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A Gateway to Electronic  
Transport Documentation in  
International Trade:  
The Rotterdam Rules in  
Perspective

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# Summary

Trade was the main reason for the development of transportation of goods by sea. With the evolution of technology, the amount of goods transported increased. Early in the history of trade, traders would sail with their goods to the port of destination. As the technology allowed more frequent and longer trips, this practice was seen to be impossible to continue. Thus, the bill of lading was invented. This document served as a receipt of the goods shipped, and over time became also to function as the evidence of the contract of carriage as well as a document of title. As such, the bill of lading fulfilled an important role in world trade. The possessor of the document had the constructive possession of the shipment - as the document represented these goods - and could therefore claim the delivery or sell the goods by transferring the bill of lading to the buyer.

As trade and transportation evolved worldwide, uniformity was necessary for the actors involved. Otherwise there would be a risk that uncertainty could create unattractive situations with costly litigation and partnerships being broken. The international law community started drafting a convention on carriage of goods by sea in order to create harmony and unification. This convention was called the Hague Rules, and was adopted in 1924. The Hague Rules created the desired uniformity. However, as custom and practice in the shipping industry became more modern the Hague Rules became old fashioned. A new convention was therefore drafted in 1968, the Hague-Visby Rules. Most of the world trade today is governed by the Hague-Visby Rules, except two of the main trading actors: USA and China. This is clearly not a harmonious and uniform condition. Additionally, the convention is over 40 years old and hardly up to date and adaptable to the technology of today.

Transport documentation and the law governing carriage of goods came to be, through custom and practice, attached to each other. Dematerializing transport documents is therefore a hard task, as the law and the whole practice is based on these tangible documents. Attempts have been made, most of them unsuccessful. UNCITRAL and CMI drafted thus a new convention in 2008, The Rotterdam Rules. The legislators of the Rotterdam Rules recognized the faults and errors made in

previous attempts and tried to avoid these. The result is a new convention recognizing electronic equivalents to traditional transport documentation, and allowing these equivalents to have the same functionalities as the traditional documents.

The Rotterdam Rules is, amongst other things, an attempt to give actors involved the possibility to make trade even more efficient. One of the approaches is by moulding together electronic commerce with multimodal contracts of carriage. The attempt takes an approach by stating merely the framework for actors to create their own ways of taking advantage of the possibilities given by the new convention. This neutral approach has many advantages when compared to earlier conventions, where the drafters set out the firm rules on how things were supposed to be done. As technology progressed and allowed other, better and more efficient means- these means were out of the scope of the out of date conventions. The Rotterdam Rules are a dynamic set of rules, which gives the industry the possibility to prosper, while the rules remain applicable and up to date.

The Rotterdam Rules introduces a notion that is new for a carriage of goods by sea convention, namely “exclusive control”. This notion is equivalent of the physical possession of the goods and gives the party with the exclusive control the same rights as if the party had a physical bill of lading. The Rotterdam Rules also codifies the rights of a party with exclusive control, which adds certainty and uniformity in current practice. Because of the introduction of the notion of exclusive control, the Rotterdam Rules provide the international shipping community the possibility to conduct business without documents, paper or electronic. The convention also provides a foundation for the usage of sea waybills, as the convention makes the evidential value of the sea waybill in the hands of a third party even greater as compared to earlier conventions on carriage of goods by sea. The Rotterdam Rules offer very suitable solutions and meet the goals that they attempt to achieve.

# Sammanfattning

Handeln var den främsta orsaken till utvecklingen av godstransporter till sjöss. I samband med teknikens utveckling, ökade mängden transporterat gods. Tidigt i handels historia seglade ägarna till godset med sina varor till destinationsorten. Denna sedvänja blev omöjlig att fortsätta tillämpa, eftersom tekniken utvecklades och det blev möjligt för skepp att segla fler och längre resor. Det lönade sig inte för handelsmännen att fortsätta segla med godset. Således uppfanns konossementet och började tillämpas i praktiken. Detta dokument tjänade som ett kvitto på de transporterade varorna, och utvecklades till att även utgöra bevis för transportavtalet och vara ett dokument som representerar det fysiska godet. Konossementet uppfyllde därmed en viktig roll i världshandeln, eftersom det representerade varorna och den legala innehavaren av dokumentet kunde göra anspråk på varorna och dess leverans eller sälja varorna genom att överföra konossementet till köparen.

Då handel och transport utvecklades till en global industri, var enhetlighet nödvändigt för inblandade aktörer, annars skulle osäkerheten medföra oattraktiva situationer med dyra rättstvister och partnerskap skulle riskera att brytas. *"International Law Association"* inledde ett utarbetande av en transport av gods till sjöss konvention, i syfte att skapa harmoni och enande. Denna konvention kallades för Haagreglerna och antogs år 1924. Enhetlighet uppnåddes genom konventionen, men den kom att bli gammal då branschen utvecklades samt seder och bruk moderniserades. Därmed antogs en ny konvention år 1968, de så kallade Haag-Visbyreglerna. Större delen av världshandeln i dag styrs av Haag-Visbyreglerna, utom två av de största handelsaktörerna: USA och Kina. Detta är uppenbarligen inte en harmonisk och enhetlig förutsättning. Dessutom är konventionen över 40 år gammal och knappast aktuell och anpassad till dagens teknik.

UNCITRAL och CMI antog en ny konvention år 2008, nämligen Rotterdamreglerna. Transportdokument och lagen som reglerar transport av gods har kommit att bli, genom sedvänja, förbundna med varandra. Därmed är dematerialisering av transportdokument en svår uppgift, eftersom lagstiftningen samt hela praktiken bygger på dessa dokument. Försök har gjorts, de flesta av dem har misslyckas.

Lagstiftarna till Rotterdamreglerna, kände till tidigare fel och misstag som begåtts och försökte undvika dessa.

Resultatet är en ny konvention som erkänner elektroniska medel på samma sätt som traditionella transportdokument. Konventionen låter dessa elektroniska motsvarigheter ha samma funktionalitet som de traditionella dokumenten. Rotterdamreglerna är ett försök att ge aktörer möjligheter att göra handeln ännu effektivare genom att bland annat gjuta samman elektronisk handel med multimodala transportavtal. Konventionen intar en neutral inställning genom att endast ange en ram för aktörer att skapa sina egna sätt att ta tillvara på de möjligheter som ges i den nya konventionen. Detta tillvägagångssätt är bättre än tidigare metoder, där lagstiftarna valde att ha bestämda regler om hur saker och ting gjordes, utan att förutse att teknologisk utveckling hade inverkan på industrin och därmed inte skulle kunna styras av föråldrade konventioner. Rotterdamreglerna är en dynamisk uppsättning av regler som ger industrin möjlighet att blomstra, med fördelen att konventionen förblir fortsatt tillämplig och aktuell.

Rotterdamreglerna inför dessutom ett begrepp som är nytt för en transport av gods till sjöss konvention, nämligen "exklusiv kontroll". Detta begrepp motsvarar den fysiska besittningen av varorna och ger parten med den exklusiva kontrollen samma rättigheter som om parten hade ett fysisk konossement. Rotterdamreglerna kodifierar även rättigheterna för en part med exklusiv kontroll, vilket ger säkerhet och enhetlighet vid tillämpning. På grund av införandet av begreppet exklusiv kontroll ger Rotterdamreglerna den internationella sjöfarten möjligheter att genomföra transporter utan dokument, varken i pappersform eller elektronisk form. Rotterdamreglerna bidrar även med en solid grund för tillämpning av fraktsedlar då konventionen gör att bevisvärdet av en fraktsedel i händerna på en tredje part blir ännu större än i jämförelse med tidigare konventioner. Rotterdamreglerna erbjuder mycket lämpliga lösningar och möter de mål som de föresatt sig att uppnå.



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**Miran Marusic**

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# List of Abbreviations

Bolero	Bill of Lading Electronic Registry Organisation
eUCP	The Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation
ESS	Electronic Shipping Solutions
EU	European Union
EWTC	East West Transport Corridor
CMI	Comité Maritime International
CMR	Convention on the Contract for the International Carriage of Goods by Road, 1956
DSUA	Databridge Service and Users Agreement
ICC	International Chamber of Commerce
ILA	International Law Association
INTERTANKO	International Association of Independent Tanker Owners
MLES	2001 UNCITRAL Model Law on Electronic Signatures
MLEC	1996 UNCITRAL Model Law on Electronic Commerce
SDR	Special Drawing Rights
SWIFT	Society for Worldwide Interbank Financial Transactions

The Hague Rules	International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924
The Hague-Visby Rules	The Hague Rules of 1924 as amended by the Visby Protocol, 1968
The Hamburg Rules	The United Nations Convention on the Carriage of Goods by Sea, 1978
The Rotterdam Rules	The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008
TTC	Through Transport Mutual Insurance Association Ltd.
UCC	Uniform Commercial Code
UCP	Uniform Customs and Practice for Documentary Credits
UK	The United Kingdom
UNECE	United Nations Economic Commission for Europe
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USA	The United States of America

# 1 Introduction

Sea transport and global economy go hand in hand. More than 80% of goods traded worldwide are transported by sea.<sup>1</sup> Total seaborne trade reached an estimated 8.4 billion tons in 2010<sup>2</sup> between 160 countries<sup>3</sup>. It is obviously a highly global industry with well-settled customs and practices embedded in the daily work. The customs are sometimes identical, regardless of where in the world the trade is taking place. When shipping goods, the shipper receives a transport document; this document varies depending on what kind of trade it is and what kind of route the shipment is transported on.

The transport document plays a crucial role in the industry and thereby on world trade. As of today, the majority of trade transactions rely on transport documents in paper form, the form in which they have been used for some centuries<sup>4</sup>. One may raise an eyebrow, when realized that the handling of this kind of documentation electronically is rather the exception than the main rule in the highly developed

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<sup>1</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – “*Strategic goals and recommendations for the EU’s maritime transport policy until 2018*”, published on 21/01/2009

<sup>2</sup> UNCTAD – Total Review of Maritime Transport 2011, found on <http://archive.unctad.org/templates/webflyer.asp?docid=15876&intItemID=6134&lang=1&mode=highlights>, accessed at 13:14 CET on 14/04/2012

<sup>3</sup> Martin Stopford, “*Maritime economics*”, 3<sup>rd</sup> ed., Routledge, New York, 2009, p. 48

<sup>4</sup> Evidence has been found of traders in the Roman Empire using wax tablets as bills of lading. The tablet would be broken in two, one piece sailing with the ship and the other one sent by mail to the consignee. At the port of destination, the lawful consignee would provide the carrier with the matching half of the wax tablet. Found in: Taco T. Terpstra, “*Trade in the Roman Empire: A study of the institutional framework*”. Submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy in the Graduate School of Arts and Sciences, Columbia University 2011, p 111, found on <http://academiccommons.columbia.edu>, accessed at 13:15 CET on 14/04/2012

technological society that we live in today.

This thesis focuses on electronic transport documents in international trade. The implementation of this intangible means of documentation would increase efficiency, reduce costs, and increase speed of the transactions that forms the foundation of the carriage of goods by sea. Every trader's aim and ambition is to increase his efficiency and reduce his costs. It is therefore questionable that the usage of electronic transport documentation - which would indeed mean all these things - has not been noticeable. The main question of this thesis is how the future concerning the implementation of electronic transport documentation looks, with the Rotterdam Rules legal framework in mind.

## **1.1 Aim of the Study**

In 2009, a signing ceremony was held for a new convention on carriage of goods by sea, namely the Rotterdam Rules. The convention was an attempt to introduce uniformity and to harmonize the fragmentation of the legal framework related to carriage of goods by sea.<sup>5</sup> The convention was also an attempt to promote the usage of modern technology in world trade, in the form of electronic transport documentation. The lawmakers wanted to create certainty for the actors involved in trade, so that technology may be used in their favour, instead of making them reluctant of taking advantage of the possibilities that technology brings, as the current uncertainty is created by the current legal unreliability.

In contrast to earlier conventions that predominantly dealt with the apportionment of liability between shippers and carriers, the new convention contains a trade approach that extends its scope of application. The Rotterdam Rules contains provisions on electronic transport documents, albeit it is a carriage of goods convention. This is proof that the legislators worked in the spirit of improving the possibilities in trade by having in mind the advancement of information technology.

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<sup>5</sup> Currently there are three different conventions regarding carriage of goods by sea, namely the Hague Rules, the Hague- Visby Rules and the Hamburg Rules.

However, it has now passed 2 ½ years since the signature ceremony and so far only Spain has ratified the convention.

This thesis will provide a descriptive and analytical view of the provisions in the convention dealing with electronic transport documentation. The aim of this thesis is to discuss what impact the Rotterdam Rules may have on the implementation of electronic transport documentation in practice. Earlier attempts regarding placing electronic transport documentation into operation will also be considered and analysed, in order to understand the possibilities and the hindrances in dematerializing<sup>6</sup> transport documents.

## 1.2 Method and Disposition

The method of fulfilling the aim of this thesis will be through a legal dogmatic approach combined with a comparative approach. Existing legal regimes will be examined and compared with the new convention through a descriptive and analytical discussion.

The thesis has been structured in five different chapters. Following this introduction, chapter 2 will describe the subject of older conventions on carriage of goods by sea and their development through a historic overview. The chapter will then naturally continue with an explanation of the development of the main regime for this thesis, the Rotterdam Rules. Finally, a synoptic overview of the rules will be presented, including the scope of application.

In chapter 3, transport documentation will be the central theme. The chapter will present an overview of the history of transport documents and deal with their functions. The chapter will then present hindrances to dematerialization of transport document, which is an important aspect to gain in order to understand what is wanted and needed from a dematerializing solution. Finally, earlier attempts on

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<sup>6</sup> Dematerialization in this thesis means making tangible documents intangible, e.g. electronically. The phrase is found in Malcolm Clarke, “*Transport documents: their transferability as documents of title; electronic documents*”, LMCLQ 2002, p. 356

dematerialization of the documents will be examined and an analysis will be made of why they failed to live up to the ambition.

Chapter 4 will exclusively focus on the provisions contained in the Rotterdam Rules regarding electronic transport documentation. The definitions used throughout the Rotterdam Rules and the prerequisites for the implementation of the dematerialization will be explained and examined, in order to understand how the Rotterdam Rules might be able to facilitate intangible transport documentation.

The final chapter, chapter 5, contains a conclusion that summarizes the key points of the previous chapters and analyzes the potential of the Rotterdam Rules in dematerializing transport documentation.

### **1.3 Sources**

To create a comprehensive view of the legal status and possibilities regarding the electronic transport documents, focus will be on the legislation of the Rotterdam Rules. Comparison with earlier conventions as well as references to national legislation will be made.

References will be made to legal sources such as books, articles and diverse websites dealing with the topic of choice. From the acquired information, a description and analysis will be presented through out the thesis.

### **1.4 Delimitations**

This thesis will attempt to give an exhaustive description and analysis regarding provisions in the Rotterdam Rules dealing with electronic transport documentation. As part of this analysis, other conventions and legislation will be mentioned, but they will not be extensively examined. The objective is not to examine other conventions and legislation in order to create a comprehensive analysis of these but - for the sake of analytical comparison - to shed light on the diversity and evolution that the Rotterdam Rules brings forth. However, the thesis includes a comparison of the

scope of application of the compared conventions i.e. the Rotterdam Rules, the Hague-Visby Rules and the Hamburg Rules. A discussion regarding the use of transport documents in paper form governed by these conventions, under provisions not dealing with electronic transport documentation will also be considered.

Legislation, other than the ones dealing with transportation will be mentioned - for example dealing with documentary credits and commercial aspects - for the sake of understanding the merging of transportation with trade. In addition, in this regard, there will not be any exhaustive analysis of the provisions in these legislation.

There will be an explanation, but no analysis, of the different definitions used in the Rotterdam Rules, so that the reader may be able to fully grasp and understand the topic.

The thesis will also introduce the reader to another feature in the Rotterdam Rules, namely multimodal transportation. This feature is included in order to understand current attempts made by the shipping industry in order to improve and enhance efficiency in world trade as the feature is connected to electronic transport documentation. There will however not be an exhaustive analysis of the provisions dealing with the multimodal concept, as the presentation will be a part of the explanation of the wider picture on how the Rotterdam Rules might be a gateway to electronic transport documentation.

The thesis will not attempt to analyse whether states should ratify the convention or not, as an effort to answer this question would have to consider the convention in its whole, and this is not in the objective of this thesis.



# 2 Background to the Creation of the Rotterdam Rules

## 2.1 A Brief History of the Law Relating to the Carriage of Goods by Sea

As this thesis focuses on transport documentation, a topic containing a natural combination between transportation and trade, the thesis attempts to present the synergy between the shipping industry's evolution and the development of the law governing the practice of the industry. In order to understand the Rotterdam Rules it is necessary to consider the development of the previous carriage of goods by sea conventions and how these developed as the industry followed the evolution of technological progress.

Carriage of goods being an international and cross-border area of law and practice makes it easy to understand that uniformity is essential for the parties involved. This attribute has been sought after since the late 19<sup>th</sup> century.<sup>7</sup> Several attempts have been made by the shipping industry and the international legal community to adopt conventions providing uniformity and balancing the interests of actors involved in the industry.

International trade would not have been able to operate without carriers. To encourage carriers, limitation of liability played an important role. From the years 1840 to 1950, the shipping industry made its greatest developments; ships went from being driven by wind sail to sail with steam engines, deep-sea cables revolutionised communications and liner shipping route systems emerged. The industry was, after

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<sup>7</sup> Michael Sturley, *“Transport law for the twenty-first century: An introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules”* in D. R. Thomas (ed.), *“A New Convention for the Carriage of Goods by Sea- The Rotterdam Rules”*, Lawtext, Great Britain, 2009, p. 3 & Lorena Salles Pallares, *“A brief approach to the Rotterdam Rules: Between hope and disappointment”*, 42 J. Mar. L. & Com., 2011, p. 454

these improvements, truly revolutionized and the amount of tons annually carried by sea grew from 20 million tons in 1840 to 550 million tons in 1950.<sup>8</sup> The industry had its boom and the legislating and governing bodies adapted in accordance, by attracting the carriers on which the industry depended. The governing laws in general used to impose a near-strict liability for any loss or damage to the cargo upon the carrier. However, in the latter half of the 19<sup>th</sup> century carriers began to limit their liability by exculpating themselves with clauses in bills of lading. These clauses were differently welcomed in various jurisdictions. Harmony was far from present and the *International Law Association (ILA)* tried to solve the problem by introducing a model bill of lading in 1882 and a model law in 1885, but without success. Instead, national laws were enacted by states such as USA, New Zealand, Canada and Australia. In 1921, the ILA addressed the problem once again and the result was reached upon when the Hague Rules were drafted in 1924. In 1938, roughly all of the major maritime nations of the world at that time had ratified the Hague Rules.<sup>9</sup> The Hague Rules were more carrier-friendly than the law at that time in general was. The Hague Rules introduced uniformity in the limitation of liability, which was important at this time as the carriers incorporated clauses in the bills of lading limiting their liability anyway. This way a uniform agreement was achieved and the limitations of liability could be controlled by the convention, instead of the carriers setting up their own standards.

However, further progress in technology and society such as containerisation of cargo, the decolonization of states around the world and national court interpretations of the Hague Rules led to the break down of the once internationally accepted legal regime. The *Comité Maritime International (CMI)* was aware of the problem and decided to amend Hague Rules. Recommendations were processed and in 1963, the CMI signed a draft protocol, which was finally concluded in 1968, called the Hague-Visby Rules, which was basically an upgrade of the previous Hague Rules. The container revolution brought the concept of unit limitation, regarding limitation of liability, which was introduced in the Hague-Visby Rules and was the greatest controversy as it revolutionized limitation of liability. Approximately 2/3 of the

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<sup>8</sup> Stopford, *supra* note 3, p. 24

<sup>9</sup> Paul Myrburgh, “*Uniformity or unilateralism in the law of carriage of goods by sea?*”, 34 VUWLR, 2000, p. 360 & Sturley, *supra* note 7, p. 4 ff. & Pallares, *supra* note 7, p. 454

world trade is still today governed by the Hague-Visby Rules.<sup>10</sup>

In 1968, the United Nations began to draft a completely new regime. The work was prepared by a Working Group requested at the *United Nations Conference on Trade and Development (UNCTAD)*, and later by the *United Nations Commission on International Trade Law (UNCITRAL)*. The result was presented in Hamburg in 1978, the so-called Hamburg Rules. The Hamburg Rules recognized contracts of carriage where no bill of lading had been issued and they recognized paperless transactions. The Hamburg Rules entered into force on 1<sup>st</sup> November 1992. Many of the provisions in the Hamburg Rules are reformulated from the prior regimes with some renovations. Thus far only 34 states have ratified the Hamburg Rules, and none of these are great maritime nations. The Hamburg Rules has little significance as they cover approximately less than 5% of the world trade.<sup>11</sup>

The situation with three different legal regimes on carriage of goods by sea simultaneously, with the Hague-Visby Rules being most prominent, but without China and USA (two major traders) being parties to this dominant regime is seen as insufficient. Furthermore, states have begun to develop solutions to problems that might occur when the current regimes collide, which are not uniform and as such making the situation even more complicated.<sup>12</sup> There is imbalance in the contractual relationship concerning the carriage of goods by sea, because cargo owners and carriers have colliding interests. States can belong to these groups of interests and thereby certain states wish to support one regime over another. Because of this, some states choose to become party to a convention while others do not.<sup>13</sup>

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<sup>10</sup> Sturley, *supra note 7*, p. 7ff. & Pallares, *supra note 7*, p. 454 & Myrburgh, *supra note 9*, p. 360

<sup>11</sup> Sturley, *ibid.*, p. 9 & Myrburgh, *ibid.*, p. 361 &

[www.oecd.org/document/32/0,3746,en\\_2649\\_34367\\_1866253\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/32/0,3746,en_2649_34367_1866253_1_1_1_1,00.html), accessed at 13:23 CET on 17/04/2012

<sup>12</sup> Sturley, *ibid.*, p. 11 & Pallares, *supra note 7*, p. 455

<sup>13</sup> Abhinayan Basu Bal, "An evaluation of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules) through critical analysis, *WMU Research Report Series, No. 2 June 2009*, p. 5

By looking at the history of the earlier conventions, one can observe a tendency of the industry's progress being followed by the evolution of the law related to the industry. It has predominantly been the industry that takes the first step, which is then followed by the legislators' attempt to draft legislation that suit the interest of the industry. Every time a major breakthrough in technology occurs or the business mentality changes, the law has been changed accordingly and a new convention has been drafted. Therefore it is remarkable that these old regimes still regulate carriage of goods by sea in our days, where the technology is at a point that drafters of the previous conventions could not imagine. In this case, the legislators have to take the initiative and take the first step by creating a platform where the shipping actors can use the technology that is currently available, as the industry will not take the step into uncertainty and possibly high litigation costs.

## 2.2 Development of the Rotterdam Rules

UNCITRAL thought that drafting a new transport convention was the appropriate solution to deal with the chaotic and un-harmonized situation created by a combination of absence of rules on one hand and gaps filled out by national legislation and conventions on carriage of goods by sea on the other. Unification was the essential aim, as well as an update of the rules, to cope with the evolution of technology, methods of transportation and other circumstances that had changed since the earlier regimes had been drafted.

In 1998, the CMI got involved in the preparatory work regarding the new transport convention. UNCITRAL cooperated with the CMI, in order to create a product that was in line with the needs of the industry. The CMI worked efficiently and submitted a draft of the rules by December 2001 to UNCITRAL<sup>14</sup>, more precisely Working Group III (Transport Law). Not much was changed from the initial draft document received from the CMI and a final draft was recommended for adoption on 11<sup>th</sup> December 2008.<sup>15</sup>

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<sup>14</sup> Gertjen van der Ziel, "*Delivery of the goods, rights of the controlling party and transfer of rights*", in D. R Thomas (ed.), p. 244

<sup>15</sup> Sturley, *supra note 7*, p. 14

The signing ceremony took place on 23<sup>rd</sup> September 2009 in Rotterdam; therefore the new convention is called the Rotterdam Rules. So far, 24 states have signed the convention, including amongst others USA, Sweden, Norway and Denmark. The convention will entry into force one year after 20 states have ratified it. As of now, Spain is the only state with ratification.<sup>16</sup>

## 2.3 Synoptic Overview of the Rotterdam Rules

### 2.3.1 Scope of Application

The scope of application of a convention can be identified through different approaches. By presenting articles regulating the scope of application from the Hague-Visby Rules, Hamburg Rules and the Rotterdam Rules in comparison, the different approaches the respective regimes apply will be illustrated.

The Hague-Visby Rules do not define the “contract of carriage”, as the two later regimes do. The Hague-Visby Rules connect the notion of a contract of carriage to the document issued, without recognizing what is the contract of carriage. The document mentioned in article 1. (b) of the Hague-Visby Rules is a contract of carriage that is evidenced by a bill of lading or any similar document of title. This means that the applicability of the convention is dependent upon the issuance of a document of title. This approach is called the “*documentary approach*”. The other two mentioned regimes define the contract of carriage, in their own various ways, by explaining that it is a contract where a carrier receives payment of freight for the goods he carries from one port to another in the Hamburg Rules and from one place to another in the Rotterdam Rules.<sup>17</sup>

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<sup>16</sup>[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XID8&chapter=11&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XID8&chapter=11&lang=en), accessed at 15:28 CET on 14/04/2012

<sup>17</sup> Compare Hague- Visby Rules, Article 1.(b), Hamburg Rules, Article 1.6 and the Rotterdam Rules, Article 1.1, see Appendix 1

The provisions dealing with the scope of application in the various regimes provide for application and exclusion of applicability of the respective regimes.<sup>18</sup> The Hamburg Rules adopt a “*contractual approach*” in article 2.1, by stating that the rules are applicable to contracts of carriage. However, it is also provided for in article 2.3 that charter parties are excluded from the scope of application, and as such the rules are adopting a “*documentary approach*” in order to exclude certain documents.<sup>19</sup>

Chapter 2 of the Rotterdam Rules regulates the scope of application of the convention. The basic requirement for the application of the Rotterdam Rules is that the carriage of goods must consist of international carriage, between two different states; at least one of them being a party to the convention.<sup>20</sup> The Rotterdam Rules applies a wider scope of application than the preceding regimes, by applying a mix of three different approaches. The “documentary approach” is recognized by the fact that the Rotterdam Rules cover carriage of goods in cases when both negotiable and non-negotiable bills of lading, sea waybills and electronic bills of lading have been issued. The “contractual approach” is apparent in situations when no document has been issued as the rules nevertheless apply, depending on the particular contract of carriage the parties have concluded. Finally, the “trade approach” is evident when the application of the rules relies on the nature of the trade the carrier deals with.<sup>21</sup> This hybrid approach allows the rules to pick the best from every approach available in order to create a dynamic set of rules. The “contractual approach” would make the scope too broad, but this is opposed by the “trade approach” which limits the scope of the convention by not being applicable to charter parties and other contracts regulating the usage of a ship or any space thereon in liner trade. In non-liner trade the rules are applicable *only* when there is no charterparty or other contract between

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<sup>18</sup> Compare Hague- Visby Rules, Article 1.(b-c), Hamburg Rules, Article 2.3 and the Rotterdam Rules, Article 6.1, see Appendix 1

<sup>19</sup> Francesco Berlingieri, “*A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules*”, p. 2, found on [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 at 16:01 CET on 14/04/2012

<sup>20</sup> Rotterdam Rules, Article 5, see Appendix 1

<sup>21</sup> Basu Bal, *supra note 13*, p. 16

the parties for the usage of a ship or any space thereon *and* a transport document or an electronic transport document has been issued.<sup>22</sup>

An important feature and extension of the Rotterdam Rules and its scope of application lies in the protection of third parties, i.e. parties other than the original contracting parties. Under the earlier regimes, protection of third parties was established under respective convention merely in the case of a bill of lading having been *endorsed and issued to the third party*. An actor being a third party in a particular scenario gets far more protection by the Rotterdam Rules. Article 7 provides third parties with protection in *all* situations. Even the exceptions in article 6, which states exclusions of the application of the Rotterdam Rules between the original contracting parties, will not hinder the rules from applying when the transport document is in the hands of a third party. This feature provides more security to third parties than the previous regimes do.<sup>23</sup>

The scope of application is relevant to understanding the ideology behind the Rotterdam Rules, in particular when compared with the previous regimes. This aspect provides one with an understanding of the gaps the new convention aims to fill. The Rotterdam Rules is a convention on carriage of goods by sea, which makes it remarkable that it contains provisions on transport documentation. This is another aspect of the “trade approach”. The legislators recognized the synergy between trade and transportation of goods by sea and acknowledged the importance of how modern technology could improve the facilitation of transport documents. Because of this, they included provisions dealing with electronic transport documentation in the Rotterdam Rules. By doing so, they expanded the scope of application of the Rotterdam Rules as compared to the earlier regimes, as the previous regimes did not regulate this feature.

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<sup>22</sup> Berlingieri, *supra note 19*, p. 4

<sup>23</sup> *Ibid.*

### 2.3.2 Multimodal Transportation

The previous conventions merely dealt with carriage of goods by sea. The coverage of the previous conventions was from the port of loading to the port of discharge, also called “*port-to-port*” coverage, as they merely covered the sea leg of the carriage. The Rotterdam Rules is a multimodal convention and widen the application to also include carriage of goods by air, rail and road, as long as one leg of the carriage is by sea. This is called “*door-to-door*” coverage.<sup>24</sup> The “door-to-door” coverage means, amongst other things, that when the convention applies on a contract of carriage, the convention’s liability terms apply on the whole carriage regardless of the damage occurring during the maritime leg or any other leg.<sup>25</sup> The “door-to-door” coverage fills a gap to the current situation, which is characterized by different conventions being applicable depending on where the damage occurs. This means high costs in litigation, as there must be investigations in order to conclude under which leg the damage occurred. The different conventions have different liability rules as well, which makes the situation even more problematic.<sup>26</sup> The legislators were afraid that the new convention would collide with the regimes that currently are applicable to other means of transportation than by sea, such as the CMR<sup>27</sup>. The solution to this problem is found in Article 26 of the Rotterdam Rules, which states that if it can be proved when the damage occurred, i.e. during which leg of the transport - then the convention, which would otherwise be applicable - shall prevail over the Rotterdam Rules and be applied just as if a separate contract was made for each and every leg of the transport.<sup>28</sup> This seems to put the carrier in a position where he risks being held liable for damages in more situations than under the previous regimes. The Rotterdam Rules deals with his potential problem by extending the number of parties that can be held liable for damages. A division in two categories is made between these parties. The first category is “*maritime*

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<sup>24</sup> Basu Bal, *supra note 13*, p. 17 & Rotterdam Rules, Article 1.1, see Appendix 1

<sup>25</sup> Christopher Hancock QC, “*Multimodal transport under the Convention*”, in D. R Thomas (ed.), p. 42

<sup>26</sup> Basu Bal, *supra note 13*, p. 17

<sup>27</sup> Convention on the Contract for the International Carriage of Goods by Road, 1956

<sup>28</sup> Theodora Nikaki, “*The carrier’s duties under the Rotterdam Rules: Better the devil you know?*” 35 Tul. Mar. L.J., 2010, p. 29 & Rotterdam Rules, Article 26, see Appendix 1



*performing parties*”, which is a party other than the carrier that alludes to perform any of the carrier’s obligations,<sup>29</sup> and can consist of parties such as subcontracted sea carriers, terminal operators, stevedores and warehouse keepers.<sup>30</sup> The second category is “*performing parties*” which are parties other than the carrier that deals with receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods.<sup>31</sup> Such a party can include agents, independent contractors and other sub-contractors.<sup>32</sup>

The Rotterdam Rules is a trade-friendly convention. The new convention allows a combination of transportation means and acknowledges the positive changes that technology can have on trade and thereby encourages parties to trade by providing a security that the previous regimes did not. The freedom the parties are given in the Rotterdam Rules reflects throughout the entire convention. This becomes evident in another significant update in the new convention, which is the development of e-commerce and the possibility of using electronic transport documentation. It is up to the parties to decide whether to take advantage of modern technology or not, as the Rotterdam Rules merely make up the framework that the parties shall act within, rather than imposing a certain way of acting. As this thesis mainly focuses on electronic transport documentation, it is essential to understand what the traditional transport documentation is, what they include and the shipping industry’s and trade’s dependence on them. Thus, the next chapter shall consist of an explanation of transport documents

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<sup>29</sup> *Ibid.* & Rotterdam Rules, Article 1.7, see Appendix 1

<sup>30</sup> D. R. Thomas, “*An analysis of the liability regime of carriers and maritime performing parties*”, in D. R. Thomas (ed.), p. 57

<sup>31</sup> Rotterdam Rules, Article 1.6 (a), see Appendix 1

<sup>32</sup> Thomas, *supra* note 30, p. 57

# 3 Transport documents

## 3.1 Historical Overview

To understand the possibilities and limitations of electronic transport documentation, one needs to understand the basic concepts of the original, tangible ancestor. Transport documentation developed through the customs of trade, as trade has always been the obvious reason why goods have been transported. When technology improved the means of transportation and trade expanded accordingly, a need for regulating the practise of documentation arose.<sup>33</sup> Before the invention of transport documentation merchants had to accompany the ship carrying the goods to be sold. The practice of accompanying the goods during carriage vanished, and the practise of transport documentation appeared. The bill of lading was introduced and served as a non-negotiable document. By the time of the 14<sup>th</sup> century the bill of lading constituted a *receipt* of the goods shipped and contained information regarding its quantity, type and condition. With time, the document also incorporated *the terms of the contract of carriage*, and finally by the 18<sup>th</sup> century the bill of lading developed a third characteristic: being *a document of title*. As of that time, the bill of lading was a negotiable document.<sup>34</sup>

## 3.2 The Bill of Lading<sup>35</sup>

As stated above, the bill of lading has three functions, being a *receipt*, *evidence of the terms of the contract of carriage* and being a *document of title*. To fully understand these functions it is useful to consider an example of how a bill of lading is produced in practice. The shipper delivers the goods to the carrier. According to the

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<sup>33</sup> Kurt Grönfors, "Towards sea waybills and electronic documents", Sjörettsföreningen i Göteborgs skrifter, nr. 70, Akademiförlaget, Gothenburg, 1991, p. 7

<sup>34</sup> John F. Wilson, "Carriage of goods by sea", 6<sup>th</sup> ed., Pearson Education Ltd., Great Britain, 2008, p. 113

<sup>35</sup> For illustration of a paper bill of lading, see Appendix 2

instructions of the carrier, a receipt is issued stating the quantity, condition and type of the goods delivered. This is called a mate's receipt. The shipper then enters the information contained in the mate's receipt and other relevant information such as the port of destination and the name of the consignee, on the carrier's bill of lading form. The cargo details on the bill of lading form are compared with the received goods and the freight is calculated and entered on the bill of lading by the carrier's agent or the master of the ship carrying the goods. The agent or the master will then sign and release the bills of lading to the shipper. Bills of lading are generally issued in sets of three originals, sometimes also in sets of six. The shipper keeps one bill of lading for him self and sends one bill of lading to the consignee. This bill of lading gives the consignee at the port of destination the right to take delivery of the goods. The carrier, who needs a bill of lading to be able to identify the rightful consignee and to be able to deliver the right amount of goods to him, keeps one bill of lading.<sup>36</sup>

### **3.2.1 Receipt of the Shipped Goods**

Information such as the quantity, description of the goods and the condition in which they were when shipped are crucial for the trade. The information tells the consignee in what shape the goods were when shipped, and if they are not received in the same condition the consignee has a right to claim against the carrier. This information, found in the bill of lading, represents evidence of the goods being shipped. If this information was not available, the buyer would take a large risk when buying goods that no representation or qualification has been made of, because he would have the burden of proving that the condition and quantity of the received goods did not match that of the shipped goods. This evidentiary receipt function makes the bill of lading a saleable document.<sup>37</sup> Naturally, this saleability is affected negatively if the bill of lading states that the goods were shipped in damaged condition.

International conventions on carriage of goods by sea such as the Rotterdam Rules and Hague-Visby Rules encourage trade by stating that a bill of lading is conclusive

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<sup>36</sup> Wilson, *supra note 34*, p. 116

<sup>37</sup> Guenter H. Treitel QC, Francis M.B. Reynolds QC, "*Carver on Bills of Lading*", 2<sup>nd</sup> ed., Sweet & Maxwell, London, 2005, p. 17

evidence in the hands of a third party that acts in good faith. Thus, what is stated in the bill of lading is not possible to prove contrary by the carrier, as provided by article 41 of the Rotterdam Rules and article 3.4 of the Hague-Visby Rules. This leads to reliability on the bill of lading by the consignee, which is in this case the third party. The consignee feels more secure purchasing goods during transit as he does not have the ulterior suspicion that he will face a situation where the onus is on him to prove that he has not received the goods in the condition the goods were when shipped.<sup>38</sup>

### **3.2.2 Evidence of a Contract of Carriage**

The bill of lading contains references to the terms and conditions of carriage that sets out the rights and liabilities of the parties to the contract of carriage, and is found on the back side of the document. This is said to be the “reverse side” of the bill of lading.<sup>39</sup> The view is that this merely constitutes the evidence of a contract, and not the contract itself, as the contract of carriage is normally concluded before the bill of lading is issued.<sup>40</sup>

### **3.2.3 Document of Title**

For a bill of lading to be a document of title, it has to be transferable. This is achieved by drafting the bill of lading to an unnamed consignee or to carrier’s order and assigns, which is known as an “*order*” bill of lading. If the bill of lading only provides for a named consignee, it is called a “*straight*” bill of lading. The “straight” bill of lading is a document of title but it is not negotiable, as it only gives the named consignee right to the goods and cannot be sold during transit or used as collateral.<sup>41</sup>

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<sup>38</sup> Marek Dubovec, “*The problems and possibilities for using electronic bills of lading as collateral*”, 23 Arizona. J. Int’l & Comp. L., 2006, p. 441

<sup>39</sup> Michael Bridge (ed.), “*Benjamin’s sale of goods*”, 8<sup>th</sup> ed., Sweet & Maxwell, London, 2010, p. 1143

<sup>40</sup> Lush J. at p. 40 in *Crooks vs. Allan* [1879] 5 QBD 38

<sup>41</sup> The topic, whether the straight bill of lading was a document of title, has been discussed. It was concluded that it is undesirable to have different rules for different kinds of bills of lading. Thereby

It is well settled that when speaking about the bill of lading and its negotiability as a document of title, what is meant is the *transferability* of the document. That is because the bill of lading does not have the characteristic that is essential for being a negotiable document, as the document does not give the transferee a better title than it gives the transferor.<sup>42</sup>

The main purpose of the document of title function is to provide the owner of the goods the document represents the same possibilities as if the owner had the goods in physical possession – also called *constructive possession*. The shipper enters a contract of carriage with the carrier to perform the obligations from the contract of sale, namely transportation of the goods. When the shipper delivers the goods to the carrier he gives up the physical possession of the goods. The issued bill of lading then constitutes the shipper's constructive possession of the goods. Thus, by transferring the document to a buyer, the ownership of the goods is transferred. The new holder then has the constructive possession that gives him the right of delivery of the goods the document represents and allows him to sell the goods under transit. These rights are transferred to the consignee by the contract of carriage, and not the contract of sale. However, if the bill of lading is issued to the shipper's order, he can maintain control over the goods until the buyer pays the price for the goods. The moment the seller transfers the bill of lading to the buyer, he loses his right to dispose of the goods. The buyer does not have the right to the delivery of the goods without the bill of lading and he will not obtain the document until he pays the shipper for the goods.<sup>43</sup>

The bill of lading also serves a function as *collateral* for loans, as the document symbolically represents the goods. The document is thus of key importance for international trade. Another function of the document of title is that the lawful holder

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the straight bill of lading also constitutes a negotiable document. Rex LJ at 145 in *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA* [2003] EWCA Civ 556; [2003] 2 Lloyd's Rep 113, "*The Rafaela S*"

<sup>42</sup> Lord Devlin at 446 in *Kum v Wah Tat Bank* [1971] 1 Lloyd's Rep 439

<sup>43</sup> Caslav Pejovic, "*Documents of title in carriage of goods by sea*". J.B.L. 2001, Sep., p. 468

of the document is entitled to *sue the carrier* in case of breach of contract.<sup>44</sup> When the goods have been delivered, the bill of lading ceases to be a document of title and has only the function of being evidence of the goods in an eventual dispute.<sup>45</sup>

When endorsing a bill of lading, the effect of the transfer of the document does not always have the same outcome. The effect of transfer depends on the intention of the parties involved as well as the applicable law. The only rights that are transferred in every case when the bill of lading has been endorsed are the rights to demand delivery and to have constructive possession of the goods.<sup>46</sup> The transferee is entitled to receive the delivery of the goods, but this does not mean that he has title to the goods. In the case of a transferor not having title in the sold goods, the transferee would still have the right of delivery. Only after it is proven that the transferor did not have a legitimate title in the goods, would he have to return the goods to the rightful owner.<sup>47</sup> From a legal perspective, property of the goods does not fall within the scope of the contract of carriage. This is obvious because the carrier issues the document as a receipt of the received goods for carriage, and therefore the carrier cannot ascertain that the shipper is a lawful owner of the goods. In practice, however, the transfer of the bill of lading often means the transfer of property. The prerequisites are that the transferor must have a legitimate title to the goods and that the parties included in the transfer have agreed on the transfer of property, including the conditions of this transfer. The contract of sale governs the transfer of property while the contract of carriage only facilitates the realization of the transfer, consequently without the contract of sale the transfer of property is without effect.<sup>48</sup> The national legislation governing the contract of sale is also a decisive factor when considering whether the bill of lading can transfer the property in the goods. It varies from state to state. According to English law, it is the intention of the parties, namely the transferor, which determines if the transfer is possible through the transfer of the document. In French law, however, the property of the goods passes when the parties

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<sup>44</sup> Pejovic, *ibid.*, p. 466 f.

<sup>45</sup> Wilson, *supra note 34*, p. 130 & Dubovec, *supra note 38*, p. 442

<sup>46</sup> Stephen Girvin, “*Carriage of goods by sea*”, 1<sup>st</sup> ed., Oxford University Press Inc., New York, 2007, p. 83 & Pejovic, *supra note 43*, p. 467

<sup>47</sup> Pejovic, *ibid.*, p. 470

<sup>48</sup> *Ibid.*, p. 471

have agreed upon the goods and their price, and no payment or delivery needs to be made for the transfer of property to take place. The property is transferred by the contract of sale and the possession by the contract of carriage. The bill of lading's importance lies exclusively at the port of delivery, when the consignee has to identify himself by showing his bill of lading. Swedish law does not contain any statutory provisions regarding the transfer of property, but the situation is governed by two well-established principles, which must be applied cumulatively. The first principle concerns the contract of sale (Swedish: *avtalsprincipen*) and stipulates that the transfer of property occurs when the sales contract is concluded. The second principle (Swedish: *traditionsprincipen*) deals with the transfer of possession and stipulates that the title is transferred to the buyer when the possession of the goods is transferred.<sup>49</sup> According to these principles, a transfer of a bill of lading – which represents the transfer of the possession of the goods – therefore provides a legal foundation to the transfer of property, provided there is an underlying sales contract.<sup>50</sup>

### 3.3 The Sea Waybill

Waybills were developed to be used for land and air transport, where the journeys were short and there was no opportunity for the consignee to sell the goods during the journey. The practices came to be implemented in sea transportation, where there was no need or interest to sell the goods during transport. The carriers' obligation is to deliver to the named consignee in the sea waybill, provided that the consignee can identify himself. The sea waybill does not serve as a negotiable document of title and cannot pass the right of suit or other rights, as no rights are acquired by the mere possession of the document. However, the document possesses the other two functions of the bill of lading, namely the functions of being a receipt of the goods shipped and evidence of the contract of carriage. The sea waybill is not used as frequently as the bill of lading, mainly because it lacks the functionality of being a

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49 NJA II 2002:9 "Ändringar i konsumentköplagen", p. 300

50 Jan Ramberg, "Köplagen", Norstedts Juridik AB, Stockholm, 1994, under chapter 1 § 2, "Avtalssyftets betydelse – omsättnings- och säkerhetsöverlåtelser", via [www.zeteo.se](http://www.zeteo.se)

document of title.<sup>51</sup>

The sea waybill is a document very similar to the “straight” bill of lading, which is however less frequently used than the sea waybill. The “straight” bill of lading is signed to a specific person and as a shipping document it possesses the same deficiencies as the sea waybill when security is required for documentary credits. The difference is that a sea waybill does not have to be surrendered at delivery. It is enough that the consignee named in the document identifies himself at the time of delivery, for the carrier to perform his obligation of delivering the goods. Therefore the sea waybill is used in transactions where security is not needed, e.g. between partners that have trust in each other, in in-house movements between branches of a multinational firm or the shipment of household and personal possessions.<sup>52</sup>

CMI Uniform Rules for Sea Waybills are rules that govern the carriage of goods by sea when a sea waybill is issued. These rules provide the shipper with the possibility to change the name of the consignee by letting the carrier know that the endorsed consignee in the sea waybill is altered. The possibility exists until a consignee claims the goods at the port of delivery, which is found in article 6.2 (a) in the CMI Uniform Rules for Sea Waybills. The shipper is thereby given the right of control and possibility to dispose of the goods in transit. It is very similar to the constructive possession that is provided by a bill of lading, with the slight difference that the carrier needs to be informed of the newly endorsed consignee in the case of a sea waybill being issued, whereas a bill of lading can be transferred without the carrier’s knowledge.

Article 6.2 (b) of the CMI Uniform Rules for Sea Waybills provides the shipper with the possibility to transfer the right of control and disposal to the consignee *before* the goods are delivered to the carrier. The consignee then has the same possibility to direct the goods carried to another person than himself, a result very similar to the bill of lading based transactions. However, it is important to note that it is *not*

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<sup>51</sup> Wilson, *supra* note 34, p. 160 & Pejovic, *supra* note 43, p. 481

<sup>52</sup> Wilson, *ibid.*, p. 158 & Judith Prakash J at 835 in *Voss Peer v APL Co Pte Ltd* [2002] SGHC 81 [2002] 1 SLR (R) 823



*possible* to transfer the right of control and disposal during the voyage as the rules allows the transfer of the right of control up until the moment the carrier receives the goods. This provides security to the shipper, as he will not transfer the right of disposal to the consignee before the goods are delivered to the carrier unless he receives payment from the consignee. Through the CMI Uniform Rules for Sea Waybills, the bill of lading and the sea waybill become more alike and the main benefits - to have the right of disposal of the goods and the right of delivery - are achieved.<sup>53</sup>

The sea waybill has the disadvantage of not being a negotiable document of title. This is the reason why the document is not being used in documentary sales, such as the bill of lading is. Nevertheless, the sea waybill possesses another quality, namely the possibility of delivery of the goods without presentation of the document. This quality could be significant to certain traders, for example those trading in oil. The oil market is a fluctuating market and there is a high interest of being able to sell the goods immediately when disposable. This possibility is provided for by the sea waybill as delivery can occur without the production of the document and the goods can be disposable immediately. There is a hindrance to this flexibility and speedily conduct if the goods are documented by a bill of lading, because the bill of lading has to be surrendered at the delivery. The problem is that the bill of lading might not be in the hands of the consignee at the port of destination, as it might not have been transferred as fast as the cargo has been transported. Oil is additionally also a commodity that is often sold and re-sold during transit. Therefore there is a need for a negotiable document, which obviously limits the usage of the sea waybill in this kind of trade.<sup>54</sup>

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<sup>53</sup> Pejovic, *supra note 43*, p. 482

<sup>54</sup> Pejovic, *ibid.*, p. 483 & Girvin, *supra note 46*, p. 48

### 3.4 Delivery of the Goods and Presentation of a Bill of Lading

The bill of lading entitles the holder to delivery of the goods and the delivery serves the carrier with a discharge of his contractual obligations. The carrier has a strict liability in delivering the goods to the consignee that presents the bill of lading and identifies himself as the consignee. For the carrier it might be impossible to know who the right consignee is, as the goods may have been sold several times during their transit. Therefore, the “order” bill of lading, which is transferable, has to be presented to the carrier at the port of discharge in order for the holder to obtain delivery of the goods. In the case of the “straight” bill of lading, the carrier has an obligation to deliver the goods only to the holder named in the bill of lading.

The problem is the custom of the bills of lading being issued in sets of three or six originals, meaning that there are several bills of lading in circulation. The carrier is protected in this case by the principle “*one bill of lading being presented, the others stand void*”.<sup>55</sup> This means that when delivery has been made upon production of a bill of lading, other endorsees cannot demand delivery referring to their bill of lading. Nonetheless, the fact that several bills of lading are issued creates a potential risk of fraud and mistakes, as there might be several bills of lading in circulation, and leaves the actors in a situation filled with uncertainties.<sup>56</sup> The practice of the issuance of several bills of lading was criticised already at the time when the electric telegraph and the steam boat was introduced, as the communication system and the speed of the ship transporting the goods made it possible for the merchants to change the practice. But then as now, merchants so not easily give up well-settled traditions.<sup>57</sup>

Another problem with presentation of the bill of lading is the efficiency of today’s transportation, as the goods may arrive faster than the document. If the bill of lading is a negotiable one and it has not arrived at the time the goods are delivered, the

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<sup>55</sup> This principle was established by Lord Cairns at 599 in *Glyn, Mills & Co. v East & West India Dock Co.* [1882] 7 App Cas 591

<sup>56</sup> Wilson, *supra note 34*, p. 153

<sup>57</sup> Lord Blackburn at 605 in *Glyn, Mills & Co v East & West India Dock Co* [1882] 7 App Cas 591

carrier cannot carry out his obligation. The carrier can receive payment for demurrage for the time he has to spend in the harbour waiting for the moment he can deliver the goods, but he still runs the risk of having his next charter cancelled, which in the end is not business efficient. Both the shipper and the carrier gain from a faster transfer of the bill of lading. Thereby delivering the goods without the presentation of the bill of lading include a risk to be taken by the shipowner and as such, it is not the ultimate solution.<sup>58</sup>

### 3.5 The Bill of Lading in International Trade

The motivation and reason behind entrepreneurship and transactions is obviously profit. Exactly because of this, the reluctance of not wanting to modernize the paper documentation remains a mystery, as the total cost of paper maintenance is estimated to represent 7% of the total cost of the world trade<sup>59</sup>, equating to US \$ 660 billion per annum (2011)<sup>60</sup>.

*Forrester Research & the UNECE Conference on Standards to Facilitate Trade* have estimated that on average when importing a single cargo, 36 documents and 240 copies of these are required and 27 parties are included. This scenario is embedded for wrongful information and other errors.<sup>61</sup> What is also costly, is the storage of and the risk of theft of the documents.<sup>62</sup>

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<sup>58</sup> Wilson, *supra note 34*, p. 156

<sup>59</sup> UNESCAP Trade and Investment Division, Staff Working Paper 01/07, “*Facilitating cross-border - trade by simplifying and aligning trade documents*”, 15/04/2007, p.1, found on [www.unescap.org/tid/publication/swp107.pdf](http://www.unescap.org/tid/publication/swp107.pdf), accessed at 18:35 CET on 16/04/2012

<sup>60</sup> Alexander Goulandris, “*Electronic bills of lading have come of age*”, Maritime Risk International, 14/04/2011, p. 2

<sup>61</sup> *Ibid.*, p.2

<sup>62</sup> Kurt Grönfors, “*Maritime Fraud*”, Gothenburg Maritime Law Association, Akademiförlaget, Gothenburg, 1983, p. 140

In 2003 UNCTAD published a report, called “*The Use of Transport Documents in International Trade*”<sup>63</sup>. The report recognized the functions and the great importance of the documents in world trade and concluded that the current practice is based on physical possession of negotiable documents and that this is a disadvantage to the industry of shipping and world trade. The UNCTAD report also contained the results from a questionnaire that circulated in the shipping industry. The questionnaire used the question why actors chose negotiable documents, and which were the main obstacles for not using non-negotiable documents and electronic alternatives to transport documents. The results of the questionnaire showed a general agreement in the industry that negotiable documents should only be used when needed, i.e. when the goods are supposed to be sold during transit. The questionnaire confirmed that although the negotiable document often was chosen out of security aspects and it appeared to be simply a matter of standard practice, the actors used a negotiable transport document without essentially being forced to. In some situations, the reason for not choosing non-negotiable documents proved also to be a matter of legislation as governments demanded the usage of negotiable documents, where the trading parties by commercial customs did not. The report further showed that the respondents of the survey claimed the total lack or insufficiency of a legal framework to be the reason not to use electronic equivalents to transport documents.<sup>64</sup>

The report also acknowledged that the usage of multimodal transportation has increased in recent years. However, the legal status of multimodal transport documents in jurisdictions such as the UK is not completely clear, i.e. whether they constitute a document of title or not. This is of course a problem since, as in the case of electronic equivalents of traditional bills of lading, uncertainty will hardly encourage adoption of a multimodal transport document.<sup>65</sup>

There are many indications that the new introductions from the Rotterdam Rules are in line with demands made by the shipping industry in order to improve international trade and make it more efficient. An example is the initiative called *EastWest*

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<sup>63</sup> “*The Use of Transport Documents in International Trade*”, UNCTAD/SDTE/TLB/2003/3

<sup>64</sup> Regina Asarotis, “*The use of transport documents in international trade: New UNCTAD report published*”, JIML 9, 2003 6, p. 577

<sup>65</sup> *Supra note 60*, p. 12

*Transport Corridor II (EWTC II)*. This is an EU funded project with around 70 partners that have joined since the beginning of the project in September 2009. The project will run to September 2012. Several partners are from the private sector and include the Swedish and Lithuanian governments. The project's aim is to increase international cooperation and create environmental sustainability in the field of transport, and to create a regional corridor of collaboration, for instance by “*integrating logistics concepts with optimal utilisation of all transport modes, so called co-modality*”<sup>66</sup>. The region in focus is stretching from the European Nordic Region, namely northeast Germany, Denmark and south Sweden, to the east of the European continent; namely Lithuania and Russia.<sup>67</sup>

One part of the project is called “*Information Broker*”. This is an information hub that eases the exchange of information during transportation of goods for the traders, transporters, national customs and other included parties as the hub gathers crucial information such as information about the weather and the goods and information crucial for the custom clearance. This project combines the interest of parties involved in international trade, including national authorities and private actors, by making it easier to combine different means of transportation and allowing the parties to share information electronically.<sup>68</sup> Clearly, this is the exact manner in which the Rotterdam Rules were meant to operate.

The actors of the shipping industry have at several times attempted to facilitate electronic transport documentation. The next chapter will introduce previous attempts and an analysis of why these attempts were not successful. Only by considering the preceding attempts and their faults and errors, can it be understood how the Rotterdam Rules can become successful and introduce a confident legal foundation for electronic transport documentation.

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<sup>66</sup> Citation from the publication “*Green Corridors*”, published by the Swedish Ministry of Industry, 15/06/2010, p. 3

<sup>67</sup> <http://www.regionblekinge.se/ewtc/about-ewtc.aspx>, accessed at 20:28 CET on 17/04/2012

<sup>68</sup> <http://www.regionblekinge.se/ewtc/project-news/work-on-information-broker-has-started.aspx>, accessed at 12:55 CET on 17/04/2012

### 3.6 Electronic Transport Documents

This chapter focuses on the topic what a replacement of the traditional bill of lading with an electronic equivalent would mean in practice. To begin with, the physical *form* of the document that the industry is familiar with would naturally be replaced, without having to change or replace the *functions* of the document. The objective for replacing the traditional bill of lading with an electronic counterpart consists of duplicating the functions vested in the tangible document and making the electronic replica transferable of the rights and liabilities.

For an electronic bill of lading to be successful it needs to be regulated by a legal framework. The UK Law Commission found that all three functions of the bill of lading might be replicated in an electronic equivalent.<sup>69</sup> Further, the notion of *singularity* is of high practical importance. There cannot exist two rightful holders of the original document, meaning that only one person can claim the right for delivery. This is obvious in the case of a tangible document, but it might be more difficult to prove the “originality” of an electronic document.<sup>70</sup> Therefore there must be an IT framework that is secure and reliable to ensure that only one party has the control of the document. This framework must be able to facilitate the communication between the parties, i.e. the endorsement of the bill of lading, the amendments in the document and the production of the document to the carrier at the port of delivery.<sup>71</sup>

As shown by preceding events and the history of shipping, the industry advances through the development of technology, as it has proven itself the path to efficiency and improvement. In our age - the electronic age - most of the tasks that are possible

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<sup>69</sup> *Electronic Commerce - Formal requirements in commercial transactions: Advice from the Law Commission*, UK Law Commission, December 2001, Part 4 p. 23-24, found on [http://lawcommission.justice.gov.uk/docs/Electronic\\_Commerce\\_Advice\\_Paper.pdf](http://lawcommission.justice.gov.uk/docs/Electronic_Commerce_Advice_Paper.pdf), accessed at 10:55 CET on 17/07/2012

<sup>70</sup> Miriam Goldby, “*Legislating to facilitate the use of electronic transferable records: A case study.*”, p. 12, found on [http://www.uncitral.org/pdf/english/colloquia/EC/Legislating\\_to\\_facilitate\\_the\\_use\\_of\\_electronic\\_transferable\\_records\\_-\\_a\\_case\\_study\\_.pdf](http://www.uncitral.org/pdf/english/colloquia/EC/Legislating_to_facilitate_the_use_of_electronic_transferable_records_-_a_case_study_.pdf), accessed at 20:22 CET on 17/04/2012

<sup>71</sup> Goulandris, *supra note 60*, p. 4

to carry out and facilitate electronically, are done so. The transport documentation, however, does not follow the same pattern. History proves that old, well-settled customs in the shipping industry are often difficult to change, but the changes nevertheless do occur. It was the merchants that endorsed the recognized functions to the bill of lading and in the beginning, the courts did not recognize these vested functions. Still, customs and the necessity for the prosperity of commerce forced the legislators to recognize the functions and to adapt legislation to the interests and needs of the industry. Just like then, new customs have to be created by the actors in trade. Currently there is interest and incentives in facilitating electronic transport documentation, but there is a fear in the industry of taking a step into something that may lead to high litigation costs. In this case, the legislators have to take the initiative and create a legal framework in order to provide certainty for the actors involved. Then it would be an opposite approach to that the industry is used to, namely the legislators paving the way for the industry instead of the industry first developing practices and customs which later inspire the legislators.<sup>72</sup>

### **3.7 Hindrances for Implementation of Electronic Transport Documents**

It has been recognized that there is a demand for an electronic transportation document to be used in world trade. Yet, the implementation has not been apparent. It is therefore relevant to consider what hindrances might have caused this missing implementation.

Legal uncertainty is considered one of the main reasons why the implementation of electronic transport documentation has not followed the rest of the technological evolution. To use an electronic bill of lading in a transaction where goods are shipped, is currently an action filled with risk, as there are no globally acknowledged and established rules governing this kind of practice. Because of this, the parties naturally favour the traditional custom.<sup>73</sup> It is possible to change the practice in an

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<sup>72</sup> Goldby, *supra note 70*, p. 1

<sup>73</sup> Caslav Pejovic, "Main legal issues in the implementation of EDI to bills of lading", European

atmosphere of legal uncertainty by creating a set of rules focusing entirely on the subject, but it can be costly and time-consuming. A faster route is for the states to reform the existing laws and thereby erase the uncertainty by providing a consistent legal framework. However, as it is always the case when it comes to international trade, the uniformity aspect needs to be considered. Thus, the reformed laws need to be in synchronization with each other to provide uniformity.<sup>74</sup> The current *status quo* is maintained and made up by prospective electronic transport document users waiting for a legal framework, combined with legislators awaiting interest from the actors being shown.<sup>75</sup>

### 3.7.1 Legal Requirements

The regimes governing international trade and carriage of goods were implemented at a time when lawmakers did not consider the idea of electronic transport documentation and other technological progressions. The wording in the provisions found in legislation brings about plenty of issues in dematerializing documents. It is therefore difficult to fit in new methods of dealing with the legal requirements, as the included phrases and concepts in the governing regimes are relating to physical documents. For example, when a regime states that information has to be written it does not state in what form it has to be written as at the time the regime was drafted the physical writing was the only imaginable form. However, these phrases evaluate the functions of the documents and thereby describes the documents, thus for an electronic equivalent to duplicate its physical counter part, it has to possess the same qualities in order to be qualified as a valid document according to the regime.<sup>76</sup>

UNCITRAL was aware of this wording problem and in 1996 the *UNCITRAL Model Law on Electronic Commerce (MLEC)* was promulgated. MLEC is an attempt to create uniformity in the law and practice when computerized systems are involved in international trade and to widen the application of electronic commerce in

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Transport Law 1999, p. 164 & Goldby, *supra note 70*, p. 11

<sup>74</sup> Goulondris, *supra note 60*, p. 3

<sup>75</sup> Goldby, *supra note 70*, p. 16

<sup>76</sup> Pejovic, *supra note 73*, p. 165 f.



international trade. Model laws are however not conventions and do not have legal status. Instead, they must be enacted in national laws in order to have legal enforcement.<sup>77</sup> This can provide a better alternative than a convention as the states can implement the model law according to their own interest. Thus, an incentive is created as the state itself can choose which parts of the model law it can implement, which is an alternative not given when dealing with conventions. Thus far, 43 states have enacted MLEC in their national legislation, including amongst others Australia, Canada, China, France, South Africa and USA.<sup>78</sup>

MLEC gives the phrase “*written form*” a wider meaning. In most jurisdictions there is a requirement that the documents need to be in written form for a valid and binding obligation to be present. This is preferable because it is easier to prove a written agreement than an oral agreement.<sup>79</sup> This immediately brings hindrances for the implementation of electronic documentation, as the electronic documentation is obviously not in written form. Article 6 of MLEC handles this hindrance by vesting electronic messages the same legal status as written messages, by stating that where the law requires information to be in writing, a data message meets the requirement, if the information contained is useable for a subsequent reference.<sup>80</sup>

Other requirements such as a need for a signing and an original document add to the hindrances in the implementation.<sup>81</sup> In most jurisdictions the signature must be placed on a document to identify the signing party, and it must be authorized for the signing to have binding effect. Each person has his own signature, which proves some sort of uniqueness. The personal signature is by way of advanced technology possible to replicate electronically, i.e. electronic signatures. Through article 7 of

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<sup>77</sup> Abdul Ghafur Hamid, “*The legal implications of electronic bills of lading: How imminent is the demise of paper documents?*”, INSAF (Journal of the Malaysian Bar) Vol.33, No. 3, 2004, p. 5

<sup>78</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html), accessed at 21:45 on 17/04/2012

<sup>79</sup> Pejovic, *supra note 73*, p. 167

<sup>80</sup> MLEC, Article 6

<sup>81</sup> Willem H. van Boom, “*Certain legal aspects of electronic bills of lading*”, European Transport Law 1997, p. 15

MLEC it is possible to apply electronic signatures in international trade.<sup>82</sup> Based on article 7 of MLEC, the *UNCITRAL Model Law on Electronic Signatures (MLES)* was promulgated in 2001.<sup>83</sup> MLES has not gained strong international support. Despite this, electronic signatures have gained acknowledgement globally, especially in Europe<sup>84</sup> and USA<sup>85</sup> and the Ibero-American countries<sup>86</sup>.

Another issue created by legal requirement is whether an electronic message can have the same evidentiary value as a physical document. In both civil and common law jurisdictions data records are in general admissible as evidence. As for common law, the “*best evidence rule*” requires the presentation of the best available evidence, meaning if there is an original physical document, a data message is considered hearsay. In the case of no available original document, the data evidence is considered as best available evidence, also if it is printed.<sup>87</sup> This is dealt with by MLEC in articles 5 and 9, which create equilibrium between electronic documentation and physical documentation. Article 5 of MLEC, states that a data message shall not be denied effectiveness, validity or enforceability as evidence solely on the ground that it is in the form of a data message. Article 9 of MLEC goes further and prohibits the hearsay rule and the best evidence rule to be applied on data messages. Article 9 thereby provides data messages admissibility in legal proceedings and provides equal weight to this kind of information to have the same evidential weight as written documentation.

When the legal requirements issues are summed up and analysed, one realizes that there are ways of dealing with the legal issues that hinders the implementation of electronic documentation in the usage of electronic documentation. Two very good

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<sup>82</sup> Hamid, *supra note 77*, p. 6 & MLEC, Article 7

<sup>83</sup> José Angelo Estrella Faria, “*Electronic Transport Records*” in Alexander von Ziegler (ed.), “*The Rotterdam Rules 2008*”, Wolters Kluwer, Alphen aan den Rijn, 2010, p. 52

<sup>84</sup> Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures

<sup>85</sup> Electronic Signatures in Global and National Commerce Act, 114 Stat. 464

<sup>86</sup> Luis Cova Arria, “*Report on implementation of electronic commerce and transport documents in Ibero- American countries*”, CMI Yearbook 2004, Part II, p. 175 ff.

<sup>87</sup> Pejovic, *supra note 73*, p. 170

examples of this are the mentioned model laws. If modern technology allows the duplication of the traditional bill of lading to its electronic equivalent in practice, legal barriers should not stand in the way in theory.<sup>88</sup>

### 3.7.2 Negotiability

A major problem with replacement of the negotiable traditional transport document, i.e. the bill of lading, is the document of title function that attaches negotiability to the document. World trade has adopted the bill of lading and the actors have based their commercial customs on the physical document and its functions. To take away the document is like changing the rules in a game that everyone obeys. On the contrary one can argue that if the information contained in the bill of lading can be communicated by other means than a piece of paper, why should these means not be allowed and recognized? Furthermore, it is the information in the document that is vital, and not the tangible document itself.<sup>89</sup> Focus needs to be shifted from the form of the document to the factor that makes the negotiable document so important to trade, namely the confidence vested in the document by the parties involved. A comparison can be made to the value of paper money and its symbol of the abstract monetary unit it represents. The comparison describes confidence as the factor that has made the intangible function of negotiability of a physical document into something material. As long as confidence is supporting a medium, that medium can be used.<sup>90</sup>

The bill of lading functions as evidence of the contract and receipt of the shipped goods are easily transformed into an electronic equivalent, whereas the document of title function is difficult to replicate electronically. The document of title function can be divided in three sub-functions: 1) the constructive possession and control over the goods, 2) the title of the goods can be transferred through the transfer of the

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<sup>88</sup> van Boom, *supra note 81*, p. 15

<sup>89</sup> Emmanuel T. Laryea, "Paperless shipping documents: An Australian perspective", 25 Tul. Mar. L.J. 2000, p. 273 & George F. Chandler III, "Maritime electronic commerce for the twenty-first century", 22 Tul. Mar. L.J., 1998, p. 471

<sup>90</sup> Chandler, *ibid.*, p. 471

document, and 3) the document provides security in the goods it represents. Transport law can regulate the two first-mentioned sub-functions of the document of title, whereas it is laws of secured transactions that govern the function of the document being a security in the goods it represents. When the legal requirement for the collateral security for banks is gained, which in this case is the final step for the electronic alternative to become accepted as an equivalent, the function of negotiability will be achieved.<sup>91</sup>

### 3.7.3 Security

*The International Chamber of Commerce (ICC)* has since 1933 produced contractual rules on the usage and issuance of documentary credits in trade. These rules are called the *Uniform Customs and Practice for Documentary Credits (UCP)*. The UCP set of rules are not subject to any national statute or any international convention. The latest set of UCP was produced in 2007 and is called UCP 600. The UCP 600 has an appendix called the eUCP, which contains provisions for electronic documentation. The appendix was first issued in 1993 as a supplement to UCP 500 and took effect in April 2002. If the banks implement these rules, which they do regularly, there is no hindrance for the banks to accept electronic data messages instead of paper documents as documentary credits when entering contracts, as the UCP rules allow electronic documentation.<sup>92</sup> The UCP rules are evidence of the banking community opening up for the possibilities of a trend break. However, as the trend has not been broken in other divisions of the trade community such as in transportation, neither has the banks taken the step towards implementing electronic transport documents as documentary credits on a notable scale. The view of the banks have been formulated as a non-interest in dematerializing the security documentation, mainly the bill of lading, because of the fact that the bills of exchange (also a negotiable instrument, obviously facing the same issues in dematerialization as the bill of lading) need to be in physical form, making the facilitation even more difficult to implement.<sup>93</sup>

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<sup>91</sup> Dubovec, *supra note 38*, p. 448

<sup>92</sup> Diane Faber, “*Electronic bills of lading*”, LMCLQ, part II, May 1996, p. 241

<sup>93</sup> Paul Todd, “*Bills of lading and banker’s documentary credits*”, 4<sup>th</sup> ed., Informa, London, 2007,

Furthermore, the problem that the document represents the goods and is thus the connection between the creditor and his collateral remains. Guidance for a solution can be found in the *Uniform Commercial Code (UCC)*, which is a number of uniform acts promulgated to harmonize trade in USA. Article 9 of UCC introduces *control* over the goods as a concept that replaces possession of the document, production upon delivery, and endorsement of the document in the case of documented securities, that are not capable of being physically transferred and possessed. The person in control of the security, in this case the goods, is protected by singularity. It is only one person at a time that has the control over the security, and only this person can transfer the control to someone else. As the control can be transferred the negotiability of the document remains.<sup>94</sup> The notion of control shall be revisited later in this thesis, when the Rotterdam Rules are analyzed.

#### **3.7.4 Insurance Cover**

When transport documents are transferred through an electronic communication system, there is a possibility of malfunctions in the system that can affect the communicating parties negatively. If the problem is traced to the provider of the communications system, the user can sue him under the contract. However, parties involved in the transaction might be outside the contractual scope relating to the communications system, thereby there is no existence of the privity of contract and the non-contractual user cannot get remedy for the financial loss sustained. On the other hand, it is difficult to insure a system provider for all the possible users and their potential claims, mainly because of the costs. A possible solution is to let the contracting parties settle for an arrangement over the detail dealing with who is to pay the insurance for trading with electronic documents, or simply let every party insure themselves for their own potential loss.<sup>95</sup>

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p. 222

<sup>94</sup> Dubovec, *supra note 38*, p. 461

<sup>95</sup> Faber, *supra note 92*, p. 234

### 3.7.5 Documentary Fraud

There is one issue regarding fraud and other criminal act related to documents, and another issue dealing with negligence and mishaps when issuing a document. What speaks for the usage of electronic documentation is that in most cases of fraud in international trade it is the paper document that is being manipulated.<sup>96</sup>

Lord Justice of Appeal Anthony Lloyd, claimed that the path to a paperless trading society was to use the sea waybill in all the transactions where the document of title was not necessary. He also claimed that the sea waybill should be electronically duplicated as this was a way of preventing fraud. His argument for this assertion was twofold: Firstly, the usage of electronic documentation was more secure as the risk of the manipulation of the tangible document is eliminated and secondly, the fact that the bill of lading is issued in sets of three, which all three are documents of title, was making fraud easier to accomplish.<sup>97</sup> The effect, if the paper documentation was replaced to electronic form, would be less fraud. It would not be as relatively easy to forge bills of lading as it is today; three originals would not have to be issued; and the bills of lading would arrive before the vessel and thereby there would not be any reason for delivery without production of the documents.<sup>98</sup> The trade has its share of crimes, but these are mostly associated with the false input of data in the shipping documents and the physical theft of the goods, thus, replacing the paper bill of lading would not do much in this sense, neither good nor bad.<sup>99</sup> The fact that the documentation is handled electronically makes the documentation process safer, but there are several degrees of safety. It depends on the system, i.e. the platform through which the documentation is being delivered. The difficulty of securing the platform increases accordingly with the degree of openness of the system. There is also the issue of the more secure the system is, the more costly it becomes.<sup>100</sup>

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<sup>96</sup> Grönfors, *supra note 62*, p. 136

<sup>97</sup> Sir Anthony Lloyd, “*The bill of lading: do we really need it?*”, LMCLQ, 1989, p. 50 & 57

<sup>98</sup> Paul Todd, “*Maritime fraud*”, Informa Professional, London, 2003, p. 138

<sup>99</sup> Grönfors, *supra note 62*, p. 137

<sup>100</sup> Todd, *supra note 96*, p. 138

The shipping industry trades security for speed and expediency. This makes the industry very vulnerable for fraud, but also somewhat tolerant of it. With today's technology it is easy to forge a bill of lading so that it looks identically to its original counterpart. This is a problem, as in practice blank original bills of lading are left unprotected in offices, making them an easy target for an interested forger. This creates a higher risk of non-existent goods being sold, obtaining credit from a bank on collateral that one does not possess and goods being sold several times to different buyers. Remarkably, the industry still adheres to the misbelief that it is better to deal with paper documents than to dematerialize them, which is evident by the fact that the dematerialization has occurred.<sup>101</sup>

### **3.8 Earlier Attempts to Modernize Shipping Documents**

This part of the thesis is concerned with attempts made with the intention to dematerialize the traditional shipping documents. The functions of these attempts will be briefly discussed, and the reasons for their failure analyzed.

The mentioned examples in this chapter does not provide an exhaustive list of previous attempts, but merely the important attempts that have made the largest impact on the parties involved in shipping.

#### **3.8.1 SeaDocs System**

In 1985 the Chase Manhattan Bank and INTERTANKO cooperated in an attempt to create a central registry for electronic bills of lading, which was called the SeaDocs System. The central registry was handled by the bank. The original paper bill of lading was deposited to the central registry. The registry acted as an agent for all the parties involved in the transaction, and it was the channel through which all the involved parties communicated. This was not an automated system as every transfer of the bill of lading had to be notified to the registry, which effected all

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<sup>101</sup> Goulandris, *supra note 60*, p. 2

endorsements.

To clarify the process of the communication, it is useful to illustrate a transaction. The original paper bill of lading was issued by the carrier, who then deposited it with SeaDocs. The bill of lading was stored at SeaDocs for safekeeping, and simultaneously a key or a code was issued to the shipper. This key or code served as control of the authenticity of the bill of lading that was transferred. When the bill of lading was to be transferred during the carriage of the goods, the registry would act as an agent for the seller by sending the key or code and receiving the key or code on behalf of the buyer as his agent. SeaDoc was informed electronically by the shipper when he wanted to transfer the document, and he provided the endorsee/buyer with the key or code. Before acting on the shipper's command of endorsing the bill of lading, SeaDocs tested the authenticity of the shipper's key or code. The endorsee/buyer also notified SeaDocs about his acceptance of the transfer, which was also verified by the system. After the endorsee's/buyer's acceptance, the system registered the endorsee/buyer as the new owner in the registry and the transaction was finalized. When the goods arrived at the port of destination, SeaDocs sent a code to the carrier and to the registered endorsee. This code identified the two parties and gave the endorsee the right to the delivery of the goods.<sup>102</sup>

This project served a trial period for a half-year, which it did not pass. The system was legally sustainable, but it did not last in practice.<sup>103</sup> The problem of SeaDocs was that it was a *closed registry*, meaning that the bank had the monopoly over the registry. This meant that potential buyers could not examine whether the bill of lading had encumbrances fastened on it. The bank was also a competitor to other financiers that might be involved in the transaction, making it a quite un-attractive system.<sup>104</sup> In addition hereto, the actors in trade, such as commodity traders, felt unsafe of having their records in a registry that made them vulnerable of inspections from authorities and other competitors.<sup>105</sup> Finally, insurance was expensive as the liability of the parties involved was not established. All these factors led to the failure

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<sup>102</sup> Laryea, *supra note 89*, p. 279 & Dubovec, *supra note 38*, p. 449 & Pejovic, *supra note 73*, p. 180

<sup>103</sup> Dubovec, *ibid.*, p. 449

<sup>104</sup> *Ibid.*, p. 450

<sup>105</sup> Laryea, *supra note 89*, p. 281



of SeaDocs, but lessons were learned and the idea of a registry was born.

### 3.8.2 CMI Rules for Electronic Bills of Lading

The CMI continued the work of dematerializing shipping documents by also using a registry. In 1990, the organization promulgated the *CMI Rules for Electronic Bills of Lading*. This was not an attempt to substitute laws governing bills of lading, nor was it a computer system like SeaDocs. CMI wanted to create a legal framework for electronic documentation by giving parties that had the opportunity to take advantage of the dematerialization of the physical document, and the application of the CMI Rules for Electronic Bills of Lading was therefore voluntary.<sup>106</sup>

The CMI Rules for Electronic Bills of Lading provides a legal framework that makes the electronic bill of lading equivalent to its paper counterpart, with the quality of being a document of title and giving the holder the same rights as the holder of a physical bill of lading has. The CMI Rules for Electronic Bills of Lading are subject to substantive law governing the bills of lading and has to be incorporated in to the contract of carriage.<sup>107</sup> The fact that the rules might be used by anyone that wishes to do so, makes it an *open system*.<sup>108</sup> “Private keys” are used instead of paper bills of lading. The private key is defined in Article 2 of the CMI Rules for Electronic Bills of Lading, as “any technically appropriate form, such as a combination of numbers and/or letters, which the parties may agree for securing the authenticity and integrity of a transmission”. In theory, the private key represents an imitation of the paper bill of lading and the transfer of the key equals to the transfer of the right of control of the goods. In practice, however, it plays out differently. The CMI Rules for Electronic Bills of Lading puts the carrier in the position of a registry, which is a decentralisation of the registry role as compared to SeaDocs, where a bank acted as a registry. When the goods are on board the ship, the shipper receives an electronic receipt message from the carrier. This message contains the private key, information about the shipper and the goods. This resembles much of the characteristics of a

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<sup>106</sup> Chandler, *supra* note 89, p. 475

<sup>107</sup> Pejovic, *supra* note 73, p. 180

<sup>108</sup> Todd, *supra* note 96, p. 140

traditional bill of lading. When the shipper (the holder of the private key) wants to transfer the right of control or title to the goods, he has to notify the carrier. The carrier then confirms the shipper's message and transmits the information in the receipt message to the transferee, *except* the private key. If the transferee accepts, the carrier cancels the original private key and issues a new one to the transferee, which only he and the transferee know about. This characteristic makes the carrier comparable to a registry.<sup>109</sup> This is a burden for the carrier, who needs to undertake these tasks in addition to having to transport the goods. If goods are sold several times during transit, there is a risk that the information is tampered with or negligently transmitted. The CMI Rules for Electronic Bills of Lading do not define the liability for the carrier in this situation. The fact that the private key changes after every transfer makes the key non-transferable, i.e. it is not a document of title. Furthermore, it is uncertain whether the private key can qualify as a bill of lading in some jurisdiction that demands the document to be in writing and with a signature.<sup>110</sup>

The private key system did not persuade banks into investing in this kind of transactions. There was not enough security in the practice because the private keys were not encrypted. This kind of registry was seen as *too* open, and in that sense it was too unsecured as well.<sup>111</sup> There was no particular kind of system that could be tested and proven to operate in the desired manner. The banks wanted certain rules in order control the procedure, whereas this was not the CMI's intention to draft this kind of rules. The intention was to have guidelines for parties that wanted to use electronic means for documentation, but the international trading community wanted specific rules. Once again, the supply did not match the demand.<sup>112</sup>

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<sup>109</sup> Dubovec, *supra* note 38, p. 451

<sup>110</sup> Laryea, *supra* note 89, p. 285

<sup>111</sup> Todd, *supra* note 96, p. 140

<sup>112</sup> Laryea, *supra* note 89, p. 285 & Dubovec, *supra* note 38, p. 452 & Todd, *ibid.*, p. 144

### 3.8.3 The Bolero System

“*Bolero*” stands for *Bill of Lading Electronic Registry Organisation*. The project was initiated as a venture by banks, traders, carriers and telecommunication companies and the European Commission in 1994. The initiative was taken after the realization that the CMI Rules for Electronic Bills of Lading would not revolutionize electronic documentation. The project gained even more acknowledgement in 1997 as two prominent organizations in trade and electronic commerce, *SWIFT (Society for Worldwide Interbank Financial Transactions)* and *TTC (Through Transport Mutual Insurance Association Ltd.)*, joined.<sup>113</sup> In 1998, a trial phase was conducted. SWIFT, TCC and 500 companies and organizations established worldwide, worked with the project by evaluating its functionality and legality. On 27 September 1999, the commercial launch was made.<sup>114</sup>

The spirit of the CMI Rules for Electronic Bills of Lading lives on in Bolero. The CMI Rules for Electronic Bills of Lading are incorporated in the system, but instead of the carrier, a third party acts as a central registry. It is a matter of a closed registry and every user of the system is subject to the *Bolero Rulebook*. The system applies a Bolero bill of lading that is electronic and transferred through the system. The system is divided in two parts; one is the *Core Message Platform*, where the parties communicate with each other electronically, and the second is a *title registry* that keeps a track on “holders” of the Bolero bill of lading and administers the rights and liabilities that are vested in the electronic document.<sup>115</sup>

An example of a transaction will better justify the understanding of Bolero. The carrier issues a Bolero bill of lading and sends the data to the Core Message Platform, which recognizes the shipper as the holder of the issued Bolero bill of lading as he is already in the system. When the shipper sells the goods, he has to notify the title registry that he wishes to transfer the ownership. The Core Message Platform verifies the message from the shipper and upon approval of this, a message is sent to the new endorsee/buyer of the goods. The endorsee/buyer is registered as

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<sup>113</sup> <http://www.bolero.net/en/company/background.aspx>, accessed at 15:01 CET on 17/04/2012

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

<sup>115</sup> Laryea, *supra note 89*, p. 287 & Pejovic, *supra note 73*, p.182 & Dubovec, *supra note 38*, p. 452

the new holder of the Bolero bill of lading in the title registry. Whenever the title registry registers a new holder, the registry's own digital signature is added to the data information, which increases the security and reduces the risk of fraud and forgery.<sup>116</sup>

The ambition of Bolero is not to replace the traditional paper bill of lading, but to create a functional equivalent. The legal underpinnings are different, because it is an electronic phenomenon. Bolero does not rely on statutes and treaties, as the parties that have deliberately submitted to be subject to the Bolero Rulebook adopt it contractually. Bolero keeps the core elements in the traditional bill of lading, but adapts them to the intangible electronic format.<sup>117</sup>

As mentioned previously, the most difficult function with duplicating a bill of lading to an electronic equivalent is the negotiability function. Bolero deals with this issue through *novation* and *assignment*. **Novation** is the substitution of a new contract for an old one. The new agreement extinguishes the rights and obligations that were in effect under the old agreement. **Assignment** means transfer of rights in real property or personal property to another that gives the recipient - the transferee - the same rights that the owner or holder of the property - the transferor - had prior to the transfer.<sup>118</sup> Thus, the transport document does not have to be negotiable, as the previous contract is extinguished and a new contract is made between the carrier and the consignee, making the new party the legal holder with the same rights and obligations as the preceding holder.<sup>119</sup>

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<sup>116</sup> van Boom, *supra note 81*, p. 11 & Todd, *supra note 96*, p. 158

<sup>117</sup> "Legal aspects of a Bolero bill of lading", found on <http://www.bolero.net/en/Newsdownloads/articlesordownloads.aspx>, accessed at 20:33 CET on 17/04/2012

<sup>118</sup> Bryan A. Garner (ed.), "*Black's Law Dictionary*", 9<sup>th</sup> ed., 2009, via <http://www.westlaw.com>, accessed at 13:38 CET on 17/04/2012. The concepts of "novation" and "assignment" are pure common law concepts. The Bolero Rulebook is governed by and shall be interpreted according to English law, see 2.5.2 Bolero Rulebook.

<sup>119</sup> Michael Bridge, "*International Sale of Goods: law and practice*", 2<sup>nd</sup> ed., Oxford University Press, New York, 2007, p.433

The founders of Bolero were aware of the problem of various courts and jurisdictions not recognizing the evidential value of the electronic bill of lading. Through clause 2.2.2 in the Bolero Rulebook, a contractual bridge is created, which equalizes the Bolero bill of lading and other electronic documents to be of same value as documents that according to the governing law, contract, custom or practice are required to be in written form, and with a signature. In clause 3.1.3, the Bolero bill of lading has full binding value of the carrier concerning his representations regarding description, quantity, nature and marks of the goods, as in the case of a paper bill of lading being issued. Moreover, the Bolero Rulebook is subject to international treaties and national statutes in situations where the two collide, thereby the international treaties and national statutes are incorporated in the Bolero Rulebook which gives the Bolero bill of lading the same evidential value as original transport documents, found in clause 3.2.4.<sup>120</sup>

Bolero is a serious attempt to gain acceptance of the dematerialization of bills of lading. However, the results have so far not been very impressive. One reason might be that traders and banks have invested money in their own, individually specialized, software solutions. Investing in Bolero might be seen as supporting a competitor. There is also a fear that the costs of being a member of the Bolero-family are higher than the service cost rendered by the traditional documents.<sup>121</sup> Other hindrances to Bolero's success could be that there is a problem with clause 3.1.3, as the Bolero bill of lading is executed with the legal notion of novation as it is not clear whether the Bolero bill of lading is *prima facie* evidence or conclusive evidence against the carrier in the hands of a third party, i.e. the transferee. There is also legal uncertainty in clause 3.2.4, as to whether regulations as the Bolero Rulebook can be subject to legislation merely by stating that in case the legislation does not include the Bolero bill of lading or conflict between the legislation and the rulebook occurs, legislation will prevail.<sup>122</sup>

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<sup>120</sup> Laryea, *supra note 89*, p. 289

<sup>121</sup> Nicholas Gaskell, "Bills of lading in an electronic age", LMCLQ, 2010, part II, p. 260

<sup>122</sup> *Ibid.*

Bolero bills of lading do not carry out the document of title function of a traditional bill of lading. Thereby, the banks will not be interested in a document that does not represent the goods.<sup>123</sup> However, something that may speak for the Bolero bill of lading is that it tries to escape the weakness of not being a negotiable document, by trading the negotiability function with novation and assignment.<sup>124</sup> However, how much appealing this is for the banks and other actors remains to be seen. The idea of creating a functional equivalent instead of replicating the paper document in its entirety seems not to have been representative of the trading society's interests and ambitions. Another attempt has been conducted, similar to Bolero, which brings us to the last example of attempts of dematerialization of transport documents.

#### **3.8.4 ESS-Databridge**

*Electronic Shipping Solutions (ESS)*, a company in the industry of electronic shipping and trade documentation, entered the market in 2003 with an attempt to accomplish a dematerialization of the traditional documentation. The project is called *ESS-Databridge*.<sup>125</sup> Distinctively from Bolero, this system does not use a title registry and it does not incorporate the CMI Rules for Electronic Bills of Lading. Similarly to Bolero, ESS-Databridge exchanges the negotiability of a document with novation and assignment. ESS-Databridge operates under a private legal outline, the *Databridge Services and Users Agreement (DSUA)*.<sup>126</sup> During transactions, the data is exchanged between members of the DSUA. The system regularly checks the authenticity and the capabilities of the user and is therefore a high-secure system. One of the possibilities the user has, is to endorse a bill of lading before transferring the document. Other documents, such as relevant certificates etc., may be attached electronically with the endorsed document.<sup>127</sup> The shipper sends the bill of lading to the carrier and the endorsee through the system. Once the bill of lading is endorsed,

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<sup>123</sup> Dubovec, *supra note 38*, p. 453

<sup>124</sup> Laryea, *supra note 89*, p. 293

<sup>125</sup> <http://www.essdocs.com/Company/Services/cargodocs-overview>, accessed at 22:50 CET on 18/04/2012

<sup>126</sup> Goldby, *supra note 70*, p. 6, fn. 32

<sup>127</sup> Gaskell, *supra note 121*, p. 263

the functionality of that bill of lading disappears. The functionality is then vested in the endorsee's bill of lading. Because there is no title registry, it is the access to the electronic document that constitutes the exclusive control, i.e. the singularity of the holder.<sup>128</sup>

The creators of the ESS-Databridge system were more creative than the Bolero's ditto. Instead of using data messages, the system has been constructed to represent a bill of lading on the screen, with the same look as a physical document. This is a step forward as it is more familiar to the users because of the resemblance to a traditional transport document.<sup>129</sup> There are other advantages that the ESS-Databridge initiative has in addition to earlier attempts, such as that the electronic equivalent can be transformed into paper - if requested by the customs or if there is a practical need for it, the incorporation of eUCP and that the DSUA has expressed liabilities carried by ESS itself, and thus ESS-Databridge deals with liabilities. Liabilities arising under ESS insurance are divided in two groups. The first is the *eRisks*, a term coined by ESS, meaning risk of losses caused by the internal operation (*eFailure*) and/or risks external to the operation such as hacking (*eCrime*). The eRisks liabilities are insured by ESS with a limit of US\$ 20 million for any one bill of lading. The second group is other liabilities arising under the DSUA, and have an insurance ceiling of US\$1 million for any one bill of lading.<sup>130</sup>

So far, more than 40 companies have signed the DSUA, including BP, Ineos, Shell, ExxonMobil, Teekay, Morgan Stanley, Iver Ships, Maersk, ConocoPhillips and AET.<sup>131</sup> These companies contribute to an interesting gathering of several actors from various divisions involve in the world trade, such as traders, financiers and carriers. The progress of ESS- Databridge continues, and may be even more successful if the legislators take certain steps that will increase uniformity and certainty in electronic transport documentation.

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<sup>128</sup> Goldby, *supra note 70*, p. 6

<sup>129</sup> Gaskell, *supra note 121*, p. 262

<sup>130</sup> <http://www.essdocs.com/news/paper-risks-fraudulent-bills-lading>, accessed at 14:10 CET on 17/04/2012

<sup>131</sup> [http://www.shippinglbc.com/content/uploads/members\\_documents/Electronic\\_Transport\\_Records\\_230211\\_-\\_Part\\_1.pdf](http://www.shippinglbc.com/content/uploads/members_documents/Electronic_Transport_Records_230211_-_Part_1.pdf), accessed at 12:38 CET on 17/04/2012

# 4 The Rotterdam Rules

In this chapter, focus is on the Rotterdam Rules provisions on electronic transport documentation and the possible effects of their implementation on world trade. First an introduction of the ideology and motivation explaining the legislators choice of dealing with the issues is needed, which is followed by a clarification of the definitions used in the convention. The focus will then naturally shift to issues regarding the delivery of the goods, rights of the controlling party and the transfer of rights. An analysis will be presented on how these topics will be facilitated through electronic documentation.

## 4.1 Introduction

It is evident that technology diversifies the possibilities in our society and brings about improvement, and this is also true regarding transportation matters. However, there is an absence of this aspect in the laws that govern electronic transport documentation. By expanding the law to also include the governance of modern technology's possibilities and creating a secure legal framework, progress is being allowed. UNCITRAL has, through the Rotterdam Rules, tried to bring about this progress and enable a smooth transition from traditional transport documentation to the more modern electronic transport documentation. In its work, UNCITRAL has abstained from recognizing specific ways of establishing functional equivalents to paper documentation. The convention may instead be seen as a framework for actors to engage in creative ways of carrying into effect functional equivalents and allowing future technologies to fall within the requirements, without having to amend the legislation as the technology and progress advances.<sup>132</sup>

It is notable throughout the convention, that the legislators have a dual approach in the Rotterdam Rules, one approaching physical documents and the other electronic

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<sup>132</sup> Faria, *supra* note 83, p. 54



equivalents.<sup>133</sup> This shows an understanding of the current situation and the problems of transferring rights through electronic negotiable documents. This kind of approach lets the actors use the kind of documentation they wish, with the opportunity to switching to either traditional form or electronic form.<sup>134</sup> There is an interesting detail in the terminology in these provisions, where two dissimilar terms used for the differently formatted documents; “transport *document*” is used for the physical transport document whereas “electronic transport *record*” is used for the electronic counterpart. The Rotterdam Rules are giving room for technological development, which is apparent in the wording of *record*, meaning that the information might be documented in other form than as an “electronic *document*”, i.e. a series of data information. The legislators have chosen this approach, out of concern of diverse national legislation and their interpretations on the notion of a document.<sup>135</sup>

The provisions concerning both the traditional and electronic documentation apply equally to both types of formats, meaning all rights, duties and evidentiary effects are the same no matter what – except for one area, found in article 46. Article 46 provides a regulation in situations where a non-negotiable transport documents that requires surrender at delivery, i.e. a “straight” bill of lading, has been issued, which exists only when the document has been issued in physical form. The legislators deliberately chose not to draft a provision that would regulate an electronic twin, as the use of an electronic “straight” bill of lading probably would not exist.<sup>136</sup>

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<sup>133</sup> For illustration see Rotterdam Rules, Article 10, Appendix 1

<sup>134</sup> Manuel Alba, “*Electronic commerce provisions in the UNCITRAL Convention On Contracts For The International Carriage Of Goods Wholly Or Partly By Sea*”, 44 Tex. Int’l L.J. 387, 2009, p. 393

<sup>135</sup> Johan de Haan, “*A test case for the Rotterdam Rules*”, Maritime Risk International, 12/11/2011, p. 1 & Alba, *ibid.*, p. 398

<sup>136</sup> Alba, *ibid.*, p. 404

## 4.2 Definitions

### 4.2.1 Transport Documents and Electronic Transport Records

Unlike the previous regimes, the Rotterdam Rules does not use a terminology that refers to specific transport documents, such as the bill of lading. The drafters were aware of that the categorization of the transport documents differ from state to state and therefore in the spirit of uniformity they instead drafted provisions that merely set out the basic attributes for transport documents.<sup>137</sup> The Rotterdam Rules divides the transport documents in to *negotiable* and *non-negotiable* documents, and as previously mentioned a further distinction is made between *transport documents* and *electronic transport records*.<sup>138</sup> Article 1.17 defines what is regarded as *electronic communication*, which constitutes the core of the provisions allowing e-commerce. The provision states that electronic communication is information that can be generated, sent, received or stored by electronic, optical, digital or similar means and the information is accessible for subsequent reference.<sup>139</sup> Two elements can be singled out in article 1.17 regarding electronic transport records. One element concerns the method of dealing with the communication of the information in the transport records, and the other element concerns the accessibility of the information. As for the communication, the provision allows for a wide variety of possibilities to communicate as compared to the expressions earlier used by UNCTAD in previous regimes dealing with the same matter. The second element, accessibility, also strengthens the new approach taken by the legislators by allowing the information to be in any form as long as it is accessible for subsequent users. This provision represents the idea of focusing on the information rather than on the form. The concept of electronic communication allows parties to use electronic means of communication in every situation where the communication would otherwise take place in writing.<sup>140</sup>

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<sup>137</sup> Richard Williams, “*Transport Documentation - The new approach*”, in D. R Thomas (ed.), p. 193

<sup>138</sup> Rotterdam Rules, Article 1.14-20, see Appendix 1

<sup>139</sup> *Ibid.*, Article 1.17

<sup>140</sup> Faria, *supra note 83*, p. 56 & Alba, *supra note 134*, p. 396

The provision in article 1.18, explains what an electronic transport record is. It is stated to be information in one or more messages issued through electronic communication under a contract of carriage by a carrier, which include information that a traditional transport document would include; namely information that verifies the receipt of goods, and evidences a contract of carriage. This provision enables electronic communication from different sources to contain the information mentioned above. The information can be incorporated through an attachment in an e-mail or a hyperlink.<sup>141</sup> Critique against this impreciseness on what exactly the formal requirement is for a message sent through electronic communication to constitute an electronic transport record, has been directed on the provision. Arguments point out that a simple e-mail may fill the requirements of an electronic transport record, if other requirements are fulfilled such as the contract particulars in article 36.<sup>142</sup> The critique will be responded to under chapter 4.3.2.

#### **4.2.2 Holder**

The “*holder*” of a transport document/electronic transport record is the person to whom the transport document/electronic transport record has been issued, either physically or electronically, by the carrier or the person to whom it has been transferred. It is vital to understand this as the phrase will be mentioned throughout the text.<sup>143</sup>

#### **4.2.3 Right of Control and Controlling Party**

The holder is the legitimate possessor of the document, either by issuance or by transfer to him. It is only the holder that can exercise the “*right of control*”. The right of control is defined in article 1.12 as the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10 of the Rotterdam Rules. The person having the right of control is the “*controlling party*”,

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<sup>141</sup> Faria, *ibid.*, p. 58

<sup>142</sup> de Haan, *supra note 135*, p 2

<sup>143</sup> Rotterdam Rules, Article 1.10, see Appendix 1.

which is stated in article 1.13 of the rules. Chapter 10 of the Rotterdam Rules states the rights the controlling party has.

#### **4.2.4 Issuance and Transfer of a Negotiable Electronic Transport Record**

Pursuant to article 1.21 *issuance* of a negotiable electronic transport record is only legitimate, if it is ensured that the record is subject to “*exclusive control*”. Exclusive control means that the record can only give rights to one person - the holder of the document - at a time, until it ceases to have an effect or validity. This is a requirement that encompasses the principle of singularity. This requirement needs to be satisfied so that the electronic transport document can be recognized as a bill of lading and thereby a document of title. *Transfer* of a negotiable electronic transport record means the transfer of the exclusive control over the record, pursuant to article 1.22.<sup>144</sup>

#### **4.2.5 Electronic Signatures**

In the same manner as MLES, the Rotterdam Rules acknowledges electronic signatures to be equally valid as physical signatures. However, the drafters have this time not chosen an approach where the reliability and validity of the electronic signature is addressed, as in article 6 of MLES.<sup>145</sup> Article 38 of the Rotterdam Rules regulates the carriers’ signatures on transport documents and his electronic signatures on electronic transport records. The Rotterdam Rules acknowledges electronic signatures, as long as they identify the signatory and indicates the carrier’s authorization of the electronic transport record.<sup>146</sup> The first paragraph of article 38 relates to the physical document and is straightforward in its content. The second paragraph is technologically neutral and leaves the door open for interpretations on how to achieve the requirements set out in the paragraph. What is left open is the level of trustworthiness vested in the electronic signature and its identification

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<sup>144</sup> Miriam Goldby, “*Electronic alternatives to transport documents: a framework for future development*”, in D. R Thomas (ed.), p. 228

<sup>145</sup> Gaskell, *supra note 121*, p. 277 & MLES, Article 6

<sup>146</sup> Alba, *supra note 134*, p. 400

function.<sup>147</sup> This does not have to mean that the provision is weak and potentially contains a loophole; instead the provision provides the parties with a freedom of choosing their way of communicating by means of their choice of technology. It is then the parties' burden to conclude the level of trustworthiness they wish to apply to the chosen technology. This reduces the risk of having to fulfill high technological demands and its coupled costs, but instead the parties may choose several different electronic signature methods as long as they fulfill the requirements set out by the Rotterdam Rules.<sup>148</sup> When defending the Rotterdam Rules against critique regarding the possible vagueness, Working Group III concluded that what constitutes a valid signature is a matter of commercial practice and freedom for the parties is the best way of handling the issue.<sup>149</sup>

## **4.3 Application of Electronic Transport Documentation**

### **4.3.1 Does the Rotterdam Rules Provisions on Electronic Transport Records Provide the Same Kind of Functions as Current Practice Provides?**

The three functions of the traditional bill of lading have to be transferable to an electronic equivalent, if a negotiable electronic transport record is to replace the traditional bill of lading. How does the Rotterdam Rules provide for this?

Chapter 8 of the Rotterdam Rules, is called "*Transport documents and electronic transport records*". These provisions regulate the shipper's right to obtain a transport document/electronic transport record of the goods shipped produced by the carrier.<sup>150</sup> The information that is to be included in the transport document/electronic transport

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<sup>147</sup> *Ibid.*, p. 401

<sup>148</sup> Faria, *supra note 83*, p.55

<sup>149</sup> The 18th Session of Working Group III: A/CN.9/616, 27th November 2006, p. 6, found on [http://www.uncitral.org/uncitral/commission/working\\_groups/3Transport.html](http://www.uncitral.org/uncitral/commission/working_groups/3Transport.html), accessed at 15:15 on 17/04/2012

<sup>150</sup> Rotterdam Rules, Article 35, see Appendix 1

record is the description, weight, quantity and quality of the goods, etc.<sup>151</sup>, the identification of the carrier<sup>152</sup>. Also, the transport document/electronic transport record has to be signed. These provisions constitute the documents' function of being a *receipt* of the goods shipped. Article 41 lays down how the information above is capable of being *evidentiary of the terms of the contract*, just as the electronic transport document's physical counterpart is.<sup>153</sup> The third function of the bill of lading is the *document of title*. This function is scattered over several provisions, but the traditional requirements are nevertheless fulfilled. For a document to be qualified as a document of title, it has to be negotiable. The provisions in article 57 and 58 provide the transfer of rights, meaning that when the document is transferred the rights and liabilities incorporated in it are also transferred. Article 47 provides the carrier's duty to carry out the delivery of the goods upon arrival at the port of destination and the holder has demonstrated the document. This provision is linked with the transfer of the right of control found in article 51.4 and the right of the controlling party, set out in article 50.1. Articles 51.4 and 50.1 are related to the transfer of right, by laying down exactly what rights are transferred by the transfer of the document. As such, these articles provide the negotiability function.<sup>154</sup>

#### **4.3.2 Preconditions for Using Electronic Transport Records**

The Rotterdam Rules, as seen above, divides the electronic transport records in negotiable and non-negotiable transport documents, a division which is equivalent to the division between negotiable bills of lading and non-negotiable sea waybills/ "straight" bills of lading. The intention of the drafters is that the electronic alternatives shall be equal at law as their physical predecessors. The electronic alternatives have to comply with prerequisites that have been imposed upon the traditional alternatives, in order to be equal at law. These requirements are found in articles 8 and 9 of the Rotterdam Rules. As will be seen below, these articles are

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<sup>151</sup> *Ibid.*, Article 36

<sup>152</sup> *Ibid.*, Article 37

<sup>153</sup> Miriam Goldby, "*Bills of lading under UNCITRAL's draft convention and electronic equivalents*", 13 JIML 2007, p. 165ff. & Basu Bal, *supra note 13*, p. 33

<sup>154</sup> Goldby, *supra note 144*, p. 229 & Basu Bal, *supra note 13*, p. 33

connected with article 3.<sup>155</sup> Article 3 sets out requirements of form regarding notices, confirmation, consent, agreement declaration and other agreements, and states that they shall be conducted in writing. However, the article also allows these communications to be performed electronically, as long it is with the *consent* of both the party communicating and the party to whom it is communicated to. The required consent for the use of *electronic transport records* can be given expressly or impliedly, between the parties to the contract. Differently, the consent for using other *electronic communications*, i.e. other documents than the electronic transport record such as exchange of notices and communications of declarations, there must be a consent that is given expressly and separately, by both the party that sends the communication and the party receiving it. This is evidently so because documents other than the electronic transport record might be of value for the parties, containing necessary information, and as there might be several other parties involved than just the shipper and carrier, such as a documentary shipper and a maritime performing party.<sup>156</sup> This fact make the critique mentioned in the comment on article 1.18 void, because it does not allow just any e-mail correspondence to be qualified as electronic communications. Thereby an exposure of a party in this situation is not possible without the party being aware of it and leaving its consent.

Consent is noted in both article 3 and 8 and the aim of this requirement is to avoid burdening any party with obligations and inconveniences that they normally would not have to deal with. The consent noted in article 8 regards the shipper and the carrier, and there is no requirement for a consignee to leave his consent for the application of an electronic transport record. This is important because the contract of carriage will be performed under a separate agreement from the transfer of the goods by e.g. a sales contract. Therefore it is up to the shipper and the consignee to decide upon the form of the transport document<sup>157</sup> However, if the consignee does not want to have an electronic transport record issued to him, the holder of the

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<sup>155</sup> Goldby, *ibid.*, p. 226

<sup>156</sup> Alba, *supra note 134*, p. 403

<sup>157</sup> Gaskell, *supra note 121*, p. 273

electronic transport record can agree with the carrier to replace the electronic equivalent with a physical bill of lading.<sup>158</sup>

Article 8 covers all sorts of transport documents, negotiable as well as non-negotiable. Article 8 acknowledges that electronic alternatives to transport documentation are subject to the convention just like their traditional counterparts; as long as there is consent by both the shipper and the carrier and that there is a guarantee of exclusive control over the issued electronic transport record.<sup>159</sup> In article 8, the notion of “*exclusive control*” is essential. It provides for the guarantee of singularity, as only one person may be the rightful holder of a negotiable transport document. In the Rotterdam Rules the exclusive control of a electronic transport record performs the same function as a physical possession of a traditional transport document. Therefore, the electronic transport record has to be able to be subject of control and be transferable. In this manner, the transfer of the electronic transport record represents the transfer of the control of the goods.<sup>160</sup> The requirement of the exclusive control is important for the document of title function of a bill of lading. Only a person who can demonstrate that he is the holder of the electronic transport record can exercise the right of control of the goods, and as such he is the controlling party.<sup>161</sup>

It is notable that the provisions in article 9 regards *negotiable* electronic transport records only. Thereby the article does not cover the procedure of the issuance of a *non-negotiable* electronic transport record, such as an electronic sea waybill.<sup>162</sup> Article 9 sets out requirements regarding the functionality of the electronic version of a negotiable transport document by requiring certain procedures to be satisfied. The legislators have left the method of achieving the satisfaction of these requirements to be developed. The requirements concern the method of issuance and the transfer of the record. This is an assurance that the negotiable record retains its integrity, the manner in which the holder can demonstrate that he is the holder and the manner of

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<sup>158</sup> Rotterdam Rules, Article 10, see Appendix 1

<sup>159</sup> Rotterdam Rules, Article 8, see Appendix 1

<sup>160</sup> Faria, *supra note 83*, p. 62 & Alba, *supra note 132*, p. 409

<sup>161</sup> Goldby, *supra note 144*, p. 229

<sup>162</sup> Gaskell, *supra note 121*, p. 274



providing confirmation that delivery to the holder has been effected or that the electronic transport record has ceased to have any effect or validity.<sup>163</sup>

The phrase “*medium and technology neutrality*” has been used to describe articles 8 and 9. In these articles, the legislators have only set up minimal requirements for systems dealing with electronic documentation and let the manner in which these requirements shall be fulfilled up to the industry.<sup>164</sup>

The weakness of the provisions dealing with electronic transport documentation is that there are no sanctions provided for by the convention, in the case of a party not following the set out procedure. Only a vague understanding of the minimum level of procedures that must be complied with to fulfil the requirements exists. Because of this, the obligations imposed on the users must be in a separate agreement from the contract of carriage, as the convention does not cover this aspect.<sup>165</sup> This is of course a serious disadvantage for parties when drafting contracts governed by the Rotterdam Rules. On the other hand, the Rotterdam Rules is a convention on carriage of goods by sea, with a trade approach that enables parties to use electronic transport documentation. By drafting the provisions on electronic transport documentation, the lawmakers are already extending the scope of application of a convention dealing with carriage of goods by sea. It may therefore be understood as that the lawmakers wish to give the actors in trade a possibility to use electronic transport documentation, without necessarily providing sanctions for parties not complying with the provisions on the usage. Including provisions on sanctions would increase the scope of application even further, and it would easily develop into a convention covering the entire aspect of trade, which is not dynamical and not attempted upon.

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<sup>163</sup> Rotterdam Rules, Article 9, see Appendix 1

<sup>164</sup> Goldby, *supra note 153*, p. 163

<sup>165</sup> Goldby, *supra note 144*, p. 275

## 4.4 Exclusive Control as the Solution

Chapter 10 of the Rotterdam Rules present an alternative by applying the notion of exclusive control, which is the key notion that facilitates and allows electronic transport documents. This is a new phenomenon in a carriage of goods convention. The rights of the controlling party are currently simply dealt with by national legislation. This leads to uncertainty, which the Rotterdam Rules tries to eradicate. The provisions stating the rights of the controlling party play their most important part when a carrier does not issue a traditional document to serve as a bill of lading, but for instance uses an electronic transport record. Thus, chapter 10 of the Rotterdam Rules contains essential provisions for the facilitation of electronic commerce.<sup>166</sup>

The notion is already seen in the UCC and presents a solution to the current issues faced by the attempts of dematerializing traditional transport documents. Systems such as Bolero and ESS-Databridge comply with the prerequisites of the notion exclusive control by identifying only one holder either through a title registry or respectively an actual bill of lading in electronic form. The CMI Rules on Electronic Bills of Lading also provide a solution with its private key. Article 6 (ii) of the CMI Rules for Sea Waybills represents a solution where the shipper transfers the right of control to the consignee. The limitation of this solution is that this must be done not later than at the time when the receipt from the carrier is issued.<sup>167</sup>

When it comes to non-negotiable transport documents, the issue of singularity and the requirement of exclusive control are non-existent, which makes the replication of the documents' electronic equivalents much easier. Because of this the industry has used these equivalents for some time. However, the sea waybill does not represent the goods, and is therefore not a document of title, and thus it does not provide collateral for e.g. banks. Therefore it is not attractive for the involved actors and thus the usage of non-negotiable transport documents instead of negotiable transport

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<sup>166</sup> Basu Bal, *supra note 13*, p. 36

<sup>167</sup> *Ibid.*, p. 233

documents is not the right solution to the current situation.<sup>168</sup>

The aspect of the document representing the goods stems from the old days when communication was not possible between the shipper and the carrier. As we have seen, that was why merchants developed the bill of lading. As the law adapted to the documents, it came to be based on the documentary process. Consequently, for the Rotterdam Rules to change the current situation it is not enough for the convention merely to codify the law of exercising right of control, it must also detach the law from the document, i.e. that rights must be detached from the physical document.<sup>169</sup>

In a previous chapter<sup>170</sup>, the transfer of possession and property when transferring the bill of lading was dealt with. The transfer of the right to control, if intended, expresses the intention of passing the property in the goods as well, not merely possession. It is important to consider whether the Rotterdam Rules include the transfer of property as well as possession. Property is a concept connected to trade and not transportation of goods. The scope of the Rotterdam Rules is limited by the contractual approach, and consequently the rules are only applicable to the contract of carriage, meaning that the Rotterdam Rules do not directly deal with the transfer of property. However the contract of carriage is very much connected to trade matters, so there is obviously an influence of the contract of sale on the contract of carriage and vice versa.<sup>171</sup> From a legal perspective there are three relevant rights that have to be clarified and distinguished from each other in order to understand the symbiosis between the contract of carriage and the sales contract. The first one is the *right of disposal*, which is a right used in the context of sale of goods. By way of this right the seller can prevent the ownership of the goods from passing to the buyer, even though the seller does not have possession of the goods any longer. This is to secure that the buyer will pay the price or fulfill a requirement. The second right, is the *right of stoppage in transitu*, which is also a right related to the sale of goods. This right allows a seller - in most cases a seller who has not been paid - to resume

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<sup>168</sup> *Ibid.*, p. 232 ff.

<sup>169</sup> Gertjen van der Ziel, "Chapter 10 of the Rotterdam Rules; Control of goods in transit", 44 *Tex. Int'l L.J.*, 2009, p. 376 f.

<sup>170</sup> See chapter 3.2.3

<sup>171</sup> van der Ziel, *supra note 14*, p. 245

the possession of goods in transit. The right is limited to certain circumstances, such as insolvency of the buyer. The right is lost, if the goods are resold and a negotiable transport document has been endorsed to a new endorsee acting in good faith.<sup>172</sup> The third right is the *right of control* of the goods during carriage and is related to the transport of the goods. The right of control makes it possible to apply the other two previously mentioned rights gained under the sales contract. An example is a seller that wants to exercise the right of stoppage, but has transferred the bill of lading i.e. the control of the goods under the contract of carriage. He then has to regain the control of the goods, before he can exercise the right of stoppage. This implies that without the right of control *of* the goods, the party cannot exercise his rights *in* the goods.<sup>173</sup>

Chapter 10 of the Rotterdam Rules regulates the rights of the controlling party, and consists of the articles 50 through 56. Article 50 states that it is only the controlling party that can exercise the right of control. The right of control is the right to give or modify instructions in respect of goods that do not constitute variation to the contract of carriage, the right to obtain delivery and the right to name a consignee. The right to instruct the carrier most often relates to instructions of an operational nature, but it can also be instructions for the carrier to contact the shipper before actually delivering. There might be situations where the shipper wants to ensure that he has received payment from the buyer before delivering the goods. Subparagraphs 50.1 (b) and (c) regulate variations of the contract of carriage and facilitates the right of *stoppage in transitu* and the *right of disposal*. Subparagraph 50.2 links the right of control to the period of responsibility of the carrier. This period can be determined by agreement.<sup>174</sup>

Article 51 states that the right of control is a transferable right. This part of the functional equivalence concerns the function of negotiability found in a traditional bill of lading. An essential characteristic is that the person who wishes to exercise the right must identify himself, i.e. “*demonstrate that he is the holder*” of the transport record. Article 51 determines who the controlling party in different situations is.

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<sup>172</sup> Swedish Maritime Code, 13:57§

<sup>173</sup> van der Ziel, *supra note 14*, p. 246

<sup>174</sup> van der Ziel, *supra note 14*, p. 249

Subparagraph 51.1 applies to situations where a non-negotiable document has been issued, or when no documents has been issued- such as in the case of document free electronic commerce. Subparagraph 51.1(b) specifically states that the right of control is a transferable right. The right is transferred and effected when the carrier has been notified. Article 3 of the convention provides the possibility of notifying the carrier electronically. Subparagraph 51.2 deals with the bill of lading that has been issued to a named person. Subparagraph 51.3 applies to negotiable transport documents. The last subparagraph, 51.4 deals with the electronic equivalent of the bill of lading. The holder of the electronic transport record is the controlling party. The right of control can be transferred pursuant to article 9, and to exercise the right of control the holder shall demonstrate that he is the holder.<sup>175</sup>

## 4.5 Trade Without Documents – Paper or Electronic

The holder of a bill of lading has the right to claim delivery at the destination. The document represents the identification of the lawful holder and is essential to the practice. However, in practice the identification function has been somewhat non-apparent.<sup>176</sup> The causes are diverse, for instance there might be a delay due to the documentary process or the cause can be related to the sales contract. An example might be a buyer that has changed his mind or the goods are sold in a chain of buyers and sellers, where the credit terms under the sale lasts longer than the goods' voyage and therefore the transport of goods is delayed. These factors lead to non-availability of the transport document at the place of delivery, which in practice means production of goods without the presentation of the bill of lading. The solution to the problem of delivery of goods without the production of the bill of lading could be electronic bills of lading. These are faster and easier to expedite to the consignee than physical documents are. However, the electronic documents still have to be presented at delivery. Therefore, the real solution to delivery without the production of the transport documents and other document related problems lies instead in electronic

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<sup>175</sup> *Ibid.*

<sup>176</sup> In "*The Sagona*", Hansen-Tangens (A/S) Rederi v. Total Transport Corp. [1984] 1 Lloyd's. Rep. 194, p. 201, a Master testified that during 14 years of service in the oil industry, he had never seen an original bill of lading presented for delivery of cargo.

commerce. By electronic commerce, it is meant trade and transport of goods without any documents - electronic or physical.

The legislators have considered the fact that the bill of lading all too often is not produced at the delivery of the goods. Article 47 deals with this situation by making it simpler for the parties involved and for the banks running the risk of financing the transactions by exactly stating what the rights and the duties of the respective parties are in situations when delivery is to be made and a negotiable document has been issued either physical or electronic. Article 47 gives the carrier right to deliver the goods *without a production* of a bill of lading, if the transport documents expressly states this possibility. Subparagraph 47.2 (a) indicates situations where the carrier cannot deliver the goods, because of the named reasons; the holder does not arrive at the time of delivery, the holder cannot identify himself or the carrier is not able to request delivery instructions from the holder. The carrier can in these situations advise the shipper for instructions relating to the delivery. In case of the shipper not being available, the carrier can advise the documentary shipper<sup>177</sup>. In subparagraph 47.2 (b) the carrier is discharged from his obligation when delivering upon instructions of the shipper or documentary shipper. This is an advantage for the carrier as predominantly the shippers are able to give proper instructions and the carrier is thereby not forced to guarantee the purchase price of the goods he is carrying as he can deliver the goods when arrived at the port of destination. It is also an advantage for the shipper, because he does not have to work with the system of letters of indemnity.<sup>178</sup>

It is risky for the banks to accept a bill of lading prior to delivery, if not mentioned as consignee or notify party. The bank needs to take certain measures to gain some security as the bank needs to contact the carrier and notify him in order to become a notify party. In addition, if the bill of lading is accepted after delivery, there is no security provided by the bill of lading if it is void, due to prior delivery without the production of the document. However, the banks already run this risk in the current practice, as the delivery already in many cases take place without the production of

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<sup>177</sup> Rotterdam Rules, Article 1.9, “*Documentary shipper*” means a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.”

<sup>178</sup> van der Ziel, *supra* note 14, p. 253

the transport document. This problem is solved by subparagraph 47.2 (d), which gives the holder of a bill of lading of which the goods have already been delivered all the rights that a bill of lading usually gives the holder, except the right to claim delivery. This is also the solution to the problem of several bills of lading being issued and are circulating on the market, when they are in reality void as delivery already has taken place. However, even in current practice under many charter parties, the carrier follows the instructions of the charterer regarding the delivery, and as such that the Rotterdam Rules basically just codifies current practise.<sup>179</sup> The provision is controversial and the question is whether the bill of lading with the “no production clause” is to be legally valid as a bill of lading, which is especially important for the banks giving letters of credit to clients. But then again, the Rotterdam Rules do not state what a bill of lading is.<sup>180</sup> The provision does not eliminate the bill of lading nor does it provide a solution to the unavailability of the document when delivery is to be made. It just provides the carrier with a few more alternatives, if agreed upon by the parties, to deliver the goods when the above-mentioned faults are apparent. However, there are gaps in this solution as the shipper might not always be willing or able to provide proper delivery instructions and the carrier does not have to listen to the instructions given under article 47.<sup>181</sup>

According to Professor van der Ziel, a solution to the legitimating problem regarding the transport documentation is to develop an electronic trading system that erases the transport documents, regardless of what form. The control of the goods can be facilitated by the rights of control, as described in chapter 10 of the Rotterdam Rules. Cash against transfer of control would replace the current system cash against documents. In most jurisdictions, the bill of lading and the rights vested in the document is transferred through an agreement. A problem arises when the goods, to which the rights relate, are in the custody of the carrier and the shipper wants to transfer the right of control to a consignee. The carrier needs to be notified of the transfer and the convention allows this notification to be done electronically. As most jurisdictions allow the transfer of the rights between the parties to be transferred electronically, the whole process can be modernized and based on an electronic

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<sup>179</sup> van der Ziel, *supra* note 14, p. 254

<sup>180</sup> Gaskell, *supra* note 121, p. 281

<sup>181</sup> van der Ziel, *supra* note 14, p. 254

system.<sup>182</sup>

The two other functions of a bill of lading, being a receipt of the goods shipped and evidence of the contract of carriage, is the next problem to be solved. Van der Ziel refers to the banking systems, which are daily used in transactions worldwide. These consists of electronic records representing the value a client has on a bank account, and transactions are made within these systems with electronic records. This can be implemented on documents of title as they also can be transferred electronically. The carriers would act like banks and their reputation is the guardian of them not interfering with the records. The records would be in the carriers' vault of electronic records and the carrier would only give the controlling party access to it, so that the controlling party can exercise the right of control or transfer the right to another party. The transfer is made when the new party accepts the transfer of control, by electronically notifying the carrier. Thus, the identity of the controlling party is always known by the carrier, which makes the communication between the parties easier. This is needed in situations for example when nobody claims delivery and the carrier needs instructions.<sup>183</sup>

This is the way the drafter chose to detach the law relating to transport documents and legally making it possible for a document free-maritime transport. It is considered to be a *functional approach*, rather than making the document in a electronic form. All the functions of a traditional document are provided for, except the difference that there are no documents included.<sup>184</sup>

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<sup>182</sup> *Ibid.*, p. 255

<sup>183</sup> van der Ziel, *supra note 14*, p. 256

<sup>184</sup> van der Ziel, *ibid.*, p. 257 & *supra note 167*, p. 377



## 5 Conclusion

The Rotterdam Rules attempt to unify and modernize the legal framework dealing with the carriage of goods. An example of this is electronic transport documentation. The approach applied by the legislators is method and technology neutral, in the sense that the rules do not establish in what manner the documentation is carried out. The rules merely set out a legal framework in which the interested and affected parties can prepare and issue the documents as they best see fit. It is a sound approach, taken by the legislators. In contrast to earlier regimes, the Rotterdam Rules is a convention that is adaptable and applicable to developing technology, much thanks to the neutral approach. An example of the contrary of the neutral approach applied in the Rotterdam Rules is the Hague Rules. The Hague Rules adapts a documentary approach, which is clearly stated in the scope of application provisions, namely that the contract of carriage must be covered by a *bill of lading*. This kind of firm approach makes a convention inadaptable to developments and evolutions, as the convention is only applicable to a particular document – which might not develop according to the needs of the industry. The Rotterdam Rules instead uses an approach by stating what kind of information a contract of carriage consists of, and as such any document which fulfils the requirements is governed by the Rotterdam Rules. This multiplies the possibilities of improvements together with allowing development to be a part of the rules. The Rotterdam Rules are meant to least by working in a synergy with the development of the shipping industry and its practice, which they do, as they are dynamical and open for developments in technology and customs.

We have seen that introducing a registry system has been an appealing idea in the shipping industry. However, it is easier said than done. For the idea to be recognized and applied worldwide there must be a collaboration of states. A particular problem in this regard is that many developing states lacks the expertise and economic possibilities for materializing the idea. This, the non-existence of a recognized system, is something that the convention cannot deal with. Legality agreed upon regarding a system dealing with cross-border transactions and involving different jurisdictions is not currently present. Even if there was a recognized system, it might

lead to a lot of litigation and other problems due to the lack of legal certainty. Also, the implementation of a registry system adds a third party to the transaction, the user has to pay fees, staff needs to be trained and to ensure that the parties trading are members of the system registry; all factors making it even more complex than if the documentation was conducted traditionally. The suggestion of the carriers installing a system instead of issuing traditional documents is appealing from one perspective, but the pros need to weigh up the cons, which in trade would mean an economic incentive. The incentive is the already mentioned cost of paper documentation, namely US \$ 660 billion per annum (2011). It is not the attempt of this thesis to evaluate the cost to implement the electronic system to be able to dematerialize transport documents. However, by approaching the issue logically, one realizes that the shipping industry is an industry that will be around as long as there is trade. Thus, an investment now may pave the way for the future ahead, a way that is smoother, which does not cost US \$ 660 billion per annum and which minimizes forgery and misrepresentations as compared to traditional transport documents.

The Rotterdam Rules recognizes the needs and interests of trade and the legislators were aware of the fact that the multimodal transportation is gaining importance and popularity. The convention recognizes multimodal transport documents. This approach is linked with the idea of modernizing the rules, and giving trading parties a possibility to ease their handling of transport documentation. Instead of issuing several documents for the different legs of the transportation of goods, only one is enough. The multimodal aspect is also apparent in the East West Transport Corridor II, which has the ambition to make it easier to combine transportation means. This proves that the Rotterdam Rules are in the same line as the industry and would most definitely ease the process for ambitions like the mentioned project. The EWTC II project mirrors the philosophy of the Rotterdam Rules, in the way that the documentation related to trade should be able to be communicated and distributed electronically. The ideas of multimodal transport and electronic documentation go hand in hand and towards a common goal – speed and cost efficiency.

The convention also creates an attractive incentive for traders to use sea waybills where a negotiable document is not needed. The provision in article 41 extends the sea waybill to be *prima facie* evidence of the contents and proof to the contrary by the carrier is not admissible against third party acting in good faith. The sea waybill

under current conventions does not possess the evidentiary strength. The sea waybill is easier to replicate electronically, and the evidentiary effect creates an incentive for using this kind of document in the trade, when allowed.

The Rotterdam Rules is a powerful tool for the industry. The industry may apply an electronic system and replace the negotiable transport document, by their choice and consent. However, as the new convention applies the *functional approach*, the possibility of totally excluding transport documentation exists and is grounded in the notion of exclusive control. The functional approach is proof of the Rotterdam Rules overcoming the great hindrance created by trading customs that is attaching the law to the documents applied in trade. The Rotterdam Rules detaches the law from the document by evidently allowing and governing the same contracts and carriages, even when there are no transportation documents issued. Exclusive control is already evident in the UCC, article 9. Thereby, once again, it is proved that the Rotterdam Rules follows the spirit of current practices and ambitions in the shipping industry and world trade. The fact that the UCC article 9 already applies the notion shows that the notion is not a new phenomenon, but a legal tool that has proved to be of worth and is applicable in some jurisdictions. As the Rotterdam Rules is a convention as opposed to the UCC that is merely national legislation, there is an even greater implication that other jurisdictions will apply the notion, if the regime has entered into force. The fact that there can be trade, totally without any documents decreases the possibilities of mistakes and forgery even more, and would thereby be likely to create an interest for traders having their contracts of carriage governed by the new convention.

The application of the notion of exclusive control would include a larger responsibility on the carrier as the transfer of the exclusive control would go through the carrier, electronically. The new practice would mean that the carrier must be equipped with an electronic system through which the transfer of the exclusive control would be conducted. This means costs. However, the carrier would gain by this electronic system of transferring the exclusive control as he would always be notified about the endorsee, that has the right to delivery of the goods and the communication system would provide the carrier more certainty when he is to perform his obligation. It is also notable that the carrier currently has to issue documents physically. The only difference would be that the carrier conducts this

electronically. The introduction of the notion exclusive control would pave the way for e-commerce and perform all the functions that current documents include.

The thesis has given several examples of previous attempts on dematerializing transport documents. There has also been given examples of other attempts that currently are in the process of being established, but the future is unclear as the legality of electronic transport documents is vague. The Rotterdam Rules will most definitely create a secure and stabile framework for these attempts to succeed. However, it is important to realize that one single system will not provide the solution for the entire industry. In many fields, such as politics and business – there are always colliding interests and different interest groups. The situation is the same in the shipping industry. Different interest groups will invest in different systems. This situation does not have to contribute to something negative, as diversity improves and allows competition among the actors. What is important is that the attempts, such as Bolero and ESS-Databridge turn into useable products that improve international trade. The Rotterdam Rules can be the final and most decisive factor that can turn these attempts into useful means of communication and transfer of electronic transport documents.

There is also a strong social factor of why electronic transport documents have not gained the popularity they deserve. This is simply because the actors are ingrained in the current customs and practices and are stubbornly not open to new ways of dealing with e.g. transport documents. This psychological factor, combined with the legal uncertainty regarding the electronic equivalents makes out the unwavering idea that tangible documents are the only way. Thus, there must be shown an understanding of the progress and process of introducing intangible transport documents. It is difficult to see how the process can entirely be completed in one generation. Patience must be exercised towards the process of modernization of transport documents, but an attempt must be started. Thus, the Rotterdam Rules constitutes an important legal framework and foundation, which is obviously needed for the industry to prosper and in this manner improve trade. The trade approach of the Rotterdam Rules becomes here very evident and contains more than merely provisions on carriage of goods. This approach is mature and important, which gives proof of the responsibility the legislators have taken in improving the tools for carriage of goods by sea by the trade approach and broadening the horizon to not

only include provisions on apportionment of liability but to also include electronic transport documents.

The Rotterdam Rules have been analysed from the perspective of electronic transport documentation and it can be concluded that they definitely take into account the needs of the industry and implement viable means of communicating and transporting goods. The legislators have taken the step to create a framework for dematerializing transport documentation. The industry can still not take a step in the same direction, as the Rotterdam Rules have not come into force yet, lacking 19 out of 20 ratifications. The fact that the convention has not entered into force is another topic. However, from the aspect of transport documentation, there is definitely something for the shipping industry and world trade to gain if the Rotterdam Rules enter into force.

# Appendix 1

## The Rotterdam Rules

### United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

*The States Parties to this Convention,*

*Reaffirming* their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

*Convinced* that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contributes to universal economic cooperation among all States on a basis of equality, equity and common interest, and to the well-being of all peoples,

*Recognizing* the significant contribution of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels on 25 August 1924, and its Protocols, and of the United Nations Convention on the Carriage of Goods by Sea, signed in Hamburg on 31 March 1978, to the harmonization of the law governing the carriage of goods by sea,

*Mindful* of the technological and commercial developments that have taken place since the adoption of those conventions and of the need to consolidate and modernize them,

*Noting* that shippers and carriers do not have the benefit of a binding universal regime to support the operation of contracts of maritime carriage involving other modes of transport,

*Believing* that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

*Have agreed* as follows:

## 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. “Volume contract” means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.
3. “Liner transportation” means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.
4. “Non-liner transportation” means any transportation that is not liner transportation.
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. “Maritime performing party” means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.
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 “non-negotiable” 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. "Container" means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.

27. "Vehicle" means a road or railroad cargo vehicle.

28. "Freight" means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.

29. "Domicile" means (a) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of

incorporation or central registered office, whichever is applicable, (ii) central administration or (iii) principal place of business, and (b) the habitual residence of a natural person.

30. “Competent court” means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.

## *Article 2*

### *Interpretation of this Convention*

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

## *Article 3*

### *Form requirements*

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 19, paragraph 2; 23, paragraphs 1 to 4; 36, subparagraphs 1 (b), (c) and (d); 40, subparagraph 4 (b); 44; 48, paragraph 3; 51, subparagraph 1 (b); 59, paragraph 1; 63; 66; 67, paragraph 2; 75, paragraph 4; and 80, paragraphs 2 and 5, shall be in writing. Electronic communications may be used for these purposes, provided that the use of such means is with the consent of the person by which it is communicated and of the person to which it is communicated.

## *Article 4*

### *Applicability of defences and limits of liability*

1. Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:

- (a) The carrier or a maritime performing party;
- (b) The master, crew or any other person that performs services on board the ship; or
- (c) Employees of the carrier or a maritime performing party.

2. Any provision of this Convention that may provide a defence for the shipper or the

documentary shipper applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their subcontractors, agents or employees.

## **Chapter 2 Scope of application**

### *Article 5*

#### *General scope of application*

1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:

- (a) The place of receipt;
- (b) The port of loading;
- (c) The place of delivery; or
- (d) The port of discharge.

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

### *Article 6*

#### *Specific exclusions*

1. This Convention does not apply to the following contracts in liner transportation:

- (a) Charter parties; and
- (b) Other contracts for the use of a ship or of any space thereon.

2. This Convention does not apply to contracts of carriage in non-liner transportation except when:

- (a) There is no charter party or other contract between the parties for the use of a ship or of any space thereon; and
- (b) A transport document or an electronic transport record is issued.

### *Article 7*

#### *Application to certain parties*

Notwithstanding article 6, this Convention applies as between the carrier and the

consignee, controlling party or holder that is not an original party to the charter party or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article

### **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 14*

#### *Specific obligations applicable to the voyage by sea*

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

(a) Make and keep the ship seaworthy;

(b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and

(c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

### *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.

#### *Article 16*

##### *Sacrifice of the goods during the voyage by sea*

Notwithstanding articles 11, 13, and 14, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure.

### **Chapter 5 Liability of the carrier for loss, damage or delay**

#### *Article 17*

##### *Basis of liability*

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.
2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.
3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:
  - (a) Act of God;
  - (b) Perils, dangers, and accidents of the sea or other navigable waters;
  - (c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;
  - (d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;
  - (e) Strikes, lockouts, stoppages, or restraints of labour;
  - (f) Fire on the ship;
  - (g) Latent defects not discoverable by due diligence;

(h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34;

(i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;

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

(k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;

(l) Saving or attempting to save life at sea;

(m) Reasonable measures to save or attempt to save property at sea;

(n) Reasonable measures to avoid or attempt to avoid damage to the environment; or

(o) Acts of the carrier in pursuance of the powers conferred by articles 15 and 16.

4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:

(a) If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies; or

(b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 18.

5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:

(a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods; and

(b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or



(ii) it complied with its obligation to exercise due diligence pursuant to article 14.

6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.

#### *Article 18*

##### *Liability of the carrier for other persons*

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

(a) Any performing party;

(b) The master or crew of the ship;

(c) Employees of the carrier or a performing party; or

(d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

#### *Article 19*

##### *Liability of maritime performing parties*

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by

this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

#### *Article 20*

##### *Joint and several liability*

1. If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this Convention.

2. Without prejudice to article 61, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Convention.

#### *Article 21*

##### *Delay*

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed.

#### *Article 22*

##### *Calculation of compensation*

1. Subject to article 59, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 43.

2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 of this article except when the carrier and the shipper have agreed to calculate compensation in a

different manner within the limits of chapter 16.

*Article 23*

*Notice in case of loss, damage or delay*

1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of loss of or damage to the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days at the place of delivery after the delivery of the goods.
2. Failure to provide the notice referred to in this article to the carrier or the performing party shall not affect the right to claim compensation for loss of or damage to the goods under this Convention, nor shall it affect the allocation of the burden of proof set out in article 17.
3. The notice referred to in this article is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the person to which they have been delivered and the carrier or the maritime performing party against which liability is being asserted.
4. No compensation in respect of delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.
5. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.
6. In the case of any actual or apprehended loss or damage, the parties to the dispute shall give all reasonable facilities to each other for inspecting and tallying the goods and shall provide access to records and documents relevant to the carriage of the goods.

## **Chapter 6 Additional provisions relating to particular stages of carriage**

### *Article 24*

#### *Deviation*

When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 61.

### *Article 25*

#### *Deck cargo on ships*

1. Goods may be carried on the deck of a ship only if:

(a) Such carriage is required by law;

(b) They are carried in or on containers or vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or vehicles; or

(c) The carriage on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.

2. The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article, but the carrier is not liable for loss of or damage to such goods, or delay in their delivery, caused by the special risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs 1 (a) or (c) of this article.

3. If the goods have been carried on deck in cases other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and is not entitled to the defences provided for in article 17.

4. The carrier is not entitled to invoke subparagraph 1 (c) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic transport record in good faith, unless the contract particulars state that the goods may be carried on deck.

5. If the carrier and shipper expressly agreed that the goods would be carried under deck, the carrier is not entitled to the benefit of the limitation of liability for any loss of, damage to or delay in the delivery of the goods to the extent that such loss,

damage, or delay resulted from their carriage on deck.

#### *Article 26*

##### *Carriage preceding or subsequent to sea carriage*

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

- (a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;
- (b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and
- (c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

### **Chapter 7 Obligations of the shipper to the carrier**

#### *Article 27*

##### *Delivery for carriage*

1. Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.
2. The shipper shall properly and carefully perform any obligation assumed under an agreement made pursuant to article 13, paragraph 2.
3. When a container is packed or a vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container or vehicle, and in such a way that they will not cause harm to persons or property.

*Article 28*

*Cooperation of the shipper and the carrier in providing information and instructions*

The carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party.

*Article 29*

*Shipper's obligation to provide information, instructions and documents*

1. The shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary:

(a) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and

(b) For the carrier to comply with law, regulations or other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.

2. Nothing in this article affects any specific obligation to provide certain information, instructions and documents related to the goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.

*Article 30*

*Basis of shipper's liability to the carrier*

1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.

2. Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 31, paragraph 2, and 32, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34.

3. When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 34.

#### *Article 31*

##### *Information for compilation of contract particulars*

1. The shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 36, paragraph 1; the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any.

2. The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this article. The shipper shall indemnify the carrier against loss or damage resulting from the inaccuracy of such information.

#### *Article 32*

##### *Special rules on dangerous goods*

When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:

(a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and

(b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.

*Article 33*

*Assumption of shipper's rights and obligations by the documentary shipper*

1. A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 55, and is entitled to the shipper's rights and defences provided by this chapter and by chapter 13.
2. Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.

*Article 34*

*Liability of the shipper for other persons*

The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.

**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.



*Article 36*

*Contract particulars*

1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper:

- (a) A description of the goods as appropriate for the transport;
- (b) The leading marks necessary for identification of the goods;
- (c) The number of packages or pieces, or the quantity of goods; and
- (d) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include:

- (a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;
- (b) The name and address of the carrier;
- (c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and
- (d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.

3. The contract particulars in the transport document or electronic transport record referred to in article 35 shall further include:

- (a) The name and address of the consignee, if named by the shipper;
- (b) The name of a ship, if specified in the contract of carriage;
- (c) The place of receipt and, if known to the carrier, the place of delivery; and
- (d) The port of loading and the port of discharge, if specified in the contract of carriage.

4. For the purposes of this article, the phrase “apparent order and condition of the goods” in subparagraph 2 (a) of this article refers to the order and condition of the goods based on:

- (a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and
- (b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or electronic transport record.

### *Article 37*

#### *Identity of the carrier*

1. If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification.
2. If no person is identified in the contract particulars as the carrier as required pursuant to article 36, subparagraph 2 (b), but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner.
3. Nothing in this article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier.

### *Article 38*

#### *Signature*

1. A transport document shall be signed by the carrier or a person acting on its behalf.
2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic transport record.

### *Article 39*

#### *Deficiencies in the contract particulars*

1. The absence or inaccuracy of one or more of the contract particulars referred to in article 36, paragraphs 1, 2 or 3, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.
2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be:

(a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or

(b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship.

3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them, the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the carrier or a performing party received them.

#### *Article 40*

##### *Qualifying the information relating to the goods in the contract particulars*

1. The carrier shall qualify the information referred to in article 36, paragraph 1, to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper if:

(a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is false or misleading; or

(b) The carrier has reasonable grounds to believe that a material statement in the transport document or electronic transport record is false or misleading.

2. Without prejudice to paragraph 1 of this article, the carrier may qualify the information referred to in article 36, paragraph 1, in the circumstances and in the manner set out in paragraphs 3 and 4 of this article to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper.

3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container or vehicle, or when they are delivered in a closed container or vehicle and the carrier or a performing party actually inspects them, the carrier may qualify the information referred to in article 36, paragraph 1, if:

(a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or

(b) The carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information.

4. When the goods are delivered for carriage to the carrier or a performing party in a closed container or vehicle, the carrier may qualify the information referred to in:

(a) Article 36, subparagraphs 1 (a), (b), or (c), if:

(i) The goods inside the container or vehicle have not actually been inspected by the carrier or a performing party; and

(ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and

(b) Article 36, subparagraph 1 (d), if:

(i) Neither the carrier nor a performing party weighed the container or vehicle, and the shipper and the carrier had not agreed prior to the shipment that the container or vehicle would be weighed and the weight would be included in the contract particulars; or

(ii) There was no physically practicable or commercially reasonable means of checking the weight of the container or vehicle.

#### *Article 41*

##### *Evidentiary effect of the contract particulars*

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 40:

(a) A transport document or an electronic transport record is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars;

(b) Proof to the contrary by the carrier in respect of any contract particulars shall not be admissible, when such contract particulars are included in:

(i) A negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith; or

(ii) A non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith;

(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any of the following contract particulars included in a non-negotiable transport document or a non-negotiable electronic transport record:

(i) The contract particulars referred to in article 36, paragraph 1, when such contract particulars are furnished by the carrier;

- (ii) The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and
- (iii) The contract particulars referred to in article 36, paragraph 2.

*Article 42*

*“Freight prepaid”*

If the contract particulars contain the statement “freight prepaid” or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.

**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

### *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 12 Limits of liability**

### *Article 59*

#### *Limits of liability*

1. Subject to articles 60 and 61, paragraph 1, the carrier's liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

2. When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.

3. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International

Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

*Article 60*

*Limits of liability for loss caused by delay*

Subject to article 61, paragraph 2, compensation for loss of or damage to the goods due to delay shall be calculated in accordance with article 22 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable pursuant to this article and article 59, paragraph 1, may not exceed the limit that would be established pursuant to article 59, paragraph 1, in respect of the total loss of the goods concerned.

*Article 61*

*Loss of the benefit of limitation of liability*

1. Neither the carrier nor any of the persons referred to in article 18 is entitled to the benefit of the limitation of liability as provided in article 59, or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier's obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

2. Neither the carrier nor any of the persons mentioned in article 18 is entitled to the benefit of the limitation of liability as provided in article 60 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.



## **Chapter 13 Time for suit**

### *Article 62*

#### *Period of time for suit*

1. No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under this Convention may be instituted after the expiration of a period of two years.
2. The period referred to in paragraph 1 of this article commences on the day on which the carrier has delivered the goods or, in cases in which no goods have been delivered or only part of the goods have been delivered, on the last day on which the goods should have been delivered. The day on which the period commences is not included in the period.
3. Notwithstanding the expiration of the period set out in paragraph 1 of this article, one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party.

### *Article 63*

#### *Extension of time for suit*

The period provided in article 62 shall not be subject to suspension or interruption, but the person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

### *Article 64*

#### *Action for indemnity*

An action for indemnity by a person held liable may be instituted after the expiration of the period provided in article 62 if the indemnity action is instituted within the later of:

- (a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or
- (b) Ninety days commencing from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.

### *Article 65*

#### *Actions against the person identified as the carrier*

An action against the bareboat charterer or the person identified as the carrier pursuant to article 37, paragraph 2, may be instituted after the expiration of the period provided in article 62 if the action is instituted within the later of:

- (a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or
- (b) Ninety days commencing from the day when the carrier has been identified, or the registered owner or bareboat charterer has rebutted the presumption that it is the carrier, pursuant to article 37, paragraph 2.

## **Chapter 14 Jurisdiction**

### *Article 66*

#### *Actions against the carrier*

Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 67 or 72, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:

- (a) In a competent court within the jurisdiction of which is situated one of the following places:
  - (i) The domicile of the carrier;
  - (ii) The place of receipt agreed in the contract of carriage;
  - (iii) The place of delivery agreed in the contract of carriage; or
  - (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or
- (b) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.

### *Article 67*

#### *Choice of court agreements*

1. The jurisdiction of a court chosen in accordance with article 66, subparagraph *b*), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:

(a) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated or (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and

(b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.

2. A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if:

(a) The court is in one of the places designated in article 66, subparagraph (a);

(b) That agreement is contained in the transport document or electronic transport record;

(c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and

(d) The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement.

#### *Article 68*

##### *Actions against the maritime performing party*

The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:

(a) The domicile of the maritime performing party; or

(b) The port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performs its activities with respect to the goods.

#### *Article 69*

##### *No additional bases of jurisdiction*

Subject to articles 71 and 72, no judicial proceedings under this Convention against the carrier or a maritime performing party may be instituted in a court not designated pursuant to article 66 or 68.

### *Article 70*

#### *Arrest and provisional or protective measures*

Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless:

- (a) The requirements of this chapter are fulfilled; or
- (b) An international convention that applies in that State so provides.

### *Article 71*

#### *Consolidation and removal of actions*

1. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, the action may be instituted only in a court designated pursuant to both article 66 and article 68. If there is no such court, such action may be instituted in a court designated pursuant to article 68, subparagraph (b), if there is such a court.

2. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, a carrier or a maritime performing party that institutes an action seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum pursuant to article 66 or 68 shall, at the request of the defendant, withdraw that action once the defendant has chosen a court designated pursuant to article 66 or 68, whichever is applicable, where the action may be recommenced.

### *Article 72*

#### *Agreement after a dispute has arisen and jurisdiction when the defendant has entered an appearance*

1. After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.

2. A competent court before which a defendant appears, without contesting jurisdiction in accordance with the rules of that court, has jurisdiction.

### *Article 73*

#### *Recognition and enforcement*

1. A decision made in one Contracting State by a court having jurisdiction under this Convention shall be recognized and enforced in another Contracting State in accordance with the law of such latter Contracting State when both States have made a declaration in accordance with article 74.
2. A court may refuse recognition and enforcement based on the grounds for the refusal of recognition and enforcement available pursuant to its law.
3. This chapter shall not affect the application of the rules of a regional economic integration organization that is a party to this Convention, as concerns the recognition or enforcement of judgements as between member States of the regional economic integration organization, whether adopted before or after this Convention.

### *Article 74*

#### *Application of chapter 14*

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

## **Chapter 15 Arbitration**

### *Article 75*

#### *Arbitration agreements*

1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.
2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at:
  - (a) Any place designated for that purpose in the arbitration agreement; or
  - (b) Any other place situated in a State where any of the following places is located:
    - (i) The domicile of the carrier;
    - (ii) The place of receipt agreed in the contract of carriage;
    - (iii) The place of delivery agreed in the contract of carriage; or
    - (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.
3. The designation of the place of arbitration in the agreement is binding for disputes

between the parties to the agreement if the agreement is contained in a volume contract that clearly states the names and addresses of the parties and either:

(a) Is individually negotiated; or

(b) Contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement.

4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:

(a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article;

(b) The agreement is contained in the transport document or electronic transport record;

(c) The person to be bound is given timely and adequate notice of the place of arbitration; and

(d) Applicable law permits that person to be bound by the arbitration agreement.

5. The provisions of paragraphs 1, 2, 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is void.

#### *Article 76*

##### *Arbitration agreement in non-liner transportation*

1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the provisions of this Convention apply by reason of:

(a) The application of article 7; or

(b) The parties' voluntary incorporation of this Convention in a contract of carriage that would not otherwise be subject to this Convention.

2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:

(a) Identifies the parties to and the date of the charter party or other contract excluded from the application of this Convention by reason of the application of article 6; and

(b) Incorporates by specific reference the clause in the charter party or other contract that contains the terms of the arbitration agreement.

*Article 77*

*Agreement to arbitrate after a dispute has arisen*

Notwithstanding the provisions of this chapter and chapter 14, after a dispute has arisen the parties to the dispute may agree to resolve it by arbitration in any place.

*Article 78*

*Application of chapter 15*

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

**Chapter 16 Validity of contractual terms**

*Article 79*

*General provisions*

1. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;

(b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or

(c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 18.

2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes, limits or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or

(b) Directly or indirectly excludes, limits or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.

*Article 80*

*Special rules for volume contracts*

1. Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.
2. A derogation pursuant to paragraph 1 of this article is binding only when:
  - (a) The volume contract contains a prominent statement that it derogates from this Convention;
  - (b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;
  - (c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and
  - (d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.
3. A carrier's public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.
4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 14, subparagraphs (a) and (b), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in article 61.
5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:
  - (a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and
  - (b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.
6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.



*Article 81*

*Special rules for live animals and certain other goods*

Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier or of a person referred to in article 18, done with the intent to cause such loss of or damage to the goods or such loss due to delay or done recklessly and with knowledge that such loss or damage or such loss due to delay would probably result; or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and that no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

**Chapter 17 Matters not governed by this convention**

*Article 82*

*International conventions governing the carriage of goods by other modes of transport*

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

(a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;

(b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;

(c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a

supplement to the carriage by rail; or

(d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

#### *Article 83*

##### *Global limitation of liability*

Nothing in this Convention affects the application of any international convention or national law regulating the global limitation of liability of vessel owners.

#### *Article 84*

##### *General average*

Nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average.

#### *Article 85*

##### *Passengers and luggage*

This Convention does not apply to a contract of carriage for passengers and their luggage.

#### *Article 86*

##### *Damage caused by nuclear incident*

No liability arises under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the Additional Protocol of 28 January 1964 and by the Protocols of 16 November 1982 and 12 February 2004, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988 and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, including any amendment to these conventions and any future convention in respect of the liability of the operator of a nuclear installation for

damage caused by a nuclear incident; or

(b) Under national law applicable to the liability for such damage, provided that such law is in all respects as favourable to persons that may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.

## **Chapter 18 Final clauses**

### *Article 87*

#### *Depositary*

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

### *Article 88*

#### *Signature, ratification, acceptance, approval or accession*

1. This Convention is open for signature by all States at Rotterdam, the Netherlands, on 23 September 2009, and thereafter at the Headquarters of the United Nations in New York.
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

### *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. For the purposes of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraphs 1 and 2 of this article that are notified to the depositary after this Convention has entered into force are not effective until such denunciations as may be required on the part of those States in respect of these instruments have become effective. The depositary of this Convention shall consult with the Government of Belgium, as the depositary of the instruments referred to in paragraph 1 of this article, so as to ensure necessary coordination in this respect.

#### *Article 90*

##### *Reservations*

No reservation is permitted to this Convention.

#### *Article 91*

##### *Procedure and effect of declarations*

1. The declarations permitted by articles 74 and 78 may be made at any time. The initial declarations permitted by article 92, paragraph 1, and article 93, paragraph 2, shall be made at the time of signature, ratification, acceptance, approval or accession. No other declaration is permitted under this Convention.

No other declaration is permitted under this Convention.

2. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

3. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

4. A declaration takes effect simultaneously with the entry into force of this

Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

5. Any State that makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. The withdrawal of a declaration, or its modification where permitted by this Convention, takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

#### *Article 92*

##### *Effect in domestic territorial units*

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. When a Contracting State has declared pursuant to this article that this Convention extends to one or more but not all of its territorial units, a place located in a territorial unit to which this Convention does not extend is not considered to be in a Contracting State for the purposes of this Convention.

4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

#### *Article 93*

##### *Participation by regional economic integration organizations*

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. When the number of Contracting States is relevant in

this Convention, the regional economic integration organization does not count as a Contracting State in addition to its member States which are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration pursuant to this paragraph.

3. Any reference to a “Contracting State” or “Contracting States” in this Convention applies equally to a regional economic integration organization when the context so requires.

#### *Article 94*

##### *Entry into force*

1. This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.

2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State.

#### *Article 95*

##### *Revision and amendment*

1. At the request of not less than one third of the Contracting States to this Convention, the Secretary-General of the United Nations shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the

Convention as amended.

*Article 96*

*Denunciation of this Convention*

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at New York, this eleventh day of December two thousand and eight, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

# The Hague-Visby Rules

## The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968

### *Article I*

In these Rules the following words are employed, with the meanings set out below:

- (a) 'Carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.
- (b) 'Contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.
- (c) 'Goods' 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 II*

Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

### *Article III*

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

- (a) Make the ship seaworthy;
- (b) Properly man, equip and supply the ship;
- (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in



which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods.

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

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

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

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

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

Subject to paragraph 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.

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

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

7, After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands be a 'shipped' bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article III, shall for the purpose of this article be deemed to constitute a 'shipped' bill of lading.

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

*Article IV*

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

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

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

(d) Act of God.

(e) Act of war.

(f) Act of public enemies.

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

(h) Quarantine restrictions.

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

(j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.

(k) Riots and civil commotions.

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

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

(n) Insufficiency of packing.

(o) Insufficiency or inadequacy of marks.

(p) Latent defects not discoverable by due diligence.

(q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that

neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

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

5 (a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 666.67 units of account per package or unit or units of account per kilo of gross weight of the goods lost or damaged, whichever is the higher.

(b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.

The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

(c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.

(d) The unit of account mentioned in this Article is the special drawing right as defined by the International Monetary Fund. The amounts mentioned in h\_visby/art/art04\_5asub-paragraph (a) of this paragraph shall be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the Court seized of the case.

(e) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from

an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

(f) The declaration mentioned in sub-paragraph (a) of this paragraph, if embodied in the bill of lading, shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

(g) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph.

(h) Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

#### *Article IV bis*

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

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

3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in these Rules.

4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this article, if it is proved that the damage resulted from an act or

omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

*Article V*

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

*Article VI*

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

An agreement so entered into shall have full legal effect.

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

*Article VII*

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility

and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea.

*Article VIII*

The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

*Article IX*

These Rules shall not affect the provisions of any international Convention or national law governing liability for nuclear damage.

*Article X*

The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if

- (a) the bill of lading is issued in a contracting State, or
- (b) the carriage is from a port in a contracting State, or
- (c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract; whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

(The last two paragraphs of this Article are not reproduced. They require contracting States to apply the Rules to bills of lading mentioned in the Article and authorise them to apply the Rules to other bills of lading).

(Article 11 to 16 of the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on August 25, 1974 are not reproduced. They deal with the coming into force of the Convention, procedure for ratification, accession and denunciation and the right to call for a fresh conference to consider amendments to the Rules contained in the Convention).

# The Hamburg Rules

## HAMBURG RULES

### UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA, 1978

#### *Preamble*

THE STATES PARTIES TO THIS CONVENTION,  
HAVING RECOGNIZED the desirability of determining by agreement certain rules relating to the carriage of goods by sea,  
HAVE DECIDED to conclude a Convention for this purpose and have thereto agreed as follows:

## **PART I**

### **GENERAL PROVISIONS**

#### *Article 1*

##### *Definitions*

In this Convention:

1. "Carrier" means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.
2. "Actual carrier" means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.
3. "Shipper" means any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.
4. "Consignee" means the person entitled to take delivery of the goods.
5. "Goods" includes live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if supplied by the shipper.
6. "Contract of carriage by sea" means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a



contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea.

7. "Bill of lading" means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

8. "Writing" includes, *inter alia*, telegram and telex.

## *Article 2*

### *Scope of application*

1. The provisions of this Convention are applicable to all contracts of carriage by sea between two different States, if:

(a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or

(b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or

(c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or

(d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or

(e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

2. The provisions of this Convention are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.

3. The provisions of this Convention are not applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.

4. If a contract provides for future carriage of goods in a series of shipments during an agreed period, the provisions of this Convention apply to each shipment.

However, where a shipment is made under a charter-party, the provisions of paragraph 3 of this article apply.

### *Article 3*

#### *Interpretation of the Convention*

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

## **PART II**

### **LIABILITY OF THE CARRIER**

#### *Article 4*

##### *Period of responsibility*

1. The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.

2. For the purpose of paragraph 1 of this article, the carrier is deemed to be in charge of the goods

(a) from the time he has taken over the goods from:

(i) the shipper, or a person acting on his behalf; or

(ii) an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment;

(b) until the time he has delivered the goods:

(i) by handing over the goods to the consignee; or

(ii) in cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or

(iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.

3. In paragraphs 1 and 2 of this article, reference to the carrier or to the consignee means, in addition to the carrier or the consignee, the servants or agents, respectively of the carrier or the consignee.

## *Article 5*

### *Basis of liability*

1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.

3. The person entitled to make a claim for the loss of goods may treat the goods as lost if they have not been delivered as required by article 4 within 60 consecutive days following the expiry of the time for delivery according to paragraph 2 of this article.

4. (a) The carrier is liable

(i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;

(ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents, in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.

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

5. With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a

part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.

6. The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.

7. Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.

## *Article 6*

### *Limits of liability*

1. (a) The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea.

(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1(a) of this article, the following rules apply:

(a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.

(b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one

separate shipping unit.

3. Unit of account means the unit of account mentioned in article 26.

4. By agreement between the carrier and the shipper, limits of liability exceeding those provided for in paragraph 1 may be fixed.

#### *Article 7*

##### *Application to non-contractual claims*

1. The defences and limits of liability provided for in this Convention apply in any action against the carrier in respect of loss or damage to the goods covered by the contract of carriage by sea, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise.

2. If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

3. Except as provided in article 8, the aggregate of the amounts recoverable from the carrier and from any persons referred to in paragraph 2 of this article shall not exceed the limits of liability provided for in this Convention.

#### *Article 8*

##### *Loss of right to limit responsibility*

1. The carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

2. Notwithstanding the provisions of paragraph 2 of article 7, a servant or agent of the carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

## *Article 9*

### *Deck cargo*

1. The carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations.
2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier must insert in the bill of lading or other document evidencing the contract of carriage by sea a statement to that effect. In the absence of such a statement the carrier has the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier is not entitled to invoke such an agreement against a third party, including a consignee, who has acquired the bill of lading in good faith.
3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article or where the carrier may not under paragraph 2 of this article invoke an agreement for carriage on deck, the carrier, notwithstanding the provisions of paragraph 1 of article 5, is liable for loss of or damage to the goods, as well as for delay in delivery, resulting solely from the carriage on deck, and the extent of his liability is to be determined in accordance with the provisions of article 6 or article 8 of this Convention, as the case may be.
4. Carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of article

## *Article 10*

### *Liability of the carrier and actual carrier*

1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.
2. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of paragraph 2 of article 8

apply if an action is brought against a servant or agent of the actual carrier.

3. Any special agreement under which the carrier assumes obligations not imposed by this Convention or waives rights conferred by this Convention affects the actual carrier only if agreed to by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement.

4. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.

5. The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability provided for in this Convention.

6. Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier.

#### *Article 11*

##### *Through carriage*

1. Notwithstanding the provisions of paragraph 1 of article 10, where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named person other than the carrier, the contract may also provide that the carrier is not liable for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage. Nevertheless, any stipulation limiting or excluding such liability is without effect if no judicial proceedings can be instituted against the actual carrier in a court competent under paragraph 1 or 2 of article 21. The burden of proving that any loss, damage or delay in delivery has been caused by such an occurrence rests upon the carrier.

2. The actual carrier is responsible in accordance with the provisions of paragraph 2 of article 10 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge.

**PART III**  
**LIABILITY OF THE SHIPPER**

*Article 12*

*General rule*

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

*Article 13*

*Special rules on dangerous goods*

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



## **PART IV**

### **TRANSPORT DOCUMENTS**

#### *Article 14*

##### *Issue of bill of lading*

1. When the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading.
2. The bill of lading may be signed by a person having authority from the carrier. A bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.
3. The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by an 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 shipper's demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading.

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

#### *Article 16*

##### *Bills of lading: reservations and evidentiary effect*

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person must insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.

2. If the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition.

3. Except for particulars in respect of which and to the extent to which a reservation

permitted under paragraph 1 of this article has been entered:

(a) the bill of lading is *prima facie* evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and

(b) proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein.

4. A bill of lading which does not, as provided in paragraph 1, subparagraph (k) of article 15, set forth the freight or otherwise indicate that freight is payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, is *prima facie* evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier is not admissible when the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

#### *Article 17*

##### *Guarantees by the shipper*

1. The shipper is deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper must indemnify the carrier against the loss resulting from inaccuracies in such particulars. The shipper remains liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity in no way limits his liability under the contract of carriage by sea to any person other than the shipper.

2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss resulting from the issuance of the bill of lading by the carrier, or by a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, is void and of no effect as against any third party, including a consignee, to whom the bill of lading has been transferred.

3. Such letter of guarantee or agreement is valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including a consignee, who acts in reliance on the description of the goods in the bill of lading. In the latter

case, if the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier has no right of indemnity from the shipper pursuant to paragraph 1 of this article.

4. In the case of intended fraud referred to in paragraph 3 of this article the carrier is liable, without the benefit of 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. If the goods have been delivered by an actual carrier, any notice given under this article to him shall have the same effect as if it had been given to the carrier, and any notice given to the carrier shall have effect as if given to such actual carrier.

7. Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the carrier or actual carrier to the shipper not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2 of article 4, whichever is later, the failure to give such notice is *prima facie* evidence that the carrier or the actual carrier has sustained no loss or damage due to the fault or neglect of the shipper, his servants or agents.

8. For the purpose of this article, notice given to a person acting on the carrier's or the actual carrier's behalf, including the master or the officer in charge of the ship, or to a person acting on the shipper's behalf is deemed to have been given to the carrier, to the actual carrier or to the shipper, respectively.

## *Article 20*

### *Limitation of actions*

1. Any action relating to carriage of goods under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

2. The limitation period commences on the day on which the carrier has delivered the goods or part thereof or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered.

3. The day on which the limitation period commences is not included in the period.

4. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

5. An action for indemnity by a person held liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted. However, the time allowed shall not be less than 90 days commencing

from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.

## *Article 21*

### *Jurisdiction*

1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or

(b) the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(c) the port of loading or the port of discharge; or

(d) any additional place designated for that purpose in the contract of carriage by sea.

2. (a) Notwithstanding the preceding provisions of this article, an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.

(b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest.

3. No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.

4. (a) Where an action has been instituted in a court competent under paragraph 1 or 2 of this article or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgement of the court before which the first action was instituted is not enforceable

in the country in which the new proceedings are instituted;

(b) for the purpose of this article the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action;

(c) for the purpose of this article, the removal of an action to a different court within the same country, or to a court in another country, in accordance with paragraph 2(a) of this article, is not to be considered as the starting of a new action.

5. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an action, is effective.

## *Article 22*

### *Arbitration*

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.

2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.

3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

(a) a place in a State within whose territory is situated:

(i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

(ii) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(iii) the port of loading or the port of discharge; or

(b) any place designated for that purpose in the arbitration clause or agreement.

4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

5. The provisions of paragraphs 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.

6. Nothing in this article affects the validity of an agreement relating to arbitration

made by the parties after the claim under the contract of carriage by sea has arisen.

## **PART VI**

### **SUPPLEMENTARY PROVISIONS**

#### *Article 23*

##### *Contractual stipulations*

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

#### *Article 24*

##### *General average*

1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage by sea or national law regarding the adjustment of general



average.

2. With the exception of article 20, the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.

#### *Article 25*

##### *Other conventions*

1. This Convention does not modify the rights or duties of the carrier, the actual carrier and their servants and agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.

2. The provisions of articles 21 and 22 of this Convention do not prevent the application of the mandatory provisions of any other multilateral convention already in force at the date of this Convention [March 31, 1978] relating to matters dealt with in the said articles, provided that the dispute arises exclusively between parties having their principal place of business in States members of such other convention. However, this paragraph does not affect the application of paragraph 4 of article 22 of this Convention.

3. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or  
(b) by virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

4. No liability shall arise under the provisions of this Convention for any loss of or damage to or delay in delivery of luggage for which the carrier is responsible under any international convention or national law relating to the carriage of passengers and their luggage by sea.

5. Nothing contained in this Convention prevents a Contracting State from applying any other international convention which is already in force at the date of this

Convention and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than transport by sea. This provision also applies to any subsequent revision or amendment of such international convention.

#### *Article 26*

##### *Unit of account*

1. The unit of account referred to in article 6 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 6 are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency in terms of the Special Drawing Right of a Contracting State which is not a member of the International Monetary Fund is to be calculated in a manner determined by that State.

2. Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, or at the time of ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as: 12,500 monetary units per package or other shipping unit or 37.5 monetary units per kilogramme of gross weight of the goods.

3. The monetary unit referred to in paragraph 2 of this article corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amounts referred to in paragraph 2 into the national currency is to be made according to the law of the State concerned.

4. The calculation mentioned in the last sentence of paragraph 1 and the conversion mentioned in paragraph 3 of this article is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for the amounts in article 6 as is expressed there in units of account. Contracting States must communicate to the depositary the manner of calculation pursuant to paragraph 1 of this article, or the result of the conversion mentioned in paragraph 3

of this article, as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this article and whenever there is a change in the manner of such calculation or in the result of such conversion.

## **PART VII**

### **FINAL CLAUSES**

#### *Article 27*

##### *Depositary*

The Secretary General of the United Nations is hereby designated as the depositary of this Convention.

#### *Article 28*

##### *Signature, ratification, acceptance, approval, accession*

1. This Convention is open for signature by all States until 30 April 1979 at the Headquarters of the United Nations, New York.
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. After 30 April 1979, this Convention will be open for accession by all States which are not signatory States.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

#### *Article 29*

##### *Reservations*

No reservations may be made to this Convention.

#### *Article 30*

##### *Entry into force*

1. This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the 20th instrument of ratification, acceptance, approval or accession.

2. For each State which becomes a Contracting State to this Convention after the date of deposit of the 20th instrument of ratification, acceptance approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.
3. Each Contracting State shall apply the provisions of this Convention to contracts of carriage by sea concluded on or after the date of the entry into force of this Convention in respect of that State.

### *Article 31*

#### *Denunciation of other conventions*

1. Upon becoming a Contracting State to this Convention, any State party to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924 (1924 Convention) must notify the Government of Belgium as the depositary of the 1924 Convention of its denunciation of the said Convention with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.
2. Upon the entry into force of this Convention under paragraph 1 of article 30, the depositary of this Convention must notify the Government of Belgium as the depositary of the 1924 Convention of the date of such entry into force, and of the names of the Contracting States in respect of which the Convention has entered into force.
3. The provisions of paragraphs 1 and 2 of this article apply correspondingly in respect of States parties to the Protocol signed on 23 February 1968 to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924.
4. Notwithstanding article 2 of this Convention, for the purposes of paragraph 1 of this article, a Contracting State may, if it deems it desirable, defer the denunciation of the 1924 Convention and of the 1924 Convention as modified by the 1968 Protocol for a maximum period of five years from the entry into force of this Convention. It will then notify the Government of Belgium of its intention. During this transitory period, it must apply to the Contracting States this Convention to the exclusion of any other one.

### *Article 32*

#### *Revision and amendment*

1. At the request of not less than one-third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.
2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention, is deemed to apply to the Convention as amended.

### *Article 33*

#### *Revision of the limitation amounts and unit of account or monetary unit*

1. Notwithstanding the provisions of article 32, a conference only for the purpose of altering the amount specified in article 6 and paragraph 2 of article 26, or of substituting either or both of the units defined in paragraphs 1 and 3 of article 26 by other units is to be convened by the depositary in accordance with paragraph 2 of this article. An alteration of the amounts shall be made only because of a significant change in their real value.
2. A revision conference is to be convened by the depositary when not less than one-fourth of the Contracting States so request.
3. Any decision by the conference must be taken by a two-thirds majority of the participating States. The amendment is communicated by the depositary to all the Contracting States for acceptance and to all the States signatories of the Convention for information.
4. Any amendment adopted enters into force on the first day of the month following one year after its acceptance by two-thirds of the Contracting States. Acceptance is to be effected by the deposit of a formal instrument to that effect, with the depositary.
5. After entry into force of an amendment a Contracting State which has accepted the amendment is entitled to apply the Convention as amended in its relations with Contracting States which have not within six months after the adoption of the amendment notified the depositary that they are not bound by the amendment.
6. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention, is deemed to apply to the Convention as amended.

*Article 34*

*Denunciation*

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Hamburg, this thirty-first day of March one thousand nine hundred and seventy-eight, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.

COMMON UNDERSTANDING ADOPTED BY THE UNITED NATIONS  
CONFERENCE ON THE CARRIAGE OF GOODS BY SEA

It is the common understanding that the liability of the carrier under this Convention is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule.

# Appendix 2

## Bill of Lading<sup>185</sup>

TRAILER/CAR NUMBER: \_\_\_\_\_

BILL DATE: \_\_\_\_\_

TO

FROM

Consignee
Street
Destination
City/State/Zip
Route:

Shipper
Street
Origin
City/State/Zip
Special Instructions:

FOR PAYMENT, SEND BILL TO

SHIPPER'S INSTRUCTIONS

Name
Company
Street
City/State/Zip


NO. SHIPPING UNITS	TIME	DESCRIPTION OF ARTICLES	WEIGHT	RATE	CHARGES
		SPECIAL MARKS & EXCEPTIONS			

<sup>185</sup> In practice the bill of lading contains the entire information set out in this samples on one page, but for the sake of optimal illustration this sample is presented over two pages. The sample is found on <http://www.samplewords.com/bill-of-lading/>

<b>REMIT C.O.D.</b>	C.O.D. AMOUNT: \$	<b>C.O.D. FEE</b> <b>PREPAID</b> <input type="checkbox"/> <b>COLLECT</b> <input type="checkbox"/>
<b>TO:</b>  <b>ADDRESS:</b>	If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.  _____ (Signature of Consignor)	TOTAL CHARGES \$
NOTE: Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding \$ _____ per _____		Freight Charges are collect unless market prepaid  CHECK BOX IF PREPAID <input type="checkbox"/>
<p>RECEIVED subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading, the property described above in apparent good order, except as noted (contents and condition of packages unknown), marked consigned and destined as indicated above which said carrier (the word carrier being understood through this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery as said destination. If on its route, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed as to each carrier of all or any of said property, over all or any portion of said route to destination and as to each party at any time interested in all or any said property, that every service to be performed hereunder shall be subject to all the Bill of Lading terms and conditions in the governing classification on the date of shipment. Shipper hereby certifies that he is familiar with all the Bill of Lading terms and conditions in the governing classification and the said terms and conditions.</p>		
Shipper	Carrier	



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