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Illegal activity in the issuance of  
negotiable documents in the  
carriage of goods by sea – do  
the existing legal regimes  
provide sufficient protection for  
the participants?

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# Abbreviations

B/L	Bill of Lading
Bs/L	Bills of Lading
COGSA	Carriage of Goods by Sea Act
UN	United Nations
RR	Rotterdam Rules
US	United States of America
RSA	Republic of South Africa
UK	The United Kingdom

# **Chapter 1**

## **Introduction**

### **1.1 Scope of research**

The business of carriage of goods by sea although developed its present form through practice, has a strange characteristic, namely the tripartite contractual relationship of its participants. These are the carrier, the shipper and the consignee. It is worth noticing that the identity of the consignee may be changed by the shipper without the knowledge or approval of the carrier.

The contract of carriage is concluded in behalf of the consignee by the shipper and is evidenced by the issuance of a negotiable document by the carrier to the shipper. Such a negotiable document is commonly known under the name bill of lading. The bill of lading is delivered by the shipper to the consignee at a later stage. Often in chain sales the consignee may sell its interest in the cargo while it is in transit simply by endorsing the bill of lading to the buyer. The carrier gets to know about that change in ownership once the rights of the former consignee have been transferred to the latter or when the carrier is presented with a proof of ownership at the discharge port. Such a multiparty relationship, in which the participants do not know each other as well as the probability that the consignee may be replaced without the knowledge/ agreement of the carrier, predetermines the possibility that some of them may be defrauded while taking part in the sale-purchase chain of the goods carried by sea.

The purpose of this essay is to deal with the ways the participants in the international carriage of goods by sea take part in illegal activities connected with the issuance and falsification of bills of lading. Attention will be paid to the international conventions governing the carriage of goods by sea and how they counteract that malpractice.

## 1.2 Method of research

This paper starts with a short description of the modern-day bill of lading where its purpose and characteristics are explained. The next chapter pays attention to its common law development through the centuries. During this historical review distinction between the bill of lading and the charter party will be made and reasons given why the both terms should be differentiated and used separately.

Due to the fact that the trade of carriage of goods by sea developed immensely during the 19<sup>th</sup> century, the existing regulations could not cope with the need to unify the contractual relationship of the parties. Therefore, a demand for more thorough and uniform control was felt. The fourth chapter looks at the uniformity introduced in the 20<sup>th</sup> century by the international regimes regulating the bill of lading. These are The Hague Rules, The Visby Protocol and The Hamburg Rules. However, the discussion is limited only to those provisions having to do with the issues of fraud in bills of lading and which of the participating parties involved in the fraudulent issuance of these negotiable documents fall under the auspices of the rules. At that moment it will become clear that the discussion of the conventions will not be thorough if the term *letter of credit* is omitted from being defined. This will be done in Chapter 4.2.

In order to avoid repetition and get a better picture of the existing situation relating to the governing international law, the same provisions of the different sets of regulations are discussed concurrently. In addition, they are compared to each other and an opinion is given which is the best to serve the fight against fraudulent bills of lading.

The fifth chapter is concerned with the way the 20<sup>th</sup> century regimes apply generally in practice. Attention is paid to the participation of third parties in the carriage of goods by sea and how they are protected against fraudulently issued bills of lading.

The same part of this thesis discusses the ways national laws apply these international instruments. Although only the laws of the UK and USA are exemplified, it becomes obvious at this stage why it is necessary for the

business of carriage of goods by sea to work towards creating a uniform single piece of legislation substituting The Hague Rules, The Visby Protocol and The Hamburg Rules.

This chapter continues with elaborating on the problems of backdating/antedating bills of lading and issuance of letters of indemnity. Through examples their effect on the negatively affected parties is demonstrated.

The next Chapter 6 is a sequel of Chapter 5. However, in this part the business of carriage of cargo by sea and the role of the fraudulent bill of lading are discussed from a different perspective. The carriage, depending on the type of cargo carried on board, is split into sectors – oil, cargo in bulk, general cargo and containers – each sector and the respective role of the bill of lading being discussed under different headings.

As the reader will be shown in Chapter 5 that there is an urgent need for unifying the existing regime as regards the bill of lading, this thesis will not be thorough in case the newly introduced Rotterdam Rules are ignored. Chapter 7 makes no comparison between The Rotterdam Rules and their predecessors. Nonetheless, it is of importance because it discusses provisions that have no previous counterpart and addresses the topic of this paper, namely the fight against fraudulently issued bills of lading.

In the beginning of Chapter 7, the readers familiarise themselves with the text of the provisions. Although some of the articles are contingent upon each other, no cross-reference is made within them and therefore are difficult to follow. In order to avoid this drawback, they are addressed concurrently.

Although the purpose of the Rotterdam Rules is quite welcome and their service, if universally accepted, will be a step forward in bringing to a halt the malpractice of using fraudulently issued bills of lading, there are some flaws that the Rotterdam Rules drafters omitted to exclude. These will be examined in the last paragraphs of Chapter 7 and possible solutions to the discussed defects proposed.

## **Chapter 2**

### **The purpose of the Bill of Lading**

A bill of lading (hereinafter referred to as B/L or Bs/L for bills of lading) is a bill of exchange. It is an undertaking of the carrier to deliver the cargo to the consignee or to any lawful holder of the B/L. It is a proof of reception of the cargo loaded onboard or received for shipment. The person entering into a contract of carriage by sea with the carrier is the shipper. The shipper takes possession of the B/L from the party issuing it – the carrier or its agent (in most cases the agent is the master of the ship).<sup>1</sup> In chain sales while the cargo is at sea, the B/L may be transferred by the shipper or any holder of the B/L to third parties.

As the B/L is freely assigned or pledged to third parties by the shipper while the cargo is in custody of the carrier, it is both a document of title and a form of a valid constructive delivery. It consists of the terms of the contract of carriage relating directly to the goods to be carried, such as description of the cargo and its location aboard the vessel, as well as the identities of the carrier, shipper and consignee.<sup>2</sup>

Although the B/L contains detailed terms as regards the duties of the carrier concerning the cargo and the duties of the person entitled to the reception of the cargo, it is not the contract of carriage itself. It is *prima facie* evidence of the existence of the contract which is concluded before the actual loading starts.<sup>3</sup> However, whenever there is an endorsement and transfer of the B/L to a third party, the B/L is held to be a conclusive evidence of the terms of the contract.<sup>4</sup>

Initially, the concept of freedom of contract was the governing power controlling the relationship between the carrier and the shipper. In addition, the carrier prior to the 20<sup>th</sup> century was in a stronger position than the shipper to determine the terms of the agreement to its benefit. Therefore, it is not strange

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<sup>1</sup> Dunlop C. R. 'The Hague Rules, 1921' 4(1922) *Journal of Comparative Legislation and International Law*, Third Series, 24 at 24.

<sup>2</sup> *Ibid.*

<sup>3</sup> *The Barranduna and Tarrago* [1985] 2 Lloyd's Rep. 419.

<sup>4</sup> *Leduc v Ward* (1888) 20 QB 475; see also the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading ("Visby Rules"), Art 3(4).

that the first attempts of the international community to unify these relations were developed in a direction ascertaining the dominance of the carrier at the expense of the shipper and the consignee.

## Chapter 3

### History of the Bill of Lading before 1900

The first written proof of the existence of the B/L in its present form dates as far back as the 17<sup>th</sup> century.<sup>5</sup> However, due to the fact that its initial role was of a dual character –evidence of the charter party and of the contract of carriage of goods by sea –<sup>6</sup> it might be traced in 1293 when an action for non-delivery of wine, based on a charter party, was brought before an English court.<sup>7</sup> On the other hand, a French writer discusses a 1255 document, looking much like a B/L, stating that all the cargo carried on board and its quantity had to be entered into a register.<sup>8</sup> Therefore, it would be correct to conclude that the time for creation of the B/L is to be considered the second half of the 13<sup>th</sup> century.

A French extract from 1316 deals with the duty of the master to provide a written document stating that he will transport the cargo loaded on board.<sup>9</sup> By entering the document of carriage into the register, the carrier obliged himself to comply with the carriage of the goods terms. It is worth noting that the master was responsible only for the documented cargo; undocumented goods were at the merchant's risk. In addition, the merchant's title of ownership over the cargo was proven by the facts that he would normally sail with the cargo and his name would be entered into the document.

At a later stage, the 1316 document was substituted by the written undertaking of the carrier entered into the ship's logbook. During the same period practice showed that the contract of carriage could also be executed orally in front of witnesses.

The three different ways of concluding the contract coexisted for some time. Bennett supports the view that the oral promise was the predecessor of the present B/L – a separate and independent agreement different from the charter

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<sup>5</sup> Bennett W 'The history and present position of the Bill of Lading as a document of title to goods' Cambridge University Press (1914) 1-15 available on <http://ia700400.us.archive.org/9/items/cu31924022473874/cu31924022473874.pdf> (accessed 20.01.2011).

<sup>6</sup> Kozolchyk B 'Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective' 23(1992) *J. Mar.L& Com* 161at 164.

<sup>7</sup> Bennett W(n 5) at 3.

<sup>8</sup> *Ibid.*

<sup>9</sup> At 4.

party.<sup>10</sup> According to him at the time when the oral commitment became more popular, merchants stopped sailing with their cargo and the need to make cargo documents more flexible became evident.

As the direct contact between the cargo owner and the recipient of the goods was discontinued, the necessity to protect the interests of the participants in the carriage of goods by sea grew more compelling. The reason is that, in order to get possession of the goods at the port of discharge, the consignee had to have a valid claim against the carrier. On the other hand, the shipper had also to be protected against the consignee in case the latter failed to pay. The oral agreement proved to be an insufficient protection and was gradually substituted by its written counterpart.

The single written document containing both the record of the goods to be shipped and the terms of the contract of carriage had the specifics of the modern sea waybill.<sup>11</sup> It meant that once the goods were boarded and the ship set sail, their owner had to receive them before having the opportunity of reselling them. In addition, since there was no personal interaction between the ship owner and the consignee prior to delivery at the discharge port, a loss of the single document of carriage would mean that the consignee would be put at the mercy of the captain whether or not to take the cargo. This was the triggering event which made the issuance of a triplicate of the document of carriage.<sup>12</sup>

Throughout the centuries the carriage of goods was getting more and more complex. The impossibility of selling their cargo while at sea was not an option that the merchants were happy with.<sup>13</sup> Their business suffered from this flaw. As a consequence, by the middle of the 16<sup>th</sup> century that practice was changed. In Europe Bs/L could be freely assigned to third parties who became owners of the cargo while in transit.<sup>14</sup> Once it was delivered to the holder of a valid B/L, its other originals became obsolete. In addition, the oral promise made in front of witnesses seems to have disappeared by that time.

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<sup>10</sup> At 6.

<sup>11</sup> UNCTAD Report on Bills of Lading, 1971 (TD/B/C.4/ISL/6/Rev.1) at 13.

<sup>12</sup> Bennett W (n 6) at 7.

<sup>13</sup> Bennett W(n 5) at 6 read together with UNCTAD Report (n 11) at 13.

<sup>14</sup> At 8.

By the end of the 16<sup>th</sup> century the use of the B/L was widespread and it was defined as an acknowledgement by the master that the loaded cargo aboard was of certain quantity and specifications.<sup>15</sup> By the 18<sup>th</sup> century the practice of using negotiable Bs/L was well established and in common use.<sup>16</sup>

As described in Chapter 2 the present role of the B/L is a proof of the contract between the shipper and the carrier which is different from the contract between the ship owner and the charterer. However, several centuries ago when the master of the ship, the carrier and the owner of the ship were one and the same person and the merchant, that is the shipper, was also the charterer, their distinction made no sense to the business and the B/L served a dual role – a charter party and a B/L. As evidence of the existence of the contractual relations between the carrier and the shipper, the predecessor of the modern B/L had more or less the same specifications as today: the carrier was entitled to freight payable by the charterer on delivery of the goods;<sup>17</sup> the existence of the three original Bs/L containing the quality, quantity and markings of the loaded goods – one remaining on the ship, one with the shipper and one sent to the recipient of the goods;<sup>18</sup> and the promise by the carrier that the delivery of the goods would take place in the order as described in the document of carriage.<sup>19</sup>

As a charter party, the contract of carriage was a proof of the agreement between the charterer and the ship owner for the ship's employment.<sup>20</sup> In it the ship owner himself or through the ship's master promised to prepare her for carriage of goods by a certain date and that the ship would sail with the first suitable wind to the specified port manned with crew described in the charter party and that she would be fitted with the proper gear. The charterer was bound to load the cargo within specified time, pay the freight upon its discharge and cover certain ordinary expenses, such as master's and port fees.<sup>21</sup> In addition, the charterer's duties were specified in the contract of carriage which meant that

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<sup>15</sup> At 8.

<sup>16</sup> UNCTAD Report (n 11) at 13

<sup>17</sup> Bennett W(n 5) at 12.

<sup>18</sup> Kozolchyk B(n 6) at 166.

<sup>19</sup> At 165.

<sup>20</sup> At 164.

<sup>21</sup> Kozolchyk B(n 6) at 165.

before availing itself to any contractual defences, it had to fulfill its obligations.<sup>22</sup>

Not until the 17<sup>th</sup> century did the business develop, had merchants already totally stopped accompanying their cargoes at sea and ship masters and owners were not the same people. The need to distinguish between the charter party and the B/L had already become obvious. The French economist Jaques Savary explained the importance of the difference – an explanation that also stands in modern times. While the charter party is a contract of voyage between the merchant and the ship owner, the bill of lading is an acknowledgement by the ship master of reception of certain type, quantity and quality of goods from the merchant to be delivered at a nominated place to a holder of the B/L.<sup>23</sup> The B/L is simply a proof of ownership while the charter party is hire of space.<sup>24</sup>

In Europe by 1691 there already existed strict rules governing the B/L. The Marine Ordinances of Louis XIV made the master liable for damage caused to goods while in his custody.<sup>25</sup> In addition, each B/L had to specify the quantity, quality and marking of the cargo. As some of the cargo was in packages on loading, there was no possibility for the crew to ascertain the exact quality of what was loaded. Since the master was obliged to deliver it in the same condition, the possibility for fraud on the side of the shipper and/ or consignee existed. Therefore, the Ordinances recognized the need for protecting the innocent carrier in the form of limiting its liability.<sup>26</sup> In addition, it became a customary practice for the master to state in a clean B/L that the quality and the quantity of the received goods were based on the representations of the consignor.<sup>27</sup>

At the dawn of transportation of goods by sea, the carrier was always held liable for damage whenever the cargo was in its possession subject to a number of exceptions.<sup>28</sup> Strangely enough, such an exception was also the general average

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<sup>22</sup> Ibid.

<sup>23</sup> At 167.

<sup>24</sup> Ibid.

<sup>25</sup> Murray D 'History and development of the Bill of Lading' 37 (1982-1983) *U.Miami L. Review* 689at 691.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Discussed in UNCTAD Report (n 11) at 11; these exclusions were force majeure, a public enemy, inherent vice, general average.

which was the sole responsibility of the charterer.<sup>29</sup> The duty of the carriers was very onerous and they suffered losses. As a result of 18<sup>th</sup> century court decisions, ship owners started amending their Bs/L by adding the new, widely worded, exclusion of “all perils of the sea and of navigation of whatever nature and kind.”<sup>30</sup> The principle of freedom of contract was used to their advantage and the concept of strict maritime liability lost whatever power it had.<sup>31</sup> In case a court upheld a cargo owner’s claim, carriers included in the Bs/L a new clause neutralizing the court’s decision.<sup>32</sup> Thus, the list of exclusions was slowly but decidedly extended.

Although the total carrying capacity of the world shipping was much less than the quantity of the transported cargo by sea, and the carriers were at large to determine the terms of their contracts unilaterally thus ignoring their counterparts’ interests, shippers, bankers and insurers were very dissatisfied with the existing situation.<sup>33</sup> The need for new legislation to remove the chaos created by the abuse of the freedom of contract concept to the advantage of ship owners became very essential.<sup>34</sup> Ship owners had to reconsider their rights and increase their contractual liabilities.<sup>35</sup> As the countries on both sides of The Atlantic Ocean and the British colonies were very dependent on the shipping business, they were the initiators of negotiations that brought the existence of compromising national pieces of legislation.<sup>36</sup>

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<sup>29</sup> UNCTAD Report (n 11) at 11.

<sup>30</sup> At 13.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> At 14.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

## **Chapter 4**

### **International convention instruments relating to Bills of Lading in the 20<sup>th</sup> century**

The reason for the brief discussion relating to the different rules governing the 20<sup>th</sup> century carriage of goods by sea is not only historical. Nowadays the three regimes – The Hague, The Hague-Visby and The Hamburg Rules – operate together. This mixture of laws that may govern the same conflicting situations at one and the same time causes confusion among the parties in the international market. This confusion is used by some of these participants to reach their own ends through the malpractice of dealing with fraudulent bills of lading. Therefore, it is necessary to research into the similarities and differences of these rules.

#### **4.1 The Hague Rules**

As different nations have a different approach in conducting business, they also have different regulations when it comes to the carriage of goods. If a nation refuses to recognize a bill of lading issued at and under the rules of another state, it would mean disruption of business.<sup>37</sup> In order to avoid the potential negative consequences, representatives of the maritime nations met in Brussels in 1924 and codified the existing rules common to the trading states. This codification became to be commonly known as The Hague Rules.<sup>38</sup>

The Rules represented a successful compromise between the conflicting interests of the carrier and the cargo owner and struck a balance between the responsibilities of the parties.<sup>39</sup> Although the attendants in The Hague were not in agreement with all the provisions of the Rules, the need to make them uniform in all maritime states so that the ship owners faced the same obligations was the reason for their acceptance.<sup>40</sup> They were quickly ratified by more than one hundred states.<sup>41</sup> The reason that they gained popularity so quickly was that

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<sup>37</sup> A727.

<sup>38</sup> The Brussels Convention on the Carriage of Goods by Sea Act, 1924.

<sup>39</sup> Tetley W 'Deck Carriage under The Hague Rules' 3 (1977-1978) *Mar. Law.* 35 at 35.

<sup>40</sup> James C 'Carriage of Goods by Sea. The Hague Rules' 74(1926) *University of Pennsylvania Law Review and American Law Register* 672 at 678.

<sup>41</sup> *Ibid.*

they represented more or less the customs of the sea business developed and practised throughout the centuries.

Article 1 is a definition clause and the meaning of the term *contract of carriage* is of greatest importance to the present discussion. It is a contract covered by a B/L or a similar document of title issued under or pursuant to a charter party from the moment at which the B/L or the document of title regulates the relations between the carrier and the holder of the document.

Worth mentioning is that the charter party is not regulated by the Rules – it is only the B/L issued under the charter party.<sup>42</sup> In addition, the Rules recognize that the charterer of a vessel enjoys the same immunities as the ship owner.<sup>43</sup> However, if the charterer or cargo owner wants to get a receipt that the cargo is onboard, other than a B/L whose main feature is its negotiability,<sup>44</sup> that receipt must be non-negotiable.<sup>45</sup> It means that even though there is no definition of the term *bill of lading* in the Rules, it is a common case that if a non-negotiable document with the same specifications as the B/L is issued, some jurisdictions will consider the cargo-owner not to enjoy the protection under the Rules since they do not consider the non-negotiable document to be a document of title.<sup>46</sup>

What is to be noted is that Bs/L are issued only on demand of the shipper.<sup>47</sup> If the shipper and consignee are the same persons and they are certain of what has been loaded on board, they do not need the B/L. However, if one considers that the B/L is not only a proof of the received cargo but also of its apparent quality, it is advisable that the shipper always require its issuance.

The Rules regulate only the period of sea carriage covered by the B/L.<sup>48</sup> Before they start applying and after they cease to govern the contract, the national legislation and custom determine the relations of the parties.<sup>49</sup> One of the most important features of the Rules is that the carrier has to use due diligence to

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<sup>42</sup> Arts 3(3) and 5.

<sup>43</sup> Art 1(a).

<sup>44</sup> James C (n 40) at 679.

<sup>45</sup> Art 6.

<sup>46</sup> Kozolchyk B (n 6) at 217.

<sup>47</sup> Art 3(3).

<sup>48</sup> Art 1(b) & 1(e).

<sup>49</sup> James C(n 40) at 680.

make the vessel cargo and seaworthy and to properly man and equip her.<sup>50</sup> Even if proven that the ship was not cargo- or seaworthy but the carrier had shown due diligence in its attempts to make her such, it will be exempted from liability.<sup>51</sup>

Delivery of the goods to the consignee is *prima facie* proof of their good condition.<sup>52</sup> As per Article 3(5) the shipper guarantees that the information provided in the B/L with regard to quantity, weight and markings of the cargo is correct. Should it be found out later that the information has been incorrect, the shipper is obliged to indemnify the carrier for any loss suffered as a result of that misstatement. However, it is uncertain whether that guarantee is operative when the B/L has been transferred to a third party.<sup>53</sup>

A written notice by the consignee informing the carrier of the bad condition of the cargo or its loss must be made at the moment of discharge or within three days of the delivery if such a loss or damage is not apparent.<sup>54</sup> Nevertheless, the consignee may bring a court claim against the carrier within one year after the reception of the cargo.<sup>55</sup> It is obvious that this provision is made solely to the benefit of the consignee. What is to be noticed is that should the three-day period expire, the only available action as per the Rules is to bring a court claim. Having in mind the large quantities of goods transported through ports, it would be correct to say that the three days are insufficient. Therefore, instead of trying to ease the involved parties in working towards rectification of the wrong done without court recourse, the Rules make them take the most undesirable course of action.

With the exception of the excluded liabilities in Article 4, the carrier is responsible for everything else while the cargo is in its custody. The only available protection is to insure against risks for which it would be otherwise

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<sup>50</sup> Art 3(1).

<sup>51</sup> Art 4 read with Art 3(1).

<sup>52</sup> Art 3(6).

<sup>53</sup> 'Fourth report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/96/Add.1)' at 12 available on [http://www.uncitral.org/uncitral/commission/working\\_groups/3Shipping.html](http://www.uncitral.org/uncitral/commission/working_groups/3Shipping.html) (accessed 10.03.2011).

<sup>54</sup> Art 3(6).

<sup>55</sup> Art 3(6).

liable.<sup>56</sup> However, the insured value of the goods is limited - the carrier or anyone else acting on its behalf would be liable for not more than the specified maximum in the Rules, unless otherwise agreed.<sup>57</sup>

If the cargo is to be carried under a special regime, the parties are at large to deviate from the Rules and define their own terms in the B/L subject to the condition that they are not contrary to public policy.<sup>58</sup> The remaining part of the Rules serves to remove any misunderstanding of the extent to which they might supersede those national laws relating to the carriage of goods by sea<sup>59</sup>.

## **4.2 The Visby Protocol and the letter of credit system**

The Hague Rules, unfortunately, did not prove to be as efficient as they were in the beginning of the century. There were loopholes that had to be filled in. Modification was considered necessary by the international community in order to bring the convention in line with the existing tendencies and overcome the problematic issues.

The Visby Protocol, adopted in 1968 in Stockholm, did not change the existing legislation. It rather added and made clear certain contentious provisions. One of them was the raise of the compensation amount to different types of cargo units.<sup>60</sup> The second important improvement was that the carrier or his representatives are not entitled to limit their liability if they intended to cause damage or acted recklessly and knowing that damage would occur.<sup>61</sup>

The third addendum was Article 3(4) which recognizes the fact that the B/L document is often used for transactions involving transfer of title to the cargo while in transit. The same provision protects the consignee or any other third party taking possession of the B/L in good faith.<sup>62</sup> Therefore, where the contract

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<sup>56</sup> Art 3(8).

<sup>57</sup> Art 4(5).

<sup>58</sup> Art 6.

<sup>59</sup> James C (n 40) at 687.

<sup>60</sup> Art IV(5) – the Visby Protocol introduced also the calculation of damage as per kilo of cargo; At a later stage, the calculation of the compensation amount was once more changed by the SDR Protocol adopted in Brussels in 1979.

<sup>61</sup> Art IV(5)(e).

<sup>62</sup> 'Fourth report of the Secretary-General on responsibility of ocean carriers for cargo' (n 53) at 4.

of carriage by sea is controlled by the Visby Protocol, a bank acting on behalf of the consignee by issuing a letter of credit should also be protected if acting *bona fide* in reliance on the B/L.<sup>63</sup> In order one to understand the reasoning behind these words, an explanation of the term *letter of credit* would be necessary.

Unlike the ordinary sale of goods where the only participants are the seller and the purchaser and the goods are paid for on delivery, in a carriage by sea sale where large quantities of goods are involved, their immediate payment in most of the cases is impossible. In order both the buyer, not having the financial resources to buy the goods, and the seller, not knowing whether he will be reimbursed, to feel safe in their relationship, the financial help of banks is important. Their assistance is conducted in two ways. The first is by lending money directly to the buyer, that is the consignee, who in turn pays to the seller upon receipt of the goods. This method is known as the credit system.

The letter of credit system is the second type used as a means of payment. Here the bank is an intermediary between the seller and the buyer and provides certainty in their relationship. Due to the fact that the consignee and the consignor are usually located in different countries, there are two banks involved – the issuing and the advising. The buyer goes to the issuing bank – asking it to issue a letter of credit in favour of the seller. The letter is valued the amount of the sale price and the bank gets a percentage of the value of the letter. This letter of credit is submitted to the advising bank – the bank of the seller.

There are several types of letters of credit, each one determining whether the issuing or the advising bank pays for the letter of credit and the moment when the payment is conducted – when the required by the buyer documents, discussed in the next paragraph, are submitted to the advising bank or at the moment when the documents reach the issuing bank. In addition, the type of letter of credit indicates whether it is the advising or the issuing bank which is to pay the seller. If it is the advising bank, it is reimbursed after paying the seller by the issuing bank which in turn extends credit to the buyer. If it is the issuing bank, the advising bank acts as its agent in the seller-issuing bank relations and the advising bank pays when the purchase sum is transferred to it.

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<sup>63</sup> At 11.

In order the seller to benefit from the letter of credit, he has to submit to the advising bank a number of documents with certain specifications. The advising bank is required to check whether they comply with all the requirements of the letter of credit and whether they are authentic. Upon ensuring themselves that the documents are in order, the advising bank employees send them to the issuing bank. The bill of lading is one of these documents. Sometimes it is misstated – a factor which the advising bank servants may be ignorant about – and honour the letter of credit. As a result they debit the seller's account, send the documentation to the issuing bank and require their employer to be reimbursed. At that moment the truth about the said bill of lading is revealed, the issuing bank refuses to pay the advising bank and litigation follows.

In instances where the advising bank acts as an agent of the issuing bank and the latter debits the seller's account thus failing to comply with the letter of credit requirements, an action for unjust enrichment against the seller is brought. However, since this is an explanation of the way in which the market of fraudulently issued Bs/L operates, there is no need to elaborate more on the issue of the letter of credit.

### **4.3 The Hamburg Rules – a comparative analysis with The Hague/ Hague-Visby Rules**

Some states, most of them from the former Communist Block, were not satisfied with the amendments in the Hague Rules and favoured a completely new approach to the unification of the rules relating to the carriage of goods by sea.<sup>64</sup> The effort to satisfy that need fell on the United Nations (hereinafter referred to as UN).

The states which preferred The Hague/ Hague-Visby Rules were in favour of the existing *status quo* in respect of greater protection of the interests of the carrier at the expense of those of the shipper. They claimed that the situation in the 1970s was reflected in the existing freight rates and insurance premiums and

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<sup>64</sup> Robert Force 'A comparison of The Hague, Hague-Visby and Hamburg Rules: Much ado about(?)' 70 (1995-96) *Tul L Rev* 2051 at 2052.

no change was necessary.<sup>65</sup> However, the developing nations did not consider that the risk distribution through the insurance market sufficed for balancing the inequality in the status of the carrier and the shipper created by The Hague/Hague-Visby Rules.<sup>66</sup> An additional factor that made the new Hamburg Rules unattractive for most of the countries was that during the review of the existing regimes political rather than commercial interests prevailed.<sup>67</sup>

### 4.3.1 Scope of application of the Rules

Whatever the reasons for disapproving The Hamburg Rules, several differences with The Hague/Hague-Visby Rules are worth pointing out. The Hague Rules apply only to a B/L issued in any contracting state.<sup>68</sup> The Hague-Visby Rules were extended to control the carriage by sea where the B/L comes from a contracting state or the carriage is from a contracting state or the contract of carriage is subject to the law of a contracting state.<sup>69</sup> Unlike them, the sphere of application of the Hamburg rules is broader. It is where the actual port of loading or discharge is in a contracting state,<sup>70</sup> where the B/L or a similar document has been issued in a contracting state or the laws of such a state have been incorporated in the B/L.<sup>71</sup>

Neither the Hague Rules, nor the Visby Protocol define the meaning of the term *bill of lading*. The only provision that may throw light into its significance is the term *contract of carriage* in Article 1(b) of the 1924 Rules which is defined as any contract of carriage covered by a bill of lading or a similar document of title. But the latter two terms have different interpretations and cannot be used interchangeably.<sup>72</sup> As a result the need to delimit the term *bill of lading* was felt in the Hamburg Rules. Article 1(7) of the latter convention states:

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<sup>65</sup> Frederick D'Political participation and legal reform in the international ,maritime rulemaking process: from The Hague Rules to The Hamburg Rules' 22(1991) *J Mar Law & Com* 81 at 96 and 103.

<sup>66</sup> At 96.

<sup>67</sup> At 97.

<sup>68</sup> Art 10.

<sup>69</sup> Art 10.

<sup>70</sup> Art 5(a)-(c).

<sup>71</sup> Art 5(d)-(e).

<sup>72</sup> 'Fourth report of the Secretary-General on responsibility of ocean carriers for cargo' (n 53) at 3.

"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.

As seen, the B/L provides that the cargo is to be delivered, depending on the wording of the B/L, only to the order of a designated person or a holder of the B/L. Therefore, this document has the quality to control the right to delivery of the goods while they are in carrier's disposition.<sup>73</sup> In addition, where the parties agree not to use a B/L,<sup>74</sup> they are at large to determine the documents to be issued in connection with the contract of carriage.<sup>75</sup> This different documentation may serve as a carrier's protection since it is only the B/L that is an irrefutable proof of the quality of the goods received for shipment when the B/L is transferred to a good faith consignee.<sup>76</sup> Therefore, when using a document of title other than a B/L, the interests of the consignee may be vitiated and the contractual relationship between the shipper and the consignee may be brought to a halt if the consignee is convinced that its interests are not taken care of during the carrier-shipper relations. It all means that the Hamburg Rules impliedly promote the use of the B/L only.

The Hague, Hague-Visby and Hamburg Rules stipulate that they are inapplicable to charter parties.<sup>77</sup> Their wording is, however, different. The Hague/ Hague-Visby Rules explicitly state that they apply only to Bs/L. On the other hand, The Hamburg Rules apply to all contracts of carriage of goods by sea regardless of whether the contracts are covered by a B/L.<sup>78</sup> Therefore, The Hamburg Rules, unlike The Hague/ Hague-Visby Rules, govern even contracts of carriage in which goods are carried under non-negotiable instruments.<sup>79</sup> However, as discussed in the previous paragraph, the parties have to be aware of the difficulties that may arise when taking care of the interests of the consignees.

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<sup>73</sup> At 4.

<sup>74</sup> Art 2(1)(d)-(e).

<sup>75</sup> 'Fourth report of the Secretary-General on responsibility of ocean carriers for cargo' (n 53) at 13.

<sup>76</sup> Art 16(3)(b).

<sup>77</sup> Arts 5 and 1(b) for The Hague/ Hague-Visby Rules and art 2(3) for The Hamburg Rules.

<sup>78</sup> Art 30(3) read with art 1(6).

<sup>79</sup> Art 18.

While The Hague/ Hague-Visby Rules provide for the due care of the carrier or its agents to make the ship sea and cargo worthy before and at the beginning of the voyage,<sup>80</sup> The Hamburg Rules presume that the carrier, its agents or servants are liable for damage to the cargo while it is in their custody at the port of loading, during the sea leg, and at the discharge port.<sup>81</sup> It means that the period of carrier's responsibility has been extended in The Hamburg Rules to the period of time between the moment of putting the cargo at carrier's disposal at the port of loading to the time when the cargo is delivered to the consignee at the port of discharge.<sup>82</sup> In addition, under The Hague/ Hague-Visby Rules the carrier is liable for loss or damage to the cargo only in certain instances. On the other hand, The Hamburg Rules hold it at all times liable for loss, damage or delay whenever it, its servants or agents cause it.<sup>83</sup> Furthermore, the period for giving notice to the carrier before involving a court action has been extended in The Hamburg Rules.<sup>84</sup>

The Visby amendment extended the available protection of the carrier to the latter's agents and employees, other than independent contractors, by stipulating that the defences available to the carrier are also applicable to them.<sup>85</sup> Article 5(1) of The Hamburg Rules makes no mention about independent contractors when referring to the protection of the carrier's employees and agents. It seems that The Hamburg Rules are also applicable to independent contractors.

As regards the liability of the shipper, comparison of the relevant provisions of the three Conventions will be made. The purpose of doing so is to show the instances in which the aggrieved party is to claim damages from the shipper and not carrier. The Hague Rules and its protocol stipulate that the shipper guarantees the correctness of the cargo information supplied to the carrier.<sup>86</sup> Article 4(3) of The Hague/ Hague-Visby Rules absolves the shipper from liability should the damage suffered by the carrier be as a result other than the shipper's act, fault or negligence. The Hamburg Rules contain the same

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<sup>80</sup> Art 3.

<sup>81</sup> Art 5(1) read with art 4.

<sup>82</sup> Art 4 of The Hamburg Rules read with art 1(b) and 1(e) of The Hague/ Hague-Visby Rules.

<sup>83</sup> Art 5.

<sup>84</sup> Art 20.

<sup>85</sup> Art 4*bis*.

<sup>86</sup> Art 3(5).

provisions.<sup>87</sup> Article 4(6) of the predecessors of The Hamburg Rules is concerned with the carriage of dangerous cargo. Unless the carrier knows about the nature of the dangerous cargo and agrees to its carriage, the shipper is liable for whatever consequences it may cause. Unlike this Article, its counterpart in The Hamburg Rules, Article 13, demands only knowledge of the carrier.

Regarding the description of the cargo in the B/L, The Hague Rules state that the carrier has to provide in the B/L the weight or other measurement of the loaded cargo.<sup>88</sup> However, the carrier sometimes described the cargo in the B/L with both its weight and number of packages while the requirement was to identify only one of those measurements.<sup>89</sup> As the consignee relied on the information contained in it, the carrier was held to be bound by its statements and liable to the consignee whether at fault or not.<sup>90</sup> This was changed in 1978 by The Hamburg Rules requiring that “the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed”<sup>91</sup> be given in the B/L.<sup>92</sup> This wording does not leave any doubt in the parties as to what exactly is required from them in fulfilling their obligations under The Hamburg Rules and what the consequences would be should fraudulent statements be made in the B/L.

#### **4.3.2 Letter of indemnity and The Hamburg Rules**

The Hamburg Rules is the only convention of the discussed ones which considers the role of the letter of indemnity against the issuance of a clean B/L.<sup>93</sup> In terms of the 1978 convention the carrier is not allowed to enforce a letter of indemnity against a *bona fide* third party transferee of the B/L but only against the shipper. It means that in order to enforce a letter of indemnity against the shipper, the carrier must first be found guilty on account of entering into the B/L false information that was relied on by the consignee and after that

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<sup>87</sup> Arts 12 and 13, respectively.

<sup>88</sup> Art 3(3)(b).

<sup>89</sup> ‘Fourth report of the Secretary-General on responsibility of ocean carriers for cargo’ (n 53) at 5.

<sup>90</sup> Ibid.

<sup>91</sup> Art 15(1)(a).

<sup>92</sup> Art 15(1)(a).

<sup>93</sup> Art 17(2).

bring an action against the shipper. However, what the carrier has to be aware of is that in order to be absolved from liability it has to prove that it had no intention in committing a fraud by issuing the clean B/L.<sup>94</sup>

Inference about the way letters of indemnity are regulated by The Hamburg Rules' predecessors may be made by virtue of taking note of Article 3(4) of The Hague Rules and Article 3(4) of The Visby Protocol. The former states that the B/L is only *prima facie* evidence of the received cargo onboard. However, the issuance of a letter of indemnity would strengthen the view that the quality of the received cargo is poorer than the one described in the B/L and an attempt to defraud a participant in the carriage of goods by sea would be more obvious.

The Visby amendment provides the same protection to the consignee as its predecessor but subject to the proviso that if the B/L has been transferred to a good faith consignee, there is an irrebuttable presumption that the condition and type of the goods are as described in the B/L. Therefore, it seems that should it be shown that the cargo differs too much from the one described in the B/L and the carrier be held liable to compensate a good faith consignee, to enforce a letter of indemnity would mean to enforce a contract whose main purpose is to defraud a participant in the sale of goods – a process that is highly likely not to happen.

This paper is concerned with frauds relating to the B/L and the picture will not be full if there is nothing more to say about the role of the letter of indemnity. However, as this chapter describes the difference between The Hamburg Rules and its predecessors, the information provided suffices. The letter of indemnity specifications will be discussed further in detail.

Although the so much craved unification of the legal regime started in 1924, it is still an impossible task. The reasons are severalfold. One of them is the ratification of the different conventions by different states. The second is that some states might have ratified the three conventions but have not denounced the conflicting rules dealing with the same subject-matter.<sup>95</sup> The third is that there are states acceding only to a part of a convention while the remaining

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<sup>94</sup> Art 17(1) and 17(3).

<sup>95</sup> 'Package and Kilo Limitations of 148 Countries' available on [http://www.mcgill.ca/maritimelaw/glossaries/package-kilo/#FN\\_NB](http://www.mcgill.ca/maritimelaw/glossaries/package-kilo/#FN_NB) (accessed 26.01.2011)

issues are regulated by different sets of rules.<sup>96</sup> The fourth is that even though a country is not a signatory to a convention, it is incorporated into national law<sup>97</sup> which causes a conflict when it comes to the interpretation of the terms of the contract of carriage.

Due to the lack of uniformity the negotiating parties are not always aware of the exact consequences of the contracts they enter into. It is very difficult for them to know for certain their position when it comes to determining their rights and duties. In addition, lots of issues may arise when people use a combination of these rules in order to achieve their own fraudulent ends at the expense of the innocent participants in the carriage of goods by sea.

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<sup>96</sup> Eg. the Scandinavian countries in their interrelations apply rules different to the ones they apply with the other states.

<sup>97</sup> Eg Germany.

## **Chapter 5**

### **Conflict of laws and fraudulent Bills of Lading**

The problem whether the issuance of a clean B/L should be considered fraudulent and as such hold the carrier liable for misstatements to the consignees, has been reviewed by many courts. This chapter pays attention to the participation of third parties in the international carriage of goods by sea, how they are protected against sham sales of cargo and how national courts interpret seemingly consistent provisions of a bill of lading relating to the topic at hand. In addition, the most common examples of misstating otherwise completely honest Bs/L through their fraudulent antedating/ backdating is displayed. Last but not least the link between letters of indemnity and the B/L is considered.

#### **5.1 Protection of a third party holder of Bill of Lading**

In order the consignee to avail itself of the existing protection, it has to show the presence of different factors which depend completely on the governing law. Therefore the three conventions have to be considered.

The Hague and Hague-Visby Rules state in Article 3(2)(q):

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from ...[a] cause arising without the actual fault or privity of the carrier, or without the actual fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

The Hamburg Rules, on the other hand, state in Article 5(1):

The carrier is liable for loss or damage to the goods ... if the occurrence which caused the loss [or] damage took place while the goods were in his charge ... 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.

It is obvious that the holder of the B/L must meet the following requirements in order to recover damages for false representations: the action must be instituted within the statutory limits; that he is a *bona fide* possessor of the B/L; that he has suffered damage.<sup>98</sup> On the other hand, for the carrier to be absolved from

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<sup>98</sup> MurrayD (n 25) at 713; see also *Margarine Union G.M.B.H. v. Cambay Prince Steamship Co. Ltd.* [1967] 3 W.L.R. 1569.

liability it has to show, if following The Hague/ Hague-Visby Rules, lack of fault or privity, or lack of fault and neglect of its agents; or, according to the Hamburg Rules, that it or its agents took all the reasonable measures to avoid the damage.

Article 3 of The Hague Rules states:

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... 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).

Paragraph 4 of The Visby amendment is continued by the addendum that the “proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith”.

Article 16 of the Hamburg Rules stipulates that:

1. If the bill of lading contains particulars [describing] 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, ... 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)...
  - (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.

As evident from the above citations whenever the carrier or its representatives are uncertain about the specifications of the cargo, they must clause their doubts in the B/L. In addition, only the Visby Protocol and the Hamburg Rules state that a B/L in the hands of a *bona fide* third party holder is conclusive evidence about the cargo into the custody of the carrier. If one considers the fact that by agreeing to issue a clean B/L, the carrier enables the shipper to misrepresent to the consignee the condition of the cargo, it would be correct to say that the

carrier becomes an accomplice to a fraud. It means that the carrier even not recklessly or intentionally participating in this “plot” will still be held liable to the receiver of the goods for its conduct.<sup>99</sup>

The above statement will not stand whenever there are no reasonable means to check the condition of the cargo because its packaging is such that no damage could be conceived by a normal inspection conducted by the carrier. However, such an absence of reasonable means of inspection must be stated in the B/L. Otherwise, the carrier still risks being held liable for fraud. And the belief that by acting as requested by the shipper not to make any statement in the B/L will make the whole process of loading quicker or that it is not privy to the fraud, does not take away or decrease its liability.<sup>100</sup>

## **5.2 Honouring fraudulent Bills of Lading, conflict of laws and difficulty in interpreting contracts of carriage**

In *Trafigura Beheer BV v Mediterranean Shipping Co SA (MSC)*<sup>101</sup> the court was concerned with determining carrier’s, that is MSC’s, liability after it honoured an order B/L falsified and presented by a fake consignee. The cargo was copper carried from the Republic of South Africa (RSA) to China. In order the cargo to be removed from the port of discharge, the fraudsters obtained, on presenting the B/L to the ship owner, a delivery order with which they paid all the taxes to the Chinese Customs and the fraudulently obtained cargo got a clearance certificate. However, at the same time the true owner presented the true B/L and the ship owner requested that the removal of the copper from the port be stopped. The removal was halted, a fresh delivery order was issued but the Chinese officials refused to release a new clearance certificate and therefore the cargo had to remain within the port area. As a result the copper owner suffered a loss and sued MSC for compensation.

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<sup>99</sup> *Hunter Grain v Hyundai* (1993) 117 ALR 507.

<sup>100</sup> Rochester V ‘Letters of indemnity and letters of guarantee in the international shipping trade: a multi-jurisdictional analysis’ at 34 available on [www.mcgill.ca/files/maritimelaw/letters.doc](http://www.mcgill.ca/files/maritimelaw/letters.doc) (accessed 12.02.2011).

<sup>101</sup> [2007] 2 CLC 379.

The conversion was not argued by MSC. It was also beyond dispute that MSC was not an accomplice to the plot against the plaintiff. Although there was some kind of complicity between the fraudsters and the owner's representatives<sup>102</sup> that could be attributed to the ship owners, the fact that the cargo was stopped from being stolen in time from the carriers, meant that the representatives of the carrier acted beyond their authority. However, this fact did not relieve the defendant from any liability even though there was a clause in the B/L, Clause 4, stating that the carrier bore no responsibility for damage or loss after discharging the cargo howsoever such damage or loss may arise.<sup>103</sup> With or without that provision, the situation would not have changed having in mind a previous decision of the Court of Appeal.<sup>104</sup> In *Motis Exports*<sup>105</sup> the judges held the ship owner liable for delivery against presentation of a forged B/L. They based their decision on the fact that the ship owner is in the best position to control the quality of its Bs/L and the ease with which they can be forged rather than the cargo owner who falls a victim to forgery over which it does not have even the slightest means of control.<sup>106</sup>

The issue before the court in the *Trafigura* was to decide which law regulated the contract for the purpose of determining the amount of the ship owner's liability. It depended on whether the contract of carriage was governed by the Hague Rules, Hague-Visby Rules or the terms of the B/L. The case would have been easy to decide had Trafigura put in the B/L the value of the copper. Had it done so, it would have avoided package limitation in the Hague/ Hague-Visby Rules<sup>107</sup> and would have been relieved of the task to look into the set of rules that regulated the B/L.

The case was brought before an English court, the shipment of the copper took place from RSA – a non-contracting to The Hague-Visby Rules state and the law governing the contract of sale as per the B/L was the English law. The B/L provided:

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<sup>102</sup>After investigation was conducted, two employees of the ship owner were dismissed for their participation in the fraud (see n 10 of *Trafigura Beheer BV v Mediterranean Shipping Co SA* [2007] EWHC 944 (Comm)).

<sup>103</sup>Todd P 'Liability for misdelivery: *Trafigura v MSC*' 13 *JIML* [2007] 356 at 357.

<sup>104</sup>Ibid.

<sup>105</sup>*Motis exports Ltd v Dampskibsselskabet AF 1912* [2000] 1 LLR 211.

<sup>106</sup>At 217.

<sup>107</sup>Todd P (n 103) at 357.

For all trades...this B/L shall be subject to the 1924 Hague Rules with the express exclusion of Article IX , or, if compulsorily applicable, subject to the 1968 Protocol (Hague-Visby) or any compulsory legislation based on the Hague Rules and/or the said Protocols. Where Hague-Visby or similar legislation is compulsorily applicable, the Hague-Visby 1979 Protocol (“SDR” Protocol) shall also apply whether or not mandatory.

The court held that for the voyage from RSA to China The Hague Rules would apply. The reason was that The Hague-Visby Rules would govern only if there was compulsory legislation of a contracting state enforcing them. Since English law was governing the relationship of the parties and as The Hague-Visby Rules were part of that law in respect of carriage from any contracting state and were also part of the law of RSA, they would have to be applied. However, although RSA had enacted them into its legislation, it was not a party to them and therefore was not a contracting state for the purposes of the convention. The B/L stated that it would be regulated by The Hague-Visby Rules only if compulsory. As a matter of English law<sup>108</sup> The Hague-Visby Rules were not compulsory. Furthermore, the express terms of the B/L made it clear that the parties did not intend The Hague Rules to apply after the discharge from the vessel but the provisions of the bill of lading. For the purposes of the present paper, it is irrelevant to delve into greater depth the reasons behind the court decision. It suffices to state that the judges felt difficulty in determining the regime governing the relationship of the litigants.

What is obvious from the case is that the existence of the different regimes regulating the relationship of the carrier and the consignee mean difficulty in determining their respective liability. The *Trafigura* decision is not the most obvious example of fraud issues roaming the world of carriage of goods by sea, but it is very clearly showing the purpose of this subchapter –the difficulty in drafting the contractual relationship of the parties and *post factum* inability to understand what their intentions have been.

In an American case, the *Acadia Forest*,<sup>109</sup> the court was concerned with the limit of the carrier’s liability in a contract of carriage of goods from Belgium to US. For the purpose it had to establish the law of which country governed the contract. The clause paramount, that is the clause determining the national law in case of a dispute, provided that:

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<sup>108</sup>Art 1 of Carriage of Goods by Sea Act (UK), 1971.

<sup>109</sup> *Daval Steel Products v. M/V Acadia Forest* 683 F. Supp. 444 (S.D.N.Y. 1988).

This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States [from] 1936 [COGSA], or if this bill of lading is issued in a locality where there is in force a ... statute of a similar nature to the [Hague Rules], it is subject to the provisions of such act...thereto annexed.

The plaintiff claimed that according to this clause the contract was governed by the rules applicable in Belgium, that is The Hague Rules as amended by the Visby and SDR Protocols, exceeding the COGSA limitation. In addition, COGSA provided that the parties could extend their liability over the limits imposed by the American Statute.<sup>110</sup> Since the amended Hague-Visby Rules did in fact extend their liability, their agreement was not contrary to the American statute. The defendant, on the other hand, argued that because the shipment was transported to US, it was regulated by COGSA to the exclusion of The Hague-Visby Rules. At one point the judge said that “COGSA governs the bill of lading here at issue”<sup>111</sup> while later in his judgment stated that COGSA did apply only to some clauses in the B/L. The mere fact of this controversy shows that even those who are legally trained feel doubts as to what the governing law is.

What the American courts understood during the years is that although US COGSA is compulsorily applicable to carriage of goods by sea to and from a US port, the law itself provides for deviation from the carrier liability standards endorsed by COGSA.<sup>112</sup> Therefore, whenever there was uncertainty they started interpreting the contracts of carriage to the detriment of the carrier who drafted the B/L.<sup>113</sup> However, there is no uniformity with regard to this course of adjudication and sometimes the courts favour the strict application of COGSA.<sup>114</sup>

It is obvious from the discussed cases that the purpose of incorporating multitude of laws in a contract of carriage of goods by sea is to make it universally applicable to the transportation of cargo between states that have incorporated different sets of rules no matter whether those rules conflict with each other. However, such an attempt most of the times causes more confusion

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<sup>110</sup> 46 U.S.C.App. § 1304(5).

<sup>111</sup> *Acadia Forest* (n 109) at 447.

<sup>112</sup> Tetley W “Application of the rules generally” available on [www.eurotransport-solutions.com/.../Hague-Visby%20Comments.pdf](http://www.eurotransport-solutions.com/.../Hague-Visby%20Comments.pdf) (accessed 12.02.2011) at 26-27.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

than certainty not only among the parties to the contract but also among courts of law.

### **5.3 Backdating/ antedating Bills of Lading**

The other issue worth discussing is when the B/L is backdated with the intention to defraud the banks issuing letters of credit. The whole process operates in the following way. A B/L states the true condition and specifications of the cargo loaded on board. However, the actual process of loading is completed later than the date specified in the B/L. The economic reasons of such an activity become obvious from the next case. In *Standard Chartered Bank (SCB) v Pakistan National Shipping Corporation (PNSC)*<sup>115</sup> the court dealt with the issuance of antedated B/L by PNSC which was the ship owner. The B/L was passed to the confirming bank, SCB which confirmed payment. Although SCB did not know about the backdated B/L, there were some additional discrepancies in the documentation presented for which SCB was aware of and was entitled to dishonour the letter.

On delivery to the issuing bank, the documentation was dishonoured due to the latter discrepancies and no money reimbursed to the confirming bank. Their Lordships held that if a fraudulent representation is relied upon when bringing a claim, in the sense that the aggrieved party would not have parted with his money if he had known it had been false, it does not matter that he held some other negligent belief about another issue and, but for that knowledge, would not have parted with his money either.<sup>116</sup> It means that once it is shown that there is misstatement on the B/L, it does not matter that there are other factors which are the guiding force of the aggrieved party's actions.

Sometimes, but not always, the backdating is accompanied by falsifying the quality of the cargo in the B/L. In the case of *M/V Sukarawan Naree*<sup>117</sup> she was time-chartered to one P which, in turn, voyage chartered her to the plaintiff C to carry cargo of cold rolled steel from China to US. The pre-survey of the cargo

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<sup>115</sup> [2002] UKHL 43.

<sup>116</sup> At para 15.

<sup>117</sup> *Cargill Ferrous Intl v. m/v Sukarawan Naree* 1998 A.M.C. 566.

showed that the packaging of the steel was damaged and rusty. The cargo was to be carried under a number of Bs/L and in order each separate B/L to be issued, mate's receipt showing the specifications of the cargo was prepared.

The time charter party – the contract between the owner and P – stated that the captain or charterer's agents were authorized to sign the B/L in conformity with the mate's receipts. The voyage charter-party – the contract between P and C – on the other hand, stated that the master/owners had to authorize agents at the loading port to sign the Bs/L in strict conformity with the mate's receipts.

The above clauses, the court held, allowed the voyage charterer to appoint its agent to sign the Bs/L on behalf of the master. However, this authorization was subject to a number of conditions – no postdating/ antedating of the B/L, no entry in the B/L of goods not actually loaded and no issuance of a B/L which is not in conformity with a mate's receipt.

The mate's receipts stated the poor condition of the packaging. However, C's supplier required clean Bs/L for the issuance of a letter of credit. To rectify this problem, C issued a letter of indemnity to P absolving it from liability for cargo damage. C's agent issued clean Bs/L. The owner of the vessel was not a privy to that agreement. In addition, the bills were antedated several days prior to the end of the loading and there was the master's letter authorizing C's agent to issue Bs/L.

The vessel sailed with the forged Bs/L. Several months later C, as the receiver of the cargo, discovered that it was damaged and filed a suit in a US court against the ship owner that in turn filed a suit against P. The applicable law was the US COGSA<sup>118</sup> which employs its own regulations to all contracts of carriage by sea to or from US ports performed under B/L.<sup>119</sup>

The court held that whenever there is a claim for damaged cargo by the cargo owners, it is the carriers that are liable. A *carrier* under COGSA is defined as “the owner or charterer who enters into a contract of carriage with a shipper.”<sup>120</sup> Although the ship owner usually does not enter in a contract of carriage when

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<sup>118</sup> 46 US Code.

<sup>119</sup> *Sukarawan Naree* (n 117) at 570.

<sup>120</sup> s 1301(a).

the ship is chartered, it may nevertheless be vicariously liable through its master's actions, the court held.<sup>121</sup> The same liability follows where the charter party agreement authorizes the charterer to appoint agents to sign on behalf of the master. That is, the ship owner, even if not privy to a collusion to defraud a consignee, may fall a victim to a rightful claim of the cargo owner. However, where an agent exceeds its authority granted by the master, the owner does not become a party to the contract of carriage – as such it does not fall within the definition of the COGSA carrier and is released from liability.<sup>122</sup>

There is another instance in which the backdated B/L is issued. Assume that the shipper concludes a contract for sale of goods subject to the condition that they are loaded on board before a certain date. One day after that date expires there is a drastic fall in the price of the goods. The buyer for certain wants to avoid that contract without incurring any liability under the contract. However, it has no clue that the goods are still not loaded. On the other hand, the shipper knows about the decrease of the prices and that the buyer is entitled to cancel the contract. In order to keep it bound, the shipper in accord with the carrier agrees to backdate the B/L.

## **5.4 Letter of indemnity**

As mentioned elsewhere in this paper,<sup>123</sup> part of the frauds linked to the B/L arises out of the wrongful issuance of the letter of indemnity and the carrier's improper reliance on its validity. A letter of indemnity is prepared by the shipper in favour of the carrier so that the latter issues a clean B/L while knowing that it constitutes an untrue statement of the actual condition of the loaded cargo. The importance of the clean B/L is, as seen from the previous discussions, either honouring a letter of credit from the bank to which the consignee makes an application or the deception of the consignee.

By accepting the letter of indemnity, the carrier does not become liable for damaging the cargo while it is in its possession; it is liable for participating in the issuance of clean B/L in exchange for a letter of indemnity and in the

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<sup>121</sup> At 570.

<sup>122</sup> At 570.

<sup>123</sup> Chapter 4.3.2.

knowledge that it misstates the true condition of the cargo. States do not accept the view that the issuance of letters of indemnity is a practice that has to be fought against with all available means. For instance German and French legislation state that the letter of indemnity is declared null and void if the information put in the B/L does not correspond the actual quality of the cargo at the moment of loading. Similarly, Finnish and Norwegian maritime legislation state the consignee has to be informed about the existence of the letter of indemnity which has been issued honestly.<sup>124</sup>

When considered from the perspective of a good faith consignee who pays for the cargo by simply reviewing the B/L containing misstated details of the cargo, the letter of indemnity constitutes a fraud. According to the Hague-Visby Rules<sup>125</sup> the clean B/L is a prima facie proof of the condition of the goods shipped and a proof to the contrary is inadmissible when a third party takes possession of it in good faith. The same situation holds for the Hamburg Rules.<sup>126</sup> It means that even though the practice within the shipping business is to issue letters of indemnity, in most of the cases their actual purpose is to defraud one or more of the parties. On the one hand, the good faith third party and, on the other, the carrier who in its attempt to assist the shipper, involuntarily and unknowingly participates in that illegal scheme.

It is not strange that courts view the letter of indemnity system as illegal and contrary to public policy and the carriers cannot rely on it to make the shippers reimburse them when complicity is attributed to them.<sup>127</sup> It is so because if a carrier, in its reliance on the letter of indemnity, sued the shipper for losses suffered as a result of the consignee's claim and were successful in court, it would mean the judges would promote the collusion between the carrier and the shipper to defraud the third party.

Even though the reasoning from the last paragraph meets more support from the judges, sometimes their decisions go the other way that is promotion of illegal activity at the expense of upholding justice. Such an example is *United City*

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<sup>124</sup> Rochester V (n 100) at 35-42.

<sup>125</sup> Art 3(4).

<sup>126</sup> Art 16(3).

<sup>127</sup> *Brown Jenkinson v. Percy Dalton* [1957] 2 Q.B. 621(C.A.)

*Merchants (Investments) Ltd. v Royal Bank of Canada*.<sup>128</sup> The case was not concerned with a letter of indemnity issue, but payment of a confirmed irrevocable letter of credit<sup>129</sup> upon presentation of antedated B/L. The plaintiff had concluded a contract with an overseas company for the sale of goods. The buyer opened a confirmed irrevocable letter of credit with its bank which in turn appointed the defendant bank as a confirming bank. As per the contract the loading date of the cargo had to be done before December 15<sup>th</sup> 1976. However, the cargo operations were concluded one day after the expiration of that date.

The carrier's brokers antedated the B/L so that it complied with the requirement of the contract. The defendant knowing about the misstatement refused to pay the seller claiming that material misrepresentations of fact in the B/L released it of its obligation to pay. The House of the Lords held that the bank had to pay because the improper dating of the B/L did not release the confirming bank of its contractual duty to pay the claimant. The court stated that the purpose of the confirmed letters of credit is to give the seller a right to be paid before it parts with its control over the goods regardless of the claims that the buyer might have against the seller at a later stage. It meant that if the documents presented to the confirming bank, on their face conformed to all the requirements of the credit, had to be honoured. This principle holds even when the bank may have information that there has been breach of the contract of sale entitling the buyer to rescind it. Nonetheless, the court continued that such a ruling would not be upheld where the seller is aware of the fraudulently entered information in the B/L and where the materiality of the inaccuracy is important. In the case under discussion there was collusion between the seller and the carrier's brokers and the one day inaccuracy was not material. A misstatement is material only if it causes a reduction in the price of the goods to which the documents relate if, failing reimbursement by the buyer, the bank would be driven to realise its security.<sup>130</sup>

Should one follow the outcome of the *United City Merchants* case, he may conclude that sometimes a fraudulent letter of credit may be considered legally

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<sup>128</sup> (1982) 2 W.L.R. 1039.

<sup>129</sup> Such a letter of credit provides the highest protection of the seller in the sense that the confirming bank undertakes to pay the seller upon the maturity date and upon presentation of the required documents.

<sup>130</sup> At 1045.

enforceable. However, this would be only in those instances where the price of the misstated cargo has not changed. Although such a statement might have lots of supporters, the aggrieved parties who have paid for something different from what they actually wanted are the ones that have to be protected and not the shippers or the carriers. Therefore, decisions like the *United City Merchants* should not be followed.

What is to be noted from the discussed caselaw is that in a court suit the starting point is always the determination of the law that regulates the contracts of carriage by sea. On the one hand, the parties put in their B/L the paramount clause governing the contract and, on the other, the Convention that determines the B/L specifics. The difficulty arises when the national legislation is not an accessory to the version mentioned in the B/L and does not provide for deviation to the benefit of the freedom of contract. Such would have been the situation in the *Trafigura Beheer* if the UK COGSA had been written in terms allowing only for The Hague-Visby Rules and that the B/L had stated that the carriage by sea contract was to be regulated by The Hague Rules. The *Acadia Forest* is the most evident example that it is even troublesome for a person taught in reconciling conflicting situations to come to a reasonable and justifiable outcome. This is an area of law commonly known as conflict of laws, a grey area of life dealing with lots of uncertainties. The international community by leaving the different regimes regulating the international carriage of goods by sea to coexist instead of unifying them by substituting the old versions with a newer, umbrella, one caused and is still causing tumult to the business.

## **Chapter 6**

### **Bills of Lading and carriage of different types of cargo**

#### **6.1 Bills of Lading and carriage of oil**

In the tanker trade a single cargo of oil may be split into many parts and resold to many people at one and the same time. These resales may occur several times in a row. In addition, a single person may participate in the purchase of shipments from several owners.<sup>131</sup>

The oil market being wholly dependent on the fluctuating prices of the oil on the spot market, changes its value every minute. The traders, in their attempts to increase their profit and decrease loss rely upon renegotiating the terms of the contracts they enter into.<sup>132</sup> This renegotiation happens quite often and it is practically impossible for the documents evidencing title of ownership to follow their actual owner. That is, in reality the sale of oil and its derivatives carried by sea occurs without delivery of the B/L but only by 'gentleman's agreement.'<sup>133</sup>

The parties negotiate the exchange of the cargo even without transferring money.<sup>134</sup> Since the cargo changes hands even minutes prior to it being discharged from the tanker and that the normal policy is to pay for it 30 days after the date on the bill of lading, a practice exists the sellers to issue letters of indemnity to the buyers instead of giving them the B/L.<sup>135</sup>

As was discussed in this paper, the letter of indemnity is considered to be illegal and contrary to public policy on condition it is prepared with the sole purpose of issuing incorrect B/L. Due to the fact that in the sale-purchase chain lots of intermediaries are involved, the B/L may reach the carrier long time after the cargo is discharged. Therefore, it is only the letter of indemnity that may serve as some kind of protection and proof of ownership to the buyer. However, it is often difficult to follow the link between the participants and say who the actual owner of the cargo is; the problem being worsened if one party of the chain goes

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<sup>131</sup> Mary Green 'Letters of Credit and the Computerization of Maritime Trade' 3 (1987-1988) *Fla. Int'l L.J.* 221 at 224.

<sup>132</sup> At 225.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> At 226.

bankrupt since it is the creditors whose claim is higher ranking than the claims of third parties doing business with the insolvent.<sup>136</sup>

A problem with the letter of indemnity, in addition to the fact it is not fraud-proof, is that it is issued for a limited period of time and after it expires, the ship owner may be left with a large claim for no delivery of the cargo to the true holder of the B/L.<sup>137</sup> On the one hand it will be the claim and, on the other, the unenforceability of the expired but otherwise fully lawful letter of indemnity. In the chain there is a number of letters of indemnity supporting one another, the oldest one most probably issued by the original buyer of the cargo – the ‘original owner’ of the oil.<sup>138</sup> Since in the most cases a single businessman participates in more than one chain sales, the probability that the transfer of a B/L might be transferred to the wrong party is high. Then the letter of indemnity would not be nullified by the delivery of the B/L but by its expiry period. In addition, all the letters of indemnity issued prior in time concerning the same cargo will also expire starting from the one issued earliest in time.<sup>139</sup>

Although the sale of oil is founded on mutual trust, sometimes this trust may be used to the advantage of unjust enrichment. Due to the fact that in most cases the original shipper has in its hands two sets of Bs/L, it may sell its cargo to two independent buyers thus starting two independent chains. The buyers of cargo evinced by a single B/L are aware of the existence of the other B/L and the both buyers know that the other has an equally valid legal claim for ownership over the cargo. Once the master of the ship is presented with an original B/L and has discharged the cargo, the aggrieved party has no claim in conversion against the ship owner/ master or the other party.

Another way to defraud the participants in the oil business is to falsify the B/L. As they are issued in standard forms, the task of falsifying them becomes easier.<sup>140</sup> The blank may be obtained easily and the fictitious cargo be put in it

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<sup>136</sup> Ibid.

<sup>137</sup> At 227.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> At 229.

as well as the details of an existent ship sailing towards its real destination.<sup>141</sup> When she comes to the port of discharge, it becomes obvious that the bought cargo has never been loaded.

A scenario similar to the one described in the previous paragraph occurred in Nigeria in the 1980s. During this decade the tanker trade in Nigeria was on the rise and the ports were very busy. Lots of tankers were waiting for berths for a long time. The information relating to a tanker, its size, cargo carrying capacity, destination and type of cargo could be obtained quite easily. When the ship started loading, the fraudsters, after obtaining all the relevant information contacted potential victims offering them the cargo at much reduced prices. The trick is that they required the payment of the cargo when the ships arrived at the discharge port that is the payment was going to be on arrival and not at the time of the sale. However, the fraudsters required that the victims paid up front for local expenses such as port and custom taxes which, depending on the size of the tanker, were between 200 000 and 400 000 USD.<sup>142</sup> Supplied with the fake bills of lading and waiting for the tanker to arrive at the port of discharge, the consignees found that they fell victims of a bogus plan.<sup>143</sup> Having in mind that today people are able to find information about a ship very easily, it is not difficult to conclude that such a scenario is still possible.

## **6.2 Bills of Lading and carriage of bulk cargoes**

Of greatest concern to the cases where the carriage of cargo in bulk is involved is the correctness of describing the cargo. According to any of the three sets of Rules, the carrier or the charterer (depending on the contract between them) must include in the B/L the quantity and quality of the loaded cargo. However, when the carrier/ charterer has reasonable grounds to suspect that it would not be able to accurately represent the goods actually loaded, it is not obliged to do so.<sup>144</sup>

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<sup>141</sup> Having in mind the control exercised at sea by the coastal nations, it is very difficult for a ship to hide herself. In addition, the online service *Marinetraffic* updates regularly the position of the ships.

<sup>142</sup> Bassindale J 'Fraud and Bills of Lading' 4(1996) *J of Financial Crime* 33 at 35.

<sup>143</sup> *Ibid.*

<sup>144</sup> See *The River Gurara* [1998] 1 Lloyd's Rep. (C.A.) 222 at 233.

In order to be absolved from liability due to wrong/ fraudulent description of the goods in the B/L, the carrier puts “particulars furnished by the shipper” or “quality and quantity as provided by the shipper”.<sup>145</sup> The reasons for this statement are severalfold.

If the carrier is uncertain about the quality and quantity of the goods and writes down “shipper’s load and count”, the uncertainty and the description are in obvious conflict. On the one hand the carrier is unsure what it carries aboard, and on the other, agrees with what the shipper says the cargo consists of. Therefore the carrier is obliged to issue B/L if required<sup>146</sup> with the exact information provided by the shipper. However, if uncertain, then the proviso of Article 3(3) of The Hague/ Hague-Visby Rules or, Article 16(1) of The Hamburg Rules, is to be invoked<sup>147</sup> and the carrier is to give reasons regarding its uncertainty.

Usually, when the person authorized to issue the B/L agrees with the weight data presented by the shipper, it must in unqualified terms put it in the B/L.<sup>148</sup> It is a document of title that in most cases is transferred to a third party which in the belief of the correct description of the goods concludes a contract with the seller. In the US decision of *Bally Inc. v. M/V Zim America*<sup>149</sup> the court held that the clause “weight as provided by the shipper” into the B/L is valid and enforceable unless there were means through which the cargo carrier would ascertain itself about the weight of the cargo.

Although in *Zim America* the *ratio decidendi* relates to the weight of the cargo, it is definitely valid as regards its quality, especially where the cargo is in bulk (maize, ore, etc). A sample of each separate shipment could be taken before loading it on board so that if later there is a claim against the carrier for misrepresentation, the relevant sample would serve as a proof. However, even so, the carrier still has to include in the B/L a qualifying phrase “quality as per

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<sup>145</sup> Tetley W, Chapter 11 “Loss While in the Charge of the Carrier,” *Marine Cargo Claims* 4<sup>th</sup> ed. at 28 available on <http://tetley.law.mcgill.ca/maritime/ch11.pdf> (accessed 01.02.2011).

<sup>146</sup> Art 3(3) Hague/ Hague-Visby and art 14(1) Hamburg Rules.

<sup>147</sup> Art 3(3) and art 16(1), respectively, state that the carrier is required to insert on the bill itself an explanation of why he was suspicious or why he could not check properly the cargo.

<sup>148</sup> See *Noble Resources v Cavalier Shipping Corp (The Atlas)* [1996] 1 Lloyd’s Rep. 642 at p. 646.

<sup>149</sup> 1994 AMC 2762 at p. 2766.

the shipper and as per relevant sample” in order to avoid liability. Although the courts of some states are unwilling to hold that the carriers by putting these qualifying words have delivered the goods in the same state as loaded,<sup>150</sup> the stipulation “quality as per the shipper and as per relevant sample” is a different case. Such a clause in the B/L should not be considered as trying to protect any “fraudulent activity” under the relevant laws, thus making it invalid and therefore removing the carrier’s limitation of liability.<sup>151</sup> Such a clause is to be viewed in a way that the carrier tries to protect itself from circumstances in which it has no available means to ascertain the correctness of the shipper’s statements. Even if using similar clauses, courts are to state that such Bs/L are clean and should it be found out that the quality of the cargo is not as stated there, then the shipper is to be held responsible.

As already seen that the rules under discussion neither show the internationally accepted practice nor national legislation, it is worth noting what the domestic legislation does in order to prevent collusion between the shipper and the carrier. In a Hague Rules state, such as US, COGSA<sup>152</sup> states that where under the customs of any trade the weight of any bulk cargo inserted in the B/L ascertained by a third party, other than the carrier or the shipper, the B/L shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of such weight, and the accuracy thereof shall not be deemed to have been guaranteed by the shipper.<sup>153</sup>

It is strange that even if the third party is better equipped in calculating the exact quantity of the cargo, its statements would still not be considered true. Usually the bulk cargo loaded onboard is determined by the ship’s draught. However, factors such as slightest swell and human factor mistake of the draught taker might decrease or increase the quantity. So, the third party calculations – for instance the port scales used for weighing the trucks entering/ leaving the port area – even correct – might deviate from the “correct” vessel’s calculations.

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<sup>150</sup> eg. France, Belgium, Italy – see Tetley W(n 145) at 30-32.

<sup>151</sup> If the state is signatory to The Hague-Visby (art 4(5)(e)) or Hamburg Rules (art 8).

<sup>152</sup> of 1936.

<sup>153</sup> The situation is the same in Malaysia.

Let us assume that the master puts in the B/L the third party's figures because the weather conditions do not allow for correct measuring the draught. In addition, there is collusion between the shipper and the third party issuing the weight certificate to defraud the consignee. Later, when the ship starts discharging, it appears that the weight figures in the B/L have been wrong. It is much easier to sue the "fraudulent" carrier rather than the shipper – the carrier is within the jurisdiction of the consignee.

In the states signatories to The Visby Protocol or The Hamburg Rules the carriage by sea acts stipulate that a B/L which has been signed by the master of the vessel or an authorized by the carrier person be conclusive evidence against the carrier of the shipment of the goods.<sup>154</sup> If one considers that the authorized person is an independent surveyor that is capable of determining the exact quantity of the loaded cargo, then Bs/L incorporating The Hague-Visby or The Hamburg Rules are a better form of security for the innocent third party than The Hague Rules followers. However, a problem might still arise – if the authorized party has been bribed by the shipper and signs on behalf of the carrier, then the carrier would be liable to the consignee even without being privy to the fraud. Should the shipper-surveyor collusion be discovered, then the carrier would be absolved from liability. Nevertheless, the initial involvement of the innocent carrier in the court litigation is almost certain.

It is true that if a B/L is governed by The Visby Protocol and The Hamburg Rules, the participants in the purchase of bulk cargoes are not only much better protected than those whose relations fall under The Hague Rules, but also banks are more willing to extend loan facilities to them.<sup>155</sup> However, a revision of the rules excluding the negative outcomes described in the previous paragraph is to be made in order innocent parties to avoid being brought to court unjustly.

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<sup>154</sup>eg s 4 UK COGSA of 1992; Some of The Hamburg Rules' ratifying states are Chile and Egypt.

<sup>155</sup> Joseph JM 'Carriage of goods by sea: Hague-Visby for Malaysia?' at 9 available on <http://www.jbc.com.my/resource/CARRIAGE%20OF%20GOODS%20BY%20SEA.pdf> (accessed 03.02.2011).

### 6.3 Bills of lading and carriage of general cargo and containers

General cargo is the cargo which is carried in a packed condition. It may take various forms such as barrels and drums for liquid cargo, boxes and pallets for small items, bags of cargo usually carried in bulk and bundles for steel products such as pipes. The B/L states only the apparent condition of the cargo loaded and it refers only to the condition of the packaging. In *Silver v Ocean SS Co*<sup>156</sup> it was held that when the insufficiency of the packing is obvious at the time of loading and the carrier issues a clean B/L, it cannot limit its liability if claim is brought by a *bona fide* third party consignee. In order to rely on that exception, the carrier must prove that the insufficiency of the packing could not be noted during loading.<sup>157</sup>

The above words are fully applicable also to cargo carried in containers. The reason for the rapid increase in the quantity of cargo carried in containers during the last century is as a result of the quicker, safer and more inexpensive transportation than the normal modes of carriage. One of the problems of this type of carriage is that the carrier most of the times is not sure what the contents of a single container is. It might be anything from worthless items to a radioactive weapon. The only source of information is the shipper who provides the relevant information necessary for filling in the B/L. The carrier is able to ascertain only the external apparent condition of the container: dents, fractures or if it is of a special type such as a refrigerating container – whether its parameters are in norm as regards the cargo carried inside.

The contact between the carrier and the contents of the container is further limited by the seal put by the cargo owner/ shipper on its door. It means that nowadays it is very difficult for a buyer trading with expensive equipment carried through containers to prove fraud on the part of the carrier or some kind of carrier's collusion with the shipper. The outcome is that it should be somebody in the line linked to the packing and stowing the cargoes inside the container who is to be held responsible. That somebody is the shipper – the

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<sup>156</sup> [1930] 1 K.B. 416.

<sup>157</sup> If the shipper can prove minor damage of the packaging which was not easily discernible at loading and therefore not "reasonably apparent" at loading. (as per arts 3(3)(c) Hague/ Hague-Visby Rules and 16(2) Hamburg Rules).

person or organization providing the cargo details necessary for the issuance of the B/L. That line of thought is supported by Article 3(3) of The Hague/ Hague-Visby Rules and Article 16 of the Hamburg Rules stipulating that if the carrier has no available means to check the condition of the cargo, it must state so in the B/L. Otherwise it may be considered an accomplice to the fraud.

## Chapter 7

### The Rotterdam Rules

In this chapter, the provisions introduced by the Rotterdam Rules<sup>158</sup> (hereinafter referred to as RR) having to do with fraud issues and having no counterpart in the Hague-Visby and Hamburg Rules will be discussed.<sup>159</sup> Unlike its predecessors which regulated contracts of carriage of cargo by sea only,<sup>160</sup> the RR have a wider application. Whenever there is a multimodal mode of transportation, the RR apply to the sea leg whether it is only a small part of the whole process of carriage. The reason for this lays in the fact that already in 2002 about 50% of the container carriage by sea was a part of the door-to-door transportation<sup>161</sup> and the need for a new regime governing the international transportation of goods in which sea carriage is involved was felt.

Unlike the predecessors of the new convention, the RR apply not only to Bs/L or waybills.<sup>162</sup> They apply to transport documents and electronic transport records to which the B/L and sea waybill are only a small part. As discussed further, the RR do apply to contracts of carriage where also no evidence of reception of goods has been issued

Of importance to the present research are the following three situations governed by The RR: delivery with or without performance of a negotiable document, delivery upon presentation of a non transferrable document<sup>163</sup> and duty of the consignee to issue a receipt of received goods.<sup>164</sup> However, the RR do not take away the long standing practice of the business to issue three originals of the B/L.<sup>165</sup> In this case the RR have in no way removed the

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<sup>158</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008.

<sup>159</sup> Ch 9-11.

<sup>160</sup> Art 1(e) Hague/ Hague-Visby Rules and art 4(1) Hamburg Rules.

<sup>161</sup> Berlingieri F 'A comparative analysis of The Hague-Visby Rules, The Hamburg Rules and The Rotterdam Rules' at 53 available on [http://www.uncitral.org/pdf/english/workinggroups/wg\\_3/Berlingieri\\_paper\\_comparing\\_RR\\_Hamb\\_HVR.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf) (accessed 02.02.2011).

<sup>162</sup> See Arts 1(7) and 18 of The Hamburg Rules.

<sup>163</sup> Arts 45-7.

<sup>164</sup> Art 43.

<sup>165</sup> Art 46(a) speaks that upon presentation of one of the originals, the others cease to be valid which implies more than one original.

possibility of selling negotiable instruments twice at the same time to innocent consignees.<sup>166</sup>

## **7.1 Rotterdam Rules Ch 9 – *Delivery of the goods.* Articles 45-47**

Article 45 requires the consignee of cargo transported by a non-transferrable document to identify itself on request by the carrier. However, if there is no request, the consignee may simply present itself as the consignee and take delivery of the goods. Should the carrier fail to ascertain the identity of the consignee, it may face the issue of being held liable for reckless conduct or fraud.<sup>167</sup> Worth noting is the name of the article – “Delivery when no negotiable transport document or negotiable electronic transport record is issued.” In addition, Article 46 is named “Delivery when a non-negotiable transport document that requires surrender is issued” while Article 47 – “Delivery when a negotiable transport document or negotiable electronic transport record is issued.”

Following the names of the articles one could be quite right to assume that Article 45 deals with those cases in which neither negotiable, nor non-negotiable transport documents, nor electronic records have been issued. If the consignee and the shipper are the same parties and the carrier knows that fact, that is there is no transfer of ownership of the cargo before and throughout the sea leg, this provision serves its purpose – the transport document is incorporated in the contract of carriage and there is no way for the aggrieved party to claim the protection of a *bona fide* third party. However, if the consignee is unknown to the carrier, the likelihood that delivery to the wrong party might occur is high. This view is supported by the fact that the carrier does not have access to the shipper-consignee contract since it is not privy to it. In addition, the contract may take various forms unlike the standard form of a B/L which is issued by the carrier and its terms and conditions are well known. Furthermore, the shipper-consignee contract may take different forms in chain sales while the cargo is under way. And even if by any chance the carrier gets

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<sup>166</sup> See the discussion on oil fraudulent activity at p 35.

<sup>167</sup> Arts 17 and 61.

access to the contract, its authenticity would be not so easily checked when on delivery the consignee starts claiming that it is the real owner of the cargo.

While the former legal regimes dealt with Bs/L and, in certain situations, sea waybills, the RR make the situation more complex for the carrier. Let us assume the perfect scenario – upon loading, the carrier is presented and familiarized with the shipper-consignee contract. The details of the receiver of the goods are well known. However, the master of the ship who has no legal training, on arrival at the port of discharge is required to honour a fraudulent contract that on its face seems to be true.

The information relating to the cargo, ship and shipper in the contract is true.<sup>168</sup> But the original consignee is a non-legal person and the fraudster represents itself by name that is very similar to name of the real consignee. The master, although knowing the consignee's details still confuses “Acta Co” for “Acta” or “Acia Co”. Having in mind the amount of work that the crew has at ports, such a situation may occur.

Article 45 of the RR speaks about the contract between the shipper and the consignee. It is a document that may take different forms and the carrier is not privy to it. It follows that the carrier faces the high risk of being defrauded and sued for negligence and/ or fraud by the real consignee. Furthermore, such a deviation from the normal practice to deliver the cargo to the one presenting a document which is also in possession of the master of the ship (in practice it is the B/L), seems to be more unnerving rather than easing the transportation. Therefore, what the parties to sea carriage must be aware of is the instances in which they may use this provision without facing the risk of being defrauded and sued.

On the other hand, when dealing with non-negotiable documents such as sea waybills, the only thing which the consignee is required to do by Article 46 is to present the document to the carrier and identify itself on request.<sup>169</sup> Even though the requirements for the consignee's identification are the same as in the previous Article, the longstanding usage of non-negotiable documents seems to

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<sup>168</sup> Art 3 read together with arts 35 and 36.

<sup>169</sup> Art 46.

make them more attractive than the ordinary contract of sale of goods. In addition, the master of the ship is in possession of the sea waybill agreed upon between him and the shipper and on delivery of the cargo he compares the details of the consignee against the information stated in the waybill. That is the sea waybill is a contract concluded to the benefit of a third party – the consignee – and the master, unlike the situation in the previous paragraph, is a party to the shipper-consignee contract. Even though there is still a risk that an innocent party may be defrauded in a non-negotiable document transaction, it is less probable than if the parties in the carriage of goods by sea determine their relations in terms of Article 45.

The next Article 47 deals with negotiable transport documents/ negotiable electronic records (the B/L or its electronic counterpart). Here the requirements as regards the carrier are the strictest. The carrier is obliged always upon delivery of the goods to be presented with the document for review<sup>170</sup> and if it is an order document, to require the identification of the holder of the bill. In order to understand the scope of its application, this provision is to be read together with Article 35.

Article 35 states that where “it is the custom, usage or practice of the trade and business or the shipper and the carrier have agreed not to use [any transport documents or electronic transport records],” then they may not be issued. However, whenever the non-use of transport document or electronic transport record is employed, reference is to be made to the requirements of Article 45.

It is true that the language in which the discussed provisions are written simply incorporates the normal practice in certain areas of carriage by sea not to rely on any documentation upon delivery of the cargo. Nonetheless, it should be mentioned that in case there are chain sales while the cargo is at sea, without any document it would be very difficult for the carrier to ascertain itself that the delivery is to the right person.

In order Article 45 not to be used to the detriment of the participants in the business, it should be used only when the shipper and the consignee are the same body or where there has been a long-standing relationship between them

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<sup>170</sup> Art 47(1).

and the carrier. Nonetheless, it is true that the purpose of Article 45 is to incorporate within the scope of the RR control the business of carriage of oil – trade completely based on the gentlemen’s agreement and popular with the fact that Bs/L do not serve any purpose at all as they reach the consignee long after the cargo has been received.

On the other hand, whenever oil is sold by using the old well-known principle of Bs/L, Article 47 comes into play. It is extended to apply to those situations where the transport document or electronic transport record explicitly states that the goods may be delivered without the production of the document or the record.<sup>171</sup>

As certain national experts claim,<sup>172</sup> Article 47(2) was introduced in order to relieve the carrier from liability whenever there is agreement between the shipper and the carrier the latter to submit the cargo to the consignee without the performance of the B/L. The reasons for this might be found in the fact that the B/L is in possession of the banks to secure the consignee’s credit and therefore the consignee cannot present the carrier with it. And in order the receiver of the goods not to be constrained from conducting its work by not taking possession of the cargo, it may get the goods by not delivering the B/L to the carrier. It means that the actual purpose of this provision is not to protect any fraudulent activity but avoid issuance of letters of indemnity and provide for greater flexibility and protection of the most innocent party – the carrier – which is done by the introduction of Paragraphs 47(2)(b)-(d). They read as follows:

2. [I]f the negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rules apply:
  - (a)...
  - (b) The carrier ...is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated ... that it is the holder;
  - (c) The person giving instructions [to the carrier] under shall indemnify the carrier against loss arising from its being held liable to the holder .... The carrier may

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<sup>171</sup> Art 47(2).

<sup>172</sup> ‘The Rotterdam Rules – an attempt to clarify certain concerns that have emerged’ – Clarification by National Experts of concerns raised by UNECE, ESC, FIATA Working Group on Sea Transport, and CLECAT at 21 available on [http://www.uncitral.org/pdf/english/texts/transport/rotterdam\\_rules/ExpertPaper.pdf](http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/ExpertPaper.pdf) accessed 03.02.2011.

refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;

- (d) A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods ... but pursuant to contractual or other arrangements made before such delivery acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods;

When reviewing Articles 45 to 47 a person discovers that there is a high chance that the carrier may confuse its duties towards the participants in the carriage of goods by sea. It is so because different types of documents are dealt with and the requirements regarding the actions of the carrier are different. The problem arises out of the fact that whenever the carrier is presented with a valid document, it must first check what the RR demand, secondly understand what exactly is required by the RR and thirdly follow them. Even though these Rules try to incorporate the existing practice, the lack of some kind of unification and the fact that all the provisions are interlinked to each other in such a way that reading one of them without referring to the other might bring the opposite effect, causes more disconcert than simplicity.

## **7.2 Rotterdam Rules Ch 10 – *Rights of the controlling party. Articles 50-56***

The next chapter of the RR deals with the provisions regulating the rights and duties of the shipper<sup>173</sup> who by default is known as the controlling party.<sup>174</sup> Under the RR the carrier's activity in respect of the cargo is more or less subject to the shipper's control. A person to qualify as the controlling party must be in possession of all the originals of the document of carriage:<sup>175</sup>

- (1)...
- (2). When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:
- (a)...
- (b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.
3. When a negotiable transport document is issued:
- (a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

The rights to which the controlling party is entitled as per Article 50(1) are:

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<sup>173</sup> Ch 10 – “*Rights of the controlling party*” – Arts 50-56.

<sup>174</sup> Art 51(1)(a).

<sup>175</sup> Art 51.

- (a)...
- (b) The right to obtain delivery of the goods at a scheduled port of call ...; and
- (c) The right to replace the consignee by any other person including the controlling party.

Article 1(10) does nothing towards changing the status of the term *holder*. It is a person that is in possession of a negotiable transport document or electronic transport record. When dealing with negotiable transport documents, the practice is that one of them remains with the carrier. Whenever the ship sails, the master of the ship is left with one of the originals. That is, the shipper is the controlling party only when the cargo is loaded on board and the transport documents issued. And after the ship sails, according to the RR, it is no more a controlling party because it cannot comply with the requirement to be a holder of all the originals. Therefore, whenever the controlling party and the holder of a bill of lading are not the same persons, the holder can never take possession of the cargo.

Following the same line of thought, an interpretation of Article 51(1)(a) stating that “ the shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee... or another person as the controlling party,” makes one conclude that the change in the controlling party is possible only at the conclusion of the contract. It means that whatever broad application the RR drafters might have intended the Rules to have for the free transfer of rights of ownership of the cargo carried by sea, in practice they would apply only to those instances where the shipper is the receiver of the cargo or when dealing with non-negotiable documents such as waybills. However, as Article 51 has a separate paragraph dealing with non-negotiable documents and transfer of control,<sup>176</sup> it is uncertain what the exact scope of application of Article 51(1)(a) is.

As per Article 51(1)(b) the controlling party may be substituted only once the carrier is notified. This provision is quite welcome because due to the fact that only the controlling party may get possession of the cargo, the carrier knows well beforehand who he is dealing with. In such a case the possibility for committing a fraud is decreased to a minimum since the receiver of the cargo is not somebody who simply might have found on the street a bearer bill of lading

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<sup>176</sup> Art 51(2).

and by that simple fact might have a legal cargo claim against the carrier, but a definite person whose name is ascertained by the shipper. However, that paragraph of the Article is explicitly excluded in cases where one deals with a negotiable,<sup>177</sup> non-negotiable transport document<sup>178</sup> or electronic transport record.<sup>179</sup> Hence, what are the instances in which the carrier could rely on that provision? One's reasoning shows that these are the instances in which there is no transport document or electronic transport record issued, that is where Article 45 applies.

According to Article 50(1)(b) the controlling party has the right to obtain delivery of the cargo at the port of loading. Article 51(3)(c) dealing with negotiable transport documents states that the holder can exercise its right of control only when producing the full set of Bs/L. However, as described above, this is more often than not impossible. Thus, whenever there is a negotiable instrument involved, only the shipper, who is the original controlling party, is the entitled party to obtain delivery. Hence, delivery to which the shipper is not a receiver might be considered conspiracy to defraud the cargo owner.

Article 56 deals with the right of the parties to the contract of carriage to vary the right of the controlling party to obtain delivery of the goods at the port of discharge.<sup>180</sup> Since it is the parties to the contract that have this right, it means that according to Article 1, these are the carrier and the shipper.<sup>181</sup> Therefore, the carrier and the shipper are at large to agree that any holder of a negotiable document (here we do not speak about electronic transport record because according to Article 51(4)(a) its holder is the controlling party) may claim delivery of the goods. However, in order such clausuring of the contract of carriage to be valid as against the carrier by a third party holder, it must be included in the transport document.<sup>182</sup> Otherwise, the holder may face the problem that it would not be capable of receiving the cargo.

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<sup>177</sup> Art 51(3).

<sup>178</sup> Art 51(2).

<sup>179</sup> Art 51(4).

<sup>180</sup> Art 50(1)(b).

<sup>181</sup> Art 1(1), 1(5), 1(8).

<sup>182</sup> Art 41(b)(i).

What this convention does is that it recognizes the fact that the right to control and the right to hold a B/L are independent although sometimes interlinked.<sup>183</sup> At the time of writing this paper there was found no literature supportive of the view that the RR should be seen as promoting the issuance of a single original B/L in order the transfer of the right to control to occur and the controlling party provisions be operative. What some authors, like Gertjan Van Der Ziel, do is to confirm the opinion that they extend their application beyond Bs/L.<sup>184</sup> The difficult way in which this convention is written presupposes such an interpretation. It is submitted that they should also apply where the contract is agreed orally and no document or electronic record is issued<sup>185</sup> or whenever the carrier is informed about the change of the controlling party regardless of the type of the transport document or electronic record. It is also commercially viable since nowadays most of the contracts are concluded orally by phone<sup>186</sup> without the necessity of any documents.

The limited scope of application of the requirement to bring to the knowledge of the carrier the change of the controlling party causes certain disconcert. There is nothing wrong if the application of that provision is extended beyond the requirements of the RR. It is so because the carrier is to a certain extent participant in the contract between the shipper and the consignee and it is to the benefit of everybody to be informed whenever there is a change of a party to the contract even though a transport document has been issued.

### **7.3 Rotterdam Rules Ch 11 – *Transfer of rights*. Articles 57-58**

Article 57 deals with the transferability of rights of a holder of a B/L. The holder may transfer rights to another person. Article 58(1) states that the holder does not become liable under the contract of carriage by the simple fact it is a holder of a negotiable document. As also seen the holder also enjoys no rights to

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<sup>183</sup> Ziel VDG: Chapter 10 of the Rotterdam Rules: Control of Goods in Transit 44 (2008-2009) *Tex. Int'l L. J.* 375 at 384.

<sup>184</sup> eg Ziel VDG (n 183) at 384.

<sup>185</sup> The transport document or electronic transport record are to take the form as described in art 3 read with art 35. However, if the oral contract does not have any transport document or electronic transport record, that agreement is to be brought to the knowledge of the carrier according to art 51(1)(b).

<sup>186</sup> Ziel VDG (n 183) at 384.

receive the cargo.<sup>187</sup> However, according to Article 56, a holder of the transport document may become the owner of the cargo if the parties to the contract agree to put that provision in writing in the transport document.

On condition that there is not such a common law practice or that the predecessors of the RR did not have such a clause, it is uncertain how the parties to the contract will avail themselves of it. However, even if used, the carrier and the shipper face the risk that some of the parties in chain sales of the cargo might be easily defrauded because the situation would be more or less the same as before. Therefore, the use of Article 56 is not advisable.

Because the idea of using Article 56 is not efficacious and because the holder of a transport document is not entitled to ownership of the cargo, the holder by paying for the B/L and in the hope of getting constructive possession of the goods does nothing more than unjustly enriching the seller/ shipper because it can never become a controlling party and thus not entitled to become a consignee of the cargo. It means that the RR impliedly promote those contracts to which only one original transport document is prepared and cases where no transport document or electronic transport record have been issued.

What the RR also do is exclude the well-known practice of issuance of three sets of Bs/L since the holder of one of the Bs/L cannot become the controlling party. It means that, in addition to promoting easier methods of conducting business, they further relations of carriage by sea that have no history of development such as entering into oral agreement without the issuance of any transport document or electronic transport record. It is so because through these provisions, the RR show that a holder can almost never become the controlling party. On the other hand, the promotion of the oral contracts with no document at all might be solely grounded in the fact that most of the carriage is performed door-to-door without change in the parties.

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<sup>187</sup> Art 50(1).

## 7.4 Transport documents and electronic transport records

Throughout the RR there is the impression that electronic documents are getting more and more popular among the shipping business.<sup>188</sup> However, the notion that they should be connected with their paper counterparts stands on. The reason is that Article 8(a) speaks about conversion of transport documents to their electronic counterparts known in the Convention as electronic transport records. No attention has been paid to those instances where the paper/electronic document might be destroyed so that only the oral agreement between the parties remain – such an action being subject to the consent of the carrier. There might be a contra argument that such an activity is useless and lacking reasonable explanation. However, what about those cases in which online transfer is corrupt and sending e-information is unsafe? What about the scenario when the transportation of documents by mail is not only insecure, but also slow so that the reception of goods happens without the production of the B/L? In these instances the documents of carriage might still fall in the hands of the wrong party and fraud occur. Although these situations are not likely to happen, there is still a possibility that they might.

Transferability from paper/ electronic to oral agreement is, however, possible if one reads Article 54 – *Variations of the contract of carriage*. It stipulates that only the controlling party and the carrier may vary the terms of the contract.<sup>189</sup> As there are no requirements how that procedure is to be done, national laws should be addressed to. If the existing national law provides that such a transformation is possible, then it is allowed. However, there is no uniformity into the application of international laws into national legislations. Following which the governments vested with the duty to fill in the gaps may do so in different ways. And since Article 90 allows for no reservations to the Convention, only the provisions that are in the Convention are what is going to be incorporated in the same way in all the signatories to the RR. As a consequence the uniformity to which the international community strives is once more not reached.

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<sup>188</sup> Arts 8-10.

<sup>189</sup> Art 54(1).

## 7.5 Positive and negative effects of The Rotterdam Rules

The positive and negative effects of the RR will be discussed concurrently. Firstly the carrier knows in detail at all times the communication with the consignee relating to the cargo, namely when the consignee or the destination of the cargo is changed.<sup>190</sup> Thus the risk to commit a fraudulent activity is decreased to a great extent by informing all the involved parties in the sale and carriage of goods. However, this is of limited application and applies only where there is no transport document or electronic transport record.

Secondly, the right to substitute a transport document with its electronic transport record and *vice versa*.<sup>191</sup> The positive outcomes are that this makes the delivery of the transport document to the consignee quicker and safer. Depending on the contract of carriage, a copy of the electronic transport record may be sent to the bank participating in the letter of credit issuance, subject to the provision that the parties in the carriage of cargo be informed about the issuance of the copy and the bank be also aware about the movement and any other relevant factors as regards the cargo.

The negatives of the existence of the electronic transport record are that several copies of it might be issued through forgery by an ill-will party and sold as originals to different parties which would consider themselves to be the real owners of the cargo. However, under the RR only the controlling party enjoys the right to obtain the cargo. Furthermore, it is only the carrier that issues the transport document or electronic transport record,<sup>192</sup> the latter being issued in a single original.<sup>193</sup>

Nothing is stated as regards the transfer of the electronic transport document to a third party. The relevant articles are 51(4) and 9(1). Article 51(4) states that:

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

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<sup>190</sup> Art 51.

<sup>191</sup> Art 10

<sup>192</sup> Art 1(14) and 1(18).

<sup>193</sup> Arts 10(1)(a)-(b), 1(21)-(22) and 51(4).

- (c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

On the other hand, Article 9 specifies the procedures for use of negotiable electronic transport records:

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:
  - (a) The method for the issuance and the transfer of that record to an intended holder;
  - (b) An assurance that the negotiable electronic transport record retains its integrity;
  - (c) The manner in which the holder is able to demonstrate that it is the holder; and
  - (d) The manner of providing confirmation that delivery to the holder has been effected...

It seems that the holder of the electronic transport record may unilaterally transfer it to whoever it desires. In addition, through forgery it may sell that record as many times as it likes. It is true that in the end the forgery and who the one to blame is will become evident but the deceptive security imposed by the RR will be once more defeated.

The way in which the transfer of the electronic transport document is to be conducted is left to national laws meaning that the universal uniformity acclaimed by the RR has not been achieved. The effect of what has been argued in this chapter might have been much easier to achieve if the provisions have been worded like that – “The transfer of an electronic transport record shall be done by the carrier on request of the holder of the electronic transport document.” In such a way the carrier will be aware at all times of the transfer of rights and the details relating to the consignee.

Thirdly, it is implied in the Rules that the controlling party, once having given up its rights cannot unilaterally obtain them back and transfer them to a fourth party. The fact that the carrier:

- 1) is informed about the change of the controlling party if the evidence of the contract of carriage is not a transport document or electronic transport record, and
- 2) the conditions of the RR have been met

is to be considered a conclusive evidence that a valid transfer of rights has occurred. In this case any claim against the fraudulent controlling party should be brought in tort for unjustified enrichment and not in contract since the

fraudulent transferor had no rights to transfer. The drawback is that the carrier is not informed whenever the controlling party is changed when there is a transport document involved.

Regarding the transfer of the electronic transport record, it seems that because the information is electronically transferred, and a substantive change of the record must be performed, and the only one entitled to the issuance of a new record is the carrier, then the transferor of the record is obliged to inform the carrier in order the latter to edit the record.

Is it possible that a party, other than the controlling party, is responsible for the fraudulent substitution of the consignee? The answer is no because for a party to qualify as a controlling party it must be in possession of all the negotiable instruments. Since a party is qualified as the controlling party, it is implied that it is in possession of all the transport documents. The controlling party may transfer possession of the originals to several holders at the same time, thus none of the holders getting the title *controlling party* and therefore not entitled to become receivers of the cargo.<sup>194</sup>

The only instance in which the holder is entitled to get possession of the goods<sup>195</sup> is when it is a representative of the controlling party and acts on its behalf. But even in such a case, unlike the RR predecessors, it can never be considered to be the cargo owner. A holder has the status of a true owner when the parties deal with electronic transport records<sup>196</sup> or a single original of the transport document is issued. In such a case, the parties to the carriage are the carrier and the holder which is the controlling party and the only person entitled to get the cargo or sell it to somebody else.<sup>197</sup>

Fourthly, the RR differentiate between the holder of a negotiable document and the controlling party. Thus the outdated principle of *bona fide* third party which gets an unencumbered title of the negotiable instrument and therefore the cargo, is no more applicable. Because the one entitled to the cargo is the controlling party, it is uncertain what Article 41(b)(i) and 41(c) do. Article 41(b)(i) says that

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<sup>194</sup> Art 51(2)(b).

<sup>195</sup> Thus not going beyond the old principle standing behind *holder of B/L*.

<sup>196</sup> Art 51(4)(a).

<sup>197</sup> Art 50(1)(a).

a negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith. is a conclusive evidence of the specifications of the cargo loaded onboard. 41(c) holds that “Proof to the contrary by the carrier shall not be admissible against a [good faith] consignee...”

The transport document/ electronic transport record is conclusive evidence of the characteristics of the goods as described when the document/ record is in the hands of a third party holder. However, since the holder is not the owner of the cargo what is the reason of including these provisions in the RR? They protect only the third party that becomes a controlling party. Why was then instead of the term *holder* not used *controlling party* in order to make the understanding of this regulation easier? Even though the controlling party falls under the definition of holder, it is uncertain as to the reasons why this provision was written in such an all-encompassing way on condition that it conflicts the rest of the RR.

In summary, the carrier cannot be held liable under the document for non-delivery of goods to the holder because it is not the controlling party.<sup>198</sup> A holder does not become a controlling party by simply taking possession of the transport document. In addition, the change of the parties to the contract could be done only by the controlling party. It is it is never the carrier that may substitute the consignee. A claim by an innocent third party would always be legally valid against the controlling party committing the fraud and not the carrier. In order the holder of a transport document to be protected by the RR, it should be an agent of the consignee or the shipper. In any other instances it is unclear how the provisions of the RR would apply and how they would protect the innocent good faith participants.

The last thing worth mentioning is that the only time when the carrier might be held accountable to the consignee is when the carrier incorrectly describes the carried cargo.<sup>199</sup> It is so because by entering the description of the cargo in the transport document/ electronic transport record, the carrier agrees that the goods have the characteristics as provided by the shipper and since the carrier is the

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<sup>198</sup> Art 50(1)(b).

<sup>199</sup> Art 41.

party in whose charge the goods are left, it is bound to deliver them as described.

## **7.6 Possible solution to fraud under The Rotterdam Rules**

As seen from the whole discussion of the RR it seems that the outcome of their introduction is disappointing. Although the recognition of the difference between the holder of a transport document and the controlling party is quite welcome, negative issues still follow. The best result from that study appears to be the introduction of the electronic type of documents, the possibility that paper documents be exchanged for their electronic counterparts and the stipulation that only one electronic document is to be issued.

As for the paper documents, nothing has been changed drastically considering the predecessors of the RR – The Hague Rules, their Visby Protocol and The Hamburg Rules. The most significant change is that the holder of a negotiable document is not necessarily entitled to become the constructive owner of the goods carried by sea. This is quite welcome since under the RR the party intending to defraud somebody in the chain would be put in a more difficult position to achieve its ends. In addition, what should be done is that the outdated principle of issuing several original transport documents should be cancelled; only one suffices.

Probably, by keeping the *status quo* the drafters wanted to keep the traditions alive. However, what they omitted is that nowadays the communication between the shipper, carrier and the master of the ship is in a much more developed state than 20 years ago and the existence of several originals only makes things more difficult in terms of ascertainment which of the parties is the one with a legally enforceable claim. Should the old order remain, it means that even where there is a distinction between the holder and the controlling party, they may still abuse their powers to the detriment of the transferees. Because the more papers one must obtain in order to qualify as somebody, the easier it becomes for the fraudsters to cheat him.

Although there is always a possibility that a fraud may occur, the easiest way to fight it is to issue two originals evidencing the carriage of goods in which the parties to be stated are the owner of the goods and the carrier. One of the originals stays with the carrier, the other with the cargo owner. The buyer of the cargo is to be substituted as the new owner only by the owner of the cargo who is also to notify the carrier. The carrier is to be held liable only for misstatements in respect of the specifications of the cargo. The carrier or its representative, instead of having the choice whether to ask or not the identity of the consignee, is always to check who receives the cargo at the discharge port. In addition, the carrier may also ascertain itself who the actual owner of the cargo is by using other independent means such as a phone call to the last owner or sending it a fax or e-mail claiming confirmation of ownership. In such a case the differentiation between a holder and a controlling party would be removed and the RR would be much easier to follow.

## **Chapter 8**

### **Summary and conclusions**

Having looked at the history of Bs/L before the 20<sup>th</sup> century, this paper continued with a discussion of the international conventions regulating the international carriage of goods by sea. The provisions paid attention to are the ones connected with the issuance of fraudulent Bs/L and the effort of the maritime business and courts to counteract the wrongdoers. As was shown through caselaw and examples from practice, the coexistence of the three international conventions – The Hague, The Hague-Visby and The Hamburg Rules – creates more confusion than uniformity in the business of international carriage of goods by sea.

Although each of the above-mentioned sets of rules is to be considered an updated version of its predecessors, the principle applicable to national laws stating that the later piece of legislation overrides its predecessors, is inappropriate here. It means that although each convention counteracts fraudulently issued Bs/L, the lack of uniformity is used by some people to achieve their ill-will goals by relying on none at all or lesser liability imposed by one of the conventions. In addition, in an attempt to create all-catch clauses in a B/L, that is creating a B/L that could be adapted to various models of contracts involving carriage of goods by sea, the carrier, the shipper and the consignee involuntarily put themselves to the risk of being sued for committing a fraud under the B/L. Furthermore, as shown in the thesis, the way different nations have enacted these rules adds more to the confusion in relation to the level of protection of the innocent party.

It was discussed that in some instances, such as the carriage of oil, with or without improving the existing regulations, the number of improperly used Bs/L is not likely to be decreased nor increased. This conclusion arises out of the fact that the relationship which is evidenced by the B/L is founded solely on the gentlemen's agreement. However, without further elaborating on Bs/L and their role in the carriage of oil, one may be left out with the impression that the existing rules are sufficient in their fight against fraudulently issued Bs/L.

Although there are not so many fraudulent Bs/L in the oil business, it is not because they are taken care of by the regulations, but because the parties do not rely at all on the contents in the B/L when contracting. The Bs/L in the business of oil trade are a legacy which nowadays serves no purpose. The Bs/L are substituted by other valid means of commercial communication such as e-mails and facsimiles when it comes to determining the rights and duties of the parties. However, in case of litigation in court, evidence of the existence of the contract of carriage is required – such being the B/L. Therefore, the necessity for being in possession of the B/L is obvious. It means that while the 20<sup>th</sup> century conventions do set out the boundaries of liability for the contracting parties, they do not provide the required protection against fraudulently issued Bs/L and are an attempt to move backwards the natural development of business in relation to fighting fraudulent Bs/L.

On the other hand, as interpreted by some national courts, Bs/L serve to impose greater liability on the wrongdoers than the domestic laws do and therefore the conclusion from the previous paragraph is wrong. However, since these interpretations are not cut in stone, they could be quite easily subjected to review and overruled. Therefore, should international trade wish to keep the B/L as valid evidence of the existence of the contract of carriage of goods by sea and at the same time sufficiently protect the concerned parties – the international conventions are to be amended. Otherwise, the existence of these negotiable documents is to be seen only as promoting improper business practices.

The enhanced level of safety in relation to the fight against the issuance of fraudulent Bs/L could be claimed to have been achieved by the newly introduced RR whose purpose is to substitute the existing international legislation regulating the international carriage of goods by sea. The RR have been signed by 23 countries<sup>200</sup> since their introduction in 2009, but have not received the required number of ratifications in order to enter into effect.

Even though the RR may attain the force of law in future, the present situation might not improve, but rather worsen. The reasons are severalfold. First, it is the certainty created by the other three conventions and their interrelationship. The

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<sup>200</sup> As of May 2011.

fact that the RR may attain the force of law in future, does not mean that their predecessors will immediately lose the power of law. What will happen is that there will be four sets of rules regulating the carriage of goods by sea. Thus the existing *status quo* created by The Hague, The Hague-Visby and The Hamburg Rules will be destroyed. And even though the RR are created in order to achieve uniformity in international law and go along with the modern tendency of sea transport, people will step into grey area full of questions.

Secondly, as was shown in the discussion on the RR, it is uncertain how the courts will interpret seemingly consistent provisions in a B/L whenever there is a fraud claim. The confusion may arise out as a result of the differentiation between a holder of a negotiable instrument and a controlling party. Although this recognition is quite welcome and is a step forward towards protecting the innocent carrier and receiver of the goods, the drafters had to put more effort into avoiding inconsistent interpretations of the provisions. In addition, the extensive application of the RR might,<sup>201</sup> instead of upholding the freedom to contract by allowing any form for concluding it,<sup>202</sup> be seen as a deterrent to the states. It might be so in view of the tradition of several centuries requiring the negotiable or non-negotiable instruments to be only in writing and in a specific form.<sup>203</sup>

Although the RR have a much wider application, it means that more conflicting issues are incorporated into them and will be subject to more litigation whenever a claim for a fraudulent B/L is brought before a court or arbitration institution. Even though the parties will have more choice into how to regulate their relations, they might be subjected to greater stress when it comes to deciding whether a seemingly proper B/L is not in fact an another version of a document defrauding them.

The electronic transport records introduced by the RR are a way forward in the fight against fraudulent Bs/L and it is true that they might be seen as the panacea to the difficulty created by the requirement that the delivery of the goods is to be performed only against the presentation of a B/L. However, the

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<sup>201</sup> Unlike their predecessors which applied only to Bs/L and non-negotiable instruments, RR apply to transport documents/ records.

<sup>202</sup> As per arts 3 and 36(1).

<sup>203</sup> Bill of Lading or a waybill.

drafters of the RR left out the possibility that several originals of a transport document might exist concurrently. Therefore, even though there are other, more comfortable and viable ways to counteract fraud, there is still a probability that somebody might be defrauded by an improperly issued transport document.

Considering the above-made conclusions, it is not wrong to state that the conventions which are in force today, are not a sufficient deterrent against fraudulently issued Bs/L and do not protect sufficiently the participants in the international carriage of goods by sea. In addition, the international instrument that is to substitute its 20<sup>th</sup> century precursors has left out the possibility that there will still be victims of improper negotiable documents. One of the solutions to avoid this from happening is to revise the RR before they have come into force. As regards the forerunners of the RR, it seems that there is nothing to be done. It is so because the provisions relating to the fight against fraudulently issued Bs/L have coexisted unchanged for many years. And the only hope to counteract the existing situation has been left out to the timely involvement of domestic legislation and courts. But even so, the situation will not change much since there will be multitude of laws dealing with the same issue in different ways.

# Appendix

## The relevant provisions of the examined international legislation

### INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW RELATING TO BILLS OF LADING ("HAGUE RULES")

(Brussels, 25 August 1924)

#### Article 1

In this Convention the following words are employed with the meanings set out below:

- (a) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.
- (b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.
- (c) "Goods" includes goods, wares, merchandise and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.
- (d) "Ship" means any vessel used for the carriage of goods by sea.
- (e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

#### Article 3

- 1. ...
- 2. Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.
- 3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:
  - (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.
  - (b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.
  - (c) The apparent order and condition of the goods.

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

- 4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(a), (b) and (c).
- 5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

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

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

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

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

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

7. ...

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

#### Article 4

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article 3. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article.
2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
  - (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.
  - (b) Fire, unless caused by the actual fault or privity of the carrier.
  - (c) Perils, dangers and accidents of the sea or other navigable waters.
  - (d) Act of God.
  - (e) Act of war.
  - (f) Act of public enemies.
  - (g) Arrest or restraint 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 actual fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.
4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.
5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.  
This declaration if embodied in the bill of lading shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.  
By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.  
Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connexion with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.
6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damage and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

#### Article 5

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under this Convention, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper. The provisions of this Convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of this Convention. Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

#### Article 6

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect.

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

#### Article 10

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

**PROTOCOL TO AMEND THE INTERNATIONAL CONVENTION FOR  
THE UNIFICATION OF CERTAIN RULES OF LAW RELATING TO  
BILLS OF LADING ("VISBY PROTOCOL")**

*(Brussels, 23 February 1968)*

Article 1

(1) In Article 3, paragraph 4, shall be added:

"However, proof to the contrary shall not be admissible when the Bill of Lading has been transferred to a third party acting in good faith".

(2) In Article 3, paragraph 6, sub-paragraph 4 shall be deleted and replaced by:

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

(3) In Article 3, after paragraph 6, shall be added the following paragraph *6bis*:

"An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself".

Article 2

Article 4, paragraph 5, shall be deleted and replaced by the following:

"(a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 10,000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

(b) ...

(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) ...

(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) ...

(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".

Article 3

Between Articles 4 and 5 of the Convention shall be inserted the following Article *4bis*:

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

2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.
3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in this Convention.
4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this Article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result".

#### Article 5

Article 10 of the Convention shall be deleted and replaced by the following:

"The provisions of this Convention shall apply to every Bill of Lading relating to the carriage of goods between ports in two different States if:

- (a) the Bill of Lading is issued in a Contracting State, or
- (b) the carriage is from a port in a Contracting State, or
- (c) the contract contained in or evidenced by the Bill of Lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

Each Contracting State shall apply the provisions of this Convention to the Bills of Lading mentioned above.

This Article shall not prevent a Contracting State from applying the rules of this Convention to Bills of Lading not included in the preceding paragraphs".

#### Article 6

As between the Parties to this Protocol the Convention and the Protocol shall be read and interpreted together as one single instrument.

A Party to this Protocol shall have no duty to apply the provisions of this Protocol to Bills of Lading issued in a State which is a Party to the Convention but which is not a Party to this Protocol.

#### Article 7

As between the Parties to this Protocol, denunciation by any of them of the Convention in accordance with Article 15 thereof, shall not be construed in any way as a denunciation of the Convention as amended by this Protocol.

#### Article 16

The Contracting Parties may give effect to this Protocol either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under this Protocol.

# UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA ("HAMBURG RULES")

(Hamburg, 31 March 1978)

## 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. ...
3. "Shipper" means any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.
4. "Consignee" means the person entitled to take delivery of the goods.
5. "Goods" includes live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, goods includes such article of transport or packaging if supplied by the shipper.
6. "Contract of carriage by sea" means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea.
7. "Bill of lading" means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.
8. "Writing" includes, *inter alia*, telegram and telex.

### *Article 2. Scope of application*

1. The provisions of this Convention are applicable to all contracts of carriage by sea between two different States, if:
  - (a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or
  - (b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or
  - (c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or
  - (d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or
  - (e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.
2. The provisions of this Convention are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.
3. The provisions of this Convention are not applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.

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

### *Article 3. Interpretation of the Convention*

In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity.

## PART II. LIABILITY OF THE CARRIER

### *Article 4. Period of responsibility*

1. The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.
2. For the purpose of paragraph 1 of this article, the carrier is deemed to be in charge of the goods
  - (a) from the time he has taken over the goods from:
    - (i) the shipper, or a person acting on his behalf; or
    - (ii) an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment;
  - (b) until the time he has delivered the goods:
    - (i) by handing over the goods to the consignee; or
    - (ii) in cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or
    - (iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.
3. In paragraphs 1 and 2 of this article, reference to the carrier or to the consignee means, in addition to the carrier or the consignee, the servants or agents, respectively of the carrier or the consignee.

### *Article 5. Basis of liability*

1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.
2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.
3. The person entitled to make a claim for the loss of goods may treat the goods as lost if they have not been delivered as required by article 4 within 60 consecutive days following the expiry of the time for delivery according to paragraph 2 of this article.
4. (a) The carrier is liable
  - (i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;
  - (ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.

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

5. With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.
6. The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.
7. Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery, the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.

#### *Article 7. Application to non-contractual claims*

1. The defences and limits of liability provided for in this Convention apply in any action against the carrier in respect of loss of or damage to the goods covered by the contract of carriage by sea, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise.
2. If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.
3. ...

#### *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.

### PART III. LIABILITY OF THE SHIPPERS

#### *Article 12. General rule*

The shipper is not liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor is any servant or agent of the shipper liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part.

#### *Article 13. Special rules on dangerous goods*

1. The shipper must mark or label in a suitable manner dangerous goods as dangerous.
2. Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper must inform him of the dangerous character of the goods and, if

necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character:

- (a) the shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and
  - (b) the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.
3. The provisions of paragraph 2 of this article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character.
  4. If, in cases where the provisions of paragraph 2, subparagraph (b), of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 5.

## PART IV. TRANSPORT DOCUMENTS

### *Article 14. Issue of bill of lading*

1. When the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading.
2. The bill of lading may be signed by a person having authority from the carrier. A bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.
3. The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.

### *Article 15. Contents of bill of lading*

1. The bill of lading must include, *inter alia*, the following particulars:
  - (a) the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;
  - (b) the apparent condition of the goods;
  - (c) the name and principal place of business of the carrier;
  - (d) the name of the shipper;
  - (e) the consignee if named by the shipper;
  - (f) the port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading;
  - (g) the port of discharge under the contract of carriage by sea;
  - (h) the number of originals of the bill of lading, if more than one;
  - (i) the place of issuance of the bill of lading;
  - (j) the signature of the carrier or a person acting on his behalf;
  - (k) the freight to the extent payable by the consignee or other indication that freight is payable by him;
  - (l) the statement referred to in paragraph 3 of article 23;
  - (m) the statement, if applicable, that the goods shall or may be carried on deck;
  - (n) the date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties; and
  - (o) any increased limit or limits of liability where agreed in accordance with paragraph 4 of article 6.
2. After the goods have been loaded on board, if the shipper so demands, the carrier must issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under

paragraph 1 of this article, must state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier the shipper must surrender such document in exchange for a "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shippers demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading.

3. The absence in the bill of lading of one or more particulars referred to in this article does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in paragraph 7 of article 1.

#### *Article 16. Bills of lading: reservations and evidentiary effect*

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages of pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person must insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.
2. If the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition.
3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:
  - (a) the bill of lading is *prima facie* evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and
  - (b) proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein.
4. A bill of lading which does not, as provided in paragraph 1, subparagraph (k), of article 15, set forth the freight or otherwise indicate that freight is payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, is *prima facie* evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier is not admissible when the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

#### *Article 17. Guarantees by the shipper*

1. The shipper is deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper must indemnify the carrier against the loss resulting from inaccuracies in such particulars. The shipper remains liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity in no way limits his liability under the contract of carriage by sea to any person other than the shipper.
2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss resulting from the issuance of the bill of lading by the carrier, or by a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, is void and of no effect as against any third party, including a consignee, to whom the bill of lading has been transferred.
3. Such a letter of guarantee or agreement is valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including a consignee, who acts in reliance on the description of the goods in the bill of lading. In the latter case, if the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier has no right of indemnity from the shipper pursuant to paragraph 1 of this article.

4. In the case of intended fraud referred to in paragraph 3 of this article, the carrier is liable, without the benefit of the limitation of liability provided for in this Convention, for the loss incurred by a third party, including a consignee, because he has acted in reliance on the description of the goods in the bill of lading.

#### *Article 18. Documents other than bills of lading*

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

### PART V. CLAIMS AND ACTIONS

#### *Article 19. Notice of loss, damage or delay*

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the carrier not later than the working day after the day when the goods were handed over to the consignee, such handing over is *prima facie* evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition.
2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply correspondingly if notice in writing is not given within 15 consecutive days after the day when the goods were handed over to the consignee.
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. ...
7. Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the carrier or actual carrier to the shipper not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2 of article 4, whichever is later, the failure to give such notice is *prima facie* evidence that the carrier or the actual carrier has sustained no loss or damage due to the fault or neglect of the shipper, his servants or agents.
8. For the purpose of this article, notice given to a person acting on the carriers or the actual carriers behalf, including the master or the officer in charge of the ship, or to a person acting on the shippers behalf is deemed to have been given to the carrier, to the actual carrier or to the shipper, respectively.

#### *Article 20. Limitation of actions*

1. Any action relating to carriage of goods under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.
2. The limitation period commences on the day on which the carrier has delivered the goods or part thereof or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered.
3. The day on which the limitation period commences is not included in the period.
4. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

5. An action for indemnity by a person held liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted. However, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.

## PART VI. SUPPLEMENTARY PROVISIONS

### *Article 23. Contractual stipulations*

1. Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of goods in favour of the carrier, or any similar clause, is null and void.
2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention.
3. Where a bill of lading or any other document evidencing the contract of carriage by sea is issued, it must contain a statement that the carriage is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.
4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 3 of this article, the carrier must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The carrier must, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.

**UNITED NATIONS CONVENTION ON CONTRACTS FOR THE  
INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY  
BY SEA  
(THE ROTTERDAM RULES)**

*(Rotterdam, 22-23 September 2009)*

Chapter 1  
General provisions

*Article 1. Definitions*

For the purposes of this Convention:

1. "Contract of carriage" means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.
- 2....
- 3....
- 4....
5. "Carrier" means a person that enters into a contract of carriage with a shipper.
6. (a) "Performing party" means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.  
(b) "Performing party" does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.
- 7....
8. "Shipper" means a person that enters into a contract of carriage with a carrier.
9. "Documentary shipper" means a person, other than the shipper, that accepts to be named as "shipper" in the transport document or electronic transport record.
10. "Holder" means:
  - (a) A person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or
  - (b) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.
11. "Consignee" means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.
12. "Right of control" of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.
13. "Controlling party" means the person that pursuant to article 51 is entitled to exercise the right of control.
14. "Transport document" means a document issued under a contract of carriage by the carrier that:
  - (a) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and
  - (b) Evidences or contains a contract of carriage.
15. "Negotiable transport document" means a transport document that indicates, by wording such as "to order" or "negotiable" or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the

order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “nonnegotiable” or “not negotiable”.

16. “Non-negotiable transport document” means a transport document that is not a negotiable transport document.
17. “Electronic communication” means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.
18. “Electronic transport record” means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that:
  - (a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and
  - (b) Evidences or contains a contract of carriage.
19. “Negotiable electronic transport record” means an electronic transport record:
  - (a) That indicates, by wording such as “to order”, or “negotiable”, or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”; and
  - (b) The use of which meets the requirements of article 9, paragraph 1.
20. “Non-negotiable electronic transport record” means an electronic transport record that is not a negotiable electronic transport record.
21. The “issuance” of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.
22. The “transfer” of a negotiable electronic transport record means the transfer of exclusive control over the record.
23. “Contract particulars” means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.
24. “Goods” means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.
25. “Ship” means any vessel used to carry goods by sea.
- 26...
- 27...
28. “Freight” means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.
- 29...
- 30...

### **Chapter 3**

#### **Electronic transport records**

##### *Article 8. Use and effect of electronic transport records*

Subject to the requirements set out in this Convention:

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

*Article 9. Procedures for use of negotiable electronic transport records*

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

*Article 10. Replacement of negotiable transport document or negotiable electronic transport record*

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

**Chapter 4**  
**Obligations of the carrier**

*Article 11. Carriage and delivery of the goods*

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

*Article 12. Period of responsibility of the carrier*

1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.
2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.
  - (b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.
3. For the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:
  - (a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or

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

*Article 13. Specific obligations*

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.
2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

*Article 15. Goods that may become a danger*

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

**Chapter 8**  
**Transport documents and electronic transport records**

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

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

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

**Chapter 9**  
**Delivery of the goods**

*Article 43. Obligation to accept delivery*

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

*Article 44. Obligation to acknowledge receipt*

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

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

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

- (a) The carrier shall deliver the goods to the consignee at the time and location referred to in article 43. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier;
- (b) If the name and address of the consignee are not referred to in the contract particulars, the controlling party shall prior to or upon the arrival of the goods at the place of destination advise the carrier of such name and address;
- (c) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions,

the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods.

If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

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

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

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

- (a) The carrier shall deliver the goods at the time and location referred to in article 43 to the consignee upon the consignee properly identifying itself on the request of the carrier and surrender of the non-negotiable document. The carrier may refuse delivery if the person claiming to be the consignee fails to properly identify itself on the request of the carrier, and shall refuse delivery if the non-negotiable document is not surrendered. If more than one original of the non-negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity;
- (b) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;
- (c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

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

1. When a negotiable transport document or a negotiable electronic transport record has been issued:
  - (a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 43 to the holder:
    - (i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), upon the holder properly identifying itself; or
    - (ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;
  - (b) The carrier shall refuse delivery if the requirements of subparagraph (a) (i) or (a) (ii) of this paragraph are not met;
  - (c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity. When a negotiable electronic transport record has been used, such electronic transport record ceases to have any effect or validity upon delivery to the holder in accordance with the procedures required by article 9, paragraph 1.
2. Without prejudice to article 48, paragraph 1, if the negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rules apply:
  - (a) If the goods are not deliverable because (i) the holder, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, subparagraph 10 (a) (i), or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;
  - (b) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph 2 (a) of this article is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;
  - (c) The person giving instructions under subparagraph 2 (a) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph 2 (e) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;
  - (d) A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods pursuant to subparagraph 2 (b) of this article, but pursuant to contractual or other arrangements made before such delivery acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods;
  - (e) Notwithstanding subparagraphs 2 (b) and 2 (d) of this article, a holder that becomes a holder after such delivery, and that did not have and could not reasonably have had knowledge of such delivery at the time it became a holder, acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

*Article 48. Goods remaining undelivered*

1. For the purposes of this article, goods shall be deemed to have remained undelivered only if, after their arrival at the place of destination:
  - (a) The consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in article 43;
  - (b) The controlling party, the holder, the shipper or the documentary shipper cannot be found or does not give the carrier adequate instructions pursuant to articles 45, 46 and 47;
  - (c) The carrier is entitled or required to refuse delivery pursuant to articles 44, 45, 46 and 47;
  - (d) The carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested; or
  - (e) The goods are otherwise undeliverable by the carrier.
2. Without prejudice to any other rights that the carrier may have against the shipper, controlling party or consignee, if the goods have remained undelivered, the carrier may, at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require, including:
  - (a) To store the goods at any suitable place;
  - (b) To unpack the goods if they are packed in containers or vehicles, or to act otherwise in respect of the goods, including by moving them; and
  - (c) To cause the goods to be sold or destroyed in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.
3. The carrier may exercise the rights under paragraph 2 of this article only after it has given reasonable notice of the intended action under paragraph 2 of this article to the person stated in the contract particulars as the person, if any, to be notified of the arrival of the goods at the place of destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper.
4. If the goods are sold pursuant to subparagraph 2 (c) of this article, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred by the carrier and any other amounts that are due to the carrier in connection with the carriage of those goods.
5. The carrier shall not be liable for loss of or damage to goods that occurs during the time that they remain undelivered pursuant to this article unless the claimant proves that such loss or damage resulted from the failure by the carrier to take steps that would have been reasonable in the circumstances to preserve the goods and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps.

#### *Article 49. Retention of goods*

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

### **Chapter 10 Rights of the controlling party**

#### *Article 50. Exercise and extent of right of control*

1. The right of control may be exercised only by the controlling party and is limited to:
  - (a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;
  - (b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and
  - (c) The right to replace the consignee by any other person including the controlling party.
2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.

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

1. Except in the cases referred to in paragraphs 2, 3 and 4 of this article:
  - (a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party;
  - (b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party; and
  - (c) The controlling party shall properly identify itself when it exercises the right of control.
2. When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:
  - (a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document by transferring the document to that person without endorsement. If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control; and
  - (b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.
3. When a negotiable transport document is issued:
  - (a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;
  - (b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and
  - (c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.
4. When a negotiable electronic transport record is issued:
  - (a) The holder is the controlling party;
  - (b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1; and
  - (c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

*Article 52. Carrier's execution of instructions*

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 50 if:
  - (a) The person giving such instructions is entitled to exercise the right of control;
  - (b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and
  - (c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.
2. In any event, the controlling party shall reimburse the carrier for any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.
3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.

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

*Article 53. Deemed delivery*

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

*Article 54. Variations to the contract of carriage*

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

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

1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to the goods not yet provided by the shipper and not otherwise reasonably available to the carrier that the carrier may reasonably need to perform its obligations under the contract of carriage.
2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions or documents to the carrier, the shipper shall provide them. If the carrier, after reasonable effort, is unable to locate the shipper, the documentary shipper shall provide such information, instructions or documents.

*Article 56. Variation by agreement*

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

**Chapter 11**  
**Transfer of rights**

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

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:
  - (a) Duly endorsed either to such other person or in blank, if an order document; or
  - (b) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.
2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

*Article 58. Liability of holder*

1. Without prejudice to article 55, a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.
2. A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.
3. For the purposes of paragraphs 1 and 2 of this article, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:
  - (a) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or
  - (b) It transfers its rights pursuant to article 57.

**Chapter 18**  
**Final clauses**

*Article 89. Denunciation of other conventions*

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the International Convention for the Unification of certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924, to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading, signed at Brussels on 23 February 1968, or to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979, shall at the same time denounce that Convention and the protocol or protocols thereto to which it is a party by notifying the Government of Belgium to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.
2. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978 shall at the same time denounce that Convention by notifying the Secretary-General of the United Nations to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.
- 3...

*Article 90. Reservations*

No reservation is permitted to this Convention.

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