LEGAL ASPECTS OF SEA AND AIR CARGO TRANSPORT DOCUMENTS WITH ESPECIAL REFERENCE TO INTERNATIONAL CARRIAGE

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Thesis submitted for the degree of Doctor of Philosophy (1990)

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Lim Hock Leng
February 1990

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ABSTRACT

The central theme of this thesis is founded on the legal aspects of sea and air cargo transport documents in relation to international conventions, national legislation adopting these conventions, and the common law. Foreign legislation and cases (particularly those of American origin) are discussed, where pertinent or possible, to establish a comparative perspective.

Chapter 1 deals with the functions of the bill of lading, the most common document used in the carriage of goods by sea. Charterparties are not discussed in order to limit the scope of the thesis. The different types of bills of lading and other sea cargo transport documents together with their complexities (for example, charterparty bills in 2.5 and container and combined transport bills in 2.7) are dealt with in Chapter 2. The international conventions and the reasons for their evolution as well as the legislative techniques employed to effect their application are considered in Chapter 3. The shipper and consignee's responsibilities (as to dangerous cargo and freight) are discussed in Chapter 4 while the carrier's

responsibilities from acceptance of the cargo and seaworthiness to delivery are discussed in Chapter 5. In Chapter 6, the carrier's liability is analysed. Here the principal areas of discussion relate to exemption clauses, and deviation and its legal implications. The Bills of Lading Act 1855 (the restrictions of its application and the language in which it is couched) and the right of suit against the carrier in tort (privity, bailment, the network contract concept, and exemption clauses) are treated in the penultimate chapter. The carriage of goods under the Warsaw System is discussed in the final chapter.

Unless otherwise indicated, the law is stated as at October 31, 1989.

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CHAPTER 1 : THE FUNCTIONS OF THE BILL OF LADING

1.1 INTRODUCTION

The bill of lading has been defined as "a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document[1]." From the definition, it is apparent that a bill of lading has three functions: (1) it evidences the contract of carriage; (2) it serves as a receipt; and (3) it is also a document of title.

The bill of lading came into use in the sixteenth century[2], and was first simply a receipt. The next stage of development was for the bill of lading to evidence the contract of carriage: when the goods were dispatched unaccompanied by the merchant shipper, terms had to be decided upon which the goods would be loaded, stowed and delivered; these terms became standardized and were invariably expressed on the back of the bill of lading. Then the bill of lading became identifiable with ownership of the goods, and thereby became a document of title.

1.2 EVIDENCE OF THE CONTRACT OF CARRIAGE

1.2.1 Prima Facie Evidence

A bill of lading is usually only *prima facie* evidence of the contract of carriage, that is, the terms of the bill of lading can be rebutted by parol evidence. Reference may be made to the oral undertakings between the shipper and the carrier or their agents, the carrier's advertisements, the booking note, the mate's receipt, and the like. In *The Ardennes*[3], the plaintiffs had shipped a cargo of mandarins in reliance of an oral representation by the carrier's agents that the vessel would proceed direct to London and reach there by December 1, 1947, the date on which the import duty on mandarins would be raised. However, the vessel proceeded first to Antwerp and did not reach London until December 4. The carrier sought to rely on a clause in the bill of lading which conferred liberty to deviate, ostensibly on the footing that the bill was *per se* the contract of carriage. Lord Goddard C.J. held[4]: ".... a bill of lading is not itself the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms: *Sewell v. Burdick*, per Lord Bramwell[5]; *Crooks & Co. v. Allan*[6]. The contract has come into existence before the bill of lading is signed; it is signed by one party only

handed by him to the shipper usually after the goods have been put on board." The decision was followed in J. Evans & Sons (Portsmouth) Ltd v. Andrea Merzario Ltd.[7]

1.2.2 Conclusive Evidence

Nonetheless, in two instances the bill of lading may be considered conclusive evidence of the contract of carriage.

Firstly, this will be the case where the parties expressly agree so. In Armour v. Leopold Walford[8], the plaintiffs had accepted without protest a booking slip which provided that: "All engagements are made subject to the conditions, terms and/or exceptions of our Bills of Lading .... ." The defendants had only one form of bill of lading and the plaintiffs had previously shipped goods under that particular form of bill of lading. The goods were damaged, and the plaintiffs sought to rely on evidence other than the bill of lading. The court, however, accepted the bill as the contract of carriage and refused to admit the extrinsic evidence. Some bills of lading embody a clause stipulating that all antecedent agreements are superseded. The superseding clause was upheld in a Canadian case, Apex v. Lunham & Moore Shipping[9], without

elaboration. It is submitted that the superseding clause is of no effect where the shipper has no means of ascertaining its existence, for example, where he has no previous dealings with the carrier and the bill of lading is issued after the ship leaves port. In such an instance, the shipper would be relying on arrangements previously made with the carrier.

Secondly, where the bill of lading is transferred to a bona fide indorsee in accordance with s.I of the Bills of Lading Act 1855, the terms of the bill of lading are deemed to comprise the contract of carriage as between the carrier and indorsee[10]. Where s.I is inapplicable, the Brandt rule which would lead to a similar result will apply if a contract can be imputed from the presentation of the bill by the indorsee and delivery by the carrier[11]. It follows from the above that, as against a bona fide indorsee for value, a shipowner is not excused from performance by any exclusion clauses not incorporated into the indorsed bill (The Patria)[12] or by any contract agreed between himself and the consignor which is inconsistent with the terms of the indorsed bill (Leduc v. Ward)[13]. In the United States, the position is as stated in the Pomerene Act 1916; by s.31, a bona fide indorsee for value of an order bill acquires "the direct obligation of the carrier to hold possession of the goods for him

according to the terms of the bill as fully as if the carrier had contracted directly with him." By s.32, the transferee of a straight bill is placed in the same position provided he notifies the carrier and the notification is not defeated by one of the factors listed therein[14].

1.2.3 Bills of Lading Issued under a Charterparty

Especial considerations apply to bills of lading issued under a charterparty[15]. In the case of a charterparty where the charterer is also the shipper, the charterparty is the contract governing relations between the shipowner and the charterer-shipper while the bill of lading is nothing more than a receipt "unless there be an express provision in the documents to the contrary," per Lord Esher in Rodocanachi v. Milburn[16]. In an American case, Ministry of Commerce v. Marine Tankers Corp.[17], the charterparty provided for arbitration in New York while the bill of lading provided for arbitration in London. As between the shipowner and the charterer, it was held that the arbitration clause in the charterparty prevailed. However, where the shipowner signs, and the charterer accepts, a bill of lading binding the latter to pay freight or demurrage, the bill will be taken to override a cesser clause insofar as the obligation is concerned: Rederi

Aktiebolaget Transatlantic v. Board of Trade[18]; Hill SS Co. v. Hugo Stinnes[19]. In the case of a charterparty where the ship is used as a general ship, the bill of lading is more than a receipt as between the carrier and the shipper (who is not the charterer); it is prima facie evidence of the contract of carriage unless otherwise agreed: Pearson v. Goschen[20].

The terms of an indorsed bill, nothwithstanding that it was issued under a charterparty, will generally be considered the contract of carriage as between the carrier and indorsee. But since a bill of lading when issued to a charterer is normally a recipt and nothing more, the question arises as to how indorsement passes a contract which does not exist. The problem appears to be more theorectical than real for the courts have had no difficulty in holding that the contract between a shipowner and an indorsee is to be found in the indorsed bill[21]. It is thought that the view expressed in Scrutton on Charterparties and Bills of Lading represents the correct explanation, viz, a sensible meaning must be given to s.I of the 1855 Act and the words "the contract contained in the bill of lading" must be taken to read "as if a contract in the terms set out in the bill of lading had at the time of shipment been made with (the indorsee)[22]."

1.2.4 Where No Bill of Lading is Issued

If no bill of lading is issued but it is contemplated that an ascertainable bill will be issued, that particular bill will be evidence of the contract of carriage. In Pyrene Co. v. Scindia S. N. Co., Devlin J. stated: ".... whenever a contract of carriage is concluded and it is contemplated that a bill of lading will in due course be issued in respect of it, that contract is from its creation 'covered' (governed) by a bill of lading and is therefore from its inception a contract of carriage within the meaning of the (Hague) rules and to which the Rules apply[23]." The dictum was cited with approval by the Supreme Court of Canada in Anticosti Shipping Co. v. St. Amand[24] where a bill of lading was prepared but not signed or issued; the contract of carriage was held to be evidenced by the bill. If it cannot be determined which particular bill of lading will be used, evidence of the contract is to be gathered from the circumstances in which the parties contracted including ancillary documents. Thus, in Harland & Wolff Ltd. v. Burns & Laird Lines Ltd. it was held that "there are in the coasting trade and in the trade between this country (Scotland) and Ireland manifold instances in which bills of lading are neither used nor practical - the conditions of carriage being those which are published in the shipowner's sailing bills[25]."

As a penultimate point, a shipper's bill (at the very latest, such a bill must be issued within a reasonable time after the goods are loaded[25a]) is only an offer and a contract of carriage on its terms will only be concluded when the carrier accepts the goods for carriage (Burke Motors Ltd. v. Mersey Docks)[26]; finally, the Hague or Hague-Visby Rules will not apply if the carrier does not accept the goods (Strohmeyer v. American Lines)[27].

1.3 RECEIPT

The bill of lading has a margin wherein the goods are described, and certain other relevant details are inserted. These details are of particular importance where the goods are intended to be sold or pledged whilst in transit, for the intended indorsee normally has no opportunity to personally inspect the goods. The foundation of the bill as a receipt lies in the rule that the ship must deliver "what she received as she received it, unless relieved by the excepted perils[28]." Where the Hague or Hague-Visby Rules apply, (a) "the leading marks", and (b) "the number of packages or pieces, or the quantity, or weight", and (c) "the apparent order and condition of the goods" have to be stated in the bill if the shipper so requires unless there are doubts about, or no reasonable means of verifying, these details: Article 3(3). These

details have different evidential value under the different Rules, statutes, and at common law. The date on which the goods are received or shipped, and quality marks, are nowhere mentioned in the Rules but are also of importance. The bill of lading's function as a receipt is examined in more detail latterly[29].

1.4 DOCUMENT OF TITLE

1.4.1 The Duty of the Carrier to Deliver the Goods against the Bill

The bill of lading's function as a document of title was first recognized by the courts in Lickbarrow v. Mason[30]. Thus, since 1794, the rule has been that only the holder of the bill is entitled to claim delivery of the goods at the port of discharge upon production and surrender of the bill. Conversely, "the shipowner is not bound to surrender possession of the goods to any person whether named as consignee or not, except on production of the bill of lading[31]." And in Sze Hai Tong v. Rambler Cycle Co. Ltd., Lord Denning stated: "It is perfectly clear that a shipowner who delivers without production of the bill of lading does so at his peril[32]." It is usual practice for bills of lading to be issued in a set of two or more original parts, but the tender of one is sufficient

to obtain delivery: Sanders v. Maclean[33]. Once an original part has been tendered and accepted (accomplished), the others stand void. The practice is explained by Professor Schmitthoff thus[34]: "Unless payment is arranged under a letter of credit[35], the various parts of the set are forwarded to the consignee by subsequent air mails .... . It is of great importance that at least one part of the set should be in the consignee's hands before or at the time of the arrival of the goods because the shipowner is not bound to hand over the goods unless a bill of lading is delivered to him."

There exists the possibility that a holder of two or more parts who is fraudulently inclined may pledge the bills to separate banks, or sell the same goods represented therein to different buyers[36]. The danger is recognized by the Pomerene Act 1916, s.4 of which proscribes the issuance of negotiable bills in a set of two or more for the carriage of goods within the United States (Alaska excepted); the carrier in breach is liable for non-delivery to a bona fide purchaser where the cargo has been delivered against another original part. In other instances, the carrier is discharged from liability after delivering the goods as described in the bill to the holder who tenders the bill provided he had not been instructed by a person having a proprietary or possessory right in the goods not

to effect delivery, or had information that the claimant was not entitled to the goods: s.10. But if the holder is a named consignee, he need not surrender or even produce the bill to obtain delivery although he will have to satisfy the carrier's lien, if any, and sign an acknowledgement that the goods have been delivered if the carrier so requires: s.8.

Unlike American law, English law does not proscribe the issuance of negotiable bills in a set of two or more original parts. In practice the difference is of little significance. Goods are commonly sold under letters of credit, and when this mode of transaction is adopted the advising bank will invariably ask for the full set of original bills from the seller. More significantly, it is usual practice to state in the bill of lading the number of originals issued. This makes it difficult, without the issuer's complicity, for fraud to be perpetrated.

Under English law, the carrier discharges his duty by delivering the goods as described in the bill to the claimant who first tenders the bill; he is not liable for wrongful delivery unless he knows, or there is a reasonable suspicion, that the claimant is not entitled to the goods: Glyn, Mills & Co. v. East and West India Dock Co.[37] If the carrier is aware that there are conflicting claimants,

he should interplead: Glyn, Mills & Co. v. East and West India Dock Co.[37] In the United States, this obligation is stipulated by s.17 of the Pomerene Act. The carrier cannot interplead where he has issued bills of lading to more than one person for the same goods: Elder Dempster Lines v. Zaki Ishaq[38].

It is to be noted that where the carrier has an undischarged lien on the goods, he may wihthold delivery. The carrier's lien may arise either from common law or by express stipulation, usually in the bill of lading. At common law, the carrier may have a lien for (1) frieght payable on delivery but not any other type of freight; (2) general average contributions; and (3) costs incurred in ensuring that the goods are safely delivered. The carrier's common law lien may be extended by agreement to cover a variety of costs related to the carriage of the goods. In the United States, if order bills are issued, the carrier may have a lien for "all charges on (the) goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation and delivery unless the bill expressly enumerates other charges for which a lien is claimed,": s.25, Pomerene Act. Clearly, the carrier's statutory lien in America is more extensive than the English common law lien but then it should be recalled that

a carrier can always extend his lien by express provision in the bill of lading. In practice, this is usually the case. The quintessence of a lien is possessory in nature; it is lost when the carrier duly delivers the goods - normally upon being reimbursed for the charges in respect of which the lien arises.

Further, the carrier need not deliver to the holder of the bill (bona fide purchasers for value excepted) where the unpaid seller exercises his right of stoppage in transit under s.44 of the Sale of Goods Act 1979. For the unpaid seller to exercise this right, the buyer must be insolvent (s.61(4)) and the goods must be in transit, as defined by s.45. In the United States, the carrier is not obliged to obey a stoppage in transit notification unless the bill (if it is an order bill) is first surrendered for cancellation: s.39, Pomerene Act.

1.4.2 Delivery of the Goods without Tender of the Bill

(a) Indemnities

The bill of lading being a document of title, the cargo claimant who does not have possession of the bill will be in a very difficult position[39]. The bill may be lost, stolen, destroyed, or it may even arrive after the

ship reaches the port of discharge. To circumvent these difficulties, it is usual practice for the carrier to release the goods to a claimant upon receipt of some security or an indemnity. In Sze Hai Tong v. Rambler Cycle Co. Ltd.[40], the carrier had been persuaded by the buyers to release the goods for an indemnity without the bills of lading being produced. Although the carrier was held liable for breach of contract and/or conversion, it was held that the indemnity was valid and enforceable. By s.14 of the Pomerene Act, "a voluntary indemnifying bond without order of court shall be binding on the parties thereto."

(b) The SeaDocs Bills of Lading Registry[41]

In the oil trade, string contracts are common and the goods occasionally arrive before the last indorsee receives the bill of lading. Since there are practical objections to the issuance of indemnities, an automated bill of lading registry for the oil trade (SeaDocs Registry Ltd) was established in 1985. It acts as a "central clearing house" to which original bills may be directed and where each transaction may be noted without the bills being transferred from one purchaser to another. Eventually, the registry instructs the master to delivery the cargo to the last purchaser without the latter having to wait for the bill of lading to arrive. The scheme has been abandoned but it may yet be revived.

(c) Damages for Wrongful or Non-delivery

Where the carrier wrongfully delivers the goods without the bill of lading being tendered, he may be sued in tort for conversion of the goods or for breach of contract. The question of the appropriate measure of damages in such an instance was recently deliberated upon by the Privy Council in The Jag Shakti[42]. It was held that the proper measure of damages would be the full market value of the goods at the time and place delivery should have been effected.

<u>FOOTNOTES</u>

1. Article 1(7), Hamburg Rules

2. See Scrutton on <u>Charterparties and Bills of Lading</u> (19th ed, 1984), p.2, n.9

3. (1951) I K.B. 55

4. Ibid, at p.59

5. (1884) 10 App.Cas. 74, 105

6. (1879) 5 Q.B.D. 38

7. (1976) I W.L.R. 1078. Lord Denning M.R. held that the carrier's promise to stow the goods under deck was a collateral contract; Roskill L.J. was of the opinion that there was no need for the construction of a collateral contract because the contract of carriage was partly written and partly oral; Lane L.J. said that the carrier's promise was not a collateral contract in the sense of an oral agreement varying the terms of a written contract.

8. (1921) 3 K.B. 473. cf. McCutcheon v. MacBrayne (1964) 1 W.L.R. 125

9. (1962) 2 Lloyd's Rep. 203

10. See 1.2.2

11. See 1.2.2

12. (1871) L.R. 3A. & E. 436

13. (1888) 20 Q.B.D. 475

14. Prior to the notification, the tranferee's rights may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or a subsequent purchaser's notification.

15. These bills are treated more fully at 1.2.3

16. (1886) 18 Q.B.D. 67, 75

17. (1961) A.M.C. 320

18. (1864) 17 C.D. (N.S.) 352

19. (1925) 30 Com. Cas. 117, 125-6

20. (1941) S.C. 324. See The Ardennes, loc. cit.; and J. Evans & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd, loc. cit.

21. As in The Patria (1871) 41 L.J.Adm. 23, and Leduc v. Ward (1888) 20 Q.B.D. 475

22. Loc. cit., pp 62-3. In Leduc v Ward, ibid, it was said that between the shipowner and the indorsee, the contract was in the bill of lading because "the shipowner has given it for the purpose of enabling the charterer to pass it on as the contract of carriage in respect of the goods," p.479

23. (1954) I Lloyd's Rep. 321, 329; See also Hugh Mack & Co Ltd v. Burns & Laird Lines Ltd (1944) 77 Ll. L.R. 377, 383

24. (1959) I Lloyd's Rep. 352

25. (1931) S.C. 722, 729

25a. Oriental SS v. Taylor (1893) 2 Q.B. 518

26. (1986) I Lloyd's Rep. 155

27. (1938) A.M.C. 875

28. Bradley v. Federal S.N. Co. Ltd. (1927) 137 L.T. 266, 267

29. See 1.3. As to why the Hague and Hague-Visby Rules do not render the carrier liable for quality references, see 5.3.3(d).

30. (1794) 5 T.R. 683

31. Barclays Bank Ltd. v. Commissioners of Customs and Excise (1963) I Lloyd's Rep. 81, 89

32. (1959) A.C. 576

33. (1883) II Q.B. 327

34. Schmitthoff's Export Trade (8th ed, 1986) at p.465

35. Where payment is arranged under a letter of credit, the advising bank will invariably ask for the full set of original bills from the seller: Art. 26 UCP (1983 Revision)

36. The seller will be liable for breach of an implied condition that he has a right to sell the goods: s.12, Sale of Goods Act 1979. By American law, the transferor will be liable for breach of a waranty that he has a right to transfer the bill or title to the goods: s.34, Pomerene Act. As to the carrier's position, see 1.4.1

37. (1882) 7 App. Cas. 591

38. (1983) 2 Lloyd's Rep. 548

39. In Trucks Spares Ltd. v. Maritime Agencies (Southampton) Ltd. (1951) 2 Lloyd's Rep.345, a Canadian company which had purchased six trucks and some spare parts did not receive the relevant bills which had been retained by the carrier to whom the seller owed freight. The Court of Appeal refused to grant an interim injuction ordering the carrier to deliver the goods without production of the bills of lading.

40. (1959) A.C.576

41. See Schmitthoff, "An Automated Bill of Lading Registry," (1983) J.B.L. 185

42. (1986) 83 L.S.Gaz. 45. Where the Hague or Hague-Visby Rules apply, the carrier is not liable beyond the liability limits stipulated therein save in limited instances. See Chapter 7. The market price means of assissing damages may be said to be objectionable in that the price of substitute goods actually paid for by the buyer is not considered.

CHAPTER 2 : TYPES OF SEA CARGO TRANSPORT AND ANCILLARY DOCUMENTS

A true bill of lading possesses the three attributes mentioned in the first chapter. It is legally superior to the waybill in that it is expressly recognized as a document of title by the courts. House bills of lading, delivery orders, and mate's receipts are not strictly cargo transport documents in the sense that they are not documents under or by which the carriage of goods is effected. They are merely documents which facilitate the carriage of goods. They are the ancillary documents referred to in this chapter.

2.1 SHIPPED AND RECEIVED BILLS OF LADING

Bills of lading are either a) "shipped" bills which indicate that the goods are actually on board the ship, or b) "received" bills which indicate that the goods are merely in the custody of the carrier ready for loading on board. Shipped bills are also known as "on board" bills whilst received bills are also known as "alongside" bills. American practice has developed versions of the received bill such as the Port bill and the Custody bill.[1] The Port bill is issued for cotton already in the port of shipment; the named ship must be in port. The Custody bill is issued for cotton delivered to the signatory at the port of shipment, but the named ship need not be in port.

Where the goods are shipped under a c.i.f. contract, the buyer can reject received bills unless the parties have expressly agreed otherwise, or it is customary practice in that trade to issue such bills: Yelo v. S. M. Machado Co. Ltd.[2] Further, where payment is arranged under the UCP, banks will require the tender of shipped bills unless the credit states otherwise: Article 26(a)(ii) (1983 Revision). For these reasons, received bills are of a lesser order.

Where the Hague or Hague-Visby Rules apply, the shipper is entitled to demand a shipped bill from the carrier after the goods have been loaded, provided he surrenders any document of title previously issued; a received bill can be converted into a shipped bill by the carrier noting in the bill the name of the ship on which the goods have been loaded and the date of loading: Article 3(7). Insofar as the UCP (1983 Revision) is concerned, a received bill can be converted into a shipped bill "by means of a notation of loading on board on the transport document signed or initialled and dated by the carrier or his agent .... ." In Westpac and Commonwealth Steel v. South Carolina National Bank,[3] the issuing bank rejected a bill of lading in "received" form bearing the words "Shipped on Board Freight Prepaid" on the basis that it was not a shipped bill. The bank argued that the bill was

neither signed or initialled and dated contrary to Article 20(b) of the UCP (1974 Revision). The Privy Council held that the issuing bank was bound to pay. Commenting on the case, Professor Schmitthoff states "The decisive fact in this case was that the words 'Shipped on Board' were contained ... in the tenor of the bill before it was issued. If a 'received for shipment' bill contains a 'shipped' statement which is added to the bill after issue ...., the position is different; in this case the requirements of the UCP - signature or initialling and dating of the notation - must be complied with in order to make the bill a 'shipped' bill of lading.[4]

2.2 CLEAN AND UNCLEAN OR CLAUSED BILLS OF LADING

By Article 34(a) of the UCP (1983 Revision), a clean bill of lading is one "which bears no superimposed clause or notation which expressly declares a defective condition of the goods and/or packaging." An unclean or claused bill is one which bears such a clause or notation. Where payment is arranged under a documentary credit, unclean bills will be rejected unless the credit expressly indicates otherwise. It is chiefly the apparent order and condition of the goods[5] which determines whether a bill is clean or unclean,[6] but charterparty bills[7] and bills indicating that the goods are carried on deck[8] are

sometimes referred to as unclean. Indemnities are sometimes offered to carriers to induce them to issue clean bills; this aspect is aftewards examined.[9]

In _The Galatia_,[10] a large cargo of sugar was loaded. Subsequent to the loading, a fire broke out and damaged 200 tons of the cargo. The bill acknowledged the cargo as having been shipped in apparent good order and condition, but it also contained a notation that the cargo was "damaged by fire and/or water used to extinguish fire." The buyers and bank appointed to provide the credit rejected the bill on the basis that it was unclean. The Court of Appeal affirmed Donaldson J.'s decision that the bill was clean since it contained no adverse notation in relation to the cargo at the time of shipment. It was held that the bill passed the legal test under which the time of shipment is the relevant time.[11] The uncertainty in this case reflects the ambiguity in the UCP provision that "banks will refuse shipping documents bearing such clauses or notations unless the credit expressly (provides otherwise)." The provision may be said to be ambiguous because the crucial time which determines cleanliness or uncleanliness is not specified.

2.3 FREIGHT AND FREIGHT COLLECT BILLS OF LADING[12]

If freight is to be paid to the carrier in advance, freight prepaid bills are used. The majority of bills are freight prepaid bills. If it is arranged for freight to be paid by the consignee on arrival of the goods, freight collect bills are used.

2.4 NEGOTIABLE AND NON-NEGOTIABLE BILLS OF LADING

The function of the bill of lading as a document of title is, strictly, distinct from its nature as a negotiable or non-negotiable document. A bill of lading is non-negotiable if it is expressly stated to be non-negotiable or if it is made out to a named consignee without the words "or order." A bill of lading is negotiable only if it is transferable and whether it is so is to be gathered from its terms. If the bill is made deliverable to "order," it is transferable by indorsement and delivery. So too if the bill is made deliverable to a named consignee "or order." Indorsement may be effected in one of two ways. It may be "special" in which case the indorser writes down his name and that of the indorsee at the back of the bill. This form of indorsement is also known as an "indorsement in full." Alternatively, the indorsement can be "in blank" in which case the indorser

merely writes down his own name but does not add that of the indorsee; the effect of an indorsement in blank is to render the bill of lading a "bearer" bill which is transferable by delivery alone. Bearer bills are relatively rare because of the characteristic of the bill of lading as a document of title.

When the term "negotiable" is used to describe a bill of lading, it is to be construed as "transferable" (Kum v. Wah Tat Bank Ltd.)[13] for the term "negotiable" in the legal sense denotes that the transferee may get a better title than the transferor and this characteristic the bill of lading does not possess. Hence, "negotiable" bills of lading are sometimes described as "quasi-negotiable." Nevertheless, the nemo dat quod non habet rule in relation to bills of lading has certain exceptions.

Firstly, by s.47 of the Sale of Goods Act 1979, the unpaid seller's right of stoppage in transit (valid against the buyer) is not available against a subsequent buyer-indorsee if the bill of lading was taken in good faith without notice;[14] s.23 is to the same effect. The statutory position was long ago established in Pease v. Gloahee.[15] In that case, a French firm through its agent sold a cargo of linseed cake to an English firm, the price

to be paid at the end of three months. A bill of lading was given to the English firm, but it was re-delivered to the French firm's agent as security. A member of the English firm obtained the bill back by fraudulent misrepresentation and indorsed it to Pease & Co. for value, who took it without notice of the fraud. The English firm went insolvent before the goods arrived, and the French firm sought to exercise its right of stoppage in transit. Lord Chelmsfords L.C. stated: ".... as long as the bill of lading remained with the parties who had fraudulently obtained it, the Vendors who had been cheated out of possession might have reclaimed and recovered it. But the moment it passed into the hands of Pease & Co., to whom it was pledged and indorsed for valuable consideration without notice, the right of the vendors to follow it was taken away."[16]

Secondly, an indorsee may be in a better position than the indorser if the indorser was party to a contract or contractual terms not evidenced by or inconsistent with the indorsed bill.[17]

Thirdly, s.2(I) of the Factors Act 1989 protects a bona fide indorsee's title where an indorser-factor acts in excess of his authority. In Lloyds Bank Ltd. v. Bank of America,[18] a company obtained advances from Lloyds' Bank

by pledging certain bills of lading. These bills were later returned under a trust receipt to enable the goods to be sold. In breach of the trust receipt's terms, the company pledged the bills to the Bank of America. The company went insolvent, and Lloyd's Bank sought to recover the bills. It was held that the Bank of America did not know of the true situation, that the company was a factor, and that accordingly the Bank of America's title was valid.

In the United States, negotiable bills of lading are known as order bills and non-negotiable bills of lading as straight bills.[19] The issuance of order bills in a set of two or more original parts is prohibited for the carriage of goods within United States (Alaska and Hawaii excepted): s.4, Pomerene Act.[20] Another difference in regard to order bills is that the carrier is not obliged to heed a stoppage in transit notice unless the bills are first surrendered for cancellation: s.39, Pomerene Act.[21] By s.30, an order bill may be negotiated by any person in possession however such possession may have been acquired. By s.37, the validity of the negotiation is not impaired by the fact that the indorser's negotiation was a breach of duty, or by the fact that the owner of the bill was deprived of possession by fraud, accident, mistake, duress, loss, theft, or conversion if the indorsee gave value therefor in good faith without notice. However, by

the Pomerene Act, s.31, and the Uniform Commercial Code, s.7-503, an indorsee acquires only such title as the indorser had or had ability to transfer to a purchaser in good faith for value so that the results are the same as under English law: a person with voidable title has the power to transfer perfect title to a bona fide purchaser without notice; and where the bill has been negotiated by one with no title (such as a thief), the true owner may replevy it or the goods represented therein from anyone into whose hands they have passed - Kendall Produce Co. Inc. v. Terminal Warehouse.[22] Straight bills of lading, despite their non-negotiability (s.6, Pomerene Act), can transfer title to the goods. By s.29, a straight bill may be "transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby." However, s.29 goes on to read: "A straight bill cannot be negotiated free from existing equities, and the indorsement of such a bill gives the transferee no additional right." No English case seems to have decided on the point as to whether a non-negotiable bill can transfer title to the goods.[23]

2.5 BILLS OF LADING ISSUED UNDER CHARTERPARTIES

Bills of lading issued under charterparties raise several questions. In the first place, which contract is

operative in respect of each of the parties involved? Secondly, who is the carrier - the shipowner or the charterer? Thirdly, there is to be considered the consequences of incorporating clauses - what are the obligations imported? Fourthly, since ships are sometimes sub-chartered, the question arises as to which charterparty an incorporating clause refers to in the absence of express stipulation? Fifthly, what if the bill of lading issued by the charterer contains more onerous terms than the shipowner bargained for in the charterparty? Sixthly, what is the standing of bills of lading issued under a charterparty in relation to the UCP? Finally, the position of these bills under the Hague-Visby Rules has to be considered.[24]

2.5.1 The Contract

(a) The Charterer-shipper

As between the shipowner and the charterer-shipper, the bill of lading is ordinarily a receipt "unless there be an express provision in it to the contrary," per Lord Esher in Rodocanachi v. Milburn;[25] Ministry of Commerce v. Marine Tankers Corp.[26] is to the same effect. Thus, it is generally the charterparty which regulates relations between these parties.[27]

(b) Shippers other than Charterers

When the shipper is not the charterer, it is the bill of lading which prima facie evidences the contract of carriage unless there is an express agreement to the contrary: Pearson v. Goschen.[28]

(c) The Indorsee

Although a bill of lading in the hands of a charterer is ordinarily a receipt, it is, when indorsed over in accordance with s.I of the Bills of Lading Act 1955, effectively the contract as between the carrier and indorsee. If s.I does not apply, the Brandt rule may so that the result is the same.[29] The indorsee is not affected by the charterparty's terms unless they are incorporated into the bill of lading, or the bill of lading is one that the master could not have lawfully issued under the charterparty's terms of which the indorsee is aware. The first exception is afterwards considered.[30] The second exception may be illustrated by The Draupner[31] where the c.i.f. buyer stipulated for "tonnage to be engaged on the conditions of the charterparty attached." The charterparty had an exclusion clause for negligence caused by the shipowners' servants. The master signed a bill of lading which did not contain the exclusion clause.

Later there was a partial loss of the cargo caused by negligent navigation It was held by the House of Lords that the buyer had actual knowledge of the exclusion clause and the shipowner was accordingly exonerated. A clause in the bill stating "all conditions as per charter" is not sufficient to give the holder constructive knowledge unless the term sought to be relied upon can be construed to have been incorporated in the bill: Manchester Trust v. Furness.[32]

2.5.2 Identifying the Carrier

(a) The Position Generally

The general position is as expounded in Samuel v. West Hartlepool S.N. Co.[33] "In (a charterparty by demise) it is reasonably clear that the contracts with the shippers under the bill of lading are between them and the charterers and not between them and the owners ... there is another class of cases in which the charterers by the charterparty do no more than undertake that a full cargo shall be shipped and guarantee payment of a certain freight. In such cases it is very often stipulated that upon (performance of these obligations) the charterers' liability under the charterparty is to cease. In such cases the contract of carriage under the bill of lading

would ordinarily be between the owners and shippers. But even in cases of this kind it is scarcely safe ... to lay down a hard and fast rule." The above applies mutadis mutandis to bona fide indorsees without notice.

As to why in a charterparty by demise [34] the charterer is generally the carrier, and in charterparties other than by demise the shipowner is the carrier, Cockburn C.J. in Sandeman v. Scurr explained thus:[35] "In a (charterparty by demise) the charterer becomes for the time the owner of the vessel, the master and crew become to all intents and purposes his servants, and through them the possession of the ship is in him. In (other charterparties), ... the ownership remains in the original owners, and through the master and crew, who continue to be their servants, the possession of the ship also." It may be mentioned that, in the latter case, even though the master continues to remain the owner's servant,his signature or an authorised signature on his behalf may bind the charterer if the charterer holds himself out to be the carrier. In The Venezuela,[36] the owners time-chartered a vessel to a Chinese agency which then sub-chartered it to CAVN, the defendants. NYK, the defendants' agents, issued a bill of lading on behalf of the master to the plaintiff. The bill was in the defendants' usual form and provided inter alia: "I. Definitions (a) Carrier (is) CAVN or the

FMGSA depending on whichever of the two is operating the vessel carrying the goods covered by this Bill of Lading." Sheen J. held that since it was CAVN which was operating the vessel, it was clear that it was the carrier within the definition of the bill.

(b) The Demise Clause

The typical bill of lading has a clause (known as the demise clause) which provides that if the ship is not owned or chartered by demise to the issuer of the bill, the bill is to be considered as a contract with the owner or charterer by demise as principal made through the agency of the issuer notwithstanding any indication to the contrary. Its origins arose out of Paterson, Zochonis v. Elder Dempster[37] where the charterers were held fully liable for loss of cargo while the shipowners were able to limit their liability under ss.502 and 503 of the Merchant Shipping Act 1894. The Merchant Shipping (Liability of Shipowners and Others) Act 1958 extended the limitation of liability provisions to charterers but the demise clause has remained in common use.

Its validity is controversial and different decisions have been reached. In Canada, in The Mica,[38] the demise clause was held to be null and void under the

Carriage of Goods by Water Act 1936; but in a recent case, The Liberian Statesman,[39] it was upheld. In the United States, it was upheld in The Iristo[40] but was subsequently held invalid in Epstein v. U.S.[41] under the Carriage of Goods by Sea Act 1936, and in Blanchard Lumber v. SS. Anthony II[42] under the Harter Act 1983. The demise clause came before an English Court in The Berkshire[43] where the shipowners were held liable as the carrier. It is respectfully submitted that the validity of the demise clause in English Law is not entirely free from doubt.

The bill of lading in that case was in a form used by the charterers' agents and contained their name at its head. Had the bill of lading not been signed on behalf of the shipowners, the case might have been decided differently. At any rate, insofar as a shipper is concerned, it is not the signature on a bill that is vital (albeit that is excellent evidence) for by The Ardennes,[44] the contract of carriage is concluded before the bill is issued. Since the rule can arguably be displaced by a superseding clause, the question must be whether, given that the charterers had actually held themselves out to be the carrier, the demise clause can have overriding effect. If the answer is in the affirmative, the bill of lading would incorrectly reflect

the true situation; the demise clause would be a contradiction. It is thought that Armour v. Leopold Walford[45] must be distinguished for there the facts were significantly different. In that case, the carrier and shipper had agreed in the booking note which preceded the issuance of the bill of lading that the bill, which had been used in previous dealings, would supersede all antecedent agreements. Without prior agreement, the demise clause should be construed with reference to the facts in each case, that is, whether the charterer or any other person seeking to rely on the demise clause actually contracted as agent of the shipowner or as the carrier.

The situation assumes a different complexion when an indorsee is involved for, as between him and the carrier, the bill of lading is effectively the contract. Given that the charterer had held himself out to be the carrier to the shipper, that the charterer had authority to sign bills of lading on the shipowners' behalf, and that the charterer did sign a bill of lading on the shipowners' behalf, what would be the situation? It is well-established that a charterer's authority to sign bills does not extend to bills containing "extraordinary" terms. In The Berkshire,[46] Brandon J. held that the demise clause is "an entirely usual and ordinary one." However, in that case it was not claimed or proved that the

charterer had held themselves out to be carrier to the shipper. It is respectfully submitted that had the charterers done so, they could possibly be treated as the undisclosed principal notwithstanding the converse wording of the demise clause.

It may be appropriate to turn now to another permutation. Even when a charterer holds himself out to be the carrier and issues as well as signs his own bills of lading, the master of the ship remains the shipowners' servant (in charterparties other than by demise). Can the shipowners as well as the charter be held liable jointly under the Hague or Hague-Visby Rules? Article 1(6) provides that the term 'carrier' "includes the owner or charterer who enters into a contract of carriage with the shipper." It is clear that the term "carrier" is used only in relation to those who enter into a contract of carriage with the shipper so that the actual carrier (the shipowners in the postulation above) does not fall within the regulatory ambit of the Rules. Moreover, Article 2 states: "Subject to the provisions of Article 6, under every CONTRACT OF CARRIAGE of goods by sea the carrier ... shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth." (Emphasis supplied). This would seem to make it manifestly clear that the Hague and Hague-Visby Rules are

concerned only with the contractual carrier, and not the actual carrier. This feature is one of the short-comings of the present legal regimes for, as Professor Tetley points out, "in most cases, the owner and the charterer share the duties of a carrier."[47] If and when the Hamburg Rules come into effect, the position would be fundamentally altered: Article 10(2) provides that the Rules apply equally to both the contractual and actual carriers. In the United States, the courts are seemingly prepared to make the necessary semantic "acrobatics" to attach liability jointly where appropriate. In The Frances Salman, the District Court stated: "Since the bill of lading was issued by (the time charterer) on behalf of the Master, and the Master was appointed by the Owners, the latter, as well as (the time charterer) entered into a contract of carriage with the shipper."[48] It was held that the shipowners were liable because of the vessel's unseaworthiness and the charterer because he had failed to stow the goods properly.

2.5.3 Incorporation Clauses

(a) The English Approach

In Skips A/s Nordheim v. Syrian Petroleum Co., Donaldson M.R. stated: "What the (shipowners) had agreed

with the charterers, whether in the charterparty or otherwise, was wholly irrelevant, save in so far as the whole or part of any such agreement had become part of the bill of lading contract."[49] The Master of the Rolls had in mind the consignees.

To ascertain whether charterparty terms have been incorporated into the bill of lading, one looks first at the wording of the incorporation clause. If it is couched in general language, as it usually is, it can only bring in terms germane to the shipment, carriage, or discharge of the goods: The Annefield.[50] This however does not mean that these terms are automatically incorporated into the bill of lading. If other terms are intended to be incorporated into the bill, specific words must be used. In Russell v. Nieman,[51] the clause "paying freight and other conditions as per charterparty" was held not to incorporate exclusion clauses. In Thomas v. Portsea,[52] the incorporating clause read: "(Shipper or assigns) paying freight for the said goods, with other conditions as per charterparty." The Privy Council held that the arbitration clause in the charterparty was not incorporated. Lord Atkinson stated that when it is sought to introduce into the bill an arbitration clause from the charterparty, the intention should be manifested by

distinct and specific words. This was so done in The Rena K[53] and it was held that the dispute had to go before arbitration.

Even if the incorporation clause is drafted specifically, the term sought to be incorporated must make sense and be consistent with the intention of the parties. In The Miramar[54] the bill had a clause which purported to incorporate "all terms whatsoever of the said charter except the rate and payment of freight specified therein." A large amount was owed by the charterers in demurrage; since the charterers were bankrupt, the shipowners sued the consignees. The House of Lords held that there is no rule of construction that terms in the charterparty which are germane to shipment, carriage or delivery of the goods and which impose these obligations on the charterer will automatically apply to the consignee. The charterer had to be the only party liable: the charterparty clearly allowed for the possibility of several discharging ports, thereby leaving the possibility that a consignee could be liable for demurrage accrued by other parties. That, Lord Diplock said, did not make commercial sense for "no businessman who has not taken leave of his senses would intentionally enter into a contract which exposed him to potential liability of this kind."[55] A fortiori, the term sought to be incorporated cannot take precedence over express terms in the bill of lading: Gardner v. Trechmann.[56]

(b) <u>The American Approach</u>

In the leading case Son Shipping Co. v. De Fosse[57] the incorporating clause stated that "all the terms whatsoever of the said charter except the rate and payment of freight specified therein apply to and govern the rights of the parties in this shipment." The court held: "These order bills of lading specifically referred to the charterparty and, in language so plain that its meaning is unmistakable, incorporated in the bills all the terms 'whatsoever' of the charterparty 'except the rate and payment of freight specified therein.' The very breadth of the language ... leaves no fair doubt as to the meaning of the parties. Where terms of the charterparty are, as here, expressly incorporated into the bills of lading they are a part of the contract of carriage and are binding (as if) the dispute were between the charterer and the shipowner."[58] In the result, the arbitration clause in the charterparty was held to be incorporated into the bill. Similarly, in Lowry v. SS. Le Moyne, Weinfeld J. stated: "It is not necessary, in order to incorporate by reference the terms of another document, that such purpose be stated in haec verba or that any particular language be used."[59]

(c) Comments

The difference in the approach of the English and American courts is radical. The English courts construe general incorporating clauses strictly. By contrast, the American courts are inclined to give effect to the literal meaning of a general incorporating clause - sometimes to excessive lengths. In Midland Tar Distillers v. M/T Lotos,[60] the general incorporating clause referred to the charterparty which stipulated arbitration for "any dispute arising in any way out of this charter ... owners and charterers each appointing an arbitrator." The court held that the dispute had to be arbitrated. It is thought that the finding is not entirely satisfactory for the generalness of a general incorporating clause does not indicate an obligation to submit to arbitration. Given that constructive notice suffices, the obligation to submit to arbitration was seemingly personal to the shipowners and charterers. It should not therefore have applied to the holder of the bill. On the whole, the English approach is preferable. The bill of lading is, or evidences, a contract of adhesion. The shipper often has no alternative but to accept the terms a carrier has expressed in the bill, much less an indorsee. Taken in conjunction with the fact that an indorsee normally has no means of ascertaining the charterparty's terms, the terms which are sought to be

incorporated must be such that they can reasonably be expected by a bill of lading holder. This, it is thought, forms the premise of the English approach - at least since The Miramar.[61]

2.5.4 Identifying the Charter

When a ship is sub-chartered and the incorporating clause does not specify which charterparty it refers to, there may be some difficulty. In The San Nicholas[62] the Court of Appeal approved the following statement in Scrutton:[63] "A general reference will normally be construed as relating to the head charter, since this is the contract to which the shipowner, who issues the bill of lading, is a party. Sometimes when a printed form of bill of lading provides for the incorporation of the "charterparty dated ________," the parties omit to fill in the blank. It is submitted that the effect is the same as if the reference were merely to "the charterparty ...." Where the charterer issues his own bills of lading, there may be a presumption that the general reference is to the sub-charter; where the intention is manifestly ambiguous, there may be no incorporation at all.[63]

The American courts adopt a different stance. In The Eliza Jane Nicholson,[64] it was held that a bill of lading which referred to a charterparty but which left blank the date of the charterparty and the parties thereto was ineffective to incorporate the terms of the charterparty. And in Tropical Gas Co. v. M/T Mundogas[65] it was held that there was no incorporation on similar facts. These decisions seem too severe, particularly since there could only be one charterparty to which the reference in each case could have related to - there was no sub-charter. These decisions reflect concern with form rather than ascertainment of the parties' intention.

2.5.5 Bills of Lading at Variance with the Charterparty: the Shipowner's Indemnity

The charterer is normally authorized to issue bills of lading on the shipowner's behalf. Since such bills may contain more onerous terms than those set out in the charterparty and bind the shipowner to a contract which he did not bargain for, it is usual practice to provide in the charterparty that the master is to sign bills as presented without prejudice to the charterparty and that the charterer is to indemnify the shipowner for any breach. Thus, if the master signs a bill of lading which is within

his usual authority but which is at variance with the charterparty, the shipowner will be bound (The Patria)[66] although he may be entitled to an indemnity from the charterers.

An obligation to indemnify may in the appropriate circumstances be implied. In a recent case, The C Joyce,[67] the court made it clear that it will not be implied solely because the shipowner is liable on the bills of lading whilst he would not be so liable under the charterparty. Bingham J. stated:[67] "In Moel Tryvan v. Kruger[68] and Elder Dempster v. Dunn[69] shipowners were held to be entitled to indemnity against charterers. But crucial to both decisions was a finding of disparity between the bills which the charterers were entitled to present under the charterparty, and the bills which they did present. In the present case the charterers were not in breach of contract in tendering the bills of lading."

2.5.6 Bills of Lading Issued under Charterparties and the UCP

Unless instructed otherwise in the credit, a bank will reject a bill of lading "which indicates that it is subject to a charterparty," : Article 26(c)(i), UCP (1983 Revision). The reason lies in the difficulties in

ascertaining the charterparty terms which have been incorporated into the bill, and the effect that it will have on the buyer's rights. A mere reference to the charterparty does not make the bill unacceptable if it is clear that the charterparty's terms are not incorporated (S.I.A.T.D. Del Ferro v. Tradax);[70] a fortiori, the bill will not be unacceptable if it contains no reference at all to the charterparty (Enrico Frust & Co. v. W.E. Fischer Ltd.).[71]

2.6 MARINE THROUGH BILLS OF LADING

Where there are more than two sea carriers or where sea carriage is only one of two or more modes of transportation, it may be to the shipper's convenience to have his goods carried under a through bill of lading. Through bills of lading involving combined transport such as the ICC Combined Transport Document and container bills are afterwards examined. It is intended first to look at marine through bills.

There are basically two kinds of marine through bills. There is the kind by which the first carrier assumes or undertakes responsibility for the whole voyage. In that case he will be the proper person to sue or be sued on the contract; but if the first carrier contracted as

agent for the on-carrier, the latter will be the contractual carrier.[72] Then there are marine through bills which stipulate that each carrier will only be responsible and liable for his own portion of the voyage. Such a stipulation was upheld in an American case, The Pioneer Land,[73] and a pre-Hague Rules English case, Crawford & Law v. Allan Line.[74] The stipulation is valid under both the Hague and Hague-Visby Rules on a proper construction of Article 7 which states: "Nothing herein contained shall prevent a carrier ... from entering into any agreement (prior to the loading on) and subsequent to the discharge from the ship on which the goods are carried by sea." Article 7 must be interpreted to mean that if a carrier stops short of his contractual destination and tranships the goods upon another agreement, he will continue to be answerable until the goods are discharged at his contractual destination.[75] Difficulties arise when it is not clear in whose hands the goods were damaged or lost. The solution would seem to lie in the receipt given by the on-carrier who in the event of any damage or loss should state so therein. If he does not do so, he will have to discharge the onerous burden of proving that the damage or loss occurred during a portion of the voyage for which he was not responsible (Crawford & Law v. Allan Line[76] or, if it occurred during his portion of the voyage, that he is exonerated by an exclusion clause or

excepted peril. It follows that where there is a multiplicity of carriers and clean receipts are given throughout, the last carrier will be *prima facie* responsible: *R. Badenhop Corp. v. N/V Koninklijke*.[77] Should the Hamburg Rules come into effect, the common stipulation in through bills that each carrier should only be answerable for his own portion of the transportation will still be valid: Article II(I).

Where the carrier undertakes responsibility for all stages of the transportation, the through bill will be a good document of title as well as being under the applicatory ambit of the *Bills of Lading Act 1855, s.I.*[78] Where there are two or more carriers, each limiting his responsibility to the duration that the goods are in his hands, there is some doubt as to whether the through bill will be a document of title or fall within *s.I*. By way of example, where the goods represented by the bill are sold after a port of transhipment, the buyer-holder of the bill has no right against the antecedent carrier.

2.7 CARRIAGE BY CONTAINERS AND THE DOCUMENTS USED

One of the major developments in the carriage of goods has been its unitization. Goods are now frequently

carried in steel or aluminium containers (in place of conventional crates and boxes) constructed to standards set by the International Standards Organization, an agency of the United Nations. containers are usually owned or leased by container operators (CTs) and to a lesser extent, shippers. The CT will normally be a shipping line, freight forwarder or road haulier. If the cargo can fill up a full container load (FCL), the shipper himself may fill up the container and send it to the CT'S container freight station (CFS), or the CT may fill up the container at the shipper's place of business. If the cargo is less than a full container (LCL), the goods are either sent by the shipper or the CT to the CFS where they will be consolidated in a groupage container together with other LCL shipments destined for the same discharge point.

From the commercial viewpoint, there are certain advantages to be derived from containerization, particularly in relation to multimodal transport. The movement of cargo is facilitated for there is no need to repack the goods to suit the means of transport, and the risk of damage, loss or pilferage is reduced. From the legal viewpoint, containerization has several problematical aspects which may be classified into three varieties. There are those that relate to containers and their carriage, and the CT. And there are those that relate to the documents used.

2.7.1 Containerized Carriage

(a) Carriage on Deck

Containers are frequently carried on deck; indeed, container ships are specifically constructed with deck carriage in mind. The difficulty here is that some authorities treat deck carriage, in the absence of agreement or custom, as disentitling the carrier from relying on the exclusion clauses in the bill of lading.[79] As a result, carriers normally insert in the bill of lading a liberty clause giving them the option of carrying the cargo on or below deck. It may be mentioned that the Hague and Hague-Visby Rules do not apply to "cargo which by the contract of carriage is stated as being carried on deck and is so carried" : Article I(c). Thus, if deck carriage is not stated or, if it is stated but the goods are in fact carried under deck, the Rules will apply. It is to be noted that an important change was effected by s.I(7) of the U.K. Carriage of Goods by Sea Act 1971. It provides that even when deck carriage is stated and the cargo is in fact so carried, the rules will apply if the bill of lading or non-negotiable receipt marked as such contains a paramount clause.

The deck carriage liberty clause is not a statement that the goods are carried on deck. In Svenska Traktor v. Maritime Agencies (Southampton Ltd.)[80] it was held that the Hague Rules applied because the clause was only an option which the carrier could elect to exercise; it did not state that the goods were in fact carried on deck. In the well-known American case, Encyclopaedia Britannica v. The Hong Kong Producer,[81] the court ruled that "no consignee or assignee could tell from the bill whether it was below deck or deck cargo". The cases however differ on the point as to whether a carrier is entitled to rely on the limitation of liability provisions under the Hague Rules in the event of undeclared deck carriage. In the former case, it was held that the carrier was entitled; but in the latter case, the decision went the other way. In J. Evans & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd., Lord Denning M.R. stated: "During the argument Roskill L.J. put the case of the Hague Rules. If a carrier made a promise that goods would be shipped under deck, and, contrary to that promise, they were carried on deck and there was a loss, the carrier could not rely on the limitation clause."[82] It is to be noted that the dictum is clearly obiter. In The Antares (No.2),[82a] the principal issue was whether a claim in respect of cargo damage caused by unauthorised deck carriage should be subject to the

one-year limitation period of the Hague-Visby rules. Steyn J. was of the opinion that "the time limit of art. III, r.6, operates as a directly enacted statutory limitation period."[82b] Steyn J. also stated: "Taking into account the provision read as a whole ("the carrier and the shipper shall IN ANY EVENT be discharged from ALL LIABILITY WHATSOEVER ... unless suit is brought within one year ...."), and in particular the words which I have emphasized, I am constrained to conclude that art. III, r.6, makes no distinction between fundamental and non-fundamental breaches of contract."[82b] It is thought that the learned judge's reasoning, based on the wording of Article 3(6), may be equally applicable to the limitation of liability provision which embodies the words: "Neither the carrier nor the ship shall IN ANY EVENT be or become liable for ... an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is higher." (Emphasis added).

Although the general inclination of the American courts has been to treat unauthorized deck carriage as deviation,[83] they seem willing to take a more lenient line with the advent of specially constructed container ships equipped for deck carriage. In Dupont de N.I. v. SS. Mormacvegu,[84] it was held that deck carriage

on such a ship did not amount to deviation. More recently, in Recumar v. Dana Arabia,[85] it was held that technological innovation and changing vessel design should be taken into account. It was further held that although the carrier committed a deviation under the Carriage of Goods by Sea Act, s.4(4), by its undeclared deck stowage, the carrier could still be entitled to the benefit of the Hague Rules' package limitation if it could prove that the deviation was reasonable.

(b) "Apparent good order," and "said to contain" acknowledgements

The state and quantity of containerized goods are unbeknown to the carrier unless he does the packing, or exercises his right to inspect the contents of the container if so allowed by the contract of carriage. If the contents cannot reasonably be ascertained or checked, the carrier is not obliged to make specific acknowledgements in the bill of lading: Article 3(3), Hague, and Hague-Visby Rules. "Received in apparent good order and condition" statements, without more, refer to the container, not the goods: Recumar v. Dana Arabia.[85] "Said to contain" or "shipper's load or count" statements are common where the goods are containerized. These acknowledgements being vague create difficulties in point

of evidence, and affect the burden of proof under the Hague and Hague-Visby Rules; further, English and American law differ significantly in their treatment of such aknowledgements. these aspects are latterly examined.[86]

(c) Package/unit limitation

Article 4(5)(a) of the Hague and Hague-Visby Rules stipulates the package or unit liability limit of the carrier and the ship. The difficulty is whether the individual items inside a container are to be regarded as packages or units, or whether the container itself is to be regarded as a package. The Hague Rules provide no guidance on this point, but Article 4(5)(c) of the Hague-Visby Rules states that where a container (or similar article of transport) is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed therein shall be deemed to be the number of packages or units for liability limitation purposes. Otherwise, the container itself is considered the package or unit.

In America, the courts take a two-pronged approach. They apply the "functional test," that is, the container in question must be used as a means of shipment rather than as a mere form of protection; the courts also

look to the description in the bill of lading. In The Kulmerland,[87] the bill of lading stated "I container said to contain Machinery": it was there held that the container was itself the package. In The Mormaclynx,[88] where the bill stated "I container s.t.c. 99 bales of leather," the goods were treated as separate packages. Although "s.t.c." and similar statements are treated differently by the English and American courts,[89] it would seem that such statements suffice for liability limitation purposes. The court did not consider this point, probably because the bill was stamped "with respect to the entire contents of each container" and the carrier had used the "s.t.c." statement for computing the freight.

Article 4(5)(c) has yet to be interpreted by the English courts. Whether the American functional test will be applied has yet to be seen. Professor Schmitthoff holds the opinion that it will be applied.[90] This view is supportable by reference to the wording of Article 4(5)(c) which refers to a container "or similar article of transport ... used to consolidate goods." Thus, if the container is not an article of transport used to consolidate goods, for instance, if it was used merely to protect the goods, it may be that the container with the enclosed goods will be treated as a single package or unit

notwithstanding specific enumeration of the goods in the bill. The courts will probably consider most containers as an article of transport used to consolidate the goods rather than as a mere form of protection for the goods.

2.7.2 The Container/Combined Transport Operator

The most striking feature of the CTO is that he undertakes responsibility for the goods from the time that the goods are received for transportation until they are delivered. The CTO may not or need not be physically involved in the carriage: he is invariably allowed by the contract of carriage to sub-contract the whole or part of the contract. At first sight, it appears that the cargo-owner may circumvent the CTO's liability limit by suing the sub-contractor in tort. In practice this is avoided by a clause in the transport document such as that in the MISC's[91] combined transport bill of lading which states: "The Merchant undertakes that no claim or allegation shall be made against any servant, agent or sub-contractor of the carrier which imposes or attempts to impose ... any liability whatsoever in connection with the Goods, and, if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof." Such a clause has been conveniently

described by Professor Tetley as a "circular indemnity clause.[92]

In The Elbe Maru,[93] the carriers undertook the carriage of pullovers and anoraks in two containers from Hong Kong to Liverpool via Southampton. The carriers sub-contracted the carriage of the goods from Southampton to Liverpool to a firm of road hauliers; part of the consignment was stolen whilst in the custody of the hauliers. The indorsee of the bills of lading sued the hauliers whereupon the carriers,pursuant to s.41 of the Judicature Act 1925, applied for an order that that the action be perpetually stayed as the indorsees being party to the bills were bound by the circular indemnity clause. Seemingly, the hauliers could have sought to be indemnified by the carriers under the Road Haulage Association terms under which part of the contract of carriage had been sub-contracted. If that happened, the carriers could seek to be indemnified by the indorsees. Ackner J. felt that there was a real possibility of the carriers suffering undue financial loss by this prospective chain of events, and upheld the circular indemnity clause. The action was accordingly stayed. It may be added that if and when the Hamburg Rules come into effect, the clause will be

ineffective for a distinction is drawn between the contractual and actual carrier; Article 10(2) gives the cargo owner the option of suing either or both.

Since the different modes of international transport are governed by different international conventions imposing varying conditions and limits of liability, there is uncertainty when loss or damage cannot be traced (localized) to a particular mode of transport. The obvious question is: under which legal regime will the CTO be answerable? The UN Convention on International Multimodal Transport of Goods[94] provides its solution by way of a uniform liability system, that is, liability limits prescribed by the Convention apply even when the loss or damage can be localized. However, the Convention, which is intended to be of mandatory application where the consignor opts for multimodal rather than unimodal transportation, has not yet come into operation. At present, the CTO's liability is decided under the network liability system which is described in the following page.

2.7.3 Documents Used in Containerized Carriage

A variety of documents is used in relation to containerized carriage. The through bill has already been considered;[95] it is intended to discuss here the other

documents used, viz., container bills of lading, the ICC Combined Transport Document, waybills, as well as house and groupage bills of lading.

(a) Container Bills of Lading and the ICC Combined Transport Document

Container bills and the ICC CT document have three features not shared by traditional bills of lading. Firstly, they adopt the network liability system whereby, if the loss or damage of the goods cannot be localized, the liability of the carrier is determined by the Hague or Hague-Visby Rules depending on the law of the forum.[96] If the loss or damage can be localized, the relevant municipal legislation or international convention will apply. If no municipal or international convention is applicable, the CTO who carries under the ICC Rules is still liable unless he is able to prove that the loss or damage was attributable to one of the listed exemptions the most comprehensive of which is "any cause or event which the CTO could not avoid and the consequences of which he could not prevent by the exercise of reasonable diligence" : Rule 12(f). Although the alternative liability schemes of the ICC Rules appear to be relatively straightforward, there may well be practical difficulties in their application. For instances, what happens if the damage

occurs during the road transportation leg and continues throughout the sea or rail transportation period? It is thought that the regime governing the mode of transportation during which the damage begins or is first caused will probably apply.

Secondly, these documents are invariably in "received for shipment" form. Thirdly, by these documents, the CTO accepts sole responsibility for the goods from the time that they are received for transportation till they are delivered.

There is some uncertainty as to whether these documents are bills of lading within the meaning of the Bills of Lading Act 1855, s.I. Professor Goode holds the view that they are not on the premise that only a bill of lading issued by a sea carrier suffices,[97] but a converse view is expressed in Scrutton's[98] and Schmitthoff's.[99] The latter view is probably the correct one; this would seem to be implicit from The Elbe Maru where Ackner J. referred to the affidavit of Mr. Wheble which stated: "The type of combined transport document which is often called a Combined Transport Bill of Lading is commonly used with the international movement of unitised cargo (container cargo) and in its negotiable form which is the more usual it is to my knowledge customary for it to be accepted by merchants

and bankers alike as a document whereby property in the goods referred to therein can be transferred by endorsement where necessary and delivery of the documents."[100] Significantly, this point was not challenged by the respondent indorsees, and they were thus treated as parties to the terms as set out in the documents. Finally, by Article 25(b)(i) and (ii) of the UCP (1983 Revision), banks will accept the ICC Combined Transport Document and container bills of lading unless the credit calls for marine shipped bills of lading.

(b) House and Groupage Bills of Lading

House bills of lading (also known as shipping certificates) are actually receipts issued by freight forwarders who undertake to arrange, rather than effect, the carriage of goods. A house bill has three endemic features: it is not a document of title; it is not a bill of lading within the meaning of the Bills of Lading Act 1855, s.I; and it cannot be tendered under a c.i.f. contract: Comptoir d' Achat v. Luis de Ridder.[101] A house bill is used as an alternative to a delivery order where the goods of several owners are consolidated into a groupage container. A groupage bill of lading is issued to the forwarder by the carrier for the LCL shipments. All documents issued by forwarders not acting as carriers or

agents for a named carrier will be rejected by banks under the UCP (1983 Revision) unless the credit stipulates otherwise: Article 25(d). The sole exception is the FIATA Combined Transport Bill of Lading[102] which is issued subject to the ICC Uniform Rules for a Combined Transport Document.

(c) Waybills

Waybills are frequently used in containerized transport. They are in non-negotiable form and are preferred in instances where there is no necessity to sell the goods in transit, or where the voyage is a short one so that the goods are likely to arrive before the bill of lading does. In connection with the latter point, it may be mentioned that the waybill is not a document of title since the consignee has only to prove his identity to obtain delivery of the goods. The Bills of Lading Act 1855, s.I, does not apply to waybills; the difficulties which result therefrom are discussed later.[103] The Hague-Visby Rules do not apply automatically to waybills; s.I(6)(b) of the Carriage of Goods by Sea Act 1971 states that the Rules do not apply to a non-negotiable receipt marked as such unless it has a paramount clause.

The position in the United States is more complex. The Pomerene Act 1916, s.2 defines a straight bill of lading as "a bill in which it is stated that the goods are consigned or destined to a specific person." On that basis, Professor Tetley concludes that "a straight bill of lading is a waybill strictly defined."[104] It is submitted that it is less certain that the Hague Rules as appended to the Carriage of Goods by Sea Act 1936 will apply even if the waybill contains a paramount clause for the statute has no provision similar to the English s.I(6)(b). The 1936 Act applies only to "every bill of lading or similar document of title" evidencing a contract of carriage to or from American ports in foreign trade. The wording indicates that the document in question must be a document of title - which the waybill is not. Nonetheless, Professor Tetley argues that waybills are subject to the 1936 Act: "It is based on the public order nature of the Hague Rules and the fact that the only exceptions permitted to contracts of carriage by sea under the text of the Rules are non-negotiable receipts issued under special circumstances in virtue of art. VI, and non-negotiable receipts in the coasting trade under certain national laws."[105] On any view, it is clear that the Harter Act 1893 applies to waybills: the enactment refers to any bill of lading "or shipping document."

Waybills are also known as blank back bills: they incorporate the carrier's standard conditions of carriage or bill of lading by reference; these terms are not stated on the back unlike the standard bill of lading.[106] Such incorporation clauses are valid (Thornton v. Shoe Land Parking)[107] but using the analogy of charterparty bills of lading cases, onerous or unexpected terms will or at least should be disallowed.[108] Finally, waybills are acceptable under the UCP (1983 Revision) unless the credit stipulates otherwise: Article 25.

(d) Delivery Orders

Delivery orders are frequently used in the commodity trade and LCL consignments. The raison d'etre of a delivery order has been explained thus by Denning L.J.: "A seller often only has one bill of lading for the whole consignment, and he cannot deliver that one bill of lading to each of the buyers because it contains more goods than that particular contract of sale."[109] There are two main types of delivery orders. There is the type issued by a seller to his buyer enabling the latter or a holder to collect the goods from the seller's agent at the port of discharge. Such a delivery order will not give the buyer or holder a direct right of action against the carrier:

Margarine Union v. Cambay Prince SS.[110] Then there is the ship's delivery order which is issued by the carrier, for the seller who would then transfer it to his buyer, addressed to the master or chief officer instructing delivery to the buyer. A ship's delivery order is legally superior in that it gives the buyer a direct cause of action against the carrier. In The Dona Mari, Kerr J. explained this by analogy to bailment: "Similarly, if a bailee concludes a contract with A on the terms of a warrant or similar document to B, and the bailee recognizes the transfer to B, then the terms of the original contract will come into force between the bailee and B."[111] Nevertheless, a ship's delivery order is not in the same legal mould as a separate bill of lading. It is not a good tender under a true c.i.f. contract; if the contract allows the tender of a ship's delivery order in lieu of a bill of lading, the contract is an "ex ship" or "arrival" contract.[112]

2.7.4 The Mate's Receipt

The mate's receipt is issued by the carrier to the shipper as a receipt of the goods, unless the port's custom dictates otherwise.[113] As soon as it is issued, the carrier holds the goods for the owner who will be the person entitled to a bill of lading. The description of

the goods in the mate's receipt is transferred to the bill of lading when it is issued. Until such time, the goods are held on the terms of the carrier's usual bill of lading: De Clermont v. General Steam Navigation.[114] Ordinarily, the mate's receipt "is not a document of title to the goods shipped. Its transfer does not pass property in the goods, nor is its possession equivalent to possession of the goods," : Nippon Yusen Kaisha v. Ramjiban Serowgee.[115] However, for the carriage of goods as between Sarawak and Singapore, the mate's receipt is by mercantile custom commonly used as a document of title. The custom is judicially recognized, but the wording in the mate's receipt must not be inconsistent: Chan Cheng Kum v. Wah Tat Bank Ltd.[116]

FOOTNOTES

1. See Gilmore & Black, "The Law of Admiralty," (2nd Ed., 1975).

2. (1952) 1 Lloyd's Rep. 183.

3. (1986) 1 Lloyd's Rep.311.

4. Schmitthoff, "Letter of Credit, Bill of Lading Marked 'Received for Shipment' and 'Shipped'," (1986) J.B.L.323, 325.

5. The words "apparent good order and condition" refer to the external condition of the goods or the container in which they are contained. See.

6. The International Chamber of Commerce has published a list of defects which render a bill unclean: "The Problem of Clean Bills of Lading," ICC Brochure 223 (1963). The list is not comprehensive.

7. See Schmitthoff's Export Trade (8th ed., 1986), p.491.

8. T. Roberts & Co. v. Calmar SS. Corp. (1945) A.M.C.375, 384.

9. See 5.3.3.B.

10. (1980) 1 All E.R.301.

11. For a criticism, see Schmitthoff (1979) J.B.L.164.

12. As to liability for freight, see 4.3.

13. (1971) 1 Lloyd's Rep. 439, 446.

14. See 1.4.1.

15. (1866) L.R. I P.C. 219.

16. Ibid, p.229.

17. As in The Patria (1871) 41 L.J.Adm.23, and Leduc v. Ward (1888) 20 Q.B.D.475.

18. (1938) s K.B.147.

19. See ss.2, 3 of the Pomerene Act.

20. See 1.4.1.

21. See 1.4.1.

22. (1929) 145 A. 511.

23. See Payne & Ivamny's Carriage of Gooods by Sea (12th ed., 1985), p.82.

24. See 3.3.4.

25. (1886) 18 Q.B.D.67, 75.

26. (1961) A.M.C.320.

27. Cf. Rederi Aktiebolaget Transatlantic v. Board of Trade (1925) 30 Com. Cas. 117, and Hill SS. Co. v. Hugo Stinnes (1941) S.C.324: where the shipowner signs, and the charterer accepts, a bill of lading binding the latter to pay freight or demurrage, the bill will override a cesser clause in the charter insofar as that obligation is concerned.

28. See The Ardennes, and J. Evans & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd., discussed at 1.2.1.

29. See Chapter seven.

30. See 2.5.5.

31. (1909) P.219.

32. (1895) 2 Q.B.539. Cf. 2.5.3.(a).

33. (1906) II Com. Cas. 115, 125-6, per Walton J.

34. In Guiman v. Pichirilo (1962) A.M.C.1142, 3-4, the Supreme Court of America stated: "To create a demise the owner of the vessel must completely and exclusively relinquish possession, command, and navigation thereof to the demisee." The English criterion is the same. See Baumwoll v. Gilchrest (1892) 1 Q.B.253, 9, approved by the House of Lords (1893) A.C.8.

35. (1866) L.R. 2 Q.B.86.

36. (1980) 1 Lloyd's Rep.393.

37. (1922) 12 Ll.L.Rep.69.

38. (1949) A.M.C.1598.

39. (1985) E.T.L.309. The charterers were not sued.

40. (1941) A.M.C.1744. The charterers were not sued.

41. (1949) A.M.C. 1598.

42. (1967) A.M.C.103.

43. (1974) 1 Lloyd's Re.185.

44. (1951) 1 K.B.55.

45. (1921) 3 K.B.473.

46. (1974) 1 Lloyd's Rep.185.

47. Tetley, "Marine Cargo Claims," (2nd ed., 1978) p.89. See also The Khian Zephyr (1982) 1 Lloyd's Rep. 73.

48. (1975) A.M.C. 1521, 35.

49. (1983) 2 Lloyd's Rep.592, 594.

50. (1971) P.168. Cf. The Merak (1965) P.223.

51. (1864) 17 C.B. (N.S.) 163.

52. (1912) A.C.I.

53. (1978) 1 Lloyd's Rep. 545.

54. (1984) A.C.676. See also Schmitthoff, "Bill of lading holder not liable for demurrage," (1984) J.B.L.352.

55. Ibid, p.685.

56. (1884) 15 Q.B.D.154, 157.

57. (1952) A.M.C. 1931.

58. Ibid, p.1932.

59. 253 F.Supp.396, 398 (S.D.N.Y. 1966).

60. 362 F.Supp.1311 (S.D.N.Y. 1973).

61. (1984) A.C.676.

62. (1976) 1 Lloyd's Rep.8.

63. Scrutton on Charterparties and Bills of Lading (19th ed., 1984), at p.65.

64. 126 F.Supp.569 (S.D.N.Y. 1954).

65. (1975) 1 A.M.C.987.

66. (1871) L.R. 3A.&E.436.

67. (March 12, 1986) Financial Times.

68. (1907) 1 K.B.809.

69. (1909) 15 Comm. Cas.49.

70. (1978) 2 Lloyd's Rep.470, 492.

71. (1960) 2 Lloyd's Rep.340.

72. See Schmitthoff's Export Trade, ibid, p.496.

73. (1957) A.M.C.50.

74. (1912) A.C.130.

75. See Mayhew Foods Ltd. v. Overseas Containers Ltd. (1984) 1 Lloyd's Rep.317.

76. (1912) A.C.130.

77. (1960) A.M.C.2114.

78. See Chapter Seven.

79. Royal Exchange Shipping Co. v. Dixon (1886) 12 A.C.1; St. Johns Corp. v. S.A.C. Geral (1923) A.M.C.1131.

80. (1953) 2 Ll.L.Rep.131.

81. (1969) 2 Lloyd's Rep.536, 542.

82. (1976) 1 W.L.R. 1078, 1082.

83. See Tetley's "Marine Cargo Claims," ibid, p.322.

84. (1974) A.M.C.67.

85. (1985) A.M.C.2284.

86. See 5.3.2.B.

87. (1973) 2 Lloyd's Rep. 428. See also The Brooklyn Maru (1975) 2 Lloyd's Rep. 512.

88. (1970) 1 Lloyd's Rep. 527.

89. See 5.3.2.B.

90. Schmitthoff's Export Trade, ibid, p.532.

91. The letters MISC stand for "Malaysian International Shipping Corporation."

92. Tetley, "Waybills: The Modern Contract of Carriage of Goods by Sea," (1984) J.M.L.C.41, 47, Part II.

93. (1978) 1 Lloyd's Rep.206.

94. See Wei Jia Ju, "UN Multimodal Transport Convention," (1981) 15 J.W.T.L.283.

95. At 2.6.

96. See Schmitthoff's Export Trade, ibid, p.530, n.25. The "Network Liability" clause has been held valid in an American case, Containers Overseas Inc. v. Container Overseas Agency Inc. (1985) AMC 371. Duffy D.J. held that the carrier need not prove that the goods were actually loaded aboard the ship.

97. Goode, "Commercial Law," (1982) at pp.632-633.

98. Scrutton, op. cit., p.383.

99. Schmitthoff's Export Trade, ibid, p.529.

100. (1978) 1 Lloyd's Rep.206, 7.

101. (1949) A.C.293.

102. The letters "FIATA" stand for Federation Internationale des Associations de Transitaires. The FIATA documents in use are described in Schmitthoff's Export Trade, ibid, pp.498-499.

103. See Chapter Seven.

104. Tetley, loc. cit., J.M.L.C. 465, 471, Part 1.

105. Ibid.

106. Schmitthoff's Export Trade, ibid, p.498. See also Williams, "Waybills and Short Form Documents: A Lawyer's View," (1979) 3 L.M.C.L.Q.297 where the implications of such incorporation clauses are discussed in detail.

107. (1971) 2. Q.B.163.

108. See 2.5.3.

109. Colin & Shields v. Weddel (1952) 2 All E.R.337, 343.

110. (1967) 2 Lloyd's Rep. 315.

111. (1973) 2 Lloyd's Rep.366, 372.

112. See Schmitthoff's Export Trade, ibid, pp.49, 500.

113. See Scrutton, loc. cit., p.175.

114. (1891) 7 T.L.R.187.

115. (1938) A.C.429.

116. (1971) 1 Lloyd's Rep.439.

CHAPTER 3 : THE TRILOGY OF INTERNATIONAL RULES - EVOLUTION AND APPLICATION

3.1 THE EVOLUTION

At common law, the carrier was absolutely responsible for the right and safe delivery of the goods unless he could prove that loss or damage was occasioned by an Act of God, the Queen's enemies, inherent vice of the goods, or a general average sacrifice; these exceptions did not exonerate the carrier if he had without lawful excuse deviated from the proper cause of the voyage, or failed to exercise due diligence, or if the ship had been unseaworthy.[1] To mitigate the common law strictness, it became usual practice for a carrier to insert wide-ranging exemption clauses into bills of lading. The situation was particularly distressing to holders of bills of lading, especially indorsees, who had no say in the formulation of the terms of carriage as opposed to the relatively fortunate charterer who invariably was able to scrutinise the terms beforehand and could generally bargain at arm's length. Also, the courts at that time held sacred the concept of freedom of contract.[2]

The United States, which then was a primarily cargo-shipping nation, was the first to legislate on the

unsatisfactory situation. So sprang into existence the Harter Act 1893 which rendered void clauses relieving the carrier from liability for negligence or fault in loading, stowing, care and proper delivery of the goods as well as ensuring the seaworthiness and proper manning of the ship.[3] The right to rely on the exemption clauses under s.3 is conditional on the ship being seaworthy in all respect (The Newport;[4] The Willlowpool)[5]; the fact that there is no causative link between unseaworthiness and the cargo loss or damage is irrelevant.[6] Finally, it may be mentioned that s.5 imposes a fine not exceeding two thousand dollars for any violation of the Act, half of which goes to the injured party; the other half goes to the Government.

Unlike the United States, the United Kingdom, which then possessed the largest merchant fleet in the world, remained passive until 1921 when the Imperial Shipping Committee recommended the introduction of statutory uniformity on bills of lading; the self-governing dominions (Australia, Canada, and New Zealand) had enacted differing versions of the Harter Act.[7] In the meantime, a growing body of nations had perceived the need for instilling uniformity into the law relating to bills of lading to coalesce with the expansive character of international trade.

It was against this backdrop that, through the initiative of the International Law Association, the Hague Rules were formulated in 1921 at the Hague with the intent that they be given statutory effect by the Contracting States. The Rules were thus founded on the underlying concept of the Harter Act - the imposition of statutory regulation over the carrier's duties and rights. They received almost universal assent; even non-Contracting States such as Canada and Finland passed enactments in similar terms.[8] The United Kingdom adopted the Hague Rules by the Carriage of Goods by Sea Act 1924; and the United States by the Carriage of Goods by Sea Act 1936.

By s.1(e) of the 1936 Act, the Harter Act is superseded in foreign trade for shipments covered by bills of lading or similar documents of title "from the time when the goods are loaded on to the time they are discharged from the ship." This means that the Harter Act is still applicable (1) for the period prior to the goods being "loaded on" and the period after they have been "discharged"[9] - provided the carrier has not undertaken under the Hague Rules to extend the duration for which he is responsible for the goods, (2) to the coastal trade - if the bill of lading or similar document of title (if any) does not invoke the Hague Rules, (3) to shipments covered by shipping documents not being bills of lading or similar

documents of title, (4) to shipments of live animals subject to the exceptions of ss.1 and 4, and (5) to carriage on deck (which is not regulated by the Rules).[10] Apart from application, the Hague Rules differ from the Harter Act in four material respects. Under the Rules, (1) there is no prerequisite that a ship be seaworthy in all respects and to have commenced on her voyage for the carrier to plead the statutory exemption clauses; (2) notice of loss or damage must be given promptly; (3) the limits of liability differ; and (4) there is imposed a time bar of one year to induce swift settlement. In other respects the 1936 Act and its precursor are similar to the extent that the difference may be considered merely semantical, or of greater academic interest than of practical importance.

With the passage of time, two sources of dissatisfaction over the Rules emerged. First, there were those who felt the rules badly drafted. Colinvaux in 1954 wrote: "A well-drafted enactment like the Sale of Goods Act 1893 has the effect of crystallizing the law within a few decades; one such as the Carriage of Goods by Sea Act 1924 puts it into confusion indefinitely. Now, nearly thirty years later, every month sees some new and insoluble problem arising under it.[11] Perhaps the situation was somewhat exaggerated, but it much reflected wide-spread

uncertainty over (1) the application of the Rules, (2) the conclusive effect of bills of lading when indorsed, (3) circumvention of the carrier's liability limits by proceedings in tort against his servants or agents - as in Alder v. Dickson;[12] Midland Silicones v. Scruttons;[13] and (4) the limits of liability. Second, a number of cargo-shipping countries felt that the Hague Rules were inclined favourably towards ship interests. But it was not until 1963 that anything concrete emerged. In that year, the Comite Maritime International promulgated in Visby, Sweden, a draft Protocol which, after some alteration, was signed in Brussels in 1968; as in June 1989, the Contracting States were nineteen.[14] The Protocol, commonly known as the Hague-Visby Rules, was adopted in the United Kingdom by the Carriage of Goods by Sea Act 1971; the 1971 Act came into force on June 23, 1977, and repealed the 1924 Act in its entirety. The Hague-Visby Rules retained the basic structure of the Hague Rules, but instituted certain changes. The main changes effected are in the areas of uncertainty and dissatisfaction as listed above.[15]

The Hague-Visby Rules did not assuage the concern of some countries (mainly those with preponderant cargo-shipping interests) that more thorough changes were warranted. In 1970, UNCTAD drew up a detailed study and

invited UNCITRAL to prepare a draft convention. In 1975, UNCITRAL completed its task. In 1976, the United Nations General Assembly convened a conference to discuss UNCITRAL's Draft Convention on the Carriage of Goods by Sea. The Draft Convention, after some alteration, was adopted in Hamburg in 1978, and thus came to be known as the Hamburg Rules. Although seventy eight countries (including the United Kingdom and United States) were represented at the conference, as in June 1989, only eleven nations (excluding the United Kingdom and the United States) had ratified or acceded to the Hamburg Rules.[16] The Hamburg Rules will come into force on the first day of the month following the passage of one year from the date of deposit of the twentieth instrument of ratification. The changes promulgated by the Hamburg Rules are far-reaching. The principal changes (1) attach liability to the contractual and actual carrier severally and jointly, (2) impose responsibilities on the carrier for the whole period that the goods are in his charge, (3) abolish the clause in the Hague and Hague-Visby Rules exempting the carrier from liability for error in the navigation or management of the ship, (4) increase and fix the carrier's liability limits in Special Drawing Rights, (5) introduce the circular indemnity clause,[17] as well as as (6) widen the application of the legal regime to encompass all contracts of carriage of goods by sea[18] (charterparties

excepted) between two different States subject to Article 2(1). The changes reflect anxieties long felt over certain aspects of the Hague and Hague-Visby Rules. If the Hamburg Rules were to come into force, the maritime world would be faced with three international conventions. The obvious question is: are these changes of such necessity as to warrant their introduction at the expense of whatever uniformity that now exists with the two legal regimes in operation? Then there is the question: will the sweeping changes which the Hamburg Rules herald result in unpredicability over their interpretation and implications for commercial quarters? This must be weighed, it is submitted, against the consideration that the Hague and Hague-Visby Rules have been judicially tested for years and their implications, legal or otherwise, are pretty well known to a certain extent. The ultimate question as to whether the Hamburg Rules ought or ought not to be adopted does not admit of an easy answer. No doubt cargo and ship interests, among others, will proffer differing views. Rather than attempt to answer the question in the definitive, it is proposed to discuss and compare the trilogy of Rules on a piecemeal basis. The next part of this chapter will look at the application of the Rules; the following four chapters consider, inter alia, the parties to the contract and their rights, responsibilities, and

liabilities under the Rules. Finally, the eighth chapter considers, inter alia, the Rules and the Warsaw Convention in a comparative perspective.

3.2 APPLICATION

3.2.1 An Outline

The Hague-Visby Rules as appended to the Carriage of Goods by Sea Act 1971 apply to (1) any contract for the carriage of goods by sea where the port of shipment is a port in the United Kingdom: s.1(3). It is to be noted that by Article 1(b), "contract of carriage" means a contract of carriage covered by a bill of lading or similar document of title. It is also to be noted the effect of s.1(3) is to make the Hague-Visby Rules applicable to the coastal trade so long as the carriage is covered by a bill of lading or similar document of title. (2) Any bill of lading which is a document of title if the contract evidenced therein expressly provides that the Hague-Visby Rules shall govern it: s.1(6)(b). Such an express provision is commonly known as paramount clause. (3) Any receipt which is a non-negotiable document (such as the waybill)[19] marked as such if the contract evidenced therein provides that the Rules shall govern it as if it were a bill of lading s.1(6)(b). The words "as if it were a bill of lading" need

not be used; it suffices if the intent of the paramount clause is clear: The Vechscroon.[20] The Singapore Carriage of Goods by Sea Act 1972 which adopts the Hague-Visby Rules has no corresponding provision to s.1(6)(b) with the result that the Singaporean Act's application as to waybills is unclear. There are three other situations in which the Hague-Visby Rules apply. By Article 10, the Hague-Visby Rules apply to every bill of lading (or similar document of title?)[21] relating to the carriage of goods between ports in 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 or legislature of any State giving effect to them are to govern the contract, "whatever may be the nationality of the ship, carrier, shipper, consignee, or any other interested person." The abrogation of the factors in the proviso, which would normally be of assistance in ascertaining the proper law of the contract, leaves no doubt that a paramount clause invoking the Rules overrides any relevance they may have.

The Carriage of Goods by Sea Act 1924 did not have the equivalent of Article 10(a) and (b) of the Hague-Visby Rules - thus excepting situations where the Hague Rules were invoked by a paramount clause in an inward bill, the

Hague rules were not applicable in the United Kingdom to inward shipments. The Hague Rules' Protocol of Signature had a dispensatory provision which allowed Contracting States to decide whether the Rules were to be applicable to their coasting trade subject to compliance with Article 6, albeit without the restriction of "particular goods" and the proviso to the Article's second paragraph.[22] The United Kingdom took up the option by s.4 of the 1924 Act. The United States adopted a different approach. There the Rules do not apply to the coasting trade unless the bill of lading or similar document of title contains a paramount clause; more significantly, the Hague Rules there apply to both outward and inward shipments in foreign trade covered by a bill of lading or similar document of title: s.13, Carriage of Goods by Sea Act 1936. Insofar as the coasting trade is concerned, the Hague-Visby Rules are silent. Contracting States were thus left free to decide on the applicability of the Rules to their coasting trade. As mentioned earlier, s.1(3) of the 1971 Act renders the Rules applicable to the coasting trade; Singapore's Carriage of Goods by Sea Act 1972, by s.6, follows s.4 of the United Kingdom Act of 1924 for its coasting trade and trade with Malaysia as well as for carriage by sailing ships. In regard to non-negotiable receipts, the 1924 Act and its American counterpart do not apply. Apart from the Harter Act, the United Kingdom Act of 1971 appears to be the only

enactment expressly applicable to non-negotiable receipts - subject to s.1(6)(b). This is most unfortunate considering the proliferation of waybills in use.

The Hamburg Rules are broad in their application. By Article 2(1), they apply to "all contracts of carriage by sea between two different States if: (a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or (b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or (c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or (d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or (e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract." Article 2(2) provides: "The provisions of this Convention are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person." By Article 1(6), "contract of carriage by sea" means "any contract whereby the carrier undertakes against payment of freight to carry

goods by sea from one port to another; however, a contract which involves carriage by sea and also by some other means is deemed to be a contract of carriage by sea for the purpose of this Convention only in so far as it relates to the carriage by sea."

Three aspects call for comment here. In the contractual sense, the Hamburg Rules are intended to cover the broadest scope possible - only charterparties are excluded: Article 2(3). There is no need for the document to be a bill of lading, similar document of title, or a non-negotiable receipt. Indeed, there is no need for the contract to be in documentary form. Secondly, the Hamburg Rules obliterate the distinction between inward and outward shipments. Thirdly, the words "between two different States" indicate that the Hamburg Rules do not apply to the coastal trade. It will now be convenient to consider certain specific aspects of the application of the Rules which require especial consideration.

3.2.2 Legislative Techniques

As to the regulatory force of the Hague Rules, the 1924 Act relied on a clause paramount being inserted in the bill of lading or similar document of title: s.3. So too the American Act of 1936: s.13. The intent was obviously

to ensure that claims at the termini regarding shipments originating from their ports would be adjudicated according to the Hague Rules. But what if a paramount clause was not inserted? Could the intent then be defeated?

In The Torni,[23] the voyage was from Jaffa to Hull. The bills of lading did not contain a paramount clause as required by the Palestine Carriage of Goods by Sea Ordinance 1926, but stated that they were "to be construed in accordance with English law." Three other facts have to be mentioned. The bills of lading contained exemption clauses not permitted under the Rules. The Palestine Ordinance 1926, s.4, stated that every bill of lading issued in Palestine had to contain a paramount clause, and the Rules would be deemed to have effect notwithstanding the absence of the clause. The Hague Rules as appended to the 1924 Act did not apply to inward shipments, though they could on their own provided this was so stipulated. Scrutton L.J. held that the provision that the bills should be construed according to English law did not exclude the Hague Rules, but merely meant that the bills with the Rules incorporated should be construed in accordance with English law. Slesser L.J. opined that the omission to insert a paramount clause could be a common law misdemeanour.

The dicta were disapproved, though not overruled, by the Privy Council in Vita Food Products v. Unus Shipping.[24] As to the insertion of a paramount clause, the Privy Council was of the opinion that it was "directory" but not "obligatory" under the 1924 Act. In Ocean Steamship Co. v. Queensland State Wheat Board,[25] the voyage was from Brisbane to Liverpool. Clause 1 of the bill of lading invoked the Australian Sea Carriage of Goods Act 1924 as the regulatory force of the contract and provided that anything inconsistent with the statute would be void. Clause 16 however specified English law as the proper law of the contract. Though the English Court of Appeal held that Clause 1 prevailed over Clause 16, it hinted that but for Clause 1 the contract would have been governed by English law. This prompted Dr. Morris in a distribe to say: "Since the United Kingdom Act only applied to outward shipments from the United Kingdom, this means that a shipment from a country like Australia which had adopted the Rules to another country like the United Kingdom which had also adopted the Rules could escape the Rules."[26] Likewise, Professor Knauth wrote: "The simplest method of evasion seems to be to refrain from mentioning the Carriage of Goods by Sea Act in force at the port of loading. It can then be argued in the courts at the port of destination ... that the bill of lading shall be given effect according to its expressed

provisions."[27] It may be added that the courts deciding the two cases above-mentioned were not situated in the ports of loading. Had it been so, the courts would surely have qualified their judgments with the caveat that a bill of lading's choice of law clause cannot take precedence over the regulatory force of the Rules in the absence of a clause paramount where the Rules are derogated from. Interestingly, in America, the 1936 Act applies mandatorily to both inward and outward bills whether or not a clause paramount is embodied therein and whether or not the Rules are being derogated from: Shackman v. Cunard White Star;[28] Indussa Corp. v. Ranborg.[29]

The 1971 Act adopts a different legislative approach from that of the 1924 Act. S.1(2) of the present enactment states: "The provisions of the Rules, as set out in the Schedule to this Act, shall have the force of law." On its meaning, Lord Denning in The Morviken stated:[30] "In my opinion it means that, in all courts of the United Kingdom, the provisions of the Rules are to be given coercive force of law. So much so that, in every case properly brought before the courts of the United Kingdom, the Rules are to be given supremacy over every other provision of the bill of lading. If there is anything elsewhere in the bill of lading which is inconsistent with the Rules or which derogates from the effect of them, it is to be rejected.

There is to be no contracting-out of the Rules. Notwithstanding any clause in the bill of lading to the contrary, the provisions of the Rules are to be paramount. A parallel is to be found in Community law." Read in conjunction with changes effected by Article 10 (rendering the Rules applicable where, inter alia, the bill of lading is issued in or the carriage is from a Contracting State), it clearly emerges that cases like the Vita Food case[31] and Ocean Steamship Co. v. Queensland State Wheat Board[32] would today be considered differently. Lord Denning further stated that freedom of contract was subject to a "higher public policy" which demanded that all goods carried by sea should be subject to uniform rules governing the rights and liabilities of the parties, and that the rules ought not to vary according to the particular country or place in which the dispute is tried. It is important to note that the House of Lords stressed that a choice of law clause which does not derogate (that is, lessen the carrier's responsibilities and liabilities) from the Rules may be valid.[33]

By way of comment, Lord Denning's judgment accords with the spirit of the Rules, and in it a reformatory side of the 1971 Act is reflected. The shortcoming of the present enactment is that under it a paramount clause need not be inserted. If no paramount clause is inserted and a

claim is made at a port of discharge where the Hague-Visby Rules have not been enacted, it may be that a claim which ought to have been subjected to the 1971 Act escapes its application. The obvious solution is to render the paramount clause mandatory so that non-compliance would then at least be tantamount to a misdemeanour. Under s.5 of Singapore's Carriage of Goods by Sea Act 1972, the insertion of a paramount clause is mandatory. This legislative technique works well enough (given that it is complied with) where the law of the port of discharge is inapplicable to inward shipments - which is almost invariably the case. Its fallibility is exposed where the shipment is to a Hague Rules Contracting State (such as the United States and Belgium) which applies its domestic legislation to inward shipments, and suit is commenced there. Incidentally, the Singaporean statute has no corresponding provision to the English s.1(2); but is doubted that in a case subject to the Hague-Visby Rules, a local court will allow a carrier to evade the rules simply by his omission of the paramount clause. Otherwise s.5 would be pointless.[34] Quaere: whether or not the fact that the 1971 Act does not apply to inward shipments except under the conditions spelt out by Article 10 constitutes a deficiency; compare the American approach in the Carriage of Goods by Sea Act 1936 and the Harter Act. There is much to be said for the question: if the Rules apply to

shipments from the United Kingdom, why should they not apply to shipments to the United Kingdom except under Article 10? However, it ought also to be considered whether a country that has adopted the Hague-Visby Rules should impose its will on those who have not? The predicament would be obliterated[35] if the world had a uniform legal regime - but this prospect, the genesis of which was discernible in the Hague Rules, is now unlikely to be realized.

The potential for conflict of law problems arising from the Hamburg Rules will very much depend on three factors, viz, the number of Contracting States, the legislative technique employed, and the form in which they are adopted. The last-named is particularly interesting because the Hamburg Rules, by Article 29,prohibit any reservation, and, by Article 30(3), require each Contracting State to apply the Rules as they stand. In this connection, Article 23(3) is of importance. It states: "Where a bill of lading or any other document evidencing the contract of carriage by sea is issued, it must contain a statement that the carriage is subject to the provisions of this Convention ...." In brief, a Contracting State would be obliged to make the paramount clause compulsory under its adopting legislation. If

enacted by a large number of Contracting States, the Hamburg Rules will introduce a certain measure of uniformity - compare the situation under the Hague Rules in regard to the coasting trade and application, as well as the United Kingdom and Singaporean Hague-Visby Rules legislation. But three problems can still arise. Firstly, the courts of the Contracting States may interpret the Hamburg Rules differently; Article 3 merely states that "regard shall be had to (the Convention's) international character and to the need to promote uniformity." By contrast, Article 31(3) of the Convention on the Contract for the International Carriage of Goods by Road, adopted in the United Kingdom by the Carriage of Goods by Road Act 1965, reads: "When a judgment entered by a court or tribunal of a contracting country ... has become enforceable in that country, it shall also become enforceable in each of the other contracting States, as soon as the formalities required in the country concerned have been complied with." Second, there is nothing to prevent non-Contracting States from adopting the Rules in an amended or modified form. Third, there is nothing to prevent non-Contracting States from applying their domestic legislation to inward shipments.

3.3.3 Duration of Application

The duration for which the Hague and Hague-Visby Rules apply is defined by Article 1(e). It "covers the period from the time when the goods are loaded on to the time when they are discharged from the ship". By Article 4(1) of the Hamburg Rules, "the responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge". Since the duration of application refers to the services for which the carrier is principally responsible, it may be as well to discuss the topic in the fifth chapter. For the moment, it suffices to mention that the carrier can extend his responsibilities and obligations beyond the period for which the Rules apply: Article 5, Hague and Hague-Visby Rules; Article 23(2), Hamburg Rules.

3.3.4 Charterparties and Bills of Lading Issued Thereunder

The trilogy of international rules are not intended to apply to charterparties. Article 5 of the Hague and Hague-Visby Rules states: "The provisions of these Rules shall not be applicable to charterparties ...." Article 2(3) of the Hamburg Rules reads: "The provisions of this Convention are not applicable to charterparties." This is

because the parties to a charterparty are presumed to be able to bargain at arm's length. It not infrequently happens that the parties seek to invoke the Hague or Hague-Visby Rules by a paramount clause in the charterparty, an act from which difficulties in interpretation can arise. Whether or not the Rules in their entirety,or as appended to a particular enactment, or in part, apply to the charterparty depends principally on the language of the paramount clause and on the construction of the charterparty as a whole.

The paramount clause itself must be clear. Borrowing words from the Rules to stipulate that the owner "shall exercise due diligence," and a statement that the owner shall have all "privileges, rights, and immunities as are contained in ss.3(6), 4, and 11 of the (United States) Carriage of Goods by Sea Act" have been held by the United States Court of Appeal to be insufficient to incorporate the whole of the Act.[36] However, a false description will not render ineffective the paramount clause if its true intent is clearly discernible. In Anglo-Saxon Petroleum Co. Ltd. v. Adamastos Shipping Co. Ltd.,[37] the paramount clause in the charterparty read: "This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United Kingdom ... which shall be deemed to be incorporated herein .... If

any term of this bill of lading be repugnant to (the) said Act to any extent such term shall be void to that extent, but no further." The House of Lords approved of Devlin J.'s decision that the principle "falsa demonstratio non nocet" applied and the paramount clause should be corrected to read "this charterparty" instead of "this bill of lading." Article 5, it was held, was to be struck off as "insensible".

It should be mentioned that the Court of Appeal was of the opinion that even if the paramount clause could be corrected to read "this charterparty" and even if Article 5 could be ignored, there were too many contradictions, inconsistencies and incongruities as to make it impossible to apply the Act. Although overruled, the Court of Appeal's decision serves to illustrate the obsfucation which may arise by imprecision in the drafting of the paramount clause and the unsuitability of the Rules to charterparties. Indeed, the House of Lords were divided as to whether the Act applied to the non-cargo carrying voyages under the charterparty. Viscount Simonds with Lords Keith and Somervell thought it did; Lords Morton and Reid thought otherwise. What of s.1(2) of the 1971 Act which gives the Hague-Visby Rules the force of law? Is that provision to be read literally so that Article 5, by force of law, means that the Rules as appended to the Act

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are inapplicable to charterparties? In any case, it is evident that charterparties do not fall within the regulatory ambit of the Act *ex proprio vigore*.

We turn now to consider the position of bills of lading under charterparties. After stating that the Hague and Hague-Visby Rules are not applicable to charterparties., Article 5 of the respective Rules goes on to state "But if bills of lading are issued in the case of a charterparty they shall comply with the terms of the Rules." The provision, if read in isolation, is capable of giving rise to obsfucation: where the shipper is the charterer, the question arises as to whether the bill of lading issued under a charterparty is subject to the Rules for as between him and the owner it is the charterparty which is the operative document whereas the bill is a mere receipt unless the documents indicate otherwise.[38] Article 1(b) provides the elucidation. By Article 1(b), a contract of carriage subject to the Rules includes any bill of lading or similar document of title issued under a charterparty from the moment at which such document regulates the relations between a carrier and a holder of the same." The words "or similar document of title" indicate that the bill of lading must itself be a document of title. There is also the requirement that the bill of lading regulates the relations between the carrier and its

holder. The pointers make it clear that a bill of lading issued under a charterparty is subject to the rules only when the shipper is not himself the charterer or when if he is, the bill of lading is indorsed to a third party. However, the words "from the moment at which such document regulates" cause more difficulty. Insofar as a third party transferee is concerned, they may be interpreted in one of two ways. First, the Rules may be taken to apply from the moment at which the bill is transferred. Alternatively, the transferee "acquires the right to claim for breaches of that contract before as well as after, the transfer of the bill, and the provisions of the bill must be considered to relate back and apply to what has been done in regard to the shipment, even before it was originally issued."[39] The Hamburg Rules adopt the latter, the wider interpretation. After stating that the Hamburg Rules are not applicable to charterparties, Article 2(3) continues: "However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer." This provisions avoids the ambiguity in Article 5 of the Hague and Hague-Visby Rules.

3.3.5 Voyages Involving Transhipment[40]

It was held in Mayhew Foods Ltd. v. Overseas Containers Ltd. that once the Hague-Visby Rules apply by reason of an outward voyage from a United Kingdom port, they continue to apply until discharge at the contractual terminus notwithstanding that the port of transhipment is a foreign port; Bingham J. stated: "My conclusion is that the rules, having applied on shipment at Shoreham, remained continuously in force (through Le Havre) until discharge at Jeddah (the contractual terminus)."[41] This interpretation of s.1(3) of the 1971 Act ("the carriage of goods by sea in ships where the port of shipment is a port in the United Kingdom") is obviously equally applicable to s.1 of the 1924 Act ("the carriage of goods by sea in ships carrying goods from any port in Great Britain").

The decision in Mayhew Foods must be distinguished from instances where the shipper/consignee has been told that there will be transhipment, and a separate bill of lading is issued at the port of transhipment so that there are two contractual voyages: Captain v. Far Eastern SS. Co.[42] The result can be startlingly different. Thus, if goods are agreed to be shipped from the United Kingdom to Japan through Malaysia as the port of transhipment and a separate bill of lading invoking the Hague Rules is issued

in Malaysia to cover the voyage from Malaysia to Japan, the Hague Rules, rather than the Hague-Visby Rules, would govern the second leg of the voyage. The Hague-Visby Rules would of course apply to the first leg of the voyage. The Hamburg Rules are more stringent; by Article 5(1), the carrier is responsible for the whole duration that the goods are in his charge. This is different from the situation under the Hague and Hague-Visby Rules where the carrier normally fulfils his obligations upon discharging the goods from the ship.[43]

3.3.6 Article 6 of the Hague and Hague-Visby Rules

In brief, Article 6 of the Hague and Hague-Visby Rules states that the Rules do not apply to extraordinary shipments where no bill of lading has been issued, and the terms of the contract of carriage are embodied in a non-negotiable receipt marked as such. The obvious question is: what constitutes an extraordinary shipment? According to Article 6, an extraordinary shipment is one of "particular goods," not being an "ordinary commercial shipment made in the ordinary course of trade ... (but one) 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." But what are

"particular goods"? It is suggested in Scrutton's that particular goods are goods the character or condition of which reasonably justifies a special agreement not subject to the Rules.[44] However, it may be that the characteristics of the goods as described in the provision refer not to "particular goods," but to the alternative condition under which a special agreement is reasonably justified - in which case the meaning of "particular goods" remains shrouded in obscurity. The words "circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement," according to Professor Ivamy, mean a situation where "the parties agree that the carrier shall perform, in relation to (the particular) goods, some service apart altogether from his usual duties as a carrier."[45] This, it is thought, provides the correct interpretation but what such a service is remains subject to conjecture. Dr. Mankabady ventures that Article 6 is nowadays "widely used for goods carried by Ro-Ro to avoid the application of the Hague Rules."[46] It is doubtful if such a ploy can be successful. The loading and discharge of goods by roll-on/roll-off vehicles can scarcely be considered a service which a carrier provides apart altogether from his usual duties such as to reasonably justify a special agreement not subject to the Rules. Indeed, the loading and discharge of goods (whether it be by Ro-Ro or by crane

or any other means) is part of the carrier's obligations under the Rules. It would be different if the shipper or consignee chose to involve himself in these operations. The Hamburg Rules do not have a provision parallel to Article 6; it is a change to be welcomed.

3.3.7 Live Animals and Deck Cargo[47]

"Goods" as defined by Article 1(c) of the Hague Rules includes everything except "live animals and cargo which by contract of carriage is stated as being carried on deck and is so carried." The same definition is retained in the Hague-Visby Rules but in s.1(7) of the 1971 Act, an important change is effected. It provides that where a paramount clause is inserted in a bill of lading or non-negotiable receipt marked as such, the rules "shall have effect as if Article 1(c) did not exclude deck cargo and live animals."

"Goods" as defined by Article 1(5) of the Hamburg Rules includes live animals. Article 5(5) exonerates the carrier for "loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage." It goes on to state that if special instructions have been given to the carrier, he need only prove compliance for a presumption to arise that the loss, damage or delay in

delivery was caused by special risks inherent in that kind of carriage. By way of comment, Article 5(5) takes into account the vulnerability of live animals in sea carriage and difficulties in ascertaining the cause of death. In that respect, the Hamburg Rules represent a stride forward, considering that the Hague Rules totally exclude live animals from their regulatory ambit while, in relation to the Hague-Visby Rules, s.1(7) fails to give the carrier protection corresponding to the risks inherent in the carriage of live animals. Finally, the Hamburg Rules apply to deck carriage; deck carriage is prohibited except where it is agreed upon by the shipper, or in accordance with trade usage, or required by statutory rules or regulations: Article 9(1).

FOOTNOTES

1. Carver, "Carriage by Sea," (13th ed., 1982) p.20.

2. See Schmitthoff, "Commercial Law in a Changing Economic Climate," (2nd ed., 1981) p.9. See also J. Adams, "The Carrier in Legal History" in "Law Litigants and the Legal Profession" ed. by Ives and Manchester (1983).

3. The changes effected by the Carriage of Goods by Sea Act 1936 are noted in 3.1.

4. (1925) A.M.C. 1193.

5. (1935) A.M.C. 1292.

6. See 5.5.6.

7. None of these countries have ratified the Hague or Hague-Visby Rules Conventions, but all three have since adopted the Hague Rules by domestic legislation: Australia by the Sea Carriage of Goods Act 1924, Canada by the Carriage of Goods by Water

Act 1936, and New Zealand by the Sea Carriage of Goods Act 1940 (amended by the Sea Carriage of Goods Amendemnt Act 1968).

8. In relation to uniformity, see 3.2.2.

9. As to meaning of "loaded on" and "discharged," see Chapter Five.

10. See 3.3.7. as to the application of the Rules to live animals and deck cargo.

11. Colinvaux, "The Carriage of Goods by Sea Act 1924," (1954).

12. (1954) 2 Lloyd's Rep. 267. See Chapter Seven.

13. (1962) A.C.446. See Chapter Seven.

14. See Schmitthoff's Export Trade (8th ed., 1986), pp.483-4. The United Kingdom (which extended the application of the Protocal to Bermuda, British Antartic Territory, British Virgin Islands, Cayman Islands, Falkland Islands, Falkland Islands Dependencies, Gibraltar, Hong Kong, Montserrat, The Isle of Man, and Turks and Caicos Islands), Belgium,

Denmark, Ecuador, Egypt, Finland, France, German Democratic Republic, Lebanon, The Netherlands, Norway, Poland, Singapore, Spain, Sri Lanka, Sweden, Switzerland, Syria and Tonga.

15. The application of the Rules is discussed in the present chapter; the "stevedore" cases and limits of liability are discussed in the Sixth and Seventh Chapters; the conclusive effect of bills of lading when transferred/indorsed was partially treated in Chapter One and will be further considered in Chapter Five.

16. Schmitthoff's Export Trade, op. cit., p. 484.

17. Seminally, see 2.7.2.

18. See 3.2.1.

19. Waybills are discussed in 2.7.3(c).

20. (1982) 1 Lloyd's Rep. 301, at p. 304.

21. The words "or similar document of title" do not appear in Article 10. Presumably, they are to be treated as if they exist therein. Article 2

provides that every contract of carriage of goods by sea shall be subject to the provisions of the Rules. Article 1(b) defines a "contract of carriage" as one "covered by a bill of lading or similar document of title ...." See Scrutton on Charterparties and Bills of Lading (19th ed., 1984), p. 415.

22. Article 6 is discussed in 3.3.6.

23. (1932) All E.R. Rep. 374.

24. (1939) A.C. 277.

25. (1941) 1 K.B. 402.

26. Morris, "The Scope of the Carriage of Goods by Sea Act 1971," Vol. 95 (1979) L.Q.R.59, at p.62.

27. Knauth, "The American Law of Ocean Bills of Lading," (4th. ed., 1953) p. 161.

28. (1940) A.M.C. 971.

29. (1967) A.M.C. 589.

30. (1982) 2 W.L.R. 556, 558.

31. (1939) A.C. 277.

32. (1941) 1 K.B. 402.

33. (1983) A.C. 565; See also The Benurty (The Times, June 16, 1984) discussed in Chapter Six.

34. See the American case of Shackman v. Cunard White Star (1940) A.M.C. 971, where the clause paramount was omitted.

35. But there will remain the possibility that the courts of different nations will make decisions at variance.

36. The Marine Sulphur Queen (1973) 1 Lloyd's Rep. 88.

37. (1958) 1 Lloyd's Rep. 73. More recent cases are: Seven Seas Transportation Ltd. v. Pacifico Union Marina Corp. (1984) 1 Lloyd's Rep. 588., and Nea Agrex v. Baltic Shipping Co. (1976) 2 Lloyd's Rep. 47.

38. See 1.2.3.

39. Carver, op. cit., p. 349.

40. In relation to through bills of lading, see 2.6.

41. (1984) 1 Lloyd's Rep. 317, 320.

42. (1979) 1 Lloyd's Rep. 595.

43. See Chapter Five.

44. Scrutton, op. cit., p. 461.

45. Payne & Ivamy's Carriage of Goods by Sea (12th ed., 1985), p. 93.

46. Mankabady in "The Hamburg Rules on the Carriage of Goods by Sea," (1978, ed. Mankabady) p. 45.

47. In relation to containerisation, deck cargo is considered in 2.7.1(a).

CHAPTER 4 : THE SHIPPER AND CONSIGNEE'S REPONSIBILITIES

4.1 THE SHIPPER'S RESPONSIBILITIES[1]

4.1.1 As to the Accuracy of Information Germane to the Cargo

Article 3(5) of the Hague and Hague-Visby Rules reads: "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 shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper." Article 17(1) of the Hamburg Rules is to the same effect.

It is obvious that the Articles do not render the shipper directly accountable to the consignee for any loss or damage arising from information inaccurately supplied. The reasons are, it is thought, two. First, the carrier, being in charge of the venture, is almost invariably in the best position to account for any discrepancy between the goods received and the information as recorded in the cargo

transport document - through the ship's manifest, stow plan, etc. To take the argument further, there is no guarantee that the carrier or his agents will not pilfer the goods once loaded. Second, the carrier has the right not to record the information supplied by the shipper if he has reasonable grounds for suspecting it to be inaccurate or if he has no reasonable means of verification: Article 3(3), Hague, Hague-Visby Rules; Article 16(1), Hamburg Rules. The cargo claimant may of course elect to sue the shipper rather than the carrier, but this may not be practical.[2]

Difficulties arise when the supplier of information is not himself the shipper. In Atlantic Overseas Corporation v. Feder,[3] the carrier having been fined for an underdeclaration of the weight of the cargo sought to be indemnified by the freight forwarder who furnished the information as well as the shipper who had done the weighing. The Southern District Court of New York stated:[4] "Since both COGSA and the contract of carriage set forth in the bill of lading speak only in terms of the responsibilities and liabilities of the "shipper" it appears that if AOC is entitled to indemnity _ _ _, it is limited by "the express language of these provisions to recovery from defendant PITC (the shipper)." The court rejected the carrier's contention that the freight

forwarder was liable in tort:[5] "Although AOC also seeks to recover indemnity from P & G (the freight forwarder) on the alternative theory of negligence, it is readily apparent that this theory is likewise unavailing here. Under principles of negligence law, AOC would have to establish that P & G owed a duty to AOC to provide shipping documents which accurately stated the particulars as to the weight of the cargo. While P & G may have owed such a duty to PITC based on the agency relationship between them, it is clear that P & G owed no such duty to AOC."

Three aspects of the case call for comment here. First, the shipper's responsibility to the carrier is personal and non-delegable in regard to information germane to the cargo. This is consistent with the language of the Hague Rules which provide that the shipper shall be deemed to have guaranteed the accuracy of the information "as furnished by him." Second, although the term "shipper" was not defined, it obviously could not have meant any person other than the person for whom or in whose account the contract of carriage was concluded with the carrier.[6] The definition under the Hamburg Rules, although couched in quite different language, is in effect no different. Article 1(3) states that a shipper is "any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with the carrier, or any

person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier __ _ _." Although it is arguable that the words "by whom" mean simply any person who makes a contract of carriage of goods by sea with a carrier, it is submitted that, on a proper construction, the words "by whom" have to be considered with agency principles in mind. Thus, if a freight forwarder contracts as an agent, he will not be considered the shipper; if he contracts as principal, as he would in an LCL shipment,[7] he will be considered the shipper. Third, if the freight forwarder was to be liable at all to the carrier, he could only be liable in tort. But in order for him to be so liable, it had to be established that he owned a duty of care to the carrier. The court did not elaborate on the criterion but the judgment indicates that sufficient proximity of relationship is crucial, which is in line with English authorities.[8]

4.1.2 As to Dangerous Cargo

Article 4(6) of the Hague and Hague-Visby Rules states: "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 disclosure 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 dealt with)."[9] The Hamburg Rules differ in three respects. By Article 13, the shipper has a duty to "mark or label in a suitable manner dangerous goods as dangerous," and to inform the carrier of the dangerous character and, if necessary, of the precautions to be taken. By Article 15(1)(a), the bill of lading must contain "an express statement, if applicable, as to the dangerous character of the goods _ _ _."

The trilogy of Rules provide no definition of dangerous goods, but it seems that any goods capable of causing loss or damage may be treated as dangerous goods. Thus in a recent American case, Drummond Coal Co. V. Interocean Shipping Co.,[10] it was held that the master exercised his discretion reasonably in refusing to sail with a cargo of coal the temperature of which had exceeded the limit estabished by the International Maritime Dangerous Goods Code (IMDGC);[11] it did not matter that the cargo may in fact have been suitable for carriage - "The Master's decision is not to be judged with hindsight."[12] Mustill J. has suggested that there are at

least ten categories of dangerous cargo - including "cargo which is not dangerous in itself but which can become dangerous if brought into proximity to other cargoes," and "cargo whose characteristics expose other participants in the adventure to the risk of seizure, delay or expense."[13] Professor Tetley puts it differently:[14] "It has been held that when cargo which is defective, although not dangerous, causes damage, then the shipper is responsible. In S.W. Sugar & Molasses Co. v. E. J. Nicholson[15] defective molasses contaminated other molasses, and the carrier was liable as a result to the consignee. The shipper of the defective cargo was, in turn, held to owe the carrier an indemnity imposed by the general maritime law and also implied by COGSA."

The two views are similar but Scrutton argues that "dangerous" under the Rules "probably means physically dangerous, and does not extend to those (common law) cases where the ship suffers loss owing to legal obstacles to the carriage or discharge of goods".[16a] That view is probably based on an ejusdem generis interpretation of the words "inflammable" and "explosive". It is respectfully submitted that the distinction between physical and legal dangers is somewhat artificial. The overriding question must be whether the goods are capable of causing loss or

damage. If so, it can scarcely matter whether the cargo is physically dangerous (such as nitroglycerine) or legally dangerous (such as contraband).

4.1.2.1 Disclosure and Knowledge

The Hague and Hague-Visby Rules do not specify the mode of disclosure by the shipper. Presumably, a verbal notification would suffice. As mentioned earlier, under the Hamburg Rules, the shipper must mark and label in a suitable manner dangerous goods as dangerous; in addition, he must inform the carrier, if necessary, of the precautions to be taken. The bill of lading must state expressly, if applicable, that the goods are dangerous. In the United Kingdom, independent of the Hague-Visby Rules, the Merchant Shipping Act 1894, s.446(1), requires written notice. By s.446(2), non-compliance renders the shipper liable to a fine not exceeding one thousand pounds unless he happens to be an agent in the shipment and was "not aware, and did not suspect and had no reason to suspect that the goods shipped by him were of a dangerous nature."

If the dangerous nature of the goods is not disclosed, the question arises as to the degree of knowledge required of the carrier. This question is of particular importance in relation to the carrier's

responsibiity as to the care of the cargo. Once the carrier knows that dangerous goods are shipped, he must, in the words of the American Court of Appeal in The Poleric,[16] "exercise due care in their handling including such methods as their nature require".

The common law position is as stated in Acatos v. Burns[17] where a cargo of maize sprouted so that further transportation was impossible. One of the questions in the action was whether the shipper had warranted that the maize was fit for carriage; the Court of Appeal held that when a carrier has full opportunity to examine the goods shipped, there is no such warranty on the part of the shipper. In Atlantic Oil Carriers v. British Petroleum,[18] it was held that the rule will not apply where the cargo has some latent dangerous characteristics which a carrier of that type of cargo could not foresee or safeguard against. The words used in the Hague and Hague-Visby Rules, "the carrier __ __ _ has not consented with knowledge of their nature and character," do not alter the common law rule whereby constructive knowledge suffices. In a Hague Rules case, Westchester Fire Insurance Co. v. Buffalo Househousewrecking, the court held: "There is an implied warranty by the shipper that the goods are fit for carriage in the ordinary way and are not dangerous. The rule, however, does not apply where the shipowner knows, or ought

to have known, the dangerous character of such goods."[19] It is thought that the position is the same under the Hamburg Rules; part of Article 13(2) reads: "If the shipper fails to (inform the carrier of the dangerous nature of the goods) and (the carrier) does not otherwise have knowledge of their dangerous character _ _ _." The words imply that constructive knowledge suffices.

What if the shipper and carrier did not know and could not have been aware of the dangerous nature of the cargo? In a common law case, Brass v. Maitland, Lord Campbell, with whom Wightman J. agreed, state: "It seems much more just and expedient that although (the shippers) were ignorant of the dangerous quantity of the goods _ _ _ the loss occasioned by the dangerous goods _ _ _ should be cast upon the shippers than upon the shipowners."[20] Crompton J. dissented: "_ _ _ I cannot agree _ _ _ that there is an absolute engagement on the part of the shipper that the goods are safe and fit to be carried on the voyage."[21] The majority view was subsequently preferred by the Court of Appeal in Bamfield v. Goole.[22] By Article 4(2)(q) of the Hague and Hague-Visby Rules and Article 5(1) of the Hamburg Rules, the carrier is exonerated from liability if he proves that the loss or damage was not caused by his fault or neglect. What if the shipper is sued? By Article 4(3) of the Hague and

Hague-Visby Rules, and Article 12 of the Hamburg Rules, the shipper is not liable without fault or neglect on his part for loss or damage sustained by the carrier. The absence of reference to the consignee suggests that the shipper may be answerable to the consignee notwithstanding that he could not reasonably have known of the cargo's dangerous nature.

4.2 THE CONSIGNEE'S RESPONSIBILITY AS TO THE COLLECTION OF CARGO

The corollary to the consignee's right to receive the cargo is the obligation to collect it. The consignee may only abandon the cargo if it has deteriorated to the extent that it is devoid of its commercial characteristics. In The Massassoit,[22] the plaintiff was guaranteed by the charterer that his cargo of creosote would be kept at a regulated temperature. This was not done, and the creosote arrived with a heavy deposit of crystals at the bottom of the tanks. The plaintiff abandoned the cargo and was held entitled to do so. Rellstab D. J. said: "The sediment in question was not oil and was not pumpable. While it contained sediment, it was commercially worthless."[23] In Compania Naviera Puerto Madin S. A. v. Esso Co.,[24] a cargo of oil was contaminated with salt water. It was held that the

consignee was entitled to reject the cargo. A distinction must be drawn between goods which have lost their commercial characteristics and goods which have merely diminished in value: Dakin v. Oxley.[25]

Where the goods are imported into the United Kingdom, the carrier is entitled to unship the goods if the consignee fails to make entry at the custom house or having made entry fails to take delivery within the contractual period; if no time limit is specified, the goods may be landed at any time after the expiration of seventy two hours, exclusive of a Sunday or holiday, from the time of the report of the ship at the custom house: s.493(1), Merchant Shipping Act 1894. If the carrier elects to exercise his statutory right, he must place the goods at a wharf or warehouse named in the contract or, in any other case, at a wharf or warehouse in which goods of a like nature are usually placed: s.493(2). These statutory provisions may be varied by contract or by the custom of the port of discharge: Red "R" SS. Co. v. Allatini.[26] To pre-empt the possibility of the consignee abandoning the goods, most bills of lading have some such clause as the following: "If delivery is not taken (according to the terms of the bill of lading), the consignee, the owner of the goods and the holder of the bill of lading shall be jointly and severally liable to pay the carrier, by way of

liquidated damages, a sum calculated at _ _ _ for each day or part of a day during which there is delay in taking delivery _ _ _ expenses incurred by the carrier during the period of delay in the reception of any goods shall be due and payable on demand by the consignee, etc."[27]

4.3 FREIGHT[28]

4.3.1 Generally

In Hunter v. Prinsep, Lord Ellenborough explained the law relating to the payment of freight: "The shipowners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas or other unavoidable casualties; and the freighter undertakes that if the goods be delivered at the place of destination, he will pay the stipulated freight but it (is) only in that event, viz, of their delivery at the place of destination, that he, the freighter, engages to pay anything. If the ship be disabled from completing her voyage, the shipowner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they are not so forwarded, unless the forwarding of them be dispensed with, or unless there be some new bargain upon

this subject. If the shipowner will not forward them, the freighter is entitled to them without paying anything."[29]

4.3.2 When Payable

For freight to be payable, the goods need not actually be delivered but must be ready to be delivered in a condition not devoid of their commercial characteristics. In Asfar & Co. v. Blundell,[30] a cargo of dates was shipped under bills of lading making the freight payable on delivery. The vessel sunk but was subsequently raised. On arrival, the dates, although retaining their appearance, were so fermented and contaminated with sewage that they were no longer merchantable as dates. Lord Esher M. R. said:[31] "There is a perfectly well known test which has for many years been applied to such cases as the present - that test is whether, as a matter of business, the nature of the thing has been altered. The nature of a thing is not necessarily altered because the thing itself has been damaged; wheat or rice may be damaged, but may still remain the thing dealt with as wheat or rice in business. But if the nature of the thing is altered, and, it becomes for business purposes something else, so that it is not dealt with by business people as the thing which it originally was, the question for determination is whether the thing insured, the

original article of commerce, has become a total loss." Kay L. J., concurring, added:[32] "In Duthie v. Hilton,[33] cement had become wet and had lost its properties as cement; it had been changed into a hard substance, though all the cement was there; and it was held that no freight was payable in respect of it. That is really a very analogous case to the present." Lopes L. J. concurred.

As stated earlier, a distinction must be drawn between goods which have lost their commercial characteristics and goods which have merely diminished in value.[34] In Dakin v. Oxley,[35] a cargo of coal had so deteriorated that it was not worth its freight. The charterer-qua-consignee abandoned the goods and refused to pay freight. It was held that he was not entitled to do so, his proper course being by way of cross-action. As Willes J. pointed out, "(the plea did not) allege that the cargo was not of mercantile value when the ship arrived at Nassau, but merely that it was of less value than the amount of freight."[36] "(T)he true test of the right to freight," stated Willes J., "is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and, according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant, though they be in a damaged state when they

arrive."[37] Obviously, where the goods delivered are not identical commercially with those shipped, the carrier will be deprived of his right to freight. In The Caspian Sea,[38] a cargo of "Bachaquero Crude" was shipped. When discharged, it was found to contain paraffin. The consignee refused to pay the freight. The court held that freight would be payable only if what the carrier had delivered could in commerical terms bear a description which sensibly and accurately included the words "Bachaquero Crude." The point was remitted to the arbitrators for decision.

4.3.3 By whom Payable

It has been rightly commented that "the question to whom freight is payable normally causes little difficulty, while the question from whom the shipowner may demand payment of the freight is of great practical significance."[39] The shipper, being the party who concludes the contract of carriage with the carrier, is *prima facie* the party responsible for paying freight. The shipper's responsibility for freight is usually stated in the cargo transport document, but it may also be implied as where he exercises his right of stoppage *in transitu*: Booth SS. Co. v. Cargo Fleet Iron Co. Ltd.[40] A consignee's obligation to pay freight arises, not from the cargo

transport document _per se_, but from his acceptance of the goods from the carrier. In a recent American case, _Waterman SS. Co. v . 350 Bundless of Hardboard, V/O Exportless and Allied Interntional Inc._,[41] it was held that the terms "C & F" and "Freight prepaid" appearing on the bill of lading do not release the consignee from liability for any freight deficiency on goods which he has accepted for such terms merely acknowledge receipt of the amount of freight calculated and paid by the shipper. It was further held that the consignee had the burden of proving estoppel by conduct. By way of comment, the judgment is consistent with the view expressed in Schmitthoff's Export Trade that the responsibility for paying freight cannot be ascertained "by reference to the contract of sale under which the exporter sold and shipped the goods. That contract regulates the ultimate responsibility for freight between the two parties to the sale but is irrelevant as far as the liability for freight to the shipowner is concerned."[42]

4.3.4 Types of Freight

Advance freight is freight payable before the goods are delivered by the carrier to the consignee. It may be payable on shipment or upon the bill of lading being issued or signed, or upon the occurence of some other event - this

depends on the contract. Once paid, advance freight cannot usually be recovered. In De Silvale v. Kendall,[43] the ship was chartered for a voyage from Liverpool to Maranham and back. The ship arrived at Maranham and advance freight was paid. On the voyage back, the ship was seized. It was held that the shipper was not entitled to recover the freight paid. In three instances, however, advance freight can be recovered or need not be paid. Firstly, where "the ship never earned freight and never begun to earn freight": Ex p. Nyholm.[44] Secondly, if the goods are lost before freight becomes payable: The Lorna I.[45] Thirdly, advance freight is recoverable in the event of non-delivery occasioned by any cause other than an excepted peril: Rodocanachi v. Milburn.[46] It is common practice for advance freight to be stipulated in addition to the clause "vessel lost or not lost." It is to be noted that the clause does not preclude a claim for recovery of freight where the vessel is lost by some means other than an excepted peril: Great Indian Ry. v. Turnbull.[47] Where freight is payable on delivery, freight collect bills of lading are used. In such an instance, the consignee's obligation to pay freight is conditional on the arrival of the goods.

Lump sum freight is freight fixed for the use of a ship or a part thereof, irrespective of the actual quantity

shipped. The term "back freight" encompasses freight in its ordinary meaning and expenses related to the conveyance of the goods to a port other than the contractual terminus, at the request or in the interest of the party responsible for the payment of freight. The term "dead freight" means damages payable to the carrier when the contractual cargo or a part thereof is not loaded. Dead freight, by reason of it being damages for breach of contract, has to be mitigated - the carrier must reasonably endeavour to obtain other cargo. If the carrier "uses the freight space which would have been taken up by the goods of the defaulting shipper and carries therein goods of other shippers (he) has to deduct the earned freight when claiming damages".[48]

Pro rata freight is freight proportionate to the voyage completed or the goods delivered. Pertaining to the first instance, there must be, according to <u>Appleby v. Myers</u>, some indication that "the parties have entered into a fresh contract."[49] A fresh contract will not be implied solely from the consignee's acceptance of the goods at an intermediate port where the carrier has insisted on landing them (<u>Metcalfe v. Brittania Ironworks Co.</u>);[50] nor will it be necessarily implied where the carrier is unable to carry the goods to the contractual terminus (<u>Vlierboom v. Chapman</u>).[51] In other words, there must be

voluntariness on the part of the party from whom freight is due and the party to whom freight is payable. Where freight is not fixed (that is, by way of lump sum freight), the carrier will be entitled "to pro rata freight where he loads only part of the agreed cargo or delivers only part of the total loaded cargo, the delivery of the remainder having become impossible through excepted perils."[52]

FOOTNOTES

1. The shipper's duty to tender the agreed cargo at the port of loading is quite straightforward. If he fails in this duty, he will be liable in damages for breach of contract.

2. As to the evidential effect of an indorsed bill of lading as against the carrier, see 2.5.1(c) and 5.3.

3. (1978) 452 F.Supp.347.

4. Ibid, pp.350,1.

5. Ibid, p.351

6. The Hague and Hague-Visby Rules do not define the term "shipper".

7. See 2.7.

8. See Donoghue v. Stevenson (1932) A.C. 562, and Anns v. Merton London Borough Council (1978) A.C. 728, 51.

9. According to Chandris v. Isbrandtsen-Moller Co. (1951) 1 K.B. 240, the absence of reference to the shipper's liability in damages and expenses in the second sentence does not mean that he is not so liable where the carrier accepts the dangerous goods for shipment with knowledge and consent. He may still be so liable on the contract of carriage.

10. (1985) A.M.C. 1152.

11. The Code is given effect by many countries (including the United Kingdom, the United States, and Sweden). The rules contained in the 1978 Report of the Department of Trade's Standing Advisory Committee on the Carriage of Dangerous Goods in Ships (more commonly referred to as the Blue Book) conform to the Code.

12. Ibid, p.1162.

13. M. Mustill, "Carrier's Liability and Insurance," in "Damage from Goods" (ed. K. Gronfors, 1978), pp.75, et. seq.

14. Tetley, "Marine Cargo Claims," (2nd ed., 1978), p.218.

15. (1956) A.M.C. 1146.

16a. Scrutton on Charterparties and Bills of Lading (19th ed., 1984), p. 457.

16b. (1928) A.M.C. 761, 5.

17. (1878) 3 Ex.D. 282.

18. (1957) 2 Lloyd's Rep. 55.

19. (1941) A.M.C. 1601, 7.

20. (1856) L.J.Q.B. 49, 54.

21. Ibid, p.57.

22. (1910) 2 K.B. 94.

23. (1928) A.M.C. 1458.

24. (1962) A.M.C. 147.

25. (1864) 15 C.B.(N.S.) 646.

26. (1909) 14 Com. Cas. 82.

27. Clause 9(b) of the New Zealand Southbound Trade Bill of Lading 1978, reproduced in Payne & Ivamy's *Carriage of Goods by Sea* (12th ed., 1985), Appendix A.

28. The topic is comprehensively covered in Scrutton, ibid, pp.331-58, and Schmitthoff's *Export Trade* (8th ed., 1986) pp.468-76.

29. (1808) 10 East 378, 94.

30. (1896) 1 Q.B. 123.

31. Ibid, pp.127, 8.

32. Ibid, p. 132.

33. (1868) L.R. 4 C.P. 138.

34. See p. 50.

35. (1864) 15C.B.(N.S.) 646.

36. Ibid, p. 656.

37. Ibid, pp. 664 - 5.

38. (1980) 1 Lloyd's Rep. 91.

39. Schmitthoff's Export Trade, loc. cit., p. 471.

40. (1916) 2K.B. 570.

41. (1986) A.M.C.

42. Schmitthoff's Export Trade, loc, cit., pp. 471 - 2.

43. (1815) 4 M. & S. 37.

44. (1873) 43 L.J.B.K. 21, 4.

45. (1983) 1 Lloyd's Rep. 373.

46. (1886) 18 Q.B.D. 67.

47. (1885) 53 L.T. 325.

48. Schmitthoff's Export Trade, loc. cit., p. 475.

49. (1867) L.R. 2 C.P. 651.

50. (1877) 2 Q.B.D. 423.

51. (1844) 13 L.J. Exch. 384.

52. Schmitthoff's Export Trade, loc. cit., p. 476.

CHAPTER 5 : THE CARRIER'S RESPONSIBILITIES

5.1 ACCEPTANCE OF CARGO

The shipowner's sailing card (wherein the ship's sailing time, available freight space and other such like information are stated) is an invitation to treat; it is, in practice, the shipper who makes the offer. Thus, if the shipper sends his goods to the port of loading without the shipowner having agreed to carry the goods, he does so at his risk. However, if the shipowner has agreed in advance to reserve space for the shipper's goods and subsequently shuts out the goods, the contract of carriage is *prima facie* broken whereby the shipper will be entitled to a refund of any freight paid; but "loss of profit on goods shut out cannot usually be recovered."[1] Normally the shipowner will have stipulated, when he undertook to reserve freight space, that he is entitled to shut out the goods if the ship is already full at the time that the goods are tendered for shipment; still he has to refund any freight paid if the goods are shut out.[2]

5.2 THE STANDARD AND EXTENT OF RESPONSIBILITY IN REGARD TO LOADING, TREATMENT, AND DISCHARGE

5.2.1 Under the Hague and Hague-Visby Rules

(a) Article 3(2) provides: "Subject to the provisions of Article IV,[3] the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

The word "properly" means "in accordance with a sound system," that is, a system sound in the light of all knowledge which a carrier has or ought to have about the nature of the goods: per Lord Reid, Albacora v. Wescott & Laurence Line.[4] Lord Pearce was of the opinion that "carefully" means "efficiently."[5] In that case, the carrier did not know that the cargo of wet salted fish would deteriorate unless refrigerated; he was only instructed to keep it away from the engines and boilers. Although the instruction was complied with, the fish deteriorated. The question was: did the carrier carry the cargo "properly and carefully"? The House of Lords held in the affirmative, explaining that to carry the goods in accordance with Article 3(2) did not necessarily entailed the adoption of a system suited to all the weaknesses and idiosyncracies of a particular cargo. But if the carrier

knew or ought to have known about the especial features of a particular cargo, he must, as was made clear by the American court in The Ensley City, "exercise due care in (its) handling and stowage, including such methods as (its) nature requires."[6] The responsibilities under Article 3(2), in as far as carried out by the carrier or his agents are personal to the carrier: he cannot escape liability for improper treatment of the goods simply by proving that the master acted on the advice of a competent surveyor (International Packers v. Ocean SS. Co.).[7] But the carrier may be exonerated where an unsound system has been adopted on the insistence of the shipper or his agent: Ismail v. Ocean Polish Lines.[8]

(b) "Loaded on"/Loading, Treatment, and Discharge

The Hague and Hague-Visby Rules ex proprio vigore apply only, by Article 1(b), to the "carriage of goods by sea" which by virtue of Article 1(e) "covers the period from the time when the goods are loaded on to the time when they are discharged from the ship." The words "loaded on" do not mean that the carrier's responsibilities under the Rules begin only when the goods are actually loaded on board. Article 3(1) requires the carrier to provide a ship seaworthy "from at least the beginning of loading,"[9] and by Article 3(3) the carrier is obliged, if

the shipper so demands, to issue a bill of lading containing certain statements germane to the goods "after receiving (them) into his charge."[10] Also, Article 3(2) provides that the carrier shall properly and carefully load, treat, and discharge the goods carried.

In Pyrene Co. v. Scindia Navigation Co.,[11] a tender, which was being lifted onto the ship by the ship's tackle, was dropped before it crossed the railing. The carrier successfully contended that he was entitled to limit his liability under the Hague Rules as they had already come into operation. Devlin J. held:[12] "(The object of the Rules) is to define not the scope of the contract service, but the terms on which that service is to be performed. The extent to which the carrier has to undertake the loading of the vessel may depend not only upon the different systems of law, but upon the custom and practice of the port and the nature of the cargo. It is difficult to believe that the Rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging so that both operations are naturally included in those covered by the contract of carriage. But I can see no reason why the Rules should not leave the parties free to determine by their own contract the part which each has to play. On

this view, the whole contract of carriage is subject to the Rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to determine." On the language of Article 3(2), Devlin J. was of the opinion that:[13] "The phrase 'shall properly and carefully load' may mean that the carrier shall load and that he shall do it properly and carefully: or that he shall do whatever loading he does properly and carefully. The former interpretation perhaps fits the language more closely, but the latter may be more consistent with the object of the Rules." In Renton v. Palmyra,[14] the House of Lords preferred Devlin J.'s adoption of the latter interpretation.

In the well-known American case The Yoro,[15] the shipper's lighters, manned by shore workers, were caught in a squall alongside the carrier's vessel. The carrier's crew failed to assist the lighters by handling the lines. As a result, the shipper's cargo was damaged. It was held that the Hague Rules applied:[16] "When the lighters ... were moored alongside according to instructions issued by the ship, and loading was commenced, the cargo ... was accepted for transportation and was thereafter subject to the ship's control ...." At first instance, it had been held that "actual physical possession of the cargo was not a prerequisite to establishing the

liability of (the carrier)".[17]

By way of comment, the dicta indicate that the moment at which the carrier is deemed to have commenced loading may not be clearly discernible. It may turn on the terms of the contract of carriage or lighterage, and whether or not the carrier has control over the means of loading. The dicta also indicate that a wide meaning may be given to the word "loading". In Thermo Engineers Ltd. v. Ferrymasters Ltd.,[18] however, Neill J. had no difficulty in ascertaining the moment of loading and the moment at which the Hague Rules applied. In that case, a shipment of machinery which had been sold to buyers in Copenhagen and was being carried in a trailer struck the bulkhead of the ship. The question was whether the Convention on the Contract for the International Carriage of Goods by Road (CMR) or the Hague Rules applied. Of relevance was Article 2(1) of the CMR. It provides that, where the goods are also carried by some mode of transport apart from road, the CMR will not apply where the loss, damage, or delay is caused by "some event which could only have occurred in the course of and by reason of the carriage by that other means of transport." The plaintiffs argued that because the damage to their goods could have equally occurred on land, it could not be said that the damage could only have occurred during and by reason of the

sea carriage. Neill J. rejected the argument thus:[19] "One is concerned to consider not whether the loss or damage could only have occurred in the course of the other means of transport but whether the event could only have so occurred. It seems to me that any adequate description of the relevant events in this case would have to include a statement to the effect that a collision with the bulkhead of a ship had taken place IN THE COURSE OF LOADING THE SHIP. Such an event could only have occurred in the course of, and by reason of, the carriage by sea." (Emphasis added).

Under the rule propounded by Devlin J., the carrier will only be responsible and liable for the loading and discharge if he undertook those operations. The rule is equally applicable to stowage. In Ismail v. Polish Ocean Lines,[20] a cargo of potatoes was shipped from Alexandria to England. The ship's capacity was up to 1,400 tons; but the master considered that she should only carry 1,000 tons with proper ventilation and dunnage. The shipper insisted that the ship load 1,400 tons and stated that no dunnage was necessary. The master demurred, but agreed upon the shipper's assurance that a surveyor's certificate to affirm that dunnage was unnecessary and an indemnity against the consequences of the cargo's stowage would be provided. The documents were not subsequently produced. The cargo arrived in a rotten state. Lord

Denning M.R. held:[21] "It seems to me that, on that assurance, the shipper or owner assumed responsibility and the master was relieved pro tanto of his responsibility for dunnage, and so forth."

Discharge of the goods must be at the named destination or place of unloading (Mayhew Foods Ltd. v. Overseas Containers Ltd.)[22] unless it has been agreed that the carrier may in certain circumstances discharge the goods elsewhere (Renton v. Palmyra).[23] Generally, discharge within the meaning of the Rules is effected when the goods have been unloaded free of the ship's tackle. In lighterage cases, however, discharge is only completed when the whole of a particular consignment has been transferred from the ship into the lighter with no other cargo to be loaded into the same lighter. Thus, in Hoegh v. Green Truck Sales Inc., the American court held that "cargo is not discharged within the meaning of (the 1936 Act) when it is still in the process of being unloaded from a vessel onto a lighter."[24] In Goodwin v. Lamport and Holt Ltd.,[25] the cargo, which had been unloaded into a lighter, was damaged by sea water seeping into the lighter as a result of other goods falling on top of it. Roche J. held that the Hague Rules were still in operation because "the discharge of these goods was not finished when they were put into a lighter when other goods were being

discharged into the same lighter to make up the lighter load which was to start for shore. When it is contemplated that these goods are to form the lighter load with other goods, the discharge of the goods themselves within the meaning of the Act of Parliament is, in my opinion, going on so long as other goods are being raised into and stowed into the lighter alongside or on top of them."[26] These cases are to be distinguished from those where the carrier assumes no responsibility and takes no part in the discharging;[26a] in the latter type of cases, the risk of lighterage would fall on the goods owner or lighter operator.

5.2.2 Under other Legal Regimes

S.1 of the Harter Act provides that "it shall not be lawful for (the carrier) to insert ... any clause whereby (he) 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 or property committed to (his) charge." It is clear from the language employed that the carrier cannot rely on a clause excepting liability for negligence in the activities listed but that he may reduce the strict liability obligation at common law to the point of due diligence. What is not clear is whether he can

transfer responsibility for these activities, as under the present Rules, to the shipper. The difficulty does not seem to have been decided judicially yet. It is thought that the words "committed to (the carrier's) charge" lend some support to an answer in the affirmative. For example, if the shipper insists on doing the loading, the goods at that particular point in time could hardly be said to have been committed to the carrier's charge. In any event, "delivery under the Harter Act is not to be equated with "discharge" under the Hague Rules: Caterpillar v. SS. Expeditor.[27] Delivery may go beyond discharge. In Crystal v. Cunard SS.[28] it was held that a cesser of liability clause which purported to operate once the goods were unloaded free of the ship's tackle was null and void under the Harter Act. In Centerchem Products v. A/S Rederiet Odfjell, it was held that "proper delivery occurs when a carrier (1) separates goods from the general bulk of the cargo; (2) designates them; and (3) gives due notice to the consignee of the time and place of their deposit, and a reasonable time for their removal."[29] The carrier may of course go further by handing the goods over to the consignee or other party entitled to receive them, but this act is not mandatory unless the contract states so.

The Hamburg Rules abandon the so-called tackle to tackle rule adopted by the Hague/Hague-Visby Rules.

Article 4(1) reads: "The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during carriage and at the port of discharge." Quaere: whether the carrier can only be deemed to be in charge of the goods at, say, the port of loading. Rule 5(e) of the ICC Uniform Rules for a Combined Transport Document provides - without reference, unlike Article 4(1) of the Hamburg Rules, to the port of loading - that the carrier is responsible for the goods from the time of taking them into his charge until delivery.[30] The question is of particular importance in the carriage of containerized goods where the container operator usually receives the goods at his container freight station or fills up the container at the shipper's place of business. Article 4(2) indicates that the moment of taking charge is not confined to the port of loading. It states that "the carrier is deemed to be in charge of the goods (a) from the time he has taken over the goods from (i) the shipper (or his agent); or (ii) an authority or other third party to whom. pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment; (b) until the time he has delivered the goods (i) by handing over the goods to the consignee; or (ii) in cases where the consignee does not receive the goods from the carrier, by placing them at (his disposal) in accordance with the

contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or (iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over." So the Hamburg Rules carrier can be responsible for the goods in the pre-loading and post-discharge periods provided he is in charge of the goods as defined. This is different from the Hague/Hague-Visby Rules position where the carrier is not subject to the Rules whilst the goods are, say, in a warehouse or quay before loading or after discharge has been completed unless otherwise agreed.[31]

But can not the moment of taking charge under the Hamburg Rules be delayed or re-defined? To put it another way, can the responsibility for loading or stowage or delivery be assumed by or entrusted to the shipper or consignee? The question is fraught with difficulties. The key words in Article 4(2) - "the carrier is deemed to be in charge" - suggest that the answer lies in the affirmative. The word "deemed" arguably suggests a presumption which may be rebutted. But would a stipulation that the shipper assumes responsibility for loading be admissible, bearing Article 23 in mind? Or a stipulation that the carrier is to be considered in charge of the goods only when they are

actually loaded on board? Article 23 provides that any stipulation which derogates, directly or indirectly, from the Convention is null and void. Article 23 could be read strictly to mean that the moment of taking charge cannot be re-defined in whatever circumstances. Or it could be treated as a condition subsequent so that whether or not a stipulation is valid is to be ascertained at the time when the carrier seeks to rely on it.[32] On this view, where it is stipulated that the shipper assumes responsibility for loading and he in fact loads whereby loss or damage results, the carrier could presumably rely on the stipulation for exoneration. However, if the carrier did the loading, the stipulation would presumably be considered a non-responsibility clause repugnant to Article 23.

The words "in charge" in Article 4(2) lend some support to the views expressed on the hypothetical stipulation. The words, it is submitted, necessarily involve an element of control. So that if the shipper does the loading thereby depriving the carrier of control in that respect, the carrier cannot at that stage be said to be in charge. One could alternatively look to Article 5(1) which provides: "The carrier is liable for loss resulting from loss or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as

defined in Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences." Presumably proof of the shipper's participation would go some way towards discharging the carrier's burden of proof that he took all reasonable measures. If both parties are at fault, the carrier has to prove the amount of loss, damage or delay not attributable to himself: Article 5(7).

As for the standard of responsibility under the Hamburg Rules, the carrier must prove that "he, his servants or agents took all measures that could reasonably be required to avoid the (cause of loss, damage or delay) and its consequences" : Article 5(1). This represents a significant change from the Hague/Hague-Visby Rules position whereunder the carrier must treat the goods "properly and carefully" and exercise "due diligence" to provide a seaworthy ship before and at the beginning of the voyage, but may be excused for loss or damage caused by an "act, neglect or default ... in the navigation or in the management of the ship"[33] or by fire "unless caused by the actual fault or privity of the carrier."[34] But the across-the-board standard of responsibility is not free of difficulties. It is couched in somewhat ambiguous language. It is not clear whether the phrase "all measures

that could reasonably be required" means that the carrier has discharged his responsibility by proving that he took reasonable care of the goods in accordance with a sound system in the light of all knowledge which he had or ought to have about the nature of the goods. In other words, is the test the same as that under the Hague/Hague-Visby Rules? Or is the carrier bond to take all steps reasonable to suit the weaknesses and idiosyncracies of a particular cargo regardless of whether he knew or ought to have known about the nature of the cargo? Annex II states: "It is the common understanding that the liability of the carrier under this Convention is based on the principle of presumed fault or negligence." Probably the presumption may be displaced by the carrier proving that he used all reasonable means to ascertain the nature and characteristics of the goods and that he adopted a sound system based on that examination. If so, the test is the same as that under the Hague/Hague-Visby Rules. Then there is the question whether an independent contractor such as that under The Muncaster Castle can be treated as a servant or agent of the carrier.[35]

5.3 ISSUANCE OF THE BILL OF LADING:[36] IMPLICATIONS OF THE REPRESENTATIONS THEREIN

5.3.1 Contents to be Listed

Where the Hague or Hague-Visby Rules apply, the carrier is obliged, on demand of the shipper,[37] to issue a bill of lading, as soon as he receives the goods into his charge, showing, (a) the leading marks and, (b) the number of packages or pieces, or the quantity, or weight, and (c) the apparent order and condition of the goods unless there are doubts about or no reasonable means of verifying these particulars: Article 3(3). These particulars are not contractual terms, but representations of fact: Compania Naviera Vasconzada v. Churchill & Sim.[38]

The list of particulars required under the Hamburg Rules is much more exhaustive. Article 15(1) states that the bill of lading must include, inter alia, the following particulars:

(a) the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods,[39] the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed,

all such particulars as furnished by the shipper. The requirement that the "number of packages or pieces, and the weight" of the goods be recorded appears unduly onerous; the Hague/Hague-Visby Rules only require the "number or weight" of the goods to be recorded.

(b) the apparent condition of the goods.

(c) the name and principal place of business of the carrier. This particular would undoubtedly be of help to the cargo owner in the event that litigation is required.

(d) the name of the shipper.

(e) the consignee if named by the shipper.

(f) the port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading.[40]

(g) the port of discharge under the contract of carriage by sea.

(h) the number of originals of the bill of lading, if more than one. The purpose is presumably to reduce the

possibility of maritime fraud. For example, a holder of two or more originals may pledge them to different banks, or sell the same goods represented therein to different buyers.[41]

(i) the place of issuance of the bill of lading.

(j) the signature of the carrier or a person acting on his behalf.

(k) the freight to the extent payable by the consignee or other indication the freight is payable by him. By Article 16(4), a bill which does not state this or the demurrage, if any, incurred at the port of loading payable by the consignee is _prima facie_ evidence that no freight or such demurrage is payable by the consignee. Proof to the contrary cannot be adduced by the carrier when the bill has been transferred to a bona fide third party, including a consignee, who acted in reliance on the absence of any such indication.

(l) a statement that the carriage is subject to the Rules.[42]

(m) the statement, if applicable, that the goods shall or may be carried on deck. This is a part recitation

of Article 9(2) which also provides that, in the absence of the statement, the carrier has the burden of proving that an agreement for carriage on deck has been entered into; the carrier cannot invoke such an agreement, when it is not recorded in the bill, against a third party, including a consignee, who has acquired the bill of lading in good faith. By contrast to (k), it seems that the third party need not have acted in reliance on the absence of the statement; he may presume that the goods are carried under deck unless otherwise stated.

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

(o) any increased limit or limits of liability where agreed. This is a repetition of Article 6(4).

The Hamburg Rules preserve the right of the carrier, as under the Hague/Hague-Visby Rules, not to state the requisite details on grounds of suspicion or knowledge that the details provided by the shipper are inaccurate, or in the absence of reasonable means of verification - but add that an explanatory reservation must be stated in the bill: Article 16(1). Article 16(2) states that if the bill of lading does not note the apparent condition of the goods,

the goods are deemed to be in apparent good condition; this is presumably to be read subject to Article 16(1). The Hague/Hague-Visby Rules have no corresponding provision but in practice, bills of lading state that goods are received (or shipped, as the case may be) in apparent good order and condition unless otherwise indicated. In respect of bills that do not so provide, the carrier will not be estopped from showing that the goods were originally damaged; in fact, the lack of reference to the cargo's condition is of no evidential value whatsoever: Niclos & Co. v. SS. Isla de Panay.[43]

It may be said that the duty to record the numerous details listed in the Hamburg Rules is commercially undesirable, and that compliance will entail burdensome documentation as well as unnecessary expense and delay. The carrier will have to state the requisite details regardless of whether the shipper so demands; he is only excused in the limited circumstances under Article 16(1), as mentioned above. An interesting question in this connection is whether a carrier can be said to have no reasonable means of checking the goods in a container stuffed and sealed by the shipper where the bill of lading entitles the carrier to inspect the contents of the container.[43a] It is thought that such a bill precludes the carrier from denying that he had no reasonable means of

checking the goods. But what if the carrier does not state the details as required? Only in respect of (b), (k) and (m) will the carrier be penalised (and even then, in a limited way) if he fails to do so. One could conclude that the word "must" in Article 15(1) is in the main deceptive or illusory.

5.3.2 The Implications of Representations in the Bill of Lading

The description of the goods and other related statements in a bill of lading may comprise prima facie or conclusive evidence as against the carrier or it may give rise to an action in tort or under the Misrepresentation Act 1967.

(a) Prima Facie Evidence

Article 3(4) of the Hague/Hague-Visby Rules provides that the bill of lading "shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with 3(a), (b) and (c)." The common law and the Harter Act, s.4, are to the same effect. So too are the Hamburg Rules: Article 16(3)(a). The foregoing applies in relation to the shipper; but a

bill of lading in the hands of an indorsee may be conclusive evidence of the goods having been received or shipped as described therein.

(b) Estoppel/Conclusive Evidence

The common law position is as laid down by Greer L.J. in Silver v. Ocean SS.[44]: "The elements necessary to create an estoppel are three. There must be (1) a statement of fact, (2) relied upon by the person alleging estoppel, and (3) he must have acted on the representations to his detriment."

The statement must be clear, otherwise estoppel will not arise. Thus, where the bill of lading contains the statement "weight and quantity unknown," no estoppel arises in respect of these particulars; the burden of proof rests on the plaintiff: New Chinese Co. v. Ocean SS.[45] In Canadian and Dominion Sugar Co. Ltd. v. Canadian National SS. Ltd.,[46] a bill of lading stated that the cargo of sugar was "received in apparent good order and condition" but contained in the margin a stamped endorsement that it was "signed under guarantee to produce ship's clean receipt." The sugar, which had been in the wharf for some time, had been damaged and the ship's receipt stated "many bags stained, torn and resown." The

Privy Council held that the shipowners were not estopped from proving the condition of the cargo before being taken into their charge. Lord Wright observed:[47] "If the statement at the head of the bill, "Received in apparent good order and condition," had stood by itself, the bill would have been a "clean" bill of lading .... But the bill did in fact on its face contain the qualifying words, "Signed under guarantee to produce ship's clean receipt": that was a stamped clause clear and obvious on the face of the document, and reasonably conveying to any businessman that if the ship's receipt was not clean the statement in the bill of lading as to apparent order and condition could not be taken to be unqualified."

In The Skarp, a "clean" bill was issued qualified by the words "condition unknown." Langton J. held: "One must look at it as a matter of construction. What would those words in a bill of lading convey to anybody who read them? What ... would "shipped in good order and condition" followed by "condition unknown" convey? Speaking for myself, they would have conveyed nothing."[48] Similar to the type of representations discussed above are "said to contain" and "shipper's load or count" statements. In A-G of Ceylon v. Scindia Steam Nagivation,[49] bills of lading were issued which acknowledged receipt of 100,652 bags of rice. The weight

of the cargo was stated under the headings "Particulars declared by Shipper" and "Said to weigh." The Privy Council held that only the notation pertaining to the number of bags shipped was of evidential value; the bills were not even prima facie evidence of the weight shipped.

The American courts adopt a different approach. In Pettinos v. American Export Lines,[50] the court held that, notwithstanding the clause "Particulars declared by shipper," the statement of the cargo's weight afforded prima facie evidence against the carrier in favour of the consignees. In Spanish American Skin Co. v. MS. Ferngulf,[51] the bill of lading bore the notation "Gross - Tare - Nett 6.8.2.8." and "Shipper's weight - Ship not responsible for weight, quality or condition of contents." It also acknowledged receipt of sixty packages. Sixty packages were discharged but there was discovered a substantial weight discrepancy. The Court of Appeal held that the bill was prima facie evidence of receipt by the carrier of both the number and weight of the goods as stated. The ratio decidendi behind these cases were considered and followed in relation to container bills in The American Astronaut, a Singapore case decided according to American law; Choor Singh J. stated:[52] "In the present case, it will be seen from the bill of lading, that on the face of it, there are two contradictory statements. First,

the number and the weight of the cartons of toilet soap are stated. Secondly, this statement is qualified by the notation "shipper's load or count" and "shipper's load, stowage and count." In my judgment, if a carrier doubts a statement of the shipper, he should not inscribe on the bill of lading the statement he doubts. Such phrases as "shipper's load and count" are a form of non-responsibility clause and are contrary to s.3(8) of the (American Carriage of Goods by Sea Act 1936) because they relieve the carrier ... from liability under the Act .... It was submitted by counsel for the defendants that the phrase "shipper's load, stowage and count" used in reference to containers, is a proper form of qualification where the carrier cannot verify the contents of a container packed and sealed by the shipper. I was unable to accept this submission. A carrier is under no obligation to "state or show in the bill of lading any marks, number, quantity or weight ... which he has no reasonable means of checking." See s.3(3)(c) of the United States Carriage of Goods by Sea Act 1936."

The English view that "said to contain" and other such like statements are not even prima facie evidence is difficult to square with the fact that such statements suffice for determination of liability purposes.[53] As regards Article 3(3) under which the

carrier is to issue a bill of lading and describe the goods only "on demand of the shipper, does the word "demand" means an express demand? The Privy Council has held that the carrier is not obliged to issue a bill of lading (Vita Food Products v. Unus Shipping Co.)[54] or to describe the goods at all (Canadian and Dominion Sugar Co Ltd v. Canadian National SS. Ltd.)[55] unless the shipper so demands. Interestingly, in a Canadian case, Patagonier v. Spear & Thorpe,[55] the court held that "the mere fact of signing was sufficient evidence that the bill of lading was demanded." It is worth noting that although the American courts treat "shipper's load or count" and the such like statements as if they were non-existent so that the particulars of the goods as stated stand alone, they treat the particulars, even when the bill has been transferred to a third party, as prima facie evidence - not conclusive evidence.

In regard to the requirement of reliance, it normally suffices if the holder of a bill of lading takes up the bill in reliance of a statement therein which is commonly relied upon.[56] . Thus, in Silver V. Ocean SS. Co., Scrutton L.J. said "the mercantile importance of clean bills is so obvious and important that I think the fact the (the indorsee) took the bill which is in fact clean, without objection, is quite sufficient evidence that he

relied on it."[57] It is to be noted that estoppel operates in favour of a bone fide indorsee even though the statement has been induced by the shipper's fraud: Evans v. Webster & Brothers Ltd.[58]

As for estoppel by statute, the Bills of Lading Act 1855, s.3 estops the master or other signatory of a bill from denying representations therein regarding quantity as against a bona fide consignee or indorsee for valuable consideration.

The Hague-Visby Rules retain Article 3(4) of the Hague Rules (statements regarding leading marks, quantity, and apparent order and condition being prima facie proof) but add a second sentence bringing about a change of great significance: "However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a a third party acting in good faith." As Scrutton points out, unlike the common law or the position under the 1855 Act, "the Rule imposes no requirement that the transfer shall be for value. Nor, indeed, does it prescribe that the transferee shall have relied on the statements in the bill when accepting the transfer."[59]

In the United States, Article 3(4) of the Hague Rules is supplemented by s.22 of the Pomerene Act which provides that "if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several Sates and with foreign nations, the carrier shall be liable to (a) the owner of the goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, or upon the shipment being made upon the date therein shown, for damages caused by the nonreceipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspondence with the description thereof in the bill at the time of its issue." The provision differs from the British 1855 Act in that liability attaches to the carrier personally. It differs from the Hague-Visby Rules in that it is free of the restrictions appertaining to the application of the latter - class of goods, type of voyage, and place of issuance of the bill.[60] It is applicable to all bills of lading for inter-state and international commercial carriage. Also, the estoppel effect is not confined to representations (a), (b), and (c) of the Rules. It extends to shipment dates

and any description of the goods so long as there is reliance and consideration on the part of the third party holder who must have acted in good faith; but these requirements do not apply to the owner of goods covered by a non-negotiable bill. Under the Hamburg Rules, when the details required to be stated are stated sans a permitted reservation in virtue of Article 16(1), "proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein": Article 16(3)(b).

(c) Actions in Tort for Misrepresentation[61]

An indorsee who has suffered loss in reliance on a misrepresentation in a bill of lading may sue the carrier in tort at common law but, by reason of Grant v. Norway,[62] may not succeed if the misrepresentation pertains to the quantity of goods shipped. It may be that the indorsee can seek recourse under the Misrepresentation Act 1967, s.2(1). Scrutton criticises the proposition as unsound: "The Bills of Lading Act does not create a new contract between the shipowner and the holder, but rather brings about a species of statutory assignment of the original agreement between the shipper and shipowner. This is not the kind of transaction to which the

Misrepresentation Act is directed."[63] If the plaintiff-indorsee is able to sue under the 1967 Act, the defendant has the burden of proving that he had reasonable grounds for believing the facts represented to be true at the time he made them. At common law, it is the plaintiff who has the burden of proving negligence (Hedley Byrne v. Heller)[64] or fraud or recklessness on the part of the representor.

5.3.3 Usual Representations

(a) Quantity

At common law, a representation as to the quantity of goods shipped is only prima facie evidence even when the bill of lading has been transferred to a third party. In Grant v. Norway,[65] the shipowners were sued by the indorsees of a bill of lading for the recovery of advances made on the bill's representations that twelve bales of silk had been shipped on board at Calcutta. The goods were in fact never shipped. Jervis C.J. held[66] "... it is generally known that the master derives (no authority for issuing bills for goods not shipped) from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority; and, in that case,

undoubtedly, he could not claim to bind the owner by a bill of lading signed, when the goods therein mentioned were never shipped."

The decision is open to criticism. It is doubtful if it is not within the scope of a master's employment and authority to issue bills of lading stating the quantity of goods shipped. Accordingly, the rule would seem to be an anomalous exception to the decision in Lloyd v. Grace, Smith & Co.[67] that a principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or agent. Also, as Scrutton puts it, "a person making payments against tender of the bill relies just as much, if not more, on the representations as to quantity as he does on the representations as to good order and condition."[68]

Fortunately, the decision can be said to be of limited application. First, the Bills of Lading Act 1855, s.3, provides that every bill of lading in the hands of a consignee or indorsee for valuable consideration shall be conclusive evidence of shipment as against the master or other person signing the bill - though not the carrier. The master or other signer of the bill can only escape liability (1) where the holder took up the bill with actual

notice that the goods had not in fact been shipped, or (2) the representation was not attributable to the signer's fault but was occasioned wholly by fraud of the shipper, or of the holder, or some other person under whom the holder claims.[69] Second, the carrier can only rebut the representation as to quantity by adducing very satisfactory evidence. In Hain SS. Co. v. Herdman & MacDougall,[70] the House of Lords held that proof of extreme probability of the goods having been removed during transit was not sufficient. Third, a "conclusive evidence of quantity" clause may by agreement be inserted in the bill; this seems to be common practice in the timber trade.[71] In most instances though, the question is whether the shipper will take the trouble to insist on such a clause. Even if he does, bills of lading are essentially standard form contracts of adhesion and shippers usually have no alternative between accepting a bill as it is or doing without the services of the carrier. Fourth, the master or signer might himself be liable for breach of an implied warranty of authority: V/O Rasnoimport v. Guthrie.[72] Fifth, recent cases have made it clear that the rule does not cover a misrepresentation that the goods are shipped under deck (The Nea Tyhi)[73] or a misrepresentation concerning the date of shipment (The Saudi Crown).[74] Sixth, where the Hague-Visby Rules apply, the rule is of no application: Article 3(4).

(b) Apparent Order and Condition

The common law position is as follows: if the bill of lading represents that the goods were "shipped in apparent good order and condition," the carrier is estopped from denying, as against a bona fide indorsee for consideration who relied on the representation, that the goods were not in such a condition when shipped: Compania Naviera Vasconzada v. Churchill and Sim.[75] Under the Hague-Visby Rules, there is no requirement that there be consideration and reliance.[76] The words "shipped in apparent good order and condition" mean "so far as met the eye, and externally (the goods) were placed in good order on board": The Peter der Grosse.[77] Put another way, the representation will bind the carrier only as to defects which meet the eye on a reasonable inspection: The Athelviscount.[78] As a recent American case, Recumar v. Dana Arabia,[79] makes clear, the representation when used in relation to containerized goods refers to the container only.

Sometimes the bill provides its own definition of "apparent good order and condition." In Tokyo Marine & Fire Insurance Co. Ltd. v. Retla SS. Co.,[80] a cargo of metal piping was shipped in a wet and rusty condition. A clean bill was nonetheless issued. It stated that

"apparent good order and condition ... does not mean that the goods, when received, were free of visible rust or moisture." The American Court of Appeal held that the consignee as an experienced importer of iron and steel products could not reasonably have considered the qualified statement as an affirmative representation that the goods were free from rust or moisture. It has been said that "there appears to be no reason why these clauses should not be valid: and they do not appear to offend the Hague Visby Rules."[81] This interpretation is ostensibly correct on a strict interpretation of the Rules; but it could hardly have been the intent of the Rules to prescribe on the one hand that certain particulars should be stated on demand of the shipper and allow, on the other hand, the evidential value of these particulars to be diminished by definitions antonymous and reprehensible. Perhaps the Rules could have included a definition of "apparent order and condition," or a provision that the required particulars are to be construed according to their natural meaning. After all, the Rules do define the words, "carrier," "contract of carriage," "goods," and so on.

(c) Leading Marks

At common law, representations as to leading marks in a bill of lading do not constitute conclusive

evidence even when the bill has been transferred unless the marks are materially indicative of the commercial nature of the goods. In Parsons v. New Zealand Shipping Co.,[82] frozen carcasses of lamb were shipped. The bills of lading described the cargo as "622 X, 608 carcasses. 488 X, 226 carcasses." At the port of discharge, some of the carcasses were found to be marked 522 X and others 388 X. The Court of Appeal held that the shipowners were not estopped from proving an error in description, and that the cargo delivered was that which was shipped. Romer L.J. observed:[83] "Suppose, by way of example, a bill of lading was dealing with five parcels of goods of the same size, quality, and value, and, after describing these goods accurately, it proceeded to state that the parcels were numbered consecutively one to five. Could a purchaser refuse to accept delivery of one or two of the parcels, and hold the signer of the bill of lading estopped ... because it turned out that two out of the five which should have been respectively marked figure 3 and figure 4 were both marked figure 4? It appears to me that he could not ...." Under the Hague-Visby Rules, "the leading marks necessary for identification of the goods" when expressed in a bill cannot be rebutted when the bill has been transferred to a bona fide third party : Article 3(4).

(d) Quality Marks

The Hague/Hague-Visby and Hamburg Rules make no mention of quality marks. The common law position is that the master has no authority to bind the carrier by inserting statements in a bill of lading indicating the quality of the goods. In Cox v. Bruce,[84] the bill erroneously described the cargo of jute as of a better quality than it actually was. The indorsees claimed the difference in value. Lord Esher M.R. held:[85] "That the captain has authority to bind his owners with regard to the weight, condition, and value of the goods under certain circumstances may be true; but it appears to me absurd to contend that persons are entitled to assume that he, though his owners really gave him no such authority, can estimate and determine and state on the bill of lading so as to bind his owners the particular mercantile quality of the goods .... To ascertain such matters is obviously quite outside the scope the functions and capacities of a ship's captain ...."

(e) Under-deck Carriage

The Hague and Hague-Visby Rules make no mention of the evidential implications of representations that the goods are carried under deck; the position under

the Hamburg Rules has already been noted.[86] The common law position is as stated in The Nea Thyi.[87] In that case, the charterers and their agents were authorized to sign bills of lading on behalf of the shipowners. The charterers' agents signed bills stating that the goods were shipped under deck which was in fact not true. Rainwater subsequently damaged the goods as a result of the stowage on deck. The indorsee of the bills sued the shipowners who argued that the agents had no authority to sign bills inconsistent with known facts. Sheen J. held that although the agents had no actual authority to sign such bills, the shipowners were liable because the agents had ostensible authority to do so. Grant v. Norway[88] was not followed for two reasons. First, although the shipper could ascertain whether the goods had been shipped, he was not in a position to know where the goods were stowed. If he could not have known, he had a right to endorse or transfer the bill. Second, Sheen J. felt that it was more reasonable that the shipowners, who had put trust in the charterers to the extent of authorising them and their agents to issue and sign bills, should bear the loss rather than the totally innocent indorsee.

(f) Date of Shipment[89]

Misdating renders the carrier liable to the bona fide indorsee for consideration who placed reliance on the date of the bill of lading, and suffered loss as a consequence. In The Saudi Crown,[90] the contract of sale provided that the bills of lading were to be dated on the day of shipment. The deadline was 15 July. Five bills, all dated 15 July, were issued by the carrier's agents. Loading was in fact only completed on 24 July; this was so noted in the surveyors' certificate. The indorsees did not know that the bills were falsely dated when accepting them. Sheen J. held that if the agents had authority to sign bills on behalf of the carrier, they must have had authority to date the bills. The learned judge further held:[91] "I can see no reason for extending Grant v. Norway[92] to protect shipowners from liability for the errors of their duly appointed agents. It cannot be said that the nature and limitations of the agents' authority are known to exclude authority to insert the date on the grounds that the ascertainment of the correct date is obviously quite outside the scope of the functions or capacities of those agents." If the master signs the bill without verifying the date as inserted by another and the carrier is held liable to an indorsee, he may have to indemnify the carrier: Stumore, Weston & Co. v. Breen.[93]

A stipulation as to the time of shipment forms part of the description of the goods and is an implied condition by statute (Sale of Goods Act 1979, s.13) and at common law (Finlay v. N.V. Kwik Hoo Tong).[93a] The condition is a condition precedent and a false date of shipment, whether fraudulent or not, entitles the c.i.f. buyer to reject the goods and claim damages for breach of contract: Ashmore & Son v. Cox.[94] The buyer's right to reject the goods is distinct from his right to reject the documents. In Kwei Tek Chao v. British Traders and Shippers Ltd.[95] the sellers agreed to sell the chemical Rongalite to buyers c.i.f. Hong Kong. The shipment was to be on or before 31 October. Unknown to the sellers, the goods were loaded after that date; the date of shipment was falsified by some person with the knowledge of the shipowners' agents to show shipment on 31 October. The goods arrived on 17 November and the buyers took delivery. Later the buyers learnt of the misdating and sued for damages. The sellers argued that any breach was waived by the buyers' acceptance of the goods. Devlin J., however, held:[96] "There is not, in my judgment, one right to reject; there are two rights to reject ---. If there is a late shipment, as there was in this case, the date of the shipment being part of the description of the goods, the seller has not put on board goods which conform to the contract description, and therefore he has broken that

obligation. He has also made it impossible to send forward a bill of lading which at once conforms with the contract and states accurately the date of shipment. Thus the same act can cause two breaches to two independent obligations."

But where the buyer knew or ought to have known of the falsification and nonetheless accepted the bill of lading, he cannot later seek to exercise his right to reject the document. In Panchaud Freres S.A. v. Etablissements General Grain Co.,[97] the seller agreed to sell Brazilian maize c.i.f. Antwerp, shipment to be July 31 at latest. The goods were loaded at a later date but the bill of lading was falsified to show shipment on July 31. The certificate of quantity, forming part of the shipping documents, bore the remark "loaded on August 10 to 12, 1965." The shipping documents were taken up and paid for by the buyers. Later, the buyers complained about the false date of shipment. Lord Denning M.R. held:[98] "By taking up the documents and paying for them, they are precluded afterwards from complaining of the late shipment or of a defect in the bill of lading." The underlying reason is that "all documents forming part of the shipping documents have to be read together."[99]

Where payment of the goods is arranged under a letter of credit, the bank is not obliged to pay the beneficiary if it has positive proof that a fraud (say, a false date of shipment in the bill of lading) has been perpetrated and that the beneficiary is aware of the fraud; it must however pay if the evidence before it shows that the fraud was unbeknownst to the beneficiary: United City Merchants Ltd. v. Royal Bank of Scotland.[100].

5.4 INDEMNITIES

Occasionally the carrier is offered an indemnity by the shipper as an inducement to issue a clean bill of lading. If the carrier does so, knowing that the clean bill could not possibly reflect the true situation, the indemnify will be unenforceable because of fraud. In Brown Jenkinson & Co. Ltd.v. Percy Dalton Ltd.,[101] the shippers undertook to indemnify the shipowners for any loss sustained through the issuance of a clean bill. The shipowners agreed despite the fact the the tally clerk had described the cargo as old and frail. Pearce L.J. held:[102] "(The practice of issuing indemnities is convenient where it is used with conscience and circumspection, but it has perils if it is used with laxity and recklessness. In trivial matters and in cases of bona fide dispute where the difficulty of ascertaining the

correct state of affairs is out of proportion to its importance, no doubt the practice is useful. But here the plaintiffs went outside those reasonable limits." Morris L.J. held:[103] "There may perhaps be some circumstances in which indemnities can properly be given. Thus, if a shipowner thinks he has detected some faulty condition in regard to goods to be taken on board, he may be assured by the shipper that he is entirely mistaken: if he is so persuaded by the shipper, it may be that he could honestly issue a clean bill of lading while taking an indemnity in case it was later shown that there had, in fact, been some faulty condition. Each case must depend on its circumstances."

In Sze Hai Tong Bank v. Rambler Cycle Co. Ltd.,[104] the carrier delivered a cargo of bicycle parts to the buyers without the bills of lading being produced. The bills of lading were with the Bank of China and were not released to the buyers because of non-payment. The buyers induced the carrier to deliver the goods on an indemnity provided by themselves in conjunction with the Sze Hai Tong Bank. The Privy Council held that although the carrier was liable to the sellers for breach of contract and conversion, the carrier was still entitled to be indemnified. By way of comment, had the carrier been aware that the buyers were not the true owners, the indemnity

would have been considered invalid. It may be that the courts are generally more willing to enforce an indemnity in this sort of situation since the vessel may well arrive at the port of discharge before the bill of lading reaches the consignee, or the bill of lading may have been lost, stolen or destroyed.

A trifle doubtful is the decision in a recent Canadian case, Canficorp v. Cormorant Bulk-Carriers,[105] where a cargo of abestos was shipped form Quebec to Kuwait in transit for Iraq. At the time of lading, the Kuwaiti authorities had imposed certain regulations for transit cargo which would cause considerable delay. The shipper, by way of an indemnity, persuaded the carrier to issue a bill of lading to the effect that the cargo on board was bound for Kuwait and not in transit. It was held that the indemnity was enforceable:[106] "The indemnity was given so as to facilitate carriage of the goods from Canada to Kuwait and as part of an overall strategy agreed to by the parties ---. The parties evidently hoped that entry of the goods into Kuwait and payment of customs duties there would enable them to be treated as Kuwaiti goods ---. Having regard to these circumstances, I cannot see how the covenant can be condemned as illegal." Although it was known that the carrier was aware that the cargo was actually transit cargo, the court was satisfied that "no

false representation was made in the bill of lading. Nor was there evidence that the strategy agreed upon to secure discharge of the cargo in Kuwait involved commission of a criminal offence against the laws of that country."[106]

5.5 SEAWORTHINESS

5.5.1. The Meaning of Seaworthiness

At common law and under the Rules, seaworthiness connotes that the ship with her crew and equipment are able to withstand the ordinary perils of the sea;[107] these aspects are presently considered.

5.5.2 At Common Law: Seaworthiness an Absolute Obligation; the Doctrine of Stages

At common law, the shipowner has an absolute obligation - in the absence of express stipulation - to provide a seaworthy ship not only at the beginning of the voyage but also at each intermediary stage, for example, where the cargo loaded at the first port lies waiting at an intermediary port for other cargo to be loaded: McFaden v. Blue Star Line.[109] This is commonly referred to as the doctrine of stages. By absolute obligation is meant that the shipowner must not only have done all that could

reasonably be expected of him but the ship he provides must in fact be seaworthy; he is not absolved even if the defect is latent: The Glenfruin.[110] This does not however entail the ship having the best or most up to date equipment; it suffices if the ship is capable of withstanding the ordinary incidents of the voyage: Virginia Caroline v. Norfolk & North American SS.[111]

5.5.3. Under the Hague/Hague-Visby Rules: Due Diligence Before and at the Beginning of the Voyage

Where the Carriage of Goods by Sea Act 1971 applies, the absolute obligation at common law to provide a seaworthy ship is abrogated: s.3. It is replaced by a need to exercise due diligence, before and at the beginning of the voyage, to make the ship to be used seaworthy. The position is the same under the Hague Rules: Article 3(1).

"Before and at the beginning of the voyage" covers the period from at least the beginning of loading until the vessel starts on her contractual voyage, but does not cover an intermediary stage: Maxine Footwear v. Canadian Government Merchant Marine Ltd.[112] There is no doctrine of stages. In Leesh River Tea v. British India S.N., The Chyebassa,[113] goods were carried from Calcutta to Rotterdam subject to the Hague Rules. The ship was

seaworthy at Calcutta when it set sail. At Port Sudan, a storm valve cover plate was pilfered rendering the ship unseaworthy. The goods were damaged as a result of the pilferage. The Court of Appeal held that for the purposes of the rules, the ship was seaworthy. Where the voyage consists of bunkering stages, it suffices if the vessel sails from her first port with adequate fuel for the first bunkering stage; if subsequent bunkering arrangements are not made, the carrier may be exonerated under Article 4(2)(a): The Makedonia.[114]

"Due diligence" means "doing everything reasonable, not everything possible. The term is practically synonymous with reasonable or ordinary care." This was so held in The Hamildoc[115] by the Quebec Court of Appeal. In Union of India v. NV Reederij Amsterdam, The Amstelslot,[116] the House of Lords was of the opinion that the standard required was the same as the common law duty of care.

Whether or not due diligence has been exercised is a question of fact. In Armadora Aristomenis v. Isbrandtsen,[117] an American case, water leaked from a valve flange which had been visually inspected. It was held that due diligence had been exercised. In The Zarembo,[118] it was clear that the ship was unseaworthy at the time of sailing for its plating was badly worn. The

American Court of Appeal held that due diligence had been exercised because there had been a number of tests and inspections although they failed to reveal the defect. In The Amstelslot,[119] on similar facts, the House of Lords held likewise. In Guan Bee & Co. v. Palembang Shipping,[120] a Singapore case, a cargo of copra was damaged due to defects in the ship's scupper pipes. The ship's engineer had visually inspected the pipes, using a torch. He did not handle or examine them at close quarters because they were high in the hold and out of reach. Buttrose J. held that due diligence had not been exercised.

The first three cases are not irreconcilable with the fourth: what is required is clearly more than a perfunctory or casual examination. Where damage of a certain type has been suffered before, the carrier has to exercise a greater degree of diligence. Thus, in the American case The Hedderheim,[121] it was held that a shipowner's previous difficulties with furnaces as well as condenser and boiler tubes ought to have alerted him to the necessity of exercising a greater degree of diligence. The degree of diligence required at any given time must be judged by contemporary standards and in the light of the carrier's knowledge at that time: The Australia Star.[122]

The carrier's obligation to make the ship seaworthy, at least insofar as repair work is concerned, extends to his servants or agents as well as independent contractors. In Riverstone Meat Co. Ltd. v. Lancashire Shipping Co., The Muncaster Castle,[123] a fitter of the ship repairers negligently refixed some inspection covers as a result of which the plaintiff's goods were damaged. The House of Lords found the shipowners responsible. One could say that a situation where the shipowner is answerable for the work of his servants or agents but not so when the work is delegated to an independent contractor would be undesirable; otherwise the shipowner could always relieve himself of responsibility by recourse to independent contractors. But the House of Lords did not stop there. It held that it made no difference even if the shipowners delegated the work to an independent contractor because it called for technical or special knowledge or experience. In the words of Viscount Simonds, "no other solution is possible than to say that the shipowners' obligation of due diligence demands due diligence in the work of repair by whosoever it may be done."[124] It is respectfully thought that the view of Willmer L.J. is to be preferred: "There may well be cases in which the employment of an independent contractor can be regarded as a delegation of the carrier's duty to exercise reasonable care e.g. where the task to be performed is something falling within the carrier's own

ordinary business as a carrier. Where the work to be done is of a specialized nature, outside the course of the carrier's ordinary business, it seems to me quite unreal to say that the carrier is delegating his duty to exercise due diligence; on the contrary, the very fact of employing a skilled and competent contractor may amount of itself to a performance of the duty. The question must be one of fact, depending on the nature of the work to be performed."[125]

Three points may be noted here. First, Willmer L.J.'s view is rightly based on the assumption that it is difficult, perhaps impossible, for a carrier to exercise real control over the work of an independent contractor when the work is of a specialized nature. Second, in the gestation period of the Hague-Visby Rules, it was proposed to introduce an amendment based on Willmer L.J.'s view. The proposal, though it gained initial support, was heavily defeated at the committee stage.[126] Third, the House of Lords decision is, it is respectfully submitted, a step back in the direction of the common law position where the only question that matters is whether the ship is seaworthy or unseaworthy. This is untenable for the common law rule "was no doubt well adapted to more simple days when ships were not very complicated wooden structures of a few hundred tons, but in modern times, when ships are complicated steel structures full of complex machinery, the

old unqualified rule impose(s) too serious an obligation ... the new <u>Acts</u> have intended to emphasise the specialization which has developed in modern times ... and limit the carrier's obligation to due diligence ...."[127]

At any rate, where a shipowner has a new ship built for him, he is not liable for the shipbuilders' lack of due diligence unless the builders are not reputable and he has failed to adopt all reasonable precautions - such as requiring the builders to satisfy a recognised classification society (for instance, Lloyd's Register) and engaging competent advisers and inspectors: <u>Angliss v. P. & O.</u>[128] The same applies to a charterer and purchaser. In that case, Wright J. held:[129] "The carrier may not be the owner of the ship, but merely the charterer; he may not have contracted for the building of the ship, but merely have purchased her, possibly years after she has been built. In the two latter cases the builders and their men cannot possibly be deemed to have been the agents or servants of the carrier and it is illogical that the should be such difference in the carrier's obligations merely because he has bought the ship by the method of contracting with the builders to build it for him."

5.5.4 Aspects of Seaworthiness/Article 3(1)

Article 3(1) of the Hague and Hague-Visby Rules provides: "The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to -

(a) Make the Ship Seaworthy

This requires only that the ship be fit in design and structurally capable of withstanding the ordinary incidents of the voyage. As long as the requirement is satisfied, the ship is not rendered unseaworthy merely because she has to be lightened at some stage of the voyage. In The Aquacharm,[130] the master negligently allowed more coal to be loaded then the vessel could carry through the Panama Canal. Part of the cargo had to be discharged into another vessel and re-loaded after the canal transit. The Court of Appeal held that the ship was seaworthy. Lord Denning M.R. stated:[131] "It may be that she had to be lightened to pass through the Panama Canal. but that did not make her unfit ... there is no case in which a ship has been held to be unseaworthy merely because she has to lighten in order to get into port. So also if she has to lighten to get through the canal." Griffiths L.J. stated:[132] "The reason why she could not enter the Panama Canal was not because she was unsuitable

to carry a cargo of coal but because the master had loaded the coal so that the Aquacharm was down by the head when she arrived at the canal, and possibly had loaded too much coal. Aquacharm was delayed because of bad stowage; not because she was unseaworthy."

(b) Properly Man, Equip and Supply the Ship

In ascertaining the suitability of the crew, reliance on certificates of competence will not necessarily be enough (The Farrandoc);[133] the shipowner would be well-advised to set up interviews and make inquiries from previous employers (The Makedonia).[134] The crew must be sufficient in number: Adamastos Shipping v. Anglo-Saxon Petroleum.[135] If the crew cannot be expected to have special knowledge about certain aspects of the ship, the shipowner must issue the appropriate instructions. In Standard Oil v. Clan Line,[136] it was held that because the shipowner had not given the master certain instructions as to stability, given by the shipbuilders, due diligence had not been exercised to make the ship seaworthy.

The ship must be equipped or supplied with such navigational equipment as would enable her to withstand the ordinary incidents of the voyage. Thus,

although Loran and radar may be necessary for sailing through canals and inland waterways, the ship need not be so equipped for a sea voyage (The Irish Spruce);[137] but a ship is unseaworthy when a container, part of its equipment, and liable to break loose, remains on board (The Red Jacket).[138]

(c) Make (All) Parts of the Ship in which Goods are Carried, Fit and Safe for their Reception, Carriage and Preservation

In The Good Friend,[139] a cargo of soya bean meal was shipped at Ontario on board the defendants' vessel for carriage to Havana. In Havana, the cargo was not allowed to be discharged due to insect infestation. The plaintiffs successfully contended that the infestation did not originate from their cargo. Staughton J. held that it was distinctly more probable that there was infestation on board the vessel before loading began, and that the condition of the vessel constituted a major obstacle to the completion of the contractual voyage. The vessel, stated the learned judge, was therefore unseaworthy.

5.5.5 The Burden of Proof as to Seaworthiness

Article 4(1) of the Hague/Hague-Visby Rules provides: "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 ... in accordance with provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article."

The plaintiff must first make out a prima facie case of unseaworthiness and consequential loss of or damage to this cargo; only then will the carrier have to prove that he exercised due diligence to make the ship seaworthy (Minister of Food v. Reardon Smith Line)[140] or that the loss or damage was not attributable to unseaworthiness (The Zesta).[141] If the carrier cannot prove due diligence on his part, he cannot seek to rely on the exemption clauses in the Rules. In Maxine Footwear v. Canadian Government Merchant Marine Ltd., Lord Somervell held:[142] "Article III, Rule I, is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage, the immunities of articles IV cannot be relied on." If there

is another cause of loss or damage, apart from unseaworthiness, the carrier may still be liable albeit that other cause is covered by an exemption clause. In the American case The Temple Bar,[143] it was stated that "if the facts in any case disclose unseaworthiness resulting from the vessel owner's failure to exercise due diligence to make the vessel seaworthy, which concur with negligent navigation in causing the loss, the owner will be liable. That is to say unseaworthiness cannot be transferred into bad seamanship for the purpose of avoiding responsibility for loss of vessel or cargo." At common law, the shipowner can escape liability for unseaworthiness by express stipulation but the exemption clause will be interpreted strictly. In Ingram & Royal Ltd. v. Services Maritime du Treport,[144] a clause professing to exonerate the shipowners from every duty and obligation on condition that they exercise reasonable care in the maintenance of the ship was held to be too ambiguous to absolve liability for the provision of an unseaworthy ship. Similarly, in The Galileo,[145] a clause stating that the goods were carried "at shippers' risk" was held not to exempt the carrier from liability for unseaworthiness.

5.5.6 The Position under the Hamburg Rules and the Harter Act

The Hamburg Rules have no express provision on seaworthiness. Instead, if loss, damage or delay takes place while the goods are in the carrier's charge, liability attaches to the carrier unless he "proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences": Article 5(1). It is submitted that "all measures that could reasonably be required" does not encompass an extension of the carrier's liability to a independent contractor as in The Muncaster Castle.[146] By contrast, under the Rules in operation, the words employed are "the carrier shall be bound." Thus, Lord Keith's opinion that the obligation to ensure seaworthiness is an "inescapable personal obligation" of the carrier.[147]

The Harter Act, s.2, prohibits any stipulation professing to relieve the carrier of any vessel transporting goods "from or between" American ports, from exercising due diligence to make the vessel seaworthy. In The Carib Prince,[148] it was held that this did not do away with the absolute obligation at common law; but a clause seeking to reduce the obligation to due diligence would be valid. Professors Gilmore and Black note:[149] "Naturally, carriers commonly inserted clauses in bills of

lading reducing the warranty to the point permitted by the Harter Act - to an obligation to use due diligence in this respect. Thus, in a case ruled by a normally drawn bill of lading under Harter, the carrier could be held liable only for damage ensuing from his failure to sue due diligence to make his vessel fit for the service - the same result as under Cogsa." There are, however, two differences between the Harter Act and the Hague/Hague-Visby Rules in regard to seaworthiness. First, the Harter Act makes no mention of the time when the carrier's vessel must be seaworthy; the common law doctrine of stages applies. Second, the right to rely on the exemption clauses under s.3 of the Act is conditional on the ship being "seaworthy in all respects," regardless of whether there is a connection between unseaworthiness and the loss or damage. This was so held by the Supreme Court in The Isis,[150] overruling the Court of Appeal which had interpreted the term "seaworthy in all respects" to mean in all respects connected with loss or damage. The Supreme Court decision that the term must be interpreted literally regardless of causation is, arguably, unduly harsh on shipowners.

5.6 EXECUTION OF THE VOYAGE

The carrier has an implied undertaking to commence on and complete the voyage agreed on [151] with reasonable dispatch.[152]

FOOTNOTES

1. This was so held in unreported case of Hecker v. Cunard SS. Co.; cited in Scrutton on Charterparties and Bills of Lading (19th ed., 1984), p.121. n.2.

2. See 4.3.

3. The American Carriage of Goods by Sea Act 1936 does not refer to Article 4 but this lack of reference presumably makes no difference.

4. (1966) 2 Lloyd's Rep. 53, 58.

5. Loc. cit., p. 62.

6. (1947) A.M.C. 568, 576.

7. (1955) 2 Lloyd's Rep. 218.

8. (1976) 1 Q.B. 893; See 5.2.1(b).

9. Maxine Footwear v. Canadian Government Merchant Marine Ltd. (1959) A.C. 589; see 5.5.3.

10. See 5.3.

11. (1954) 2 Q.B. 402.

12. Loc. cit., p. 418.

13. Loc. cit., p. 418.

14. (1957) A.C. 149.

15. (1952) A.M.C. 1094.

16. Loc. cit., p. 1096.

17. (1949) A.M.C. 187.

18. (1981) 1 Lloyd's Rep. 200.

19. Loc. cit., p. 205. Emphasis added.

20. (1976) 1 Q.B. 893.

21. Ibid.

22. (1984) 1 Lloyd's Rep. 317, 320.

23. (1957) A.C. 149.

24. (1962) A.M.C. 432, 434.

25. (1920) 34 Ll. l. R. 192.

26. Loc. cit., p. 194.

26a. Cf. Sze Hai Tong Bank v. Rambler Cycle Co. Ltd. (1959) A.C. 576.

27. (1963) A.M.C. 1662. See 8.3.4.

28. (1965) A.M.C. 39.

29. (1972) A.M.C. 373, 374-5.

30. As to the scheme of liability and the CTD, see 2.7.2.

31. By Article 7, "prior to the loading on, and subsequent to the discharge," the parties are free to contract as they wish; but see n.26a.

32. Article 3(8) of the Hague/Hague-Visby Rules, the equivalent of Article 23, was so treated in The Morviken (1983) 1 Lloyd's Rep. 1.

33. Article 4(2)(a).

34. Article 4(2)(b).

35. See 5.5.6.

36. See 2.1.

37. The carrier need not issue a bill of lading or describe the goods if the shipper does not so demand; see 5.3.2(b). Cf. the Harter Act; s.4 makes it the carrier's duty to issue a "a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent or the vessel for transportation ...."

38. (1906) 1 K.B. 237, 247.

39. Discussed in relation to the Hague/Hague-Visby Rules at 4.1.2.

40. As to the date of shipment, see 5.3.3(f).

41. See 1.4.1.

42. See 3.2.2.

43. (1925) A.M.C. 447.

43a. Cf. The American Astronaut (1979) 1 M.L.J. 216, and The Red Jacket (1977) A.M.C. 1382.

44. (1930) 1 K.B. 416, 433.

45. (1917) 2 K.B. 664.

46. (1947) 80 Ll. L. Rep. 13.

47. Loc. cit., p. 17.

48. (1935) p. 134, 143.

49. (1962) A.C. 60; see also Oricon GmbH v. Intergraan NV (1967) 2 Lloyd's Rep. 82.

50. (1946) A.M.C. 1252.

51. (1957) A.M.C. 611.

52. (1979) 1 M.L.J. 216, 218.

53. Scrutton describes the situation as "unsatisfactory." Ibid, p. 455.

54. (1939) A.C. 277, 294.

55. (1947) 80 Ll. L. Rep. 13.

56. Cf. Grant v. Norway (1851) 10. C.B. 665.

57. (1930) 1 K.B. 416.

58. (1928) 34 Com.Cas.172. Cf. s.3 of the Bills of Lading Act 1855. But in this case, although the misrepresentation was caused by the shipper's fraud, there was a conclusive evidence of quantity clause and it was the shipowner who was sued, not the signer of the bill.

59. Ibid, p. 438.

60. See Chapter Three.

61. The ensuing discussion is derived from Scrutton, ibid, p. 111, et. seq.

62. (1851) 10 C.B. 665.

63. Ibid, p. 113.

64. (1964) A.C. 465.

65. (1851) 10 C.B. 665.

66. Loc. cit., p. 688.

67. (1912) A.C. 716.

68. Ibid, p. 115, n.72.

69. See n.58.

70. (1922) Ll. L. Rep. 58.

71. See _Evans v. Webster & Brothers Ltd._ (1928) 34 Com.Cas.172; _Lishman v. Christie_ (1887) 19 Q.B.D. 333.

72. (1966) 1 Lloyd's Rep. 1.

73. (1982) 1 Lloyd's Rep. 606.

74. (1986) 1 Lloyd's Rep. 261; see 5.3.3(f).

75. (1906) 1 K.B. 237.

76. See 5.3.2(b).

77. (1875) 1 P.D. 414, 420.

78. (1934) 39 Com.Cas.227.

79. (1985) A.M.C. 2284.

80. (1970) 2 Lloyd's Rep. 91.

81. Scrutton, ibid, p. 118.

82. (1901) 1 K.B. 548.

83. Loc. cit., p. 570.

84. (1886) 18 Q.B.D. 147.

85. Loc. cit., p. 152.

86. See 3.3.7.

87. (1982) 1 Lloyd's Rep. 606.

88. (1851) 10 C.B. 665.

89. See Schmitthoff's Export Trade (8th ed., 1986) for a more comprehensive account; pp. 36 - 8, 501 - 2.

90. (1986) 1 Lloyd's Rep. 261.

91. Loc. cit., p. 265.

92. (1851) 10 C.B. 665.

93. (1886) 12 A.C. 698. See also The Manila (1988) 3 All E.R. 843. Cf. The Almak (1985) 1 Lloyd's Rep. 557. In that case, the charterparty provided that the charterers were to indemnify the shipowners against all consequences arising from the signing of bills on the charterers' directions. The sub-charter also bore this provision. The sub-charterers sued the shipowners for losses incurred as a result of a bill being misdated by the shipper which was not

noticed by the master who signed it. Mustill J. held that if the plaintiffs chose to have the bill presented by an independent shipper and consequently suffered loss, it was only just that they bore the loss; the claim had to fail for circuity of action. In any event, there was no implied undertaking on the part of the defendants that the master would take reasonable care to ensure correct dating; Mustill J. held (at p. 559): "I cannot see any such implication in needed in order to make the sub-charter operate effectively ...." It is respectfully submitted that this aspect of the judgment is not free from doubt. The plaintiffs were not suing in their capacity as sub-charterers. They were suing qua indorsees. It is common practice for bills of lading, which may later be transferred, to be issued under a charter or sub-charter. It is noteworthy that Mustill J. did contemplate that if the shipowners had been successfully sued, they would "have had a valid claim to be indemnified by the shippers." (p. 561). On any view, it has to be accepted that final responsibility rested with the plaintiffs by reason of the indemnity clause.

93a. (1929) 1 K.B. 400.

94. (1899) 1 Q.B. 436.

95. (1954) 2 Q.B. 459.

96. Loc. cit., p. 481.

97. (1970) 1 Lloyd's Rep. 53.

98. Loc. cit., p. 58.

99. Schmitthoff's Export Trade, ibid, p. 37; see also p. 350.

100. (1983) 1 A.C. 168.

101. (1957) 2 Q.B. 621.

102. Loc. cit., p. 639.

103. Loc. cit., p. 632.

104. (1959) A.C. 576.

105. (1985) A.M.C. 1444.

106. Loc. cit., p. 1459.

107. <u>The Aquacharm</u> (1982) 1 Lloyd's Rep. 7, 11. See 5.5.4(a).

108. Cf. the position under the Hague, Hague-Visby, and Hamburg Rules and the <u>Harter Act</u>.

109. (1905) 1 K.B. 697.

110. (1885) 10 P.D. 103.

111. (1912) 1 K.B. 229.

112. (1959) A.C. 589.

113. (1967) 2 Q.B. 250.

114. (1962) 1 Lloyd's Rep. 316.

115. (1950) A.M.C. 1973, 1985.

116. (1963) 2 Lloyd's Rep. 223.

117. (1954) A.M.C. 1642.

118. (1943) A.M.C. 954.

119. (1963) 2 Lloyd's Rep. 223.

120. (1969) 1 M.L.J. 90.

121. (1941) A.M.C. 730.

122. (1940) 67 Ll. L. Rep. 110.

123. (1961) 1 All E.R. 495.

124. Loc. cit., p. 504.

125. (1959) 2 Lloyd's Rep. 553, 585.

126. See R.P. Colinvaux, "Revision of the Hague Rules Relating to Bills of Lading," (1963) J.B.L., p. 341.

127. Angliss v. P. & O. (1927) 2 K.B. 456, 461.

128. (1927) 2 K.B. 456.

129. Loc. cit., p. 461.

130. (1982) 1 Lloyd's Rep. 7.

131. Loc. cit., p. 9.

132. Loc. cit., p. 11.

133. (1967) 2 Lloyd's Rep. 276.

134. (1962) 1 Lloyd's Rep. 316.

135. (1958) 1 Lloyd's Rep. 73.

136. (1924) A.C. 100.

137. (1976) 1 Lloyd's Rep. 63.

138. (1978) 1 Lloyd's Rep. 300.

139. (1984) 2 Lloyd's Rep. 586.

140. (1951) 2 Lloyd's Rep. 265.

141. (1954) 212 F.2d. 127.

142. (1959) 2 Lloyd's Rep. 105, 113.

143. (1942) A.M.C. 1125, 1139.

144. (1914) 1 K.B. 541.

145. (1914) p. 9.

146. (1961) 1 All E.R. 495.

147. (1961) A.C. 807, 867.

148. (1898) 170 U.S. 655.

149. Gilmore & Black, "The Law of Admiralty," (2nd ed., 1975) p. 152.

150. (1933) A.M.C. 1565.

151. The route normally has to be implied; most bills of lading state only the ports of loading and discharge. As to deviation, see Chapter Six.

152. As to delay, see 6.1.1.

CHAPTER 6 : THE CARRIER'S LIABILITY

6.1 INTRODUCTION

Actions against carriers for lost, damaged or delayed cargo are normally founded on contract (for instance, the ICC Rules) or statute (for instance, the Bills of Lading Act 1855 and the Carriage of Goods by Sea Act 1971). The carrier's liability in bailment is usually qualified by statute or contract (cf. Johnson, Matthey & Co. Ltd. v. Constantine Terminals Exports Co. Ltd.).[1] As for actions in tort, this avenue has been somewhat restricted since the House of Lords decision in The Aliakmon[1a] that the plaintiff must be the cargo owner or had possession of the cargo at the time of its loss or damage.

6.1.1 "Loss or Damage"

The words "loss or damage" appear several times in the Hague and Hague-Visby Rules; they are also used in the Harter Act, ss.1 and 3. At one time it was uncertain whether the words referred only to physical loss of or damage to the goods or whether they extended beyond to cover such occurrences as delay, misdelivery and loss of

profit. The reason for the uncertainty is not difficult to discern. In Articles 3(8) and 4(5), the words "loss or damage" are followed by the words "to or in connection with goods." But in Articles 4(1) and (2), the words "loss or damage" do not so appear.

In Anglo-Saxon Petroleum Co. v. Adamastos Shipping Co.,[1b] the Hague Rules were incorporated into a charterparty which required the completion of as many consecutive voyages as could be executed within 18 months. Due to unseaworthiness, the vessel completed fewer voyages than it could otherwise have completed. Devlin J. held:[2] "The Act is dealing with responsibilities and liabilities under contracts of carriage of goods by sea, and clearly such contractual liabilities are not limited to physical damage. A carrier may be liable for loss caused to the shipper by delay or misdelivery, even though the goods themselves are intact. I can see no reason why the general words 'loss or damage' should be limited to physical loss or damage. The only limitation which is, I think, to be put upon them is that which is to be derived from section 2 which is headed: 'Risks.' The 'loss or damage' must, in my opinion, arise in relation to the 'loading, handling' stowage, carriage, custody, care and discharge of such goods,' but is subject to no other limitation."

It follows from Devlin J.'s dictum that "loss or damage" includes loss of profit. If loss of profit is to be recovered, going by the principle in Hadley v. Baxendale, it must be proved that the carrier in breach should have reasonably contemplated that his breach was likely to cause the loss or there was a real possibility of such loss arising from his breach.[3] In a charterparty case, Czarnikow v. Koufos,[4] because of a deviation with consequential delay, the cargo of sugar fetched a lower price than it would have fetched had the ship arrived on time. The House of Lords held that since prices in a commodity market were likely to fluctuate, shipowners should reasonably contemplate that loss of profit was not unlikely or was a serious possibility if their ships delayed their voyage. The plaintiffs recovered the difference between the market price on the day their cargo should have arrived and the price for which the cargo was sold. However, where a contract at a particularly lucrative price is lost through delay and the carrier has no knowledge (actual or constructive) of that special factor, the damages recoverable will be on the normal market value basis: Horne v. Midland Railway.[5]

The Hamburg Rules make it clear that a carrier can be liable for delay. Article 5(1) states that "delay in delivery occurs when the goods have not been delivered at

the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case." A point for debate here is whether the carrier can circumvent the intent of the provision (that is, liability for delay) by excessively extending the time normally taken for delivery through express stipulation in the cargo transport document. Perhaps the purpose would have been better served if some form of qualification followed the words "within the time expressly agreed upon," for example, "which must be reasonable having regard to the circumstances of the case." At any rate, the courts would probably apply the "main objects and intent of the contract" rule of construction. Article 5(3) is somewhat draconian; it gives the claimant an option to treat delay, when it has gone on for 60 consecutive days, as a loss of goods. This legal equation or metamorphosis is not free of difficulty. The provision does not speak of the consequences which ensue when the claimant elects to treat the delayed goods as lost. To give an example: in whom does ownership of the goods vest when they eventually arrive? Also, what happens to the bill of lading as a document of title?

6.1.2 The Basis of Liability

(a) At Common Law

Statutory and contractual provisions aside, a common carrier for reward is liable for any loss of or damage to the goods of any shipper unless caused by an act of God, or the Queen's enemies, or by the inherent nature of the goods, or by the fault or fraud of the shipper, or by a general average sacrifice properly made: Coggs v. Bernard.[6] A common carrier is one who holds himself out as being prepared to carry for all and sundry; if he reserves to himself the right of refusal, regardless of his capacity to carry, being guided by the attractiveness of the reward, he is not a common carrier: Belfast Ropework Co. v. Bushell.[7] The Interstate Commerce Act, 49 U.S.C., s.902(d), defines a common carrier in like terms.

The strict liability of common carriers for reward is said to have originated by custom in the reigns of Elizabeth I and James I as an exception to the rule that bailees were only bound to exercise reasonable care and diligence,[8] the reason for the imposition of an insurer's liability being the prevention of collusion between carriers and thieves.[9]

Although gratuitious common carriers are only liable for loss occasioned by negligence,[9] it remains open whether shipowners who are not common carriers (i.e., private carriers) bear the same liability as that of common carriers for reward. In Liver Alkali Co. v. Johnson,[10] Brett J. was of the opinion that the question admitted of an answer in the affirmative. In Nugent v. Smith,[11] Brett J. repeated: "The true rule is that every shipowner or master who carries goods on board his ship for hire is, in the absence of express stipulation to the contrary, subject by implication ... by reason of his acceptance of the goods to be carried, to the liability of an insurer ... not because he is a common carrier, but because he carries goods in his ship for hire." Since the ship in that case was a general ship, what was said by Brett J. was clearly by way of obiter dictum. However, in the Court of Appeal, Cockburn C.J. said that shipowners of chartered vessels need only exercise reasonable care and diligence.[12] In Baxter's Leather Co. v. Royal Mail, Sir Correll Barnes preferred the view of Brett J. and said: "Shipowners are not, strictly speaking, common carriers, but they are under the same kind of liability as common carriers unless that liability is cut down by a special contract."[13] Earlier, Willes J. had expressed a different opinion:[14] "In the case of a bill of lading ... the contract is to carry with reasonable care ...." Again, this view was obiter but it

derives force from acceptance by eminent writers such as Scrutton[15] and Payne and Ivamy.[16] But, by parity of reasoning, it has rightly been said that there is no good reason why a shipowner who carries the goods of a charterer should have a more lenient basis of liability than he would if the ship had been a general ship and the goods had been shipped by several shippers.[17]

It is submitted that the difference in opinion is of academic interest rather than of practical importance as goods are generally shipped subject to a multitude of contractual terms and exemption clauses. As Professor Otto Kahn-Freund observes, "carriage by sea without a special contract either by way of charterparty or by way of bill of lading is a rare exception."[18] In the United States, it is firmly established that a private carrier need only exercise reasonable care and diligence.[19]

(b) Under the Trilogy of Rules and the Harter Act[20]

Under the Hague and Hague-Visby Rules, the carrier has properly and carefully to load, stow, carry, keep, care for, and discharge the goods: Article 3(1). As for seaworthiness, the common law doctrine of stages is abrogated. It is replaced by an obligation to exercise due diligence, before and at the beginning of the voyage, in

making the ship seaworthy. Generally speaking, a Hague or Hague-Visby Rules carrier is not liable unless he or his servant or agent has been negligent in performing the duties imposed.[21] The carrier cannot contract out of his liability under the Rules: Article 3(8). He may only increase his liability: Article 5.

In respect of the duties above-mentioned, the Harter Act renders void any clause purporting to exonerate the carrier for negligence: ss.1, 2. There are three material differences which require mention. First, s.1 requires "proper delivery" whereas Article 3(1)does not. By the latter, proper and careful discharge suffices. The significance of the difference is reflected by Crystal v. Cunard SS.,[22] [a Harter Act case] where it was held that a cesser of liability clause which purported to operate once the goods were discharged free of the ship's tackle was void. Second, the common law doctrine of stages which requires the ship to be seaworthy at each and every stage of the voyage remains intact under the Harter Act: The Carib Prince.[23] Third, under the Rules the carrier must prove due diligence in making the ship seaworthy or that the loss or damage was not attributable to unseaworthiness before he can rely on the excepted perils therein.[24] By contrast, the carrier's right to rely on the excepted perils under the Harter Act is conditional upon the ship

being seaworthy in all respects regardless of whether there is a connection between the loss or damage and unseaworthiness: The Isis.[25]

The Hamburg Rules have an across-the-board basis of liability. If loss, damage or delay occurs whilst the goods are in the carrier's charge, the carrier is liable "unless (he) proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences" : Article 5(1). The carrier's liability under the Rules cannot be decreased but may be increased: Article 23.

6.2 EXCLUSION OF LIABILITY: RULES OF CONSTRUCTION

Apart from the excepted perils at common law, a carrier may seek to rely on the exclusion clauses which form part of the contract of carriage as well statutory exceptions where applicable. It is necessary to bear in mind at the outset that the Unfair Contract Terms Act 1977 does not apply to contracts for the carriage of goods: Schedule I, paragraph 3. That however does not mean that a carrier's recourse to exclusion clauses is unfettered. Although the courts generally have to respect the liberty of the parties to contract, they look on exclusion clauses with some disfavour. The typical approach is to ascertain

whether the clause sought to be relied upon has been incorporated into the contract and whether notice has been given. If an exclusion clause survives this stage, it will be read contra proferentem.

In instances where the Hague or Hague-Visby Rules apply, it has to be ascertained whether a particular clause falls foul of Article 3(8) which prohibits any stipulation excluding or lessening the carrier's responsibilities and liabilities under the Rules. The Hamburg Rules have a similar safeguard in Article 23. Likewise, the Harter Act sets down minimum standards in regard to the performance of certain responsibilities which cannot be lessened in any way. Thus, s.1 renders void any clause relieving the "shipowner, master, agent or manager" of liability for loss of or damage to the goods due to negligence in the loading to delivery stage whilst s.2 renders void any clause relieving the same class of persons from exercising due diligence in making the ship seaworthy.

6.2.1. Notice and Incorporation of Exclusion Clauses

The requirement of notice in carriage of goods by sea cases is not without importance although the consignor is usually aware or may be taken to be aware of the terms upon which he has shipped the goods.[26] Difficulties may

arise in three respects. First, where an exclusion clause is agreed upon between the original parties to the contract of carriage and is not incorporated into the bill of lading which is latterly indorsed over. In such a case, the shipper's actual notice of the clause is of no assistance to the carrier as against the indorsee. Leduc v. Ward[27] is an oft-cited illustration of the "brought home" aspect of notice.

Second, as to unusual clauses in small print, Lush J. in Crooks v. Allan said:[28] "If a shipowner wishes to introduce into his bill of lading so novel a clause, as one exempting him from general average contribution ... he ought not only to make it clear in words, but also to make it conspicuous by inserting it in such type and in such part of the document that a person of ordinary capacity and care could not fail to see it." Thus, a shipowner who seeks to rely on an unusual exclusion clause may have to prove that he took special measures to bring it to the notice of the plaintiff: presumably notification of or referral to the clause on the face of the bill of lading would suffice.[29] It has been held by the Court of Appeal that when one condition in a set is particularly onerous, something special has to be done to draw the customer's attention to that particular condition: Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.[30] Each

case will turn on its own facts, but it is doubtful if the courts will adopt a literal application of Denning L.J.'s obiter dictum in Spurling v. Bradshaw: "Some clauses which I have seen would need to be printed in red ink on the case of the document with a red had pointing to it before the notice could be held to sufficient."[31]

Third, in relation to short form bills of lading, there can be difficulties when the standard conditions are amended or where there is inconsistency. In respect of the former, it is submitted that the unamended conditions will apply until such time as notice of the change is fairly brought to the consignor/consignee. In respect of the latter, the terms on the short form bills under which the goods are shipped will probably prevail.

6.2.2 The Contra Proferentem Rule

If a particular clause is ambiguous, it will be construed strongly against the party for whose benefit it was drafted.[32] As the United States Court of Appeals said in Encyclopaedia Britannica Inc. v. The Hong Kong Producer, "any special provisions, not uniformly standard in bills of lading and not required by COGSA, must be narrowly and strictly construed against the carrier."[33] The court went on to cite an observation of Professor

Corbin: "The rule is hardly to be regarded as truly a rule of interpretation .... It is chiefly a rule of public policy, generally favouring the underdog .... It may well be that the rule is applied mainly in cases where the agreement contains an 'unconscionable' or at least an 'unreasonable' provision, and the court feels that the attention of the party whom it affects adversely was not clearly called to it."[34] In that case, containers were shipped under a short form bill which made no mention of on-deck stowage, but stated that the shipment was subject to the carrier's regular bill which provided that the goods could be carried on deck "unless the shipper informs the carrier in writing before delivery of the goods to the carrier that under deck stowage is required." The court held that the liberty clause had to be construed narrowly against the carrier and stated: "The bill of lading (short form and long form combined) nowhere states that the cargo is being carried on deck. Clause 13 says it may be so carried but not that it is being so carried."[35] It may be recalled that the Hague Rules do not apply to "cargo which by the contract of carriage is stated as being carried on deck and is so carried": Article I(c).[36] As such, the containers were held to be "goods" to which the Rules applied.

6.2.3 The Ejusdem Generis Rule

Where specific words are followed by general words in an exclusion clause, the latter are taken to refer only to the things or contingencies described by the former. In Tillmans v. Knutfort,[37] where the words "war, disturbance or any other cause," were used, it was held that ice was not covered by the general words "or any other cause." Conversely, where general words are followed by specific words, the genus of the things or contingencies specified limit the generality of the former. In Diana Maritime Corp. v. Southerns Ltd.,[38] the words "causes beyond the carrier's control such as blockade, interdict, war, strikes, lockouts, disturbances, ice, storms or the consequences thereof" were interpreted to refer only to those causes specifically mentioned.

Only if it is exceedingly clear that the general words do not exhaustively refer to the genus of the specific words will the ejusdem generis rule be rendered inoperative - for example, "any other hindrance of whatsoever nature"[39] or "any other cause whatsoever."[40] Whether or not the rule applies or not is not always easy to determine. In Micada C.N. v. Texim,[41] where the general words were followed by the words "such as" together with the specific words in brackets, it was

held that the words in bracket were used only by way of example and did not restrict the scope of the general words. This decision may be compared with that in Diana Maritime Corp. v. Southerns Ltd.[42] where the specific words were not in brackets.

6.3 THE EXPECTED PERILS AND IMMUNITIES

(a) At Common Law, and under the Harter Act and Hamburg Rules

The circumstances in which a carrier may be freed from liability at common law,[43] and under the Hamburg Rules[44] have already been mentioned and need not presently be re-considered. The Harter Act, as the percussor of the Hague and Hague-Visby Rules, embodies a number of the excepted perils found in the latter, viz, fault or error in navigation or management of the ship, dangers of the sea or other navigable waters, acts of God, public enemies, inherent vice of the goods, insufficiency of package, seizure under legal process, act or omission of the shipper or owner of the goods, his agent or representative, or saving life of property at sea. There is, however, a fundamental difference. Under the Harter Act, reliance on the excepted perils is conditional on the

ship being seaworthy regardless of whether there is a link between the ship being unseaworthy and loss or damage: The Isis.[45]

(b) Under the Hague/Hague Visby Rules

Article 4(1) exonerates the carrier from liability arising from unseaworthiness unless the unseaworthiness is caused by negligence on the part of the carrier.[46]

Article 4(2) provides: "Neither the carrier or 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.

The words "navigation" and "management" are not synonymous. In The Glenochil, Sir Francis Jeune was of the opinion that "the word 'management' goes somewhat beyond ... perhaps not much beyond ... navigation, but far enough to take in this very class of acts which do not affect the sailing or movement of the vessel, but do affect the vessel herself."[47] In ascertaining whether

the exception applies, the criterion to be employed is that in the dissenting judgment of Greer L.J. in Gosse Millerd Ltd. v. Canadian Govt. Merchant Marine which was subsequently approved by the House of Lords:[48] "If the cause of the damage is solely, or even primarily, a neglect to take reasonable care of the ship, or some part of it, as distinct from the cargo, the ship is relieved from liability; but if the negligence is not negligence towards the ship, but only a negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved."

The American courts take a similar view. In Schnell v. The Vallescura,[49] a cargo of onions was damaged due to non-ventilation. For part of the voyage, there could be no ventilation because of adverse weather but at times when ventilation could be effected, it was not. The court held that the failure to ventilate when it was possible to was negligence in the care of the goods; it held that ventilation was a responsibility towards the goods, not towards the management of the ship. In The Germanie,[50] it had been said that whether the exception applied had to be "determined by the primary nature and object of the acts which cause(d) the act."

By way of comment, the exception is difficult to square with the general duty imposed by the Rules to exercise due diligence in respect of the cargo and seaworthiness of the ship. Put another way, why should the carrier be exonerated from liability for the negligence of his servants in the navigation or management of the ship but be held liable for the negligence of an independent contractor in regard to repairs of the ship? Anthony Diamond Q.C., in a diatribe against the exception, says that it encapsulates the anachronistic concept that the carriage of goods by sea is "a partnership between ship and cargo so that, once the relevant voyage had begun, the crew of the ship were treated, in a sense, as though they were employed by both owner and cargo instead of being exclusively the shipowner's servants."[51] Another criticism that may be made of the exception is that of its inherent difficulties in application, notwithstanding the usefulness of the test laid down on both sides of the Atlantic. One cannot necessarily say with a certain degree of confidence whether a certain act or omission amounts to unseaworthiness or negligent navigation or management. In _The Tolmidis_,[52] a failure to close the low sea inlet valves of the ship and the overboard discharge valve of the coolers was held to be negligent management. In _The Glenochil_,[53] a failure to inspect the pipes prior to the pumping of water into the ballast tank was also held to be

negligent management. But in The Washington,[54] the master's negligent failure to change course to avoid a storm was held not to be an act, neglect or fault in navigation or management.

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

Damage or loss caused by fire covers damage by smoke and by water used to extinguish the fire: The Diamond.[55] However, heat without fire does not come within the exception; it must be accompanied by some "visible flame" (Western Woolen Mill Co. v. Northern Assurance Co.)[56] or "ignition" (Louis Dreyfus v. Tempus Shipping Co.).[57]

In the United Kingdom, the owner of a British ship may alternatively seek to be exonerated under s.18(1)(a) of the Merchant Shipping Act 1979. By this provision, such a person is not liable for loss or damage caused by fire aboard if he proves that the loss or damage occurred without his intent or recklessness with knowledge that such would probably result. The same goes for a master or member of the crew acting in the course of his employment as a servant of the owner: s.18(2). The term "owner" in the 1979 Act "includes any part owner and any

charterer, manager or operator of the ship": s.18(4). The above-mentioned provisions of the 1979 Act were brought into force by SI No. 1986/1052, and replace s.502 of the Merchant Shipping Act 1894 as amended by the Merchant Shipping Act 1958, s.3(1).[58] The burden of proof under s.502 is the reverse of that under the present s.18(1)(a): Lennard's Co. v. Asiatic Co.[59] Also, the type of conduct disentitling reliance on the exception differs: by s.502, actual fault or privity would suffice.

From the viewpoint of an owner of a British ship, s.18 of the 1979 Act is certainly preferable to the fire exception in the Hague-Visby Rules. For a start, the type of conduct barring exculpation under the 1979 Act (intent or recklessness with knowledge) favours the shipowner more than that under the Hague-Visby Rules (actual fault or privity).[60] Also, reliance upon s.18 is not conditional on due diligence having been exercised in making the ship seaworthy.[61]

In the United States, the alternative to the fire exception under the Hague Rules lies in the Fire Statute (46 U.S. Code, s.182). That enactment frees the "owner of any vessel" from liability for loss of or damage to cargo caused by the "design or neglect of such owner." The American courts have concluded that "design or neglect"

under the Fire Statute and "actual fault or privity" under the Rules bear the same meaning.[62] Reliance on the Fire Statute is not displaced merely by the ship being unseaworthy: The Silvercypress.[63] The Harter Act which requires that a ship be seaworthy in all respects, regardless of whether there is a nexus between the condition of the ship and loss or damage, before an exception can be relied on does not affect this decision because s.6 thereof expressly saves the Fire Statute from repeal.[64]

There are two fundamental differences between the British and American legislation which require mention. First, the Fire Statute is confined to the owner of any vessel but the 1979 Act applies to the owner of a British ship and any charterer, manager or operator of the ship as well as the master or member of the crew acting in the course of his employment. Secondly, the burden of proof under the Fire Statute is on the claimant: The Venice Maru.[65] This was recently affirmed in Westinghouse v. M/V Leslie Lakes[66] where Brown J. of the Court of Appeal held that once a carrier has established fire as the cause of loss, the burden shifts to the claimant to prove that the fire was caused by the carrier's actual fault or privity. In the United Kingdom, in Lennard's Co. v. Asiatic Co.,[67] it has been held that a party seeking to

rely on s.502 of the Merchant Shipping Act 1894 had to prove that the fire arose without his actual fault or privity; under s.18 of the 1979 Act, it is thought, the cargo claimant has to establish that the fire was caused with intent or by recklessness with knowledge that loss or damage would probably result. It is submitted that the approach under s.502 is to be preferred because the claimant is hardly likely to be in a position to know what goes on aboard the ship in the course of its voyage, let alone discharge the required standard of proof. A Hamburg Rules carrier is liable for loss of or damage to the goods by fire if the "claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents": Article 5(4).

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

"As the phrase is 'perils of' not 'perils on' the sea, it does not include every misfortune that may befall the ship or cargo on the sea or every loss or damage of which the sea is the immediate cause."[68] In The Frey,[69] an American case, it was said: "There is no rule by which it can be defined with accuracy what degree of violence of the wind or waves is necessary to constitute a peril of the sea. Different cases must be determined

according to their special circumstances." In The Benoi VI,[70] a cargo of ramin logs was loaded onto a barge at Indonesia and towed by tugboat to Singapore. At the port of discharge, almost all of the logs were found to be missing. The surveyors' report concluded that "the loss of the cargo is attributable to the heavy weather prevailing during the period the vessel was proceeding to Singapore." The Singapore Court of Appeal held that on the facts, the loss was occasioned by the perils of the sea. Since the sea perils exception contemplates a fortuitious loss, the decision would have gone the other way if the weather encountered could have been foreseen or expected. As Lord Herschell said in The Xantho,[71] the casualty must be one which could not have been foreseen as one of the necessary incidents of the voyage. Thus, in G.E. Crippen & Associated Ltd. v. Vancouver Tug Boat Co. Ltd.,[72] the British Columbia Exchequer Court held that the damage to a cargo of peat moss could not be attributed to the sea perils exception as the weather was normally inclement at that time of the year. In some instances, it will be necessary to distinguish between unseaworthiness or bad stowage on the one hand and the sea perils exception on the other hand. In The Oquendo,[73] where the goods were stowed in a place exposed to the sea and damaged by sea water in adverse weather, it was held that the improper stowage excluded the protection of the excepted peril.

(d) Act of God.

To rely on this excepted peril, the carrier must show that the occurrence was due to natural causes directly and exclusively, and that it could not have been prevented by any reasonable foresight, pains and care: per James L.J. in Nugent v. Smith.[74] The exception will not avail the carrier where, although the immediate cause of the loss was an act of God, the original cause, without which the act of God would not have happened, arose out of his servants' negligence: Siordet v. Hall.[75] Quite often, the sea perils and act of God exceptions cover the same thing, but as has been pointed out: "Collision by negligence of another ship, and 'pirates' appear to be 'perils of the sea' but not 'acts of God.' On the other hand, the exception 'act of God' appears to cover such causes of loss as frost, lightning, etc., which are not perils peculiar to the sea."[76]

(e) Act of War.

This would apparently cover acts perpetrated in civil wars (Curtis v. Matthews)[77] and during hostilities between governments which have yet to sever diplomatic relations (Kawasaki Kisen v. Bantham Co.) (No.2).[78]

(f) Act of public enemies

Scrutton expresses the view that this excepted peril includes the acts of pirates.[79]

(g) Arrest or restraint of princes, rulers or people, or seizure under legal process.

It applies to embargoes and blockages as well as forcible governmental interferences, but not to ordinary legal proceedings and their outcome nor to the application of the law at the port of discharge when the local law is known before the voyage is executed.[80]

(h) Quarantine restrictions.

This is covered by the exception above.

(i) Act or omission of the shipper or owner of the goods, his agents or representative.

In Ismail v. Ocean Polish Lines,[81] this exception was of relevance. There the carrier was exonerated because the unsound system of stowage had been adopted on the shipper's insistence. In connection with this exception, reference may be made to Article 3(5) of

the Hague Rules which imposes a duty on the shipper to furnish accurate information germane to the goods to the carrier, and Article 4(6) which urges the shipper of dangerous goods to disclose to the carrier the nature and character of the goods.[82] It is also related to exceptions (n) insufficiency of packing, and (o) insufficiency or inadequacy of marks.

(j) Strikes or lock-outs or stoppage or restraint of labour from whatever cause whether partial or general.

An _obiter dictum_ of Brandon J. in _The Arawa_[83] indicates that the exception is operative even though a stoppage results in improper care of the goods so long as the carrier is not personally at fault in regard to the stoppage and consequential damage. Similarly, the Exchequer Court of Canada has held that "_s.4(2)(j)_ will only provide a defence to a carrier in respect of a loss arising out of strike provided that ... the carrier can show that no negligence of his ... contributed to the loss."[84] No doubt whether or not a carrier can be said to be at fault in regard to a stoppage or strike will be a difficult question of fact in each case. Probably the carrier will not be freed from liability if he fails to

exercise due diligence in procuring replacement or suitable labour.

(k) Riots and civil commotions.[85]

(l) Saving or attempting to save life or property at sea.

These exculpatory instances are reiterated in Article 4(4) which, in addition, frees the carrier from liability for "any reasonable deviation."[86]

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods.

In other words, inherent vice of the goods or "unfitness of the goods to withstand the ordinary incidents of the voyage."[87] The quintessence of this excepted peril is two-fold.

First, as was stated in an American case, The Ensley City: "The law imposes upon shipowners the duty to use all reasonable means to ascertain the nature and characteristics of goods tendered for shipment ...."[88] In The Hovanger,[89] overripe apples were loaded and their

loss was held to be due to inherent vice. An examination of the cargo by the defendants' expert had failed to reveal the condition of the apples at the time of shipment and a clean bill had been issued. The Federal Court of Canada held that "the carriers in this instance did not contend themselves with an ordinary inspection but went beyond .... Not only would it be improper but there would be no legal justification for fixing liability on a carrier based on the lack of knowledge or expertise of an expert which the carrier was not by law or by duty to the consignee bound to engage."[90] Second, when a reasonable examination has been conducted and the goods are discovered to be inherently unsound, the degree of care required to be exercised in relation to the stowage and carriage of the goods must be such as the nature of the goods requires. If the carrier fails to exercise a degree of care commensurate to that which the disclosed inherent vice of the goods requires, it may be that the carrier will not be able to rely on the excepted peril of inherent vice: Internationale Guano v. MacAndrew.[91]

(n) Insufficiency of packing.

It appears that a carrier will be exculpated where the packing of the goods by the shipper is

such that it damages other goods stowed nearby in the same ownership (Silver v. Ocean SS.)[92] and even those not in the same ownership (Goodwin v. Lamport and Holt Ltd.).[93]

(o) Insufficiency or inadequacy of marks.

This is not unexpected since Article 3(5) makes the accuracy of information germane to the goods as supplied to the carrier the responsibility of the shipper.

(p) Latent defects not discoverable by due diligence.

This phrase refers to latent defects of the ship but arguably it may also be taken to refer to latent defects in equipment used by the carrier in the loading and discharging process of the goods, such as a crane.[94] A latent defect is a defect that is not discoverable by a competent person on a reasonable inspection: The Dimitries N. Rallins.[95]

(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.

In Leesh River Tea Co. v. British India S.N. Co. Ltd.,[96] a storm valve cover plate of the ship was pilfered at an intermediate port by a servant of the stevedore company employed by the shipowners. The theft allowed in seawater which damaged the goods. The Court of Appeal held that the thief's employment had merely provided him with an opportunity to steal the cover plate and as the pilferage was not within his course of employment (i.e., not for the purpose of loading or unloading), he was not an agent of the shipowners when he stole the cover plate. As such, the shipowners were exonerated under Article 4(2)(q).

6.3.1 THE BURDEN OF PROOF

A carrier who seeks to rely on an excepted peril must prove that the loss or damage was caused thereby. This principle has been applied in pre-Hague Rules cases (for instance, The Glendarroach),[97] in Hague Rules cases (for instance, The Flowergate),[98] and in Hague-Visby Rules cases (for instance, The Torenia).[99] It is equally applicable under the Harter Act. In The Vallescura, the court stated: "In general the burden rests upon the carrier

of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him. This is (also) true at common law .... The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved form liability."[100] The position under the Hamburg Rules is the same: Article 5(1).

The cargo claimant may of course adduce evidence to prove that the actual cause of the loss or damage was or could not be excepted, for instance, unseaworthiness or negligence. Pertaining to negligence under the Rules, two points need to be raised. First, the carrier under the Hague or Hague-Visby Rules is excused for loss or damage caused by the negligence of his servants or agents in the navigation or management of the ship: Article 4(2)(a). This exception is not present in the Hamburg Rules. Second, under the Hague and Hague-Visby Rules, in regard

to the fire exception, it is not clear whether the plaintiff has the burden of proving actual fault or privity of the carrier or whether it is up to the carrier to prove that the fire arose without his actual fault or privity.[101] Under the Hamburg Rules, it is the claimant who has to prove that the fire arose from fault or neglect on the part of the carrier, his servants or agents: Article 5(4).

In instances where there are two or more contributory causes of loss or damage and at least one of them is an excepted peril, the carrier must prove which part of the loss or damage is attributable to the exception else he bears the whole loss or damage.[102] If the excepted peril upon which the carrier wishes to rely is only a remote cause, the carrier will not be excused: causa proxima non remota spectatur. The cause must be a proximate or direct one. In The Thrunscoe,[103] adverse weather led to the ventilation being closed. The goods were damaged as a consequence of the heat. It was held that the direct cause of the damage was the weather, a peril of the sea.

6.4 LIMITS OF LIABILITY

6.4.1 Under the Hague Rules

S.4(5) of the United States Carriage of Goods by Sea Act 1936 reads: "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of the 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 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. In no event shall the carrier be liable for more than the amount of damage actually sustained."

The position under the now repealed Carriage of goods by Sea Act 1924 differs in two material respects. First, as to the limit of liability, the amount recoverable

is not to exceed "100 pounds sterling[103a] ... or the equivalent of that sum in other currency ...." The 100 Pounds limit has been felt to be too low and where the Hague Rules still apply, the parties to the British Maritime Law Association Agreement 1950, as amended in 1970 (commonly referred to the Gold Clause Agreement), accept the liability limit at 400 Pounds. The subscribers are mainly British shipowners, insurers, and P & I clubs; due to the lack of foreign subscribers and the replacement of the Hague Rules by the Hague-Visby Rules in a number of countries, the Gold Clause Agreement is now virtually obsolete.[104] Second, as to the references to which the limit of liability is drawn, the words used are "per package or unit."

A package must be something which has undergone packing of some sort or other. Thus, in Berkshire Knitting v. Moore-McCormack,[105] a wooden case was held to be a package while an unboxed automobile in Studebaker Distributors v. Charlton SS.[106] was held not to be a package. Some cases are not as straightforward. In Standard Electrica v. Hamburg Sudamerikanische,[107] the shipment comprised nine pallets, each of which in turn comprised six cartons of television tuners strapped to pallet boards. Seven pallets were not delivered. The question was: was each pallet a "package" or was each of

the missing forty two cartons a "package"? If the former, the carrier's liability would be limited to $3,500. If the latter, the carrier's limit of liability would be $21,000. The American Court of Appeal held that (1) the dock receipt, bill of lading and the plaintiff's claim letter all indicated that the parties regarded each pallet as a package, (2) it was the shipper, not the carrier, who chose to make the cartons up into pallets, and (3) the shipper could have covered himself by declaring the nature and value of the goods.

It may be pointed out that although considerable weight may be attached to the wording in the bill of lading and other shipping documents to determine whether certain goods constitute a package, such documents may not necessarily reflect the contract of carriage.[108] Also, it is thought that an attempt to define the word "package" so as to secure a lessening of liability would be invalid: Article 3(8).

Further, the bill of lading itself may contain conflicting notations. In Primary Industries Corp. v. Barber Lines A/S and Skibs A/s Tropic,[109] the bill of lading prepared by the shipper had "550" as the "No. of Pkgs" but also read "Ingots Tin Ingots (In 25 Bundles, Each 22 Ingots) (Net Weight: 25,402.0 Kgs.) (Total Ingots 550 In

25 Bundles Only)." Twenty two ingots were not delivered. The American Court held that the carrier was entitled to limit its liability to $500 for non-delivery of one bundle: "The fact that each bundle was formed by strapping the 22 tin ingots in the bundle by two metal bands and that the 22 tin ingots were not completely covered or encased does not render the bundle any less of a package."[110]

The word "unit" itself is not free of difficulty. It is capable of being interpreted as the shipping unit (that is, any cargo that is not a package),[111] or the freight unit (that is, the basis on which the freight for the cargo is calculated).[112] It is thought that the latter interpretation is to be preferred for if the "shipping unit" concept were to be applied to bulk cargoes the amount recoverable would certainly be too low; it would defeat the objective of the Rules in striking a fair limit of liability.

The American version of the Hague Rules avoids the uncertainty by using the phrase "customary freight unit" which has been judicially defined to mean a freight unit that is "well-known in the shipping industry or at least one known to the immediate parties."[113] In <u>The Pioneer Moon</u>,[114] the plaintiff's cargo of liquid latex was filled into the defendant's tanks and delivered to the defendant's

ship for storage in its hatches. Freight was charged at $54 per long ton. If the tanks were treated as packages, recovery of damages for the lost latex would be limited to $5,500 ... calculated on the basis of $500 per tank. If the tanks were not packages and the "freight unit" concept were to be applied, the damages recoverable would be $27,733.73. The U.S. Court of Appeal held that the tanks were not packages; they were functionally part of the ship and were not included in computing the freight charges. In Falconbridge Nickel Mines v. Chimo Shipping,[115] however, the Supreme Court of Canada held that an unpacked tractor and generator were each a unit, thereby applying the "shipping unit" concept. Two remarks are called for here. First, the goods were described in the bill of lading under the heading "No. of Packages and Contents." Second, the phrase "customary freight unit" appears only in the American version of the Hague Rules.

6.4.2 Under the Hague-Visby Rules

Article 4(5)(a) of the Hague-Visby Rules heralds two changes: the expression of the monetary unit in Special Drawing Rights,[116] and an alternative limit based on weight. The relevant passage reads: "666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged,

whichever is higher."[117] The alternative limitation based on weight is intended to achieve certainty in relation to bulk cargoes which cannot reasonably be categorised as either packages or shipping units.

Article 4(5)(b) is an entirely new provision which codifies the common law position: "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."

Article 4(5)(c) is also an entirely new provision.[118] It takes into account the post-war proliferation of containerised transportation. The Hague Rules provide no guidance as to whether the individual items inside a container are to be regarded as packages or units, or whether the container itself is to be regarded as a package; this resulted in a great deal of uncertainty. In The Mormaclynx,[119] the criterion was whether the items were individually enumerated in the bill of lading. But in

The Kulmerland,[120] the declaration in the bill of lading was not considered decisive. The court instead applied the "functional test" which holds that if a container is used merely as a protective means rather than as a means of facilitating transportation, the container itself is to be treated as a package. Significantly though, the bill of lading in that case had the vague notation "1 container said to contain machine." As Collier J. observed in The Tindefjell,[121] that notation did not give any "indication to the carrier of the number of cartons or the intention of the shipper to contract on that basis." Turning back to Article 4(5)(c) it reads: "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."

Clearly the enumeration in the bill of lading is prima facie decisive under Article 4(5)(c). What is less clear is whether the functional test will be applicable. It has been opined that the answer lies in the affirmative.[122] The words "or similar article of transport ... used to consolidate goods" lend support to

this view. Thus, if the container is not an article of transport used to consolidate goods - that is, if it is instead used merely to protect the goods - the container together with the goods will be regarded as a single package despite specific enumeration of the goods in the bill of lading. In brief, the courts are likely to adopt a two-pronged approach. They will, it is submitted, look to the wording in the bill of lading as well as apply the functional test.

6.4.3 Under the Hamburg Rules

Instead of using the ambiguous term "package or unit," the Hamburg Rules use the words "package or other shipping unit," thereby eliminating the plausible interpretation of "unit" as "freight unit." The Hamburg Rules, by Article 6(1)(a), increase the limits of liability to "835 units of account per package or other shipping unit or 2.5 units of account per kilogramme or gross weight of the goods lost or damaged, whichever is the higher." The unit of account referred to is the Special Drawing Right of the International Monetary Fund: Articles 6(3) and 26(1). By Article 26(2), those States which are not members of the IMF and whose laws do not permit the use of SDRs may have as the limit of liability: "12,500 monetary units per package or other shipping unit or 37.5 monetary units per

kilogramme of gross weight of the goods." The monetary unit thereof equals sixty five and a half milligrammes of gold of millesimal fineness nine hundred: Article 26(3). The Hamburg Rules retain the Hague-Visby Rules' approach to containerised goods by Article 6(2)(a) but add the provision that "where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate unit": Article 6(2)(b). A limit of liability, linked to freight, for delay is introduced. Article 6(1)(b) states that "the liability of the carrier for delay in delivery according to the provisions of article 5 is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea."

6.4.4 Under the Harter Act

The approach of the Harter Act in regard to the carrier's limitation of liability may be said to be unsatisfactory. Although the Act established, inter alia, a duty to exercise at least due diligence in regard to the treatment of the cargo and seaworthiness and imposed a fine not exceeding two thousand dollars for any infringement, it

did not nullify or affect unduly low limits of liability clauses at all.[123]

6.4.5 Under the Merchant Shipping Act 1979, SS.17-19

In cases before the United Kingdom courts, the limitation of liability that is usually pleaded and applied is usually that under the Hague-Visby Rules. There is another limit of liability, based on the tonnage of the ship, which may be of application. It is less frequently pleaded than the limits under the Rules which being generally lower are preferred by carriers. It figures only when a large cargo claim is made and the ship is relatively small so that the claim exceeds the tonnage limit, or if the Hague or Hague-Visby Rules do not apply for some reason.

The tonnage limitation scheme is to be found in the Merchant Shipping Act 1979, ss.17-19, which implements the Convention on Limitation of Liability for Maritime Claims 1979.[124] The persons entitled to limit their liability are shipowners and salvors: Article 1(1). The term "shipowner" under the Convention means "the owner, charterer, manager or operator of a seagoing ship": Article 1(2). The claims subject to limitation are, *inter alia*, claims in respect of loss of life or personal injury

or loss of or damage to property occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom, as well as claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage: Article 2(1). Article 6(1)(b) which applies to claims other than those concerning loss of life or personal injury sets the limit of liability at "167,000 (SDR) Units of Account for a ship with a tonnage not exceeding 500 tons." Article 6(1)(b) goes on to state that "for a ship with a tonnage in excess thereof the following amount in addition (applies): for each ton from 501 to 30,000 tones, 167 Units of Account; for each ton from 30,001 to 70,000 tons, 125 Units of Account; and for each ton in excess of 70,000 tons, 83 Units of Account." In respect of claims other than those concerning loss of life or personal injury, where the ship's tonnage is less than 300 tons, the limit is 83,333 Units of Account: Article 5(1), Part II. The tonnage referred to throughout the Convention is the ship's gross tonnage "calculated in such manner as may be presrcibed by an order made by the Secretary of State": Article 5(2), Part II.

6.4.6 Article 3(8) and Limitation of Liability

Article 3(8) of the Hague and Hague-Visby Rules provides that the carrier cannot contract out of the responsibilities and liabilities imposed on him by the Rules or decrease them otherwise than in accordance with the Rules. The provision has been tested in court several times;[125] it is intended here only to consider the issue of exclusive jurisdiction clauses in relation to the legislative techniques used in implementing the Rules.[126] The issue is not new and has a history replete with disagreements on the juristic foundation of the proper law.

The view that the parties' freedom to select the proper law of the contract should be unfettered was rejected by the Court of Appeal in The Torni,[127] but was supported by the Privy Council in Vita Food Products v. Unus Shipping[128] and by the Court of Appeal in Ocean SS. v. Queensland State Wheat Board.[129] Dr. Morris described the latter two decisions as fatal to the raison d'etre of the Hague Rules,[130] and said: "Since the United Kingdom Act only applied to outward shipments from the United Kingdom, this means that a shipment from a country like Australia which had adopted the Rules to another country like the United Kingdom which had also adopted the Rules

could escape the Rules."[131] As to the application of the Hague Rules, the 1924 Act depended on a clause paramount being inserted in the bill of lading or similar document of title: s.3. Although Slesser L.J. in The Torni[132] had opined that the omission to insert a clause paramount in accordance with s.3 could be a common law misdemeanour, the Privy Council in Vita Food Products v. Unus Shipping[133] said that the language of s.3 was "directory" but not "obligatory." Summarily, the weight of authority suggested that the limits of liability under the Hague Rules could be decreased by the insertion of a clause conferring exclusive jurisdiction on the courts of a country where lower limits of liability applied.

In the United States, it has been held that the Hague Rules as appended to the 1936 Act apply mandatorily in respect of both inward and outward bills of regardless of whether a paramount clause is embodied therein: Shackman v. Cunard White Star:[134] Indussa Corp. v. Ranborg.[135] This approach, it is submitted, arises from the language of s.13 which, apart from stipulating the insertion of a clause paramount' states: "This Act shall apply to ALL contracts for carriage of goods by sea to or from ports of the United States in foreign trade." (Emphasis added). On the other hand, s.1 of the U.K. Act of 1924 reads: "SUBJECT TO THE PROVISIONS OF THIS ACT, the Rules shall have effect

in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Great Britain or Northern Ireland to any port whether in or outside Great Britain or Northern Ireland." (Emphasis added). The words emphasised suggest that if s.3 which stipulates the insertion of a clause paramount is not complied with, the carriage need not be subject to the regulatory force of the Rules.

The Morviken[136] presented the English courts with an opportunity to ascertain the effectiveness of the 1971 Act in terms of obliterating circumvention of the maximum liability limits under the Hague-Visby Rules by jurisdiction clauses invoking the application of foreign law with lower maximum liability limits. In that case, a road-finishing machine was shipped by the plaintiffs from a a port in the United Kingdom to the Dutch Antilles. The bill of lading provided that all disputes arising out of the carriage had to be brought before the Court of Amsterdam and that the Hague Rules were to apply under which the maximum liability of the carriage would be 250 Pounds. The cargo was damaged and the owners arrested The Hollandia, a sister ship of The Morviken which had transhipped the cargo. At that time, the Hague-Visby Rules had not yet been enacted by the Netherlands but they had already been given effect in the United Kingdom by which

the carrier's liability would have been a maximum of 11,490.96 Pounds. Sheen J. held:[137] "The plaintiffs have no ground for complaint if the result of the litigation is that they recover no more than the limit agreed in the contract. On the other hand, the defendants would feel justifiably aggrieved if the plaintiffs, having commenced proceedings in this jurisdiction in breach of their agreement, are permitted to continue with that litigation, and thereby recover more than the agreed limit." In the Court of Appeal, all three judges were agreed that s.1(2) of the 1971 Act overrode the express agreement of the parties that the proper law of the contract was the law of the Netherlands. S.1(2) reads: "The provisions of the Rules, as set out in the Schedule to this Act, shall have the force of law." On its implications, Lord Denning drew a parallel with Community law and said:[138] "In my opinion it means that, in all courts of the United Kingdom, the provisions of the Rules are to be given coercive force of law. So much so that, in every case properly brought before the courts of the United Kingdom, the Rules are to be given supremacy over every other provision of the bill of lading. If there is anything elsewhere in the bill of lading which in inconsistent with the Rules or which derogates from the effect of them, it is to be rejected."" The House of Lords affirmed the decision, though Lord Diplock was at pains to point out that:[139] "A choice of

forum clause ... does not ex facie offend against art.III, r.8. It is a provision of the contract of carriage that is subject to a condition subsequent; it comes into operation only upon the occurrence of a future event that may or may not occur .... There may be some disputes that would bring the choice of forum clause into operation but which would not be concerned at all with negligence, fault or failure by the carrier or the ship ... a claim for unpaid freight is an obvious example. So a choice of forum clause which selects as the exclusive forum for the resolution of disputes a Court which will not apply the Hague-Visby Rules, even after such clause has come into operation, does not necessarily always have the effect of lessening the liability of the carrier in a way that attracts the application of art.III, r.8."

Lord Diplock's caveat was of relevance in The Benarty.[140] In that case, goods were shipped from British and Continental ports to Indonesia. The bills of lading provided that all actions were to be brought before the Court at Djakarta. The goods were damaged by inclement weather, and the goods' owners sued the defendants in England. They argued that the courts in Indonesia would not apply the Hague-Visby Rules or the limits of liability thereunder. The defendants were willing to accept the package limitation under the Rules, but sought to reduce

their liability on that basis by reference to the tonnage limitation under the Indonesian Commercial Code which, according to the bills of lading, was the proper law of contract. Clearly the Indonesian tonnage limitation was lower than that provided for in the U.K. Merchant Shipping Acts 1894-1984. The goods' owners contended that Article 8 of the Hague-Visby Rules which reads "The Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels" included only United Kingdom statutes. The Court of Appeal held that since the Rules constituted an International Convention, Article 3 included the Indonesian Commercial Code. Professor Schmitthoff rightly comments that The Morviken[141] "only means that the foreign courts applies the same package limitation as that applying in the United Kingdom."[142] Thus, where the Hague-Visby Rules apply and the carrier accepts the package limitation thereunder (in fact, he must) but seeks to limit his overall liability by reference to tonnage limitation in accordance with the law contractually stipulated to be the proper law of the contract, the courts will not, in virtue of Article 8, stand in the way.

6.5 EXTENSION OF THE CARRIER'S PROTECTION TO SERVANTS, AGENTS AND INDEPENDENT CONTRACTORS

6.5.1 At Common Law

Where a claimant's goods are lost, damaged or delayed, the claimant will usually sue the carrier or submit a claim to his underwriter who, by virtue of the right of subrogation, will be entitled to seek recompense from the carrier. The carrier may in turn seek to be exculpated under an excepted peril or limit his liability through contractual and/or statutory provisions. So as to circumvent the carrier's protection, the claimant may elect to sue a third party who is connected with the carriage or custody of the goods in some way. The crucial question in such a situation is: can a person who is not a party to the contract but one who plays a part in its performance shelter behind the protection granted to the carrier by contract or statute?

Generally the answer lies in the negative. The reasons are two: the third party will not normally have furnished consideration and the doctrine of privity of contract supervenes.[143] In Adler v. Dickson,[144] an insecure gangway of the "Himalaya" caused the plaintiff to slip and sustain injury, so she sued the carrier's servants

who were responsible for the gangway's condition. The Court of Appeal held that the plaintiff was entitled to succeed because the servants were not privy to the contract between her and the carrier.

In Elder Dempster & Co. v. Paterson Zochonis & Co.[145] there was a different outcome. In that case, the vessel was time-chartered but the bill of lading was signed by the master as agent for the charterers. The contract was thus between the charterers and the shipper. The goods were damaged by negligent stowage which by the terms of the bill of lading was excused. It was thus the cargo owner sued the shipowners in tort. The House of Lords held that the shipowners were entitled to rely on the exception in the bill. Viscounts Cave[146] and Finlay[147] spoke of "vicarious immunity" by which is meant that when a contract embodies exception clauses, any servant or agent in the course of performing that contract may benefit from the same protection given to his employers. The concept does not appear to have attracted much judicial support.[148] But in certain bailment cases and network contract situations, a third party such as an actual carrier may well be able to rely on the contract between the contractual carrier and the shipper.[148a]

Professor Mankabady contends that the _Elder Dempster_ ratio rested on "an implied contract between the plaintiffs and the shipowners, the terms of which incorporated the exceptions and limitations of liability stipulated in the bill of lading."[149] Professor Tetley goes further: "In effect charterers and shipowners are together the carrier. They are really parties in the common venture and as such are joint parties to the contract of carriage either overtly or as undisclosed principals or agents of the one another."[150] It is respectfully submitted that Professor Tetley's interpretation runs into difficulties where the Hague or Hague-Visby Rules are applicable for, although a shipowner and charterer share the duties of a carrier in most cases, it blurs the distinction between an actual carrier and contractual carrier. The Rules do not appear to be concerned with actual carriers. Article 1(a) states that the term 'carrier' "includes the owner or charterer who enters into a contract of carriage with the shipper." Since the term "carrier" is used only in relation to those who enter into a contract of carriage with the shipper, actual carriers arguably do not fall within the regulatory ambit of the Rules. Further, Article 2 states: "Subject to the provisions of Article 6, under every CONTRACT OF CARRIAGE of goods by sea the carrier ... shall be subject to the responsibilities and liabilities, and entitled to

the rights and immunities hereinafter set forth." (Emphasis added). But, as pointed out earlier,[151] the position under the Hamburg Rules is fundamentally different. Article 10(2) states that the Rules are applicable to contractual and actual carriers alike.

The question as to whether a stevedore could rely on a Himalaya clause[152] (a clause which expressly provides that the servants, agents or others shall have the benefit of the carrier's protection) first came before the House of Lords in Scruttons Ltd. v. Midlands Silicones Ltd.[153] There a drum of chemicals shipped form New York to London was damaged by stevedores in the process of unloading. The House of Lords (Lord Denning dissenting)[154] held that the stevedores could not rely on the limitation clause in the bill of lading for they were not privy to the contract. The Edler Dempster case[155] was distinguished on two grounds. First, the third party in that case was a ship-owning company, a bailee. A stevedore could not properly be considered a bailee for possession does not pass to a stevedore who merely handles the goods in transit.[156] Second, the fact that the master there took the goods on board and performed services under the bill of lading as a servant of the shipowners gave rise to an inference that the shipowner took the goods into custody on the terms of the bill.

The House of Lords did not settle the question whether the doctrine of privity could be circumvented by agency as it was not necessary to do so, but Lord Reid took the opportunity to put forward his view:[157] "I can see a possibility of success of the agency argument if (i) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (ii) the bill of lading makes it clear that the carrier, in addition to contracting for those provisions on his own behalf, is also contracting as agent for the stevedore, (iii) the carrier has authority to do that, or perhaps later ratification by the stevedore would suffice, and (iv) that any difficulties about consideration moving from the stevedore were overcome." Lord Reid's four-fold test was held to be fulfilled in The Eurymedon.[158] The Privy Council held (Viscount Dilhorne and Lord Simon dissenting)[159] that the stevedores were protected because the clause clearly intended the stevedores to benefit, that the carriers acted on their own behalf as well as in the capacity of agents for the stevedores, that the unilateral contract by agency between the shipper and the stevedores became mutual by the performance of the services by the stevedores, and that the stevedores' services formed the necessary consideration for the shipper's agreement that the stevedores could rely on the exception clause.

In Australia, the Himalaya clause has had a mixed reception. It was given effect in Waters Trading v. Dalgety,[160] but this decision was reversed by the High Court in Wilson v. Darling Island Stevedoring Co. thus:[161] "The stevedore is a complete stranger to the contract of carriage, and it is no concern of his whether there is a bill of lading or not, or, if there is, what are its terms. He is engaged by the shipowner and by nobody else, and the terms on which he handles the goods are to be found in his contract with the shipowner and nowhere else. The shipowner has no authority whatever to bind the shipper or consignee ...." In The New York Star,[162] stevedores were employed by the carrier to discharge and hand over the goods to the consignee in Sydney. The goods were stolen whilst in storage. Stephen J. held that the Himalaya clause which the stevedores sought to rely on, "falls foul of the doctrine of consideration. Nor am I, with respect, satisfied that, either in the interests of international commercial comity or upon grounds of public policy, this is a case in which the language of the parties ought to be strained in an endeavour to give it an efficacy which, according to its ordinary meaning, it does not possess .... If public policy does not dictate such a course, neither do considerations of comity."[163] Stephen J. went on to say:[163] "The decision in The Eurymedon turned upon quite special facts ... the appellant stevedore not only

habitually acted as such for the carrier in New Zealand but was its parent,[164] so that (citing Lord Wilberfrce's words) the carrier, was, indisputably, authorised by the appellant to contract as its agent for the purposes ...." On appeal to the Privy Council, the Australian High Court decision was overruled: "Although, in each case, there will be room for evidence as to the precise relationship of carrier and stevedore and as to the practice at the relevant port, the decision does not support, and their Lordships would not encourage, a search for fine distinctions which would diminish the general applicability, in the light of established commercial practice, of the principle."[164] The decision was recently followed by the New South Wales Court of Appeal in Godina v. Patrick Operations.[165]

In the United States, the decisions vary according to the wording of the Himalaya clause. Following the decision of Laurence v. Fox[166] in the mid-nineteenth century, many states have abandoned the doctrine of privity. It has thus been said that stevedores are protected by the carrier's exception clauses not by reason of their agency relationship, but only if the bill of lading expressly extends its benefits to them.[167] In Herd & Co. v. Krawill Machinery Corp.,[168] the clause did not specifically refer to the stevedores. In The

Mormacstar,[169] the bill of lading defined "carrier" to mean "all persons rendering services in connection with performance of this contract." In Carle & Montanari Inc. v. Isbrandtsen Lines,[170] the clause specifically expressed an intention to benefit the stevedore. In Tessler Bros. v. Italpacific,[171] the clause, although it did not expressly refer to the stevedores, used the term "every independent contractor." In the first two cases, the Himalaya clause did not avail the stevedores; but in the latter two cases, the stevedores were held entitled to shelter behind the protection available to the carrier himself.

6.5.2 Under the Rules

The Hague Rules are silent as to whether the carrier's protection thereof can be extended to his servants or agents, or independent contractors. It was left to the common law to fill the gap. The Hague-Visby rules introduce two new provisions under Article 4 bis:

"(1) The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or tort."

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

The editors of Scrutton on Charterparties and Bills of Lading take the view that the intention of the words in brackets "was to exclude from the protection of the Rules persons such as stevedores."[172] Nonetheless, a stevedore need not always be an independent contractor. A shipowning company may provide stevedoring services as part of its commercial activities in which case its stevedores are just as much its servants or agents as the master, loading supervisor and other such like persons. Only if the stevedores discharge their duties independently of the shipowner's control and supervision or perform some service apart from those stipulated by the contract of carriage can they rightly be considered independent contractors. Finally, while the Hague-Visby Rules protect only the contractual carrier and its servants or agents, the Hamburg Rules in addition provide that an actual carrier and its servants or agents may benefit too.[173]

6.6 BREAKING THE LIMIT/LOSS OF RIGHT TO RELY ON THE EXCEPTION CLAUSES

6.6.1 Negligence

Unless otherwise agreed, a carrier cannot rely on the common law exceptions or exception clauses in the bill of lading where he has been negligent and his negligence contributes to the loss of damage. In Siordet v. Hall,[174] the goods were damaged by water from a boiler pipe which had cracked because of frost. It was held that although frost was an act of God, the loss was caused by the master's negligence in leaving the boiler full on a cold night. A clause purporting to except liability "for any loss of or damage to goods which can be covered by insurance" will not free a carrier from liability for negligence (Price & Co. v. The Union Lighterage Co.);[175] but it would be different if no other construction could be put on an exemption clause except to say that it covers negligence, for instance, where the words used are "not liable for any loss or damage however caused."[176] In the United States (New York excepted,[177] a private carrier may contract out of liability for negligence but not a common carrier on grounds of public policy. In Oceanic S.N. Co. v. Corcoran, a common carrier case, it was said of the "negligence clause" that "in so far as it relieves the

defendant from its responsibility to the plaintiff of its own negligence, it is void and without effect, being contrary to the public policy of the country ...."[178]

6.6.2 Unseaworthiness

Unseaworthiness in relation to the right to rely on the excepted perils and exemption clauses at common law, under the trilogy of Rules, and the Harter Act has already been considered.[179]

6.6.3. Fundamental Breach and Deviation

In Karsales (Harrow) Ltd. v. Wallis, Denning L.J. said that "exemption clauses ... no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects .... They do not avail him when he is guilty of a breach which goes to the root of the contract."[180] This "rule of law" approach, followed in Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pumps Co. Ltd.,[181] has been laid to rest by the House of Lords decision in Photo Production Ltd., v. Securicor Ltd.[182] There, the "rule of construction" approach was preferred. It was held that whether or not an exemption clause is to be applied in respect of a fundamental breach is a matter of construction. Until then, it was not clear

whether the Suisse Atlantique case stood for the rule of law or rule of construction approach.[183]

The Photo Production case may be regarded as one in which freedom of contract held sway; to quote Lord Diplock: "A basic principle of the common law of contract, to which there are no exceptions that are relevant in the instant case, is that parties to a contract are free to determine for themselves what primary obligations they will accept ... if the parties wish to reject or modify primary obligations which would otherwise be so incorporated, they are fully at liberty to do so by express words."[184] And Lord Salmon in explaining his decision said: "Any persons capable of making a contract are free to enter into any contract they may choose .... In the end, everything depends upon the true construction of the clause in dispute ..."[185] By contrast, the theoretical basis of the rule of law approach is that any clause which purports to release a party from his fundamental obligation is so unfair that it should not have effect. As Lord Salmon explained, "clauses which absolve a party to a contract from liability for breaking it are no doubt unpopular - particularly when they are unfair .... It is, I think, because of the unpopularity of such clauses that a so called "rule of law" has been developed in the Court of Appeal ...."[186] In the United States, the rule of law

approach prevails. As Augustus Ct. J. said in The Alaska Maru: "The general rule undoubtedly is that, if the shipowner commits a breach of the contract of affreightment which goes to the essence of the contract, he is not entitled after such breach to invoke the provisions of the contract which are in his favour."[187]

Undoubtedly, the courts in deciding whether or not an exemption clause on its true construction applies to a breach may reject it as being repugnant to the main object of the contract. This follows from a dictum of Lord Wilberforce in the Suisse Atlantique case: "Since the contracting parties could hardly have been supposed to contemplate such a mis-performance, or to have provided against it without destroying the whole contractual sub-stratum, there is no difficulty here in holding exception clauses to be inapplicable."[188] In Sze Hai Tong v. Rambler Cycle Co.,[189] the bill of lading stated that the carrier's liability was to 'cease absolutely" upon discharge of the goods in Singapore. The goods were delivered without the bill of lading being produced. The Privy Council held that although the exemption clause could hardly be more comprehensive, it could not be given effect otherwise it would "run counter to the main object and intent of the contract."[190] Although the main object may vary, "it can be assumed that, in a contract for the

carriage of goods by sea, the main object of the shipowner will ordinarily be to earn freight, and of the goods owner, to see that the cargo is carried with all reasonable expedition to its destination and be there delivered to an authorised person."[191] The ensuing discussion looks at what constitutes a deviation, when it is justifiable, and the legal consequences of an unjustifiable deviation.

6.6.3.1 What is a Deviation?

Strictly speaking, a deviation is a departure from the contractual route stated in a voyage charterparty or bill of lading. If the route is not specified (the typical bill of lading states only the ports of loading and discharge), the proper route is "presumed to be (the) direct geographical route, but evidence may also be given to show what the usual route is": The Indian City.[192] In the United States, the word "deviation" bears a wider meaning. It is not confined to the geographical sense. Overcarriage has been treated as a deviation,[193] as has the return of goods to the port of loading.[194] In the celebrated case Jones v. The Flying Clipper, it was held: "Deck stowage where underdeck stowage is required is more than negligence ... it is a deviation ...."[195] The trilogy of Rules and the Harter Act provide no guidance as

to what constitutes a deviation; they sate only the circumstances in which it is permitted.

6.6.3.2 When is a Deviation Justifiable?

(a) At Common Law

At common law, a deviation is justifiable only (1) when it is necessary to save life (Scaramanga v. Stamp),[196] or (2) to ensure the safety of the voyage itself notwithstanding that the necessity for the deviation arises from the ship's unseaworthiness (Kish v. Taylor),[197] or (3) to the extent allowed by a "liberty to devaite" clause. In regard to the American equation of deck carriage with deviation, deck carriage is only permitted in the face of custom, or agreement, or when the ship is purpose-built for carriage on deck.[198] It is to be noted that a clean bill of lading imports a duty to carry under deck: Schooner St. Johns.[199] This may be contrasted with Consumers Glass v. Farrell Lines[200] where the Ontario Supreme Court held that a clean bill does not import a duty to stow under deck, and that a short form bill (which made no reference to on-deck carriage) incorporated a liberty to carry on deck clause in the long form bill. The court rejected American jurisprudence to the contrary, including The Hong Kong Producer[201] where,

on similar facts, the Court of Appeal held that the liberty to carry on deck clause in the regular form of bill of lading was not incorporated into the short form bill. The point has hitherto not been decided by the English courts.

Turning back to "liberty to deviate" clauses they generally purport to confer on the carrier unfettered discretion in plotting and executing the voyage (for instance, "with liberty to call at any ports in any order" as in Leduc v. Ward),[202] but the courts have consistently refused to give such clauses a literal interpretation. Thus in Leduc v. Ward,[202] the ambit of the clause was adjudged to be restricted to ports on or near the contemplated route. In Stag Line v. Foscolo Mango,[203] a similar clause was held not to cover a deviation unconnected with the contract voyage; so also in an Australian case, Thiess v. Australian SS.[204] It clearly emerges from these cases that the courts will construe "liberty to deviate" clauses with reference to the venture which the parties had in mind or, as Coote puts it, "by reference to the 'main objects' of the contract."[204b] This, it is thought, forms the correct approach. It avoids the otherwise inescapable conclusion that a liberty clause necessarily defines the contract route. However, Carver expresses the view that "it is more correct to regard the departure (from the ordinary route) as part of the contract

voyage, as extended by the liberty clause. A so-called 'deviation' permitted by the contract is _ex hypothesi_, no deviation at all (in the sense of a breach of contract); it is, necessarily, part of the contract voyage."[205] But if that view is correct, a typically drafted "liberty to deviate" clause would allow a carrier to call at any port in the world without regard to the usual route - a proposition which would be untenable with the shipper's expectations.

(b) Under the Harter Act

The _Harter Act_, _s.3_, extends the class of justifiable deviations at common law to include deviations made to save or in attempting to save life or property at sea. Such deviations must not extend beyond what is required. In _The Emily_,[206] a steamer deviated in order to tow another steamer to a harbour where the latter was pumped out but left in a potentially dangerous position. The salving steamer then towed it elsewhere notwithstanding that tugs could have carried out the task. The subsequent deviation was held to be unjustifiable.

(c) Under the Hague and Hague-Visby Rules

By Article 4(4) of the Hague and Hague-Visby Rules, any deviation in saving or attempting to save life or property at sea or any reasonable deviation is justifiable. The American version of the Hague Rules adds: "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." Briefly, under the Rules, in cases involving "liberty to deviate" clauses, the reasonableness or unreasonableness of a deviation will be of primary importance rather than the wording of the clauses.

As to what constitutes a reasonable deviation, Lord Atkin in Stag Line v. Foscolo Mango stated: "A deviation may, and often will, be caused by fortuitous circumstances never contemplated by the original parties to the contract, and may be reasonable though it is made solely in the interests of the ship or solely in the interests of the cargo or indeed in the direct interest of neither; as for instance where the presence of a passenger or of a member of the ship or crew was urgently required after the voyage had begun on a matter of national importance .... 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."[207] In that case, two engineers were taken aboard a ship for its voyage from Swansea to Constantinople. They were to have left at Lundy after checking the ship's apparatus but because their task had not been carried out by then, the ship deviated to land them at St. Ives. After landing the engineers, the ship hugged the coast too closely, struck a rock, and was lost. In the circumstances, the deviation to land the engineers was held to be unreasonable. But in <u>The M/V Belleville</u>,[208] an American case, a deviation of ten to fifteen miles to drop off a pilot was held to be reasonable. In <u>Thiess v. Australian SS.</u>,[209] an Australian case, where a ship bound for Melbourne deviated four miles off her course to take on bunkers for the next voyage, the deviation was held to unreasonable. Although there may be difficulties in determining whether a deviation is reasonable or not, it seems that a deviation from the contractual port which is strikebound to the nearest port will be held to be reasonable (<u>The Manx Fisher</u>)[210] especially when the "liberty to deviate" clause contemplates this contingency (<u>Renton v. Palmyra</u>).[211]

(d) Under the Hamburg Rules

Article 5(6) reads: "The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea." This provision is different from that of the extant Rules in force in two respects. First, a disgression to save property is expressly required to be reasonable. Second, the exculpatory words "any reasonable deviation" in the Hague and Hague-Visby Rules do not appear but presumably that aspect is encompassed by Article 5(1) which states that the carrier is not liable if he proves that "he, his servants or agents took all measures that could reasonably be required" to avoid the loss, damage or delay.

6.6.3.3 The Legal Implications/Consequences of an Unjustifiable Deviation

(a) At Common Law

(i) Breach of Condition

An unjustifiable deviation, like any other breach of condition, entitles the innocent party to treat the contract as at an end; although he may waive the

breach, there must be acts which plainly show that he intended to treat the contract as subsisting: Hain v. Tate & Lyle.[212] In that case, the charterer was held to have waived the deviation because he loaded the ship at the final port with knowledge of its deviation.

(ii) Precluding Reliance on Contractual and Common Law Exceptions

The Photo Production case[213] has not affected the principle long established that "an unjustified deviation is always treated as a breach to which (an exception clause) does not apply, unless the charterer or goods' owner affirms the contract of carriage."[214] In addition to the ousting of contractual exception clauses, the carrier is also barred from recourse to the excepted perils at common law. In Morrison v. Shaw Savill,[215] a ship which had unjustifiably deviated to Le Harve was torpedoed by a German submarine. It was held that the shipowner could only be excused if he could prove that the cargo would have perished by reason of the King's enemies even without the deviation. On the facts of the case, it was not surprising that the shipowner failed to discharge the burden of proof.[216]

The present position of the law, in as far as unjustifiable deviations are concerned, seems to be that "ordinary principles of foreseeability and remoteness of damage simply do not apply."[217] American law is of the same effect.[218] As to when the exceptions are displaced, the editors of Scrutton on <u>Charterparties and Bills of Lading</u> suggest that "it is probably immaterial whether the loss or damage arises BEFORE, or during, the deviation, or after it has ceased."[219] (Emphasis added). However, it is not a view shared by others. In <u>Hain v. Tate & Lyle</u>, it was said by the Lord Maugham that "the charterers became entitled to treat the contract as at an end from the date of repudiation."[220] Coote believes this to be the correct view and argues that the defence that loss or damage would have resulted even without the deviation would be meaningless otherwise.[221]

In the United States, the precept that causation is irrelevant has been questioned by Professors Gilmore and Black,[222] and in recent cases. In <u>The SS.Nancy Lykes</u>,[223] the cargo was swept overboard by a gale after an unjustifiable deviation. The court stated that exception clauses could be displaced only when an unjustifiable deviation caused the loss or damage. Since the deviation in that case was undoubtedly a proximate cause of the loss, the dictum was clearly obiter. In <u>The</u>

Banglor Kakoli[224] the goods were damaged before and after an unjustifiable deviation. Weinfeld J. stated that an unjustifiable deviation does not render a carrier liable unless the damage or loss results therefrom. Since the shipowner failed to prove which part of the damage was unrelated to the deviation, he was held liable for the damage in its entirety. Weinfeld J.'s dictum is clearly obiter and leaves intact the view that causation is irrelevant and that the exceptions are displaced as from the time of the unjustifiable deviation. First, had the shipowner proved which part of the damage was sustained before the deviation, he would have been freed of liability to that extent. This does not rebut or affect in any way the view that causation is irrelevant as from the time for the unjustifiable deviation . Second, as to that part of the damage sustained after the deviation, the nexus between the deviation and the damage was proximate - not remote as in Joseph Thorley v. Orchis[225] (where the shipowner was held liable for damage caused by negligent discharge which happened long after the deviation) - so Weinfeld J.'s dictum was clearly obiter.

We turn now to the reasons why an unjustifiable deviation displaces the contractual and common law exceptions. In Joseph Thorley v. Orchis, Cozens-Hardy L.J. stated: "It appears to me that the

shipowner who, by deviating, has voluntarily substituted another voyage for that contracted for in the bill of lading, cannot claim the benefit of an exception obtained in the special contract, which is only applicable to the voyage mentioned in that contract."[226] In Hain v. Tate & Lyle, Lord Atkin said: "I venture to think that the true view is that the departure from the voyage contracted to be made is a breach by the shipowner of this contract, a breach of such a serious character that, however slight the deviation, the other party to the contract is entitled to treat it as going to the root of the contract, and declare himself as no longer bound by any of the contract terms ...."[227] By way of comment, these dicta fail to explain why deviation as a breach of contract ousts the common law exceptions as well. Coote rightly observes that "deviation is a breach of condition, but it is something more besides".[228] In Rendall v. Arcos, Lord Wright put it down to a change of risks: "The essence of the principle is that damage has been sustained under conditions involving danger other than and therefore different from the conditions which would have operated if the contract had been fulfilled; for the consequences of such conditions the defendant is held liable .... The defendant must show ... that there must have been the same damage if the contract had not been broken ...."[229]

(iii) Demurrage, General Average and Freight

The House of Lords in U.S. Shipping Board v. Bunge[230] held that, in the event of an unjustifiable deviation, the shipowner cannot rely on a demurrage provision and, in Hain v. Tate & Lyle,[231] that he cannot claim a general average contribution. On freight, Fletcher Moulton L.J. in Joseph Thorley v. Orchis said: "The most favourable position which (the shipowner) can claim to occupy is that he has carried the goods as a common carrier for the agreed freight. I do not say that in all circumstances he would be entitled as of right to be treated even as favourably as this, but in the present case the plaintiffs do not contest his right to stand in that position.[232] In Hain v. Tate & Lyle,[223] it was suggested that a shipowner who delivers the goods safely at the port of discharge is entitled to freight on a quantum meruit basis (by implied contract) unless the facts are such, as they were in the present case, as to defeat the implication. In that case, the ship deviated on the way to the third port of loading and on leaving there, incurred substantial general average expenditure. The indorsee of the bills of lading was held not liable to pay the contractual freight for the goods shipped at the first two ports as well as freight on a quantum meruit basis for the shipment at the third port.

(b) Under the Hague and Hague-Visby Rules

The ensuing discussion centres on the question: have the Hague and Hague-Visby Rules altered the common law as regards the legal implications/consequences of an unjustifiable deviation?

Carver suggests:[234] "It is clear from Stag Line v. Foscolo Mango[235] that the Rules have not altered the principle that an unjustifiable deviation deprives a ship of the protection of exceptions from liability, or, indeed, affected in any way the pre-existing position as to the effect of a deviation. In this respect the exceptions in Article IV, rule 2, and, indeed, the whole of the Rules, must be regarded as part of the contract which is abrogated by the deviation. For, by Article II, the provisions of the Rules apply only under a contract of carriage covered by a bill of lading or similar document of title: if that contract goes, so go the Rules with it." In Stag Line v. Foscolo Mango, Lord Atkin had said:[236] "I find no substance in the contention faintly made by the defendants that an unauthorised deviation would not displace the statutory exceptions contained in the Carriage of Goods by Sea Act. ... I can find nothing in the Act which makes its statutory exceptions apply to a voyage which is not the voyage the subject of the 'contract for the carriage of goods by sea' to which the Act applies."

Yet Article 4(5) in stipulating the maximum limits of liability employs the words "in any event" as does Article 3(6) in laying down the one year limitation for suit, and Lord Atkin referred to the excepted perils under the Rules - not the limits of liability nor the limitation period. Further, the replacement of the words "all liability in respect of loss or damage" in the Hague Rules by the words "all liability whatsoever" in relation to the time-bar under the Hague-Visby Rules suggest strongly that a claimant must bring suit against the carrier within one year even if there has been a deviation. As Steyn J. said in The Antares (No.2): "The most important change from the wording of the Hague Rules is undoubtedly the introduction of the word 'whatsoever.' Taking into account the provision read as a whole ... I am constrained to conclude that art. III, r.6, makes no distinction between the fundamental and non-fundamental breaches of contract."[236a] The difficulty chiefly rests on the conflict between the words "in any event" used in relation to the limits of liability and the limitation period and Article 2 which states that "under every contract of carriage ... the carrier ... shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth." It has been suggested that the carrier may still rely on the limits of liability and limitation period if the Rules

apply statutorily.[237] Though the proposition is not without force considering that the Hague Rules in Stag Line v. Foscolo Mango[238] applied as a matter of contractual incorporation, the fact remains that Article 2 still stands in the way. Further, the words "any reasonable deviation (or justifiable deviation) shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage" in Article 4(4) may be read to mean that any unjustifiable deviation shall be deemed to be an infringement or breach displacing all of the carrier's protection under the Rules and contract. It has to be conceded though that this is no more than a conjecture at best.

The American cases have not been conclusive; rather, they point to a conflict between the Seventh and Second Circuit Courts. In Atlantic Mutual Insurance v. Poseidon,[239] a Seventh Circuit Court held that the carrier could rely on the liability limits under the Rules because of the words "in any event" and because the liability limits provision followed the provision allowing deviation in certain circumstances - which the Court took to imply the latter controlled the former. In Francosteel Corp. v. N.V. Nederlandsch,[240] the California Court of Appeals held that an unjustifiable deviation does not mean that a claimant is not bound by the one-year limitation

period. In Jones v. the Flying Clipper, a Second Circuit Court held that "nothing in the legislative history of COGSA indicated that the $500 limitation was intended to displace the doctrine of unjustified deviation. Had such a drastic change in the existing law, entailing such far-reaching commercial and financial consequences, been intended, it would have been expressed in clear and unmistakable terms."[241] In Encyclopaedia Britannica Inc. v. The Hong Kong Producer, the Second Circuit Court of Appeals held that "the stowing of the six containers on the weather deck was ... an unreasonable deviation" and that "the carrier is liable for the full amount of damage sustained without the benefit of the $500 limitation per package of COGSA."[242] This approach may be contrasted with that of Lloyd J.'s in The Antares: "Whatever may be the position with regard to deviation cases strictly so called ... I can see no reason for regarding the unauthorised loading of deck cargo as a special case."[243]

We turn now to consider two changes brought about by the Hague-Visby Rules which pertain to the question whether the Rules alter the common law as to unjustifiable deviations. Article 4(5)(e) is an entirely new provision. It provides that the carrier loses the benefit of the limitation of liability provision 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 probabaly result." The editors of Scrutton on Charterparties and Bills of Lading suggest: "The fact that the draftsman has specifically provided that serious misconduct deprives the carrier of his right to limit might be said to imply that the other protective provisions were not intended to be vitiated by such misconduct."[244] The "other protective provisions" may be taken to refer to the excepted perils and the limitation period. While there is nothing in the Rules which conclusively lead to a different construction, there is likewise nothing in the Rules which conclusively support the view expressed in Scrutton. It has further been suggested that "paragraph (e) leaves no room for the doctrine of deviation to deprive the carrier of his right to limit his liability: at any rate where the act relied upon is committed by the carrier."[244] If that view is correct, then the carrier loses his right to liability limitation only if his deviation falls within the type of misconduct prescribed by paragraph (e).[245] As for the time limitation period under the Hague-Visby Rules, the introduction of the word "whatsoever" after the words "the carrier and the ship shall in any event be discharged from all liability," effectively means that an unjustifiable deviation will not deprive the carrier of the benefit of the time limitation period.[246]

(c) <u>Under the Hamburg Rules</u>

The Hague and Hague-Visby Rules have, by their reticence on the legal effects of unjustifiable deviations, caused mush obsfucation; one would have thought that the drafters of the Hamburg Rules could have provided the necessary clarifications.

Article 5(6) states: "The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea." Apart from this exculpatory provision and Article 5(1) - "all measures that could reasonably be required" - the carrier is liable for any other deviation. But to what extent? Article 6 stipulates the limits of liability but does not use the words "in any event" or words to that effect. Article 8(1) enumerates the types of misconduct which would deprive the carrier of his right to limit, but without reference to unjustifiable deviations. As with the Hague-Visby Rules, the question is whether the carrier is so deprived only when his misconduct is of a type mentioned under the provisions, that is, only when he deviates with intent to cause loss, damage or delay, or recklessly with knowledge that loss , damage or delay would probabaly result.

Article 20(1), dealing with the limitation period for suit, does not use the term "in any event" or "whatsoever." It reads: "Any action relating to carriage of goods under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years." Although the provision does not say "contract of goods" but refer to "any action relating to the carriage of goods," Article 7 states that the carrier's defences and limits of liability under the Rules shall apply in any action in respect of the goods as "covered by the contract of carriage by sea." On deck carriage contrary to express agreement, the position is clear; it is "deemed to be an act or omission of the carrier within the meaning of Article 8" depriving him of his right to limit his liability: Article 9(4).

6.6.4 Exceeding the Limits by Agreement

The carrier's maximum limits of liability under the Hague and Hague-Visby Rules may be exceeded by agreement. Two requisites however have to be complied with: Not only must the "nature and value" of the goods be declared by the shipper before shipment, but the particulars must also be "inserted in the bill of lading": Article 4(5)(a). In an early Hague Rules case, Pendle & Rivet Ltd. v. Ellerman Lines Ltd., Mackinnon J. said:[247] "Though the plaintiffs

did declare the value of the goods before shipment, that was not inserted in the bill of lading; and in those circumstances only one of the conditions on which the defendants could be liable for more than £100 was fulfilled," and held the maximum limits applicable. In Anticosti Shipping v. Viateur St. Amand,[248] the Supreme Court of Canada ruled that the carrier's knowledge of the cargo's value was insufficient. From a commercial viewpoint, it is worthy of note that "when the parties arrange for the carrier's liability in excess of the maximum limits, the freight rate is higher than in the case when the limits apply."[249]

In the United States, the shipper must have been afforded an opportunity or choice to declare a higher value. Else the carrier cannot limit his liability to $500 per package or customary freight unit. The requirement is fulfilled if the bill of lading states that a choice of freight rates is available to the shipper (The Caledonier)[250] which presumably may be taken to imply that the shipper can secure unlimited or a higher level of liability on the part of the carrier on payment of a higher freight rate. In General Electric Co. v. Lady Sophie,[251] it was held that the absence of a space in the bill of lading for a declared value of the goods disentitled the carrier from relying on the $500 limit of liability. The

case has to be read subject to Tractech Inv. c. Costa Line,[252] where it was held by a New York court that a bill of lading need not have a space specifically designated for a declaration of the cargo's value. In so far as concerns short form bills of lading, it suffices that the opportunity to declare a higher value is incorporated by general reference. There is a plethora of cases to this effect,[253] and Komatsu v. States SS. Co.[254] to the contrary seems to be an isolated case.

6.6.5 Misconduct under the Rules Resulting in Loss of Right to Limit

The Hague Rules do not stipulate the types of misconduct which will deprive the carrier of his right to limit. Nor does the Harter Act. By Article 4(5)(e) of the Hague-Visby Rules, "it is provided for the first time that certain types of misconduct by the carrier will deprive him of the benefit of the limitation."[255] It reads: "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." Article 8(1) of the Hamburg Rules is to the same effect.

The implications of Article 4(5)(e) are somewhat unclear in two respects. First, was it intended that only in the case of intent to cause damage or reckless misconduct that the carrier would lose his right to limit?[256] Second, does the carrier lose his right to limit when the misconduct is that of his servants or agents? In regard to the latter question, it is thought that the answer lies in the negative for elsewhere there is express reference to the consequences of misconduct by the carrier's servants or agents. Article 4 bis provides that "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 probabaly result." Since "the provisions of this article" includes the excepted perils - Article 4(2) - the servant or agent can be deprived of reliance on the excepted perils in addition to the maximum limits of liability.[257] By contrast, Article 4(5)(e) refers only to the carrier's loss of his "benefit of the limitation of liability." But where the carrier is a company and the directors exercise no direct functions in connection with carriage, it may be proper to attribute the misconduct of a person with managerial capacity (notwithstanding that he be a servant

or agent) to the company-qua-carrier.[258] Only in that sense, it is thought, can the carrier lose his right to limit when the misconduct is that of his servant or agent.

The words "intent to cause damage" appear to be free of difficulties in interpretation; the meaning of "recklessly and with knowledge that damage would probably result" was crucial in Goldman v. Thai Airways.[259] The case concerned a personal injury claim. The claim rested on the meaning of Article 25 of the Warsaw Convention which includes the words in parentheses. The Court of Appeal held that actual knowledge of the probability of the damage which was in fact suffered, and disregard of the probability had to be proved by the plaintiff. As the plaintiff failed to discharge that burden of proof, the limit of liability remained inviolate.

Article 4 of Schedule 4 of the London Convention on Limitation of Liability for Maritime Claims 1976, appended to the Merchant Shipping Act 1979, adopts the same elements of misconduct barring limitation as that of Article 4(5)(e) of the Hague-Visby Rules - but it makes clear that the misconduct barring limitation must be that of the defendant himself. It reads: "A person liable shall not be entitled to limit his liability if it is proved that the loss

resulted form his personal act or omission, committed with intent to cause such loss, or recklessly and with knowledge that such loss would probabaly result."

By contrast, the now defunct s.502 of the Merchant Shipping Act 1894 freed any owner of a British ship from liability for loss of or damage to (i) goods on board the ship caused by fire, or (ii) valuable gods ("gold, silver, diamonds, watches, jewels or precious stones") the true nature and value of which have not at the time of shipment been declared if the loss or damage happened without his "actual fault or privity." Its corollary, s.503(1), ensured that the owners of a ship, British or foreign, were not liable beyond certain limits in respect of other loss or damage if the occurrence took place without their "actual fault or privity." By the Merchant Shipping Act 1958, s.3: "The persons whose liability in connection with a ship is excluded or limited by Part VIII of the Merchant Shipping Act 1894, shall include any charterer and any person interested in or in possession of the ship, and, in particular, any manager or operator of the ship." These provisions have now been replaced by the London Convention, but it may be necessary to look at the words "actual fault or privity" as a comparison and also because the U.S. Fire Statute uses the words "design or neglect" which have been judicially stated to mean the same as "actual fault or privity."[260].

In The Lady Gwendolen, Winn L.J. stated:[261] "First: an owner who seeks to limit his liability must establish that, although for the immediate cause of the occurrence he is responsible on the basis of respondeat superior, in no respect which might possibly have causatively contributed was he himself at fault. An established causative link is an essential element of any actionable breach of duty: therefore, "actual fault" in this context does not invariably connote actionable breach of duty. Second: an owner is not himself without actual fault if he owed any duty to the party damaged or injured which (a) was not discharged; (b) to secure the proper discharge of which he should himself have done but failed to do something which in the given circumstances lay within his personal sphere of performance." In that case, the plaintiff's ship which was proceeding at full speed in fog collided with the defendants' ship. The plaintiffs had not instructed the master to use radar or to place considerations of safety above punctuality. It was held that since the day to day management of the plaintiffs' company was entrusted to the head of traffic department, he was the alter ego of the company and his failure to issue proper instructions to the master was due to the actual fault or privity of the plaintiffs. The decision follows Haldane L.C.'s dictum in Lennard's Co. v. Asiatic Co. that where the owner is a corporation, the fault or privity must

be that of the person who is "the directing mind and will of the corporation, the every ego and centre of the personality of the corporation" in order for the corporation to be deprived of the 1894 Act's protection.[262]

Three recent cases may be cited to illustrate the type of persons who may be regarded as the alter ego of their company. In The Garden City,[263] the plaintiffs claimed a declaration that they were entitled to limit their liability for a collision for which they had already been found 60 per cent to blame. The issue was whether fault or privity could be attributed to the corporation via the Chief Navigator who was responsible for the Master and the Third Officer who were on watch when the collision happened. It was not disputed that the Chief Navigator's subordinates were not the alter ego of the corporation; his superior, the Director General and the director of Technical Affairs, had been found not to be negligent. Staughton J. held that the Chief Navigator was not somebody for whom the corporation was liable for his action could not be regarded as the very action of the corporation. By way of comment, the decision indicates that where the hierarchy of a corporation comprises of numerous strata, it may be necessary to go for the very top to establish the corporation's actual fault or privity. Looked at another

way, there are buffers within a large corporation. By contrast, in The Marion[264] where there was no marine superintendent or chief navigator, the managing director was held to be the alter ego of the company. These cases are not to be taken to mean that the courts will look to the rank rather than the functions of the person alleged to have been at fault. Thus, although the two directors but not the superintendent and manager of the technical department were held to be the alter ego of the company in The Torenia,[265] the two directors were actually involved in the management of the company.

In conclusion, claimants will find it more difficult to prove intent to cause damage or recklessness with knowledge or probable damage under the Hague-Visby and Hamburg Rules, and the Merchant Shipping Act 1979 than actual fault or privity under the Merchant Shipping Act 1894. The modern day legal regimes have thus restricted the scope for the carrier's loss of right to limit liability. While this direction heralds certainty and presumably brings down the carrier's cost of insurance, it must be doubtful if the effect is reflected by way of lower freight rates. Nonetheless, claimants may find comfort in the progressively higher limits of liability.

FOOTNOTES

1. (1976) 2 Lloyd's Rep. 215. See 8.4.2.1.

1a. (1986) 1 A.C. 785.

1b. (1957) 2 Q.B. 233.

2. Ibid, at p. 253; approved by the House of Lords (1959) A.C. 133, 157.

3. (1854) 9 Ex. 341.

4. (1966) 1 Lloyd's Rep. 595; (1969) 1 A.C. 350. See also Page Com. Engineers v. Hellenic Lines (1973) A.M.C. 1761 where damages were held recoverable for a 30 per cent loss of efficiency at a building site which had resulted from a short shipment.

5. (1873) L.R. 8 C.P. 131.

6. (1703) 2 Ld. Raym. 909.

7. (1918) 1 K.B. 260.

8. Nugent v. Smith (1876) 1 C.P.D. 423, 430. See also J.N. Adams; "The Standardization of Commercial Contracts, or the Contractualization of Standard Terms." (1978) Anglo-Am. Law Rev. 136.

9. Coggs v. Bernard (1703) 2 Ld. Raym. 909.

10. (1874) L.R. 9 Ex. 338.

11. (1876) 45 L.J.C.P. 697, 700.

12. (1876) 1 C.P.D. 423.

13. (1908) 2 K.B. 626, 630.

14. Grill v. General Iron Screw Collier Co. (1866) 1 C.P. 600, 612.

15. Scrutton on Charterparties and Bills of Lading (19th ed., 1984) p. 201, et. seq.

16. Payne & Ivamy's Carriage of Goods by Sea (12th ed., 1985) p. 164 et. seq.

17. Carver's Carriage by Sea (13th ed., 1982) para. 5.

18. O. Kahn-Freund, "Law of Carriage by Inland Transport" (4th ed., 1967) p. 207. Cf. The Golden Lake (1982) 2 Lloyd's Rep. 632 where the goods were shipped pursuant to a bill of lading which was not signed on behalf of or for the benefit of the shipowners who, in the judgment of the Singapore High Court, were held to be common carriers. See also Southcote's Case (1601) Co. Rep. 836, noted at 8.4.2.1.

19. The Neaffie 17 F. Cas. 1250 (No. 10,063) (1870); United States v. Power 6 Mont. 271 (1887).

20. The carrier's responsibilities here listed are treated in Chapter 5.

21. Cf. The Muncaster Castle (1961) 1 All E.R. 495 where it was held that the carrier's duty to make the ship seaworthy, in as far as concerns repair work, is a personal one which extends to independent contractors as well.

22. (1965) A.M.C. 39, 59.

23. (1898) 170 U.S. 655; see 5.5.6.

24. See 5.5.5.

25. (1933) A.M.C. 1565.

26. See Parker v. S.E.Rly. (1877) 2 C.P.D. 416, 422. For a historical account of the development of the law relating to the carrier's notices, see J.N. Adams, "The Carrier in Legal History," in "Law Litigants and the Legal Profession." ed. by Ives and Manchester (1983).

27. (1888) 20 Q.B.D. 475; see also The Patria (1871) 41 L.J. Adm. 23.

28. (1879) 5 Q.B.D. 38, 40.

29. See the Australian case of Wilson v. Cie. des Messageries Maritimes (1954) 1 Lloyd's Rep. 229; see also Thornton v. Shoe Lane Parking (1971) 2 Q.B. 167.

30. Times Law Report (November 14, 1987).

31. (1956) 1 W.L.R. 461, 466.

32. "The rule is based on the principle that a person is responsible for ambiguities in his own expression, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the Court will adopt a construction by which they would mean another thing, more to his advantage." Anson's Law of Contract (26th ed., by A.G. Guest, 1984)

33. (1969) 2 Lloyd's Rep. 536, 542.

34. Corbin, "Contracts," Vol. 3 (1960), at pp. 269 - 270.

35. Ibid.

36. See 2.7.1.

37. (1908) A.C. 406.

38. (1967) 1 Lloyd's Rep. 114.

39. Reardon Smith v. Ministry of Agriculture (1962) 1 Q.B. 42.

40. The Mastro Giorgis (1983) 2 Lloyd's Rep. 66.

41. (1968) 2 Lloyd's Rep. 57.

42. Ibid.

43. See 6.2.

44. See 5.5.6.

45. (1933) A.M.C. 1565; see 5.5.6.

46. As to requirement of seaworthiness under the various regimes, see 5.5.

47. (1896) p. 10, 16.

48. (1928) 1 K.B. 717, 749; (1929) A.C. 223.

49. (1934) 293 U.S. 296.

50. (1904) 196 U.S. 589, 598.

51. Anthony Diamond Q.C. (1978) L.M.C.L.Q. 241.

52. (1983) 1 Lloyd's Rep. 520.

53. (1896) P. 10.

54. (1976) 2 Lloyd's Rep. 453 (Canadian case).

55. (1906) P. 282.

56. (1905) 139 F. 637.

57. (1931) A.C. 726.

58. These provisions are reproduced in Scrutton, ibid, Appendix I; see esp. pp. 479 - 492.

59. (1915) A.C. 706.

60. See 6.6.5.

61. See 5.5.5 at to the position under the Rules.

62. The Shell Bar (1905) 224 F.2d 72, 75; Abestos Corp. v. Cyprion Fabre (1973) A.M.C. 1683, 1686.

63. (1944) A.M.C. 895.

64. See The Isis (1933) A.M.C. 1565, noted at 5.5.6.

65. (1943) A.M.C. 277 and 1209.

66. (1985) A.M.C. 247.

67. (1915) A.C. 706.

68. Halsbury's Laws of England (4th ed., 1983) Vol. 43, para. 454.

69. 106 F.319.

70. (1987) 2 M.L.J. 123.

71. (1887) 12 App. Cas. 503, 509.

72. (1971) 2 Lloyd's Rep. 207.

73. (1877) 38 L.T. 151.

74. (1875) 45 L.J.Q.B. 697, 708.

75. (1828) 4 Bing 607.

76. Scrutton, ibid, p. 222. It is thought that this view is preferable to that expressed in Tetley, "Marine Cargo Claims," (2nd ed., 1979), p. 208: "The Hague Rules have a number of exceptions

similar to perils of the sea; which are in fact perils of the sea. They are Act of God, art. 4(2)(d) ...."

77. (1919) 1 K.B. 425.

78. (1939) 2 K.B. 544.

79. Scrutton, ibid, p. 447.

80. Scrutton, ibid, pp. 223 - 224.

81. (1976) 1 Q.B. 893.

82. As to the shipper's responsibilities, see Chapter 4.

83. 2 Lloyd's Rep. 416.

84. Ship Mormacsaga v. Crelinstein Fruit (1968) 2 Lloyd's Rep. 184.

85. A riot is a tumultuous disturbance of the peace by three or more persons assembled, without lawful authority, with an intent to mutually assist one another in the execution of a common purpose in

pursuance of which alarm is caused to at least one person of reasonable firmness and courage. A civil commotion may be described as an insurrection of the people for general purposes, representing a stage intermediate between riot and civil war. See Halsbury's Laws of England (4th ed.) paras. 322 - 323.

86. As to what constitutes a reasonable deviation, see 6.6.3.2 (c).

87. Scrutton, ibid, p. 226.

88. (1947) A.M.C. 568, 576; see 5.2.1.

89. (1979) 2 Lloyd's Rep. 79.

90. Loc. cit., p. 89.

91. (1909) 2 K.B. 300.

92. (1929) 34 Ll. L. Rep. 149, 155.

93. (1929) 34 Ll. L. Rep. 192, 196.

94. Scrutton, ibid, p. 450.

95. (1922) 13 Ll. L. Rep. 363.

96. (1967) 2 Q.B. 250. Cf. the position under the Warsaw System; see 8.4.2.4.

97. (1894) p. 226.

98. (1967) 1 Lloyd's Rep. 1, 8.

99. (1983) 2 Lloyd's Rep. 210.

100. (1934) A.M.C. 1573, 1576.

101. Cf. Lennard's Co. v. Asiatic Co. (1915) A.C. 706, a decision on s.502 of the Merchant Shipping Act 1894 which holds that the carrier has the burden of proof.

102. Ceylon government v. Chandris (1965) 2 Lloyd's Rep. 204; The Otho (1943) A.M.C. 210.

103. (1897) p. 301.

103a. See A. Diamond, "Liability of the Carrier in Multimodal Transport," in "International Carriage of Goods: Some Legal Problems and Possible Solutions," (1988 ed. by C.M. Schmitthoff and R. Goode, published by the Centre for Commercial Law Studies) pp. 43 - 44.

104. See Schmitthoff's Export Trade (8th ed., 1986) p. 518.

105. (1966) A.M.C. 2651.

106. (1937) 59 Ll. L. Rep. 23.

107. (1967) 2 Lloyd's Rep. 193.

108. See The Ardennes (1951) 1 K.B. 55, and J. Evans and Son (Portsmouth) Ltd. v. Andrea Merzaria (1976) 1 W.L.R. 1078.

109. (1974) A.M.C. 1444.

110. Loc. cit., p. 1446.

111. Anthony Diamond Q.C., "The Hague-Visby Rules," (1978) L.M.C.L.Q. 241.

112. Schmitthoff's Export Trade, ibid, p. 519.

113. Freedman & Slater v. MV Tofevo (1963) A.M.C. 1525, 1538.

114. (1975) 1 Lloyd's Rep. 199.

115. (1973) 2 Lloyd's Rep. 469.

116. The IMF's SDR replaces the Poincare Franc which was the original monetary unit in the amended Rules. The change was effected by the Merchant Shipping Act 1981, s.2(3), which was brought into force by S.I., 1983 No. 1906.

117. The conversion of a SDR unit of account is presently 79 pence; see A. Diamond "Liability of the Carrier in Multimodal Transport," in "International Carriage of Goods: Some Legal Problems and Possible Solutions," (1988, ed., by C.M. Schmitthoff and R. Goode, published by the Centre for Commercial Law Studies).

118. See also 2.7.1 (b).

119. (1970) 1 Lloyd's Rep. 527.

120. (1973) 2 Lloyd's Rep. 428. Followed in The Brooklyn Maru (1975) 2 Lloyd's Rep. 512.

121. (1973) 2 Lloyd's Rep. 253, a Canadian case which followed The Mormaclynx (1970) 1 Lloyd's Rep. 527.

122. See Schmitthoff's Export Trade, ibid, p. 532.

123. B.W. Yancey, "The Carriage of Goods: Hague, COGSA, Visby, and Hamburg," (1983) Tul. L. Rev. 1238, 9.

124. Replacing s.503 of the Merchant Shipping Act 1894.

125 Nabob Foods Ltd. v. The Cape Corso (1954) 2 Lloyd's Rep. 40. where the Exchequer Court of Canada held invalid a clause which purported to limit the carrier's liability to the invoice value of the goods. See also Smith v. The Ferncliff (1939) A.M.C. 403, and McAllister & Co. Skibs. A/S Marie Bakke (1958) A.M.C. 2432. Cf. Holden v. SS. Kendall Fish (1968) A.M.C. 2080 where an invoice value clause was held invalid even though the actual recoverable damages for the goods comprised a lesser amount. It appears to be an erroneous decision since Article 3(8) voids only clauses

which lessen the carrier's liability; further, Article 5 expressly allows the carrier's liability to be increased.

126. The legislative techniques in relation to the application of the Rules are discussed at 3.2.2.

127. (1932) All E.R. 374.

128. (1939) A.C. 277.

129. (1941) 1 K.B. 402.

130. Morris, "The Choice of Law Clause in Statutes," (1946) Vol. 62 L.Q.R. 170, 177.

131. Morris, "The Scope of the Carriage of Goods by Sea Act 1971," (1979) Vol. 95 L.Q.R. 59, 62.

132. (1932) All E.R. 374.

133. (1939) A.C. 277.

134. (1940) A.M.C. 971.

135. (1967) A.M.C. 589.

136. (1983) A.C. 565; (1983) 1 Lloyd's Rep. 1.

137. (1981) 2 Lloyd's Rep. 61, 65.

138. (1982) 2 W.L.R. 556, 558.

139. (1983) 1 Lloyd's Rep. 1, 7.

140. (1983) 2 Lloyd's Rep. 50.

141. See n. 136.

142. Schmitthoff, "Tonnage Limitation and Package Limitation of the Carrier," (1984) J.B.L. 353, 354.

143. See Cosgrove v. Horsfall (1945) 62 T.L.R. 140, and Anson's Law of Contract, ibid, p. 159, et. seq.

144. (1954) 2 Lloyd's Rep. 267.

145. (1924) A.C. 522.

146. Ibid, p. 534.

147. Ibid, p. 538.

148. In Scruttons v. Midland Silicones (1959) 1 Lloyd's Rep. 289, Devlin J. said there was no authority for the proposition of vicarious immunity. In The Golden Lake (1982) 2 Lloyd's Rep. 632, 636, Chua J. of the Singapore High Court observed: "Counsel for the defendants says that the Elder Dempster case is good law and urges this Court to follow that decision. But is it good law? It seems to me that it is a decision of doubtful authority and has not once been followed or applied in the more than half a century since it was decided .... It seems that no general principle is to be extracted from the Elder Dempster case." See 8.4.2.1.

148a. See 8.4.2.1. Seminally, see Adams and Brownsword, "Privity and the Concept of a Network Contract," (1990) J.B.L. 23.

149. Mankabady, "Comments on the Hamburg Rules," in "The Hamburg Rules on the Carriage of Goods by Sea," (1978, ed., Mankabady, published by Sijthoff), at p. 66.

150. Tetley, ibid, p. 375.

151. See 2.5.2 (b).

152. The clause is so called after the vessel in _Adler v. Dickson_ (1954) 2 Lloyd's Rep. 267.

153. (1962) A.C. 446.

154. Lord Denning was of the opinion that the stevedores were protected because the respondents, by accepting the bill of lading, had assented to the risk of negligence. In other words, volenti non fit injuria. See 8.4.2.1.

155. (1924) A.C. 522.

156. Cf. _Gilchrist, Watt and Sanderson Ltd. v. York Products Ltd._ (1970) 3 All E.R. 825, where the stevedores were held to be "quasi-bailees" because they took on the additional task of storage.

157. Ibid, p. 474.

158. (1975) A.C. 154.

159. Their Lordships felt that the stevedores had failed to furnish consideration.

160. (1951) 2 Lloyd's Rep. 385.

161. (1956) 1 Lloyd's Rep. 346, 364.

162. (1980) 2 Lloyd's Rep. 317 (P.C.); 1 Lloyd's Rep. 298.

163. Ibid, p. 312.

164. Ibid, p. 321.

165. (1984) 1 Lloyd's Rep. 333.

166. (1859) N.Y. 268 (C.A.N.Y.). See Beale, Bishop, & Furmston, "Contract Cases and Materials," (1985) p. 708. (Published by Butterworths).

167. Restatement 2d. ss. 304, 305. (Published by the American Law Institute Publishers).

168. (1959) A.M.C. 879.

169. (1973) A.M.C. 1093.

170. (1967) A.M.C. 2529.

171. (1975) 1 Lloyd's Rep. 210.

172. Ibid, pp. 458 - 459.

173. Article 10.

174. (1828) 6 L.J.C.P. 137.

175. (1904) 1 K.B. 412.

176. See The Raphael (1982) 2 Lloyd's Rep. 42 where a similar clause was held wide enough to exclude liability for negligence.

177. Rubens v. Lidgate Hill SS. (1892) 20 N.Y.S. 481; see Chiang, "The Characterization of a Vessel as a Common or Private Carrier," (1974) 48 Tul. L. Rev. 299.

178. (1925) 9 F. 2d 724, 733. See J.N. Adams, "The Carrier in Legal History," in "Law Litigants and the Legal Profession," ed. by Ives and Manchester (1983). (Published by the Royal Historical Society).

179. See 5.5.

180. (1956) 1 W.L.R. 936, 940.

181. (1970) 2 W.L.R. 198.

182. (1980) A.C. 827.

183. The Court of Appeal in the Harbutt's Plasticine case, ibid, cited it as authority for the rule of law approach, but in the Photo Production case, Lord Wilberforce explained that the Suisse Atlantique case in fact repulsed the rule of law approach.

184. Ibid, p. 848.

185. Ibid, p. 853.

186. Ibid, pp. 852 - 853.

187. (1931) A.M.C. 528, 531.

188. (1907) 1 A.C. 361, 433.

189. (1959) A.C. 576.

190. Ibid, p. 587.

191. Coote, "Exception Clauses," (1964) p. 96. (Published by Sweet & Maxwell).

192. (1939) 3 All E.R. 444, 457.

193. The Balto (1922) 282 F. 235; Atlantic Mutual Insurance Co. v. Poseidon (1963) A.M.C. 665.

194. The Pozman (1921) 276 F. 418.

195. (1954) A.M.C. 259, 263. See also Encyclopaedia Brittanica v. SS. Hong Kong Producer (1969) 2 Lloyd's Rep. 536.

196. (1880) 4 Asp. M.L.C. 295, 299.

197. (1912) A.C. 604; cf. The Louise (1945) A.M.C. 363. In that case, a ship carrying explosives had to return to the port of loading because of its unseaworthy state. The American court held that the ship had unjustifiably deviated and had lost its right to retain advance freight; the stipulation in the bill for advance freight "ship lost or not lost" was ruled immaterial. As to advance freight, see 4.3.4.

198. See 2.7.1(a).

199. (1923) A.M.C. 1131.

200. (1986) A.M.C. 443.

201. (1969) 2 Lloyd's Rep. 536.

202. (1888) 20 Q.B.D. 475.

203. (1932) A.C. 328.

204. (1955) 1 Lloyd's Rep. 459.

204b. Ibid, p. 65.

205. Ibid, p. 548.

206. (1896) 74 F. 881.

207. Ibid, p. 343.

208. (1970) A.M.C. 633.

209. (1955) 1 Lloyd's Rep. 459.

210. (1954) A.C. 149.

211. (1957) A.C. 149.

212. (1936) 41 Com. Cas. 350.

213. (1980) A.C. 827, 845, 850.

214. Scrutton, ibid, p. 207.

215. (1916) 2 K.B. 783.

216. Cf. Internationale Guano v. Macandrew (1909) 2 K.B. 306 where the shipowner proved that the damage arose out of inherent vice.

217. Coote, ibid, pp. 81 - 82.

218. Farr v. Hain SS. (1941) A.M.C. 1282; Jones v. The Flying Clipper (1954) A.M.C. 259.

219. Ibid, p. 262.

220. Ibid, p. 371.

221. Ibid, p. 82.

222. Gilmore and Black, "The Law of Admiralty," (2nd ed., 1975), pp. 179 - 182. (Published by Foundation Press).

223. (1983) A.M.C. 1947.

224. (13 June, 1984) S.D.N.Y. No. 81 - 7704.

225. (1907) 1 K.B. 660.

226. Ibid, p. 669.

227. (1936) 2 All E.R. 597, 601.

228. Ibid, p. 85.

229. (1937) 43 Com. Cas. 1, 15.

230. (1925) 42 T.L.R. 174.

231. Ibid.

232. Ibid, p. 669.

233. Ibid.

234. Ibid, p. 551.

235. Ibid.

236. Ibid, p. 340.

236a. (1986) 2 Lloyd's Rep. 633, 637.

237. Scrutton, ibid, p.453.

238. Ibid. The same is true of Jones v. The Flying Clipper (1954) A.M.C. 259.

239. (1963) A.M.C. 665.

240. (1967) A.M.C. 2240.

241. Ibid, p. 261.

242. Ibid, p. 554.

243. Cf. The Antares (1987) 1 Lloyd's Rep. 424, 430.

244. Ibid, p. 456.

245. Cf. deviation in air law; see 8.3.5.4.

246. See The Antares (1986) 2 Lloyd's Rep. 633, 637.

247. (1927) 33 Com. Cas. 70, 78.

248. (1959) 1 Lloyd's Rep. 352.

249. Schmitthoff's Export Trade, ibid, p. 519.

250. (1929) A.M.C. 725.

251. (1979) 2 Lloyd's Rep. 173.

252. (1984) S.D.N.Y. No. 83 - 5942.

253. Barth v. Atlantic Container Line (1985) A.M.C. 1196; Cincinnati Milacron Ltd. v. M.V. American Legend (1985) A.M.C. 1065; E.M.S. Industrie v. Polski T.O. (1985) E.D.N.Y. No. 83 - 4279 are some of the more recent cases.

254. (1982) A.M.C. 2152.

255. Scrutton, ibid, p. 456.

256. See 6.6.3.

257. Article 8(2) of the Hamburg Rules refers only to the servants or agents' loss of right to limit their liability.

258. Anthony Diamond Q.C., "The Hague-Visby Rules," (1978) L.M.C.L.Q. 245.

259. (1983) 1 W.L.R. 1186; discussed in greater detail in 8.3.5.4.

260. See n. 62.

261. (1965) 1 Lloyd's Rep. 325, 348.

262. (1915) A.C. 705, 713.

263. (1982) 2 Lloyd's Rep. 382.

264. (1983) 2 Lloyd's Rep. 156.

265. (1983) 2 Lloyd's Rep. 210.

CHAPTER 7 : RIGHT OF SUIT AGAINST THE CARRIER

7.1 THE CONSIGNEE/INDORSEE'S RIGHT TO SUE IN CONTRACT

7.1.1 Under the Bills of Lading Act 1855, S.1

Although it was decided in Lickbarrow v. Mason[1] that a bill of lading as a document of title could pass property in the goods by indorsement, it was not until the Bills of Lading Act 1855 was enacted that an assignee who obtained property in the goods by indorsement could by the same act obtain a direct right of action against the carrier based on the terms of the bill of lading indorsed.[2] The preamble to the 1855 Act records the situation thus: "Whereas by the custom of merchants a bill of lading being transferable by endorsement the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property ...." S.1 provides: "Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the

same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." While the intention of s.1 is clear enough from the preamble to the Act, the language in which it is couched has given rise to a number of difficulties in interpretation and it is not to every contract of carriage that the provision is applicable; these aspects form the ensuing subject of discussion.

7.1.1.1 Kinds of Documents

S.1 is only applicable to documents of title and clearly waybills, delivery orders as well as house and groupage bills of lading do not meet that requirement. It is less certain that mate's receipts which by trade custom are treated as documents of title in the same way as bills of lading are excluded from the purview of s.1. In Chan Cheng Kum & Another v. Wah Tat Bank Ltd.,[3] such a custom was proved to exist in shipments between Singapore and Sarawak (the 1855 Act applies in Singapore by reason of the Civil Law Act, s.5(1), and in Sarawak, by reason of the Malaysian Civil Law Act, s.5(2)). Lord Devlin, in delivering the judgment of the Privy Council, said: "The form of mate's receipt used is similar to a bill of lading and there is no difficulty about treating it as an equivalent. In this respect it may be contrasted with the

form considered in Hathesing v. Laing[4] which appears to have been a receipt and nothing more and not to have named a consignee. Their Lordships can see nothing unreasonable in using the mate's receipt in this case as a document of title."[5] The custom was however discounted because it was inconsistent with the words "not negotiable" in the mate's receipt concerned. What remains unsettled from the decision is whether a negotiable mate's receipt which by custom is treated in the same way as a bill of lading may be acceptable for the purposes as S.1.[6]

Since waybills are outside the purview of S.1, their issuers commonly seek to rely on the agency concept. The General Council of British Shipping Waybill, for instance, provides: "The Shipper accepts the said Standard Conditions on his own behalf and on behalf of the Consignee and the owner of the goods and warrants that he has authority to do so. The Consignee by presenting this Waybill and/or requesting delivery of the goods further undertakes all liabilities of the Shipper hereunder, such undertaking being additional and without prejudice to the Shipper's own liability. The benefit of the contracts evidenced by this Waybill shall thereby be transferred to the Consignee or other persons presenting this Waybill." The clause indicates that the consignee's right to sue on the terms of the waybill is conditional on his assumption

of the shipper's liabilities and his presentation of the waybill; in practice, the consignee obtains the goods merely upon proof of his identity. Further, if freight has been prepaid and no demurrage or other charge is due, the consignee would have difficulty in proving his provision of consideration. Since the shipper (at least on the wording of the clause) contracts on his own behalf and as an agent of the consignee, it might be argued that any difficulty about consideration moving from the consignee may be discounted. But the courts are likely to go beyond semantics. To draw an analogy, in The Eurymedon,[7] the Privy Council found it necessary to establish the provision of consideration by the stevedores even though the Himalaya Clause made it clear that the carrier acted as agent for the stevedores. Yet the obstacle is not as formidable as it seems. In that case, the stevedore's consideration was held to have been furnished by their discharging of the goods. In the same way, the consignee's assumption of all of the shipper's liabilities may be considered good consideration.

Doubt has been expressed as to whether a combined transport bill of lading is a document of title to which s.1 applies. Professor Goode argues that "only a bill of lading issued by a sea carrier is within the Bills of Lading Act 1855, so even if a CT bill of lading were to be

transferable it would not operate to transfer to the consignee or indorsee the shipper's contractual rights against the CTO."[8] Interestingly enough however, in The Elbe Maru, a case involving combined transport bills of lading, the applicant's contention that "the respondent became a party to the bill of lading contracts by reason of the fact that they were indorsees of the bills of lading to whom property in the said goods passed upon or by reason of the said indorsement and/or by reason of the fact that they presented the said bills of lading"[9] went unchallenged. In respect of through bills of lading where the original carrier assumes responsibility for the entire voyage, it is thought that they are documents of title which fall within the purview of s.1.[10] In respect of through bills of lading which stipulate that each carrier is only answerable for his own portion of the voyage, the on-carrier's bill is not a document of title to which s.1 applies for it is the through bill which has to be produced to obtain the goods. The situation acquires a very problematic facet if the on-carrier is not known at the time the through bill is issued for "(t)he law requires that the person for whom the agent (in this case, the issuer of the through bill) purports to act must be one who is capable of being ascertained at the time the contract is made."[11] Even if the on-carrier is known at the time of the issuance of the through bill, there are difficulties still, viz, the usual

stipulation that the issuer's liability ceases upon transhipment and the reference in s.1 to "the contract contained in the bill of lading." Not only is the on-carrier's bill a separate contract which is not transferable under s.1, it is also not a document of title representative of the goods.[12]

7.1.1.2 Bulk Cargos

Where a bulk cargo comprises of several consignments, s.1 may be inapplicable for two reasons. First, delivery orders rather than bills of lading will normally have been issued the reason being that the seller often only has one bill of lading or less bills of lading than could be delivered to each of the various buyers. Second, property in the goods will not pass until the individual consignments have been ascertained: Sale of Goods Act 1979, s.16. Ascertainment may possibly not happen until delivery at the contractual destination, and this can be fatal to a buyer's claim. In Re Wait,[13] the sub-purchaser who paid cash for part of a bulk cargo failed to secure delivery through an action for specific performance. The purchaser who had hypothecated the bill of lading for the whole cargo became bankrupt before the ship arrived and his trustee in bankruptcy, having redeemed the bill, successfully claimed that there had never been an appropriation or ascertainment of the goods which

represented the sub-purchaser's purchase. The decision has rightly been criticised. Schmitthoff's Export Trade suggests: "A more equitable solution of the problem of undivided shares in bulk would be if the law provided that persons interested in the bulk should be regarded as joint owners pro rata their interest."[14]

Goods forming part of a bulk cargo may also be ascertained through exhaustion by delivery to other buyers or damage of such part of the bulk that the remainder is entirely referable to a buyer's purchase. In The Elafi,[15] parts of a bulk cargo of copra were discharged at Rotterdam and Hamburg till the remainder on board comprised only that which had been purchased by the plaintiffs under several contracts. At Karlshmn, seawater damaged the copra left. Mustill J. held that the goods were ascertained by exhaustion after the other buyers had had their copra delivered. As such, the plaintiffs had acquired property in the remainder of the copra at the time of damage. Apropos the separate contracts, the learned judge held that it was not necessary for the cargo to be appropriated or earmarked specifically for each separate contract since all the cargo left aboard at the time of damage was purchased by one party. Professor Adams points out that "it was purely fortuitous that other parts of the cargo had been offloaded by the time the damage

occurred."[16] Where a cargo is lost in transit without having been ascertained, the risk cannot be considered to be with the buyer since it cannot be predicated that it was the contractual cargo which was lost; in that kind of situation, the seller has to fulfil his obligations by shipping a similar cargo again.[17]

7.1.1.3 Property: Its Meaning and Required Manner of Transfer under S.1

The word "property" under s.1 is not elaborated or explained; clarification has been left to the courts. It is now clear that the pledging of a bill of lading passes only a "special" property to the pledgee whilst leaving the "general" property vested in the shipper. In Sewell v. Burdick, after considering the different views expressed by the judges in the lower courts, Earl Selborne L.C. concluded: "It is very difficult to conceive that when the goods are in transitu, when the substance of the contract is not sale and purchase, but borrowing and lending, and when the indorsement and deposit of the bill of lading is only by way of security for a loan, it can be the intention of either party thereby, without more, to divest the shipper of all proprietary right to the goods, and to take from him and transfer to the indorsee all rights of suit under the contract with the shipowner."[18] Thus, when all

that is intended in a transaction is a pledge, the pledgee receives only a special property in the goods which is not enough for the purposes of s.1. In other words, the pledge would give the pledgee "a" property but not "the" property[19]

In The Aliakmon,[20] the buyers argued that although the legal property in the goods remained in the sellers, they had the equitable property and that they were able to sue on that basis. This argument was rejected by Lord Brandon who said that equitable ownership had to be coupled with a possessory title to support a claim and even then the legal owner had to be joined as party to the action. More importantly, Lord Brandon felt it extremely doubtful whether equitable interests in goods could be created in ordinary contracts of sale. Lord Brandon also held the Sale of Goods Act 1979, which applied to the c. and f. contract of sale in the present case, to be a complete code which made no distinction between the legal and equitable property in the goods. The word "property" as used in s.1 therefore refers to both the legal and equitable property in the goods.

As to how the property in the goods must pass, the instructive words in s.1 are "upon or by reason of such consignment or endorsement" which the editors of Scrutton

on Charterparties and Bills of Lading interpret thus: "If the property in the goods passes otherwise than upon or by reason of the consignment or indorsement the rights of suit do not pass to the receiver."[21] The editor of Carver's Carriage by Sea however takes the view that "the property need only pass from the shipper to the consignee or indorsee under a contract in pursuance of which the goods are consigned to him under the bill of lading; or in pursuance of which the bill of lading is indorsed in his favour."[22] The view expressed in Scrutton on Charterparties and Bills of Lading, though more faithful to the language of s.1, carries the problematic implication that s.1 is inoperative when there is a time lapse between the passage of property and the consignment or indorsement, or if the property passes by virtue of some reason other than the consignment or indorsement. In practice, property occasionally passes upon or by reason of payment (especially in transactions involving Romalpa clauses); and if the goods form part of a bulk cargo, property passes only upon ascertainment. It is therefore hardly surprising that the wider view expressed in Carver's Carriage by Sea was preferred by Lloyd J. in The Sevonia Team[23] and by Mustill J. in The Elafi where it was added that it suffices for the property to pass before or after the consignment or indorsement provided the passage "forms an essential link in the chain of events by which title is transferred."[24]

The circumstances in which the passage of property does not form an essential link in the chain of events by which title is transferred were not enumerated but it may be safely assumed that the property must pass whilst the bill of lading is still in force as a document of title.[25]

A liberal interpretation of the words "upon or by reason of such consignment or endorsement" was also favoured by the Court of Appeal in The San Nicholas[26] where a clause in the contract of sale stipulated: "... the title to the molasses and the risk of the molasses shall pass to the buyers at the permanent hose connection of the vessel at loading port." The ship sank before it could reach the port of discharge. The defendants argued that the property in the goods passed through the hose connection at the port of loading and as such, "it did not pass to (the plaintiffs) 'upon or by reason of the consignment or endorsement' of the bill of lading within the Bills of Lading Act 1855, s.1."[27] Lord Denning, however, distinguished Giamperi v. Greek Petroleum[28] on which the defendants relied, from the present case: "(That case) has no bearing on the present case where the bill of lading was for delivery 'to order' .... By reserving it 'to order' the shipper reserved to himself power of disposing of the property and the property did not pass to the purchaser on shipment ...."[29] Summarily, the Court of Appeal, in its finding for the plaintiffs, relied on

Lord Bramwell's dictum in Sewell v. Burdick: "... the truth is that the property does not pass by the indorsement but by the contract in pursuance of which the indorsement is made."[30]

7.1.1.4 "The Contract Contained in the Bill of Lading"

The words "the contract contained in the bill of lading" in s.1 are inaccurate in two ways. First, a bill of lading may not embody all the terms of the contract of carriage.[31] Second, as between a shipowner and charterer, the bill of lading is ordinarily a receipt[32] but when it is indorsed over, the indorsee has all the rights and liabilities as are in "the contract contained in the bill of lading."[33] Different views have been advanced as to how a receipt upon indorsement turns into a contract. In Leduc v. Ward, Lord Esher M.R. said that between the shipowner and indorsee, the contract was in the bill of lading because "the shipowner has given it for the purpose of enabling the charterer to pass it on as the contract of carriage in respect of the goods."[34] In Hain SS. Co. v. Tate & Lyle, Lord Atkin said: "A new contract appears to spring up between the ship and consignee on the terms of the bill of lading."[35] Whatever the merits or demerits of these explanations, the simplest approach would be to treat the words in question as an imprecision in

expression. It has been suggested that the words should be read to mean "as if a contract in the terms set out in the bill of lading had at the time of shipment been made with (the indorsee or consignee)."[36]

7.1.1.5 Are the Shipper's Liabilities Transferred Wholly?

By s.2 of the 1855 Act, the shipowner's right to look to the shipper for freight remains. In Ministry of Food v. Lamport & Holt Line, Sellers J., having in mind the shipper's obligations in regard to dangerous goods, said: "It does not appear to have been settled whether (s.1) operates to transfer all liabilities of the shipper, whether incurred before or at the time of shipment, or before indorsement of the bill of lading, or only to transfer liabilities subsequent to shipment or indorsement of the bill of lading."[37] The words "the same liabilities" in s.1 of the 1855 Act should preferably be taken to refer to the liabilities arising post-shipment or indorsement; a narrower construction would render the consignee or indorsee liable for damage caused by the shipper's consignment of dangerous goods. Under Article 4(b) of the Hague and Hague-Visby Rules, it is clear that "the shipper of (dangerous) goods shall be liable ...."

7.1.2 Under the Brandt Rule

Where s.1 does not apply, the recipient of the goods may still be able to sue in contract on the same terms as those contained in the bill of lading if such a contract can be inferred from his presentation of the bill and acceptance of the goods thereunder. In Brandt v. Liverpool, Brazil and River Plate Steam Navigation Co. Ltd, Bankes L.J. held:[38] "By these authorities (Stindt v. Roberts, Young v. Moeller, and Allen v. Coltart)[39] it has been clearly established that where the holder of a bill of lading presents it and offers to accept delivery, if that offer is accepted by the shipowner, the bill of lading holder does come under an obligation to pay the freight and to pay the demurrage, if any, and there are general expressions in all those three cases, I think, in which the learned Judges have said that the contract so made by that offer and acceptance extends to include the terms of the bill of lading." It is to be noted that the proper law of the implied contract may differ from that which governs the bill of lading. In The St. Joseph,[40] the goods were shipped under a bill of lading issued in Belgium which had adopted the Hague Rules. The bill of lading did not however contain a clause paramount or choice of law clause. The court held that the implied contract was a separate contract based on the express terms of the bill of

lading which did not include the Hague Rules. In The Niegos,[41] it was held that a charterparty which is incorporated into a bill of lading carries with it its choice of law clause. However, the incorporating words must be manifestly clear for effect to be given to the clause: Thomas v. Portsea.[42] The words "paying freight and other conditions as per charterparty" are not enough to import an arbitration clause in the charterparty into the bill of lading.

Turning now to the conditions necessary for the finding of a Brandt contract, May L.J. in The Elli 2 said:[43] "... the boundaries of the doctrine are not clear. I would not expect them to be so. As the question whether or not any such contract is to be implied is one of fact, its answer must depend upon the circumstances of each particular case - and the different sets of facts which arise for consideration in these cases are legion. However, I also agree that no such contract should be implied on the facts of any given case unless it is necessary to do so: necessary, that is to say, in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances which one would expect that business reality and those enforceable obligations to exist."

May L.J.'s note of caution was of relevance, though not referred to, in The Aramis[44] where the vessel was chartered to carry goods forming part of an undivided bulk. There were two separate claims as to non-delivery and short delivery. Bingham L.J. said that there was no precedent whereby a contract had been implied on the mere facts that an indorsee-holder of the bill of lading demanded delivery and the shipowner, bound by contract with the shipper or charterer to deliver the goods to any presenter of the bill, duly made such delivery. The shipowners and holders of the bills of lading had done nothing, it was further explained, which would have been different had their intention been to avoid a contract on the terms of the bills. Two comments may be made about the present case.

First, it is distinguishable from Brandt v. Liverpool[45] where the bill of lading holder offered to pay the freight before the goods were delivered and in fact paid it. Second, the decision seems somewhat harsh as the evidence, though not entirely satisfactory, showed it unlikely that the full quantity was not put on board at the port of lading. On any view, it is clear that a contract will not be implied where the "possession of goods is taken against a bill of lading in circumstances in which nothing remains to be done in performance of the relevant contract

of carriage save physically to hand the goods over to the receiver."[46] Although it is not necessary that freight should remain payable, there must be some form of consideration (such as demurrage) to support the implication of a contract; the surrender of the shipowner's lien for general average contribution or freight would suffice. A contract will not be implied where the presenter of the bill refuses to take delivery on its terms (SS. County of Lancaster v. Sharp)[47] or where the bill rules out such a contract (Amos v. Temperley)[48] or where the buyer presents the bill of lading as an agent of the seller (The Aliakmon).[49] So also where the goods are a total loss.

7.2 THE CONSIGNEE/INDORSEE'S RIGHT TO SUE IN TORT

The transport document under which the goods are shipped may not fall within the purview of s.1 or may expressly rule out an implied contract; the goods may be unascertained or property in the goods may not have passed "upon or by reason of (the) consignment or indorsement;" or there may have been no previous course of dealing. Where for any of these or other reasons, the buyer is unable to sue under s.1 or on an implied contract, the question arises as to the circumstances in which he may successfully maintain an action in tort against the carrier.

In Margarine Union Gmbh v. Cambay Prince SS. Co. Ltd., The Wear Breeze,[50] the plaintiffs held four delivery orders in respect of an as yet undivided bulk cargo of copra. The risk passed to them on shipment but it was clear that they would not acquire legal or possessory title to the goods before discharge. During the voyage, the goods were damaged as a result of the carrier's negligence in fumigating the ship's holds. The plaintiffs could not sue under s.1 as they were never holders of bills of lading; nor could they sue on an implied contract as the delivery orders were issued by sub-charterers who were not the carrier-defendants. The plaintiffs therefore framed their action in tort. Roskill J., as he then was, rejected the plaintiff's claim thus:[51] "... it has always been the law of this country that before anyone can sue in tort for damage to goods he must prove that he was, at the time when the damage was suffered by the negligence complained of, the owner of those goods and, as such owner, he had either a legal or possessory title to them; not only has that always been the law of this country, but that principle of law has been left wholly unaffected by the two decisions of the House of Lords: Donoghue v. Steveson[52] and Hedley Byrne v. Heller & Partners Ltd.[53]

It will be convenient at this stage to defer analysis of Roskill J.'s reasoning for a consideration of

The Irene's Success[54] where the facts were similar but the result different. There the plaintiffs were c.i.f. buyers of a cargo of coke which was shipped aboard the defendants' vessel from Virginia to Hamburg. Before title in the cargo passed to the buyers, it was damaged by sea water - an event which the plaintiffs attributed to the defendants' negligence. The plaintiffs could not sue under s.1 (delivery orders having been used) or on an implied contract and so sued in tort. Although Lloyd J. accepted that the material facts were similar to those of The Wear Breeze, he was of the opinion that the case required reconsideration in the light of recent cases relating to economic loss.[55]

Lloyd J. cited Anns v. Merton London Borough Council where Lord Wilberforce stated: "... the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a

prima facie duty of care arises. Secondly, if the question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or reduce or limit the scope of the duty or the class of person to whom it is owned or the damages to which a breach of it may give rise."[56]

Pertaining to the first stage of Lord Wilberforce's test, Lloyd J. held that "the defendants ought reasonably to have contemplated that carelessness on their part in carrying the goods would be likely to cause damage to the plaintiffs .... Every carrier knows or ought to know that in the classic c.i.f. contract the risk passes to the buyer on shipment; even though the seller may retain the right of disposal ... until he has been paid. In those circumstances it seems to me almost self evident that the person at whose risk the goods are is likely to suffer loss if the goods are damaged by the carrier's negligence. Accordingly, I would hold that the plaintiffs, as c.i.f. buyers, satisfy the first half of Lord Wilberforce's test, and that a prima facie duty of care therefore arises."[57]

As for the second half of Lord Wilberforce's test, Lloyd J. found no reason strong enough to displace the duty of care. Lloyd J. discounted the "floodgates" argument "because any given bill of lading quantity might be spilt

among a number of different delivery orders. But even so it is clear that the present case, if decided in favour of the plaintiffs, could not give rise to anything approaching unlimited liability."[57] The possibility of c.i.f. buyers sidestepping the carrier's contractual exceptions was not broached but Lloyd's J. took the opportunity to deal with it thus: "... if I may express my own tentative view, it would be that it would require a much stronger argument of policy for the duty of care in the present case, arising out of so close a relationship as that which exists between a carrier and a c.i.f. buyer, to be excluded."[58]

The threat of a carrier's contractual protection being circumvented by an action in tort may have been inadequately dealt with by Lloyd J. Where the only contract is between the consignor and the carrier, it is a distinctly difficult issue. Bailment on terms does not provide the answer where the only bailment is that by the consignor to the carrier and the carrier has not attorned to deliver on like terms to the buyer.[59] Tettenborn argues that "a deus ex machina in the form of a statute may provide the right answer. The Hague Rules, which govern most ocean bills of lading, are a case in point. In their revised form (as adopted in the Carriage of Goods by Sea Act 1971), article IV bis provides that the limitations of liability contained in the rules apply to actions brought

in tort as much as to actions in contract; and given that the Rules themselves are applied to shipments by virtue of the law and not simply by contractual incorporation, this seems to pre-empt any objection to their applicability based on privity of contract."[60]

Yet the position is not as attractively simple as that. First, as the author acknowledges, the statute does not apply to all contracts for the carriage of goods by sea. Second, a perusal of Article 4 _bis_ 1 in conjunction with Article 1(a) validly leads to a construction that the protection under the Rules extends only to the contractual carrier but not the actual carrier. Article 4 _bis_ 1 reads: "The defence and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be in contract or tort." Article 1(a) states that the term "carrier" includes the owner or the charterer who enters into a contract of carriage with the shipper." As the editors of Scrutton on _Charterparties and Bills of Lading_ argue, the term "carrier" under the Rules "does not extend beyond the person who is contracting as carrier under the relevant contract of carriage."[61] Third, there is also the unresolved question whether, if there exists a contract of carriage between a carrier and freight forwarder whereby the Rules are brought into play statutorily, a goods owner

whose goods are shipped by the freight forwarder in a container with other goods under a single bill of lading will be bound by the carrier's protection under the Rules. In respect of a ship's delivery order, a goods' owner will only be bound by the terms of the bill of lading if the former incorporates the terms of the latter.[62]

In The Nea Tyhi,[63] a cargo of plywood was damaged before title passed to the plaintiffs. The plaintiffs' purchase had been made on the strength of a misrepresentation in the bill of lading which, when it came to light, formed the basis of their suit. Sheen J. held the carrier liable on principles of agency law but he went on to consider the position in tort lest he was wrong. Sheen J. summed up his alternative judgment thus: "The question which I would have to answer ... is whether I agree with Mr. Justice Roskill or with Mr. Justice Lloyd. ... one cannot follow the enquiry prescribed by Lord Wilberforce ... without reaching the same conclusion as Mr. Justice Lloyd."[64]

Clearly Sheen J.'s reticence on the difficulties germane to his alternative judgment rendered clarification or exposition at appellate level desirable. This opportunity was soon afforded by The Aliakmon[65] the facts of which are as follows. A cargo of steel coils was

shipped c. & f. from Korea to England. As with c.i.f. contracts, the property in goods shipped c. & f. usually passes upon the bill of lading being transferred to the buyer. In this case, however, the buyers' bank refused to back their bill of exchange and it was only after some negotiation that the sellers allowed the buyers to have the bill of lading. This was done on the understanding that the steel coils were to be at the disposal of the sellers, the buyers were to collect the cargo as agents for the sellers, and the goods were to be warehoused to the order of the sellers. On discharge, it was found that the cargo was damaged to the extent of some 80,000.00 Pounds.

Staughton J.'s decision that the buyers had acquired property in the goods upon shipment and transfer of the bill of lading and therefore the right to sue under the 1855 Act was overruled by the Court of Appeal. It held that the property in the goods did not pass at that time because the goods were then held at the disposal of or to the order of the sellers; further, the buyers had acted as the sellers' agents when they took delivery so that any contention of an implied contract in their favour could not be sustained. The House of Lords was of the same opinion. Lord Brandon, who gave the leading speech, said: "... the property in the goods did not pass to the buyers upon or by reason of the endorsement of the bill of lading but only

upon payment of the purchase price by the buyers to the sellers after the goods had been discharged and warehoused at Immingham."[66] Mustill J.'s view in The Elafi[67] that s.1 may be applicable even if the property passes at a different time from the consignment or indorsement must then be taken to mean that the transfer must be at a time when the bill of lading is still in force as a document of title.

The right to sue under s.1 or on an implied contract having been ruled out, the buyers were left with their alternative argument that their relationship with the carrier was of sufficient proximity to give rise to a prima facie duty of care which would support a claim in tort. Counsel for the buyers undoubtedly had in mind the possibility of the duty of care, if it could be established, being negatived by policy reasons and submitted that the shipowners' duty of care to the buyers was subject to the terms of the bill of lading. Donaldson M.R. said he could not accept how "any duty of care owned in tort to the buyer could in some way be equated to the contractual duty of care owed to the shipper ...."[68] Oliver L.J. agreed, having already made clear that a duty of care had never been held to be due to anyone who was not the owner of the goods at the time of their damage.

Goff L.J. (as he then was), in a dissenting judgment, held that the shipowners owed a duty of care to the buyers but on the facts were not in breach of that duty. Goff L.J. held that "the policy reasons pointing towards a direct right of action by the buyer against the shipowner in a case of this kind outweigh the policy reasons which generally preclude recovery for purely economic loss. There is here no question of any wide or indeterminate liability being imposed on wrongdoers; on the contrary, the shipowner is simply held liable to the buyer in damages for loss for which he would ordinarily be liable to the goods owner."[69] On the risk of exemption clauses being circumvented, Goff L.J. relied on what he called the principle of transferred loss: "Where A owes a duty of care in tort not to cause physical damage to B's property, and commits a breach of that duty in circumstances in which the loss of or physical damage to the property will ordinarily fall on B but (as is reasonably foreseeable by A) such loss or damage, by reason of a contractual relationship between B and C, falls upon C, then C will be entitled, subject to the terms of any contract restricting A's liability to B, to bring an action in tort against A in respect of such loss or damage to the extent that it falls on him, C."[70] The proposition is attractive in that it gets round the problem of the carrier's contractual protection being circumvented but, as noted earlier, neither Donaldson M.R.

nor Oliver L.J. found it acceptable. Lord Brandon observed that the principle "is not only not supported by authority, but is on the contrary inconsistent with it."[71]

A distinction was drawn with Junior Books Ltd. v. Veitchi Co. Ltd.[72] where the majority of the House of Lords held that a sub-contractor employed by the head contractor was not only contractually obliged to the head contractor, but also owned a duty of care in tort to the building owners, not to lay a defective factory floor. The crucial factor was that the plaintiffs there were the legal owners of the defective property which formed the subject of litigation. Reference was made to the recent Privy Council case, The Mineral Transporter,[73] which reaffirmed the rule as stated in Cattle v. Stockton Waterworks Co.[74] that a plaintiff has no right of suit in tort for loss sustained through property which is not vested in him or in which he had no possessory title at the time of the act complained of. By way of comment, Lord Wilberforce's two-stage test has its boundaries circumscribed by precedents: its applicability does not necessarily extend to novel type of situations. As was said by Lord Brandon, Lord Wilberforce "was not ... suggesting that the same approach would be adopted to the existence of a duty of care in a factual situation in which the existence of such a duty had repeatedly been held not to exist."[75]

Clearly the decision in The Aliakmon[76] that risk without ownership or possessory title does not suffice to back a plaintiff's claim in negligence is founded on policy considerations, viz, certainty and the carrier's potential exposure to indeterminate liability. The importance of certainty was further stressed by Lord Brandon when he said: "If an exception to the general rule were to be made in the field of carriage by sea, it would no doubt have to be extended to the field of carriage by land .... If such detraction were to be permitted in one particular case, it would lead to attempts to have it permitted in a variety of other particular cases, and the result would be that the certainty, which the application of the general rule presently provides, would be seriously undermined."[77] Two criticisms may be made of this point. First, both the CMR and Warsaw Conventions allow the holder of a consignment note or air waybill to enforce in his own name against the carrier any rights arising thereunder regardless of ownership.[78] Second, the factor of certainty in the context of Lord Brandon's speech is not entirely convincing for if it were carried to its logical end, it would mean that the law should not be susceptible to change. Probably the correct view is that given by Professor Treitel: "The main force of the argument of certainty is that the carrier should be able to anticipate the extent of his liability (rather than the person to whom

he will be liable) and to make his insurance arrangements accordingly."[79] It is arguable that Article 4 bis of the Hague-Visby Rules which states that the carrier's defences apply "whether the action be found in contract or in tort" provides the certainty."[79a] On any view, the fact remains that the buyers in The Aliakmon were left without remedy. The problem is expressed by Professor Adams and Brownsword thus: "In the interests of certainty, especially in commercial settings, the law must not be too open-ended; but, in the interests of justice, an innocent client, who suffers financial loss, should not be left without a remedy against the defaulting party."[80]

Although the facts of The Aliakmon may have been unusual or exceptional, the right of third parties sans ownership to sue sea carriers in tort has been considered in court at least four times in the last three decades or so.[81] The issue has stemmed primarily from the inextricable linkage between the requirement of ownership and the right of suit under the 1855 Act or in tort, and rigid adherence to the doctrine of privity of contract. As such, the solutions put forward by Professor Adams and Brownsword are based along these lines.[82] It is suggested that one way in which a solution could be provided for the buyer who would otherwise be barred from recovery would be to amend the Bills of Lading Act to

correspond with the international air and road conventions whereby the holders of the relevant documents can sue regardless of ownerhsip.[83] More radical is the suggestion that the requirement of privity of contract be abandoned so that third party beneficiaries may sue on Goff L.J.'s principle of transferred loss; as Professor Adams and Brownsword put it: "The corollary of permitting a third party beneficiary to sue would be that a person who seeks to take a benefit under a contract, must accept its burden ...."[84]

This proposal is in line with the decision of Donaldson J. in Johnson Matthey & Co. Ltd. v. Constantine Terminals Export Co. Ltd.[84a] In that case, a cargo of silver grain was entrusted for carriage by the plaintiffs (A) to B who in turn entrusted it to C. The cargo was stolen while in the custody of C. A could not sue B because it was a term of the contract between them that B would be free of all liability unless the cargo was in B's actual custody. Since there was no contractual relationship between A and C, A had to frame their action in tort. It was held that the action was subject to the contract between B and C: "... in order to found a cause of action, the plaintiffs have to establish a relationship between Constantine Terminals and the silver which involves a duty of care. In doing so and proving the nature of the

bailment, the plaintiffs are forced to rely upon the contract between those parties, including the protective clauses."[84b] As argued elsewhere in the thesis, the network contract concept allows tortious liability to co-exist with a contractual relationship to which the plaintiff is not privy (a situation which The Aliakmon side-steps); the bailment on terms cases indicate that it is only judicial imaginativeness which is needed to facilitate acceptability.[84c]

An alternative solution, that put forward by Shaw, concerns the German concept of Drittschadensliquidation.[85] It covers the situation in which "B has a right of action against A' but it is C, not B, who, by virtue of some internal arrangement or statutory provision, suffers the loss; B then has a right to 'liquidate' C's loss against A even though he or she has not actually suffered."[86] This may be contrasted with Lord Diplock's observation The Albazero that "it has never been suggested that (the consignor) could be compelled by a court of equity to exercise his right of action for the benefit of those persons who had in fact suffered actual loss as if they were cestuis que trust."[86a] In the circumstances of The Aliakmon,[87] if the sellers (B) exercise their right under German law, they must account to the buyers (C) for the damages recovered: s.281, Civil

Code. If the sellers decline to exercise their right of suit (usually they will have no incentive to sue), they must assign that right to the buyers. It is interesting that when Lord Brandon rejected the plaintiffs' argument that any rational system of law ought to provide them with a remedy, he did so on the basis that "the buyers, if properly advised, should have made it a further term of the variation that the sellers would either exercise (their right of suit for the buyers' account) or assign such right to them to exercise for themselves."[88] Arguably the clause in Lord Brandon's contemplation was broached out of hindsight for at the time the contract was varied, The Irene's Success[89] and The Nea Tyhi[90] were still good law; the insertion of such a clause would have seemed unnecessary then. As the law stands now, it would be prudent to insist on an assignment-of-rights provision whereby "on payment by the buyer of the price of the goods, any rights in respect of those goods then vested in the seller, in so far as not previously transferred, should be automatically transferred to the buyer."[91]

7.3 THE CONSIGNOR'S RIGHT TO SUE

The right of the consignor to recover substantial damages from the carrier is severely circumscribed by the Bills of Lading Act 1955, s.1, and the rule in Brandt[92]

as well as the principle that a party who has suffered no loss is at most entitled to nominal damages.

In The Albazero,[93] a cargo of crude oil was to be shipped from Venezuela to Antwerp. The charterers, who were named as consignees in the bills of lading, in due course indorsed the bills to a third party. The bills were posted one day before the vessel sank; the day after the mishap, the plaintiffs received the bills. The preliminary issues before the court were whether the charterers still had property in the cargo at the time of the loss; and if not, whether the charterers could still sue for and obtain substantial damages. The indorsees, a company in the same group as the charterers, had lost their right to sue due to the expiry of the one-year period under the Hague Rules.

Brandon J., with whom the Court of Appeal agreed, held that the property in the cargo passed to the indorsees when the bills of lading were posted. The charterers successfully argued that though they were divested of property in the cargo at the time of its loss, they were nonetheless entitled to succeed in their action on the basis on what Lord Cottenham L.C. had said in Dunlop v. Lambert: "... if the consignor made a special contract with the carrier, and the carrier agreed to take the goods from him and to deliver them to any particular person at a

particular place, the special contract supersedes the necessity of showing the ownership in the goods; ... the consignor, the person making the contract with the carrier, may maintain the action, though the goods may be the goods of the consignee"[94]

Lord Cottenham's speech, however was not so clear-cut as to facilitate discernment of the underlying principle of a special contract. A special contract, said Brandon J., was founded on estoppel. This was made clear by his contention that the "carrier who agrees to carry goods for a person as if that person had an interest in them, and who accepts payment by that person for the carriage on that footing, cannot afterwards be heard to say, when he is sued for loss of or damage to the goods, that that person in fact had no interest in them."[95] The Court of Appeal, however, was of the opinion that privity of contract formed the quintessence of a special contract: "Only if there were privity of contract could the plaintiff sue. Questions of title and risk were relevant to determine questions of privity but when once privity was established neither title nor risk was a condition precedent to a successful claim for damage if breach of contract and resultant loss and damage were proved."[96] Setting aside that difference, both Brandon J. and the Court of Appeal were aware that their decision meant that a

consignor could obtain damages for loss which he did not suffer and held that in such an instance there would be a constructive trust.

The defendant shipowners were successful on appeal to the House of Lords where Lord Diplock held:[97] "With the passing of the Bills of Lading Act 1855, the rationale of Dunlop v. Lambert[98] could no longer apply in cases where the only contract of carriage into which the shipowner had entered was that contained in a bill of lading, and the property in the goods passed to the consignee or indorsee named in the bill of lading by reason of the consignment or indorsement. Upon that happening the right of suit against the shipowner in respect of obligations arising under the contract of carriage passes to him from the consignor." But if the property in the goods is transferred to the consignee otherwise than on consignment or endorsement of the bill of lading (for instance, prior to shipment), the consignee does not have the right to sue under the 1855 Act : The Kapetan Markos (No. 2).[98a] Lord Diplock also stated: "The rationale of the rule is in my view also incapable of justifying its extension to contracts for carriage of goods which contemplate that the carrier will also enter into separate contracts of carriage with whoever may become the owner of goods carried pursuant to the original contract. ...

there would be no sensible business reason for inferring that the shipowner in entering into the charter-party intended to accept concurrent liabilities to be sued for the same loss or damage by the charterer and by the consignee or indorsee of the bill of lading. A fortiori there can be no sensible business reason for extending the rule to cases as respects holders for valuable consideration because of the statutory estoppel (under s.3 of the 1855 Act)."[97]

Dunlop v. Lambert[98] was however not overruled. Said Lord Diplock: "... the rule extends to all forms of carriage including carriage by sea itself where a bill of lading has been issued; and there may still be occasional cases in which the rule would provide remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it."[99] The rule may be of application "in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated as having entered into the contract for the benefit of all persons

who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into."[100]

Lord Diplock's acceptance that the consignor may possibly recover substantial damages for the benefit of the consignee would appear to include the situation where the document used is one on which where is some doubt as to its status as a document of title within the meaning of s.1 (for instance, a combined transport bill of lading or a waybill); but this is of little help to the consignee who has suffered loss if the consignor refuses to sue on his behalf.[101] If the consignor agrees to sue on behalf of the consignee and does so successfully, he has of course to hand over the damages to the consignee.[102] In connection with this principle, if the goods are damaged whilst in the custody of a carrier, the carrier can recover substantial damages from the tortfeasor but has to hold the damages recovered on trust for the person in whom the proprietary interest is vested: The Winkfield.[103] Similarly, where a bailor's goods have been insured by the bailee, the bailee can recover the sum insured but has to hold it on trust: A. Tomlinson (Hauliers) Ltd. v. Hepburn;[104] Petrofina (U.K.) Ltd. v. Magnaload Ltd.[105]

7.4. RIGHT OF SUIT AGAINST THE CARRIER IN THE UNITED STATES

The American Federal Bills of Lading Act 1916, s.22, reads: "That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu, or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, or upon the shipment being made upon the date therein shown, for damages caused by the non-receipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspond with the description thereof in the bill at the time of its issue."

S.22 avoid much of the obsfucatory language of its English counterpart. For instance, it does not inaccurately refer to the "contract contained in the bill of lading." Nor does it require that the property in the goods must pass "upon or by reason of such consignment or endorsement." Reliance on s.22 is not as restricted as

under s.1 of the British Act. Rule 17(a) of the Federal Rules of Civil Procedure states that every action must be taken in the name of the "real party in interest." The crucial words "real party in interest" are not therein defined and their meaning has been left to the courts to decide.

In the United States, the plaintiff need not be the owner of the goods at the time of their loss or damage so long as he can prove his "interest" in the goods. In Socomet Inc. v. SS. Sliedrecht,[106] the plaintiff established his right to sue by proving his "interest" in the form of a joint venture agreement with the buyer which provided that all profits and losses ensuing from the sale of the goods were to be shared equally. In GEC v. MV Lady Sophie,[107] the plaintiff agreed to provide gas turbine power parts to the Saudi National Co. Ltd. The cargo was shipped "C.I.F. Jeddah (Title Passage F.O.B. Factory)" and damaged whilst at sea. Evidence adduced showed that the plaintiff had a turn-key contract with the buyers whereby the plaintiff retained custody and control of the cargo and had responsibility for making any necessary repairs and the replacement of any parts at its expense until the generator plant was able to function as a unit. Werker J. held that even though legal title passed to the buyers when the goods were loaded onto the vessel, the plaintiff retained a

"financial interest" in the cargo and was therefore a proper plaintiff. In New Hampshire Insurance Co. v. SS. Castillo Manzanares,[108] the court went further. Though the preponderance of evidence suggested that the consignee had ownership of the goods on the basis of which he was held entitled to maintain an action against the carrier, Langton D.J. went on to say: "Even if Miller were not the owner, the Miller Company could maintain this action, for it is clear that the consignee may bring an action seeking damages for alleged cargo loss."[109] It is respectfully submitted that Langton D.J.'s obiter dictum is erroneous. An "interest" of some kind or other must be established to support a claim against the carrier; the cases decided thus far do not seem to indicate otherwise.

In National Starch & Chemical Corp. v. SS. Hermione,[110] under the contract of sale, the plaintiff was to pay the full purchase price regardless of the cargo's condition on discharge, bear the risk of any damage to or loss of the cargo whilst at sea, and insure against that risk though it would normally have been the seller's duty in an ex-dock sale. Weinfeld D.J. said: "Whilst it is true that the bills of lading were not formally endorsed or assigned to plaintiff, it is clear that at all times, even before the issuance of the bills of lading, plaintiffs, as purchaser of the yet to be delivered shipment, was the

beneficial owner thereof. Under this arrangement, even if plaintiff was not the formal holder of legal title, it was at least the equitable or beneficial owner and is entitled to maintain the action against the carrier for the loss sustained."[111] This case may be distinguished from Firestone Plantations Co. v. Pan Atlantic SS. Corp.[112] where a claim by the purchaser who was not an assignee of the bills of lading was dismissed. The cargo had been sold ex-dock to the plaintiff after discharge from the ship in New York. As such, it was held that the plaintiff did not acquire any rights in the cargo while it was in transit: "The transaction being ex-dock, I think the purchaser made its bargain for the crude rubber in the condition in which it was at that place."[113] Similarly, in Mr. Galvanized v. Shin Ming,[114] it was held that a buyer of goods after discharge had no standing to sue the carrier on the terms of the bill of lading since it was not party to the contract of carriage. Apart from that kind of situation, a plaintiff will not succeed if he has parted with the title and risk for he then has no further interest in the cargo: The Burgondier.[115] In Thyssen Steel v. Palma Armadora,[116] the seller who had been paid in full before the total loss of the cargo was held not to have the requisite interest to support his action.

When a buyer justifiably rejects the damaged goods, the buyer's right of suit is revested in the seller: The Astli.[117] Such a case has not come before the English courts but on a strict reading of The Aliakmon,[118] if a consignee-buyer had assumed ownership prior to the damage but then later justifiably rejected the goods because of, for instance, non-conformity, the seller would seemingly have no recourse against the carrier for he was not the owner at the time of the damage. Arguably the seller may be said to retain "conditional ownership" of the goods which entitles him to maintain an action against the carrier and remains vested in him until the buyer accepts the goods.[119]

Summarily, the plaintiff must "establish that it is a party to (the contract of carriage) or became the owner of the goods during the period of the contract of carriage or that it bore the risk of loss prior to delivery ... so as to authorize it to bring (an) action under the bill of lading or contract of carriage."[120] As for direct actions in tort whereby contractual exemptions may be circumvented, the courts seem to be more concerned about double recovery. In Levatino Co. v. M/s Helvig Torm, Cooper D.J. noted "the long-established rule that an owner or consignee may recover for damage to cargo, and that, being protected against double recovery, the carrier has no

concern with any equities between the owner or consignee and others."[121] And in the National Starch case, Weinfeld D.J. held: "Insofar as the defendant claims that plaintiff was not the owner of the cargo, its only legitimate concern is that, in the event it is found liable, it is not called upon to pay damages twice for the same loss. There is no danger of double recovery in this case since Tapioca Associates (the only other possible plaintiff) upon this trial expressly disavowed any claim for loss in connection with the cargo."[122]

7.5 NOTICE OF LOSS OR DAMAGE AND THE TIME BAR

7.5.1. Under the Hague and Hague-Visby Rules

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

state of the goods has at the time of their receipt been the subject of joint survey or inspection." This provision is retained in its entirety by the Hague-Visby Rules.

The next sentence in Article 6 of the Hague Rules is not present in the Hague-Visby Rules: "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless it is brought within one year after delivery of the goods or the date when the goods should have been delivered." In its place is the provision: "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." Both sets of Rules further provide: "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."

Article 3(6) _bis_ reads: "An action for indemnity against a third party 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." This new provision was apparently introduced to enable a contractual carrier who had been sued by the cargo owner to pursue a recourse claim against the on-carrier outside the usual one-year period.

7.5.1.1 Time-bar Applicable in All Instances

The replacement of the words "all liability in respect of loss or damage" by the words "all liability whatsoever" in relation to the time-bar under the Hague-Visby Rules suggests more strongly that a claimant must bring suit against the carrier within one year even if there has been a geographical deviation or misdelivery. In a recent case, The Antares (No. 2), Lloyd J. held: "Whatever may be the position with regard to deviation cases strictly so called ... I can see no reason for regarding the unauthorized loading of deck cargo as a special case."[123] Though this left open the question whether the time-bar applies to cases of geographical deviation and misdelivery, there is dicta (albeit obiter) from the judge at first instance to suggest that the answer lies in the affirmative. As Steyn J. put it: "The most

important change from the wording of the Hague rules is undoubtedly the introduction of the word 'whatsoever.' Taking into account the provision read as a whole ... I am constrained to conclude that art. III, r.6, makes no distinction between fundamental and non-fundamental breaches of contract."[124] Arguably Article 4, Rule 5(e) which states that the limits of liability do not apply to acts done by the carrier "with intent to cause damage, or recklessly and with knowledge that damage would probably result" does not in any way affect the time-bar.

7.5.1.2 "Suit"

The word "suit" includes arbitration: The Merak.[125] The words "suit ... within one year" means suit in the correct jurisdiction so that suit brought within one year in another jurisdiction is not treated as compliance with the one-year time limit: Compania Colombiana de Segaros v. Pacific S.N. Co.[126]

In the United States, it has been held that arbitration is not within the term "suit" as used in s.3(6) of the 1936 Act: "Instead, it is the performance of a contract providing for the resolution of controversy without suit. That is only common sense, but the difficulty is that the Act says: 'the carrier ... shall be

discharged from all liability ... unless suit is brought within one year.' It is therefore desirable that parties submitting to arbitration should expressly agree to waive this requirement, though a court (it is to be hoped) would readily infer such waiver from the inception of arbitration proceedings. It is absurd that the law should require a writ to be issued, even if there is a provision for arbitration; but it is possible that that is the position."[127]

7.5.2 Under the Hamburg Rules

7.5.2.1 Notice

Written notice of the loss or damage suffered must be given to the carrier not later than the working day after the day when the goods were handed over to the consignee: Article 19(1). Where the loss or damage is not apparent, the period within which written notice must be given is 15 consecutive days after the day when the goods were handed over to the consignee: Article 19(2). Failure to give notice on time constitutes prima facie evidence of the delivery of the goods in the condition as described in the transport document: Article 19(1). But as with the Hague and Hague-Visby Rules, notice need not be given of any loss or damage ascertained during a joint survey or

inspection: Article 19(3). In cases of loss or damage caused by delay, no compensation is payable unless notice is given to the carrier within 60 consecutive days after the day when the goods were handed over to the consignee: Article 19(5). Unlike the Hague and Hague-Visby Rules which are only concerned with the contractual carrier, the Hamburg Rules provide that notice may be given to the actual or contractual carrier: Article 19(6). Article 19(8) states that notice given to a person acting on the carrier's or the actual carrier's behalf is deemed to be notice for the purposes of Article 19 as a whole.

7.5.2.2 <u>The Time-bar</u>

The time-bar provision under the Hamburg Rules is much clearer than its counterpart in the Hague and Hague-Visby rules. Article 20(1) reads: "Any action relating to carriage of goods under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years." The words "any action" no doubt cover any claim, be it in tort or contract, relating to the carriage of goods under the Rules. The language of Article 20(1) suggests that the time limit applies in all instances, even if there has been an unauthorized deviation or misdelivery; there is nothing in Article 8 (which concerns the loss of the carrier's

defences in the event of loss, damage or delay caused by intentional or reckless acts) to suggest otherwise. Unlike Article 3(6) of the Hague and Hague-Visby Rules, Article 20(1) of the Hamburg Rules specifically includes arbitral proceedings in the time-bar of two years. Article 20(2) provides that "the limitation period commences on the day on which the carrier has delivered the goods or part thereof or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered." The day on which the limitation period runs is not included in the period: Article 20(3). The limitation period may be extended by the person against whom the claim is made by way of a written declaration to the claimant: Article 20(4). An action for indemnity by a person held liable may be instituted even after the two-year period if instituted within the time allowed by the law of the State where the dispute is heard: "the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself" : Article 20(5).

FOOTNOTES

1. (1794) 5 T.R. 683.

2. Unless, of course, the consignor had contracted with the carrier as agent for the consignee. See The Albazero (1976) 2 Lloyd's Rep. 467, 471.

3. (1971) 1 Lloyd's Rep. 439.

4. (1873) L.R. 17 Eq. 92.

5. Ibid, p. 444.

6. It is also unsettled whether a mate's receipt which by custom is treated in the same way as a bill of lading is acceptable for the purposes of the Hague-Visby Rules.

7. (1975) A.C. 154. Cf. The New York Star (1980) 3 All E.R. 257, 261 where Lord Wilberforce said that the courts would not encourage a search for fine distinctions.

8. Goode, "Commercial Law," (1982, published by Allen Lane) pp. 632 - 3.

9. (1978) 1 Lloyd's Rep. 206, 207.

10. See Scrutton on Charterparties and Bills of Lading (19th ed., 1984; published by Sweet & Maxwell) p. 383.

11. Watson v. Swann (1862) 31 L.J.C.P. 210, 214.

12. See Carver, "On Some Defects In The Bills of Lading Act 1855," (1890) 6 L.Q.R. 289, 301.

13. (1927) 1 Ch. 606.

14. Schmitthoff's Export Trade (8th ed., 1986) p. 102; see also John Adams, "The Negligent Carrier: The Buyer's Success," (1982) M.L.R. 690 where s.16 of the Sale of Goods Act 1979 is discussed vis-a-vis the Bills of Lading Act, s.1, and The Elafi (1981) 2 Lloyd's Rep. 679 is compared with the The Irene's Success (1982) Q.B. 481.

15. (1981) 2 Lloyd's Rep. 679. See also The Kapetan Markos (No. 2) (1986) 1 Lloyd's Rep. 238.

16. John Adams, op. cit., p. 691.

17. Goode, op. cit., p. 594.

18. (1984) 10 App. Cas. 74, 84.

19. Ibid, per Lord Bramwell, p. 103. To avoid having to rely solely on an implied contract, a bank will usually prefer the consignment to be directed to the buyer who will then be asked to deposit the bill of lading indorsed in blank with the bank. See Goode, op. cit., p. 625.

20. (1986) 1 A.C. 785.

21. Scrutton, op. cit., p. 27.

22. Carver, "Carriage by Sea," (13th ed., 1982) p. 71.

23. (1983) 2 Lloyd's Rep. 640.

24. (1982) 1 All E.R. 208, 217.

25. See McKelvie v. Wallace (1919) 2 I.R. 299.

26. (1976) 1 Lloyd's Rep. 8.

27. Ibid, p. 11.

28. (1961) 2 Lloyd's Rep. 259.

29. Ibid, p. 11. Both Roskill and Ormrod L.JJ. agreed.

30. Ibid, p. 105.

31. See 1.2.1.

32. Rodacanachi v. Milburn (1886) 18 Q.B.D. 67, 75.

33. Leduc v. Ward (1888) 20 Q.B.D. 475.

34. Ibid, p. 479.

35. (1936) 41 Com. Cas. 350, 357.

36. See Scrutton, op. cit., p. 63.

37. (1952) 2 Lloyd's Rep. 371, 382. The shipper's liability in respect of dangerous goods is more stringent under the Hamburg Rules. See 4.1.2.

38. (1923) All E.R. 656, 659.

39. (1848) 5 Dow. & L. 460, (1855) 5 E. & B. 755, (1883) 11 Q.E.D. 782.

40. (1933) P. 119; see F.M.B. Reynolds, "Proper Law of a Brandt v. Liverpool Contract," (1985) L.M.C.L.Q. 188.

41. (1936) P. 90.

42. (1912) A.C. 1.

43. (1985) 2 Lloyd's Rep. 107, 115.

44. The Times Law Report, 17 November 1988.

45. Ibid.

46. The Elli 2, Ibid.

47. (1889) 24 Q.B.D. 158.

48. (1841) 8 M. & W. 798.

49. (1986) 1 A.C. 785.

50. (1967) 3 All E.R. 775.

51. Ibid, pp. 781 - 2. Roskill J. relied on, inter alia, on Cattle v. Stockton Waterworks (1875) L.R. 10 Q.B. 453 where a contractor doing work on another's land failed in his action against a contracting company for negligence in allowing water to leak onto the aforesaid land. See also Candlewood Navigation Corp. Ltd v. Mitsuit OSK Lines Ltd. (1986) A.C. 1.

52. (1932) A.C. 562.

53. (1964) A.C. 465.

54. (1981) 2 Lloyd's Rep. 635.

55. Inter alia, Dorset Yacht Co. Ltd. v. Home Office (1970) 1 Lloyd's Rep. 453; Anns v. Merton Borough Council (1978) A.C. 728; Ross v. Caunters (1980) Ch. 297; Caltex Oil (Australia) Ltd. v. Willemstad (1976) 136 C.L.R. 529.

56. Ibid, p. 752.

57. Ibid, p. 637. The possibility of a claim by the seller was not raised presumably because it was assumed that he would have difficulty in obtaining

damages sans loss. See The Albazero (1978) 2 Lloyd's Rep. 467 and pp. 146 - 8, post. Cf. The Charlotte (1909) P. 206 where a cargo was damaged before ownership thereof passed to the c.i.f. buyers. The Court of Appeal allowed the insurers who had been subrogated to the sellers' claim to succeed; the damages were then held on trust for the buyers. Difficulties arise if a seller recovers first and then absconds or becomes insolvent. Would a c.i.f. buyer still be able to recover damages on Lloyd's J.'s principle? If so, what of the limits under the Rules? These problems are now purely theoretical in the light of The Aliakmon (1986) 1 A.C. 785.

58. Ibid, p. 637.

59. See The Aliakmon, ibid, p. 818. See also A.M. Tettenborn, "Sellers, Buyers and Negligent Damage to Goods," (1983) J.B.L. 459, p. 461.

60. Tettenborn, ibid, p. 462.

61. Scrutton, ibid, p. 427.

62. See Diamond "The Hague-Visby Rules" (1978) L.M.C.L.Q. 225, 248 et. seq.

63. (1982) 1 Lloyd's Rep. 606.

64. Ibid, p. 612.

65. Ibid.

66. Ibid, p. 809.

67. (1981) 2 Lloyd's Rep. 679, 687. See also McKelvie v. Wallace (1919) 2 I.R. 299.

68. (1985) Q.B. 350, 388.

69. Ibid, p. 399.

70. Ibid, p. 399.

71. Ibid, p. 820.

72. (1983) A.C. 520.

73. (1986) A.C. 1.

74. (1875) L.R. 10 Q.B. 453.

75. Ibid, p. 815.

76. Ibid.

77. Ibid, pp. 816 - 7.

78. See J.N. Adams and Brownsword, "The Aliakmon and the Hague Rules," (1990) J.B.L. 23.

79. G.H. Treitel, "Bills of Lading and Third Parties," (1986) L.M.C.L.Q. 294, 301.

79a. Scrutton, loc. cit., p. 458 where it is opined that the provision only meant "that a person who is a party to the contract of carriage cannot improve his position by disregarding the contract and suing in tort."

80. J.N. Adams and Brownsword, op. cit.

81. The Wear Breeze (1967) 3 All E.R. 775; The Irene's Success (1981) 2 Lloyd's Rep. 635; The Nea Tyhi (1982) 1 Lloyd's Rep. 606, and The Aliakmon (1986) 1 A.C. 785. See also Transcontainer Express Ltd. v. Custodian Security Ltd. (1988) 1 Lloyd's Rep. 128.

82. J.N. Adams and Brownsword, op. cit.

83. J.N. Adams and Brownsword, op. cit.

84. J.N. Adams and Brownsword, op. cit.

84a. (1976) 2 Lloyd's Rep. 215.

84b. Ibid, p. 219.

84c. See 8.4.2.1.

85. J. Shaw, "Recovery of Third Party Loss in German Law," (1987) J.B.L. 55.

86. J. Shaw, op. cit., p. 57.

86a. (1977) A.C. 774, 845.

87. Ibid.

88. The Aliakmon, ibid, p. 819.

89. Ibid, n. 81.

90. Ibid, n. 81.

91. A.M. Tettenborn, "<u>The Carrier and the Non-Owning Consignee - an Inconsequential Immunity</u>," (1987) J.B.L. 12, p. 16.

92. Ibid, n. 38.

93. (1987) 2 Lloyd's Rep. 467; (1975) 2 Lloyd's Rep. 295; (1974) 2 All E.R. 906.

94. (1839) 6 Cl. & F. 600, p. 626.

95. (1974) 2 All E.R. 906, 921.

96. (1975) 2 Lloyd's Rep. 295, 306.

97. Ibid, p. 475.

98. Ibid, n. 94.

98a. (1986) 1 Lloyd's Rep. 238.

99. Ibid, pp. 474 - 5.

100. Ibid, p. 475.

101. Cf. Coulds v. Bagot's Executor and Trustee Co. Ltd. (1966 - 67) 119 C.L.R. 460 where Windeyer J. was of the opinion that a third party could force the promisee to sue on his behalf.

102. "... if the goods are not his property or at his risk, he will be accountable to the true owner for the proceeds of his judgment" : per Lord Diplock in The Albazero, ibid, at p. 473.

103. (1902) P. 42.

104. (1966) A.C. 451.

105. (1983) 2 Lloyd's Rep. 91, 95.

106. (1975) A.M.C. 314.

107. (1979) A.M.C. 2554.

108. (1968) A.M.C. 2317.

109. Ibid, p. 2319.

110. (1975) A.M.C. 1982.

111. Ibid, p. 1983.

112. (1948) A.M.C. 1240.

113. Ibid, p. 1241.

114. (1982) A.M.C. 1049.

115. (1929) A.M.C. 1141.

116. (1984) A.M.C. 1133.

117. (1945) A.M.C. 1064.

118. (1986) 1 A.C. 785.

119. See Tettenborn, "The Carrier and the Non-Owning Consignee - an Inconsequential Immunity," (1987) J.B.L. 12, 13.

120. Mr. Galvanized v. Shin Ming (1982) A.M.C. 1049, 1062.

121. (1968) A.M.C. 2263, 2265.

122. (1975) A.M.C. 1982, 1984.

123. (1987) 1 Lloyd's Rep. 424, 430 (Glidewell and O'Conner L.JJ. concurring).

124. (1986) 2 Lloyd's Rep. 633, 637.

125. (1965) P. 223.

126. (1963) 2 Lloyd's Rep. 479.

127. Son Shipping Co. v. De Fosse & Tangler (1952) A.M.C. 1903.

CHAPTER 8 : THE CARRIAGE OF GOODS UNDER THE WARSAW SYSTEM

SCOPE OF DISCUSSION

Unlike the trilogy of international regimes governing cargo carriage by sea, the Warsaw System (a term of convenience here used to refer to the unamended/amended Warsaw Convention collectively) is not confined to the regulation of the carrier-consignor/consignee relationship; it also regulates the carrier-passenger relationship. This chapter is principally concerned with the Warsaw System's regulation of the carrier-consignor/consignee relationship. The word "goods" or "cargo", in the context of this chapter, generally refers to goods carried under air waybills; it does not include baggage unless otherwise indicated.

8.1 THE REGIMES GOVERNING CARRIAGE BY AIR: A GENERAL SURVEY

The Warsaw Convention was promulgated by the Comite International Technique d' Experts Juridiques Aeriens (CITEJA) with the objectives of obviating conflict of law problems, and achieving a uniform scheme of rights and liabilities relating to international air carriage as well as uniform documentation. It came into effect in 1932

after having received the necessary number of ratifications. It was given statutory effect in the United Kingdom by the Carriage by Air Act 1932, and was adopted in 1934 by the United States where it is still in force. The Warsaw Convention was amended by a Protocol adopted at the Hague in 1955. A vast majority of the countries that ratified[1] the original Warsaw Convention are now High Contracting Parties to the Hague Protocol, with the most significant exception being the United States.[2]

A Supplementary Convention was drafted in Guadalajara in 1961 to include actual carriers within the regulatory ambit of the Warsaw System. It was given the "force of law" in the United Kingdom by the Carriage by Air (Supplementary Provisions) Act 1962.[3] The United States is not a Party to the Guadalajara Convention. The above-mentioned regimes are further supplemented by the International Air Transport Association (IATA) Conditions of Carriage which are adopted by the major airlines of the world. These Conditions exist within the framework of the Warsaw System; they cannot derogate from the carrier-liability provisions of the Warsaw System: Article 23.

The Montreal Agreement of 1966 which increased the liability limit (the amended liability limit is unbreakable) for passenger death or injury binds only the carriers who are signatory to it and that only when the contractual place of departure or destination or an agreed stopping place is in the United States. A Protocol was signed in Guatemala in 1971 to increase the liability limits (also unbreakable) for passenger death or injury as well as baggage loss, damage or delay. Like the Montreal Agreement, it introduces a system of strict liability in relation to passenger death or injury. In 1975, the Montreal Protocols were drafted. The Montreal Protocol Nos. 1, 2, and 3 are aimed at replacing the gold franc with the Special Drawing Right as the unit in which the limits of liability are expressed. Protocol No. 1 is intended to apply to countries which have adopted the Warsaw Convention. Protocol No. 2 is intended to apply to countries which have adopted the Hague Protocol. Protocol No. 3 is intended to apply to countries which have ratified the Guatemala Protocol.[4] The Montreal Protocol No. 4 makes the liability limit in relation to cargo carriage unbreakable and is in addition aimed at air waybill simplification. The Guatemala Protocol and the Montreal Protocols Nos. 3 and 4 are appended to the English Carriage by Air and Road Act 1979; the instruments as appended to the 1979 Act and the Montreal Protocols Nos. 1 and 2 are not yet in force.

Summarily, in the United Kingdom, it is the Warsaw Convention as amended by The Hague Protocol or the non-Convention Rules[4a] which will be of application. Before proceeding to consider these regimes, mention must be made of the chaos and loss of uniformity which the extant mass of Conventions and Protocols has produced. Professor Bin Cheng rightly refers to the Warsaw Convention and its related instruments as a "tangled network" and a "disgraceful shambles".[5]

8.1.1 The Amended Convention

In the United Kingdom, the Warsaw Convention as amended by The Hague Protocol was given the "force of law" by the Carriage by Air Act 1961[6] which also repealed the Act of 1932 to which the original Convention was appended.[7] The amended Convention brought about four main changes: 1) the liability limit for passenger death or injury was doubled from 125,000 gold francs to 250,000 gold francs;[8] 2) the phrase "wilful misconduct" (which would deprive the carrier of his right to rely on the liability limits) was replaced by "an act or omission _ _ _ done with intent to cause damage or recklessly and with knowledge that damage would probably result;" 3) the time-limits for notice of damage and delay in relation to baggage and goods were increased; and 4) a proviso was added that the liability limits are exclusive of costs.

Article 1(1) provides that the Convention "applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuituous carriage by aircraft performed by an air transport undertaking." Article 1(1) of the original Convention is to the same effect. The amended Convention does not apply (a) to carriage of mail or postal packages, such carriage being governed by the Carriage by Air Acts (Application of Provisions Order 1967, SI 1967/480; (b) where the whole capacity of the aircraft has been reserved for use by the military authorities of any State, including the United Kingdom, specified by Order in Council (Carriage by Air Act 1961, s.7). The original Convention does not apply to (a) carriage performed by way of experimental trial with a view to the establishment of regular air services on a certain route (Article 34); (b) carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business (Article 34);[9] and (c) carriage performed under the terms of any international postal convention: Article 2(2).

The term "international carriage" means any carriage in which, according to the agreement [10] between the parties, the places of departure and destination (whether or not there be a break in the carriage or transhipment) are situated "either within the territories

of the two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party". Article 1(2) carries a special technical meaning. Thus carriage between two countries which are not High Contracting Parties would be international in the ordinary sense but would not be international within the meaning of Article 1(2). An "agreed stopping place" means "any place at which under the particular contract the aeroplane is to descend in foreign territory between the points of departure and destination."[11] The agreed stopping place need not be expressly mentioned in the air waybill; reference in the carrier's timetables suffices.[12] In regard to successive carriage, "it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State": Article 1(3).

8.1.2 The Non-Convention Rules

In the United Kingdom, where the carriage does not fall within the regulatory ambit of the amended Convention, the non-Convention Rules as set out in the Carriage by Air Acts (Application of Provisions) Order 1967 will be of

application. The scheme of liability under the 1967 Order follows that of the amended Convention with certain modifications.

The non-Convention Rules apply where the points of departure and destination are both in one State (there being no successive carriage), and there is no agreed stopover in the territory of a High Contracting Party. In connection with this, reference may be made to the recent case of Keiko Holmes v. Bangladesh Biman Corp.[13] which although concerned with passenger carriage is equally relevant to cargo carriage. The deceased, a British citizen domiciled in the United Kingdom, was a passenger on board the defendants' aircraft on an internal Bangladesh flight. The ticket which was issued in Bangladesh did not provide for any stopping place outside Bangladesh. The deceased was killed when the aircraft crashed as it approached Zia International Airport. If the carriage was carriage by air in respect of which Schedule 1 to the Carriage by Air Acts (Application of Provisions) Order 1967 had effect, the widow could recover up to 100,000 Special Drawing Rights (approximately £83,763). If the carriage was not so governed, the Defendant's liability would be limited to 39,500 takas (approximately £913) either by contract or by the Bangladesh Carriage by Air Act 1934. So the main issue was which legal regime applied.

Although the Court of Appeal accepted that Bangladesh law was the proper law of the contract, it held that the 1967 Order prevailed. The court's reasoning was based on Article 3 of the 1967 Order which reads: "This Order shall apply to all carriage by air, not being carriage to which the amended Convention applies." Bingham L.J. analysed Article 3 in the following way: "The amended Convention certainly does not apply to domestic carriage (not involving a stopping place in a foreign state) within the United Kingdom or within any other country. So on its face the order could apply to domestic carriage either at home or abroad."[14] The decision, said Bingham L.J., "does not mean that the English Court will be obliged to try numerous actions against airlines arising out of incidents having nothing whatever to do with this country. The Court has ample power to ensure that it does not entertain actions which ought in justice to be tried elsewhere."[15] On appeal,[16] the decision was overruled. The House of Lords unanimously held that Parliament had no power to legislate in respect of a contract of carriage by air entered into and to be performed in the territory of a foreign country. The presumption against extra-territoriality therefore prevailed; the case shows that the non-Convention Rules apply only to carriage within the United Kingdom.

The non-convention Rules apply to the carriage of mail or postal packages whether domestic or international: Carriage by Air Acts (Application of Provisions) Order 1967, Article 4. S29(1) of the Post Office Act 1969 is of relevance here. It provides that "no proceedings in tort shall lie against the Post Office in respect of any loss or damage suffered by any person."[17] S.29(3) provides: "No person engaged in or about the carriage of mail _ _ _ shall be subject __ __ _ to any civil liability for any loss or damage in the case of which liability of the Post Office is therefore excluded." In American Express Co. and another v. British Airways Board,[18] the plaintiffs handed over a postal packet of travellers cheques to the Post Office for transmission to Swaziland. The Post Office in turn tendered the packet in a sealed bag to the defendants, an air carrier. In the course of loading, the packet was stolen by one of the defendants' employees. Lloyd J. held that the defendants could take advantage of the vicarious immunity as provided for by s.29(3). It has rightly been commented that the total immunity from suit under that provision is unsatisfactory.[19]

8.2 THE AIR WAYBILL

8.2.1 The Issuance of the Air Waybill

The air waybill, once referred to as the air consignment note, is made out by the consignor in triplicate. The first copy is for the carrier and should be signed by the consignor; the inadvertent omission of the consignor's signature does not affect the contract for the handing over and acceptance of the goods points to the conclusion of the contract.[20] The second copy is for the consignee and should be signed by the carrier and consignor; it accompanies the goods. The third copy is signed by the carrier and is handed over to the consignor after the acceptance of the goods for carriage. All three copies are treated as originals: Article 6. Occasionally, additional copies are issued for the benefit of agents and intermediaries.

In the normal course of events, the goods are collected by the carrier who then incorporates the necessary details into the air waybill on the basis of the air waybill forms and invoices provided by the consignor. Article 6(5) takes into account this practice for it provides that the carrier who fills in these details acts for the consignor. Article 10 holds the consignor

answerable for the veracity and accuracy of the information germane to the goods which he or the carrier inserts on his behalf in the air waybill. Article 16(1) adds that the consignor must furnish such information and such documents as are necessary to meet police or customs requirements at the point of delivery; the consignor is answerable for any loss caused by the insufficiency or irregularity of any such information or documents unless the loss is attributable to the fault of the carrier or his agents. The carrier is not obliged to enquire into the sufficiency or correctness of such information or documents: Article 16(2). The foregoing provisions do not mean that responsibility for an air waybill's information rests solely on the consignor. There are certain particulars (Article 9) for which the carrier is solely responsible.[20a] Answerability for an air waybill's information is therefore two-fold, involving both carrier and consignor.

8.2.2 The Functions of the Air Waybill

The air waybill, unlike the bill of lading, is not a document of title. Although Article 15(3) of the amended Convention[21] allows for a negotiable air waybill, the speed of air carriage largely negates the need for such a document. Air waybills are therefore in practice marked

"not negotiable". It is doubtful if a through bill of lading covering on-carriage by air has the status of a document of title: "While in practice the goods might sometimes not be delivered to the consignee at the final place of destination without surrender of the through bill of lading by him, no commercial custom exists to that effect; the exporter cannot rely on this practice and has no legal remedy if it is not observed."[22]

By Article 11(1), the air waybill comprises "prima facie evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of transportation."[23] Article 11(2) provides: "The statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of packages, shall be prima facie evidence of the facts stated; those relating to the quantity, volume, and condition of the goods shall not constitute evidence against the carrier except so far as they both have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods." Article 11 may be contrasted with the law relating to maritime cargo carriage where a bill of lading which has been transferred to a bona fide indorsee binds the carrier as to its terms and representations.[24]

8.2.3 The Particulars in the Air Waybill

The nineteen particulars which have to be listed in the air waybill, by reason of Article 8 of the original Convention, reflect the dual role of the air waybill as evidence of the contract of carriage and as receipt. Article 8 is to be read in conjunction with Article 9 which provides that "if the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability." The nineteen particulars are as follows:

(a) the place and date of (the air waybill's) execution. In connection with this particular, it should be noted that the contract may have been made before, or at a different place from, the issuance of the air waybill.

(b) the place of departure and of destination. These places mean "the place at which the contractual carriage begins and the place at which the contractual carriage ends."[26]

(c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right

the alteration shall not have the effect of depriving the transportation of its international character. Here it is clear that the criterion for application relates to the contractual stopping place and not the actual stopping place. The courts have not interpreted Article 8(c) strictly. In Rotterdamsche Bank NV and Banque De L'Indochine v. BOAC and Aden Airways Ltd, the requirement was held to be satisfied by a reference in the carrier's timetable. The American court in Flying Tiger V. U.S.[28] went further. There the agreed stopping place was not even mentioned in the carrier's timetable. The court held that mutual knowledge of the stopover sufficed.

(d) the name and address of the consignor.

(e) the name and address of the first carrier. Particular (e) is of relevance in cases of successive carriage. Article 30(3) states that the consignor has a right of action against the first carrier. Where successive carriage is not involved, the name of the issuer of the air waybill or the contracting carrier is more important. Apropos the naming of carriers, the Guadalajara Convention allows suit to be brought against carriers not identified in the air waybill, that is, actual carriers.

(f) the name and address of the consignee, if the case so requires. Quaere: an implicit provision allowing the issuance of negotiable air waybills? Article 15(3) of the amended Convention expressly allows negotiable air waybills.

(g) the nature of the goods. This particular is of importance in a number of ways. It will determine whether the goods should be accepted and if so, the rate of freight which is applicable. It may also well determine the standard or method of care required. Kelley v. Hitzig[29] neatly illustrates the point. In that case, a dog escaped from its cage and caused injury. The carrier was held responsible for the escape while the owner was held responsible for failing to notify the carrier about the viciousness of the dog. It is noteworthy that in a maritime cargo case the court held that if a carrier knows about the special features of a particular cargo, he must "exercise due care in (its) handling and stowage, including such methods as (its) nature requires."[30]

(h) the number of packages, the method of packing, and the particular marks or numbers upon them. The French text does not contain the word "and". The implications are considered in relation to (i) in the ensuing paragraph. For present purposes, it suffices to refer to a recent

American case, Exim Industries v. Pan Am,[31] where one of the air waybills failed to mention the method of packing or the distinctive marks. The court held that because the omissions were of little or no commercial significance, the carrier was entitled to have its liability limited. It further held that the only particulars which require mention are those that are necessary or significant for the purposes of the consignment.[32]

(i) the weight, the quantity, and the volume or dimensions of the goods. In Corocraft Ltd. and another v. Pan Am,[33] the quantity, volume and dimensions of the goods were not mentioned but the weight was noted. On a literal reading of the English text, the first two particulars and either the volume or dimensions of the goods would have to be noted because of the word "and" which the French text omits. So on the basis of the French text, only one of the particulars has to be noted. As to which text to go by, Lord Denning said: "It was plainly the intention of all the parties to the convention that the French text shall be the one official and authorised text __ __ __. If there is any inconsistency between the English text and the French text, the text in French shall prevail. I know that the Act of 1932 says that we are to give effect to the provisions of the convention `as set out in the First Schedule.' That description of the convention

is true enough so long as the translation is an exact translation. But as soon as any inconsistencies appear, the description is no longer a true description _ _ _ and it should be rejected _ _ _. There is another, and perhaps more powerful, reason for adopting the French text. The Warsaw Convention is an international convention which is binding in international law on all the countries who have ratified it: and it is the duty of these courts to construe our legislation so as to be in conformity with international law and not in conflict with it."[34] It is to be noted that the issue was decided on the basis of the 1932 Act. S.1(2) of the 1961 Act puts the matter beyond doubt; it expressly provides that if there is any inconsistency between the two texts, the French text is to prevail. Interestingly enough, the French text also prevails in the United States.[35]

The Court of Appeal's decision is entirely logical for, as Professor Drion puts it, "what is the quantity of a suitcase containing personal belongings, shipped under an air waybill? And how to describe in any exact way the volume or dimensions of e.g. a bicycle?"[36] It needs to be mentioned that the Corocraft case is not confined to a resolution of which text should be given precedence. Lord Denning's alternative dictum makes that clear: "I hold that (Article 8) does not require that the

consignment note should state every particular, no matter how useless or irrelevant. It only requires those particulars to be stated so far as they are necessary or useful for the purpose in hand."[37] This approach, often adopted by the American courts,[38] rejects a literal construction of Article 8(i) of the French text by which at least one of the four particulars would have to be stated. However, this does not mean that all of the particulars may be omitted. Presumably, the weight of the goods, as the basis on which the carrier's liability is limited (cf. the weight/unit/package/tonnage limitation schemes in maritime law),[39] must usually be noted. An exception, it is submitted, would be where a special declaration of value is made - in which case the weight of the goods is irrelevant as regards limitation purposes.

(j) the apparent condition of the goods and of the packing. The words "apparent order and condition (of the goods)" have been interpreted to mean the order and condition of the goods "so far as met the eye."[40] When used in relation to containerised goods, the statement refers to the container only.[41] It is thought that these considerations, derived from sea cargo cases, are equally applicable to particular (j). If the consignor makes the notation, the carrier may amend or correct the notation in the event of inaccuracy but he is not obliged to do so:

Article 10(1). If the carrier fails to do so, he may have difficulty in proving the true condition of the goods at the time of their transfer to him.

(k) the freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it. In the event of non-payment of the freight, the carrier has the right to seek payment from the consignor, the latter being the party who concludes the contract of carriage with the carrier. Under the IATA Conditions, freight remains due even if the goods are damaged or lost.

(l) if the goods are sent for payment on delivery, the price of the goods, and if the case so requires, the amount of the expenses incurred. By IATA Resolution 512(a), the C.O.D. (Cash On Delivery) transaction is an arrangement between the carrier and the consignor whereunder the former collects from the consignee the amount which is stipulated to be payable to the consignor; the costs of transportation and delivery are collected before the C.O.D. price is paid to the consignor.

(m) the amount of the value declared in accordance with Article 22(2). The declaration must be specifically mentioned in the air waybill; the typical air waybill has a box or blank space for this purpose. A verbal declaration

to the carrier's servants has no effect.[42] So also an amount specified in the box for customs declaration.[43] The courts will construe a declaration of value strictly because the effect of a genuine declaration properly made bars the carrier from relying on the liability limit. The carrier may only rely on the limit of liability if he can prove that the actual value of the goods was lower than that declared: Article 22(2). The damages recoverable in cases of wilful misconduct may exceed the liability limit but not the declared value for it is supposed to represent the actual value.[44] A supplementary charge is usually levied for a declaration. Although the charge is by no means a pre-requisite to recovery, it is clearly of evidential importance. In L. & C. Mayers Co. Inc. v. KLM,[45] Valente J. accepted the testimony of the defendants' cargo traffic manager who said that if there had been an acceptance of the cargo under a declared value for carriage, an additional charge would have been made and recorded in the air waybill.

By Article 3(2) of the Guadalajara Convention, the declared value will only bind the actual carrier if he accedes to it. In the case of a successive carrier, the declared value is binding only if the successive carrier knows of it. In Orlove v. Phillipine Airlines and Flying Tiger Airlines,[46] the contract of carriage was concluded

with Phillipine Airlines which delegated a part of it to Flying Tiger Airlines who were not informed of the value of the cargo which had been declared. The court held Phillipine Airlines solely liable for the amount declared because it had been at fault by failing to inform Flying Tiger Airlines of the declared value.

(n) the number of parts of the air waybill.

(o) the documents handed to the carrier to accompany the air waybill.

(p) the time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon. Since the carrier can be held liable for delay under Article 19 even if a time limit has not been stipulated, the implication is clear that Article 8(p) allows his responsibility for punctuality to be rendered more onerous. Understandably, carriers do not in practice bind themselves to delivery within a stipulated time limit.

(q) a statement that the transportation is subject to the rules relating to liability established by this Convention. Following maritime practice and as a matter of convenience, the particular (q) statement will here be

referred to as the paramount clause. The insertion of a paramount clause in a bill of lading in accordance with the Carriage of Goods by Sea Act 1924 was held by the Privy Council to be non-essential; the requirement, it was said, was "directory" but not obligatory.[47] This meant that the legislative technique of the 1924 Act failed to ensure the mandatory application of the Hague Rules. The 1971 Act, to which the Hague-Visby Rules are appended, remedies this defect through s.1 which states that "the provisions of the Rules _ _ _ shall have the force of law." By this statement, the Rules cannot be contracted out of notwithstanding any provisions in the bill of lading to the contrary; similarly, the Rules apply even in the absence of a paramount clause.[48] The omission of a paramount clause does not deprive a Hague-Visby Rules carrier of the right to rely on the liability limits as would be the case under the Warsaw System.

Not only is the paramount clause under the Warsaw System mandatory, but the clause must be manifestly clear too. In Westminster Bank Ltd. v. Imperial Airways Ltd.,[49] a statement on the back of the consignment note read: "The general conditions of carriage of goods are applicable to both internal and international carriage. These general conditions are based upon the Convention of Warsaw of October 12, 1929, in so far as concerns

international carriage within the special meaning of the said Convention." Lewis J. held that the statement failed to comply with Article 8(q): "To say that certain conditions are applicable to the carriage which said conditions are based upon the convention is, in my opinion, a very different matter from saying that the convention governs the carriage."[50] Consequently, the defendants were barred from relying on the liability limit of the Convention and the plaintiffs were able to recover the full value of their lost goods. In Flying Tiger Line Inc. v. U.S.,[51] the United States Court of Claims rejected a submission that Article 8(q) was satisfied by a referral to the applicable tariff which in turn referred to a third document where it was stated that the carrier's liability was subject to limitation by the Convention.

These cases may be contrasted with Samuel Montagu v. Swissair[52] and Seth v. BOAC[53] which were decided by the English Court of Appeal and the United States First Circuit Court of Appeal respectively. In both cases, the notice stated that the carriage was subject to the rules of the Warsaw Convention unless the carriage was not international in the context of the Convention. The plaintiffs argues that the word "unless" meant that the carriage "may be" subject to the Convention whereas Article 8 required a notice stating that the carriage "is subject"

to the Convention. The argument rightly failed for the possibility of non-application as conveyed by the word "unless" did not extend to any instances where the Convention would apply, but only to situations where the Convention would not apply at any rate.

Less importance is attached to the paramount clause by the United States Second Circuit Court. In Exim Industries v. Pan Am,[54] the notice merely stated that the carriage "may be" subject to the Convention. Here the notice was ambigous: it clearly did not state that the Convention would apply when it would be of application (cf. the cases in the antecedent paragraph). The Court held: "___ ___ _ the framers' intent was that the shipper be given reasonable notice of the likelihood that the Convention would be applicable, not that the carrier be treated as diadetic arbiter of the law."[55] In a more recent case, Republic National Bank of New York v. Eastern Airlines,[56] the Court went further. There a piece of baggage containing a substantial amount of money was checked in for carriage by a courier. In the course of transportation, the baggage went amiss. The baggage check did not contain a paramount clause as required by Article 4(h). It was held by the court that the omission was non-prejudicial because the courier was an experienced traveller and his ticket had a notice of the Convention's applicability.

The purpose of Article 8(q) is apparent; notice that the carrier's liability is limited by the Convention enables a consignor to obtain additional insurance coverage. Although the Court's ruling in the <u>Republic case</u> is contrary to the express provisions of the Convention, its reasoning (presumed awareness of the Convention's application) recognises the purpose of the Convention's paramount clause. However, "the information that his rights are subject to the Convention's limitation rules does not offer much enlightenment. It is unlikely that (the consignor) will immediately take the precautions that the information is supposed to convey to him."[57] This is clearly a point in favour of cargo carriage by sea law whereunder the paramount clause is not mandatory. However, the purpose of the maritime paramount clause has always been considered in a different light: the clause is treated as a means by which the application of the Hague Rules can be ensured, not as a means by which the consignor can be informed of the liability limits under the Rules.

The exhaustive list of particulars as required by Article 8 is deleted under The Hague Protocol and the corresponding provision thereof reads: "The air waybill shall contain: a) an indication of the places of departure and destination; b) if the places of departure and destination are within the territory of a single High

Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place; c) a notice to the consignor to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to cargo." Article 9 is rephrased thus: "If, with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the air waybill does not include the notice required by Article 8, paragraph c) the carrier shall not be entitled to avail himself of the provisions of Article 22, paragraph 2. The necessity for a paramount clause is retained but the required wording is relaxed.

The amendment of Article 8 is to be welcomed. A number of the compulsory particulars are often of little consequence. Further, the numerous details required to be recorded entail much documentation resulting in considerable delay and expense. The case for simplification is borne out by the increasing usage of short form air waybills. Article 8 in its unamended form seems to be more concerned with the legal aspects of the air waybill (particularly the establishment of evidence

should litigation ensue) as opposed to its commercial role; as Magdelenat observes, "it would have been preferable to simplify the procedure for consignment than to be concerned with making the legal process easier."[58] It is regrettable that while the Hague Protocol has reduced the number of particulars to be inserted in the air waybill, the Hamburg Rules have increased the number of details to be inserted in the bill of lading or other sea cargo transport document. As for Article 9 in its unamended form, it is instructive to refer to the criticism by Lord Denning: "That is a remarkable provision. I cannot understand how it got into the convention. It appears to mean this: suppose the sender, when he makes out the consignment note, omits some particular or other; and the carrier does not notice the omission, or does not insist on it being filled in. Tha omission means that the carrier is under an unlimited liability - the liability of an insurer of the goods - without receiving any premium for it. It follows that the sender, if he is clever, need not insure his goods with an insurance company or pay any premium. He need only miss out one of the particulars, and he is then in just as good a position as if he were fully insured."[59]

8.3 THE CARRIER'S BASIS OF LIABILITY

8.3.1 Loss and Damage in the Context of the Warsaw System

The word "damage" is not defined in either the original or amended Convention. On a restrictive construction, its meaning could be confined to physical damage of the goods. In the alternative, its meaning could be extended to include partial loss of the goods. The significance of its meaning lies in Article 26(2) which prescribes certain time limits[60] within which notice of damage must be lodged with the carrier. By way of explanation, the Warsaw System has no provision for notice in relation to loss. This is to be ascertained from the contract of carriage. The IATA Conditions of Carriage impose a 120-day period for notice in the case of cargo loss.

In Fothergill v. Monarch Airlines[61] the plaintiff, on returning from holiday, found his suitcase badly torn. A "property irregularity report" was completed at the airport. Only upon his return home did the plaintiff find some of his personal effects missing from the suitcase. The plaintiff notified his insurers who passed the claim to the defendants some four weeks later. The defendants accepted liability for the torn suitcase but

rejected the plaintiff's claim for the value of the missing articles as the "damage" had not been notified within seven days as required by Article 26(3) of the amended Convention. The House of Lords held that "damage" (or "avarie" in the French text)[62] included partial loss and that, accordingly, the plaintiff was required to give notice of the damage within seven days of the receipt of the baggage. In reaching its decision, the House of Lords did not find the French text of much help but added that travaux preparatoires could be used as an aid. As to the use of travaux preparatoires, Lord Wilberforce was of the opinion that two conditions had to be satisfied: "First, that the material involved is public and accessible; secondly, that it clearly and indisputably points to a definite legislative intention."[63]

Four comments may be made on the decision. First, it would appear that the decisive factor is delivery. If the cargo is delivered, albeit only part of it, notice must be given within the prescribed period; but if there has been no delivery (total loss), the time within which notice must be given is that which is stated in the contract of carriage. Second, the law in America differs: damage does not include partial loss. In Bernard Schwimmer v. Air France, Shapiro J. summed up the position thus: "Defendants argue that the loss of a portion of a shipment constitutes

'damage' within the meaning of subdivision (2) of article 26 and thus the notice provisions of that article control. I cannot agree. Damage is damage and loss is loss."[64] Third, the House of Lords did not elaborate on whether economic loss falls within "damage" or "loss". It is thought that because economic loss is a consequence of either damage, loss or delay, the requirement of notice applies only to its cause. Fourth, it is to be noted that the Carriage by Air and Road Act 1979, s.2(1) provides: "In article 26(2) the references to damage shall be construed as including loss of part of the baggage _ _ _," but by s.2(2), s.2(1) does not apply retrospectively. S.2(1) came into force on April 4, 1979. The Guatemala Protocol and the Montreal Protocol Nos. 3 and 4 as appended to the 1979 Act are not yet in force.

8.3.2 Delay

The carrier's liability for delay is expressly provided for in Article 19: "The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage or goods." Delay is not defined, and the IATA Conditions of Carriage stipulate that the times indicated in tariffs or timetables are not guaranteed. Although Article 8(p) allows for a time limit to be specified, air carriers in practice refrain from

doing so. These factors however do not mean that a carrier is free to take his time in performing the contract of carriage. In Goldsant v. Slick Airways,[65] there was a delay of 24 hours. The defendant's tariff provided: "The carrier assumes no obligation to commence or complete the transportation within a certain time or according to any special schedule, and no carrier shall be held liable for failure to do so." Lazarens J. however held: "This does not mean that the Defendant is free of liability for failure to deliver the merchandise within a reasonable time. Otherwise the contract of carriage would impose no obligation of any kind upon the carrier as to time of delivery, and this is not a reasonable construction of the tariff in question."[66] It is to be noted that the decision does not disallow contractual definitions of delay. In Bart v. British West Indian Airways,[67] the Guyana Court of Appeal upheld a condition which exonerated the carrier from liability for delay not extending beyond seven days from the time the cargo ought to have arrived. Summarily, it would seem that in each case where the question of delay arises, the court will look to the reasonableness of such provisions having regard to the circumstances, for instance, weather conditions.

In accordance with the principles of causation, delay by itself does not entitle the plaintiff to damages. Loss or damage as a consequence of the delay must be

proved. In Vassalo and Clare v. Trans Canada Airlines,[68] where loss or damage resulting from the delay could not be proved, the claim failed. Although there is no direct link between Article 19 (liability for delay) and Article 20 (exoneration from liability) or Article 22 (limitation of liability), the very fact that they exist within the same framework suggests the determination of the carrier's liability for delay according to the latter provisions. Indeed, in UTA v. Demoiselle Blain,[69] where a delay in the delivery of a variety artiste's musical instruments and equipment resulted in the failure of her tour, the French Court of Appeal held the carrier liable up to the Convention limit of liability.

8.3.3 Nature of the Carrier's Liability/Exoneration from Liability

The nature of a carrier's liability depends on whether he is a common carrier or private carrier. A common carrier is one who holds himself out as being prepared to carry for all and sundry. As was said by MacKinnon J. in Aslan v. Imperial Airways Ltd.: "If a man who owned an aeroplane or a seaplane chose to engage in the trade of carrying goods as a regular business and to hold himself out as ready to carry for anyone who wished to employ him so far as he had room in his airship or

aeroplane for their goods, very likely he could become a common carrier or be under the various liabilities of a common carrier."[70] A common carrier's liability is strict; he is an insurer of the safety of the goods and is liable for their loss, damage or delay whatever the cause except in four instances: (i) an Act of God; (ii) the Queen's enemies; (iii) the inherent vice of the goods; or (iv) fault or fraud on the part of the consignor.[71] Common carriers are rare for goods are normally carried subject to a multitude of conditions, one of which usually reserves the right of refusal to carry. For instance, the defendants in the Aslan case were held not to be common carriers because the contract of carriage included the right to refuse goods for carriage and the consignment note expressly disavowed the status of common carriers on the part of the defendants.

Any carrier who is not a common carrier is a private carrier. A private carrier needs only to exercise reasonable care or diligence,[72] and that is the norm of the present-day regimes which attempt to contrive a balanced allocation of rights and liabilities taking into account the interests of the parties involved. Certainly the underlying principle, that a carrier is only liable for negligent acts and omissions (cf. negligent navigation and management)[73] achieves a better balance than the

principle of strict liability for common carriers which however must be understood in its historical perspective. The strict liability of common carriers is said to have originated by custom in the reigns of Elizabeth I and James I as an exception to the rule that bailees need only exercise reasonable care and diligence, the reason for the imposition of an insurer's liability being the prevention of collusion between carriers and thieves.[74]

The scheme of the carrier's liability under the Hague and Hague-Visby Rules is formulated quite differently from that under the Warsaw System. Under the Hague and Hague-Visby Rules, the carrier's basis of liability comprises of his responsibilities the non-performance of which are subject to various exceptions. To elaborate, the sea carrier must treat the goods "properly and carefully" from the time of loading up to the time of discharge subject to the long list of exceptions listed in Article 4(2), and he must exercise "due diligence" to provide a seaworthy ship before and at the beginning of the voyage. The burden of proof in relation to the two responsibilities are placed on different parties. In the case of the former, the carrier must establish that the loss or damage was caused by one of the excepted perils.[75] In the case of the latter, it is the claimant who must prove that the loss or damage sustained was caused by unseaworthiness

before the carrier has to prove the exercise of due diligence.[76]

The Warsaw System adopts an across-the-board scheme of liability based on presumed fault. The burden of proof is not divided between the parties, and different standards of performance at different stages are not required. Article 20 provides that "the carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures". It is arguable that the phrase "all necessary measures" is clearly distinguishable from the phrase "all measures that could reasonably be required" as used in the Hamburg Rules. Such an interpretation is unacceptable because the mere fact that loss or damage has occurred would be taken to mean that "all necessary measures" have not been adopted. Nonetheless, early American cases were to the effect that liability attaches to the carrier if the loss or damage could have been avoided by a single measure which was not taken.[77] However, in _Manufacturers Hanover Trust Co. v. Alitalia Airlines_, the Southern District Court of New York said that the phrase "all necessary measures" should not be read with strict literality: "Article 20 requires of defendant proof, not of a surfeit of presentatives, but rather, of an undertaking embracing all

precautions that in sum are appropriate to the risk, i.e., measures reasonably available to the defendant and reasonably calculated, in cumulation, to prevent the subject loss."[78] This seems to indicate a shift towards the approach taken in Grein v. Imperial Airways where Greer L.J. said that the carrier has only to prove the use of "all reasonable skill and care in taking all necessary measures to avoid causing damage or ___ that it was impossible to take such measures".[79]

8.3.4 Duration of Responsibility for the Goods

By Article 18(2), the duration for which the carrier remains responsible for the goods comprises "the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever". Article 18(3) provides that "the period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air".

The use of the words "in any place whatsoever" indicates that the responsibility of the carrier for the goods is not confined within a geographical context. Further, if other modes of transportation are used for the purpose of loading, delivery or transhipment of air cargo, such transportation will be deemed to be within the regulation of the Warsaw System. This method by which the System is brought into operation is less restrictive than s.1(3) of the Carriage of Goods by Sea Act 1971 which states that the Hague-Visby Rules apply only in relation to and in connection with the carriage of goods by sea. The contrast may be illustrated by reference to two cases decided under the different regimes. In UTA v. Tous Transports Aeriens,[80] the Warsaw Convention was held to be applicable to a delivery some 150 kilometers from the airport. In Mayhew Foods v. OCL, Bingham J. said: "(The Rules) do not apply to carriage or storage before the port of shipment or after the port of discharge, because that would be inland and not sea carriage."[81]

The key words "in charge" in Article 18(2) are not defined. This prompts the question whether the carrier can postpone his taking charge of the goods by contractual definition, for instance, "the carrier is not deemed to be in charge of the goods until they are loaded onto the aircraft". The wording of Article 18(3) suggests otherwise

but it might be argued that the provision is intended to apply to situations where other modes of transportation are used, not as an elaboration or clarification of the term "in charge". It is thought that the courts will give the term "in charge" its natural meaning and look to Article 23 which renders void any clause relieving the carrier of his liability under the Warsaw System. However, what does the term "in charge" mean? This question is particularly pertinent not only because of its direct bearing on the carrier's liability but also because the Warsaw System, unlike the Hague/Hague-Visby Rules, does not stipulate the points at which the period of transportation begin and end. Insofar as the law of bailment is concerned, the carrier's basis of liability does not depend on any contract or statute; it arises from the carrier taking charge or possession of the goods.

It is thought that the carrier is in charge of the goods from the moment he accepts the goods for transportation subject to the shipper's control over any causative acts or omissions in regard to the loss of or damage to the goods. The common law defence of contributory negligence as encapsulated in Article 21 supports this construction. It is also thought that United International Stables Ltd. v. Pacific Western Airlines Ltd.[82] is distinguishable. In that case, an air

carrier's maintenance crew designed and built stables for the transportation of a cargo of racehorses. One of the horses escaped during flight and, being unruly, was destroyed by order of the captain. Although the horses were accompanied by the consignor's handlers, the British Colombia Supreme Court held that the horses were in the charge of the carrier. The Court said that Article 18(2) "was not intended to exclude liability in cases in which the consignor or consignee assists in caring for the cargo".[83] However, it is to be noted that the loss of the horse was directly attributable to the carrier's insufficient care in providing a stall of adequate dimensions. Further, although the Court accepted that the "charter agreement clearly provided that the pilot was in over-all charge," it also accepted that a carrier could in certain cases succeed in arguing that the plaintiff or his handlers had charge of the cargo: "The essence of the defendant's argument here is that the plaintiff's handlers had charge of the horses throughout. This argument might have greater weight if the horse had died of disease or improper handling."[84]

More difficult is the situation where third parties are involved; so also the question as to when the carrier is no longer in charge. In their resolution of these difficulties, the courts employ either the "actual control"

or "legal control" test. In Favre v. Belgian State and Sabena,[85] a consignment of watches from Switzerland to Belgium was placed by the carrier into the custody of the Belgian Customs, pending clearance by the consignee. When the consignee arrived with the carrier's delivery advice note, part of the consignment had disappeared. The Brussels Court of Appeal held: "_ _ _ it follows that from the moment SABENA __ _ _ has complied with the customary obligation to deposit the goods with the customs authorities it is released from responsibility in respect of such goods, which cease to be under its control. _ _ _ SABENA had no right whatever of supervision over the goods once they had been handed over to the customs authorities, who were solely in charge of the storehouse."[86] In Hermes Assurance Co. v. Pan Am,[87] the Buenos Aires Court of Appeal also interpreted "in charge" to mean "actual control". There the consignee contracted to have his goods placed in private bonded storage acceptable to his agents. It was held that the goods, which had to be sealed and opened together with third parties, were not in the charge of the carrier.

Miller notes that the preponderance of French cases are inclined towards the "legal control" test whereunder the carrier is deemed to be in charge of the goods until they are effectively delivered to the consignee.[88] In

Air Express International Agency (France) v. Ste Marais & Cie,[89] the Paris Court of Appeal held that the contract of carriage comes to an end only when the consignee takes actual possession of the goods. In Sprinks & Cie v. Air France, the Paris Court of Appeal elaborated: "_ _ _ delivery _ _ _ is primarily a legal act which transfers the risk and the custody of the goods from the carrier to the consignee, it is necessarily accompanied by material acts (presentation of title, handling, displacing of the object, etc.) which purport to allow the consignee to materially take possession of the goods _ _ _."[90]

The position of the American courts is not clear. In Altransport Inc. v. Seaboard World Airlines, Sherman J. said that the limitation period "does not start to run until the goods are no longer `in charge of the carrier' _ _ _ `in charge' while hardly words of art must mean in this context actual custody and control".[91] Having made clear his preference for the "actual control" test, Sherman J. went on to say: "_ _ _ the defendant argues that according to the shipping contract and tariff regulations _ _ _ delivery to the consignee is deemed completed when the goods are turned over to customs. However the Warsaw Convention Article 29(1) is concerned with physical custody and actual delivery not constructive delivery."[92] By way of comment, there appears to be a

contradiction between the two passages cited. In the first passage, the term "in charge" is equated to "actual control" but, in the second passage, Sherman J. refers to "actual delivery" which leaves the implication that the carrier is deemed to be "in charge" even though the goods are in the custody of a third party.

It is arguable that the dicta may be explained this way: "in charge" or "actual control" refers to the period for which the carrier is responsible for the goods, but insofar as the limitation period is concerned, it is actual delivery that matters. In regard to the latter point, Article 29(1) refers to "the date on which the transportation stopped". However, the wording does not expressly indicate that actual delivery is required, which leaves the point open to debate. Nor does Article 18(2) in any way refer to actual delivery as the point at which the carrier ceases to be in charge. Although the language in which Article 18(3) is couched is wide enough to accommodate the concept of actual delivery, the fact that it is not expressly provided for[93] suggests that constructive delivery suffices, that is, delivery to a third party as required by the contract of carriage or by the law of the place of destination pending collection by the consignee unless the contract itself requires actual delivery. Put another way, the goods must at least be

placed at the disposal of the consignee but they need not be actually delivered into the hands of the consignee unless the contract so stipulates.[94] The decision of Wollenberg D.J. in National Packaging Corp. v. N.Y.K. Line is worth noting mutadis mutandis: "Just as `delivery' does not mean actual physical transfer, neither does it mean discharge from the ship, without more. Between these two extremes is a period in which the consignee should receive notice that the goods have been discharged and should have a reasonable opportunity to remove the goods or place them under proper care and custody."[95]

8.3.5 Liability Limitation

8.3.5.1 Value of the Liability Limit for Cargo

Article 22(2) of the Warsaw System provides that unless a declaration of value has been made by the consignor,[96] the liability of the carrier for cargo loss, damage or delay is 250 Poincare francs per kilogram. The present value of 250 Poincare francs is £13.63: Carriage by Air (Sterling Equivalents) Order 1986 (S.I. 1986/1778). The amount may be changed by further Sterling Equivalent Orders. For non-Convention carriage, SDRs have already been substituted for gold francs: Carriage by Air (Application of Provisions)(Second Amendement) Order 1979

(S.I. 1979 No. 931). Turning back to the Warsaw System, Article 22(4) allows the limits of liability to be converted into any national currency in round figures. Thus, in the United States, the value of 250 Poincare francs is stated to be US20 dollars.[97]

8.3.5.2 Cargo Liability Limit Inclusive of Interest but not Costs

The cargo liability limit is comprehensive and includes all damages or expense except costs; interest may only be awarded if, together with the damages, it does not exceed the liability limit: Swiss Bank Corp. and others v. Brink's-MAT Ltd. and others.[98] In that case, the plaintiffs had recovered damages which represented the maximum sum recoverable against the carrier under Article 22(4), but latterly asked for interest on the damages. Bingham J., in referring to Article 24(1) which provides that "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention," stated: "It seems to me that there is, on the language of that article _ _ _ very considerable force in the submission made by the airlines that what is imposed, for better or worse, is a global limitation on the total monetary and which the airline can find itself liable to pay."[99] Having noted that Article 22(4) expressly

made an exception as to the award of costs, Bingham J. went on to say that "had those who framed the convention intended interest to be awarded in addition to the monetary limits and to be treated in the same way as court costs or legal expenses, it would have been the subject of special mention".[99]

Apropos the practice of the English courts in excluding interest from the liability limits of the Hague-Visby Rules, Bingham J. said that the practice was not uniformly followed amongst other countries and added: "It does not seem to me that English maritime practice is something which should be of very strong persuasive authority in the construction of this convention."[100]

The American courts are split on the issue whether interest can be awarded on top of damages limited by Article 22(2). In O'Rourke v. Eastern Airlines Inc.,[101] the Second Circuit Court of Appeals thought the answer to be in the negative; this approach was recently adopted by the Seventh Circuit Court of Appeal in Deere & Co. v. Lufthansa.[102] But in Domangue v. Eastern Airlines Inc.,[103] the Fifth Circuit Court of Appeals thought otherwise.

Mention may be made of Bingham J.'s acceptance that his construction is not one which "leaps out of the page or presents itself as so obviously correct as to enable one with supreme confidence to reject any alternative construction".[104] This, it is submitted, indicates that the issue remains a live one. The view that interest should be awarded on top of damages already limited by Article 22(2) has merit in that it takes into account delayed payments. As the learned judge himself admitted, he was not dealing with interest as part of the damages but with interest on damages the award of which may be viewed as having a "public policy purpose in that it tends to deprive a recalcitrant defendant of any advantage which he might otherwise derive from protracting the proceedings".[105]

8.3.5.3 Calculation of the Cargo Liability Limit

In Data Card Corp. v. Air Express International Corp.,[106] one of the eight packages consigned was severely damaged. The damaged package weighed 659 kilogrammes; the whole consignment had a gross weight of 3132.5 kilogrammes. The sterling equivalent rate for liability limitation purposes was at the relevant time £10.05 per kilogramme. The court held that the carrier's liability limit was to be calculated on a per kilogramme of

the damaged goods basis (the same result could have been achieved through Article 7 which allows a carrier to require the consignor to make out separate air waybills for each package) rather than on a per kilogramme of the total consignment basis. The plaintiffs were therefore only able to recover damages of £6,622.95. Had the latter method been used, the amount recoverable would have been £31,481.95. Bingham J. explained his decision thus: "A requirement that the limit should be calculated by reference to goods neither lost nor damaged would, as it seems to me, require express language or clear implication which are not found in (Article 22)."[107] It is thought that the reasons given by the Californian Central District Court in The Hartford Fire Insurance Co. v. TWA are more forceful: "To interpret Article 22(2) otherwise would lead to the anomalous result that a shipper or consignee's recovery would be the same for a partial loss as it would be for loss of an entire shipment. If plaintiffs's position were sound, then it should follow that upon payment for loss based on the weight of the entire shipment, the carrier should be entitled to the salvage value of the remaining portion of the shipment. Plaintiff's subroger here had the benefit of the value of the remaining undamaged or unlost portion of the shipments. This fact bolsters the interpretation adopted by the court."[108]

Calculation of the liability limit according to the weight of the lost or damaged goods only has its complications however. For instance, a generator plant may have to be dismantled into many parts and it may happen that a vital part is damaged or lost which renders the entire plant useless. The amended Convention recognises this difficulty and contains the following proviso: "Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability."[109] Clearly the conditions for the application of this proviso are two: the packages must be noted in the same air waybill or bagagge check and the cargo must be affected as a whole.

8.3.5.4 Exceeding the Cargo Liability Limit

The carrier's cargo liability limit may only be exceeded if i) no air waybill has been issued or if the compulsory particulars have been omitted by the carrier,[110] or ii) there has been a declaration of value,[111] or iii) the damage resulted from wilful misconduct on the part of the carrier, his servants or agents (Article 25 of the unamended Convention) or from an

act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; in the case of such act or omission by a servant, it must be proved that the servant or agent was acting within the scope of his employment (Article 25 of the amended Convention). The stipulation that the servant or agent must be proved to have been acting within the scope of his employment reiterates the common law position; but, as latterly discussed, there is a divergence between the way the English and American courts construe the words "within the scope of his employment".[112]

Before considering Article 25 in its two different forms, it may be convenient to take a brief look at deviation and its legal implications in a comparative perspective. "Liberty to deviate" clauses in maritime cases have been construed strictly with reference to the main objects of the constract of carriage; thus in Leduc v. Ward,[113] the application of the clause was held to be restricted to ports on or near the contractual route. Such clauses in relation to air carriage do not appear to have been before the courts. It is noteworthy that the IATA Conditions include a provision that the carrier "is authorized to select the routing or to change or deviate from the routing shown on the air waybill". It is thought

that such clauses in air carriage will be construed liberally; under the common law, certain rules have evolved as to when a deviation at sea is justifiable[114] but there are no such parallels in air law.

It is well-established that an unjustifiable deviation by a sea carrier precludes the application of any common law or contractual exception or liability limitation clause.[115] Why this is so is unsettled. In Joseph Thorley v. Orchis,[116] it was held that the exceptions contained in the bill of lading could only apply to the voyage mentioned in the bill of lading. But in Hain v. Tate & Lyle,[117] Lord Atkin felt that a deviation was a breach of contract so serious that the other party could declare himself as no longer bound by any of the contract terms. As indicated earlier,[118] these dicta do not explain why an unjustifiable deviation displaces the common law exceptions as well. That leaves Lord Wright's dictum in Rendall v. Arcos, vis, a change of risks: "The essence of the principle is that damage has been sustained under conditions involving danger other than and therefore different from the conditions which would have operated if the contract had been fulfilled _ _ _. The defendant must show _ _ _ that there must have been the same danger if the contract had not been broken."[119] It might be added that although the House of Lords in Photo Production Ltd. v.

Securicor Transport Ltd.[120] held that whether a particular exclusion clause is to be applied to a serious breach of contract is a matter of construction, Lord Wilberforce accepted that the maritime deviation cases could be a body of authority sui generis.

The extent to which the common law position on deviation has been altered by the Hague or Hague-Visby Rules is not clear. Carver argues that the common law position remains unaltered, relying on Lord Atkin's dictum in Stag Line v. Foscolo Mango: "I can find nothing in the Act which makes its statutory exceptions apply to a voyage which is not the voyage the subject of `the contract for the carriage of goods by sea' to which the Act applies."[121] However, Lord Atkin's dictum has as its reference point statutory exceptions - not the limits of liability which in Article 4(5) are stated together with a proviso that they apply "in any event". Also, the time-bar in the Hague-Visby Rules is stipulated together with the words "all liability whatsoever" which Steyn J. in The Antares said "makes no distinction between fundamental and non-fundamental breaches of contract".[122]

On the other hand, it is clear that an aerial deviation does not affect the application of the Warsaw System in any way. In Rotterdamsche Bank and Banque De

L'Indochine v. BOAC and Aden Airways Ltd.,[123] Pilcher J. rejected the plaintiffs' argument based ón maritime deviation jurisprudence and held that an aerial deviation did not remove the carriage from the Convention's regulatory ambit. Similarly, the American court in Bianchi v. United Airlines[124] held that the common law approach to deviation did not apply to the Warsaw Convention. The raison d'etre ostensibly lies in the way in which the Warsaw Convention is framed, for instance, the limit of liability for goods is 250 francs per kilogram "unless" a special declaration of value has been made; further, the express provision that the carrier shall not be entitled to avail himself of the provisions of the Convention "if" there has been wilful misconduct on his part may be read to mean that a carrier may rely on the Convention's protection unless the deviation is tantamount to "wilful misconduct" or, under the amended Convention, an act "done with intent to cause damage or recklessly and with knowledge that damage would probably result".

Whether an act or omission amounts to wilful misconduct may be resolved either objectively (what another carrier would have done) or subjectively (the circumstances of the particular case to be taken into account). Under the objective test, it suffices that the carrier should have realised the consequences of his act or omission;

under the subjective test, the carrier must possess actual knowledge. Early American jurisprudence favoured the objective test,[125] but most writers and modern cases consider the subjective test as the correct approach.[126] Thus, in Grey v. American Airlines, the court held that to prove wilful misconduct, a plaintiff had to show that the carrier had "a conscious intent to do or omit doing an act from which harm results to another _ _ _ (and) there must be a realisation of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct".[127] "Wilful misconduct" is therefore distinct from negligence however gross or culpable; the act or omission must be intentional.[128]

Most cases do not refer to recklessness but the courts do not appear to have any difficulty in interpreting wilful misconduct as inclusive of recklessness. In Maschinenfabrik Kern A.G. v. Northwest Airlines, the court held that "wilful misconduct occurs where an act or omission is taken with knowledge that the act probably will result in injury or damage or with reckless disregard of the probable consequences".[129] Similarly, in Pekelis v. Transcontinental & Western Air Inc., the court held that wilful misconduct "may be the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences of the performance of the act".[130]

The decision means that the doer must have had actual knowledge of the wrongfulness but nonetheless banished it to the back of his mind.[131]

At the Hague Conference, the majority of the delegates voted to retain the underlying principles of Article 25 and at the same time eliminate its reference to national laws by replacing the abstract concept of wilful misconduct by concrete specifications,[132] that is - "an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result _ _ _". It is not inconceivable that different courts will interpret the provision differently. For instance, must the resultant damage be of the kind realized? Or does it suffice that there is actual knowledge that damage would probably result and some kind of damage, but not the kind contemplated, materializes? Also, while one court may equate "probably" with "something (that) is likely to happen,"[133] another may consider "probably" to mean "most likely to happen" or no more than a slightly better than even chance that something may happen.

In Tondriau v. Air India,[134] the Belgian Cour de Cassation considered the phrases "recklessly" and "with knowledge that damage would probably result" separately.

It is thought that the correct approach is that adopted by the Court of Appeal in Goldman v. Thai Airways Ltd.[135] The word "recklessly" should not be construed in isolation, said Eveleigh L.J., because "a word will have a different meaning or shade of meaning depending upon its context".[136] The learned judge added: "I say at once that, reading Article 25 as a whole for the moment and not pausing to give an isolated meaning to the word `recklessly', the article requires the plaintiff to prove the following: (1) that the damage resulted from an act or omission; (2) that it was done with intent to cause damage; or (3) that it was done when the doer was aware that damage would probably result, but he did so regardless of that probability; (4) that the damage complained of is the kind of damage known to be the probable result."[137] For Eveleigh L.J., the subjective test applies to recklessness. This is evident from his observation that "the doing of the act or omission is not only qualified by the adverb `recklessly,' but also by the adverbial phrase `with knowledge that damage would probably result'. If the pilot did not know that damage would probably result from his omission, I cannot see that we are entitled to attribute to his knowledge which another pilot might have possessed or which he himself should have possessed."[137]

8.3.6 The Carrier's Liability under the Warsav System cannot be Reduced

Article 23 of the Warsaw System provides that any provision relieving the carrier of liability or reducing the limits of liability as set out is null and void; the nullity of a provision does not nullify the whole contract - it remains subject to the Convention. The amended Convention provides an express exception to Article 23 in the case of provisions governing loss or damage resulting from the inherent defect or vice of the cargo carried. A clause imposing a 120-day limit for the filing of notice in relation to cargo loss is not contrary to Article 23,[138] but a clause excluding liability for loss of jewelry and silverware is null and void (Montazami v. Kuwait Airways Corp.)[139] In Mohammed Saiyed v. Transmediterranean Airways,[140] the court held that a clause which purported to preclude recovery for special or consequential damages to be null and void. Consequently, the plaintiff was able to recover for lost profits and injury to his credit rating due to the delay of the defendants.

8.4 SUIT AGAINST THE CARRIER

A contract of cargo carriage by air may be a straightforward transaction involving just the consignor who is himself the consignee and a single carrier. In such an instance, there is no difficulty in ascertaining who may sue and who may be sued. In practice, the situation is usually more complex. Freight forwarders, actual or successive carriers, and customs agents or other intermediaries often play a part in the transportation.

8.4.1. Who can Sue

Specific provision is made as to who may sue and who may be sued in the case of transportation by successive carriers. Article 30(3) states that the "consignor shall have a right of action against the first carrier, and the consignee who is entitled to delivery shall have a right of action against the last carrier". By the same provision, both may sue "the carrier who performed the transportation during which the destruction, loss, damage, or delay took place". Also by the same provision, the first carrier, the performing carrier, and the last carrier are jointly and severally liable to the consignor and consignee.

An interesting feature of the Warsaw System is that no mention is made of the cargo owner's right to sue. Article 14 mentions only the consignor and consignee: "The consignor and the consignee can respectively enforce the rights given them by Articles 12 (stoppage in transit) and 13 (right to receive the goods), each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract."

Since it is usually the cargo owner who will have the incentive or reason to sue, it seems to have been assumed by the drafters that ownership is vested in either the consignor or consignee. However, on the wording of Article 14 ("whether he is acting in his own interest or in the interest of another"), it seems more likely that the provision was intended to enable a consignor or consignee who would not otherwise be able to sue because he has no proprietary interest (or in the case of the consignee, because he is not privy to the contract of carriage) to pursue a claim against the carrier. An analogy may be drawn with the Bills of Lading Act 1855 which however requires that the consignee be the owner of the goods by reason of the consignment or endorsement of the bill of lading. That no express provision is made in the Warsaw System for the right of a cargo owner to sue has caused a

divergence of approach on the question as to who may sue. The decisions of the American courts are based on two differnt grounds though the result reached is the same, viz, the right to sue is vested in those named in the air waybill.

In Manhattan Novelty Corp. v. Seaboard and Western Airlines Inc., the decision was founded on the premise that specific mention of the consignor and consignee's right to sue excluded cargo owners from claiming against the carrier: "The convention gives the right of action to the consignee (articles 12, 13, 14, 15, 30) who may sue in his own name whether he is acting in his own interest or in the interest of another (Article 14)). These provisions are intended to be exclusive. The plaintiff has no right of action, even though the consignee may have been the plaintiff's custom broker."[141] This reasoning was followed in a recent case, Johnson v. American Airlines: "Because the airlines are entitled to protection under the Convention, the plaintiffs' claim can only be brought subject to the conditions and limits in the Convention. Art. 24(1). One of those conditions is that only the consignor and consignee to the air waybill have standing to sue under the Convention."[142]

In Holzer Watch Co. Inc. v. Seaboard & Western Airlines Inc., the decision was based on notice: "It is reasonable that the carrier be subject to suit only by those whom he knowingly dealt with, that is the consignor or consignee named in the Air Waybill."[143] It is submitted that the reasoning is vulnerable on two grounds. First, customs clearing agents or other intermediaries often play a part in the conclusion of the contract of carriage, and it is often assumed or known that these parties have a principal behind them. Second, the carrier's total liability is the same by virtue of Article 22 (liability limitation) whether or not the cargo owner is known to the carrier. Any objection based on double liability is difficult to accept since it is contemplated that the consignor and consignee may have concurrent claims which a restrictive construction of Article 14 does not eliminate and, in practice, litigants do not litigate for litigation's sake. The Holzer case was distinguished in Parke, Davis & Co. v. BOAC[144] where the plaintiffs were able to sue because their name appeared immediately after that of their agent who was named as the consignee ("a/c Parke, Davis & Co., Detroit, Michigan"). The scope of this decision is arguably limited for it appears that the carrier must be put on notice as to the identity of prospective plaintiffs.

The issue as to whether a cargo owner, not being the consignor or consignee, has a right of action was recently before an English court for the first time in Gatewhite Ltd. v. Iberia Lineas SA.[145] In that case, a consignment of flowers from Las Palmas to London had to be destroyed because of a long delay in the transportation. Ownership in the flowers passed from the second plaintiff, who took no part in the summons, to the first plaintiff on delivery to the defendant. The consignees were named as Perishables Transport Co. Ltd., who were the first plaintiff's customs clearing agents; the first plaintiff's name appeared as the `notify' party -- this of course brought the case squarely within the rationale of Parke, Davis & Co. v. BOAC.[146] Gatehouse J. however chose to go beyond that decision by holding that "the owner of goods damaged or lost by the carrier is entitled to sue in his own name and there is nothing in the convention which deprives him of that right. As the convention does not expressly deal with position by excluding the owner's right of action ___ _ _ the lex fori _ _ _ can fill the gap. It would be a curious and unfortunate situation if the right to sue had to depend on the ability and willingness of the consignee alone to take action against the carrier, when the consignee may be (and no doubt frequently is) merely a customs clearing agent, a forwarding agent or the buyer's bank".[147] This decision is consistent with the decision in The Aliakmon.[147a]

Gatehouse J. preferred the view of the New Zealand High Court in Tasman Pulp and Paper Co. Ltd. v. Brambles J. B. O'Loghlen Ltd. and Pan Am[148] where a cargo owner, who was neither named as the consignor or consignee in the air waybill, was held entitled to sue the carrier. The learned judge also referred to s.1(1) of the 1961 Act and Article 10(2), and held that the words "any other person(s)" in those provisions included an undisclosed cargo owner. S.1(1) reads: "Subject to this section, the provisions of the (amended Convention) shall, so far as they relate to the rights and liabilities of carriers, carriers' servants and agents, passengers, consignors, and consignees and other person __ __ _." Article 10(2) provides that "the consignor shall indemnify the carrier against all damages suffered by the carrier or any other person _ _ _". The reasoning of the restrictive American interpretation was criticised as "brief in the extreme _ _ _. Nor do I follow the point that it is reasonable that the carrier shall only be liable to parties with whom it `knowingly' dealt. The carrier by sea is not so protected. The cargo is the same cargo, whoever may be the owner. What magic is there in the name on an air waybill?"[149]

It might be mentioned that the introduction of Article 15(3) by the Hague Protocol was relied upon by the plaintiff as "indicating that the carrier must contemplate

that ownership of cargo may change in the contract of carriage and may thus become vested in persons of whose identity he is unaware". This proposition was not commented upon, but it no doubt lessens the persuasiveness of the American authorities - it will be recalled that the original Convention, which does not make express provision for the issuance of negotiable air waybills, applies in the United States.

Since it is accepted that a carrier put on notice as to the identity of prospective plaintiffs may be sued by the latter, it would seem that the usual requirement of privity is of little consequence. However, the courts in the Parke Davis and Gatewhite cases did not deal with the question of privity directly, that is, whether they accepted that the customs clearing agent in each case contracted as agent for the cargo-owing plaintiffs. Nonetheless, there can scarcely be any serious objection to the decision of Gatehouse J. that an undisclosed cargo owner not privy to the contract of carriage has a right of action against the carrier. Indeed, the learned judge's decision fits well into the network contract concept as developed by Professor Adams and Brownsword: "_ _ _ as between network contractors, the privity principle should have no application. Whereas, at present, the privity doctrine operates in relation to strangers to particular

contracts, we propose that privity should operate in relation only to strangers to a particular network of contracts (but not as between the network contractors themselves)."[150] It is rightly commented by the authors that in so far as certainty is concerned, "the overriding consideration is, quite simply, that contractors should know where they stand".[151] On the other hand, Lord Brandon in The Aliakmon was concerned about certainty in a different way: "If such detraction were to be permitted in one particular case, it would lead to attempts to have it permitted in a variety of other particular cases, and the result would be that the certainty, which the general rule presently provides, would be seriously undermined".[152] As noted earlier,[153] Lord Brandon's reasoning is not entirely convincing for if it were carried to its logical end, it would mean that the law should not be susceptible to change.

Going back to the point made by Professor Adams and Brownsword about certainty - in cases such as the Gatewhite case, the carrier knows precisely what his total liability is (since this is stipulated in the Convention) and that the principal is usually undisclosed since intermediaries often play a part in the conclusion of the contract of carriage. In any event, the class of prospective litigants is limited: the consignor can enforce his right of stoppage

in transit; the consignee has a right to the delivery of the goods - if he does not own the goods, he can only obtain nominal damages; and the cargo owner can enforce his proprietary rights in the goods. Conversely, the carrier can enforce his right to freight through the agent to whom the cargo owner is liable to provide the necessary money. Most importantly, by Article 24, "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention _ _ _". This provision assuages any concern about the carrier not being able to rely on the protective provisions which he bargained for or knows are applicable from being circumvented by a third party action founded on tort. There are of course difficulties if the Convention does not apply; this point will shortly be considered.

8.4.2 Who can be Sued

8.4.2.1 Contractual and Actual Carriers

It is not clear whether the term "carrier" in the Warsaw System refers exclusively to the contractual or actual carrier or whether it includes the both of them. Professor Drion is of the opinion that "for the purpose of the Convention the carrier is the person who has concluded a contract of carriage with respect to the transportation

of the passengers or goods concerned, or who can be considered a successive carrier in the sense of Article 30".[154] McNair, on the other hand, argues that the carrier within the meaning of the Convention is the one who actually transports the goods.[155]

Since there is nothing in the Warsaw System which leads to a conclusive interpretation in favour of either view, it might be argued that the Warsaw System accommodates both the contractual and actual carrier within its regulatory ambit. Where the Warsaw System does not apply, a carrier may be held liable to a third party in tort without recourse to the protective provisions in the contract of carriage. Arguably the answer lies in bailment or the more extensive network contract concept.

In Johnson Matthey & Co. Ltd. v. Constantine Terminals Exports Co. Ltd.,[156] the plaintiffs contracted with International Express (IE) for the carriage of silver grain to Milan. The cargo was in turn entrusted by IE to Constantine Terminals (CT) who then stored it at the London International Freight Terminal where it was stolen. The plaintiffs could not succeed against IE for it was a term of the contract between them that IE would not be liable for loss unless the goods were in their actual custody.

That left CT as the only possible party from whom damages could be recovered. It was accepted that there was no privity of contract between the plaintiffs and CT. The plaintiffs therefore had to frame their action in tort. Donaldson J. summed up the position and his reasoning thus: "The mere fact that the silver was on the premises of Constantine Terminals does not give rise to any duty on their part to take care of it and the further fact that it was stolen from those premises does not provide any evidence of a breach of any duty owed by them to the plaintiffs. The silver might have been on the premises without Constantine Terminals' knowledge or consent. Constantine Terminals might have held it as gratuitious bailees or as bailees for award. No, in order to found a cause of action, the plaintiffs have to establish a relationship between Constantine Terminals and the silver which involves a duty of care. In doing so and proving the nature of the bailment, the plaintiffs are forced to rely upon the contract between those parties, including the protective clauses."[157]

Three points are to be noted in connection with Donaldson J.'s decision. First, Midland Silicones v. Scruttons was distinguished for there the stevedores were not bailees "whether sub, bald or simple".[158] Second, although Elder, Dempster & Co. Ltd. v. Paterson, Zochonis &

Co. Ltd.[159] was also a bailment case, the defendants there received the cargo direct from the plaintiff shippers whereas in the present case, CT received the goods from IE and not from the plaintiffs. In addition, the defendant shipowners relied on the terms of a contract between the plaintiff shippers and the time charterers, whereas CT relied on contractual terms to which the plaintiffs were strangers. Consequently, Donaldson J. preferred to regard his decision as the exploration of different ground. Third, the reasoning of these cases are on different grounds. In the Elder Dempster case, Viscounts Finlay and Cave spoke of "vicarious immunity" by which is meant that when a contract contains exemption clauses, any servant or agent in the course of performing that contract may rely on the same clauses available to his employer. By contrast, Donaldson J.'s decision rested on the fact that the plaintiffs were forced to rely on the contract between IE and CT in order to sue CT and it was only fair that CT should be able to rely on the terms of that contract. In Scruttons v. Midland Silicones, Lord Denning's dissenting judgement was on the basis that the respondents, by accepting the bill of lading, had assented to its terms, including that which exonerated the stevedores.

Notwithstanding the different rationales, it is noticeable that in each case, the contract in question was a network contract - a contract which formed part of a set with an overall objective.[160] Professor Adams and Brownsword argue that in such a setting, the privity doctrine should not play a part as between the network contractors themselves but should only apply in relation to strangers to the network of contracts;[160] this concept, though it runs counter to the privity doctrine and the majority view in Scruttons, seems to have gained currency in recent cases.[161] Arguably the privity doctrine is not applicable in bailment on terms cases. Thus in Singer Co. Ltd. v. Tees and Hartlepool Port Authority, Steyn J., whilst accepting that "the hallowed doctrine of privity is not challenged," upheld the submission that "a bailor of goods is bound by the terms of any sub-bailment which he has expressly or impliedly authorised the bailee to enter into: the bailor cannot, despite the lack of a contractual relationship, disregard those terms against the sub-bailee".[162] In such a situation, "the critical question is not one of privity but of whether A has consented to (or knows of) the risk".[163] Cases which ostensibly indicate otherwise may be distinguished. The stevedores in Scruttons could not be considered to be bailees as possession does not pass to a stevedore who merely handles the goods in transit.[164] In The

Aliakmon,[165] the House of Lords and the Court of Appeal placed most importance on the fact that the plaintiffs were not the owners of the goods at the time of their damage. And it is interesting that Lord Brandon accepted that "if the shipowners as bailors had ever attorned to the buyers, so that they became bailors in place of the sellers, the terms of the bailment would then have taken effet as between the shipowners and the buyers".[166] As for Lee Cooper v. C.H. Jeakins & Sons Ltd.,[167] the case was decided as a question of contract law, not bailment. Although Learoyd Bros. & Co. Ltd. v. Pope & Sons Ltd.[168] was a bailment case, Lord Denning's rationale of bailment on terms in Morris v. C.W. Martin & Sons Ltd.[169] was not disputed. In any event, it is clear that the application of exemption clauses is not confined solely within a contractual setting, for instance, the "without liability" clause in Hedley Byrne & Co. v. Heller & Partners[170] exonerated the defendants who had no contract with the plaintiffs. In addition, as pointed out by Professor Adams and Brownsword, the law developed on the basis of Southcote's case[171] (special acceptance) "long pre-dates modern contract theory".[172]

The Guadalajara Convention fills the gap in the Warsaw System by including both the contractual and actual carrier within the regulatory ambit of either regime. By

Article 1(b), the term "contracting carrier" means "a person who as a principal makes an agreement for carriage governed by the Warsaw Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor". By Article 1(c), the term "actual carrier" means "a person, other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated in paragraph b) but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention". The contracting carrier is responsible for the whole of the carriage contemplated in the contract of carriage while the actual carrier is responsible solely for the carriage which he performs: Article 2. Any special agreement or declaration of value which the contracting carrier accepts does not affect the actual carrier unless agreed to by him: Article 3(2). The total damages recoverable from both carriers cannot exceed the highest amount that can be awarded against either under the Convention: Article 6.

8.4.2.2 Successive Carriers

Article 1(3) of the Warsaw Convention provides that transportation to be performed by several successive carriers is deemed to be one undivided transportation "if

it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it should not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory __ __ __ of the same High Contracting Party". Article 30(3) states that the consignor has a right of action against the first carrier, and the consignee who is entitled to delivery has a right of action against the last carrier; both may sue the carrier who performed the transportation during which loss, damage or delay took place. These carriers are jointly and severally liable.

Undoubtedly it is the intention of the parties which is decisive in determining whether transportation by the successive carriers is undivided. The fact that separate air waybills are issued makes no difference (Parke, Davis & Co. v. BOAC, Seaboard and Western Airlines),[173] that is, unless the defendants had stipulated that their services terminated at a certain specified point (Atlantic Fish and Oyster Co. v. Pan Am).[174] Any special agreement or declaration of value accepted by the first successive carrier unbeknown to the second successive carrier does not bind the latter: Orlove v. Phillipine Airlines.[175] Finally, reference may be

made to Rotterdamsche Bank v. BOAC,[176] a case concerning the substitution of carriers. In that case, BOAC had agreed to carry a parcel of gold coins from Cairo to Djibouti via Asmara. The parcel was transhipped at Asmara into aircraft operated by Aden Airways, a wholly-owned subsidiary of BOAC. The consignment note did not mention Aden Airways and noted that freight was payable to BOAC in respect of the whole carriage. The BOAC timetable however showed that air services from Asmara to Djibouti were operated by Aden Airways. Pilcher J. held that although on the face of the consignment note the plaintiffs had no contract with Aden Airways, the actual services by which the whole carriage was to be performed were clearly set out and indicated that the carriage was to be effected by successive carriers. The decision is in line with Article 8(e) which requires only that the first carrier be named.

8.4.2.3 Freight Forwarders and Combined Transport Operators

The usual role of a freight forwarder is as an agent who contracts with another to have his principal's cargo transported. As Hill puts it, "In other words the forwarder does not generally offer to carry himself, he merely offers to act as a professional intermediary between the consignor or consignee of goods and the carrier, though this does not preclude him from effecting part of the

transit personally".[177] Whether or not a freight forwarder has contracted to act as a carrier is not always easily discernible; it all depends on the circumstances and facts of the case at hand.[178]

Where the goods are carried partly by air and partly by another mode of transportation, the Warsaw System applies only to that part of the transportation by air which is "international" within the meaning of Article 1(2): Article 31(1). "If, however, (another mode of transportation) takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air": Article 18(3). Article 31(2) allows the parties to contract for the application of the Warsaw System to other modes of transportation; in such a situation, the Warsaw System does not apply _ex propiore vigore_ but by contract.[179] The Warsaw System is therefore capable of accommodating combined transport operators within its scope of application.

8.4.2.4 Servants and Agents

The unamended Convention mentions the carrier's servants and agents in Articles 16, 20 and 25 but does not state whether its protective provisions in regard to the carrier apply to his servants or agents. The cases on this point are mainly American. In Pierre v. Eastern Airlines Inc.,[180] the court held that because Article 25A of the Hague Protocol was drafted to provide for the application of the carrier's liability limit to his servants or agents, such protection could not have been contemplated by the unamended Convention. This argument is not entirely convincing for the void in the unamended Convention could be attributable to an assumption that the liability limits expressed therein were equally available to servants and agents; in other words, Article 25A of the Hague Protocol may be regarded as no more than an express affirmation of an assumption in the unamended Convention. But in Hoffman v. BOAC,[181] it was held that recourse to Article 28 (choice of jurisdiction) was limited to parties to the contract of carriage - this reasoning is said to be favoured by the French Courts.[182]

The majority of the American cases, particularly those of recent origin, take the view that servants and agents are protected by the carrier's liability limits. In

Reed v. Wiser, where the president of the company and his vice-president were sued instead of the airline, the court's main line of inquiry was whether the term "carrier" was limited to the corporate carrier or whether it extended to "the group or community of persons actually performing the corporate entity's functions".[183] The court accepted that the common law liability of a wrongdoing agent was a separate and distinct source of redress from that of the principal, but held that the Convention was intended to act as an international uniform law and had to be read in the context of the legal systems of its members.[183] The court went on to say that although it had not familiarised itself with the legal systems of all the member states, "it is clear that in at least some jurisdictions the language of Art.22(1) would have the effect of limiting the liability of the carrier's employees as well as that of the carrier".[183] After a consideration of the views of various delegates expressed at the International Conferences on Private Air Law at the Hague and Guadalajara, the court was satisfied that the issue was not to be decided on a common law reading.

The court's reasoning based on uniformity is somewhat suspect as it seems to have been acknowledged that there are cases at odds with its decision. Professor Drion's view, which the court accepted, is to be preferred:

"As it is practically impossible to distinguish the carrier from the community of persons whose joint activity is the carrier's activity, as far as the principle of the carrier's liability is concerned, so is it illogical to make such a distinction for the purpose of the limitation of liability. If the carrier's liability is to be limited, the liability of the members of the carrier's enterprise should also be limited, for any negligence of the carrier is negligence of his employees. Any other solution would defeat the purpose of Article 24, which is to prevent claimants from avoiding the provisions of the Convention by suing the enterprise outside the contract of carriage".[184]

Following Reed v. Wiser, the court in Julius Young Jewelry Manufacturing Co. Inc. v. Delta Airlines and Eastern Airlines[185] held that an independent contractor employed to handle baggage transfer could assert as a defense the liability limitations of the Warsaw Convention. These cases are concerned with liability limitation, but in Johnson v. Allied Eastern States Maintenance Corp.,[186] the court allowed an independent contract to rely on the two-year limitation period under the Warsaw Convention. The court rejected the appellants' argument that "the test for determining whether the Convention applies should be whether the service provided by the agent (or independent contractor) is essential to

the operation of the carrier's business. Given the purposes of the Convention, we cannot agree. We held instead that the test is merely whether the particular activity of the agent which resulted in injury was in furtherance of the contract of carriage".[187]

Where the amended Convention applies, a servant or agent of the carrier, "if he proves that he acted within the scope of his employment," is entitled to "avail himself of the limits of liability which the carrier himself is entitled to invoke under Article 22": Article 25A(1). The provision does not speak of independent contractors, and it will be interesting to see whether an English court will exclude independent contractors from the Convention's protection or adopt Lord Reid's four-fold test as enunciated in Scruttons v. Midland Silicones[188] or go further by adopting the Johnson test[189] which falls within the network contract concept. It is possible that a liberal view may be favoured on the basis of what Lord Wilberforce said in The New York Star:[190] "Although, in each case, there will be room for evidence as to the precise relationship of carrier and stevedore and as to the practice at the relevant port, the decision (in The Eurymedon)[191] does not support, and their Lordships would not encourage, a search for fine distinctions which would diminish the general applicability, in the light of

established commerical practice, of the principle". Further, there is nothing in Article 25A which would prevent an independent contractor from being treated as an agent of the carrier. This may be contrasted with Article 4 bis of the Hague-Visby Rules which uses the words "such servant or agent not being an independent contractor".

"The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case shall not exceed the said limits": Article 25A(2). Articles 25A (1) and (2) do not apply if it is proved that the damage resulted from an act or omission of the agent done with intent to cause damage or recklessly and with knowledge that damage would probably result": Article 25A(3). The Guadalajara Convention takes a similar position in regard to servants or agents of the actual or contracting carrier. Although neither the amended Warsaw or Guadalajara Convention refers to a servant or agent's right to rely on the carrier's other defences apart from the liability limits (for instance, the two-year limitation period or exoneration of liability clause), it is probable that the servant or agent may avail himself of such protection.[192] In English law, at any rate, the two-year limitation period applies to actions against the carrier's servants or agents: s.6(1), Carriage by Air Act 1961.

Miller draws attention to the fact that there is "a considerable difference in the manner in which various courts assess whether a particular conduct is within the scope of employment".[193] She cites the cases of Eve Boutique Imports Inc. v. Seaboard World Arlines Inc.[194] and Swissair v. Cie La Concorde[195] where goods were stolen, in both cases, by the carrier's servants. In the latter case, the Swiss court held the carrier fully liable because the servant's wilful misconduct had taken place within the scope of his employment. In the other case, the New York court held that the employees' theft established that they had not acted within the scope of their employment.

The English courts adopt a more intricate approach. All depends on whether the servant who pilfered the cargo was entrusted with its care: Rustenburg Platinum Mines Ltd. v. South African Airways and Pan Am.[196] If he was, he will be considered to have committed the theft whilst acting within the scope of his employement - the reason being that he did badly what he had been asked to do properly.[197] It would be different if the theft had been committed by a servant who had nothing to do with the care of the cargo. The distinction may be easier to grasp than to apply. In the Rustenburg case, Lord Denning held: "If this box of platinum was stolen by one of the loaders who

was entrusted with the task of loading it carefully and securely into the aircraft; if it were stolen by himself or in combined operation with others outside the aircraft; such a person is guilty of wilful misconduct acting within the scope of his employment."[198] In The Chyebassa,[199] a ship's storm valve cover plate was stolen by a servant of the stevedore company employed by the shipowners. The loss of the cover plate allowed in seawater which damaged the goods. The Court of Appeal held that the thief's employment had merely given him the opportunity to steal and as that act was not done for the purpose of loading or unloading, the thief was not acting within the scope of his employment.

8.4.3 Where to Sue

The Warsaw System prescribes four alternatives of forum for the claimant by virtue of Article 28: the court having jurisdiction where the carrier a) is ordinarily resident, or b) has his principal place of business, or c) has an establishment by which the contract has been made, or d) the court having jurisdiction at the place of destination. The court must be situated in the territory of one of the High Contracting Parties. This restriction does not apply to the Guadalajara Convention, Article 8 of which allows two additional choices to the four

above-mentioned: the court having jurisdiction at the place where the actual carrier (i) is ordinarily resident, or (ii) has his principal place of business. These provisions do not rule out arbitration clauses but, as Magdelenat points out, an arbitration clause "must operate within the framework of the jurisdictions which are defined in article 28 of the Warsaw Convention and article 8 of the Guadalajara Convention".[200]

In the French text, (a) is phrased "le tribunal du domicile du transporteur". The English text uses the phrase "ordinarily resident" while the American text uses the phrase "domicile". Miller explains the difference thus: "Because the domicile of the common law is that place 'where a man has his true, fixed and permanent home, and to which, whenever he is absent, he has the intention of returning,' a man may change residence many times in the course of his life and retain the same domicile."[201] The difference has not been at issue in the courts, but it serves as "a useful warning of the dangers which may arise if one tries to apply the language of the text to other translations to the English text of article 28 which is scheduled alongside the French text".[202]

In Rothmans Ltd. v. Saudi Arabian Airlines Corp.,[203] the defendant airline agreed, by a contract made in Amsterdam, to carry a consignment of cigarettes from Amsterdam to Jeddah. Part of the cargo was lost and the plaintiffs issued a writ which was served at one of the defendants' branches in England. The Court of Appeal held that Article 28(1) was a self-contained code which dealt with jurisdiction and not the procedural law of service, and that the phrase "ordinarily resident" had to be construed in the context of that code. The fact that the defendants had a branch office in England which, under English procedure, could be served with a writ was not sufficient to confer jurisdiction on the English courts.

The corresponding phrase in the American text "domicile" has been interpreted, in relation to a corporate carrier, to mean the place of its incorporation or the place where its headquarters is sited.[204] These fora are seemingly different from (b) where it should simply be "a matter of comparing the relative importance of one business centre in relation to others".[205] The American courts however consider an agency issuing tickets or air waybills to satisfy Article 28(b).[206] Since the provision refers to "the carrier's principal place of business" rather than "the carrier's principal place(s) of business," it may be that the American interpretation is unduly wide. Another

approach would be to treat (b) as the headquarters of the carrier, but this would render (b) a part-duplication of (a). In any event, (c) would cover a ticket agency;[207] the pre-requisite here is that the establishment must be one through which the contract is concluded.[208] As for d), the "place of destination" means the place where the contractual carriage ends.[209]

8.4.4 Notice

By Article 26(2) of the unamended Convention, "in case of damage, the person entitled to delivery must complain to the carrier (within) seven days from the date of receipt of (the) goods. In case of delay the complaint must be made at the latest within fourteen days from the date on which the baggage or goods have been placed at his disposal". The corresponding article in the amended Convention requires notice within 14 days in the case of damaged goods and 21 days in the case of delayed goods. The notice must be in writing: Article 26(3). It is not enough to prove that the carrier knew of the damage: Dalton v. Delta Air Lines Inc.[210] Article 26(4) provides that unless notice is filed within the prescribed period, no action shall lie against the carrier save in the case of fraud on his part. "Fraud" in Article 26(4) probably only encompasses fraudulent acts "tending to prevent the

consignee from complaining within the prescribed period".[211] If so, other fraudulent acts (for example, a fraudulent misrepresentation that special measures will be taken to guard the goods) will not deprive the carrier of his right to rely on Article 26.

Neither Convention sets out any requirement as to notice in the case of loss, and a 120-day period for notice is often stipulated as part of the contract. Whether or not such a stipulation is contrary to Article 23, which forbids any provision tending to relieve or decrease the carrier's liability as laid down in the Convention, has yet to be decided by an English court. In Butler's Shoe Corporation v. Pan Am, the American court was of the opinion that "the longer a plaintiff waits to notify the carrier of a loss, the longer are the chances that a search for the cargo will be successful. Therefore, the inclusion of defendant's tariff of a 120-day notice of claim requirement for lost cargo can be viewed as a reasonable attempt by the carrier to avoid excessive damages".[212] The court's decision is entirely logical. The fact that no reference whatsoever is made to notice in the case of loss leads to the conclusion that it is a matter to be agreed upon by the parties. Further, a 120-day period for notification in the case of cargo loss as opposed to the 14-day period under the amended Convention for notification

of cargo damage does not seem unreasonable. From the claimant's viewpoint, the danger is that too short a period for notification may be stipulated. In as far as partial loss is concerned, the English courts treat it as damage while the American courts consider it as loss.[213] So the period within which notice must be filed when part of a consignment is lost depends on where the claim is being adjudicated.

8.4.5 The Limitation Period

Article 29(1) of the Warsaw System reads: "The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped." Article 29(2) provides that "the method of calculating the period of limitation shall be determined by the law of the Court to which the case is submitted".

In The Brede,[214] the shipowner sued the charterer for freight and the charterer counter-claimed for cargo damage. The charterparty incorporated Article 3(6) of the Hague Rules: "___ the carrier and the ship shall in any event be discharged from all liability in respect of loss

or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered." The Court of Appeal held that the counter-claim was barred because the charterer had not sued before the expiry of the one-year limitation period. Similarly, in The Aries,[215] the House of Lords held that there could be no set-off against freight after the limitation period had expired. Lord Wiberforce held that Article 3(6) is "a time-bar of a special kind, viz, one which extinguishes the claim (cf. Article 29 of the Warsaw Convention 1929), not one which, as most English statutes of limitation _ _ _ and some interntional conventions _ _ _ do, bars the remedy while leaving the claim itself in existence".[216] These cases would seem to indicate that a person sued for air freight cannot oppose the action by a set-off or counter-claim if his claim is not within the two-year limitation period. However, in an American case involving the Hague Rules, the court allowed a charterer to make a counter-claim even though the limitation period had expired.[217] Further, it might be noted that while Article 3(6) of the Hague Rules uses the words "discharged from all liability," Article 29 of the Warsaw System refers to "the right to damages". Although the American court in Son Shipping Co. v. De Fosse & Tanghe[218] held that the word "suit" in s.3(6) of the Carriage by Sea Act 1936 did not encompass arbitration, it is submitted that the same

will not be said of the word "action" in Article 29(1). An English court will apply the limitation period in Article 29(1) to arbitration proceedings.[219]

FOOTNOTES

1. "The Warsaw Convention is an international convention which is binding in international law on all the countries who have ratified it": per Lord Denning M.R. in Corocraft Ltd. v. Pan Am (1969) 1 All E.R. 82, 89; cf. Phillipson v. Imperial Airways Ltd.(1939) A.C. 332 which has been interpreted to mean that the signature to the Convention by a State suffices to confer on it the status of a High Contracting Party. See Miller, "Liability in International Air Transport: the Warsaw System in Municipal Courts," (1977) (Published by Deventer-Kluwer).

2. See Lowenfeld and Mendelsohn, "The United States and the Warsaw Convention," (1967) 80 Harv. L. Rev. 497; Bell (1988) J.A.L.C. 840.

3. Cf. the "paramount clause technique" of the Carriage of Goods by Sea Act 1924. See 8.2.3 (q).

4. Ratification by thirty nations is required to bring the Guatemala Protocol into force. Five of these nations must account for at least 40 per cent of

scheduled air traffic. Since the United States itself accounts for 40 per cent of scheduled air traffic, the Protocol practically cannot come into force without U.S. ratification. See Bell, loc. cit., p.850, n.69.

4a. See 8.1.2.

5. Cheng, "Wilful Misconduct: From Warsaw to The Hague and from Brussels to Paris," (1977) Annals of Air and Space Law 55; see also Martin, "Fifty Years of the Warsaw Convention: A Practical Man's Guide," (1979) Annals of Air and Space Law 233.

6. Cf. the "paramount clause technique" of the Carriage of Goods by Sea Act 1924' See 8.2.3 (q).

7. The original Convention may still be of limited application; see Schedule II of the Carriage by Air Act (Application of Provisions) Order 1967.

8. The United States, insistent on a higher limit, refused to ratify the Hague Protocol. There the liability limit for injury or death is US$75,000 as provided for in the Montreal Agreement. See 8.2.

9. As where an aircraft carries an engine for a ship in trouble whilst at sea fishing for sardines; see Vanderburg v. French Sardine Co. and Souby (1953) 4 Avi. 17,189.

10. "The contract __ _ _ is, so to speak, the unit to which attention is to be paid in considering whether the carriage to be performed under it is international or not": per Greene L.J. in Grein v. Imperial Airways Ltd. (1937) 1 K.B. 50, 77.

11. Grein v. Imperial Airways Ltd., ibid, at p.81.

12. Rotterdamsche Bank v. BOAC (1953) Ll.L.Rep. 154.

13. (1988) 2 Lloyd's Rep.120.

14. Ibid, p.123.

15. Ibid, pp.123-4. On forum non conveniens, see Schmitthoff (1987) J.B.L. 8.

16. FT Law Reports (Feb. 21, 1989).

17. In actions founded on contract, the maximum amount payable is £12 unless an insurance fee has been paid in which case the limit is £1,000: Postal Rates Oversea Compendium, Feb., 1982, p.20.

18. (1983) All E.R. 557.

19. Schmitthoff's Export Trade (8th ed., 1986, published by Stevens) p.544; cf. Moukatoff v. BOAC (1967) 1 Lloyd's Rep. 396, where the sender of an airmail package successfully maintained a direct action against the carrier without any limitation liability. The apprehension of unlimited liability is said to be the reason behind s.29; see Kean (1983) J.B.L. 160.

20. United International Stables Ltd. v. Pacific Western Airlines Ltd. (1969) 5 D.L.R. 67. In that case, the air waybill was not signed by the consignor but the judge held that the omission did not prevent the application of the Convention.

20a. See 8.2.3.

21. The original Convention did not make express provision for the issuance of negotiable air waybills. See I. H. Ph. Diederiks-Verschoor, "An Introduction to Air Law," (2nd end., 1985, published by Deventer-Kluwer) p.52.

22. Schmitthoff's Export Trade, loc, cit., p.497.

23. If the terms therein are erroneous, evidence may be adduced to establish or prove the actual agreement: L. & C. Mayers Co. Inc. v. KLM (1951) U.S. Av. R.428.

24. See 5.3.2 (b).

25. See n.23.

26. Grein v. Imperial Airways Ltd., ibid, at p.81.

27. Ibid.

28. (1959) U.S. Av. R. 112.

29. (1972) 12 Avi. 17.

30. The Ensley City (1947) A.M.C. 568, 576.

31. (1985) 754 F.2d. 106.

32. Corocraft Ltd. and another v. Pan Am 91969) All E.R. 82 is to the same effect.

33. Ibid.

34. Ibid, pp.86-7.

35. Block v. Compagnie Nationale Air France (1967) 386 F.2d. 323. Cf. The Borneo Co. Ltd. v. Braathens Souther American & F.E. Air Transport A.S. (1960) M.L.J. 200 and Shiro (China) Ltd. v. Thai Airways (1967) M.L.J. 91 where it was held by the Malaysian courts that Article 8(i) is not satisfied where only the weight of the goods is noted in the consignment note.

36. Drion, "Limitation of Liability in International Air Law," (1954, published by Nijhoff) p.311.

37. Ibid, p.89.

38. See Exim Industries v. Pan Am (1985) 754 F.2d. 106 (Method of packing, volume, and dimensions of cargo not noted; the omissions were held to be

insignificant); Republic National Bank of New York v. Eastern Airlines Inc. (1987) 20 Avi. 6,948 (Absence of information about the weight and identification number on baggage checks held not to expose carrier to unlimited liability).

39. See Chapter 5.

40. The Athelviscount (1934) Com. Cas. 227.

41. Recumar v. Dana Arabia (1985) A.M.C. 2284.

42. Thomas v. TWA (1971) 12 Avi. 17,428. Cf. Orlove v. Phillipine Air Lines and Flying Tiger Line (1958) U.S. Av. R. 611 where the consignor recovered the full value of the goods because the declaration of value was not noted in the air waybill due to the fault of the carrer's agent.

43. L. & C. Mayers Co. Inc. v. KLM (1951) U.S. Av. R. 428.

44. Magdelenat, "Air Cargo Regulation and Claims," (1983, published by Butterworths) p.58.

45. Ibid.

46. Ibid.

47. Vita Food Products v. Unus Shipping (1939) A.C. 277.

48. The Morviken (1982) 2 W.L.R. 556, 558; affirmed by the House of Lords (1983) A.C. 565. See also The Benarty, The Times Law Reports (June 16, 1984).

49. 2 All E.R. 890.

50. Ibid, p.896.

51. (1959) U.S. Av. R. 112.

52. (1966) 1 All E.R. 814.

53. (1964) 8 Avi. 18,183.

54. Ibid.

55. Ibid, p.108.

56. Ibid. For a criticism, see Bell, loc. cit., pp.870-80.

57. Magdelenat, loc. cit., p.61.

58. Magdelenat, ibid.

59. <u>Corocraft and another v. Pan Am</u>, ibid, p.84.

60. See 8.4.4.

61. (1980) A.C. 251.

62. On the French cases, see Miller, loc. cit.

63. Ibid, p.278.

64. (1976) 14 Avi. 17,466, at p.17,467. See also <u>Rugani v. KLM</u> (1954) U.S. Av. R. 74,77 and <u>Brentwood Fabrics Corp. v. KLM</u> (1970) 13 Avi. 17,426.

65. (1954) U.S. Av. R. 179.

66. Ibid, p.180.

67. (1967) 1 Lloyd's Rep. 239.

68. (1965) 38 D.L.R. 383.

69. (1977) R.F.D.A. 181.

70. (1933) 149 L.T. 276, 278.

71. Coggs. v. Barnard (1703) Ld. Raym. 909.

72. See Re Missouri SS Co. (1889) 42 Ch. D. 321; see also 6.1.2 (a).

73. Article 4(2)(a), Hague-Visby Rules; Article 20(2), Warsaw Convention, deleted in the amended Convention.

74. Coggs v. Barnard, ibid.

75. This rule has been consistently applied under the common law and in Hague and Hague-Visby Rules cases.

76. The Theodegmon, The Times Law Reports (June 15, 1989).

77. For instance, Rugani v. KLM (1954) U.S. Av. R. 74.

78. (1977) 14 Avi. 17,710, at p.17,712.

79. (1937) 1 K.B. 50, 60.

80. (1977) R.F.D.A. 79. Cf. Dabrai v. Air India (1955) All Indian Rep. 10 where a cargo of gold was transported from Karachi to Bombay. The cargo was stolen from an iron cage in the Bombay office of the carrier where it had been placed awaiting collection by the consignee. The court held that because the cargo had reached its destination and had been carried to the office where they were to remain in storage until called for by the consignee, it could not be said that there was any continuing carriage by air.

81. (1983) 1 Lloyd's Rep. 317, 320.

82. (1969) 5 D.L.R. (3d) 67.

83. Ibid, p.77.

84. Ibid, p.76.

85. (1950) U.S. Av. R. 392.

86. Ibid, pp.394-5.

87. (1978) Air Law 113.

88. Miller, loc. cit., p.147.

89. (1968) 22 R.F.D.A. 79.

90. (1969) 23 R.F.D.A. 405, 409.

91. (1973) 12 Avi. 18, 163, at p.18, 164.

92. Ibid.

93. See Rambler Cycle Co. v. P. & O. S. N. Co. (1968) 1 Lloyd's Rep. 42. In that case, the Malaysian Federal Court of Appeal held that if the Hague Rules had been intended to apply to delivery, as opposed to discharge, nothing would have been simpler than to insert the word "delivery" in Article 1(e).

94. Delivery to a successive carrier is a different matter. Article 30(3) states that a consignor has a right of suit against the first carrier as well as the carrier who performed the carriage during

which the loss or damage took place. See Wing Hang Bank Ltd. v. Japan Air Lines (1973) 12 Avi. 17,884. In that case, JAL, who did not have the necessary facilities at the airport, asked American Airlines to provide storage. JAL were held liable though the goods were stolen while in the custody of AAL. The indemnity clause in the agreement between JAL and AAL allowed AAL to claim back all its costs and expenses.

95. (1973) 1 Lloyd's Rep. 46.

96. See 8.3.3.

97. Federal Aviation Act 1958, ss.204(a), 403, and 1002. In Franklin Mint Corp. v. TWA (1984) 2 Lloyd's Rep. 432, it was held that the 1978 repeal of legislation setting an official gold price did not terminate the United States' duty to adhere to the Convention liability limits.

98. (1986) 2 All E.R. 188.

99. Ibid, p.190.

100. Ibid, p.192.

101. (1984) 730 F. 2d. 842.

102. (1988) Avi. 17,513.

103. (1984) 722 F. 2d. 256.

104. Ibid, p.191.

105. Ibid, p.189.

106. (1983) 2 All E.R. 639.

107. Ibid, p.643.

108. (1988) Avi. 18,254, at p.18,255.

109. See Deere & Co. v. Lufthansa, ibid.

110. See 8.3.3.

111. See 8.3.3.

112. See 8.4.2.4.

113. (1888) 20 Q.B.D. 475.

114. See 6.6.3.2.

115. See 6.6.3.3.

116. (1907) 1 K.B. 660, 669.

117. (1936) 2 All E.R. 597, 601.

118. See 6.6.3.3 (a) (iii).

119. (1937) 43 Com. Cas. 1, 15.

120. (1980) A.C. 827, 845, 850.

121. See Carver's _Carriage by Sea_ (13th ed., 1982, published by Stevens) p.551.

122. (1986) 2 Lloyd's Rep. 633, 637.

123. (1953) 1 Lloyd's Rep. 155.

124. (1978) 587 F. 2d. 632.

125. _Ulen v. American Airlines_ (1943) U.S. Av. R. 338, _Ritts v. American Overseas Airlines_ (1949) U.S. Av. R. 65.

126. Cheng, loc. cit., pp.66-8, Miller, loc. cit., pp.203-23. Mashinenfabrik Kern A.G. v. Northwest Airlines (1983) 562 F. Supp. 232, Goepp v. American Overseas Airlines (1952) U.S. Av. R. 486.

127. (1955) 227 F. 2d. 282, 285.

128. See n.126, and Rashap v. American Airlines (1955) U.S. Av. R. 593, 608-9.

129. Ibid, p.240.

130. (1951) Avi. 17,440, at p.17,441.

131. Cheng, loc. cit., p.75.

132. Cheng, loc. cit., p.83.

133. See Goldman v. Thai Airways Ltd. (1983) 1 W.L.R. 1186, 1196.

134. (1976) 11 E.T.L. 907.

135. Ibid.

136. Ibid, p.1193.

137. Ibid, p.1194.

138. Butler's Shoe Corp. v. Pan Am (1974) 13 Avi. 17,182, 17,184. See 8.4.4.

139. (1987) 20 Avi. 17,920.

140. (1981) 16 Avi. 17,835.

141. (1957) 5 Avi. 17,229, 17,230.

142. (1987) 20 Avi. 18,248, 18,251-3.

143. (1957) 5 Avi. 17,854, 17,855.

144. (1958) 5 Avi. 17,838.

145. (1989) 1 All E.R. 944.

146. Ibid.

147. Ibid, p.950.

148. (1981) 2 N.Z.L.R. 225.

149. Ibid, p.948.

150. Adams and Brownsword, "Privity and the Concept of a Network Contract" (forthcoming) (J.B.L.).

151. Ibid.

152. (1986) 1 A.C. 785, 816-7.

153. See the discussion in Chapter Seven.

154. Drion, loc. cit., p.142.

155. McNair, "The Law of the Air," (1964, published by Stevens) p.278.

156. (1976) 2 Lloyd's Rep. 215.

157. Ibid, p.219.

158. (1959) 1 Lloyd's Rep. 228, 301.

159. (1924) A.C. 522.

160. See Adam and Brownsword, loc. cit.

161. Norwich City Council v. Harvey (1989) 1 All E.R. 1180, Southern Water Authority v. Carey (1985) 2 All E.R. 1077.

162. (1988) 2 Lloyd's Rep. 164, 167.

163. Adams and Brownsword, loc. cit. Cf. the Johnson Matthey case, ibid.

164. (1962) A.C. 446.

165. Ibid.

166. Ibid.

167. (1964) 1 Lloyd's Rep. 300.

168. (1966) 2 Lloyd's Rep. 142.

169. (1965) 2 Lloyd's Rep. 63.

170. (1964) A.C. 465.

171. (1601) Co. Rep. 836.

172. Ibid.

173. (1958) U.S. Av. R. 122.

174. (1950) R.G.A. 962.

175. (1958) 5 Avi. 18,103. See also Article 3(2) of the Guadalajara Convention.

176. (1953) Ll. L. R. 154.

177. Hill, "Freight Forwarders," (1972, published by Stevens) p.22.

178. See Salsi v. Jetspeed Air Services (1977) 2 Lloyd's Rep. 57.

179. See Pick. v. Lufthansa (1965) 9 Avi. 18,077.

180. (1957) 5 Avi. 17,515.

181. (1964) 9 Avi. 17,180; see also Products-General Mills Inc. v. The Flying Tiger Line Inc. and others (1987) 20 Avi. 18,282.

182. See Miller, loc. cit., pp.276-8.

183. (1977) 14 Avi. 17,841, 17,843; see also Chutter v. KLM (1955) 4 Avi. 17,733 and King (1978) 44 J.A.L.C. 175.

184. Drion, loc. cit., p.158.

185. (1979) 15 Avi. 17,568.

186. (1985) Avi. 17,847.

187. Ibid, p.17,850.

188. (1962) A.C. 446.

189. Ibid, p.17,850.

190. (1981) 1 W.L.R. 138.

191. (1980) 2 Lloyd's Rep. 317.

192. See Shawcross and Beaumont, "Air Law," (4th ed., 1977, published by Butterworths) Chapter 7, para.199.

193. Miller, loc. cit., p.

194. (1968) 10 Avi. 17,703.

195. (1961) 15 R.F.D.A.

196. (1979) 1 Lloyd's Rep. 19.

197. Ibid, p.24.

198. Ibid, p.23.

199. (1967) 2 Q.B. 250.

200. Magdelenat, loc. cit., p.117.

201. Miller, loc. cit., pp.300-1.

202. Rothmans Ltd. v. Saudi Arabian Airlines Corp. (1981) Q.B. 368,388, per Roskill L.J.

203. Ibid.

204. See Miller, loc. cit., p.301.

205. Magdelenat, loc. cit., p.118.

206. Eck v. United Arab Airlines (1964) 9 Avi. 17,364; Winsor v. United Airlines (1957) U.S. Av. R. 446.

207. Eck v. United Arab Airlines, ibid; Warshaw v. TWA (1977) 14 Avi. 18,297.

208. Cf. Herfroy v. Artop (1962) R.F.D.A. 177 where it was held that an agency, though having authority to issue tickets, was not an establishment within Article 28 because it had a different structure entirely independent of the carrier and was not the property of the carrier. Noted in Diedericks-Verschoor, loc. cit., pp.67-8.

209. Grein v. Imperial Airways Ltd. (1937) 1 K.B. 50,81.

210. (1974) 14 Avi. 17,219.

211. Miller, loc. cit., p.173.

212. (1974) 13 Avi. 17,182, 17,184. See also Rugani v. KLM (1954) U.S. Av. R. 74,77.

213. See 8.3.1.

214. (1973) 2 Lloyd's Rep. 333.

215. (1977) 1 All E.R. 398.

216. Ibid, p.402.

217. Puerto Madrin SA v. Esso Standard Oil Co. (1962) A.M.C. 147.

218. (1952) A.M.C. 1931.

219. See The Merak (1964) 2 Lloyd's Rep. 527.

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BILLS OF LADING ACT 1855 (18 & 19 Vict. c. 111)

Whereas by the custom of merchants a bill of lading of goods being transferable by endorsement the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property; and whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a bona fide holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid:

1. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

2. Nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

3. Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other persons signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

THE UNITED STATES CARRIAGE OF GOODS BY SEA ACT 1936

CARRIAGE OF GOODS BY SEA ACT

(Public-No. 521-74th Congress)

TITLE I

SECTION 1. When used in this Act -

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term "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) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

RISKS

SECTION 2. Subject to the provisions of section 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.

RESPONSIBILITIES AND LIABILITIES

SECTION 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 cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.
(2) 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 manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: Provided, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c), or this section: Provided, That nothing in this Act shall be construed as repealing or limiting the application of any part of the Act, as amended, entitled "An Act relating to bills of lading in interstate and foreign commerce," approved August 29, 1916 (U.S.C., title 49, ss.81-124), commonly known as the "Pomerene Bills of Lading Act".

(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.

Said notice of loss or damage may be indorsed upon the receipt for the goods given by the person taking delivery thereof.

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; Provided, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

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

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: Provided, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the

issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause, shall be deemed to be a clause relieving the carrier from liability.

RIGHTS AND IMMUNITIES

SECTION 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 section 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 persons claiming exemption under this section.

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

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

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

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

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

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

(h) Quarantine restrictions;

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

(j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general: Provided, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(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; and

(q) Any other cause arising without the actual fault and privity of the carrier and 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 Act or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: 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.

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight 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 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. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently 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.

SURRENDER OF RIGHTS AND IMMUNITIES AND INCREASE OF RESPONSIBILITIES AND LIABILITIES

SECTION 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 Act, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of the Act 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 Act. Nothing in this Act shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

SPECIAL CONDITIONS

SECTION 6. Notwithstanding the provisions of the preceding sections, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: Provided, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: Provided, That this section 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.

SECTION 7. Nothing contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading and subsequent to the discharge from the ship on which the goods are carried by sea.

SECTION 8. The provisions of this Act shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act 1916, or under the provisions of sections 4281 to 4289 inclusive, of the Revised Statutes of the United States, or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

TITLE II

SECTION 9. Nothing contained in this Act shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this Act: or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 5, title I, of this Act; or (c) in any other way prohibited by the Shipping Act 1916, as amended.

SECTION 10. (Repealed by the Transportation Act 1940.)

SECTION 11. Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this Act, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

SECTION 12. Nothing in this Act shall be construed as superseding any part of the Act entitled "An Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property," approved February 13, 1893, or of any other law which would be applicable in the absence of this Act, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

SECTION 13. This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this Act the term "United States" includes its districts, territories, and possessions: Provided, however, That the Philippine Legislature may by law exclude its application to transportation to or from ports of the Philippine Islands. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this Act shall be held to apply to

contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: Provided, however, That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to th eprovisions of this Act, shall be subjected hereto as fully as if subject hereto by the express provisions of this Act: Provided further, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this Act.

SECTION 14. Upon the certification of the Secretary of Commerce that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of title I of this Act, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of title I of this Act for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of title I hereof, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or recession of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Any contract for the carriage of goods by sea, subject to the provisions of this Act, effective during any period when title I hereof, or any part thereof, is suspended, shall be subject to all provisions of law now or hereafter applicable to that part of title I which may have thus been suspended.

SECTION 15. This Act shall take effect ninety days after the date of its approval; but nothing in this Act shall apply during a period not to exceed one year following its approval to any contract for the carriage of goods by sea, made before the date on which this Act is approved, nor to any bill of lading or similar document of title issued, whether before or after such date of approval in pursuance of any such contract as aforesaid.

SECTION 16. This Act may be cited as the "Carriage of Goods by Sea Act." Approved, April 16, 1936.

CARRIAGE OF GOODS BY SEA ACT 1971

(a) IN RELATION TO VESSELS OTHER THAN HOVERCRAFT

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

1. Application of Hague Rules as amended. - (1) In this Act, 'the Rules' means the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on 25 August 1924, as amended by the Protocol signed at Brussels on 23 February 1968 and by the Protocol signed at Brussels on 21 December 1979.

(2) The provisions of the Rules, as set out in the Schedule to this Act, shall have the force of law.

(3) Without prejudice to subsection (2) above, the said provisions shall have effect (and have the force of law) in relation to and in connection with the carriage of goods by sea in ships where the port of shipment is a port in the United Kingdom, whether or not the carriage is between ports in two different States within the meaning of Article X of the Rules.

(4) Subject to subsection (6) below, nothing in this section shall be taken as applying anything in the Rules to any contract for the carriage of goods by sea, unless the contract expressly or by implication provided for the issue of a bill of lading or any similar document of title.

(5) [repealed].

(6) Without prejudice to Article X(c) of the Rules, the Rules shall have the force of law in relation to -

(a) any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract, and

(b) any receipt which is a non-negotiable document marked as such if the contract contained in or evidenced by it is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading,

but subject, where paragraph (b) applies, to any necessary modifications and in particular with the omission in Article III of the Rules of the second sentence of paragraph 4 and of paragraph 7.

(7) If and so far as the contract contained in or evidenced by a bill of lading or receipt within paragraph (a) or (b) of subsection (6) above applies to deck cargo or live animals, the Rules as given the force of law by that subsection shall have effect as if Article I(c) did not exclude deck cargo and live animals.

In this subsection 'deck cargo' means cargo which by the contract of carriage is stated as being carried on deck and is so carried.

2. Contracting States. (1) If Her Majesty by Order in Council certifies to the following effect, that is to say, that for the purposes of the Rules -

(a) a State specified in the Order is a contracting State, or is a contracting State in respect of any place or territory so specified; or

(b) any place or territory specified in the Order forms part of a State so specified (whether a contracting State or not),

the Order shall, except so far as it has been superseded by a subsequent Order, be conclusive evidence of the matters so certified.

(2) An Order in Council under this section may be varied or revoked by a subsequent Order in Council.

3. Absolute warranty of seaworthiness not to be implied in contracts to which Rules apply. There shall not be implied in any contract for the carriage of goods by sea to which the Rules apply by virtue of this Act any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

4. Application of Act to British possessions, etc. (1) Her Majesty may by Order in Council direct that this Act shall extend, subject to such exceptions, adaptations and modifications as may be specified in the Order, to all or any of the following territories, that is -

(a) any colony (not being a colony for whose external relations a country other than the United Kingdom is responsible),

(b) any country outside Her Majesty's dominions in which Her Majesty has jurisdiction in right of Her Majesty's Government of the United Kingdom.

(2) An Order in Council under this section may contain such transitional and other consequential and incidental provisions as appear to Her Majesty to be expedient, including provisions amending or repealing any legislation about the carriage of goods by sea forming part of the law

of any of the territories mentioned in paragraphs (a) and (b) above.

(3) An Order in Council under this section may be varied or revoked by a subsequent Order in Council.

5. Extension of application of Rules to carriage from ports in British possessions, etc. (1) Her Majesty may by Order in Council provide that section 1(3) of this Act shall have effect as if the reference herein to the United Kingdom included a reference to all or any of the following territories, that is -

(a) the Isle of Man;

(b) any of the Channel Islands specified in the Order;

(c) any colony specified in the Order (not being a colony for whose external relations a country other than the United Kingdom is responsible);

(d) any associated state (as defined by section 1(3) of the West Indies Act 1967) specified in the Order;

(e) any country specified in the Order, being a country outside Her Majesty's dominions in which Her Majesty has jurisdiction in right of Her Majesty's Government of the United Kingdom.

(2) An Order in Council under this section may be varied or revoked by a subsequent Order in Council.

6. Supplemental. (1) This Act may be cited as the Carriage of Goods by Sea Act 1971.

(2) It is hereby declared that this Act extends to Northern Ireland.

(3) The following enactments shall be repealed, that is-

(a) the Carriage of Goods by Sea Act 1924,

(b) section 12(4)(a) of the Nuclear Installations Act 1965,

and without prejudice to section 38(1) of the

Interpretation Act 1889, the reference to the said Act of 1924 in section 1(1)(i)(ii) of the Hovercraft Act 1968 shall include a reference to this Act.

(4) It is hereby declared that for the purposes of Article VIII of the Rules section 18 of the Merchant Shipping Act 1979 which entirely exempts shipowners and others in certain circumstances from liability for loss of, or damage to goods) is a provision relating to limitation of liability.

(5) This Act shall come into force on such day as her Majesty may by Order in Council appoint, and, for the purposes of the transition from the law in force immediately before the day appointed under this subsection to the provisions of this Act, the Order appointing the day may provide that those provisions shall have effect subject to such transitional provisions as may be contained in the Order.

SCHEDULE

THE HAGUE RULES AS AMENDED BY THE BRUSSELS PROTOCOL 1968

ARTICLE I.

In these Rules the following words are employed, with the meanings set out below:-

(a) 'Carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) 'Contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as

aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) 'Goods' incudes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by 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 II.

Subject to the provisions of Article VI, 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 III.

1. The carrier shall be bound before and at the beginning of the voyage to exercise the 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 IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things -

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods.

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with 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.

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

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

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

Subject to paragraph 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.

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

6 bis. An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.

7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands, be a 'shipped' bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article III, shall for the purpose of this article be deemed to constitute a 'shipped' bill of lading.

8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

ARTICLE IV.

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

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

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

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

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

(d) Act of God.

(e) Act of war.

(f) Act of public enemies.

(g) Arrest or restraint of princes, rulers or people, or seizure under legal process.

(h) Quarantine restrictions.

(i) Act or omission of the shipper or owner of the goods, his agent or representative.

(j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.

(k) Riots and civil commotions.

(l) Saving or attempting to save life or property at sea.

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.

(n) Insufficiency of packing.

(o) Insufficiency or inadequacy of marks.

(p) Latent defects not discoverable by due diligence.

(q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

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

5.(a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or

in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

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

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

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

(d) The unit of account mentioned in this Article is the special drawing right as defined by the International Monetary Fund. The amounts mentioned in sub-paragraph (a) of this paragraph shall be converted into national currency on the basis of the value of that currency on a date to be determined 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-paragragh (a) of this paragraph, if embodied in the bill of lading, shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

(g) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph.

(h) Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.

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

ARTICLE IV BIS.

1. The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.

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

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

4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

ARTICLE V.

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 resonsibilities and obligations under these Rules, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper. The provisions of these Rules shall not be applicable to charter-parties, but if bills of lading are issued in the

case of a ship under a charter-party they shall comply with the terms of these Rules. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

AVERAGE VI.

Notwithstanding the provisions of the preceding articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

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

ARTICLE VII.

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

ARTICLE VIII.

The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

ARTICLE IX.

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

ARTICLE X.

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

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

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

(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract,

whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

[The last two paragraphs of this article are not reproduced. They require contracting States to apply the Rules to bills of lading mentioned in the article and authorise them to apply the Rules to other bills of lading.]

[Articles 11 to 16 of the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on 25 August 1924 are not reproduced. They deal with the coming into force of the Convention, procedure for ratification, accession and denunciation, and the right to call for a fresh conference to consider amendments to the Rules contained in the Convention.]

ANNEX I

UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA 1978

Preamble

THE STATES PARTIES TO THIS CONVENTION,

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

HAVING DECIDED to conclude a Convention for this purpose and have thereto agreed as follows:

PART I. GENERAL PROVISIONS

Article 1. Definitions

In this Convention:

1. "Carrier" means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.
2. "Actual carrier" means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.
3. "Shipper" means any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or

in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.

4. "Consignee" means the person entitled to take delivery of the goods.

5. "Goods" includes live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if supplied by the shipper.

6. "Contract of carriage by sea" means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea.

7. "Bill of lading" means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

8. "Writing" includes, inter alia, telegram and telex.

Article 2. Scope of application

1. The provisions of this Convention are applicable to all contracts of carriage by sea between two different States; if:

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

Contracting State, or

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

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

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

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

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

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

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

Article 3. Interpretation of the Convention

In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity.

PART II. LIABILITY OF THE CARRIER

Article 4. Period of responsibility

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

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

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

(b) until the time he has delivered the goods:
  (i) by handing over the goods to the consignee; or
  (ii) in cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract

or with the law or with the usage of the particular trade, applicable at the port of discharge; or

(iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.

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

Article 5. Basis of liability

1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.

3. The person entitled to make a claim for the loss of goods may treat the goods as lost if they have not been

delivered as required by article 4 within 60 consecutive days following the expiry of the time for delivery according to paragraph 2 of this article.

4. (a) The carrier is liable

(i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;

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

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

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

or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.

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

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

Article 6. Limits of liability

1. (a) The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

   (b) The liability of the carrier for delay in delivery according to the provisions of article 5 is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea.

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

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 (a) of this article, the following rules apply:

(a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.

(b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.

3. Unit of account means the unit of account mentioned in article 26.

4. By agreement between the carrier and the shipper, limits of liability exceeding those provided for in paragraph 1 may be fixed.

Article 7. Application to non-contractual claims

1. The defences and limits of liability provided for in this Convention apply in any action against the carrier in respect of loss or damage to the goods covered by the contract of carriage by sea, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise.

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

3. Except as provided in article 8, the aggregate of the amounts recoverable from the carrier and from any persons referred to in paragraph 2 of this article shall not exceed the limits of liability provided for in this Convention.

Article 8. Loss of right to limit responsibility

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

2. Notwithstanding the provisions of paragraph 2 of article 7, a servant or agent of the carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or

omission of such servant or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

Article 9. Deck cargo

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

2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier must insert in the bill of lading or other document evidencing the contract of carriage by sea a statement to that effect. In the absence of such a statement the carrier has the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier is not entitled to invoke such an agreement against a third party, including a consignee, who has acquired the bill of lading in good faith.

3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article or where the carrier may not under paragraph 2 of this article invoke an agreement for carriage on deck, the carrier, notwithstanding the provisions of paragraph 1 of article 5, is liable for loss of or damage to the goods, as well as for delay in delivery, resulting solely from the carriage on deck, and the extent of his liability is to be determined in accordance with the provisions of article 6 or article 8 of this Convention, as the case may be.

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

Article 10. Liability of the carrier and actual carrier

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

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

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

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

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

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

Article 11. Through carriage

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

2. The actual carrier is responsible in accordance with the provisions of paragraph 2 of article 10 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge.

PART III. LIABILITY OF THE SHIPPER

Article 12. General rule

The shipper is not liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor is any servant or agent of the shipper liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part.

Article 13. Special rules on dangerous goods

1. The shipper must mark or label in a suitable manner dangerous goods as dangerous.

2. Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper must inform him of the dangerous character of the goods and, if necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character:

   (a) the shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and

   (b) the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

3. The provisions of paragraph 2 of this article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character.

4. If, in cases where the provisions of paragraph 2, subparagraph (b), of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 5.

PART IV. TRANSPORT DOCUMENTS

Article 14. Issue of bill of lading

1. When the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading.

2. The bill of lading may be signed by a person having authority from the carrier. A bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.

3. The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.

Article 15. Contents of bill of lading

1. The bill of lading must include, inter alia, the following particulars:

   (a) the general nature of the goods, the leading marks necessary for identification of the goods,

an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of all the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

(b) the apparent condition of the goods;

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

(d) the name of the shipper;

(e) the consignee if named by the shipper;

(f) the port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading;

(g) the port of discharge under the contract of carriage by sea;

(h) the number of originals of the bill of lading, if more than one;

(i) the place of issuance of the bill of lading;

(j) the signature of the carrier or a person acting on his behalf;

(k) the freight to the extent payable by the consignee or other indication that freight is payable by him;

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

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

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

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

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

3. The absence in the bill of lading of one or more particulars referred to in this article does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in paragraph 7 of article 1.

Article 16. Bills of lading: reservations and evidentiary effect

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if

he had no reasonable means of checking such particulars, the carrier or such other person must insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.

2. If the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition.

3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:

(a) the bill of lading is prima facie evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and

(b) proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein.

4. A bill of lading which does not, as provided in paragraph 1, subparagraph (k) of article 15, set forth the freight or otherwise indicate that freight is payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, is prima facie evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier is not admissible when the bill of lading has been transferred

to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

Article 17. Guarantees by the shipper

1. The shipper is deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper must indemnify the carrier against the loss resulting from inaccuracies in such particulars. The shipper remains liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity in no way limits his liability under the contract of carriage by sea to any person other than the shipper.

2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss resulting from the issuance of the bill of lading by the carrier, or by a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, is void and of no effect as against any third party, including a consignee, to whom the bill of lading has been transferred.

3. Such letter of guarantee or agreement is valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including a consignee, who acts in reliance on the description of the goods in the bill of lading. In the latter case, if the reservation omitted relates to

particulars furnished by the shipper for insertion in the bill of lading, the carrier has no right of indemnity from the shipper pursuant to paragraph 1 of this article.

4. In the case of intended fraud referred to in paragraph 3 of this article the carrier is liable, without the benefit of limitation of liability provided for in this Convention, for the loss incurred by a third party, including a consignee, because he has acted in reliance on the description of the goods in the bill of lading.

Article 18. Documents other than bills of lading

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

PART V. CLAIMS AND ACTIONS

Article 19. Notice of loss, damage or delay

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

2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply

correspondingly if notice in writing is not given within 15 consecutive days after the day when the goods were handed over to the consignee.

3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

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

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

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

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

8. For the purpose of this article, notice given to a person acting on the carrier's or the actual carrier's behalf, including the master or the officer in charge of the ship, or to a person acting on the shipper's behalf is deemed to have been given to the carrier, to the actual carrier or to the shipper, respectively.

Article 20. Limitation of actions

1. Any action relating to carriage of goods under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

2. The limitation period commences on the day on which the carrier has delivered the goods or part thereof or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered.

3. The day on which the limitation period commences is not included in the period.

4. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

5. An action for indemnity by a person held liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted. However, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.

Article 21. Jurisdiction

1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or

(b) the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(c) the port of loading or the port of discharge; or

(d) any additional place designated for that purpose in the contract of carriage by sea.

2.(a) Notwithstanding the preceding provisions of this article, an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgment that may subsequently be awarded to the claimant in the action.

(b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest.

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

4.(a) Where an action has been instituted in a court competent under paragraph 1 or 2 of this article or where judgment has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgment of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted;

(b) for the purpose of this article the institution of measures with a view to obtaining enforcement of a judgment is not to be considered as the starting of a new action;

(c) for the purpose of this article, the removal of an action to a different court within the same country, or to a court in another country, in accordance with paragraph 2(a) of this article, is not to be considered as the starting of a new action.

5. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an action, is effective.

Article 22. Arbitration

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

2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.

3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

(a) a place in a State within whose territory is situated:

(i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

(ii) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(iii) the port of loading or the port of discharge; or

(b) any place designated for that purpose in the arbitration clause or agreement.

4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

5. The provisions of paragraphs 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.

6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.

PART VI. SUPPLEMENTARY PROVISIONS

Article 23. Contractual stipulations

1. Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, is null and void.

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

3. Where a bill of lading or any other document evidencing the contract of carriage by sea is issued, it must contain a statement that the carriage is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.

4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null

and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 3 of this article, the carrier must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The carrier must, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.

Article 24. General average

1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage by sea or national law regarding the adjustment of general average.
2. With the exception of article 20, the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.

Article 25. Other conventions

1. This Convention does not modify the rights or duties of the carrier, the actual carrier and their servants or

agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.

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

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

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

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

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

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

Article 26. Unit of account

1. The unit of account referred to in article 6 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 6 are to be converted into the national currency of a State according to the value of such currency at the date of judgment or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency in terms of the Special Drawing Right of a Contracting State which is not a member of the International Monetary Fund is to be calculated in a manner determined by that State.

2. Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, or at the time of ratification, acceptance, approval, or accession or at any time thereafter, declare that the limits of liability

provided for in this Convention to be applied in their territories shall be fixed as:

> 12,500 monetary units per package or other shipping unit or 37.5 monetary units per kilogramme of gross weight of the goods.

3. The monetary unit referred to in paragraph 2 of this article corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amounts referred to in paragraph 2 into the national currency is to be made according to the law of the State concerned.

4. The calculation mentioned in the last sentence of paragraph 1 and the conversion mentioned in paragraph 3 of this article is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for the amounts in article 6 as is expressed there in units of account. Contracting States must communicate to the depositary the manner of calculation pursuant to paragraph 1 of this article, or the result of the conversion mentioned in paragraph 3 of this article, as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this article and whenever there is a change in the manner of such calculation or in the result of such conversion.

PART VII. FINAL CLAUSES

Article 27. Depositary

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

Article 28. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States until 30 April 1979 at the Headquarters of the United Nations, New York.
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. After 30 April 1979, this Convention will be open for accession by all States which are not signatory States.
4. Instruments of ratification, acceptances, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 29. Reservations

No reservations may be made to this Convention.

Article 30. Entry into Force

1. This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the 20th instrument of ratification, acceptance, approval or accession.
2. For each State which becomes a Contracting State to this Convention after the date of the deposit of the 20th instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.
3. Each Contracting State shall apply the provisions of this Convention to contracts of carriage by sea concluded

on or after the date of the entry into force of this Convention in respect of that State.

Article 31. Denunciation of other conventions

1. Upon becoming a Contracting State to this Convention, any State party to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924 (1924 Convention) must notify the Government of Belgium as the depositary of the 1924 Convention of its denunciation of the said Convention with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.
2. Upon the entry into force of this Convention under paragraph 1 of article 30, the depositary of this Convention must notify the Government of Belgium as the depositary of the 1924 Convention of the date of such entry into force, and of the names of the Contracting States in respect of which the Convention has entered into force.
3. The provisions of paragraphs 1 and 2 of this article apply correspondingly in respect of States parties to the Protocol signed on 23 February 1968 to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924.
4. Notwithstanding article 2 of this Convention, for the purposes of paragraph 1 of this article, a contracting State may, if it deems it desirable, defer the denunciation of the 1924 Convention and of the 1924 Convention as modified by the 1968 Protocol for a maximum period of five years from the entry into force of this Convention. It will then notify the Government of Belgium of its

intention. During this transitory period, it must apply to the Contracting States this Convention to the exclusion of any other one.

Article 32. Revision and amendment

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

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

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

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

2. A revision conference is to be convened by the depositary when not less than one-fourth of the Contracting States so request.

3. Any decision by the conference must be taken by a two-thirds majority of the participating States. The

amendment is communicated by the depositary to all the Contracting States for acceptance and to all the States signatories of the Convention for information.

4. Any amendment adopted enters into force on the first day of the month following one year after its acceptance by two-thirds of the Contracting States. Acceptance is to be effected by the deposit of a formal instrument to that effect, with the depositary.

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

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

Article 34. Denunciation

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

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

DONE at Hamburg, this thirty-first day of March one thousand nine hundred and seventy-eight, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

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

ANNEX II

COMMON UNDERSTANDING ADOPTED BY THE UNITED NATIONS CONFERENCE ON THE CARRIAGE OF GOODS BY SEA

It is the common understanding that the liability of the carrier under this Convention is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule.

Convention for The Unification of Certain Rules Relating to International Transportation by Air

Signed at Warsaw, On 12 October 1929

The President of the German Reich, the Federal President of the Republic of Austria, His Majesty the King of the Belgians, the President of the United States of Brazil, His Majesty the King of the Bulgarians, the President of the Nationalist Government of China, His Majesty the King of Denmark and Iceland, His Majesty the King of Egypt, His Majesty the King of Spain, the Chief of State of the Republic of Estonia, the President of the Republic of Finland, the President of the French Republic,

PROTOCOL

To Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air

Warsaw, 12 October 1929
Signed at The Hague, on 28 September 1955

THE GOVERNMENTS UNDER-SIGNED

CONSIDERING that it is desirable to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929,

HAVE AGREED as follows:

His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India, the President of the Hellenic Republic, His Most Serene Highness the Regent of the Kingdom of Hungary, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Latvia, Her Royal Highness the Grand Duchess of Luxemburg, the President of the United Mexican States, His Majesty the King of Norway, Her Majesty the Queen of the Netherlands, the President of the Republic of Poland, His Majesty the King of Roumania, His Majesty the King of Sweden, the Swiss Federal Council, the President of the Czechoslovak Republic, the Central Executive Committee of the Union of Soviet Republics, the President of the United States of Venezuela, His Majesty the King of Yugoslavia;

Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier,

Have nominated to this end their respective Plenipotentiaries, who. being thereto duly authorized, have concluded and signed the following convention:

CHAPTER I

SCOPE - DEFINITIONS

Article 1

(1) This Convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

CHAPTER I

AMENDMENTS TO THE CONVENTION

Article I

In article 1 of the Convention-

a) paragraph 2 shall be deleted and replaced by the following:-

"2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the

(2) For the purposes of this Convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transhipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this Convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention."

b) paragraph 3 shall be deleted and replaced by the following:-

"3. Carriage to be performed by several successive air carriers is deemed, for the purpose of this Convention, to be one

Party shall not be deemed to be international for the purposes of this Convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this Convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State."

Article 2

(1) This Convention shall apply to transportation

Article II

In Article 2 of the Convention - paragraph 2

performed by the State or by legal entities constituted under public law provided it falls within the conditions laid down in article 1.

(2) This Convention shall not apply to transportation performed under the terms of any international postal Convention.

shall be deleted and replaced by the following:-

"2. This Convention shall not apply to carriage of mail and postal packages.

CHAPTER II

TRANSPORTATION DOCUMENTS

SECTION 1. - PASSENGER TICKET

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) the place and date of issue;

(b) the place of departure and of destination;

(c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping

Article III

In Article 3 of the Convention -

a) paragraph 1 shall be deleted and replaced by the following:-

"1. In respect of the carriage of passengers a ticket shall be delivered containing:

a) an indication of the places of departure and destination;

b) if the places of

places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) the name and address of the carrier or carriers;

(e) a statement that the transportation is subject to the rules relating to liability established by this Convention.

(2) the absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this Convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage."

b) paragraph 2 shall be deleted and replaced by the following:-

"2. The passenger ticket shall constitute prima facie evidence of the conclusion and conditions of the contract of

carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22.

SECTION 2. - BAGGAGE CHECK

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

Article IV

In Article 4 of the Convention -

a) paragraphs 1, 2 and 3 shall be deleted and replaced by the following:-

"1. In respect of the carriage of registered

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(a) the place and date of issue;

(b) the place of departure and of destination;

(c) the name and address of the carrier or carriers;

(d) the number of the passenger ticket;

(e) a statement that delivery of the baggage will be made to the bearer of the baggage check;

(f) the number and weight of the packages;

(g) the amount of the value declared in accordance with article 22(2);

(h) a statement that the transportation is subject to the rules relating to liability established by this Convention.

(4) The absence, irregularity, or loss of the baggage check shall not

baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a passenger ticket which complies with the provisions of Article 3, paragraph 1, shall contain:-

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

c) a notice to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in

affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this Convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

respect of loss or of damage to baggage.

b) paragraph 4 shall be deleted and replaced by the following:-

"2. The baggage check shall constitute prima facie evidence of the registration of the baggage and of the conditions of the contract of carriage. The absence, irregularity or loss of the baggage check does not effect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if the carrier takes charge of the baggage without a baggage check having been delivered or if the baggage check (unless combined with or incorporated in the passenger ticket which complies with the provisions of Article 3, paragraph 1c) does not include the notice required by 1c) of this Article, he shall not be entitled to

avail himself of the provisions of Article 22, paragraph 2."

Article 5

(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air waybill"; every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity, or loss of this document shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of Article 9, be none the less governed by the rules of this Convention.

Article 6

(1) The air waybill shall be made out by the consignor in three original parts and be handed over with the goods.

Article V

In Article 6 of the Convention -

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

(3) The carrier shall sign on acceptance of the goods.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

paragraph 3 shall be deleted and replaced by the following:-

"3. The carrier shall sign prior to the loading of the cargo on board the aircraft."

Article 7

The carrier of goods has the right to require the consignor to make out

separate waybills when there is more than one package.

Article 8

The air waybill shall contain the following particulars:
(a) the place and date of its execution;
(b) the place of departure and of destination;
(c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;
(d) the name and address of the consignor;
(e) the name and address of the first carrier;
(f) the name and address of the consignee, if the case so requires;
(g) the nature of the goods;

Article VI

Article 8 of the Convention shall be deleted and replaced by the following:-

"The air waybill shall contain:

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

c) a notice to the consignor to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the

(h) the number of packages, the method of packing, and the particular marks or numbers upon them;

(i) the weight, the quantity, the volume, or dimensions of the goods;

(j) the apparent condition of the goods and of the packing;

(k) the freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(l) if the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(m) the amount of the value declared in accordance with Article 22(2);

(n) the number of parts of the air waybill;

(o) the documents handed to the carrier to accompany the air waybill;

(p) the time fixed for the completion of the transportation and a brief note of the route to be

Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to cargo."

followed, if these matters have been agreed upon;

(q) a statement that the transportation is subject to the rules relating to liability established by this Convention.

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability.

Article 10

(1) The consignor shall be responsible for the correctness of the particulars and statements

Article VII

Article 9 of the Convention shall be deleted and replaced by the following:-

"If, with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the air waybill does not include the notice required by Article 8, paragraph c), the carrier shall not be entitled to avail himself of the provisions of Article 22, paragraph 2."

Article VIII

In Article 10 of the Convention -

paragraph 2 shall be deleted and replaced by the

relating to the goods which he inserts in the air waybill.

(2) The consignor shall be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

following:-

"2. The consignor shall indemnify the carrier against all damage suffered by him, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor."

Article 11

(1) The air waybill shall be prima facie evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of transportation.

(2) The statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of packages, shall be prima facie evidence of the facts stated; those relating to the quantity, volume, and condition of the goods

shall not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods.

Article 12

STOPPAGE IN TRANSIT

(1) Subject to his liability to carry out all his obligations under the contract of transportation, the consignor shall have the right to dispose of the goods by withdrawing them at the airport of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination, or in the course of the journey to a person other than the consignee named in the air waybill, or by requiring

them to be returned to the airport of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air waybill delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill.

(4) The right conferred on the consignor shall cease at the moment when that of the consignee begins in

accordance with Article 13, below. Nevertheless, if the consignee declines to accept the waybill or the goods, or if he cannot be communicated with, the consignor shall resume his right of disposition.

Article 13

CONSIGNEE'S RIGHTS

Except in the circumstances set out in the preceding article, the consignee shall be entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air waybill and to deliver the goods to him, on payment of the charges due and on complying with the conditions of transportation set out in the air waybill.

(2) Unless it is otherwise agreed, it shall be the duly of the carrier to give notice to the consignee as soon as the goods arrive.

SEVEN DAYS DELAY - PRESUMPTION OF LOSS

(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee shall be entitled to put into force against the carrier the rights which flow from the contract of transportation.

Article 14
SUIT FOR USE OF ANOTHER

The consignor and the consignee can respectively enforce all the rights given them by Articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

Article 15
RIGHTS OF CONSIGNOR AND CONSIGNEE INTER SE

(1) Articles 12, 13, and 14 shall not affect either the relations of the consignor and the consignee with each other or the relations of third parties whose rights are derived either from the consignor or from the consignee.

(2) The provisions of Articles 12, 13, and 14 can only be varied by express provision in the air waybill.

Article IX

To Article 15 of the Convention -

the following paragraph shall be added:-

"3. Nothing in this Convention prevents the issue of a negotiable air waybill."

Article 16
CUSTOMS DOCUMENTS

(1) The Consignor must furnish such information and attach to the air waybill such documents as are necessary to meet the formalities of customs, octroi, or police before the goods can be delivered to the consignee. The consignor shall be liable to the carrier for any

damage occasioned by the absence, insufficiency, or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

(2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

CHAPTER III
LIABILITY OF THE CARRIER
Article 17
INJURY TO PASSENGER

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18

DAMAGE TO GOODS AND BAGGAGE

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

DEFINITION OF AIR TRANSPORTATION

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any

transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Article 19
DAMAGE BY DELAY

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

Article 20

EXEMPTION - ALL NECESSARY MEASURES TAKEN - IMPOSSIBILITY

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

ERROR IN PILOTING, HANDLING OF AIRCRAFT OR NAVIGATION

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article X

Paragraph 2 of Article 20 of the Convention shall be deleted.

Article 21

CONTRIBUTORY NEGLIGENCE

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Article 22

LIMIT OF LIABILITY - PASSENGERS

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the Court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special

Article XI

Article 22 of the Convention shall be deleted and replaced by the following:-

1. In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of

contract, the carrier and the passenger may agree to a higher limit of liability.

LIMIT OF LIABILITY - BAGGAGE AND GOODS

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

2a) In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogramme, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the passenger's or consignor's actual interest in delivery at destination.

LIMIT OF
LIABILITY - PROPERTY IN
PASSENGERS' CHARGE

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

STANDARD OF CURRENCY

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

b) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

3. As regards objects of which the passenger takes charge himself the liability of the carrier is limited to five thousand francs per passenger.

4. The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of action, if that is later.

5. The sums mentioned in francs in this Article shall be deemed to refer to a currency limit consisting of sixty-five and a half milligrames of gold of millesimal fineness nine hundred. These sums may be converted into national

currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment."

Article 23
PROVISIONS RELIEVING
CARRIER NULL AND VOID

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Article XII

In Article 23 of the Convention, the existing provision shall be renumbered as paragraph 1 and another paragraph shall be added as follows:-

"2. Paragraph 1 of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried."

Article 24
REMEDY OF CONVENTION
EXCLUSIVE

(1) In the cases covered by

Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

(2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25
CARRIER'S WILFUL MISCONDUCT OR DEFAULT

(1) The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered

Article XIII

In Article 25 of the Convention - paragraphs 1 and 2 shall be deleted and replaced by the following:-

"The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause

to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."

Article XIV

After Article 25 of the Convention, the following article shall be inserted:-

"Article 25A

1. If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.

2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits.

3. The provisions of paragraphs 1 and 2 of this article shall not apply 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 26
RECEIPT OF
GOODS - WITHOUT COMPLAINT

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be prima facie evidence that the same have been delivered in good condition and in accordance with the document of transportation.

Article XV

In Article 26 of this Convention - paragraph 2 shall be deleted and replaced by the following:-

"2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case

NOTICE OF DAMAGE - 3 DAYS FOR BAGGAGE, 7 DAYS FOR GOODS, 14 DAYS FOR DELAY

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within three days from the date of receipt in the case of baggage and seven days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within fourteen days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his disposal."

Article 27
DEATH OF PERSON LIABLE - LIABILITY EXTENDED TO HIS ESTATE

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his estate.

Article 28
JURISDICTION AND PROCEDURE

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the Court at the place of destination.

(2) Questions of procedure shall be governed by the

law of the Court to which the case is submitted.

Article 29
TIME FOR SUIT - 2 YEARS

(1) The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the Court to which the case is submitted.

Article 30
SUIT AGAINST SUCCESSIVE AIR CARRIERS

(1) In the case of transportation to be performed by various successive carriers and

falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this Convention, and shall be deemed to be one of the contracting parties to the contract of transportation in so far as the contract deals with that part of the transportation which is performed under this supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a

right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place, These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

CHAPTER IV
PROVISIONS RELATING TO COMBINED TRANSPORTATION BY AIR AND LAND OR SEA

Article 31

(1) In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this Convention shall apply only to the transportation by

air, provided that the transportation by air falls within the terms of Article 1.

(2) Nothing in this Convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to other modes of transportation, provided that the provisions of this Convention are observed as regards the transportation by air.

CHAPTER V
GENERAL AND FINAL PROVISIONS

Article 32

AGREEMENTS INFRINGING RULES OF CONVENTION DECLARED NULL AND VOID

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties

purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this Convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of Article 28.

Article 33
CARRIER MAY REFUSE TO CARRY - MAY MAKE REGULATIONS

Nothing contained in this Convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this Convention.

Article 34
EXPERIMENTAL AND
EXTRA-ORDINARY FLIGHTS

This Convention shall not apply to international transportation by air performed by way of experimental trial by air navigation enterprises with the view to the establishment of regular lines of air navigation, nor shall it apply to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business.

Article 35
DEFINITION - "DAYS"

The expression "days" when used in this Convention means current days, not working days.

Article 36

This Convention is drawn up in French in a single copy which shall remain deposited in the archives

Article XVI

Article 34 of the Convention shall be deleted and replaced by the following:-

"The provisions of Articles 3 to 9 inclusive relating to documents of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business."

of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

Article 37

(1) This Convention shall be ratified. The instruments of ratification shall be deposited in the archives of the Ministry for Foreign Affairs of Poland, which shall give notice of the deposit to the Government of each of the High Contracting Parties.

(2) As soon as this Convention shall have been ratified by five of the High Contracting Parties it shall come into force as between them on the ninetieth day after the deposit of the fifth ratification. Thereafter it shall come into force between the High Contracting Parties which

shall have ratified and the High Contracting Party which deposits its instrument of ratification on the ninetieth day after the deposit.

(3) It shall be the duty of the Government of the Republic of Poland to notify the Government of each of the High Contracting Parties of the date on which this Convention comes into force as well as the date of the deposit of each ratification.

Article 38

(1) This Convention shall after it has come into force, remain open for adherence by any State.

(2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.

(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Article 39

(1) Any one of the High Contracting Parties may denounce this Convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Article 40

(1) Any High Contracting Party may, at the time of signature or of deposit of ratification or of adherence declare that the

acceptance which it gives to this Convention does not apply to all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or its authority, or any other territory under its suzerainty.

(2) Accordingly any High Contracting Party may subsequently adhere separately in the name of all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority or any other territory under its suzerainty which have been thus excluded by its original declaration.

(3) Any High Contracting Party may denounce this Convention, in accordance with its provisions, separately or for all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its

Article XVII

After Article 40 of the Convention, the following Article shall be inserted:-

"Article 40A

1. In Article 37, paragraph 2 and Article 40, paragraph 1, the expression 'High Contracting Party' shall mean 'State'. In all other cases, the expression 'High Contracting Party' shall mean a State whose ratification of or adherence to the Convention has become effective and whose denunciation thereof has not become effective.

2. For the purposes of the

sovereignty or to its authority, or any other territory under its suzerainty.

Article 41

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this Convention to call for assembling of a new international conference in order to consider any improvements which may be made in this Convention. To this end it will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such Conference.

This Convention, done at Warsaw on October 12, 1929, shall remain open for signature until January 31, 1930.

Convention the word territory means not only the metropolitan territory of a State but also all other territories for the foreign relations of which that State is responsible."

Additional Protocol
With reference to
Article 2

The High Contracting Parties reserve to themselves the right to declare at the time of ratification or of adherence that the first paragraph of Article 2 of this Convention shall not apply to international transportation by air performed directly by the State, its colonies, protectorates, or mandated territories, or by any other territory under its sovereignty, suzerainty, or authority.

CHAPTER II
SCOPE OF APPLICATION OF THE CONVENTION AS AMENDED

Article XVIII

The Convention as amended by this Protocol shall apply to international carriage as defined in Article 1 of the Convention, provided that the places of departure and destination referred to in that Article are situated either in the territories of two parties to this Protocol or within the territory of a single party to this Protocol with an agreed stopping place within the territory of another State.

CHAPTER III
FINAL CLAUSES

Article XIX

As between the Parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as one single instrument and shall be known as the Warsaw Convention as amended at The Hague, 1955.

Article XX

Until the date on which this Protocol comes into force in accordance with the provisions of Article XXII, paragraph 1, it shall remain open for signature on behalf of any State which up to that date has ratified or adhered to the Convention or which has participated in the Conference at which this Protocol was adopted.

Article XXI

1. This Protocol shall be subject to ratification by the signatory States.

2. Ratification of this Protocol by any State which is not a Party to the Convention shall have effect of adherence to the Convention as amended by this Protocol.

3. The instruments of ratification shall be deposited with the Government of the People's Republic of Poland.

Article XXII

1. As soon as thirty signatory States have deposited their instruments of ratification of this Protocol, it shall come into force between them on the nineteenth day after the deposit of the thirtieth instrument of ratification. It shall come into force for each State ratifying thereafter on the ninetieth day after the deposit of its instrument of ratification.

2. As soon as this Protocol comes in force it shall be registered with the United Nations by the Government of the People's Republic of Poland.

Article XXIII

1. This Protocol shall, after it has come into force, be open for adherence by any non-signatory State.

2. Adherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol.

3. Adherence shall be effected by the deposit of an instrument of adherence with the Government of the People's Republic of Poland and shall take effect on the ninetieth day after the deposit.

Article XXIV

1. Any Party to this Protocol may denounce the Protocol by notification addressed to the Government of the People's Republic of Poland.

2. Denunciation shall take effect six months after the date of receipt by the Government of the People's Republic of Poland of the notification of denunciation.

3. As between the Parties to this Protocol, denunciation by any of them of the Convention in accordance with Article 39 thereof shall not be construed in any way as a denunciation of the Convention as amended by this Protocol.

Article XXV

1. This Protocol shall apply to all territories for the foreign relations of which a State Party to this Protocol is responsible, with the exception of territories in respect of which a declaration has been made in accordance with paragraph 2 of this Article.

2. Any State may, at the time of deposit of its instrument of ratification or adherence, declare that its acceptance of this Protocol does not apply to any one or more of the territories for the foreign relations of which such State is responsible.

3. Any State may subsequently, by notification to the Government of the People's Republic of Poland, extend the application of this Protocol to any or all of the territories regarding which it has made a declaration in accordance with paragraph 2 of this Article. The notification shall take effect on the ninetieth day after its receipt by that Government.

4. Any State Party to this Protocol may denounce it, in accordance with the provisions of Article XXIV, paragraph 1, separately for any or all of the territories for the foreign relations of which such State is responsible.

Article XXVI

No reservation may be made to this Protocol except that a State may at any time declare by a notification addressed to the Government of the People's Republic Of Poland that the Convention as amended by this Protocol shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities.

Article XXVII

The Government of the People's Republic of Poland shall give immediate notice to the Governments of all States signatories to the Convention or this Protocol, all States Parties to the Convention or this Protocol, and all

States Members of the International Civil Aviation Organization or of the United Nations and to the International Civil Aviation Organization:

a) of any signature of this Protocol and the date thereof;

b) of the deposit of any instrument of ratification or adherence in respect of this Protocol and the date thereof;

c) of the date on which this Protocol comes into force in accordance with Article XXII, paragraph 1;

d) of the receipt of any notification of denunciation and the date thereof;

e) of the receipt of any declaration or notification made under Article XXV and the date thereof; and

f) of the receipt of any notification made under Article XXVI and the date thereof.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Protocol.

DONE at The Hague on the twenty-eighth day of the month of September of the year One Thousand Nine Hundred and Fifty-Five, in three authentic texts in the English, French and Spanish languages. In the case of any inconsistency, the text in French language, in which language the Convention was drawn up, shall prevail.

This Protocol shall be deposited with the Government of the People's Republic of Poland with which, in accordance with Article XX, it shall remain open for signature, and that Government shall send certified copies thereof to the Governments of all States signatories to the Convention or this Protocol, all States Parties to the

Convention or this Protocol, and all States Members of the International Civil Aviation Organization or of the United Nations, and to the International Civil Aviation Organization.

CONVENTION

Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier.

THE STATES SIGNATORY TO THE PRESENT CONVENTION

NOTING that the Warsaw Convention does not contain particular rules relating to international carriage by air performed by a person who is not a party to the agreement for carriage.

CONSIDERING that it is therefore desirable to formulate rules to apply in such circumstances

HAVE AGREED AS FOLLOWS:

Article I

In this Convention:

a) "Warsaw Convention" means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, or the Warsaw Convention as amended at The Hague, 1955, according to whether the carriage under the agreement referred to in paragraph b) is governed by the one or by the other:

b) "contracting carrier" means a person who as a principal makes an agreement for carriage

governed by the Warsaw Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor:

c) "actual carrier" means a person, other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated in paragraph b) but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention. Such authority is presumed in the absence of proof to the contrary.

Article II

If an actual carrier performs the whole or part of carriage which, according to the agreement referred to in Article I paragraph b), is governed by the Warsaw Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Convention, be subject to the rules of the Warsaw Convention, the former for the whole of the carriage contemplated in the agreement, the latter solely for the carriage which he performs.

Article III

1. The acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

2. The acts and omissions of the contracting carrier and of his servants and agents acting within the scope of

their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the limits specified in Article 22 of the Warsaw Convention. Any special agreement under which the contracting carrier assumes obligations not imposed by the Warsaw Convention or any waiver of rights conferred by that Convention or any special declaration of interest in delivery at destination contemplated in Article 22 of the said Convention, shall not affect the actual carrier unless agreed to by him.

Article IV

Any complaint to be made or order to be given under the Warsaw Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevertheless, orders referred to in Article 12 of the Warsaw Convention shall only be effective if addressed to the contracting carrier.

Article V

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if he proves that he acted within the scope of his employment, be entitled to avail himself of the limits of liability which are applicable under this Convention to the carrier whose servant or agent he is unless it is proved that he acted in a manner which, under the Warsaw Convention, prevents the limits of liability from being invoked.

Article VI

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within the scope of their employment, shall not exceed the highest amount which could be awarded against either the contacting carrier or the actual carrier under this Convention, but none of the person mentioned shall be liable for a sum in excess of the limit applicable to him.

Article VII

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.

Article VIII

Any action for damages contemplated in Article VII of this Convention must be brought at the option of the plaintiff, either before a court in which an action may be brought against the contracting carrier, as provided in Article 28 of the Warsaw Convention or before the court

having jurisdiction at the place where the actual carrier is ordinarily resident or has his principal place of business.

Article IX

1. Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Convention or to fix a lower limit than that which is applicable according to this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole agreement, which shall remain subject to the provisions of this Convention.

2. In respect of the carriage performed by the actual carrier, the preceding paragraph shall not apply to contractual provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.

3. Any clause contained in an agreement for carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless, for the carriage of cargo arbitration clauses are allowed, subject to this Convention, if the arbitration is to take place in one of the jurisdictions referred to in Article VIII.

Article X

Except as provided in Article VII, nothing in this Convention shall affect the rights and obligations of the two carriers between themselves.

Article XI

Until the date on which this Convention comes into force in accordance with the provisions of Article XIII, it shall remain open for signature on behalf of any State which at that date is a Member of the United Nations or of any of the Specialized Agencies.

Article XII

1. This Convention shall be subject to ratification by the signatory States.

2. The instruments of ratification shall be deposited with the Government of the United States of Mexico.

Article XIII

1. As soon as five of the signatory States have deposited their instruments of ratification of the Convention, it shall come into force between them on the ninetieth day after the date of the deposit of the fifth instrument of ratification. It shall come into force for each State ratifying thereafter on the ninetieth day after the deposit of its instrument of ratification.

2. As soon as this Convention comes into force, it shall be registered with the United Nations and the International Civil Aviation Organization by the Government of the United States of Mexico.

Article XIV

1. This Convention shall, after it has come into force, be open for accession by any State Member of the United Nations or of any of the Specialized Agencies.
2. The accession of a State sahll be effected by the deposit of an instrument of accession with the Government of the United States of Mexico and shall take effect as from the ninetieth day after the date of such deposit.

Article XV

1. Any Contracting State may denounce this Convention by notification addressed to the Government of the United States of Mexico.
2. Denunciation shall take effect six months after the date of receipt by the Government of the United States of Mexico of the notification of denunciation.

Article XVI

1. Any Contracting State may at the time of its ratification of or accession to this Convention or at any time thereafter declare by notification to the Government of the United States of Mexico that the Convention shall extend to any of the territories for whose international relations it is responsible.
2. The Convention shall, ninety days after the date of the receipt of such notification by the government of the United States of Mexico, extend to the territories named therein.

3. Any Contracting State may denounce this Convention in accordance with the provisions of Article XV, separately for any or all of the territories for the international relations of which such State is responsible.

Article XVII

No reservation may be made to this Convention.

Article XVIII

The Government of the United States of Mexico shall give notice to the International Civil Aviation Organization and to all States Members of the United Nations or of any of the Specialized Agencies:

a) of any signature of this Convention and the date thereof:

b) of the deposit of any instrument of ratification or accession and the date thereof:

c) of the date on which this Convention comes into force in accordance with Article XIII, paragraph 1:

d) of the receipt of any notification of denunciation and the date thereof:

e) of the receipt of any declaration or notification made under Article XVI and the date thereof:

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

DONE at Guadalajara on the eighteenth day of September One Thousand Nine Hundred and Sixty-One in three authentic texts drawn up in English, French and Spanish languages. In case of any inconsistency the text in the

French language, in which language the Warsaw Convention of 12 October 1929 was drawn up, shall prevail. The Government of the United Sates of Mexico will establish an official translation of the text of the Convention in the Russian language.

The Convention shall be deposited with the Government of the United States of Mexico with which in accordance with Article XI, it shall remain open for signature and that Government shall send certified copies thereof to the International Civil Aviation Organization and to all States Members of the United nations or of any Specialized Agency.