

# THE UNCITRAL DRAFT CONVENTION ON THE CARRIAGE OF GOODS (WHOLLY OR PARTLY) (BY SEA)

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*This paper constitutes systematic overview of the UNCITRAL Draft Convention on the Carriage of Goods (Wholly or Partly) (by Sea). The author elaborates on important and controversial provisions of Draft Convention dealing with scope of application, mandatory character of the provisions of the Draft Convention, period of responsibility, obligations and liability of the carrier as well as of the shipper, transport documents, right of control, limits of liability, time for suit, jurisdiction, arbitration etc. Differences between Draft Convention and international legislation in force are pointed out.*

*Key words: UNCITRAL Draft Convention on the Carriage of Goods (Wholly or Partly) (by Sea), carriage of goods, liability of the carrier, liability of the shipper, international maritime law*

## I. INTRODUCTION

It has often been stated that for several decades there has been an increasing lack of uniformity in the regime of carriage of goods by sea owing to the 1968 and 1979 Protocols to the Brussels Bills of Lading Convention<sup>1</sup> having been ratified only by some of the States parties to the Convention<sup>2</sup>, to the

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<sup>1</sup> Convention Internationale pour l'Unification de Certaines Règles en Matière de Connaissance, 25 August 1924, as amended by the Protocols of 23 February 1968 and 21 December 1979.

<sup>2</sup> 65 States are still parties to the 1924 Convention, 7 States are parties only to the 1968 Protocol, 20 States are also parties to the 1979 Protocol.

entry into force of the Hamburg Convention<sup>3</sup> and to the enactment by several States of provisions frequently embodying rules from both the Brussels and the Hamburg Conventions.

Although these remarks are correct, so far the international situation is not as prejudiced as *prima facie* would suggest. In fact the core provisions of the Brussels Convention are still applied in most maritime countries and are voluntarily incorporated by a great many charterparties.

The fact remains, however, that the regime adopted in 1924, even with the amendments made by the two Protocols, is in part obsolete and does not satisfy the needs of to-day's maritime trade.

The main reasons are the following:

- (a) the period of application is limited to tackle-to-tackle;
- (b) the scope of application is restricted to contracts of carriage evidenced by or incorporated in bills of lading;
- (c) the Hague-Visby Rules do not apply to deck cargo;
- (d) the Hague-Visby Rules do not apply to economic loss caused by delay;
- (e) the restriction of the obligation to exercise due diligence to make a ship seaworthy at the time of the commencement of the voyage is no longer justified;
- (f) similarly, the exoneration of the carrier's liability in respect of loss of or damage to the goods caused by fault in the navigation and in the management of the ship is no longer justified;
- (g) the obligations and liability of the shipper are not adequately regulated;
- (h) there are no rules regulating electronic communication.

When the United Nations Commission on International Trade Law - UNCITRAL in 1996 considered the proposal to include in its work programme a review of current practices and laws in the area of carriage of goods by sea with a view to establishing the need for uniform rules where no such rules existed,<sup>4</sup> the Comité Maritime International (CMI) which had already carried out a thorough investigation into the liability regime in force, offered its assistance.

A Draft Outline Instrument was prepared by a CMI International Sub-Committee and after having been approved by the CMI Conference held in Singapore in February 2001, was submitted to UNCITRAL in December 2001.<sup>5</sup>

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<sup>3</sup> The United Nations Convention on the Carriage of Goods by Sea, 31 March 1978.

<sup>4</sup> Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), paragraphs 210 and 211.

<sup>5</sup> *CMI Yearbook 2001-Singapore II*, p. 532 and UNCITRAL document A/CN.9/WG.III/WP.21 of 8 January 2002.

At the ninth session of UNCITRAL Working Group III on Transport Law, held in New York from 15 to 26 April 2002, when the Draft Outline Instrument, renamed “Preliminary Draft Instrument on Carriage of Goods by Sea”, was considered, the Working Group decided that “*it would be also desirable to include within the scope of its discussions door-to-door operations and to deal with these operations by developing a regime that resolved any conflict between the draft instrument and provisions governing land carriage in cases where sea carriage was complemented by one or more land carriage segments*”<sup>6</sup> and the working assumption that the Draft Instrument should cover door-to-door transport operations was approved by UNCITRAL at its thirty-fifth session held later that year. The Draft Instrument, subsequently renamed “Draft convention on the carriage of goods [wholly or partly] [by sea]” was considered in the following year during the two sessions of the Working Group each year held in Vienna and New York and the second reading of the Draft Convention was completed in Vienna in November 2006. A third and last reading started at the nineteenth session held in New York in April this year and it is hoped will be completed at the next session, expected to take place in Vienna in October 2007. Thereafter the Draft Convention should be submitted to UNCITRAL for approval. After the first reading the original draft was revised by the UNCITRAL Secretariat and the revised text was published as document A/CN.9/WG.III/WP.56. A further revision was made after completion of the second reading, and the newly revised text was published as document A/CN.9/WG.III/WP.81.<sup>7</sup> The overview of the Draft Convention that follows is based on the Reports of the sessions of the Working Group and, in respect of the last session, also on personal notes taken during that session.

## II. AN OVERVIEW OF THE DRAFT CONVENTION

### 1. General scope of application

The scope of application (draft article 5) is based on the geographical connection of the carriage with a Contracting State. In the conventions in which

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<sup>6</sup> Report of the Working Group on Transport Law on the work of its ninth session (New York, 15-26 April 2002), Document A/CN.9/510 of 7 May 2002, para 32, p. 11.

<sup>7</sup> Available on the UNCITRAL website [www.uncitral.org/uncitral/en/commission/working\\_groups/3Transport.html](http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html)

the period of application is tackle to tackle or port to port the main connecting factor is the location of the port of loading (for the Hague-Visby Rules) or of the port of loading or port of discharge (for the Hamburg Rules) in a Contracting State. In the Draft Convention, when the scope of application is door-to-door, reference is made instead to the place of receipt and to the place of delivery (which may both be inland). Since, however, the sea leg is always required for the Draft Convention to apply, it has been decided that the ports of loading onto and discharge from a ship must still be considered relevant alternative connecting factors. Therefore for the Draft Convention to apply it is sufficient that the place of receipt, the port of loading, the port of discharge or the place of delivery be in a Contracting State. Note that no reference is made to the place where the transport document is issued or the contract is made, because such places may have no direct connection with the carriage. Nor is it provided any longer for the agreement of the parties to be a connecting factor, as in the Hague-Visby Rules and in the Hamburg Rules, since that could give rise to uncertainty as to the regime actually applicable, whether it be the Convention itself or the text implemented by the relevant Contracting State.

## 2. Mandatory character of the provisions of the Draft Convention

It is necessary to consider this issue at the outset, because its solution affects the structure of the Draft Convention. The very purpose of the Hague Rules had been to lay down limits to the freedom of contract, that in certain jurisdictions, such as the English jurisdiction, had been almost totally unconstrained, so that the carrier could exonerate himself from almost all liability as well as limit its liability to ridiculous amounts. The need to protect the shipper was felt necessary for two different reasons: first, to protect the shipper when he had very little bargaining power, if any; and second to foster trade by increasing the reliability of bills of lading in the sale of goods with payment against documents. This aim was achieved by excluding charter parties from the scope of the Hague Rules, because it was stressed that owners and charterers have equal bargaining power and, therefore, the charterers do not need any protection,<sup>8</sup> and by providing that

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<sup>8</sup> During the CMI Conference held in Goteborg in 1922, when the intention to convert the Rules drawn up as a model bill of lading into an international convention was discussed, a Danish shipowner, A.P. Möller, made the following remark (The *Travaux Préparatoires* of the Hague-Visby Rules, edited by F. Berlingieri, page 95):

the Rules have a mandatory character,<sup>9</sup> albeit with some limited exceptions.<sup>10</sup> The technique adopted in the Hamburg Rules was the same, save that there is no exception to the mandatory character of the Rules.<sup>11</sup> The Draft Convention follows the dual approach of the Hague and Hague-Visby Rules, but the exclusions in the scope of application of the Draft Convention and the situations where freedom of contract is permitted reflect modern trade requirements. A short analysis of the exclusions in the scope of application of the Draft Convention and of the provisions on freedom of contract follows.

### 2.1. Exclusions

While the Hague-Visby Rules adopt, in order to define the limits of the scope of application, a documentary approach and provide that they apply

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“It must be remembered that the call for reform and the reason that these Rules have been brought into being at all, as far as I understand it, has been owing to the position as regards liner bills of lading. Everyone knows the liner bill of lading is full of clauses in small print that few people have the good eyes to read and no one has the time to read. Merchants could justly say that there was no freedom of contract in liner bills of lading, and so far as I understand it the whole agitation for reform arose through that circumstance. Now as regards tramp shipping the position has always been and is to day quite different. Tramp shipping is done on a basis of free contract”.

<sup>9</sup> Article 3(8) of the Hague Rules so in fact provides:

*Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.*

<sup>10</sup> Article 6 of the Hague Rules and of the Hague-Visby Rules provides in fact that the carrier and the shipper are at liberty to enter into any agreement in respect of the rights and immunities of the carrier and his obligations provided that no bill of lading is issued and the cargo is not an ordinary commercial shipment.

<sup>11</sup> Article 23(1) of the Hamburg Rules so provides:

*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.*

to contracts of carriage covered by a bill of lading or “similar document of title”, thereby implicitly excluding charter parties, the Hamburg Rules adopt a contractual approach and provide that they generally apply to contracts of carriage by sea, but then expressly exclude charter parties. The best manner to define the scope of the Draft Convention has been the subject of a long debate. Three different approaches were in fact suggested: a) the traditional documentary approach of the Hague-Visby Rules, b) the contractual approach adopted by the Hamburg Rules and, c) a type of trade approach based on the distinction between the liner trade and the tramping trade. The final result was that all such approaches have been adopted. The fundamental rule is based on the contractual approach: pursuant to article 5 (1) the Draft Convention applies to contracts of carriage, defined in article 1 (1) as contracts in which a carrier undertakes to carry goods from one place to another, and must include a sea leg. There follow in article 6 the exclusions, based on the documentary approach and on the type of trade approach. The Draft Convention in fact does not apply to charter parties and other contracts for the use of the ships or of any space thereon as well as, generally, to contracts of carriage in non-liner transportation, except when there is no charter party and the evidence of the contract is a document that evidences the receipt of the goods.

The exclusions, however, operate only between the original contracting parties. In the Hague-Visby Rules protection of third parties exists only where a bill of lading (or other similar document of title) is issued under a charter party and regulates the relations between the carrier and the holder. The problem that arose during the sessions of the UNCITRAL Working Group was whether at present, given the increasing use of sea waybills and, also, mere receipt, the holder of such non-negotiable documents also deserves the same protection and it was ultimately decided that this should be the case.<sup>12</sup>

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<sup>12</sup> Article 7 of the Draft Convention, that follows the provision on the exclusions, so in fact provides:

*Application to certain parties -- Notwithstanding article 6, this Convention applies as between the carrier and the consignor, consignee, controlling party or holder that is not an original party to the charterparty or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.*

## 2.2. Freedom of contract

The basic rule, as in the Hague-Visby Rules and in the Hamburg Rules, is to the effect that the provisions of the Draft Convention are mandatory. But, and this is a new development, their mandatory character is extended also to the provisions regulating the obligations and the liability of the shipper and of the consignee. Contractual freedom is then granted, in addition to the special contracts of carriage, reference to which is made in the Hague-Visby Rules, to a special type of contract of carriage normally performed in the liner trade, called “volume contract”. This is a contract pursuant to which the shipper and the carrier agree respectively to deliver for carriage and to carry a specified quantity of goods (normally in containers) during a specified period of time in a number of subsequent shipments.<sup>13</sup>

The reason why freedom of contract has been deemed justified is that in this type of contract, which normally takes place between carriers and big shippers, the parties have equal bargaining power as in charter parties. Since, however, this is a type of contract that may cover also a limited number of containers, in which event there may not be such equal bargaining power between the parties, it has been deemed necessary to set out certain basic conditions for the operation of the freedom of contract. Such conditions consist in the need for the contract to be individually negotiated or to prominently specify the sections of the contract containing the derogations from the provisions of the Draft Convention. The purpose is that of ensuring that both contracting parties are conscious of the existence of the derogations. An identical purpose has inspired the adoption by the Italian legislator of article 1341 of the Civil Code.<sup>14</sup>

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<sup>13</sup> Section 2 paragraph 19 of the 1984 United States Shipping Act, as amended by s.101(11) of the Ocean Shipping Act 1999 so provides:

*(19) ‘service contract’ means a written contract, other than a bill of lading or a receipt, between one or more shippers and an individual ocean common carrier or an agreement between or among ocean common carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed time period, and the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of non-performance on the part of any party.*

<sup>14</sup> Article 1341 of the Italian Civil Code so provides in fact:

*1341. Standard contract conditions .-- Standard conditions prepared by one of the parties are also effective upon the other; if at the time of formation of the contract the latter knew of them or should have known of them by using ordinary diligence.*



It would of course be preferable that both conditions be required, which could be achieved by replacing the “or” with “and”. In any event derogation is not permitted in respect of provisions of the Draft Convention that have a public policy nature, viz. those relating to the seaworthiness of the ship (article 16) and to the carriage of dangerous goods (article 32).

It has been debated within the UNCITRAL Working Group whether the derogations should be binding also on parties other than the original contracting parties, such as the consignee and it has been decided that that must be conditional on such parties having received information that prominently indicates the derogation and having given their express consent to be bound by it. A provision to this effect may be found in paragraph 5 of article 89.

### 3. Period of responsibility

Whilst the Hague-Visby Rules apply, pursuant to their articles 1(e) and 2, between the time of commencement of loading on to the completion of discharge from the ship (the so called “tackle-to-tackle” period) and the Hamburg Rules apply, pursuant to their article 4(1), during the period when the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge (so called “port-to-port” period), the Draft Convention applies, pursuant to its article 11(1), from the time the carrier (or a performing party<sup>15</sup>)

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*In any case, conditions, in favour of him who has prepared them in advance, which establish limitations on liability, the power of withdrawing from the contract or of suspending its performance, or which impose time limits involving forfeitures on the other party, limitations on the power to raise defenses, restrictions on contractual freedom in relations with third parties, tacit extension or renewal of the contract, arbitration clauses, or derogations from the competence of courts, are ineffective, unless specifically approved in writing.*

<sup>15</sup> “Performing party” is so defined in article 1(5) of the Draft Convention:

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

*(b) Performing party does not include:*

*(i) an employee of the carrier or a performing party; or*

*(ii) any person that is retained, either directly or indirectly, by a shipper; by a documentary shipper; by the consignor; by the controlling party or by the consignee instead of by the carrier.*



receives the goods for carriage until the time when the goods are delivered to the consignee (so called “door-to-door” period).

There is in fact one requirement of the liner trade that is not satisfied by any of the transport conventions presently in force, and that is the need for a global regime applicable to the door-to-door container trade.<sup>16</sup> Attempts to adopt such a global regime for combined transport, as it was originally called, started almost forty years ago, when the CMI adopted at its 1969 Tokyo Conference a Draft Convention on Combined Transport (“Tokyo Rules”), and continued until the United Nations Convention on International Multimodal Transport of Goods was adopted in 1980, although it never came into force. This prompted UNCTAD and the ICC to issue in 1992 their Rules for Multimodal Transport Documents and BIMCO to issue the Multimodal Transport Bill of Lading and the Combined Transport Bill of Lading. But none of these initiatives could ensure actual uniformity since the rules adopted could not prevail over the mandatory provisions of international conventions and national laws.<sup>17</sup>

The difference between the Draft Convention and the Multimodal Convention of 1980 is that while the Multimodal Convention aims at regulating multimodal transport of goods generally,<sup>18</sup> the Draft Convention aims at regulating, in addition to the transport of goods by sea, the transport by other modes which is complementary to the transport by sea. This is made clear by the definition of contract of carriage in article 1.1, pursuant to which “contract of carriage” means a contract under which a carrier “undertakes to carry goods wholly or partly by sea from one place to another”.

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<sup>16</sup> In 2001 the total world seaborne trade, excluding bulk trade, has been 924 million tons, of which 524 million tons (62.8 million TEU) have been container trade. Over 50% of the container trade is door-to-door.

<sup>17</sup> The following statement is made in the Summary of the Final Report of the European Commission’s study *The Economic Impact of Carrier Liability on Intermodal Freight Transport*, 2001:

“Although these Model Rules give the impression of simplicity they mask the precedence of the International Conventions and the contracts adopting these Rules are effectively private contracts which are subject to different interpretation by different courts. The result is remaining uncertainty in the terms of liability and legal position”.

<sup>18</sup> Article 1(1) of the Multimodal Convention defines the international multimodal transport as “the carriage of goods by at least two different modes of transport” and, therefore, also applies, for example, to a rail/road transport or to an air/road transport.

A similar approach is adopted in the new text of COTIF-CIM<sup>19</sup> pursuant to which carriage by sea is governed by CIM where it is a “supplement” to the carriage by rail and is performed on services included in the list of services provided for in article 24 § 1 of COTIF. In this case the “supplemental” character of the carriage by sea is identified by the transport by sea being included in the aforesaid list of services. A different approach is instead adopted in CMNI.<sup>20</sup> Pursuant to its article 2 CMNI is in fact applicable also to the carriage by sea except where either the contract is evidenced by a “marine bill of lading” or the distance travelled by sea is greater. Yet a different approach is adopted by the CMR<sup>21</sup> which, pursuant to its article 2(1), applies during the journey by sea where the goods are not unloaded from the vehicle. The Montreal Convention on international carriage by air<sup>22</sup> has adopted a criterion similar to that of the Hamburg Convention. Its article 18(4) provides in fact that the period of the carriage by air does not extend to any carriage by land, sea or river performed outside an airport: it therefore applies “airport-to-airport” in the same manner as the Hamburg Convention applies port-to-port.

All these Conventions, therefore, apply to carriage by other modes which is ancillary to the carriage by the mode which is specifically regulated by each such Convention, even though the ancillary character is qualified in a different manner in each of them.

The approach adopted by the Draft Convention is different. In fact for the Draft Convention to apply it is sufficient that the carrier has undertaken to carry the goods partly by sea. Even if in most cases the carriage by other modes will be ancillary to the carriage by sea this is not a condition; nor is a condition that the contracting carrier be a carrier by sea. Moreover the Draft Instrument applies, pursuant to its article 19, in respect of claims brought by the shipper or consignee against any person that performs any of the carrier’s obligations during the period between the arrival of the goods at the port of loading and their departure from the port of discharge.<sup>23</sup> Any claim of the ship-

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<sup>19</sup> Uniform Rules Concerning the International Carriage of Goods by Rail, Appendix to COTIF 1999.

<sup>20</sup> Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 1999.

<sup>21</sup> Convention on the Contract for the International Carriage of Goods by Road, 1956.

<sup>22</sup> Convention for the Unification of Certain Rules for the International Carriage by Air, Montreal 1999.

<sup>23</sup> Article 19 governs the liability of “maritime performing parties”, that are so defined in article 1 (7):

per or consignee that may be brought against any person that performs any of the carrier's obligations prior to the arrival of the goods at the port of loading or after their departure from the port of discharge as well as any recourse action of the carrier against any such person, is instead governed by the convention or national law applicable to that specific leg of the transport.

This extended application of the Draft Instrument is counterbalanced by the adoption of a (limited) network system. Article 26 in fact provides that where loss or damage to the goods occurs solely during either the period preceding or that subsequent to the carriage by sea and there are mandatory provisions of an international convention applicable in respect of such loss or damage, such provisions prevail over those of the Draft Instrument, but only to the extent that they govern the carrier's liability, limitation of liability and time for suit.

The purpose of this provision is that of avoiding a conflict between conventions, but its effect is also to make the liability regime applicable to the door-to-door carriage less foreseeable. If in fact it is proved that the loss, damage or delay has occurred during a stage other than the carriage by sea, the regime applicable to such stage would depend on the particular mode of transport (e.g. by road or rail) and on whether an international convention governing that mode of transport is in force in the country where the loss, damage or delay has occurred and whether its provisions apply mandatorily.

This inconvenience would become much greater if the proposal were accepted that reference be made also to national laws since in such a case also national laws promulgated after the entry into force of the Convention would prevail over its provisions.

#### 4. Obligations and liability of the carrier

The provisions of the Draft Convention are based on those of the Hague-Visby Rules but differ from them in several relevant respects.

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*“Maritime performing party” means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship, but, in the event of a trans-shipment, does not include a performing party that performs any of the carrier’s obligations inland during the period between the departure of the goods from a port and their arrival at another port of loading. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.*

The first difference consists in the express regulation of the liability of the carrier in respect of economic loss due to delay in the delivery of the goods. In this respect it has been debated whether delay could be deemed to occur not only when the parties have agreed that delivery must be made within a specified date, but also when it does not take place within a reasonable time, but at the last session the first alternative was finally accepted.

As regards the obligation of the carrier to exercise due diligence to make the ship seaworthy, which has been maintained, in consideration of its provisions having been the subject of a thorough analysis by the jurisprudence of a great many maritime countries during last century, after a long debate it has been decided to make such obligation continuous, throughout the voyage, while at present it must be exercised only before and at the beginning of the voyage.

Then the allocation of the burden of proof between the parties has been clearly regulated. First, the claimant has the burden of proving that the loss, damage or delay, or the event that caused or contributed to it, took place during the period of the carrier's responsibility. Secondly, once the claimant has met its burden of proof, the carrier, in order to be relieved of all or part of its liability, may alternatively prove either that the cause or one of the causes of the loss, damage or delay is not attributable to its fault or to the fault of any person for whose acts or omissions it is liable, or that one of the events or circumstances specifically listed in article 17(3) has caused or contributed to the loss, damage or delay. These events and circumstances reproduce most of those already listed in article 4(2) of the Hague-Visby Rules, reference to which is commonly made as the "excepted perils". But the two more significant events, which were the only two actual exonerations from liability - fault in the navigation and in the management of the ship - have been omitted. The other "excepted perils" are not causes of exoneration but only events or circumstances in respect of which it is justified to presume an absence of fault. They thus give rise to a reversal of the burden of proof, since it is the claimant who has then the burden of proving: a) that the fault of the carrier caused or contributed to the event or circumstance invoked by the carrier or that another event or circumstance, not included in the list, contributed to the loss, damage or delay, or, b) that the breach of the carrier's obligations in respect of the seaworthiness of the ship has probably caused or contributed to the loss, damage or delay, in which event the carrier is liable unless it proves the exercise of due diligence. This last provision on the allocation of the burden of proof between the parties is perhaps that which gave rise to the longest debate, until the compromise was reached of placing on the

claimant only the burden of proving the probability of the causal relationship, rather than the existence of an actual causal relationship.

The Draft Convention regulates also the carriage of goods on deck and the liability of the carrier for loss, damage or delay in respect of such goods. Article 25(1) sets out three situations where goods may be carried on deck: a) when such carriage is required by law, e.g. owing to the dangerous character of the goods, b) when they are carried in or on a container on decks specially fitted to carry containers, and, c) when such carriage is in accordance with the contract or customs, usages or practices of the trade. Article 25(2) regulates the liability of the carrier and provides that if deck carriage is in accordance with (a) and (c) the carrier is not liable for loss, damage or delay that occurs owing to the special risks involved in deck carriage.

The principle *respondeat superior* is incorporated in article 18 the text of which has been the subject of review during last session, *inter alia* because, as the author of this paper pointed out, the distinction between performing party and servants and agents of the carrier, as well as of maritime performing parties (who include sub-carriers) was not at all clear and in view of the fact that the persons for whom the carrier (as well as a maritime performing party) is responsible are entitled to the defences and limits of the Convention, there was the danger that the master and crew of the ship might not be included. It was therefore agreed to mention specifically in article 18 the master and crew of the ship as well as the employees and agents of the carrier and to amend article 4, which indicates which are the persons that are entitled to the defences and limits of liability provided for in the Convention, by making express reference to the master and crew of the ship, who may not be the servants of the carrier nor of a performing party.<sup>24</sup>

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<sup>24</sup> The defences and limits of liability provided for in this Convention and the obligations imposed by this Convention apply in any action against the carrier or a maritime performing party for loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention, whether the action is founded in contract, in tort or otherwise.

It was agreed in New York last April to add to the above text (which would become § 1 of article 4, the two following paragraphs:

2. *If judicial or arbitral proceedings are instituted in respect of loss or damage [or delay] covered by this Convention against master, crew or any other person who performs services on board the ship or employees or agents of a carrier or a maritime performing party that person is entitled to defences and limits of liability as provided for in this Convention.*

## 5. Obligations and liability of the shipper<sup>25</sup>

The obligations of the shipper, which in the Brussels and Hamburg Conventions are scattered in various parts of the text and are the subject of a rather incomplete regulation, in the Draft Convention are assembled in one chapter - chapter 8 - and include the obligation to deliver the goods in such condition that they will withstand the intended carriage (article 27), to provide to the carrier the information, instructions and documents reasonably necessary for the handling and carriage of the goods as well as for the compliance with rules and regulations of competent authorities and for the compilation of the transport documents (article 29) and to provide information necessary for the description of the goods in the transport document (article 31). Special rules are then provided (in article 32) for the carriage of dangerous goods and include, as in the existing conventions, the obligation of the shipper to inform the carrier of the dangerous nature or character of the goods and to mark or label such goods in accordance with existing rules and regulations.

The liability of the shipper in respect of the breach of the obligations under articles 27 and 29 is based on fault, while that in respect of the breach of its obligations under articles 31 and 32 is strict and the burden of proof is on the carrier.

An issue that has been much debated during last session, as well as during the preceding Vienna session of November 2006, is that of the shipper's liability for delay. In view of the possible damages arising out of the delayed sailing of a big container ship due to a breach by the shipper of its obligations under articles 27 and 29 it was accepted that such liability should be limited but it appeared impossible to find a reasonable limit. It was consequently decided during last session not to regulate the shipper's liability for delay in the Convention and thus to leave the matter to the applicable national law.

## 6. Transport documents and electronic transport records

### 6.1. *Notion of transport document*

Article 1(16) defines the transport document as a document issued by the carrier pursuant to a contract of carriage that evidences the receipt of the goods

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<sup>25</sup> Article 1(19) of the Draft Instrument defines the "Shipper" as the person that enters into a contract of carriage with a carrier. Article 1.3 defines the "Consignor" as the person that delivers the goods to a carrier for carriage.

by the carrier (or a performing party) or evidences or contains a contract of carriage or both.

### *6.2. Categories of transport documents and electronic transport records*

Since the legal nature of transport documents may differ in the various jurisdictions, in the Draft Convention a distinction is made between two main categories of transport documents: those that are transferable from one person to another<sup>26</sup> and those that are not transferable. The same distinction is made in respect of electronic transport records. The typical negotiable transport document is the bill of lading, while the typical non negotiable transport document is the sea waybill. The main characteristics of negotiable transport documents, though not expressly spelt out, are implied in several provisions of the Draft Convention: a) they represent the goods described therein;<sup>27</sup> b) the holder has the right of possession of the goods and such right is transferred with the transfer of the document;<sup>28</sup> c) proof against the contents of the document is not permissible against a subsequent holder in good faith of the document.

### *6.3. Documentary and electronic evidence of the contract and of the receipt of the goods*

Since it was intended that the Draft Convention should apply to all contracts of carriage, including those concluded electronically, it was necessary to extend the provisions on transport documents to information recorded by electronic means in respect of which it was decided to use the expression

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<sup>26</sup> Article 1(17) contains the following definition of “negotiable transport document”:

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

<sup>27</sup> This is the reason why the holder of the negotiable transport document must surrender the document to the carrier when obtaining delivery of the goods. This is provided by article 49(a).

<sup>28</sup> In this connection the reference is made to article 59 that regulates the transfer of the rights incorporated in a negotiable transport document.



“electronic transport record”, which was considered to be medium neutral. “Electronic transport record” has been defined in article 1(20) as information in one or more messages issued by electronic communication pursuant to a contract of carriage that evidences receipt of the goods or evidences or contains a contract of carriage or both. In turn “electronic communication” has been defined in article 1(19) as information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference. The chapter on transport documents includes, therefore, parallel rules on electronic transport records.

#### *6.4. Persons entitled to obtain the negotiable transport document or the negotiable electronic transport record*

The first problem that it was deemed necessary to consider, in view of the strict link that exists between contracts of carriage and contracts of sale of goods, was that of identifying the person or persons entitled to obtain the transport document or electronic record upon delivery of the goods to the carrier. In fact, while in case of a c.i.f. or c&f sale the shipper, who is the person who enters into the contract of carriage with the carrier, is also the seller and, therefore, is clearly the person entitled to obtain the transport document or electronic transport record, in f.o.b. sales the shipper is the buyer and may not be entitled to obtain the transport document or electronic record unless and until he has paid the purchase price. An attempt has therefore been made to cover these situations by providing in article 36 that the consignor is entitled to obtain a non-negotiable transport document or a non-negotiable electronic transport record evidencing the carrier’s receipt of the goods while the shipper, or, if the shipper so indicates, the person identified as “shipper” in the contract particulars, is entitled to obtain from the carrier a negotiable transport document or a negotiable electronic transport record.

These provisions do not yet solve all problems, but clearly indicate to sellers and buyers that, unless otherwise agreed between them, only the person entering into the contract of carriage with the carrier (the shipper) is entitled to receive from the carrier a negotiable transport document (or a negotiable transport record). Therefore in a f.o.b. sale if the purchase price is payable against delivery to the buyer of the usual documents, including the bill of

lading, the seller must ensure that the buyer, who enters into the contract of carriage with the carrier, gives written irrevocable instructions to the carrier to deliver to the consignor (who will be the seller or an agent of the seller) the full set of the original bills of lading.

#### *6.5. Information to be provided in the transport document or electronic transport record*

The information that must be provided in the transport document and in the electronic transport record, whether negotiable or not, called “contract particulars”, is supplied in part by the shipper and in part by the carrier. The shipper must supply a description of the goods, the leading marks and the number of packages or pieces, or the quantity of the goods or their weight (article 37(1)). The carrier must indicate the apparent order and condition of the goods, its name and address, the date on which it has received the goods or on which the goods have been loaded on board the ship and the number of originals if a negotiable transport document or a negotiable electronic transport record is issued (article 38(2)).

The transport record must be signed by the carrier or a person acting on its behalf and the electronic transport record must include its electronic signature.

#### *6.6. Deficiencies in the contract particulars*

The most relevant deficiency that may occur is that relating to the failure to identify the carrier. It happens frequently that bills of lading, particularly if issued in connection with a charter party, are issued on a blank form and fail completely to indicate the name of the carrier. Sometimes, when issued for carriage of goods on a given line to which several carriers participate, they only indicate the name of the shipping line; some other times they are issued on a form with the name of the agents or even of the shippers. In such cases it is difficult for the consignee to identify the carrier. In some jurisdictions, amongst them the Italian, it is frequently held that when the bill of lading does not bear any heading or bears a heading that clearly is not that of the carrier and it is signed by or on behalf of the master, the carrier must be deemed to

be the operator of the ship who is the employer of the master and, unless there is evidence that the ship has been bareboat chartered, the operator must be deemed to be the owner. Another problem that may arise is when there is a conflict between the name appearing on the face of the bill of lading and the identity of carrier clause on the reverse side of the document. A proposal has been made by some delegations to the effect that when a transport document fails to properly identify the carrier, the carrier must be deemed to be the registered owner, unless the registered owner proves that it has leased or chartered the ship and identifies the lessee or charterer, in which case the lessee or charterer must be deemed to be the carrier. Pursuant to such proposal, if a person is identified on the face of the transport document as the carrier, any information on the reverse side expressly or implicitly identifying a different person as carrier has no legal effect. Such proposal, that initially met with very strong opposition, was ultimately accepted at the last session on the basis of an amended text which provides that in case of a bareboat chartered ship, the bareboat charterer also enjoys a similar defence.<sup>29</sup>

#### *6.7. Evidentiary effect of the description of the goods in the transport document or electronic transport record*

The general rule, set out in article 42(a), is that a transport document or an electronic transport record that evidences receipt of the goods is prima facie evidence of the receipt of the goods by the carrier as described in the contract

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<sup>29</sup> The basic text, subject to minor drafting amendments, is the following:

*Article 38. Identity of the carrier*

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

2. *If no person is identified in the contract particulars as the carrier as required pursuant to article 37, subparagraph 2 (b), but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may defeat any presumption of being the carrier in the same manner.*

3. *Nothing in paragraph 2 of this article prevents the claimant from proving that any person other than the registered owner is the carrier.*

particulars supplied by the carrier. However proof to the contrary is not admissible in respect of the particulars indicated by the carrier nor in respect of the particulars supplied by the shipper when the transport document or electronic transport record issued by the carrier is negotiable and is transferred to a third party in good faith.

#### *6.8. Qualifying the description of the goods in the contract particulars*

It frequently happens that the carrier qualifies the contract particulars supplied by the shipper by adding to the bill of lading words such as “weight unknown”, “number unknown”, etc. in which event it does not assume any responsibility in respect of the particulars so qualified and, consequently the consignee has the burden of proving the condition of the goods at the time of their receipt by the carrier. The effect of such qualifying clauses is not regulated by the Hague-Visby Rules, pursuant to which when the carrier is reasonably unable to check the information supplied by the shipper it may refuse to mention such information in the bill of lading. The Hamburg Rules instead not only indicate when reservations are permitted, but also, whereas it is customary to consider reservations as a right of the carrier, they treat them as an obligation of the carrier.

In the Draft Convention the situations in which qualifying the description of the goods is a right of the carrier and those in which it is instead an obligation are distinguished: the right becomes an obligation when there is a need for the protection of third parties, this being the case when the carrier has actual knowledge that any material statement in the transport document is materially false or misleading or has reason to believe that it is materially false or misleading, its effect being that the carrier “does not assume responsibility for the accuracy of the information furnished by the shipper”.

The advent of containers has given rise to many disputes in respect of the situations where the right to qualify the information furnished by the shipper exists and those in which it does not. Although the jurisprudence has generally recognised such right when the container is filled by the shipper, it is unsettled when such right exists in respect of the weight.

In the Draft Convention there are two separate provisions, one in respect of non-containerised goods and one for containerised goods. In respect of non-containerised goods two situations are envisaged: a) that where the carrier

has no reasonable means of checking the information, and, b) that where the carrier reasonably considers such information to be inaccurate. In the first case the carrier may qualify the information, but has the burden of proving that the condition for the exercise of such right existed; in the second case rather than qualifying the information, what he may do is to include a clause describing what it reasonably considers accurate information. In respect of containerised goods a distinction is made between description and weight of the goods. As to the description, when the container is delivered closed to the carrier the carrier may qualify the information furnished by the shipper if he has not inspected the goods inside the container; but rather strangely, also in this case he must also show that he reasonably considers the information furnished by the shipper to be inaccurate: but that he cannot do if he has not inspected the container. As to the weight, the carrier may qualify the information furnished by the shipper, provided it did not weigh or agree to weigh the container and provided further that there were no “physically practicable and commercially reasonable means of checking the weight”.

## 7. Right of control

The need for provisions on the right to give instructions to the carrier in respect of the goods has been perceived particularly where the transport documents are normally non-negotiable. This is the reason why such provisions may be found in the CMR (article 12), in COTIF-CIM (article 14) and in the Warsaw and Montreal Conventions (article 12) while they do not exist in the Brussels and Hamburg Conventions. Such need, however, exists also where negotiable transport documents are issued because the instructions may not relate only to the identification of the person entitled to the delivery of the goods but, also, to the manner in which the carriage must be performed (e.g. change of destination).

The term used in the Draft Convention is “control” while in the other transport conventions it is “disposal”. The reason for this is that the subject matter of such right goes beyond the disposal of the goods in the apparent strict sense in the definition in article 1.14. In fact pursuant to article 52 the right of control includes the right (i) to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage, (ii) to demand delivery of the goods before their arrival at the place of destination,

but only at a scheduled port of call or, in respect of inland carriage, at a place en route, and, (iii) to replace the consignee.

Article 53 of the Draft Convention contains provisions about the persons entitled to exercise the right of control when no negotiable transport document or no negotiable electronic transport record is issued (paragraph 1), when a non-negotiable transport document or electronic record that provides that it shall be surrendered in order to obtain delivery of the goods is issued (paragraph 2) and when a negotiable transport document or negotiable electronic transport record is issued (respectively paragraphs 3 and 4). The rules governing the execution of the instructions are contained in article 54. The carrier must execute the instructions when a) they are given by the person entitled to exercise the right of control, b) they can reasonably be executed, and, c) they do not interfere with the normal operations of the carrier.

The rights and obligations of the controlling party and of the carrier arising out of the exercise of the right of control are the following: a) the controlling party must reimburse the carrier any additional expense the carrier may incur and indemnify the carrier against any loss or damage; b) the carrier is entitled to obtain security for the amount of additional expense, loss or damage the carrier will incur in connection with the execution of the instructions of the controlling party; c) the carrier is liable for loss of or damage to the goods resulting from its failure to comply with the instructions and its liability is governed by the provisions previously considered in paragraph 5.

The Draft Convention also regulates variations to the contract of carriage by providing that the party entitled to negotiate any variations with the carrier is the controlling party and that where a negotiable transport document or a negotiable electronic transport record is issued any variation must be stated in the document or incorporated in the electronic record.

There may also be situations where it is the carrier who needs information, instructions or documents in respect of the goods, in which event, pursuant to article 57, such information, instructions or documents must be provided by the controlling party or the shipper.

## **8. Transfer of rights**

Under the title “Transfer of rights” there are set out in chapter 12 rules on the methods of transferring negotiable transport documents or negotiable

electronic transport records. The approach adopted is that of regulating the method of transferring the rights incorporated in the documents and of providing that the rights be transferred by means of the transfer of the documents, while usually reference is made to the method of transferring the documents. No express mention is made of which rights are incorporated in a negotiable transport document, but this results from the provisions on the right of control and on delivery.

A distinction is made between bearer documents and order documents. The former, which include blank endorsed documents, are transferred by delivery to another person. The latter are sub-divided into two categories, namely “order document” and “document made out to the order of a named party”. This distinction actually exists in some jurisdictions<sup>30</sup> but does not exist in others and may create some confusion.

As regards negotiable electronic records, article 59.2 merely provides that the rights incorporated therein are transferred by passing the electronic record in accordance with the rules of procedure agreed between the carrier and the shipper.

The transfer of rights in case when no negotiable transport document or negotiable electronic transport record is issued is governed, pursuant to article 61, by the provisions of the national law applicable to the contract of carriage “relating to the transfer of rights”.

## 9. Delivery

While there are practically no provisions in the Hague-Visby Rules and in the Hamburg Rules on the subject of delivery of the goods, an attempt has been made in the Draft Convention to deal at least with some of the major problems that arise in practice.

Delivery must not be considered only from the standpoint of the consignee, but, also, from the standpoint of the carrier. If, in fact, the consignee has obviously, in a normal situation, an interest in obtaining delivery of the goods, the carrier has an even greater interest in removing the goods from the carrying ship in order to employ the ship for the carriage of other cargo. A similar problem

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<sup>30</sup> For example, in England: see *Carver on Bills of Lading*, 1<sup>st</sup> Edition by Treitel and Reynolds, London 2001, paragraph 1-004, p. 2.



exists, of course in a much smaller scale, in respect of containers furnished by the carrier to the shipper.

### *9.1. Person entitled to obtain delivery*

There are separate provisions in the Draft Convention according to whether a negotiable transport document or a negotiable electronic transport record is issued or not. In the first case the person entitled to delivery is the holder of the document, who must surrender the document; similarly, the holder of a negotiable electronic transport record must prove that he is the holder (article 49(a)). In the second case the carrier is entitled to require the consignee, whose name is indicated in the transport document, to produce proper identification (article 46) and, in cases when a non-negotiable transport document or a non-negotiable electronic transport record that requires surrender has been issued, to surrender such document or prove that the person named in the record has exclusive control of the record.

### *9.2. Failure to claim delivery of the goods*

Separate provisions are contained in the Draft Convention according to whether a negotiable transport document or a negotiable electronic transport record is issued or not.

In the first case, pursuant to article 49(d) if the holder does not claim delivery the carrier must advise the controlling party or if the controlling party cannot be identified, the shipper, and - this is a very relevant exception to the general rule - pursuant to article 49(e) if it delivers the goods in accordance with their instructions it is discharged from its obligation to deliver the goods to the holder, irrespective of the transport document being surrendered or not, or irrespective of the person to whom the goods must be delivered demonstrating that he is the holder or not. A provision follows in respect of the rights of the actual holder of the negotiable transport document or electronic record: pursuant to article 49(f) a person who becomes the holder **after** the carrier has delivered the goods pursuant to article 49(e) but pursuant to arrangements made **before** such delivery acquires rights against the carrier other than the right to claim delivery.

In the second case the carrier must advise the controlling party or the shipper (articles 46 (c) and if he delivers the goods upon their instructions is similarly discharged from its delivery obligations.

### 9.3. *Disposal of undelivered goods*

Pursuant to article 50 if the goods remain undelivered the carrier may, without prejudice to its rights against the shipper, the controlling party or the consignee, a) store the goods, b) unpack the goods, or act otherwise in respect of the goods including causing them to be destroyed, or to be sold.

### 9.4. *Obligation to accept delivery*

The first problem is whether and under which conditions the consignee has the obligation to accept delivery of the goods. The solution that has been adopted in article 44 is based on the construction of the contract of carriage as a contract for the benefit of a third party who, therefore, becomes bound by the contract if he accepts the contract. Such acceptance is normally expressed by the request of delivery. It has however been deemed convenient to create an obligation of the consignee upon its exercising “any of its rights” under the contract. This perhaps may be even too wide a description, as is shown by “*The Berge Sisar*” case<sup>31</sup> where the consignee had only taken samples from the cargo.

## 10. **Limits of liability**

The provisions on the limits of liability of the carrier in respect of loss of or damage to the goods are practically identical to those of the Hague-Visby Rules, save that the limits have not yet been decided, even though they are likely to be increased by a relatively small amount. Although this may appear difficult to understand, in view of the time elapsed since they were last amended,<sup>32</sup> it

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<sup>31</sup> *Borealis A.B. v. Stargas Ltd.* [1998] 2 *Lloyd's Rep.* 475.

<sup>32</sup> The original limit of 100 pounds gold per package or unit adopted in 1924 was replaced in 1968 by the Protocol adopted on 23<sup>rd</sup> February 1968 by a limit of 10,000 Poincaré

would appear that the average present value of the goods carried is not significantly different. The question that might be asked, however, is whether it is right to calculate an average value of all kinds of goods, however carried, given the great difference between the average value of bulk cargoes, such as cereals, iron ore or oil (notwithstanding the great increase of the price of oil), and the average value of containerised goods.

There is however one new limit in the Draft Convention compared to those in the Hague-Visby Rules, the limit of liability of the carrier in respect of economic loss due to delay in the delivery of the goods. As in the Hamburg Rules, the limit is based on the freight payable on the goods delayed and the question still open is whether the limit should be one time such freight or two times, as in the Hamburg Rules.

## 11. Time for suit

The time limit that was agreed during the November 2006 session of the Working Group is two years rather than one as in the Hague-Visby Rules. Such time limit applies to any proceedings under the Draft Convention and, therefore, both to proceedings against the carrier and to proceedings against the shipper. After some discussion, it was also agreed that the limitation period may not be interrupted or suspended, but may only be extended upon agreement between the parties.

Pursuant to article 67 an action for indemnity by a person held liable may be instituted after expiration of the later of either the time allowed by the applicable law or 90 days commencing on the day when the person instituting such

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francs (a money of account consisting of 65.5 milligrammes of gold of millesimal fineness 900') per package or unit and a limit pf 30 Poincaré francs per kilo of gross weight of the goods lost or damaged, whichever was the higher. This gave rise to disputes in various jurisdictions on the relevant value of gold, whether the official or the market value. Subsequently, in 1979 the Poincaré franc was replaced by the Protocol of 21<sup>st</sup> December 1979, by the special drawing right (666.67 SDRs per package or unit and 2 SDRs per kilo) but this did not entail any increase, the change having consisted in a mere conversion calculated on the basis of the gold content of the Poincaré franc and the value of the of the SDR, originally fixed in relation to the dollar parity, with a gold content of 0.888671 grams of fine gold: the ratio was therefore 15:1.

When, in 1978 (10 years later), the Hamburg Rules were adopted, the limits were only slightly increased, respectively to 835 and 2,5 SDRs.

action has either settled the claim or been served with process in the action against itself.

There is then a provision linked to that relating to the identification of the carrier: in the event that the owner defeats the presumption that he is the carrier by proving that he had leased or chartered the ship, proceedings may be instituted against the actual carrier within 90 days commencing on the day when the owner proves that the ship was leased or chartered and adequately identifies the lessee or charterer.

## 12. Jurisdiction

No provision on jurisdiction is contained in the Hague-Visby Rules, probably because at the time of their adoption no need for such a provision existed. Jurisdiction is instead regulated in the Hamburg Rules, article 21(1) of which provides that the plaintiff may, at his option, institute proceedings in a court in the jurisdiction of which is situated the principal place of business or the habitual residence of the defendant, the place where the contract was made, the port of loading or the port of discharge as well as any additional place designated in the contract of carriage. Therefore, pursuant to the Hamburg Rules jurisdiction clauses contained in transport documents are still valid, but jurisdiction becomes non exclusive, the plaintiff having the option of instituting proceedings in any one of the other places listed in article 21(1). Only after a dispute has arisen may an exclusive jurisdiction agreement be valid and binding pursuant to article 21(5) of the Hamburg Rules. Although the purpose of this provision is clearly that of protecting shippers and consignees, this aim may not be achieved because the choice is given to the plaintiff, and the plaintiff may also be the carrier who may bring a declaratory action against the shipper or consignee.

The need for a provision on jurisdiction has been the subject of a long debate within the Working Group. Three main views were put forward: a) there should be no provision; b) shippers and consignees should be protected and therefore it should be avoided, through a provision along the lines of article 21 of the Hamburg Rules, that they be forced to institute proceedings in a place chosen by the carrier; c) exclusive jurisdiction clauses should only be permitted in contracts in which the parties have an equal bargaining power, such as the volume contracts.

When the European Commission participated to the debate, jurisdiction being a matter within the exclusive competence of the Council of the European Union, its approach to the problem was based on the principles laid down in Council Regulation N° 44/2001, pursuant to which exclusive jurisdiction clauses are valid if in compliance with article 23(1).<sup>33</sup> A compromise solution was then negotiated between the delegates of the Commission and the delegates of the United States, who supported the alternative under c) above, based on the following principles:

- (i) As a general rule, the plaintiff has the option of instituting proceedings against the carrier in a competent court within the jurisdiction of which is situated the domicile of the carrier, the contractual place of receipt or of delivery, the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship or any place designated for that purpose by the parties;
- (ii) An exclusive choice of court agreement is valid if contained in a volume contract that clearly states the names and addresses of the parties and either is individually negotiated or contains a prominent statement that there is an exclusive choice of court agreement and specifies its location;
- (iii) A person not a party to the volume contract is only bound by an exclusive choice of court agreement if the court is in one of the places designated under (i) above, the agreement is contained in the contract particulars of the transport document or electronic transport record, and that person is given timely and adequate notice of the court where the action must be brought;

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<sup>33</sup> Article 23 (1) of Regulation No. 44/2001 so provides:

*1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:*

*(a) in writing or evidenced in writing; or*

*(b) in a form which accords with practices which the parties have established between themselves; or*

*(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.*

- (iv) A contracting State, however, is not prevented from giving effect to a choice of court agreement that does not meet the requirement under (iii) above;
- (v) If a contracting State avails itself of the liberty granted under (iv) above, a court specified under (i) above situated in another contracting State may exercise jurisdiction over the dispute.

Since the principle laid down under (iv) following a request of the delegates of the European Commission, was considered extremely dangerous, because it would have adversely affected uniformity and, what was worse, would have given rise to *lis pendens* situations which instead Regulation N° 44/2001 is trying to avoid, the suggestion was made, first within the Civil Law Committee of the Council and then by a number of delegations within the UNCITRAL Working Group, to overcome the problem by deleting the liberty granted under (iv) above and by separating the chapter on jurisdiction from the rest of the Draft Convention, so that ratification of or accession to the Convention would not include the chapter on jurisdiction unless a special declaration to that effect be made (so-called “opt-in” procedure); or, alternatively, by allowing reservation in respect of that chapter. This proposal is still under consideration and a decision thereon is expected to be made in the October 2007 session of the Working Group.<sup>34</sup>

### 13. Arbitration

The position in the Hague-Visby Rules and in the Hamburg Rules is the same as for jurisdiction. No provision exists in the Hague-Visby Rules and the provisions in the Hamburg Rules are similar to those for jurisdiction. It must be considered that arbitration clauses are common in charter party forms but are unusual in bills of lading. Therefore since charter parties are not subject to the Draft Convention, provisions on arbitration in the Draft Convention are not as important as those on jurisdiction, even though the problem of validity of an arbitration clause may arise when the charter party terms are incorporated in bills of lading.

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<sup>34</sup> The “opt-in” alternative may be drafted as follows:

*The provisions of this chapter shall be binding to a Contracting State only if that State makes a declaration to this effect at the time of signature, ratification, acceptance, approval or accession, [or at any time thereafter].*

The “reservation” alternative may be drafted as follows:

*Any Contracting State may declare in accordance with article --- not to be bound by this chapter.*

The choice by the plaintiff of the place of arbitration may create problems in institutional arbitrations, for which the conduct of arbitration is to a greater or lesser extent linked to the place of the seat of the institution. Suffice it to make reference to the London Maritime Arbitration Association and to the *Chambre Arbitrale Maritime* of Paris.

But any effort to find an alternative solution failed and at present the structure of the rules included in the most recent draft are parallel to those adopted in respect of jurisdiction. In fact:

- (i) the general rule is to the effect that arbitration proceedings may, at the option of the person asserting a claim against the carrier, take place at the place designated in the arbitration agreement or at any of the places where judicial proceedings may be instituted;
- (ii) the exception, also in arbitration, is that in volume contracts the place indicated in the arbitration agreement is binding provided conditions identical to those required in respect of jurisdiction clauses materialize;
- (iii) in such a case the clause is effective vis-à-vis third parties in accordance with rules identical to those prescribed in respect of jurisdiction clauses.

However the suggestion has been made to adopt for arbitration the same “opt-in” or “opt-out” approach that has been put forward in respect of jurisdiction.

Sažetak

**Francesco Berlingieri \***

**NACRT KONVENCIJE UNCITRAL-a O PRIJEVOZU ROBE  
(U CIJELOSTI ILI DJELOMIČNO) (MOREM)**

*U radu se daje sustavan prikaz odredaba Nacrta konvencije UNCITRAL-a o prijevozu robe (u cijelosti ili djelomično) (morem). Autor analizira važne i kontroverzne odredbe Nacrta koje uređuju polje njegove primjene, kognitnost odredaba, razdoblje odgo-*

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*vornosti za robu, obveze i odgovornosti prijevoznika i krcatelja, prijevozne isprave, pravo nadzora, granice odgovornosti, zastaru, nadležnost, arbitražu itd. Posebno su naglašene razlike između rješenja Nacrta i međunarodne regulative na snazi.*

*Ključne riječi: Nacrt konvencije UNCITRAL-a o prijevozu robe (u cijelosti ili djelomično) (morem), prijevoz robe, odgovornost prijevoznika, odgovornost krcatelja, konvencije pomorskog prava*