to serious faults on the part of the carrier. In the 1968 amendments, the new rule states that neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability if the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

281. Article 4, paragraph 5, is to be read in conjunction with article 9 of the Rules in those countries which have given effect to or enacted article 9 in their national legislation. Article 9 states that the monetary units mentioned in the Rules are to be "of gold value".[275]

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[265] See E. Selvig, *Unit Limitation of Carrier's Liability*, *op. cit.*, pp. 36-39; Schlegelberger and Liesecke, article 660, note 4. A Genoa court has held that the carrier was entitled to limit his liability for damage to frozen fish carried in bulk (*The Tamesis* Dir. Mar. 1960, 523, Genoa, 29 July 1959).

[266] See cases mentioned in foot-notes 20 and 21 in E. Selvig, *Six Lectures on the Hague Rules*, *op. cit.*, p. 115. If the freight were agreed as a lump sum for one shipping unit, no anomaly would ordinarily arise, since both freight unit and shipping unit would be the same; see *The Edmund Fanning* (1953), A.M.C. 86,2 CCA, discussed in foot-note 259 above.

[267] The 1968 amendments cover this topic (see para. 283 below). A special Convention for Combined Transport Operators is also under consideration.

[268] *Standard Electrica, S.A. v. Hamburg Sudamerikanische and Columbus Lines* (1967) 2 Ll.L.R. Apparently the court was heavily influenced by the fact that all the shipping documents referred to 9 packages and that the shipper could have obtained full coverage simply by declaring the value of the goods in the bill of lading.

[269] They are apparently reluctant to declare cargo values, in case this may lay them open to paying additional taxes; see note 9 in E. Selvig, *Unit Limitation of Carrier's Liability*, *op. cit.*, p. 197.

[270] *Ibid.*, p. 200.

[271] *Ibid.*, p. 97. As exemplified in the finding of the Cour de cassation (*Kopajtic*, 4 January 1950), D.M.F. 1950, p. 167 (see G. Ripert, *Droit maritime*, 4th ed. (Paris, Librairie Dalloz, 1950), p. 226). *Renton v. Palmyra* (1956), 2 Ll.L.R. 379 appears to support the contention that loss or damage to goods in the Hague Rules is not restricted to actual loss or physical damage to the goods (see E. Selvig, *Unit Limitation of Carrier's Liability*, *op. cit.*, p. 96).

[272] See E. Selvig, *Unit Limitation of Carrier's Liability*, *op. cit.*, p. 100.

[273] *Ibid.*, pp. 101 and 102.

[274] *Ibid.*, p. 107.

[275] T. G. Carver, *op. cit.*, para. 306, states: " The gold value of £100 in 1924 clearly meant the intrinsic value of the gold coin to which the holder of £100 in notes was in theory entitled by Act of Parliament, viz. 100 gold sovereigns,

The ambiguity of the phrase has rendered its exact interpretation uncertain, particularly in view of the severe depreciation of many currencies in relation to gold.[276] This question will lose its importance when the 1968 amendments come into general force.

Limitation of liability under the 1968 Protocol

282. In the amendments of February 1968, the new paragraph 5 of article 4 considerably improves the position of cargo owners with respect to limitation of liability. Not only does it raise the limit, but it also makes a special rule for containers and other similar articles of transport. The new rule raises the limitation to 10,000 Francs Poincaré (approximately £276 sterling at the present exchange rates) per package or unit or 30 Francs Poincaré per kg (approximately £842 sterling per ton) of the gross weight of the goods, whichever is higher. The first limit is intended to apply to light, valuable cargo, while the second limit is intended to apply to heavy cargo. Although the weight unit limitation appears to have improved matters for cargo owners, it should be stressed that the figure is considerably below the figures in other international transport conventions. It seems desirable that in this respect article 4, paragraph 5, should be more in line with those conventions.

283. The new article 4, paragraph 5, further states that, where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed to be the number of packages or units for calculating the limitation of liability. This amendment clearly improves the position of cargo owners.[277]

284. From what has been said in the preceding paragraphs, it would appear that the existing article 4, paragraph 5, is unsatisfactory and in need of considerable modification, although the 1968 amendments have made some improvements. The view that carriers would not be able to secure competitive P and I insurance rates if limitation rules were relaxed in favour of cargo owners, is considered "hardly tenable" by a modern authority who has specialized on unit limitation studies.[278]

which, as then Britain was contemplating a full return to the gold standard, was an obvious standard by which to fix internationally the extent of the carrier's liability . . . ."

[276] " . . . the original amounts now appear ridiculously low" (see E. Selvig, *Unit Limitation of Carrier's Liability, op. cit.*, p. 34).

[277] For example, if 100 boxes of cargo, valued at £60,000 and weighing 10 tons gross, are stowed in one container and the container is lost overboard during the sea transit, and the 100 boxes have been enumerated in the bill of lading, the limit of liability will be £276 × 100 = £27,600. If the boxes have not been enumerated in the bill of lading, so that the container becomes the package or unit, the cargo owner can still take the benefit of the weight limit in the same provision, so that the limit will be £842 × 10 = £8,420.

[278] See E. Selvig in *Six Lectures on the Hague Rules, op. cit.*, p. 122. He feels that global limitation of liabilities guide the P and I clause in this matter. See also paragraph 164 above.

E. Article 5

285. Article 5 states that the provisions of the Rules are not applicable to charter-parties, but goes on further to say that they apply to bills of lading issued with charter-parties. Difficulties encountered by charterers, shippers, carriers and receivers in identifying their liabilities when charter-party terms are incorporated in bills of lading are discussed in paragraphs 310-324 in chapter VII below.

F. Special conditions—Article 6

286. Article 6 states as follows:

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

287. The Rules are said not to apply to non-negotiable receipts under certain conditions. One of these conditions is that the carriage must not be an "ordinary commercial shipment made in the ordinary course of trade". This phrase is rather vague and might be clarified by amendment.

G. Damages

288. The principal articles of the Rules of major concern to this report have now been examined. One topic, which is not specifically mentioned in the Rules, but which arises directly out of their operation, is that of damages. This subject was introduced into the Rules in the 1968 amendments, and is discussed below.

289. After it has been established that the carrier is liable under the Hague Rules, a second problem arises over the method for calculating the amount of damages which he must pay. The Rules do not stipulate that any particular method shall be used for this calculation, but the rule of thumb used has been "arrived sound market value" less "arrived damaged market value",[279] subject of course to unit limitation of liability.

[279] See *Empresa Central Mercantil v. Brasileiro* (1957), A.M.C. 218, at p. 220: *Tribunal de commerce de Rouen (Nido,* 23 February 1962), D.M.F. (1962), p. 294. Courts have often

(Continued on next page)

290. Article 2 of the 1968 amendments stipulates that:

> The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged. The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

The effect of the new Rule is to codify the principles which have been generally applied over the years, but the difficulty of establishing the market value of goods would seem to remain. Adjustment based upon the CIF value plus a percentage for profit, or upon invoice value plus freight, insurance and a percentage for profit, might lead to greater certainty in the matter and would avoid protracted litigation between parties.[280]

Damages for delay

291. Courts in some countries have held that the words "loss or damage" in the Rules includes damage caused by delay, so that cargo owners can claim damages for delay caused by the fault of the carrier.[281] It is common to see clauses in liner bills of lading either excluding or limiting liability for delay; such clauses would appear to be invalidated by the application of article 3, paragraph 8,[282] but they continue to be used.

292. In practice, cargo owners find considerable difficulty in obtaining compensation for loss suffered through delay, because such losses are difficult to prove and to quantify. The Rules are silent on the matter and usually disputes can only be settled by arbitration or litigation. Some national COGSA do, however, make provision for delay [283] and the Rules might be similarly amended to make the position clear in the future on a matter of considerable concern to cargo owners.

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cautioned that "arrived sound market value" is a rule of thumb only, and subject to many exceptions in order to be brought within the basic principle of *restitutio in integrum*. Arrived sound market value is difficult to calculate unless there is a market with published prices at the place of discharge. C and F or CIF value, although easier to calculate, is not a true measure of damages, because arrived sound market value includes customs duties and profit, in addition to cost, insurance, and freight. The practice of taking invoice value or CIF value and then deducting salvage (i.e. arrived damaged market value), although giving an immediate figure, favours carriers, because C and F or CIF value is not arrived sound market value, while salvage is arrived damaged market value.

[280] See, however, *Copiapo* (1943), A.M.C. 412, for general difficulties in connexion with the calculation of damages.

[281] See *Renton v. Palmyra* (1956), (2) Ll.L.R. 379, and *Anglo Saxon Petroleum v. Adamastos Shipping Co.* (1958), (1) Ll.L.R. 73: *The Main* (1940), A.M.C. 1299. The United States Court of Appeals in *Comm. Trans. Internat. v. Lykes Bros* (1957) A.M.C. 1188, held that "the provisions of COGSA apply to 'loss or damage' by delay without physical damage to cargo ". See also *The Ardennes* 84 Ll.L.R. 340. In many countries, the question of liability for delay in delivery of the cargo is often dealt with in the context of their general laws, *vide* "Technica à Gospodorka Morska" 1/1968, p. 551. See also R. Rodière, *op. cit.*, vol. II, para. 608.

[282] See Cour d'appel de Madagascar (*Lionel*, 19 March 1952), D.M.F. (1952), p. 599. Also see S. Dor, *op. cit.*, p. 165.

[283] COGSA, Japan, Art. 3. Some other countries have a similar provision, but it is not clear, from the cases, whether immaterial damages are covered by the provisions of these laws.

CHAPTER VII

REVIEW OF BILL OF LADING CLAUSES NOT SPECIFICALLY COVERED BY THE HAGUE RULES

A. Introduction

293. "The provisions of the Brussels International Convention do not pretend to cover all aspects of ocean carriage; much is left to mutual agreement between the parties, providing however that such clauses or covenants do not contravene the principle set forth in article 3, paragraph 8, of the Convention".[284] In addition to the specific provisions of the Hague Rules, there are a number of standard bill of lading clauses which raise problems and require consideration. Such clauses include (*a*) "liberty" clauses, (*b*) "jurisdiction" clauses, which specify that disputes concerning a bill of lading shall be decided in a particular country, or that a particular country's law should apply to such disputes, (*c*) "transhipment" clauses, by which a carrier claims the right to tranship and disclaims responsibility for the goods during segments of the transhipment, and (*d*) clauses which incorporate the terms of a charter-party in a bill of lading. These clauses should be considered in the light of two standards: (*a*) article 3, paragraph 8, of the Rules, which nullifies any clause lessening the carrier's liabilities otherwise than as provided in the Rules, and (*b*) general considerations of fairness in the balance of rights and duties between the parties to a contract of affreightment.

B. Liberty clauses

294. The term "liberty clause" or "voyage clause" arose in connexion with those clauses which were "devised and improved from time to time in order to enable shipowners to do what would otherwise be regarded in law as a 'deviation'".[285] In a narrow sense, the term still applies only to those clauses which attempt to grant the carrier liberty to deviate from the itinerary.[286] However, the term "liberty clause" is often used in a broader sense, to include a wide range of clauses with attempt to grant the carrier rights or immunities which he would not otherwise enjoy.[287] "Liberty clauses" in this broader sense might include, for example, "freight" and "refrigeration" clauses, clauses granting the carrier the liberty to carry goods on deck, to dry-dock with cargo on board, to leave goods on the wharf on arrival if the receiver is absent, and to postpone the date of the ship's departure and the date of delivery of the goods.[288] It is in this broader sense that the term "liberty clause" is used in this report.[289]

295. Some liberty clauses are clearly invalid because they conflict with the Hague Rules; yet they continue to clutter bills of lading, causing uncertainty and increasing litigation. Their removal would facilitate trade, because their continued inclusion has the following onerous effects: (*a*) the clauses mislead cargo interests, thus causing them to drop the pursuit of valid claims, (*b*) they present an excuse for prolonging discussion and negotiation of claims which otherwise might have been settled promptly, and (*c*) they encourage unnecessary litigation.

296. Two examples of liberty clauses which have frequently been held invalid are "freight" clauses and "refrigeration" clauses. Freight clauses frequently have the effect of lessening the carrier's liability, and hence are invalid under article 3, paragraph 8, of the Rules. For example, the following freight clause appears in virtually all liner bills of lading: "freight on the goods shall be deemed earned on shipment and shall be payable vessel and/or goods lost or not lost." If there is a loss for which the carrier is legally responsible, then the clause quoted above is considered a lessening of liability in violation of article 3, paragraph 8; the carrier must refund the freight if already paid, or make no claim for the freight if it is payable at destination.[290]

297. Refrigeration clauses frequently attempt to relieve the carrier from liability for the defective functioning of the refrigerating machinery. Such clauses are generally held invalid under article 3, paragraph 8,

[284] See S. Dor, *op. cit.*, p. 11.

[285] See H. Holman, *op. cit.*, p. 402. See also clauses 7-12 in the P and I model bill of lading in annex III, below, which are typical liberty clauses.

[286] See paras. 256-264 above on the question of deviation.

[287] "Shipowners have sought by means of these clauses to provide for themselves a 'maximum' of rights and liberties . . . The purpose of the Convention was precisely to restrain, to some extent, such attempts" (see S. Dor, *op. cit.*, p. 41).

[288] *Ibid.*, pp. 51-64.

[289] A recurrent cause of complaint by many respondents to the UNCTAD questionnaire was the alleged practice by carriers of refusing to load ("shutting out") firmly booked cargo on the basis of liberty-type clauses in carrier's cargo-booking forms which purportedly give them power to do so at the risk and expense of cargo owners. This problem would appear to be more amenable to solution on a local, rather than on an international, basis.

[290] The clause is valid in cases of loss for which the carrier is not legally responsible (for example, negligent navigation under article 4, paragraph 2).

for they lessen the carrier's liability under both article 3, paragraph 1 (*c*) and article 3, paragraph 2.

298. Other clauses state that an inspection certificate issued at the loading port by a representative of a Classification Society shall be conclusive evidence that the carrier has exercised due diligence to make the refrigerating and cool chambers fit and safe for the preservation of goods. In most countries, inspection certificates alone, without proof of actual due diligence, do not satisfy the courts and are not generally of any value to carriers. One authority has stated ". . . to avoid doubt the time has come for further examples of clauses offending against article 3, paragraph 8, to be expressly inserted in the Rule".[291] The inclusion in the Rules of many commonly used "invalid clauses", as examples of clauses prohibited by the Rules, might be a suitable method of resolving this problem.

C. Jurisdiction clauses[292]

299. Courts of various countries often construe particular Hague Rule principles in different ways. Carriers usually attempt to avoid confrontation with courts and jurisprudence that may operate against their interests by inserting "jurisdiction" clauses in their bills of lading specifying that a particular court, law or the law of a particular country should exclusively determine any disputes that may arise from the bill of lading. "The choice of a court may be more important than many of the express terms of the contract; may indeed be determinative of the outcome".[293]

300. The 1924 Convention does not refer to jurisdiction clauses, but some countries have, in adopting the Convention, included special provisions making such clauses invalid.[294] The laws of most countries contain no reference to them, and therefore their courts may accept or refuse jurisdiction. In exercising their discretion, courts may invoke article 3, paragraph 8, of the Hague Rules and rule the jurisdiction clause invalid if they consider that the change in jurisdiction might have the effect of reducing the rights of the cargo owner.

301. Among those countries whose laws are silent upon jurisdiction clauses, there are differences in the manner in which the courts exercice their discretion to accept or refuse jurisdiction. Some courts do not enforce clauses which attempt to grant exclusive jurisdiction to a foreign court. In rejecting such a clause, one court recently stated that to require a consignee, claiming damages in the sum of $2,600, to travel 4,200 miles to a court with a different legal system and language would, in practical effect, decrease the carrier's liability, and, therefore, the court invoked article 3, paragraph 8.[295] The court observed that in such cases the jurisdiction clause allows carriers to secure lower settlements than would be possible if cargo owners were allowed to sue in the most convenient forum. Other courts tend to recognize jurisdiction clauses contained in bills of lading only if they are satisfied that the foreign courts will apply the Hague Rules as enacted in their maritime law and that the foreign courts will construe the Hague Rules as they do.[296]

302. But many courts are more willing to recognize jurisdiction clauses on the basis of freedom of contract. They will generally stay proceedings in cases where "all the terms of the charter-party" (or similar words) there is a foreign jurisdiction clause, and will only allow them to proceed when satisfied that it is just and proper to do so.[297]

303. If jurisdiction were required to be, *inter alia*, either in the country of shipment or in that of delivery, at the option of the plaintiff,[298] there might be certainty as well as fairness to cargo owners. This would also be fair to carriers, since it is arguable that, by agreeing to trade between the two ports, they impliedly consented to the probability of submitting to the jurisdiction of either port.

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[291] See E. R. H. Hardy-Ivamy, "The Carriage of Goods by Sea", in *Current Legal Problems* (London, 1960), pp. 216 and 217. The only example of such an "invalid clause" mentioned in article 3, paragraph 8, is the "benefit of insurance" or similar clause which is "deemed to be a clause relieving the carrier from liability".

[292] Jurisdiction clauses in bills of lading tend to be of the following types:

(*a*) "Any dispute arising under this bill of lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply";

(*b*) "The contract evidenced by this bill of lading shall be governed by . . . . . law and dispute determined in . . . . . (or at the option of the carrier, at the port of destination) according to . . . . . law to the exclusion of the jurisdiction of the courts of any other country". Type (*b*) is more usual in liner bills of lading. Type (*a*) has been severely criticized by many courts and authorities on grounds that "it should be unthinkable" that a receiver had to discover the principal place of business of an unknown carrier (which is possible in case of charter) in order to exercise his rights against him. See A. G. Vaes, *The Identity of the Hague Rule Carrier* (Göteborg, Akademiförlaget-Gumperts, 1968), p. 18.

[293] Judge Learned Hand in *The Tricolor* (1933), A.M.C. 919.

[294] For example, the Australian COGSA reads:

"All parties to any bill of lading document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.

"Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the courts of the Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void, and of no effect".

[295] See *Indussa Corporation v. The Ranborg* (1967), A.M.C. 589. The circumstances of this case, which arose in a developed country, and the judicial attitude adopted, were much in line with some complaints raised and positions taken by many respondents from developing countries in replying to the UNCTAD questionnaire.

[296] See *Tribunal de commerce d'Anvers*, J.P.A. 1963, p. 484.

[297] See *The Eleftheria* (1969), 1 Ll.L.R., 237.

[298] See the dictum in *Koster v. (American) Lumbermen's Mutual Casualty Co.* 330, US 518, 524, (1947). "In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the convenience the defendant may have shown".

304. Article 5 of the 1968 amendments to the Hague Rules did not resolve the most pressing problems of jurisdiction clauses, since they did not extend the scope of the Rules to both inward and outward shipments, as was earlier proposed (see para. 70 above).

D. Transhipment clauses

305. Virtually all cargo liner bills of lading contain "transhipment" clauses, which state that each carrier along a route is to be responsible for the goods only while they are in his possession. If valid, such clauses raise problems, because (*a*) the extent of the different carriers' liability is difficult to determine precisely, (*b*) goods might be transhipped at a port where the Hague Rules are not in force, with the result that the Rules may not apply to the on-carriage period, and (*c*) the transhipment clause may state that each individual carrier's bill of lading is to apply while the goods are in that carrier's hands. This also raises the question whether jurisdiction clauses in each bill of lading along the route would be valid, so that a cargo owner might have to sue different carriers in different jurisdictions.

306. These problems might be resolved by amending the Rules to make the original carrier responsible for the whole of a transit, and to make the Rules apply during the entire period. This approach is applied by the Transatlantic Australian Homeward Bill of Lading, section 3 (*d*) of which reads:

> The goods or part thereof may be carried by the names or other vessels, whether belonging to the Line or others and should circumstances in the opinion of the Carrier, Master or Agent render transhipment desirable or expedient may be transhipped at any port or ports, place or places whatsoever, and while in course of transhipment may be placed or stored in craft or ashore and may be reshipped or forwarded or returned by land and/or water and/or air at Carrier's option and expense, all as part of the contract voyage and all the provisions of the bill of lading shall continue to apply.[299]

307. Moreover, if it could be made clear that, even when a transhipment clause is valid, certain conditions must be satisfied by the carrier in order to effect the carriage "properly and carefully" within the meaning of article 3, paragraph 2, this would go a long way, towards bringing certainty into the transhipment process. These conditions would, *inter alia*, provide:[300]

(*a*) That transhipment was reasonable and proper in the circumstances;

(*b*) That, wherever applicable, the carrier notified the cargo owner of the transhipment so as to enable him to insure any new risks which might be involved through the substitution of another ship for the original ship;

(*c*) That the carrier should exercise due care for the goods during the transhipment;

(*d*) That, wherever applicable, the carrier continued to exercise due care and diligence to forward the goods as soon as possible and would not be excused if he delayed the transhipment in order to avoid paying a high rate of freight for forwarding the goods;

(*e*) That in appropriate circumstances the carrier would deliver the goods at his own risk or expense, or the risk and expense might be shared with the cargo owner.

308. The Rules, when amended to make the original carrier responsible for the whole of the through transit, should perhaps also make it clear that the original carrier must seek indemnity from the on-carrier to satisfy a claim for loss or damage occurring while the goods are in the custody of the on-carrier. In fact, many shipowners who are container operators currently do this voluntarily.

309. The primary interest of the cargo owner would appear to be to hold a bill of lading which ensures that, unless he has otherwise agreed, transhipment of his goods cannot be effected under terms less favourable than those in his original contract of carriage. The carrier, on the other hand, would wish to be protected against the sole burden of risk and expense of caring for and forwarding cargo under unavoidable and unreasonable circumstances. Perhaps there can be a more equitable adjustment of the conflicting interests of cargo owners and carriers.

E. Clauses incorporating the terms of charter-parties in a bill of lading

310. The Hague Rules only apply to a bill of lading issued under a charter-party when the bill regulates the relations between the carrier and a holder of the bill of lading. This will not be the case until the charterer passes the bill of lading on to some other person.[301] The Rules also provide that if bills of lading are issued under a charter-party they shall comply with the terms of the Rules.[302] Although article 5 further states that the provisions of the Rules shall not be applicable to charter-parties, the Rules are frequently expressly incorporated in a charter-party, and this has caused problems[303] because charter-party provisions have legal effect between the shipowner and the charterer, while the bill of lading has legal effect between the shipowner and the receiver.

311. The Rules do not cover bill of lading provisions concerning arbitration, liens, demurrage, dead freight, and many other topics.[304] The central problem then becomes: "Can the charter-party terms be enforced

[299] There are authoritative views that the use of this clause would not cause problems of sufficient economic magnitude to attract unfavourable reaction from insurers. See K. Grönfors, "On carriage in Swedish maritime law", in *Six Lectures on the Hague Rules, op. cit.*, p. 53; he feels that P and I insurers have not "become unduly worried" by the use of the clause.

[300] See S. Dor, *op. cit.*, p. 67.

[301] Article 1(*b*), read in conjunction with article 5; see W. Tetley, *op. cit.*, p. 12.

[302] See article 5, second paragraph.

[303] Charter-parties sometimes specifically invoke the Hague Rules by means of a paramount clause, and this may have the effect of invalidating all other charter-party clauses which may be contrary to the Hague Rules (see *Anglo Saxon Petroleum Co. v. Adamastos Shipping Co.* (1957), 1 Ll. L. R. 79).

[304] Dead freight and demurrage clauses are considered in paras. 323 and 324 below.

against the receiver, who usually has no knowledge of its terms?" Most charter-parties contain a cesser and lien clause, which usually states that "the charterer's liability shall cease upon shipment of the goods; shipowner to have a lien on the goods for freight, dead freight, demurrage and damages for detention". In most countries, the effect of the cesser clause is to release the charterer from liability for matters in respect of which the carrier has a lien (cesser is co-extensive with lien). When charter-party terms are incorporated in a bill of lading, the cesser clause must be borne in mind, because it usually leads to the shipowner seeking to obtain redress from the receiver for such things as demurrage incurred at the loading port and dead freight.[305] As will be seen, the enforcement of charter-party terms against a bill of lading holder can operate against receivers of cargo.[306]

312. In considering the legal effect of incorporating clauses, two central questions arise:

(*a*) What kind of incorporating clause is required to give the greatest effect?

(*b*) Even with a very wide incorporating clause, which of the charter-party terms will be included in the bill of lading and which will be rejected?

313. Typical incorporating clauses now in use state: "all terms, conditions, clauses and exceptions as per charter-party", or "all the terms, conditions, liberties, and exceptions of the charter-party are herewith incorporated". Such clauses have the effect of reading the charter-party verbatim into the bill of lading as though it were printed in full. However, the courts in some countries have not enforced against the purchaser of a bill of lading unusual charter-party clauses which he has had no opportunity to see. Clauses which would alter express terms in the bill of lading, or which are not conditions to be performed by a consignee in the particular circumstances of a case, will not usually be enforced against the holder of a bill of lading.[307]

314. The main argument advanced in support of incorporating clauses is that the practice, if effective, would lead to simplicity in documentation. The bill of lading should correspond with the charter-party, and to achieve this purpose it is convenient to state that "all the terms of the charter-party" (or similar words) are to be considered part of the bill of lading. By this method, the bill of lading becomes a shorter document than the usual liner bill of lading. It is also often put forward that the bill of lading should include all the relevant provisions, but it is virtually impossible to prepare a satisfactory tramp bill of lading in advance, because the clauses can only be drafted when the charter-party contents are known. It obviously saves time to use incorporating clauses, and by using them the parties avoid the possibility of prejudicing their position by deciding beforehand which of the charter-party terms should be repeated in the bill of lading. However, as explained below, the incorporation of charter-party terms in bills of lading also entails certain disadvantages.

315. The principal disadvantages of incorporating clauses are:

(*a*) The parties to the bill of lading may have difficulty in ascertaining their legal position. It might be difficult to determine which of the clauses of a lengthy charter-party are incorporated, and frequently the charter-party is not at hand when the bill of lading contract is concluded or when the bill of lading is transferred.

(*b*) The bill of lading governs the rights and responsibilities of the shipowner and the bill of lading holder, and the shipowner should not, therefore, have any claims or defences which do not appear in some way in the document.

(*c*) In contracts of sale, the buyer may be forced to accept a bill of lading. It may be agreed in the sale contract that the buyer shall pay on presentation of the bill of lading, but even if this is not done the seller has the right in some instances to oblige the buyer to pay on presentation of the bill of lading. If "Incoterms" apply, the charter-party has to be presented with the bill of lading, but otherwise this may not be so.[308] When goods are sold afloat, the prospective buyer is free to refuse to become a party to an agreement if he thinks that a reference to a charter-party is likely to be dangerous, in which case it can be argued that the effect of the incorporating clause is to reduce the transferability of the bill of lading.

(*d*) Under the "Uniform Customs and Practice for Documentary Credits",[309] unless specifically authorized in the credit, a bill of lading which is issued under and subject to the conditions of a charter-party will be rejected; the effect of an incorporating clause is, therefore, to restrict the use of bills of lading as documents of credit.

316. If the bill of lading is regarded in the light of the commercial requirements under a sale contract, an incorporating clause may have some restrictive effects. However, if the bill of lading is treated as a contract of carriage, an incorporating clause is convenient for carriers, for carriers naturally wish to reduce their risks under the bill of lading to equal those undertaken in the charter-party.

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[305] The receiver is primarily interested in ensuring that, unless he has agreed to the contrary, he does not by purchasing a bill of lading attract liabilities contained in a charter-party which it would be unusual for a receiver to bear in the particular transaction to which he is a party. In practice, he is often disappointed in this expectation, owing to the uncertain state of the law.

[306] The cesser clause will not be considered at length here, except to mention that its effects cannot be described in general terms, since "in each case the effect depends upon the interpretation of other parts of the contract" (see I. Cs. Carver, *op. cit.*, para. 1313).

[307] Court decisions have not been consistent and have often been at variance with the textbooks. The position differs in different legal systems.

[308] In *Finska Cellulosaforeningen v. Westfield Paper Co.* (1940), 4 All E.R. 473, it was held that even if the charter-party is referred to in the bill of lading the buyer will not necessarily be entitled to a copy of it if its terms are well known in the trade.

[309] See Br. 222 (EF) 1963, of the International Chamber of Commerce.

317. What is required is to improve the present situation so that the receiver does not suffer injustice and there is no delay in commercial transactions. The following points might be taken into account in future conventions:

(*a*) When the bill of lading is issued by the carrier, a copy of the charter-party should be attached to the bill of lading;

(*b*) When a bill of lading is tendered under a sale contract, a copy of the charter-party should be presented with the bill of lading, as under "Incoterms";

(*c*) Any demurrage incurred at the loading port should be endorsed on the bill of lading;

(*d*) If there is a total time for loading and discharging, the time taken in loading should be endorsed on the bill of lading;

(*e*) Any dead freight or possible dead freight should be endorsed on the bill of lading;

(*f*) Cesser clauses should be invalid;

(*g*) Regarding arbitration clauses in charter-parties, article 3, paragraph 6, of the Rules could be amended to provide either that "suit" would not include arbitration proceedings, or that the presence of an arbitration clause would not operate so as to debar cargo owners from bringing suit if in fact they had commenced legal proceedings of some kind within the one-year time limit;

(*h*) The "Uniform Customs and Practice for Documentary Credits" should be amended to provide that bills of lading subject to the conditions of a charter-parlty are authorized so long as they meet requirements such as those in points (*a*) to (*e*) above.

318. Virtually all charter-parties contain arbitration clauses, but almost no bills of lading issued under charter-parties contain such clauses. Questions have arisen over the extent to which charter-party arbitration clauses are binding on receivers through incorporating clauses in bills of lading.

319. Courts have tended to look closely at the wording of arbitration clauses in determining whether they are binding upon receivers. Thus, a clause providing that "all disputes under this charter shall be referred to arbitration" has been held not to be sufficient to bind the receiver,[310] but a clause providing that "any dispute arising out of this charter or any bill of lading issued hereunder shall be referred to arbitration" has been held to be sufficient, because of its reference to the bill of lading.[311]

320. A further problem arises if the time limit in the charter-party arbitration clause is shorter than that in the Hague Rules, in cases where there is a bill of lading to which the Rules apply.[312] Application of a shorter time limit would violate article 3, paragraph 8, because it would lessen the carrier's liability, but it is uncertain whether the effect would be to void the whole arbitration clause or only the provision for a shorter time limit.[313]

321. In some countries, it has been held that a clause in a charter-party granting the shipowner a lien for dead freight could be enforced against the receiver under an incorporating clause in the bill of lading. It is somewhat difficult to justify the receiver paying for the charterer's failure to supply cargo.

322. A lien for demurrage in the charter-party can be enforced against the receiver if the charter-party is incorporated into the bill of lading by the usual incorporating clause.[314] Such a lien is effective against the receiver for demurrage at the loading port as well as at the discharging port, and the fact that the amount of demurrage incurred at the loading port is not endorsed on the bill of lading will not affect this result.

323. It will be apparent that problems arising from the incorporation of charter-party terms in bills of lading require considerable reflection, since they affect also the terms of sale and the freedom of contractual relationships.

324. It appears that, generally speaking, the consequential effects of the two documents, the charter-party and the bill of lading, should be kept quite separate, and the holder of the bill of lading, if he is not also the charterer, should not be subject to liabilities arising from the charter-party which he has not expressly agreed to accept.

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[310] See *Hamilton v. Mackie* (1889), 5 T.L.R. 677. See also *Thomas v. Portsea Steamship Co.* (1912), A.C. 1, where the facts and the finding were almost identical. In *The Phonizien* (1966), 1 Ll.L.R. 150, it was held that the phrase "any dispute arising under this charter-party shall be referred to arbitration" was not effective for a dispute arising under the bill of lading, even though the dispute was between the charterer and the shipowner, instead of a third party receiver and the shipowner.

[311] See *The Merak* (1964), 2 Ll.L.R. 527. Decisions in the United States appear to be slightly less consistent. There, the phrase "any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration in the City of New York" was sufficient to bind the receiver (see *Son Shipping Company v. De Fosse and Tanghe* (1952), A.M.C. 1931); while the clause " . . . any dispute between the disponent owners and the charterers" was not sufficient (see *Import Export Steel Corp. v. Mississippi Valley Barge Line Company* (1966), A.M.C. 237).

[312] The Hague Rules apply to a bill of lading issued under a charter-party whenever such a bill of lading has been transferred by the charterer to another person.

[313] It is believed that an English court would nullify only the provision for a shorter time limit, allowing the remainder of the arbitration clause to stand (see *Svenska Traktor Aktiebolaget v. Maritime Agencies* (1953), 2 A.M.C. 1217). In the United States, it has been held that such a conflict was for the arbitrators to resolve, not the court (see *Lowry and Co. v. SS Le Moyne D'Iberville* (1966), A.M.C. 2195). In the Federal Republic of Germany, the provision for a shorter time limit is considered as invalid (see G. Shaps-Abraham, *op. cit.*, vol. II, Anm. 9, para. 612).

[314] See *Fidelitas Shipping Co. v. V/O Exportchleb* (1963), 2 Ll. L.R. 113.

ANNEXES

Annex I

The Hague Rules, 1924

INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO BILLS OF LADING, SIGNED AT BRUSSELS ON 25 AUGUST 1924[a]

Article 1

In this Convention the following words are employed with the meanings set out below:

(*a*) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(*b*) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea; it also applies to any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such instrument regulates the relations between a carrier and a holder of the same.

(*c*) "Goods" includes goods, wares, merchandise and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(*d*) "Ship" means any vessel used for the carriage of goods by sea.

(*e*) "Carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

Article 2

Subject to the provisions of Article 6, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

Article 3

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

(*a*) Make the ship seaworthy;

(*b*) Properly man, equip and supply the ship;

(*c*) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

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

3. After receiving the goods into his charge, the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

(*a*) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner, as should ordinarily remain legible until the end of the voyage;

(*b*) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;

(*c*) The apparent order and condition of the goods.

Provided that no carrier, master, or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking.

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (*a*), (*b*) and (*c*).

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

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

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

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

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

[a] The text of this Convention is also reproduced in League of Nations, *Treaty Series*, vol. CXX, 1931-1932, No. 2764.

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

7. After the goods are loaded, the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading. At the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article 3, it shall for the purpose of this article be deemed to constitute a "shipped" bill of lading.

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

Article 4

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped, and supplied and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

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

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

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

(*c*) Perils, danger and accidents of the sea or other navigable waters;

(*d*) Act of God;

(*e*) Act of war;

(*f*) Act of public enemies;

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

(*h*) Quarantine restrictions;

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

(*j*) Strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;

(*k*) Riots and civil commotions;

(*l*) Saving or attempting to save life or property at sea;

(*m*) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(*n*) Insufficiency of packing;

(*o*) Insufficiency or inadequacy of marks;

(*p*) Latent defects not discoverable by due diligence;

(*q*) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be *prima facie* evidence but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connexion with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

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

Article 5

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

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

Article 6

Notwithstanding the provisions of the preceding articles, a carrier, master, or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability

of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or concerning his obligation as to seaworthiness so far as this stipulation is not contrary to public policy, or concerning the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect.

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

Article 7

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

Article 8

The provisions of this Convention shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of seagoing vessels.

Article 9

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

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

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

Article 10

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

Article 11

After an interval of not more than two years from the day on which the Convention is signed, the Belgian Government shall place itself in communication with the Governments of the High Contracting Parties which have declared themselves prepared to ratify the Convention, with a view to deciding whether it shall be put into force. The ratifications shall be deposited at Brussels at a date to be fixed by agreement among the said Governments. The first deposit of ratifications shall be recorded in a *procès-verbal* signed by the representatives of the Powers which take part therein and by the Belgian Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Belgian Government and accompanied by the instrument of ratification.

A duly certified copy of the *procès-verbal* relating to the first deposit of ratifications, of the notifications referred to in the previous paragraph, and also of the instruments of ratification accompanying them, shall be immediately sent by the Belgian Government through the diplomatic channel to the Powers [which] have signed this Convention or [which] have acceded to it. In the cases contemplated in the preceding paragraph the said Government shall inform them at the same time of the date on which it received the notification.

Article 12

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

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

The Belgian Government shall immediately forward to all the States which have signed or acceded to the Convention a duly certified copy of the notification and of the act of accession, mentioning the date on which it received the notification.

Article 13

The High Contracting Parties may at the time of signature, ratification, or accession declare that their acceptance of the present Convention does not include any or all of the self-governing dominions, or of the colonies, overseas possessions, protectorates or territories under their sovereignty or authority, and they may subsequently accede separately on behalf of any self-governing dominion, colony, overseas possession protectorate or territory excluded in their declaration. They may also denounce the Convention separately in accordance with its provisions in respect of any self-governing dominion, or any colony, overseas possession, protectorate or territory under their sovereignty authority.

Article 14

The present Convention shall take effect, in the case of the States which have taken part in the first deposit of ratifications, one year after the date of the *procès-verbal* recording such deposit.

As respects the States which ratify subsequently or which accede, and also in cases in which the Convention is subsequently put into effect in accordance with Article 13, it shall take effect six months after the notifications specified in paragraph 2 of Article 11, and paragraph 2 of Article 12, have been received by the Belgian Government.

Article 15

In the event of one of the contracting States wishing to denounce the present Convention, the denunciation shall be notified in writing to the Belgian Government, which shall immediately communicate a duly certified copy of the notification to all the other States informing them of the date on which it was received.

The denunciation shall only operate in respect of the State which made the notification, and on the expiry of one year after the notification has reached the Belgian Government.

Article 16

Any one of the contracting States shall have the right to call for a fresh conference with a view to considering possible amendments.

A State which would exercise this right should notify its intention to the other States through the Belgian Government, which would make arrangements for convening the conference.

Done at Brussels, in a single copy, August 25th, 1924.

(The signatures follow)

PROTOCOL OF SIGNATURE

At the time of signing the International Convention for the unification of certain rules of law relating to bills of lading, the Plenipotentiaries whose signatures appear below have agreed on the present Protocol, which shall have the same force and the same scope as if these provisions were inserted in the text of the Convention to which they relate.

The High Contracting Parties may give effect to this Convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under this Convention.

They may reserve the right:

(1) To prescribe that in the cases referred to in paragraph 2 (*c*) to (*p*) of Article 4, the holder of a bill of lading shall be entitled to establish responsibility for loss or damage arising from the personal fault of the carrier or the fault of his servants which are not covered by paragraph (*a*).

(2) To apply Article 6 in so far as the national coasting trade is concerned to all classes of goods without taking account of the restriction set out in the last paragraph of that article.

Done at Brussels, in a single copy, August 25th, 1924.

(The signatures follow)

Annex II

The 1968 Brussels Protocol

PROTOCOL TO AMEND THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO BILLS OF LADING, SIGNED AT BRUSSELS ON 25 AUGUST 1924

The contracting parties

Considering that it is desirable to amend the International Convention for the Unification of certain Rules relating to Bills of Lading, signed at Brussels on 25 August 1924,

Have agreed as follows:

Article 1

1. In Article 3, paragraph 4, shall be added:

"However, proof to the contrary shall not be admissible when the Bill of Lading has been transferred to a third party acting in good faith".

2. In Article 3, paragraph 6, the fourth sub-paragraph shall be replaced by:

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

3. In Article 3, after paragraph 6 shall be added the following paragraph 6 *bis*:

"An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself."

Article 2

Article 4, paragraph 5, shall be deleted and replaced by the following:

"(*a*) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of francs 10,000 per package or unit or francs 30 per kilo of gross weight of the goods lost or damaged, whichever is the higher.

"(*b*) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged. The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

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

" (*d*) A franc means 'a unit consisting of 65,5 milligrammes of gold of millesimal fineness 900'. The date of conversion of the sum awarded into national currencies shall be governed by the law of the court seized of the case.

"(*e*) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

"(*f*) The declaration mentioned in sub-paragraph (*a*) of this paragraph, if embodied in the bill of lading, shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

"(*g*) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (*a*) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph.

"(*h*) Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connexion with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading. "

Article 3

Between Articles 4 and 5 of the Convention shall be inserted the following Article 4 *bis:*

"1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage, whether the action be founded in contract or in tort.

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

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

"4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this Article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result."

Article 4

Article 9 of the Convention shall be replaced by the following:

"The provisions of this Convention shall apply to every Bill of Lading relating to the carriage of goods between ports in two different States if:

"(*a*) The Bill of Lading is issued in a contracting State, or

"(*b*) The carriage is from a port in a contracting State, or

"(*c*) The contract contained in or evidenced by the bill of lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract, whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

"Each contracting State shall apply the provisions of this Convention to the bills of lading mentioned above.

"This Article shall not prevent a contracting State from applying the Rules of this Convention to bills of lading not included in the preceding paragraphs."

Article 6

As between the Parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as one single instrument.

A Party to this Protocol shall have no duty to apply the provisions of this Protocol to bills of lading issued in a State which is a Party to the Convention but which is not a Party to this Protocol.

Article 7

As between the Parties to this Protocol, denunciation be any of them of the Convention in accordance with Article 15 thereof shall not be construed in any way as a denunciation of the Convention as amended by this Protocol.

Article 8

Any dispute between two or more Contracting Parties concerning the interpretation or application of the Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

Article 9

1. Each Contracting Party may, at the time of signature or ratification of this Protocol or accession thereto, declare that it does not consider itself bound by Article 8 of this Protocol. The other Contracting Parties shall not be bound by this Article with respect to any Contracting Party having made such a reservation.

2. Any Contracting Party having made a reservation in accordance with paragraph 1 may at any time withdraw this reservation by notification to the Belgian Government.

Article 10

This Protocol shall be open for signature by the States which have ratified the Convention or which have adhered thereto before 23 February 1968, and by any State represented at the twelfth session (1967-1968) of the Diplomatic Conference on Maritime Law.

Article 11

1. This Protocol shall be ratified.

2. Ratification of this Protocol by any State which is not a Party to the Convention shall have the effect of accession to the Convention.

3. The instruments of ratification shall be deposited with the Belgian Government.

Article 12

1. States Members of the United Nations or members of the specialized agencies of the United Nations, not represented at the twelfth session of the Diplomatic Conference on Maritime Law, may accede to this Protocol.

2. Accession to this Protocol shall have the effect of accession to the Convention.

3. The instruments of accession shall be deposited with the Belgian Government.

Article 13

1. This Protocol shall come into force three months after the date of the deposit of ten instruments of ratification or accession, of which at least five shall have been deposited by States that have each a tonnage equal or superior to one million gross tons of tonnage.

2. For each State which ratifies this Protocol or accedes thereto after the date of deposit of the instrument of ratification or accession determining the coming into force such as is stipulated in paragraph 1 of this Article, this Protocol shall come into force three months after the deposit of its instrument of ratification or accession.

Article 14

1. Any Contracting State may denounce this Protocol by notification to the Belgian Government.

2. This denunciation shall have the effect of denunciation of the Convention.

3. The denunciation shall take effect one year after the date on which the notification has been received by the Belgian Government.

Article 15

1. Any Contracting State may at the time of signature, ratification or accession or at any time thereafter declare by written notification to the Belgian Government which among the territories under its sovereignty of for whose international relations it is responsible, are those to which the present Protocol applies.

The Protocol shall, three months after the date of the receipt of such notification by the Belgian Government, extend to the territories named therein, but not before the date of the coming into force of the Protocol in respect of such State.

2. This extension also shall apply to the Convention if the latter is not yet applicable to those territories.

3. Any Contracting State which has made a declaration under paragraph 1 of this Article may at any time thereafter declare by notification given to the Belgian Government that the Protocol shall cease to extend to such territory. This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian Government; it also shall apply to the Convention.

Article 16

The Contracting Parties may give effect to this Protocol either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under this Protocol.

Article 17

The Belgian Government shall notify the States represented at the twelfth session (1967-1968) of the Diplomatic Conference on Maritime Law, the acceding States to this Protocol, and the States Parties to the Convention, of the following:

1. The signatures, ratification and accessions received in accordance with Articles 10, 11 and 12;

2. The date on which the present Protocol will come into force in accordance with Article 13;

3. The notifications with regard to the territorial application in accordance with Article 15.

4. The denunciation received in accordance with Article 14.

In witness whereof the undersigned Plenipotentiaries, duly authorized, have signed this Protocol.

Done at Brussels, this 23rd day of February 1968, in the French and English languages, both texts being equally authentic, in a single copy, which shall remain deposited in the archives of the Belgian Government, which shall issue certified copies.

(The signatures follow)

Annex III

EXAMPLES OF BILLS OF LADING

A. The ALAMAR bill of lading

The Single Bill of Lading
of the Latin American Shipowners Association

The contract of carriage documented in this bill of lading is, by agreement between the two parties, the carrier and the shipper, subject to the stipulations and conditions appearing on the observe side and to the following clauses:

1. *Meaning of the terms used in this bill of lading*

(*a*) "Carrier" means the natural or legal person shown on the obverse side of his bill of lading as receiving the goods, whether or not he is the owner and/or operator of the ship or charterer and/or operator of the ship in which the goods were embarked or whether the said ship has been made available to him by virtue of some other contract under maritime law.

(*b*) "Shipper" means the natural or legal person, corporation or trading company described as the shipper on the obverse side of this bill of lading as well as the person for whose account the goods are shipped, the owner of the goods, the consignee or addressee or any endorsee or legitimate holder of the bill of lading, or any person who has an interest in receiving the goods.

(*c*) "Consignee" includes, in addition to the person so designated on the obverse side of this bill of lading, any person who receives, or is entitled to receive, the goods covered by it, whether directly from the ship or from warehouses, or the legitimate holder of this bill of lading and any person with a legitimate interest in receiving the cargo.

(*d*) "Expenses" include the freight charge and any other obligation to pay sums of money in connexion with the goods incurred on behalf of the shipper, consignee, addressee or owner of the goods, or of the endorsee or legitimate holder of the bill of lading, or of any other person with an interest in receiving the cargo.

(*e*) "Ship" means not only the vessel mentioned on the obverse side of this bill of lading but also any other vessel to which the goods are transhipped prior to their arrival at their destination.

2. *Standards applicable*

(*a*) The clauses of this contract of carriage are based on the Brussels Convention for the Unification of certain Rules relating to Bills of Lading of 25 August 1924, hereinafter called the Convention.

(*b*) In all matters not governed by the clauses of this bill of lading, the laws, uses and customs of the place in which the engagement covered by it is to be discharged shall apply.

(*c*) If any court should set aside the application of any of the aforesaid rules or should declare them null and void, the remaining rules shall retain full validity and shall be applicable.

3. *Competent court*

In any action derived from this contract of carriage, the courts of the place in which the obligation whose performance is claimed is to be performed shall have jurisdiction, unless the plaintiff opts for the courts of the defender's country of domicile or for those of the place in which the voyage terminated.

Liability of the carrier

4. *Liability of the carrier during transport*

The liability of the carrier commences when the hook of the ship's loading tackle engages in the goods to be shipped and ends at the precise moment that they are disengaged from the hook of the tackle after unloading. If the cargo loading and unloading operations are carried out by means of hooks, cranes, derricks or other devices which are not those appertaining to the ship, the carrier shall not be liable for any damage or loss which the goods may undergo during handling, unless the said winches, cranes, derricks or other devices were used on the initiative of the carrier and in his own exclusive interest.

5. *Liability of the carrier before and after actual transport*

(*a*) Before the goods are loaded and after they are unloaded, in the exact circumstances defined in the preceding clause (No. 4), and until the goods are received by the addressee, providing that the latter duly complies with all his obligations under this bill of lading, the carrier shall be liable for the goods while he has them in his effective material custody and under his effective material control.

(*b*) Any delivery of the goods to Customs, bond or private warehouses or to lighters or other port vessels shall terminate the liability of the carrier and, from that moment onward, the goods shall be regarded as having been delivered to their consignees, unless such delivery is effected on the initiative of the carrier and in his own exclusive interest.

(*c*) However, if he retains the effective material custody and control of the goods as aforesaid, he shall not be liable for any damage, injury or loss which they may undergo through the acts and/or circumstances set out in article 4, paragraph 2, of the Convention which are, by agreement between the parties, regarded as cases of *force majeure*, and the carrier shall be covered by the limitation in article 4, paragraph 5, of the said Convention, where applicable.

(*d*) If the carrier is compelled to retain the goods in his keeping because the consignee has not fulfilled his obligation to take possession of them, the carrier shall have the option, subject to the right of retention, of dispatching them to a warehouse or store or of allowing them to remain in the place in which they were unloaded at the consignee's expense and risk.

6. *Due diligence*

If the carrier is in possession of certificates issued by the shipping authorities and/or by the international classification societies attesting to the seaworthiness of the ship and the good condition and functioning of its machinery, he shall be regarded as having complied with the due diligence provision concerning seaworthiness required by this contract and by article 4 of the Convention and as having manned the ship with a crew in accordance with the regulations established by the shipping authority and/or by the international conventions for its full, proper and requisite manning, equipment and supply, and as having made the holds, refrigerating and cool chambers, and other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation. Consequently, the carrier shall not be liable in respect of any damage and/or injury to and/or loss of goods resulting from the condition of the ship.

7. *Navigational errors*

The carrier shall not be liable for any consequences resulting from the act, neglect or default of the master, pilot or other personnel on board in the navigation or in the management of the ship, or from any of the other acts and occurrences mentioned in article 4 of the Convention.

8. *Pilots and steersmen*

The master may leave ports, roadsteads or rivers without pilots or steersmen, whether or not under tow, and the carrier shall not be responsible for any accident which may result from such circumstances.

9. *The master as representative of the public authorities*

The carrier shall not be liable for any actions by the master in his capacity as representative of the public authorities, or for any harmful consequences to the shipper resulting therefrom, without prejudice to the carrier's right to bring actions to secure the contributions for general average in accordance with clause 45 of this bill of lading.

10. *Substitution of the ship*

As stipulated on the obverse side of this bill of lading, the ship in which the goods were embarked may, without prior notice, be replaced by another whenever and wherever the carrier considers it necessary to do so, whether the ship so substituted is the property of the carrier or of another enterprise or person and whether or not it arrives or departs, or is scheduled to arrive or depart, earlier or later than the ship for which it is substituted, provided that the substituted ship meets all the requirements of the Convention.

11. *Duration of the voyage*

The carrier does not guarantee the dates of the departure or arrival of the ship or engage himself to complete the voyage in a given space of time, and he shall not be liable for any damage which may result for the shipper, whether in connexion with the cargo or for any other reason, from the fact that the ship does not depart or arrive at the dates on which it might reasonably have been expected so to do or from an extraordinary prolongation of the voyage.

12. *Reasonable deviation*

Provided that the carrier acts in a reasonable manner, the ship may return to its port of departure or to any port of call, vary its normal or advertised ports of call, or include additional ports of call, whether to discharge or take on cargo or for any other reason. It may depart from the scheduled route, change the geographical order of the ports of call from that originally scheduled, or interrupt or suspend the voyage in order to carry out repairs and inspections, take on fuel and provisions, lend assistance or save life or property.

Goods

13. *Delivery of the cargo*

This contract of carriage came formally into existence on the submission of an application by the shipper to reserve space, accepted by the carrier, and agreement on the relevant freight charge. Consequently, if the shipper does not deliver the cargo to the dockside at the place, date, hour and time fixed by the carrier or his representatives, in a condition suitable for immediate loading, he shall be bound to pay the full freight charge for the goods not loaded, whether in whole or in part.

14. *Identification of the goods*

The shipper shall be bound to provide the goods with suitable packing, according to the nature of their contents and of the voyage, and to place on it the marks, numbers, weight and other particulars shown in this bill of lading, in a clear and indelible form, in such a way that they will remain legible until delivery of the goods to their addressee.

15. *Inaccuracies, inadequacies and deficiences in the contents, marks, number, quantity of packages or pieces, weight, volume and dimensions*

All the particulars concerning the shipment which are described in this bill of lading shall be deemed to have been furnished solely by the shipper, whether or not they are written in his own hand. Consequently, the shipper shall be liable for any inaccuracy, inadequacy or illegibility of such declarations and shall indemnify the carrier against all loss or damage directly or indirectly attributable thereto, pursuant to the provisions of article 3, paragraph 5, of the Convention.

16. *Shipper's certificates*

The shipper shall be liable for any loss or damage which the carrier may sustain by reason of the shipper's failure to provide or deliver all documents required by the laws and regulations of the countries linked by the voyage.

17. *Detention of the ship through the fault of the shipper*

If by reason of the absence of any of the certificates mentioned in the preceding article, failure to pay any tax on the goods or to comply with any law or regulation pertaining to the goods or any other act by the shipper, the ship is detained or embargoed by the authorities of a country, the shipper shall be liable for any loss or damage sustained by the carrier.

18. *Reconditioning of the goods*

If any reconditioning or repacking of the goods, repairs to the goods or packaging or collection of material shipped in bulk or of the contents of packages is required as a result of inadequate packing or the fault or neglect of the shipper, the shipper shall be liable for all expenses incurred by the carrier in that connexion, together with any other loss or damage he may suffer.

19. *Goods whose importation is forbidden*

Should it prove impossible to discharge the goods owing to an order by the competent authorities of the country of destination or to any other obstacle which was insuperable when unloading was to take place, the carrier shall have the right to return them to the port of embarkation or to unload them at the first port at which he is able to do so, charging the appropriate freight and any other costs he may have incurred.

20. *Dispatch by other means of transport*

If the ship is unable to reach its destination or the goods cannot be discharged, these may be dispatched to their destination by another ship or by other means of transport, in which case the carrier shall act as the shipper's representative and his liability and the application of this bill of lading shall cease, the carriage then becoming subject ot the conditions of the appropriate bill of lading, way-bill or similar document.

21. *Remittance of valuables*

The carriage of cash remittances, paper coin, jewels, silverware, works of art, precious stones or metals, bank-notes, securities and other negotiable documents or valuables shall also be governed by the articles of this bill of lading, under the same conditions as any other goods. Consequently, the carrier shall enjoy all the immunities and limitations of liability specified in this bill of lading, unless the shipper delivers the package(s) under the conditions specified in clause 44 so as to enjoy the benefits of that clause. The shipper shall meet the following special requirements: (*a*) the package shall be in perfect condition and shall be fastened with sealing wax stamped with an identifying seal of the party concerned; (*b*) very heavy cases shall be wired, the ends of the wire being fastened with sealing wax and stamped in the centre of the top surface of the case, (*c*) the package shall be delivered on board the ship against a receipt signed by the master, the first mate and the deck watch officer on duty at that moment, (*d*) all copies of the lading documents and valuables of any kind shall bear the same stamp in sealing wax, (*e*) the value declared by the shipper shall be clearly marked on the top surface of the package, (*f*) the consignees shall withdraw it from shipboard in the port of destination on the deck of the ship on the day of its arrival, and the responsibility of the carrier shall terminate forthwith.

22. *Carrier's reservations concerning the order and condition of the goods*

The declaration contained in this bill of lading that the goods were received in apparent good order and condition shall not affect the right of the carrier to prove the contrary, viz. that the goods were not in good order and condition owing to the existence of stains, fragility, a discrepancy in weight, damaged packaging or other circumstances, even if no reservation was entered in this bill of lading at the time of embarkation, pursuant to the provisions of article 3, paragraph 4, of the Convention. If any such circumstances are proved, the carrier shall not be liable for any reflection in volume or loss of weight, or any other loss, damage or shortage found in the goods at the place of discharge which is attributable to the lack of good order and condition.

23. *Dangerous goods*

The shipper shall be liable for all damage and/or cost to the carrier due to loss or damage sustained by the ship and/or cargo and/or persons carried caused by acids, inflammables, explosives, or malodorous or dangerous products in its cargo, provided that these were shipped without a special agreement and without an indication of their true nature, even if the shipper was not aware of their condition, and whether he is acting on his own account or on behalf of another person. The carrier or person representing him may at any time, prior to the discharge of the said goods, jettison them, land them at any place, destroy them or render them innocuous, as and when he may judge appropriate, without any liability to compensate any person who may consider himself injured thereby. If any of the goods aforementioned were embarked with the information and consent of the carrier and subsequently become a danger to the ship and/or cargo and/or persons carried, they may similarly be jettisoned, landed, destroyed or rendered innocuous by the carrier or the person representing him, without any liability on his part being thereby incurred except to general average, if any, as provided for in article 4, paragraph 6, of the Convention.

24. *Live animals*

This bill of lading shall not apply to the carriage of live animals. If it should be utilized for that purpose, however, the carrier shall be in no way liable for any injuries, deaths or illnesses of the animals during carriage, loading or unloading, and the immunities and limitations provided for in article 4, paragraphs 1, 2, 4 and 5 of the Convention and such other clauses of this bill of lading as may be appropriate, shall apply.

25. *Stowage of the goods*

The carrier may stow the goods in any part of the ship designed for that purpose, or in any other covered space which is commonly used for the carriage of goods. In no case may this form of stowage be deemed to differ from below-deck carriage.

26. *Deck stowage*

Goods carried as deck cargo, if this is the use and custom or with the consent of the shipper, in places other than those mentioned in the preceding clause, shall be carried at the responsibility and risk of the shipper in respect of all eventualities related to this form of stowage, and the immunities and limitations provided for in article 4, paragraphs 1, 2, 4 and 5 of the Convention and such other clauses of this of this bill of lading as may be appropriate, shall apply.

27. *Refrigeration, heating and other facilities*

Unless the shipper specifically states that the goods he is shipping are perishable and requests the carrier in writing before loading begins to carry them in refrigerating or cool chambers or with special heating or ventilation, at the freight price for special cargo, and unless the carrier expressly agrees in this bill of lading to carry the goods in that way, the shipper implicitly accepts that the goods do not require, and the carrier is not bound to furnish, specially heated or refrigerated stowage or any other treatment different from common stowage in the usual cargo holds. Unless there is a stipulation to the contrary, the carrier shall not be bound to supply refrigeration, heating or other special cooling or ventilation facilities for the goods during loading and unloading, even if the goods so require, and subsequently shall not be liable for any resulting damage thereto.

28. *Missing packages*

On receipt of a written claim by the owner of record of the cargo, the carrier shall be allowed a period of six months in which to trace any package which is thought to be missing or to have been misdelivered by his agents, but he shall be relieved of all responsibility if he can prove that the package bore marks or numbers additional to or differing from those recorded by the shipper in this bill of lading, or if such marks have been obliterated or become illegible. Goods which cannot be identified by means of marks or numbers, and remnants of the shipment, liquid residues and unclaimed goods which it has proved impossible to account for in any other way, may be distributed by the carrier in order to complete deliveries to consignees of goods of identical nature in quantities proportional to shortages, loss of weight or damage.

29. *Loss of or damage to bulk cargo*

Where cargo is stowed in bulk, without separation, whether belonging to one and the same shipper or to different shippers, any loss or damage sustained by the various shipments shall be proportionately divided among them.

Extraordinary events

30. *Instructions by the authorities*

Any orders given by a person exercising or holding authority, even if arbitrary, and complied with the carrier or the master, shall not entail any liability on the part of the carrier towards the owners of record of the shipment, even if such compliance results in damage or harm to the cargo or to their other interests. In no case shall the carrier be held liable for having complied with a manifestly arbitrary order.

31. *Acts of war, earthquakes, submarine earthquakes, mutinies, civil commotions and other cases of* force majeure

If, in the opinion of the carrier, the master or the carrier's representative, entry into the port of destination of the goods is unsafe, forbidden or inadvisable due to the imminence of a civil war, mutiny, civil commotions, blockade hazards, seizure or embargo of the ship and/or its cargo, in part or in whole, or through total or partial prohibition of the importation, exportation or transit of the goods it is carrying or for any other reason of *force majeure* which prevents discharge in any port of destination, the carrier shall have the same rights and options as in the cases mentioned in clause 19 of this bill of lading.

32. *Quarantines, strikes, lock-outs, labour stoppages or disputes, international boycotts*

In the event of the threat or the existence, in the port of destination of any shipment, of an epidemic, quarantine, restrictions on the ship, strikes, lock-outs, labour stoppages or disputes, ice, congestion or loading or unloading difficulties that might endanger the ship and/or cargo and/or crew and/or passengers, which result in detention, cause demurrage, render it impossible to operate in the normal way or delay or prevent departure from the port, the carrier shall have the same rights and options as in the cases mentioned in clause 19 of this bill of lading.

33. *Fulfilment of the contract of carriage in the cases of clauses 30, 31 and 32*

In any of the cases mentioned in clauses 30, 31 and 32 thereof the carrier shall be entitled to regard the contract of carriage as having been fulfilled and to charge the full freight. Any expenditure occasioned to the carrier by these special cases of contract fulfilment over and above that involved in a normal fulfilment, shall be for the account of the shipper and must be repaid immediately, before withdrawal of the goods.

Loading and unloading

34. *Loading*

The shipper shall deliver the goods at the dockside, in a condition to be received on board immediately, in the place and on the day indicated by the carrier. The goods shall be taken on board as rapidly as the ship is capable of receiving them on working days and during working hours, but the carrier may require them to be taken on board on non-working days and/or outside working hours.

35. *Unloading into lighters where the warehouses or the consignees do not receive the goods*

If the consignee does not remove the goods with all possible speed, the carrier may unload them on his own initiative, whether into lighters, open spaces, ships or other places, being the nearest and most accessible places, as a continuous operation, including Sundays and holidays, at any time of the day or night, whatever the weather. All additional expenses and costs arising from such unloading, together with any loss or damage sustained by the carrier, shall be charged to the consignee. Such discharge shall constitute the definitive surrender of the goods to the consignee, but the carrier must advise or notify the consignee of such discharge.

36. *Unloading on own initiative where the consignee does not withdraw the goods as rapidly as the ship can deliver them*

If the consignee does not attend at the opportune moment to receive and withdraw the goods, as rapidly as the ship can deliver them, the carrier shall have the same right to unload them on his own initiative as that established in clause 35 and to the same effect.

37. *Unloading of inflammables*

Inflammable, explosive, dangerous or noxious cargoes shall be withdrawn within twenty-four hours of the arrival of the ship, at the place designated by the competent authorities, at the consignee's expense and risk.

38. *Unloading into lighters if the ship is not moored at a dock or wharf*

(*a*) *Consignee's responsibility:*

If the ship is unable to unload directly on to a dock or wharf or shore, the consignee must accept delivery in lighters or other craft. When making use of lighters or other transport craft between the ship and the dock or shore, the carrier shall do so as agent for the shipper and the consignee and at their risk and expense. If, for any reason, such transport is held to be carried out on the responsibility of the carrier, it shall be governed by the provisions of this bill of lading. The carrier shall be entitled to require the consignee to supply lighters and/or other craft, winches, warehouses, wharves and other facilities to enable him to unload the ship as soon as it is ready and as rapidly as the master requires, whereby any loss or expense to the carrier resulting from any delays to the ship caused by fault of the consignee shall be charged to the consignee.

(*b*) *Expenses:*

All expenses, duties, charges and costs for the use of lighters or other craft, winches, supervision of distribution, stowage, transport, delivery, harbour dues, sheds, night and holiday work and any other facilities and services whatsoever connected with the unloading, safekeeping and consequent delivery or any other disposal of the goods shall be charged to the consignee.

(*c*) *Cessation of liability:*

All liability of the carrier of any kind shall cease completely and the goods shall be regarded as delivered, but subject to the carrier's right of retention at the consignee's expense and risk, when they are delivered into the lighters or other craft or are delivered into the hands of the Customs or port authorities or other authorities or persons or into public docks or warehouses. The aforesaid authorities, on taking possession of the goods, shall be regarded as having accepted delivery of them as agents for the shipper, consignee, legitimate holder of this bill of lading or owner of the goods.

Freight charges

39. *Calculation of the freight charge*

The freight charge shall be determined on the basis of the gross weight or volume of the goods or the value or number of packages, at the time of shipment.

40. *Data furnished by the shipper for the calculation of freight charges*

The freight charge may be calculated on the basis of the particulars concerning the goods supplied by the shipper in this bill of lading, or on the basis of the weight, gross volume,

number of packages or value verified in the port of discharge, without prejudice to the right of the carrier to open the packages in the port of discharge and to examine, weigh, measure and evaluate the goods.

If the weight or volume of the goods proves to be greater than that stated in this bill of lading, the shipper or consignee shall pay double freight on the total amount, and if they are different in nature from or greater in value than that declared, the carrier, in addition to charging double the freight applicable to their nature or value, in accordance with the provisions of article 4, paragraph 5, of the Convention shall be in no way liable for losses or damage caused to the goods or connected with the goods.

41. *Pre-payment of freight charges*

Freight charges and expenses are to be paid in advance and shall be paid when this bill of lading is delivered to the shipper, unless it is expressly stipulated herein that payment shall be made at the place of destination, in which case it shall be made prior to unloading and at the time designated by the carrier, even if the consignee does not remove the goods from the Customs or the ship. Payment of freight charges and expenses at the destination shall in all cases be subject to the joint responsability of the shipper.

42. *Freight charge payable in any event*

The carrier shall be deemed to be definitely entitled to payment in full of the freight and costs in respect of the goods or valuables covered by this bill of lading once the goods or valuables are receveid in the port of shipment, whether the amount due has been stipulated or is to be paid in advance or at the destination. Hence the carrier shall be entitled to payment in full of the freight corresponding to this bill of lading, whether or not it has previously been paid, whether the ship and/or goods reach their destination or another port or are lost during the voyage, or receptacles holding liquids arrive empty.

43. *Currency in which freight is to be paid*

The freight must be paid, without any compensation, against claims, in the currency designated by the carrier.

44. *Economic limitation of liability*

It is agreed by the parties that, where the carrier is not exonerated from liability by this bill of lading, such liability shall be limited to the equivalent of . . . per package, in the case of general cargo. In the case of shipments of cereals in bulk or in bags, his liability shall be limited to the same amount per metric ton. In the case of shipments of timber or any other material, the freight rate for which is based not on the number of units but on bulk weight or space occupied, the limitation of liability shall follow the same rule. This limitation of liability shall not apply in cases in which, the nature and value of the goods having been declared in writing by the shipper to the carrier before embarkation, these particulars have been inserted in this bill of lading and the shipper has paid the extra freight corresponding to that value. In such cases, the declared value shall constitute the carrier's maximum liability, even if the actual value of the goods is greater. At all events, the value which has been duly declared and noted in this bill of lading shall constitute a presumption only, and the carrier reserves the right to prove that the actual value at the time when the bill of lading was delivered was less than that declared. This agreement concerning liability in the case of a declared value shall only apply if, on the observe side of this document, it is attested that the said value has been declared for the purposes of the application of this article, any other declaration having no validity in this respect, even if made for fiscal or other purposes.

45. *General average*

General average and claims in respect of assistance or salvage shall be settled in accordance with the York-Antwerp Rules, 1950, in the port and by the liquidator designated by the carrier exclusively. The carrier shall have the right to require the consignee, before withdrawing the goods consigned, to make a cash deposit, in the currency indicated by the carrier, as a provisional contribution. The carrier shall also have the right, without prejudice to such deposit, to require a guarantee to be given of the final contribution, whether in the form of cash or of a bank or insurance company bond, at his option exclusively.

If the ship which rendered the assistance or carried out the salvage operation is the property of the carrier or under his control, administration or operation, the shipment shall be equally obliged to contribute just as if the operation had been carried out or the assistance rendered by a different ship or one with which the carrier had no connexion.

B. The CONLINE bill of lading

Liner bill of lading

(Liner terms approved by the Baltic
and International Maritime Conference)
Amended January 1st, 1950 and August 1st, 1952

1. *Definition*

Wherever the term "merchant" is used in this bill of lading, it shall be deemed to include the shipper, the receiver, the consignee, the holder of the bill of lading and the owner of the cargo.

2. *Paramount clause*

The Hague Rules contained in the International Convention for the Unification of certain Rules relating to Bills of Lading, dated at Brussels the 25th August 1924, as enacted in the country of shipment, shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.

3. *Jurisdiction*

Any dispute arising under this bill of lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein.

4. *Period of responsibility*

The carrier or his agent shall not be liable for loss of or damage to the goods during the period before loading and after discharge from the vessel, howsoever such loss or damage arises.

5. *Scope of the voyage*

The contract is for liner service an the voyage herein undertaken shall include usual or customary or advertised ports of call whether named in this contract or not, also ports in or out of the advertised, geographical, usual or ordinary route or order, even though in proceeding thereto the vessel may sail beyond the port of discharge or in a direction contrary thereto, or depart from the direct or customary route. The vessel may call at any port for the purpose of the current voyage or of a prior or subsequent voyage. The vessel may omit calling at any port or ports whether scheduled or not, and may call at the same port more than once; [it] may, either with or without the goods on board, and before or after proceeding towards the port of discharge, adjust compasses, dry-dock, go on ways

or to repair yards, shift berths, undergo degaussing, wiping or similar measures, take fuel or stores, land stowaways, remain in port, sail without pilots, tow and be towed, and save or attempt to save life or property, and all of the foregoing are inclused in the contract voyage.

6. *Substitution of vessel, transhipment and forwarding*

Whether expressly arranged beforehand or otherwise, the carrier shall be at liberty to carry the goods to their port of destination by the said or other vessel or vessels either belonging to the carrier or other, or by other means of transport, proceeding either directly or indirectly to such port and to carry the goods or part of them beyond their port of destination, and to tranship, land and store the goods either on shore or afloat and reship and forward the same at the carrier's expense but at the merchant's risk. When the ultimate destination at which the carrier may have engaged to deliver the goods is other than the vessel's port of discharge, the carrier acts as forwarding agent only.

The responsibility of the carrier shall be limited to the part of the transport performed by him on vessels under his management and no claim will be acknowledged by the carrier for damage or loss arising during any other part of the transport even though the freight for the whole transport has been collected by him.

7. *Lighterage*

Any lightering in or off ports of loading or ports of discharge to be for the account of the merchant.

8. *Loading, discharging and delivery of the cargo*

These shall be arranged by the carrier's agent unless otherwise agreed.

Landing, storing and delivery shall be for the merchant's account.

Loading and discharging may commence without previous notice.

The merchant or his assign shall tender the goods when the vessel is ready to load and as fast as the vessel can receive and—but only if required by the carrier—also outside ordinary working hours notwithstanding any custom of the port. Otherwise the carrier shall be relieved of any obligation to load such cargo and the vessel may leave the port without further notice and dead-freight is to be paid.

The merchant or his assign shall take delivery of the goods and continue to receive the goods as fast as the vessel can deliver and—but only if required by the carrier—also outside ordinary working hours notwithstanding any custom of the port. Otherwise the carrier shall be at liberty to discharge the goods and any discharge to be deemed a true fulfilment of the contract, or alternatively to act under clause 16 below.

The merchant shall bear all overtime charges in connection with tendering and taking delivery of the goods as above.

If the goods are not applied for within a reasonable time, the carrier may sell the same privately or by auction.

The marchant shall accept his reasonable proportion of unidentified loose cargo.

9. *Live animals, plants and deck cargo*

These shall be carried subject to the Hague Rules as referred to in clause 2 hereof with the exception that the carrier shall not be liable for any loss or damage resulting from any act, neglect or default of his servants in the management of such animals, plants and deck cargo.

10. *Options*

The port of discharge for optional cargo must be declared to the vessel's agents at the first of the optional ports not later than 48 hours before the vessel's arrival there. In the absence of such declaration the carrier may elect to discharge at the first or any other optional port and the contract of carriage shall then be considered as having been fulfilled. Any option can be exercized for the total quantity under this bill of lading only.

11. *Freight and charges*

(*a*) Prepayable freight, whether actually paid or not, shall be considered as fully earned upon loading and non-returnable in any event. The carrier's claim for any charges under this contract shall be considered definitely payable in like manner as soon as the charges have been incurred. Interest, at 5 per cent, shall run from the date when freight and charges are due.

(*b*) The merchant shall be liable for expenses of fumigation and of gathering and sorting loose cargo and of weighing on board and expenses incurred in repairing damage to and replacing of packing due to excepted causes and for all expenses caused by extra handling of the cargo for any of the aforementioned reasons.

(*c*) Any dues, duties, taxes and charges which under any denomination may be levied on any basis such as amount of freight, weight of cargo or tonnage of the vessel shall be paid by the merchant.

(*d*) The merchant shall be liable for all fines and/or losses which the carrier, vessel or cargo may incur through non-observance of Custom house and/or import or export regulations.

(*e*) The carrier is entitled in case of incorrect declaration of contents, weights, measurements or value of the goods to claim double the amount of freight which would have been due if such declaration had been correctly given. For the purpose of ascertaining the actual facts, the carrier reserves the right to obtain from the merchant the original invoice and to have the contents inspected and the weight, measurement or value verified.

12. *Lien*

The carrier shall have a lien for any amount due under this contract and costs of recovering same and shall be entitled to sell the goods privately or by auction to cover any claims.

13. *Delay*

The carrier shall not be responsible for any loss sustained by the merchant through delay of the goods unless caused by the carrier's personal gross negligence.

14. *General average and salvage*

General average to be adjusted at any port or place at carrier's option and to be settled according to the York-Antwerp Rules, 1950. In the event of accident, danger, damage or disaster before of after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the carrier is not responsible by statute, contract or otherwise, the merchant shall contribute with the carrier in general average to the payment of any sacrifice, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving vessel is owned or operated by the carrier, salvage shall be paid for as fully as if the salving vessel or vessels belonged to strangers.

15. *Both-to-blame collision clause* (This clause to remain in effect even if unenforceable in the courts of the United States of America)

If the vessel comes into collision with another vessel as a result of the negligence of the other vessel and any act, negligence or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the vessel, the merchant will indemnify the carrier against all loss or liability to the other or non-carrying vessel or her owner in so far as such loss or liability represents loss of or damage to or any claim whatsoever of the owner of the said goods paid or payable by the other or non-carrying vessel or her owner to the owner of said cargo and set-off, or recouped or recovered by the other or non-carrying vessel or her owner as part of his claim against the carrying vessel or carrier. The foregoing provisions shall also apply where the owner, operator or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision or contact.

16. *Government directions, war, epidemics, ice, strikes, etc.*

(*a*) The master and the carrier shall have liberty to comply with any order or directions or recommendations in connection with the transport under this contract given by any Government or authority, or anybody acting or purporting to act on behalf of such Government or authority, or having under the terms of the insurance on the vessel the right to give such orders or directions or recommendations.

(*b*) Should it appear that the performance of the transport would expose the vessel or any goods on board to risk of seizure or damage or delay, resulting from war, warlike operations, blockade, riots, civil commotions or piracy, or any person on board to the risk of loss of life or freedom, or that any such risk has increased, the master may discharge the cargo at port of loading or any other safe and convenient port.

(*c*) Should it appear that epidemics, quarantine, ice—labour troubles, labour obstructions, strikes, lockouts, any of which on board or on shore—difficulties in loading or discharging would prevent the vessel from leaving the port of loading or reaching or entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the master may discharge the cargo at port of loading or any other safe and convenient port.

(*d*) The discharge under the provisions of this clause of any cargo for which a bill of lading has been issued shall be deemed due fulfilment of the contract. If in connection with the exercise of any liberty under this clause any extra expenses are incurred, they shall be paid by the merchant in addition to the freight, together with return freight if any and a reasonable compensation for any extra services rendered to the goods.

(*e*) If any situation referred to in this clause may be anticipated, or if for any such reason the vessel cannot safely and without delay reach or enter the loading port or must undergo repairs, the carrier may cancel the contract before the bill of lading is issued.

(*f*) The merchant shall be informed if possible.

17. *Identity of carrier*

The contract evidenced by this bill of lading is between the merchant and the owner of the vessel named herein (or substitute) and it is therefore agreed that the said shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If, despite the foregoing, it is adjudged that any other is the carrier and/or bailee of the goods shipped hereunder, all limitations of, and exonerations from, liability provided for by law or by this bill of lading shall be available to such other.

It is further understood and agreed that as the line, company or agents who has executed this bill of lading for and on behalf of the master is not a principal in the transaction, the said line, company or agents shall not be under any liability arising out of the contract of carriage, nor as carrier nor bailee of the goods.

Additional clauses

(To be added if required in the contemplated trade)

A. *Demurrage*

The carrier shall be paid demurrage at the daily rate of . . . per ton of the vessel's gross register tonnage if the vessel is not loaded or discharged with the dispatch set out in clause 8 hereof any delay in waiting for berth at or off port to count.

Provided that if the delay is due to causes beyond the control of the merchant, 24 hours shall be deducted from the time on demurrage.

Each merchant shall be liable towards the carrier for a proportionate part of the total demurrage due, based upon the total freight on the goods to be loaded or discharged at the port in question.

No merchant shall be liable in demurrage for any delay arisen only in connection with goods belonging to other merchants.

The demurrage in respect of each parcel shall not exceed its freight.

B. *Scandinavian trade-shipment between ports in Denmark, Finland, Norway and Sweden*

Where section 122 of the Danish, Finnish, Norwegian or Swedish Maritime Codes applies, the carrier takes all reservations as to responsibility permissible under sections 122 and 123 of the said Codes.

C. *United States trade-period of responsibility*

In case the contract evidenced by this bill of lading is subject to the United States Carriage of Goods by Sea Act, then the provisions stated in the said Act shall govern before loading and after discharge and throughout the entire time the goods are in the carrier's custody.

Shipped at . . . . . .
in apparent good order and condition, weight, measure, marks, numbers, quality, contents and value unknown, by . . .
of . . . . . .
on board the good Vessel called the . . . . . .
for carriage to . . . . . .
for so near thereunto as the Vessel may safely get and lie always afloat, the following goods:

(Shipper's description of packages and contents)

of which loaded
on deck:
under deck:

Freight:

TOTAL

Freight advance
Received on account of freight:

which are to be delivered in the like good order and condition at the aforesaid port unto . . . . . or to his or their assigns, he or they paying freight as per note on the margin plus other charges incurred in accordance with the provisions contained in this bill of lading.

In accepting this bill of lading, the merchant expressly accepts and agrees to all its stipulations on both pages, whether written, printed, stamped or otherwise incorporated, as fully as if they were all signed by the merchant.

One original bill of lading must be surrendered duly endorsed in exchange for the goods or delivery order.

IN WITNESS whereof the master of the said Vessel has signed . . . bills of lading all of this tenor and date, one of which being accomplished, the others to stand void.

. . . . . ., the . . .
19 . . .

C. The P and I model bill of lading

[*Front Page*]

BILL OF LADING

ALL PURPOSE

[*Insert here name of Company or Line, in print*]

B/L No.	
Reference No.	

SHIPPER

CONSIGNEE

NOTIFYING ADDRESS

Managers: [*Print as appropriate*]
Brokers:
Agents:

LOCAL VESSEL — FROM

PORT OF LOADING

OCEAN VESSEL — PORT OF LOADING

PORT OF DISCHARGE — FINAL DESTINATION (IF ON-CARRIAGE)

FREIGHT PAYABLE AT — NUMBER OF ORIGINAL Bs/L

PARTICULARS DECLARED BY SHIPPER

MARKS AND NUMBERS	NUMBER AND KIND OF PACKAGES: DESCRIPTION OF GOODS	GROSS WEIGHT—KILOS	MEASUREMENT

NUMBERS OF PACKAGES (in words)

SHIPPED in apparent good order and condition, unless otherwise stated herein, on board the above Ocean Vessel (or on board the above Local Vessel, if named above, for forwarding subject to clause 30 on the reverse side of this bill of lading) the goods or packages said to contain goods, hereafter called "the goods", specified above for carriage from the above named port of loading (or other port or place determined by the carrier under the said clause 30) by the above Ocean Vessel (or vessel substituted under the said clause 30) on a voyage as described and agreed by clauses 7, 8, 9, 10, 11, 12 and 19 of this bill of lading and discharge, such carriage and discharge being always subject to the exceptions, limitations, conditions and liberties hereinafter agreed, in like order and condition at the port of discharge named above or such other port or place as is provided in the clauses hereinbefore referred to, or so near thereunto as she may safely get, always afloat, where the carrier's responsibilities and liabilities shall in all cases and all circumstances whatsoever finally cease, for delivery unto the abovementioned consignee or to his or their assigns.

If the final destination is named above the goods shall be forwarded in accordance with clause 31 on the reverse side of this bill of lading subject to the exceptions, limitations, conditions and liberties therein or otherwise hereinafter agreed for delivery unto the abovementioned consignee or to his or their assigns.

Full freight hereunder shall be due and payable at the place where this bill of lading is issued by the shipper in cash without deduction on receipt of the goods or part thereof by the carrier for shipment even if stated in this bill of lading to be payable elsewhere and shall be deemed to have been fully earned upon such receipt of such goods. All charges due hereunder together with freight (if not paid at the port of loading as aforesaid) shall be due from and payable on demand by the shipper, consignee, owner of the goods or holder of this bill of lading (who shall be jointly and severally liable to the carrier therefor) at such port or place as the carrier may require, vessel or cargo lost or not lost from any cause whatsoever.

The freight stated herein to be paid or payable has been calculated and based upon the particulars of the goods furnished by the shipper to the carrier, the carrier shall be entitled at any time to open and re-classify or re-weigh and re-measure or re-value any goods, and freight shall be paid on the proper classification or the excess weight or measurement or value (if any) as the case may be so ascertained. The expenses of and incidental to re-classifying or re-weighing or re-measuring or re-valuing shall be borne by the carrier if the classification or weight or measurement or value as furnished by the shipper is found to be correct, but otherwise such expenses shall be considered as freight and shall be borne and paid by the shipper, consignee or owner of the goods. The shipper shall, if required by the carrier so to do, furnish forthwith on demand to the carrier the invoice or a true copy relating to the goods.

In accepting this bill of lading any local customs or privileges to the contrary notwithstanding the shipper, consignee and owner of the goods and the holder of this bill of lading agree to be bound by all the stipulations, exceptions and conditions stated herein whether written, printed, stamped or incorporated on the front or reverse side hereof, as fully as if they were all signed by such shipper, consignee, owner or holder.

If the Ocean Vessel is not owned by or chartered by demise to the Company or Line by whom this bill of lading is issued (as may be the case notwithstanding anything that appears to the contrary), this bill of lading shall take effect only as a contract of carriage with the owner or demise charterer as the case may be as principal made through the agency of the said Company or Line who act solely as agents and shall be under no personal liability whatsoever in respect thereof.

Agents signing this bill of lading on behalf of the said Company or Line have only the limited authority at common law of a vessel's master signing a bill of lading.

IN WITNESS WHEREOF the above stated number of bills of lading all of this tenor and date have been signed one of which being accomplished, the others to stand void.

PLACE AND DATE OF ISSUE:

AS AGENTS

(Continued on reverse side)

(REVERSE SIDE)

1. *Clause paramount*

Where the port of shipment is in territory where legislation giving compulsory effect to the International Convention for the Unification of certain Rules relating to Bills of Lading of 25 August 1924, is in force, the contract evidenced by this bill of lading shall, subject to clauses 30 and 31 hereunder, have effect subject to such legislation for the period beginning with whichever of the following operations is agreed to be first performed by the carrier, namely loading, handling, stowing or carrying the goods on the vessel until the completion of whichever of the following operations is agreed to be last performed by the carrier, namely carrying the goods on, or discharging them from the vessel, and if and to the extent that any provision of this bill of lading is repugnant to or inconsistent with the said legislation, such provision shall be null and void in relation to that period, but no further.

Whether or not the contract evidenced by this bill of lading is so subject to such legislation, the carrier shall at all times when performing that contract be entitled to the benefit of all privileges, rights and immunities contained in the Schedule to the Carriage of Goods by Sea Act, 1924.

2. *Exemptions and immunities of all servants and agents of the carrier*

It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee, owner of the goods or holder of this bill of lading for any loss, damage or delay or otherwise of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connexion with his employment and, but without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract evidenced by this bill of lading.

The carrier shall be entitled to be paid by the shipper, consignee, owner of the goods or holder of this bill of lading (who shall be jointly and severally liable to the carrier therefor) on demand any sum recovered or recoverable by either such shipper, consignee, owner, holder or any other from such servant or agent of the carrier for any such loss, damage, delay or otherwise.

3. *Reservation of all carrier's rights and privileges*

Nothing herein contained shall prevent the carrier from claiming in the courts of any country the benefit of, or derogate in any way from, any statutory protection or exemption from or limitation of liability afforded to the carrier or to the vessel by the laws of that or of any other country.

4. *Carrier's exemption clause*

Subject to clause 1 hereof the carrier shall not be responsible for loss or damage to or in connexion with the goods of any kind whatsoever (including deterioration, delay or loss of market) however caused (whether by unseaworthiness or unfitness of the vessel or of any other vessel, tender, lighter or craft or of any other mode of conveyance whatsoever or by faults, errors or negligence, or otherwise howsoever).

In particular and without prejudice to the generality of the foregoing:

A. The carrier shall be under no such responsibility: (i) at any time prior to the loading of the goods on to and subsequent to the discharge of the goods or part thereof from the vessel when but for the provisions of this clause such goods would be the responsibility of the carrier and (ii) in the case of live animals or of cargo which in this bill of lading is stated as being carried on deck and is so carried (none of which is subject to the legislation referred to in clause 1 hereof) at any time when, but for the provisions of this clause, such goods would be the responsibility of the carrier.

B. Unless this bill of lading is subject to such legislation as is referred to in clause 1 hereof the carrier shall not be liable for loss of or damage to or in connexion with the goods or part thereof of any kind whatsoever (including deterioration, delay or loss of market) arising or resulting from: unseaworthiness (whether or not due diligence shall have been exercised by the carrier, his servants or agents or others to make the vessel seaworthy); act, neglect or default of the master, mariner, pilot or the servants or agents of the carrier in the navigation or in the management of the vessel or in the care of the cargo; fire; perils, dangers and accidents of the sea or other navigable waters; act of God; act of war; act of public enemies; arrest or restraint of princes, rulers or people, or seizure under legal process; quarantine restrictions; act or omission of the shipper, consignee, owner of the goods, or holder of this bill of lading, his agents or representatives; strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general; riots and civil commotions; saving or attempting to save life or property at sea; wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods; insufficiency of packing; insufficiency or inadequacy of marks; latent defects; any other cause whatsoever, whether or not of a like kind to those above mentioned, and including negligence on the part of the carrier, his servants, agents or others.

5. *Acknowledgment of weight, quality, marks, etc.*

Where, in the case of goods shipped in bulk, the weight stated herein is a weight ascertained or accepted by a third party other than the carrier or the shipper, no acknowledgment is made as to quantity, weight or quality. Where the number of packages or pieces is stated in this bill of lading, no acknowledgment is made as to quantity, weight or quality. The carrier is only responsible for leading marks provided that the goods have been correctly marked with those leading marks before shipment and that those correct leading marks are stamped in letters at least two inches high and in such manner as should ordinarily remain legible until the end of the voyage. No acknowledgment is made as to the contents of cases packages, barrels or containers. Value unknown unless it shall have been declared by the shipper before shipment and inserted in this bill of lading. The carrier, his servants and agents shall not under any circumstances whatever be under any liability for insufficient packing or inaccuracies, obliteration or absence of marks, numbers, address or description, nor for delivery to drop marks, or quality marks, or countermarks, or numbers. If on the arrival of the vessel at the port of discharge or at such other port or place as is referred to in clauses 8, 9, 10, 11 and/or 12 of this bill of lading any of the goods cannot be identified by reason of insufficiency of marks, obliteration of marks or no marks then in any such case the shipper, consignee, owner of the goods or holder of this bill of lading shall accept as due delivery of the goods under this bill of lading any bales or packages which may be on board the vessel and be tendered them by the carrier or his agents notwithstanding that such bales or packages do not bear the marks and description stated to be declared by the shipper in this bill of lading. If any bagged or baled goods are landed slack or torn the shipper, consignee, owner of the goods and/or holder of this bill of lading shall accept such proportion of the sweepings as may be allotted by the carrier or his agents as due delivery of the goods under this bill of lading.

6. Unless this bill of lading is subject to such legislation as is referred to in the first paragraph of clause 1 hereof, and notwithstanding clause 5 hereof, no acknowledgment whatever is made by the carrier as to the accuracy of any of the particulars stated to be declared by the shipper in this bill of lading.

7. *Voyage*

The vessel may at any time whatsoever whether before or after shipment or before or after proceeding towards or calling at the port of discharge proceed by any route whatsoever in the carrier's or master's absolute discretion (whether or not such route is the nearest or most direct or customary or advertised route between the ports of shipment or discharge) and (but without prejudice to the foregoing) may tow or be towed, sail with or without pilot and/or tugs, adjust speed and course for suitable arrival in ports, sail at reduced speed for any purpose whatsoever, tip or list vessel for inspection and/or repairs and proceed under sail and adjust navigational instruments and engage in trial trips of any description (including speed, engine and all other tests whatsoever) whether loaded or unloaded, and whether during such trial trips the vessel be manned or navigated either wholly or partially by the carrier's master, officers, servants or agents or the master, officers, servants or agents of any other person, and carry live animals and every description of cargo on deck, and further may carry (whether on or below deck or both) contraband, explosives, munitions or warlike stores or dangerous cargo of every kind to any extent and may sail armed and unarmed and may proceed to or stay at any port or place whatsoever (although in a contrary direction to or out of or beyond the customary or intended or advertised route to the port of discharge once or more often in any order backwards or forwards) for loading or discharging mails and/or cargo and/or stores and/or fuel (whether intended to be used or carried on this or any other voyage of the vessel or any other vessel or for storage or sale) embarking or disembarking passengers, pilots, officers engineers or crew, towing or assisting vessels in all situations, saving life or property or for inspection of or repairs to the vessel or any part thereof, dry-docking with or without the goods on board, bunkering, for the convenience or entertainment of passengers or for the convenience of exigencies of the mail

service (whether the foregoing purposes or any of them be for this or any other voyage) or for any other purposes whatsoever and may otherwise sail, proceed or stay in any manner or for any purposes whatsoever (even if making in substance another voyage or other voyages) and all such routes, ports, places, sailings and actions shall be deemed to be included within the contractual and intended voyage and any departure in pursuance of the liberties hereby conferred shall not be deemed a deviation in law; the liberties hereby conferred shall not be considered as restricted by any words in this bill of lading, whether written or printed or by any circumstances attending or preceding the shipment of the goods or by the nature of the goods or construed by reference to whether any departure pursuant to such liberties would or would not frustrate the object of this bill of lading, any custom or rule of law notwithstanding and notwithstanding unseaworthiness or unfitness of the vessel at the commencement or at any stage of the voyage.

8. *Transhipment, etc.*

The carrier, his servants or agents may at any time and for any purpose whatsoever discharge the goods or any part thereof from the vessel whether before or after sailing from the port of loading and land or store either on shore or afloat and/or re-ship on the vessel or tranship or forward the same (even though they have not been shipped on the Ocean Vessel named herein) by another vessel or other vessels whether prior or subsequent in sailing to the vessel and whether sailing from the port of reception of the goods or from any other port and whether belonging to the carrier or to any other persons or by land or air or other transport. The goods shall at all times during and after such discharge, while being so landed or in store or awaiting or during re-shipment, transhipment or forwarding to another vessel be at the sole risk of the shipper, consignee, owner of the goods or holder of this bill of lading for all purposes whatsoever, but after receipt into the custody of the vessel or other means of transport by which they are to be on-carried, the carrier shal be entitled to the benefit of all the exceptions, limitations, conditions and liberties of that vessel's bill of lading or of the contract of carriage relating to such on-carriage in addition to the benefit of all the exceptions, limitations, conditions and liberties of this bill of lading. In the event of any conflict between any of the foregoing exceptions, limitations, conditions and liberties, the carrier shall be entitled to the benefit of those most favourable to him.

In the event of there being no immediate opportunity for transhipping the goods from the port where the goods are discharged for transhipment, the carrier, his servants or agents shall be at liberty to enter and land the goods, or to put them into craft or store, at the sole risk and expense of the shipper, consignee, owner of the goods or holder of this bill of lading for all purposes whatsoever.

Nothing herein contained shall oblige the carrier to tranship or forward the goods by any mode or method or conveyance by which goods of the quantity or description or type of the goods are not usually transhipped or forwarded or shall entitle the shipper, consignee, owner of the goods, or holder of this bill of lading to any return of freight or free them or any of them from their obligations to pay the full freight due and payable hereunder. Nothing herein contained shall limit or affect the rights and liberties of the carrier under clauses 7, 9, 10, 11 and 12 hereof.

9. *Carrier's liberties in the event of strikes, delay, etc.*

In the case of war, hostilities, warlike or naval operations or demonstrations, blockade or interdict of any port, civil strife, piracies, civil commotions, strikes, lock-outs or stoppage of labour, quarantine, ice or closure by ice, any breach of the warranty hereinafter contained that the goods are and shall be lawful merchandise of the happening of any other matter or event whatsoever whether any of the foregoing are actual or threatened and whether taking place at or near the port of discharge or elsewhere in the course of the voyage and whether or not existing or anticipated before commencement of the voyage, which matters or events, or any of them in the judgment of the master or carrier may result in damage or delay (however long or short) to or loss of the vessel or the cargo or any part thereof or make it unsafe or imprudent for any reason to proceed on or continue the voyage or enter or discharge or continue to discharge cargo at the port of discharge, or give rise to delay (however long or short) or difficulty in reaching, remaining at, discharging or continuing to discharge at or leaving the port of discharge, the carrier or master may without notice to the shipper, consignee, owner of the goods, holder of this bill of lading or any other person discharge the goods or any part thereof at the port of loading or proceed to or stay at and discharge the goods at any other port or place whatsoever in any manner whatsoever as the carrier or master may elect, and when goods are so discharged from the vessel such goods shall be at the sole risk and expense of the shipper, consignee, owner of the goods and/or holder of this bill of lading and the carrier shall not be liable for any loss of or damage to or in connexion with such goods of any kind whatsoever (including deterioration, delay or loss of market) howsoever caused and such discharge shall constitute complete delivery and performance under the contract evidenced by this bill of lading, full bill of lading freight and charges shal be deemed earned (and if not paid shall be promptly paid) and the carrier shall be free from any further responsibility in respect of such goods and the shipper, consignee, owner of the goods and/or holder of this bill of lading shall bear and pay all charges and expenses incurred in consequence of such discharge, the carrier, master and agents acting solely as agents of the shipper, consignee, owner of the goods and/or holder of this bill of lading after such goods have been so discharged.

10. *Carrier's liberties in the event of war, etc.*

When and so long as a state of war (including civil war) exists rendering the voyage unsafe or impracticable of the vessel or her cargo in danger of capture or detention or delay and/or so long as any control over the use or movements of the vessel is exercised by any Government or other authorities, and/or the insulated or other space on the vessel is requisitioned or controlled, the carrier and/or his agents and/or the master may (if such state of war, control or requisition makes it in his or their absolute discretion reasonable so to do) at any time before or after the commencement of the voyage cancel this engagement or alter or vary or depart from the proposed or advertised or agreed or customary route and/or delay or detain the vessel at or off any port or place and/or tranship the cargo at any port or ports, place or places without being liable for any loss or damage whatsoever directly or indirectly sustained by the shipper, consignee, owner of the goods or holder of this bill of lading. The vessel in addition to any liberties expressed or implied herein, shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, transhipment, discharge or destination, or otherwise howsoever given by any Government or any department thereof or by any local authority or any person acting or purporting to act with the authority of any Government or of any department thereof or of any local authority, or by any committee or person having under the therms of the war risks insurance on the vessel the right to give such orders or directions, and if by reason of, and in

compliance with, any such orders or directions anything is done or is not done, the same shall not be deemed a deviation.

11. *Carrier's further liberties*

The carrier in addition to any liberties expressed or implied herein shall, in the event of the imminence or existence of war, hostilities or warlike operations between any nations, cessation or prohibition or restriction of intercourse, commercial or otherwise, between nations, or of rebellion or civil war, sanctions imposed or measures taken by or against any Government in consequence of, or connected with, any of the above matters, have the rights and liberties as set out in the preceding clauses.

12. *Everything to form part of contract voyage*

Anything done or not done by reason of, or in compliance with, the last five preceding clauses hereof or clause 19 shall be deemed to be done or not done as part of or as the case may be in fulfilment of the contractual and intended voyage, and of all the carrier's obligations hereunder and in the case of discharge, jettison, landing, destination or rendering innocuous of the goods or part thereof in persuance of any of the liberties accorded by clauses 8, 9, 10, 11 and 19 hereof, the carrier shall cease to be under any obligation to forward such goods to the port of discharge or final destination of the goods named herein, and all the remedies and rights of the carrier his servants or agents shall have effect accordingly; and nothing so done or not done shall be deemed a deviation, and the shipper, consignee, owner of the goods and/or holder of this bill of lading shall pay the full freight if not prepaid, and if prepaid the carrier shall be entitled to retain the same.

13. *Warranted lawful merchandise*

The shipper warrants the goods lawful merchandise at the port of loading, throughout the voyage and at the port of discharge or such other port or place as is referred to in clauses 8, 9, 10, 11 and/or 12 of this bill of lading.

14. *Port, Customs, consular and other regulations*

All stamps, duties, fines, penalties and charges imposed by any Government or authority (local or otherwise) on goods or on the vessel by reason of having such goods on board shall be for account of the goods. The shipper, consignee, owner of the goods or holder of this bill of lading shall comply with the regulations and requirements of the port, Customs and other authorities, and shall bear and pay all duties, taxes, fines, imposts, expenses, loss or damage, of whatever nature incurred or suffered by reason of any breach thereof, or by reason of the illegal, incorrect or insufficient marking, numbering or addressing of package or description of their contents, and hereby indemnify the carrier and his agents and the master and the owners of the other cargo on board against all claims, demands, losses and expenses in respect thereof. In the event of the goods not complying with the port, Customs or other regulations at the port of discharge, or of any of the aforesaid matters arising, the carrier shall be at liberty to bring back, or re-ship, such goods to the port of shipment at the sole risk and expense of the shipper, consignee, owner of the goods and/or holder of this bill of lading. Bills of lading must be made out in accordance with the prescriptions and regulations of port, Customs or consular authorities. Consular, board of health or other certificates required to accompany the goods or part thereof are to be procured by the shipper and any detention, charges or penalties occurring to steamer or cargo owing to the want of such certificates are to be borne by the shipper, consignee, owner of the goods and/or holder of this bill of lading.

15. *Undertaking to Customs*

The carrier or his agents may, in respect of dutiable goods transhipped at the port of discharge, give such undertaking as the Customs authorities at that port require with respect to dealing with such goods at the port where duty is payable, and all charges involved or liabilities incurred shall be borne by the shipper, consignee, owner of the goods, and/or holder of this bill of lading.

16. *Discharge and delivery*

Notwithstanding any custom of the port to the contrary, the goods are to be received by the shipper, consignee, owner of the goods and/or holder of this bill of lading immediately on discharge from the vessel, and the vessel may commence discharging immediately on arrival without notice to the consignee or any other, and discharge continuously, irrespective of weather, by day and by night, Sundays and holidays included, any custom of the port to the contrary notwithstanding, on to quay, or into shed, warehouse, depot, hulk, lighter or any other premises, vehicle, vessel or craft as the carrier or his agents may determine. Delivery overside to consignee's lighters is at the vessel's option, and if the master of carrier so elects, the shipper, consignee, owner of the goods and/or holder of this bill of lading shall provide and pay for sufficient lighters and men to receive the goods as fast as the vessel can deliver any custom of the port to the contrary notwithstanding. Whether the vessel's tackles or shore cranes or other means be employed in the course of delivery on to quay or otherwise, the carrier shall not be responsible for any loss or damage to or in connexion with any of the goods, other goods or lighters, or for death of or injury to any of the men employed directly or indirectly by the shipper, consignee owner of the goods and/or holder of this bill of lading, or any other men whomsoever, after discharge of any of the goods from the vessel, when such goods shall be at the sole risk and expense of the shipper, consignee, owner of the goods and/or holder of this bill of lading, and the shipper, consignee, owner of the goods and/or holder of this bill of lading shall jointly and severally indemnify the carrier, his servants and agents against claims (including the cost of investigation and defending any such claim) which may be made against him or them or any of them in respect of any such loss, damage, death or injury. The collector or other proper officer of the port is hereby authorized to grant a general order for discharging immediately after the entry of the vessel.

17. *Carrier's rights of consignee not ready*

It the goods are not taken by the consignee at the time when the vessel is entitled to call upon him to take possession, or if they are not removed from alongside the vessel without delay, the carrier shall be at liberty, at the sole risk and expense of the shipper, consignee, owner of the goods and/or holder of this bill of lading, and subject always to the provisions of the preceding clause to enter and land or remove the goods or part thereof, or to put them into craft or store.

18. *Landing: landing charges*

The goods may in all cases be landed by the vessel, and the landing charges shall be payable by the shipper, consignee, owner of the goods and/or holder of this bill of lading against delivery. Lighterage, if any, at port of discharge to be paid by the shipper, consignee, owner of the goods and/or holder

of this bill of lading, any custom or alleged custom of the port to the contrary notwithstanding.

19. *Dangerous and perishable goods*

Without prejudice to all other rights and liberties of the carrier hereunder, the carrier his servants and agents shall be at liberty in their absolute discretion to jettison, land, destroy or render innocuous any goods of an inflammable, explosive or dangerous nature or declared or considered to be hazardous or prohibited goods by civil or military authority (whether or not the carrier, his servants or agents shall have consented to the shipment thereof with knowledge of their nature and character) and any goods which shall in the course of carriage hereunder perish or become decomposed or which might become a danger to the vessel or her cargo. The shipper, consignee, owner of such goods and/or holder of this bill or lading shall bear and pay all charges and expenses incurred in or in consequence of such jettison, landing, destruction or rendering innocuous.

20. *Damaged packages, etc.*

The shipper, consignee, owner of the goods and/or holder of this bill of lading shall bear and pay the cost of all mending, bailing and cooperage of and repairs to or replacement of packages, boxes, crates, wrappers, bags or barrels resulting from insufficiency of packing or from excepted perils.

21. *Stowage*

The goods or part thereof may be stowed in poop, forecastle, deckhouse, shelter deck, passenger space, or any covered space commonly used in the trade for the carriage of such goods and when so stowed shall be deemed for all purposes to be stowed under deck.

22. *Shortages, etc.*

In the event of shortage of goods for any consignee, unclaimed goods of like kind and quality shall at the carrier's option be deemed to constitute a part of the goods and be accepted by such consignee as good delivery under this bill of lading. Where bulk goods or goods without marks or goods with the same or similar marks are shipped to more than one consignee the shipper, consignee, owner of the goods and/or holder of this bill of lading shall jointly and severally bear any expense or loss in dividing the goods or parcels into pro rata quantities and any deficiency shall fall upon them in such proportion as the carrier, his servants or agents shall decide.

23. *Valuable cargo*

Neither the carrier nor the vessel shall be responsible for valuable cargo, such as specie, bullion, precious stones, bonds or other negotiable documents, until such goods are delivered to and receipted for by the master or the officer on duty personally.

24. *Valuation and container clause*

(*a*) Whenever the value of the goods is less than £100 sterling, currency of the United Kingdom, per package or unit, their value in the calculation and adjustment of claims for which the carrier may be liable shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the invoice value, plus freight and insurance if paid, irrespective of whether any other value is greater or less.

(*b*) In case of any loss or damage to or in connexion with goods exceeding in actual value £100 sterling, lawful money of the United Kingdom, per package, or in case of goods not shipped in packages, per unit, the value of the goods shall be deemed to be £100 sterling, per package or per unit, on which basis the freight is adjusted and the carrier's liability, if any, shall be determined on the basis of a value of £100 sterling, per package or per unit, or pro rata in case of partial loss or damage, unless the nature of the goods and a valuation higher than £100 sterling shall have been declared in writing by the shipper upon delivery to the carrier and inserted in this bill of lading and extra freight paid and in such case if the actual value of the goods per package or per unit shall exceed such declared value, the value shall nevertheless be deemed to be the declared value and the carrier's liability, if any, shall not exceed the declared value, and any partial loss or damage shall be adjusted pro rata on the basis of such declared value. In no event shall the carrier be liable for more than the amount of damage actually sustained, and shall be entitled to deduct the amount of Customs duties whether paid or unpaid from all claims for non-delivery whether partial or total.

(*c*) Where the particulars declared by shipper herein refer to containers, and the goods comprise goods stowed in containers, it is hereby agreed that each container (including the entire contents thereof) shall constitute one package for all purposes including limitation of the carrier's liability.

25. *Refrigerator clause*

Specially cooled stowage is not to be furnished unless contracted for at an increased freight rate. Owners undertake, before loading refrigerated cargo in any insulated space, to obtain a certificate of a competent surveyor that such insulated space and the refrigerating machinery have been surveyed under working conditions and found in good condition and fit for the conveyance of refrigerated cargoes; said certificate to be obtained either at the first or at a later port of the vessel's voyage, whether or not refrigerated cargo is loaded at that port. It is hereby agreed that the existence of such certificate shall be deemed by all parties concerned conclusive evidence that the carrier has exercised due diligence to make the said insulated space and refrigerating machinery seaworthy. The provisions of the clause are in addition to the other provisions of this bill of lading; and the goods are subject to all of the other provisions of this bill of lading.

26. *Emergency expenditure*

If the carrier shall at any time incur any expenditure in restowing the goods or in otherwise avoiding, remedying or ameliorating any accident to the goods following any actual, threatened or anticipated casualty thereto for which the carrier is not responsible by reason of any provision of this bill of lading and such expenditure is not admissible in general average or otherwise recoverable hereunder by the carrier from the shipper, consignee, owner of the goods, or holder of this bill of lading, the shipper, consignee, owner of the goods and holder of this bill of lading shall nevertheless be jointly and severally liable to repay to the carrier on demand all such expenditure so incurred by him.

27. *General average*

General average shall be adjusted according to York-Antwerp Rules, 1950 (if in England supplemented by the practice of English average adjusters), save and except that no loss of or injury sustained by live animals, whether by jettison or otherwise, shall be recoverable. Adjustments shall be prepared at such port as shall be selected by the carrier. If a salving vessel is owned or operated by the carrier, salvage shall be paid for as fully as if the said salving vessel or vessels belonged to strangers. Such deposit as the carrier or

his agents may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the shipper, consignee, owner of the goods and/or holder of this bill of lading to the carrier before delivery; provided that where an adjustment is made in accordance with the law and practice of the United States of America or of any other country having the same or similar law or practice, the following clause shall apply:

"New Jason clause. (*a*) In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract or otherwise, the goods, shippers, consignees or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods.

"(*b*) If a salving vessel is owned or operated by the carrier, salvage shall be paid for as fully as if the said salving vessel or vessels belonged to strangers. Such deposit as the carrier or his agents may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery."

28. *Both to blame collision clause*

If the vessel comes into collision with another vessel as a result of the negligence of the other vessel and any act neglect or default of the master, mariners, pilot or the servants of the carrier in the navigation or in the management of the vessel, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or non-carrying vessel or her owners in so far as such loss or liability represents loss of or damage to or any claim whatsoever of the owners of the said goods, paid or payable by the other or non-carrying vessel or her owners to the owners of the said goods and set off, recouped or recovered by the other or non-carrying vessel or her owners as part of their claim against the carrying vessel or carrier. The foregoing provisions shall also apply where the owners, operators, or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect to a collision or contact.

29. *Lien*

The carrier his servants or agents shall have a lien on the goods or any part thereof and a right to sell such goods whether privately or by public auction for all freight (including additional freight payable as is herein stipulated) primage dead freight, demurrage, detention charges, salvage, average of any kind whatsoever, stamps, duties, fines or penalties and for all other charges and expenses whatsoever, which are for account of the goods or of the shipper, consignee, owner of the goods and/or holder of this bill of lading under this bill of lading, and for the costs and expenses of exercising such lien and of such sale and also for all previously unsatisfied debts whatsoever due to him by the shipper, consignee, owner of the goods and/or holder of this bill of lading. The lien hereby accorded may be exercised by the carrier, his servants or agents notwithstanding that he or they may have parted with possession of the goods, and the carrier, his servants or agents shall at all times stand authorized by the shipper, consignee, owner of the goods and holder of this bill of lading to give all such notices to any person or persons for the time being in possession of the goods as may be required for the purpose of giving effect to the provisions of this clause. Nothing in this clause shall prevent the carrier from recovering from the shipper, consignee, owner of the goods and/or holder of this bill of lading the difference between the amount due from them or any of them to him and the amount realized by the exercise of the rights given to the carrier under this clause.

30. *Pre-carriage* (This clause is applicable only where Local Vessel is named herein)

(*a*) Where the Local Vessel is named herein the carrier shall act only as agent of the shipper, consignee, owner of the goods, or holder of this bill of lading in arranging for the forwarding of the goods to the port of loading named herein (or such other port or place wheresoever as the carrier may in his discretion determine), and the carrier shall be under no liability whatsoever as carrier, bailee or otherwise in connexion with the goods until the goods are loaded upon the Ocean Vessel named herein (or such other vessel owned by the carrier or otherwise as the carrier may in his discretion substitute for the named Ocean Vessel) save where the goods are so forwarded by carriage on a vessel owned by the carrier in which event the said carriage shall be subject to all exceptions, limitations, conditions and liberties contained in this bill of lading.

(*b*) Notwithstanding that the goods have been loaded upon the Local Vessel named herein such forwarding of the goods to the port of loading named herein may be effected by any mode or modes of conveyance (whether by land, sea or air) under one or more bills of lading or other contract or contracts of carriage all subject to such exceptions, limitations, conditions and liberties (including liberty to discharge the goods at a port or place other than the port of loading named herein) as the carrier his servants or agents may in his or their discretion determine or agree or have agreed to upon behalf of the shipper, consignee, owner of the goods or holder of this bill of lading who shall be deemed to have notice thereof.

(*c*) Any carrier with whom any such arrangements or agreements are made shall, in addition to being entitled to the benefit of whatever exceptions, limitations, conditions and liberties may be so agreed upon be further entitled to the benefit of all the exceptions, limitations, conditions and liberties herein contained, and for the purpose of this sub-clause, but not otherwise, the carrier is or shall be deemed to be acting as agent and/or trustee on behalf of and for the benefit of *that carrier and that carrier shall to that extent but not* otherwise be or be deemed to be a party to the contract contained in or evidenced by this bill of lading. In the event of any conflict between any of the foregoing exceptions, limitations, conditions and liberties, that carrier shall be entitled to the benefit of those most favourable to him.

(*d*) Without prejudice to the foregoing sub-clauses (*a*), (*b*) and (*c*) of this clause, where either no Ocean Vessel or no port of loading is named in this bill of lading, the carrier shall act only as agent as aforesaid for the forwarding of the goods to the final destination or, if such port or place is not named herein, to the named port of discharge or, if no such port or places are named herein, to the port of loading, and the carrier shall be entitled also to the benefit of clause 31 of this bill of lading and also to the benefit of all other exceptions, limitations, conditions and liberties herein.

31. *On-carriage* (This clause is applicable (subject to clause 30 (*d*) above) only where the final destination is named herein)

(*a*) Where the final destination is named herein the carrier may discharge the goods at the port of discharge or without

notice at such other port or place wheresoever (including the port of loading) as the carrier may in his discretion determine for forwarding to the final destination and carrier's responsibility shall finally cease on discharge of the goods from the Ocean Vessel (or vessel substituted under clause 30 hereof). Thereafter (provided always that the carrier is not by reason of any other provision of this bill of lading relieved of his obligations to forward the goods to the final destination) the carrier shall act only as agent of the shipper, consignee, owner of the goods or holder of this bill of lading in arranging for the forwarding of the goods to the final destination and the carrier shall be under no further or other responsibility whatever, save that where the goods are on-carried on a vessel owned by the carrier the carrier's liability as carrier shall be governed by the exceptions, limitations, conditions and liberties of this bill of lading. After discharge from the Ocean Vessel the carrier may store the goods at any place or in any manner and forward them by any mode or modes of conveyance under one or more bill or bills of lading or other contract or contracts of on-carriage all subject to such exceptions, limitations, conditions and liberties (including liberty to discharge the goods at a port or place other than the final destination) as the carrier his servants or agents may in his or their discretion determine or agree to upon behalf of the shipper, consignee, owner of the goods or holder of this bill of lading, who shall be deemed to have notice thereof.

(*b*) The shipper, consignee, owner of the goods or holder of this bill of lading shall, if required by the carrier so to do, forthwith provide the carrier with all documents which may be necessary in order to clear the goods at the port of discharge or to store and forward them to the final destination.

(*c*) Any on-carrier with whom any arrangements or agreements are made by the carrier acting as aforesaid shall, in addition to being entitled to the benefit of whatever exceptions, limitations, conditions and liberties may be agreed upon between him and the carrier acting as aforesaid, be further entitled to the benefit of all the exceptions, limitations, conditions and liberties herein contained, and for the purpose of this sub-clause, but not otherwise, the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of that on-carrier and that on-carrier shall to that extent but not otherwise be or be deemed to be a party to the contract contained in or evidenced by this bill of lading. In the event of any conflict between any of the foregoing exceptions, limitations, conditions and liberties, the on-carrier shall be entitled to the benefit of those most favourable to him.

32. *Jurisdiction*

The contract evidenced by this bill of lading shall be governed by . . . [a] law and any disputes thereunder shall be determined in . . . [a] according to . . . [a] law, to the exclusion of the jurisdiction of the courts of any other country.

[a] Shipping lines insert here the national law and jurisdiction of their choice.

Annex IV

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