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The Carriers Responsibilities and Immunities
Under The Hague and Hamburg Rules

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Mémoire présenté à la faculté des études supérieures
En vue de l’obtention du grade de
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The Carriers Responsibilities and Immunities
Under The Hague and Hamburg Rules

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SUMMARY

Over the last few centuries the carriage of goods by sea has gone through a constant evolution. Only in the last century were the changes so noticeable. Since the early days of shipping, maritime law has tried to adapt to the realities of its time. Change was slow and not always easy to achieve. Prior to statutory regulation the practical reality was such that carriers managed to escape most if not all of their responsibilities. In the last century everything changed, the adoption of The Hague, Hague-Visby and Hamburg Rules transformed the whole system of carriage of goods by sea and their system of responsibilities. The maritime industry was marked by gradual evolution and maritime law has never been the same since.

In the last few decades, maritime law went through various reforms and many changes. Today, the shipping industry faces two carriages of goods by sea regimes, The Hague or Hague/Visby Rules and the new Hamburg Rules. Since the early nineteen hundreds, the maritime industry, with the help of a number of international and national organisations, have been working toward "one goal", the adoption of a universal convention regulating maritime trade. The objective was to reach acceptability, predictability, certainty, clarity and unanimity among all the parties involved i.e. carriers as well as shippers, insurers and governments.

The 1924 Hague convention was a great innovator. For the first time in maritime history, an international convention limited the carriers practice of using exoneration clauses to limit their responsibilities. Article 3(8) of the Hague Rules regulated the issue in clear and simple terms. Any exemption clause found to be contrary to the Hague Rules would be null and void. The aim was to change the pattern of abuse that existed and promote fairness and balance between shippers and carriers.

The carrier’s rights and immunities are expressed in art. IV of the Rules. Here again, the convention outlines the importance of the carriers responsibilities found in art. III by
restating them in art. IV(1). Only after discharging such duties, are carriers allowed to follow with the use of available defences (art. IV (2)).

For the first time, a mandatory convention regulated affairs of carriage by sea, in particular the use of exemption clauses by carriers. This was a novelty in such an old industry, whose working was based on customs and the freedom of contract basis. Thus, it seemed natural to praise such an accomplishment and indeed no one can contest that in those days, it was an accomplishment.

In the late sixties, the Hague rules were amended. The amendments were adopted in Brussels on February 23, 1968 and were known as the Visby Protocol. They represented the response to modernisation and changes that have marked the shipping industry and that were not covered by the original Hague Rules. Nonetheless, even with the changes brought forth by the Visby Rules, international criticism over The Hague and Hague Visby Rules persisted.

Thus, in 1978, the Hamburg Rules were adopted to answer the growing dissatisfaction of shipper interests, particularly amongst developing nations. The adoption of the Hamburg Rules meant the implementation of a new regime to govern the relationship between cargo owners and carriers.

The adoption of the Hamburg Rules modernised the transit of cargo by ships. They replaced the Hague Rules as well as clarified and simplified maritime shipping matters. They abolished the list of available defences found in article 4(2) of The Hague, and changed the carrier’s basis of liability.

No longer will exoneration, in cases of fault or neglect, be accepted. The new system is based on the presumption of fault or neglect. This issue is made clear in article 5 (1) of the Hamburg Rules, which states that the carrier will be held responsible for the loss or damage to the goods under his charge, until he proves he was not at fault and that he used the
reasonable required measures to avoid such loss or damage.

In practice the Hamburg Rules are not universally accepted, none of the major trading states (US, Britain, Canada, France etc...) have adopted this new system. However, they are more suitable for modern maritime shipping needs, they expanded into areas that Hague did not cover or did not exist (electronic technology), and further, eliminated the perception of bias and injustice that was perceived with the Hague Rules. Formulated by all parties concerned they are more illustrative of all interests involved.

Today the question on everyone’s mind is, which system should be the one to govern? Until everyone agrees on the acceptable solution, if ever, we will have to face an industry being regulated by two systems or three if we consider the Hague/Visby System as distinct from the original Hague Rules.
Résumé

Toujours en évolution le droit maritime est constamment en train de se moderniser. Depuis ses débuts le droit maritime essaie de s'adapter aux réalités de son temps. Le changement fut lent et difficile à atteindre. Au départ la pratique voulait qu'un transporteur maritime puisse échapper à presque toute responsabilité. L'application des coutumes du domaine et du droit contractuel avait laisser place aux abus et aux inégalités de pouvoir entre transporteurs maritimes et chargeurs/propropriétaires de marchandises.

La venue du vingtième siècle changea tout. L'adoption des Règles de la Haye, Haye/Visby et Hambourg a transformé le système de transport de marchandise par mer tel qu'on le connaissait jusqu'à date. Ainsi une évolution graduelle marqua l'industrie maritime, parallèlement le droit maritime se développa considérablement avec une participation judiciaire plus active.

De nos jours, les transporteurs maritimes sont plus responsables, or cela n'empêche pas qu'ils ne sont pas toujours capables de livrer leurs cargaisons en bonne condition. Chaque fois qu'un bateau quitte le port lui et sa cargaison sont en danger. De par ce fait, des biens sont perdus ou endommagés en cours de route sous la responsabilité du transporteur. Malgré les changements et l'évolution dans les opérations marines et l'administration du domaine la réalité demeure telle que le transport de marchandise par mer n'est pas garanti à cent pour cent.

Dans les premiers temps, un transporteur maritime encourait toutes sortes de périsms durant son voyage. Conséquemment les marchandises étaient exposées aux pertes et dangers en cours de route. Chaque année un grand nombre de navires sont perdu en mer et avec eux la cargaison qu'ils transportent. Toute la modernisation au monde ne peut éliminer les hauts risques auxquels sont exposés les transporteurs et leurs marchandises. Vers la fin des années soixante-dix avec la venue de la convention de Hambourg on pouvait encore constater que le nombre de navires qui sont perdus en mer était en croissance. Ainsi
même en temps moderne on n’échappe pas aux problèmes du passé.

"En moyenne chaque jour un navire de plus de 100 tonneaux se perd corps et biens (ceci veut dire: navire et cargaison) et le chiffre croît: 473 en 1978. À ces sinistres majeurs viennent s’ajouter les multiples avaries dues au mauvais temps et les pertes pour de multiples raisons (marquage insuffisant, erreurs de destination…). Ces périls expliquent: (1) le système de responsabilité des transporteurs ; (2) la limitation de responsabilité des propriétaires de navires;…”

L’historique légal du système de responsabilité et d’indemnité des armateurs démontre la difficulté encourue par les cours en essayant d’atteindre un consensus et uniformité en traitant ses notions.

Pour mieux comprendre les différentes facettes du commerce maritime il faut avoir une compréhension du rôle des armateurs dans ce domaine. Les armateurs représentent le moyen par lequel le transport de marchandises par mer est possible. Leur rôle est d’une importance centrale.

Par conséquent, le droit maritime se retrouve face à des questions complexes de responsabilités et d’indemnités. En particulier, la validité de l’insertion de clauses d’exonérations par les transporteurs pour se libérer d’une partie ou de toutes leurs responsabilités. À travers les années cette pratique a atteint un tel point d’injustice et de flagrant abus qu’il n’est plus possible d’ignorer le problème. L’industrie en crise se trouve obliger d’affronter ces questions et promouvoir le changement.

En droit commun, l’armateur pouvait modifier son obligation prima facie autant qu’il le voulait. Au cours des ans, ces clauses d’exception augmentaient en nombre et en complexité au point qu’il devenait difficile de percevoir quel droit on pouvait avoir contre le transporteur.

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1 René RODIÈRE, Le droit maritime, Presse universitaire de France, 1980, p. 26
Les propriétaires de marchandise, exportateurs et importateurs de marchandises i.e. chargeurs, transporteurs, juristes et auteurs sont d'avis qu'il faut trouver une solution relative aux questions des clauses d'exonérations insérées dans les contrats de transport sous connaissance. Plus précisément ces clauses qui favorisent beaucoup plus les armateurs que les chargeurs. De plus, depuis longtemps la notion du fardeau de preuve était obscure.

Il était primordial pour les pays de chargeurs d'atteindre une solution concernant cette question, citant qu'en pratique un fardeau très lourd leur était imposé. Leur désir était de trouver une solution juste et équitable pour toutes les parties concernées, et non une solution favorisant les intérêts d'un coté seulement. Le transport par mer étant en grande partie international il était évident qu'une solution viable ne pouvait être laissée aux mains d'un pays. La solution idéale devait inclure toutes les parties concernées.

Malgré le désir de trouver une solution globale, le consensus général fut long à atteindre. Le besoin urgent d'uniformité entre les pays donna naissance à plusieurs essais au niveau privé, national et international. Au cours des ans, on tint un grand nombre de conférences traitant des questions de responsabilités et d'indemnités des transporteurs maritimes. Aucun succès n'est atteint dans la poursuite de l'uniformité. Conséquemment, en 1893 les Etats Unis prennent la situation en mains pour régler le problème et adopte une loi nationale.

Ainsi: «Les réactions sont venues des Etats Unis, pays de chargeurs qui supportent mal un système qui les désavantage au profit des armateurs traditionnels, anglais, norvégiens, grecs... Le Harter Act de 1893 établit un système transactionnel, mais impératif...»

On constate qu'aux Etats Unis la question des clauses d'exonérations était enfin régie et

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2 René ROCHER, Le droit maritime, Presse universitaire de France, 1980, p. 27
par conséquent en grande partie leur application limitée. L’application du Harter Act n’étant pas au niveau international son degré de succès avait des limites. Sur le plan international la situation demeure la même et le besoin de trouver une solution acceptable pour tous persiste.

Au début du vingtième siècle, l’utilisation des contrats de transport sous connaissement pour le transport de marchandise par mer est pratique courante. Au cœur du problème les contrats de transport sous connaissement dans lesquels les armateurs insèrent toutes sortes de clauses d’exonérations controversées. Il devient évident qu’une solution au problème des clauses d’exonérations abusives tourne autour d’une réglementation de l’utilisation des contrats de transport sous connaissement. Ainsi, tout compromis qu’on peut envisager doit nécessairement régir la pratique des armateurs dans leurs utilisations des contrats de transport sous connaissement.

Les années antérieures et postérieures à la première guerre mondiale furent marquées par l’utilisation croissante et injuste des contrats de transport sous connaissement. Le besoin de standardiser la pratique devenait alors pressant et les pays chargeurs s’impatientaient et réclamaient l’adoption d’une législation semblable au Harter Act des États Unis. Une chose était certaine, tous les intérêts en cause aspiraient au même objectif, atteindre une acceptation, certitude et unanimité dans les pratiques courantes et légales.

Les Règles de la Haye furent la solution tant recherchée. Ils représentaient un nouveau régime pour gouverner les obligations et responsabilités des transporteurs. Leur but était de promouvoir un système bien balancé entre les parties en cause. De plus elles visaient à partager équitablement la responsabilité entre transporteurs et chargeurs pour toute perte ou dommage causés aux biens transportés. Par conséquent, l’applicabilité des Règles de la Haye était limitée aux contrats de transport sous connaissement. Avec le temps on a reconnu aux Règles un caractère international et on a accepté leur place centrale sur le plan global en tant que base des relations entre chargeurs et transporteurs.
Au départ, la réception du nouveau régime ne fut pas chaleureuse. La convention de la Haye de 1924 fut ainsi sujette à une opposition massive de la part des transporteurs maritimes, qui refusaient l'imposition d'un compromis affectant l'utilisation des clauses d'exonérations. Finalement le besoin d'uniformité sur le plan international stimula son adoption en grand nombre. Les règles de la Haye furent pour leur temps une vraie innovation une catalyse pour les reformes futures et un modèle de réussite globale. Pour la première fois dans l'histoire du droit maritime une convention internationale régira et limitera les pratiques abusives des transporteurs maritimes. Les règles ne laissent pas place aux incertitudes ils stipulent clairement que les clauses d'exonération contraire aux règles de la Haye seront nulles et sans valeur. De plus les règles énoncent sans équivoque les droits, obligations et responsabilités des transporteurs.

Néanmoins, le commerce maritime suivant son cours est marqué par le modernisme de son temps. La pratique courante exige des réformes pour s'adapter aux changements de l'industrie mettant ainsi fin à la période d'harmonisation. Les règles de la Haye sous leur forme originale ne répondent plus aux besoins de l'industrie maritime. Par conséquent à la fin des années soixante on adopte les Règles de Visby. Malgré leur succès les règles n'ont pu échapper aux nombreuses critiques exprimant l'opinion, qu'elles étaient plutôt favorables aux intérêts des transporteurs et au détriment des chargeurs.

Répondant aux pressions montantes on amende les Règles de la Haye, et le 23 février 1968 elles sont modifiées par le protocole de Visby. Essayant de complaire à l'insatisfaction des pays chargeurs, l'adoption des Règles de Visby est loin d'être une réussite. Leur adoption ne remplace pas le régime de la Haye mais simplement met en place un supplément pour combler les lacunes du système existant.

Les changements qu'on retrouve dans Visby n'étant pas d'une grande envergure, la reforme fut critiquée par tous. Donnant naissance à des nouveaux débats et enfin à une nouvelle convention. Visby étant un échec, en 1978 la réponse arrive avec l'instauration d'un nouveau régime, différent de son prédécesseur (Hay/Haye-Visby). Les Règles de
Hambourg sont le résultat de beaucoup d’efforts sur le plan international. Sous une pression croissante des pays chargeurs et plus particulièrement des pays en voie de développement la venue d’un nouveau régime était inévitables. Le bon fonctionnement de l’industrie et la satisfaction de toutes les parties intéressées nécessitaient un compromis qui répond aux intérêts de tous.

Avec l’aide des Nations Unis et la participation de toutes les parties concernées les Règles de Hambourg furent adoptées. Accepter ce nouveau régime impliqua le début d’un nouveau système et la fin d’une époque centrée autour des règles de la Haye. Il n’y a aucun doute que les nouvelles règles coupent les liens avec le passé et changent le système de responsabilité qui gouverne les transporteurs maritimes. L’article 4(2) de la Haye et sa liste d’exception sont éliminés. Un demi-siècle de pratique est mis de côté, on tourne la page sur les expériences du passé et on se tourne vers un nouveau futur.

Il est clair que les deux systèmes régissant le droit maritime visent le même but, une conformité internationale. Cette thèse traitera la notion de responsabilité, obligation et indemnisation des transporteurs maritimes sous les règles de la Haye et Hambourg. En particulier les difficultés face aux questions d’exonérations et d’indemnités. Chaque régime a une approche distincte pour résoudre les questions et les inquiétudes du domaine. D’un coté, la thèse démontrera les différentes facettes de chaque système, par la suite on mettra l’accent sur les points faibles et les points forts de chaque régime.

Chaque pays fait face au dilemme de savoir quel régime devrait gouverner son transport maritime. La question primordiale est de savoir comment briser les liens du passé et laisser les Règles de la Haye dans leur place, comme prédécesseur et modèle pour le nouveau système.

Il est sur qu’un grand nombre de pays ne veulent pas se départir des règles de la Haye et continuent de les appliquer. Un grand nombre d’auteurs expriment leurs désaccords et indiquent qu’il serait regrettable de tourner le dos à tant d’années de travail. Pour se
départir des Règles de la Haye, il serait une erreur ainsi qu’une perte de temps et d’argent. Pendant plus de 50 ans les cours à travers le monde ont réussi à instaurer une certaine certitude et harmonisation sur le plan juridique. Tout changer maintenant ne semble pas logique.

Tout de même l’évident ne peut être ignorer, les Règles de la Haye ne répondent plus aux besoins du domaine maritime moderne. Les questions de responsabilité, immunité, fardeau de preuve et conflit juridictionnel demeurent floues. La législation internationale nécessite des réformes qui vont avec les changements qui marquent l’évolution du domaine. Les précurseurs du changement décrivent les Règles de la Haye comme archaïques, injustes et non conforme au progrès. Elles sont connues comme le produit des pays industrialisés sans l’accord ou la participation des pays chargeurs ou en voie de développement.

Ainsi l’adoption des Règles de Hambourg signifie le remplacement du système précédent et non pas sa réforme. L’article 5(1) du nouveau système décrit un régime de responsabilité basé sur la présomption de faute sans recours à une liste d’exonération, de plus les nouvelles règles étendent la période de responsabilité du transporteur.

Les Règles de Hambourg ne sont peut être pas la solution idéale mais pour la première fois elle représente les intérêts de toutes les parties concernées et mieux encore un compromis accepté par tous. Cela dit, il est vrai que le futur prochain demeure incertain. Il est clair que la plupart des pays ne sont pas pressés de joindre ce nouveau régime aussi merveilleux soit-il.

Le débat demeure ouvert le verdict délibère encore. Une chose demeure sure, l’analyse détaillée du fonctionnement de Hambourg avec ses défauts et mérites est loin d’être achevée. Seulement avec le recul on peut chanter les louanges, la réussite ou l’insuccès d’un nouveau système. Par conséquent, le nombre restreint des parties y adhérents rend l’analyse difficile et seulement théorique. Néanmoins il y’a de l’espoir qu’avec le temps
l'objectif recherché sera atteint et qu'un commerce maritime régi par des règles et coutumes uniformes à travers le globe sera pratique courante. Entre temps la réalité du domaine nous expose à un monde divisé et régi par deux systèmes.
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LIST OF ABBREVIATIONS

AMC: American Maritime Cases.

ICC: International chamber of Commerce.

CMI: Comité Maritime International

UN: United Nations

UNCITRAL: United Nations Commission on International Trade Law

UNCTAD: United Nations Commission on Trade and Development
I would like to dedicate this work to my family who did not stop believing I could finish this thesis even when I stopped believing in it myself.
For my sister Vered who became my right hand during the writing of this paper and without her computer expertise this paper would never of seen the light of day
For my Brother Eric for being proud of me no matter what.
For my mother Monique and my father Armand for supporting and continually reminding me it was almost over and that I should not give up so close to the end.
For my grandfather Judah, may he rest in peace.

I would like to thank Me Guy Lefebvre for helping me find a stimulating topic and guiding me through it.

I would also like to thank Mme. Sirois for saving me on a few occasions near my deadline.
INTRODUCTION

Maritime trade is an evolving industry, one that has gone through many changes. Since the early days of shipping, maritime law has tried to adapt to the realities of its time. Change was slow and not always easy to achieve. Prior to statutory regulation the practical reality was such that carriers/shipowners managed to escape most if not all of their responsibilities. In the last century everything changed, the adoption of The Hague, Hague-Visby and Hamburg Rules transformed the whole system of carriage of goods by sea. Thus, the maritime industry was marked by gradual evolution and maritime law has undergone considerable development, with a more active judiciary.

Today’s carriers are more responsible and thus liable, nonetheless, the carrier’s duty to deliver goods safely to destination is not always possible. Each time a ship sails from port she and her cargo are at risk. Consequently, goods have been lost or damaged whilst in the custody of shipowners. Regardless of evolution and change in the operation and administration of the shipping industry, the reality is that carriage by sea is not full proof.

From the early days of maritime trade shipowners encountered all sorts of perils whilst in transit, and hence, the goods they carried were exposed to loss and damage. Every year, a large number of ships are lost at sea and with them the goods carried. All the modernisation in the world cannot eliminate the high risks they are exposed to during their voyage. By the time the Hamburg Rules were adopted in the late seventies, the number of ships lost at sea was still on the rise. As a result, the shipping industry and in particular shipowners were still facing the same old issues.
"En moyenne chaque jour un navire de plus de 100 tonneaux se perd corps et biens (ceci veut dire: navire et cargaison) et le chiffre croît: 473 en 1978. A ces sinistres majeurs viennent s'ajouter les multiples avaries dues au mauvais temps et les pertes pour de multiples raisons (marquage insuffisant, erreurs de destination...). Ces périls expliquent : (1) le système de responsabilité des transporteurs ; (2) la limitation de responsabilité des propriétaires de navires ;..." 1

The legal history of the shipowners system of responsibility and liability demonstrates how difficult it was for the judiciary to reach some sort of consensus and uniformity in dealing with these issues. All attempts to understand the disparate aspects of maritime trade implicitly assume some understanding of the shipowners role in this arena. History tends to emphasise the important role they hold. Consequently, to fully comprehend the working of the carriage of goods by sea, one needs to concentrate on its players.

Shipowners represent the means by which carriage of goods by sea is made possible. Their position is of great importance. However, their role has led to many unresolved issues, such as the responsibility and liability of shipowners in cases of loss or damage to the cargo they carry. In particular, the use of exception clauses exonerating shipowners from some or all liabilities. Over time, this practice reached a point of flagrant abuse and injustice. Thus, leaving the shipping world in a crisis and in desperate need of change.

1 René RODIÈRE, Le droit maritime, Presse universitaire de France, 1980, p. 26,
"At common law the shipowner, whether he carried the goods under a charterparty or under a bill of lading, could modify his prima facie liability as carrier as much as he wished, and in the course of the years the protective exceptions in these documents increased both in number and complexity to such an extent that a careful scrutiny of the documents became necessary in order to ascertain what rights they conferred against the shipowner."  

A general agreement existed amongst shippers, shipowners, maritime lawyers and authors, that a solution must be found to allow the regulation of shipping contracts, and in particular the use of bills of lading exception clauses, unjustly favouring one party at the others expense.

"Shippers and consignees, on their side, complained amongst other things that an unfair burden of proof was thrust on them whenever they had cause to try and establish the carrier's liability for loss of or damage to the goods during transit. Some means, therefore, had to be found to regulate the situation and provide for the balance being held fairly between the two sides. As sea carriage is largely international, it was obvious that little good would result from isolated action by one country alone."

For the longest time such general agreement did not exist. Nonetheless, the desire to achieve some sort of conformity amongst nations has led to several attempts at the private level, as well as at the national and international levels.

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Over the years, a number of conferences dealing with maritime shipping matters were held. Not one succeeded in its search for uniformity. As a result, the United States took matters in their own hands, and in 1893 adopted a domestic legislation to resolve this issue.

"Les réactions sont venues des Etats Unis, pays de chargeurs qui supportent mal un système qui les désavantage au profits des armateurs traditionnels, anglais, norvégiens, grecs... Le Harter Act de 1893 établit un système transactionnel, mais impératif..."

Hence, the exception clauses found in bills of lading were now regulated, and to a great extent limited. Nonetheless, the Act was more or less successful since its scope was far from international. Thus, the international maritime arena was still in search of a solution. A regulated solution, not one left to the voluntary agreement of the parties involved. By the beginning of the twentieth century, the use of bills of lading in carriage by sea was a well-established practice. Bills of lading were at the heart of the matter, since that is where most of the exoneration clauses were inserted. Their central role made it obvious that the solution to the problem evolved around them. Therefore, any sort of compromise in resolving the issue implied some regulation of shipowners use of bills of lading exoneration clauses.

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"In the years before and immediately after the 1914-1918 War, as the terms of bills of lading became more diverse, the need for standardisation became more and more insistent and increasing demand was made on the part of importers and exporters for the imposition by legislation, on the lines of the American Harter Act 1893, of certain minimum liabilities of sea-carriers who issued bills of lading."

The Hague Rules were the solution. It represented the new regime governing the responsibilities and liabilities of the carriers. Their goal was to create a system based on fair balance, as well as one that regulates cargo losses between shippers and shipowners. Consequently, the applicability of these Rules was limited to cases in which bills of lading or other negotiable document were issued.

Over time, their scope became international, and therefore they represented the basis of shippers and shipowners relationships in most parts of the world. By the 1960's the Rules had been incorporated in legislation enacted by the great majority of maritime nations all over the world.

"The 1924 Convention at the outset was opposed by the carriers who objected to the compromise affecting their exemption clauses, and also by the then-rudimentary organisations representing shippers. However, the crucial need for international uniformity stimulated legislative activity that led to widespread adoption of the Hague Rules."

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5 Sir Alan AMOCATA et autres, ibid., id. note 2, p. 410,
7 John G. HONNOLD, "Ocean Carriers and Cargo; Clarity and Fairness- Hague or Hamburg? ", (1993) 24 I.Mar.L. & Com., 77-78,
Nonetheless, in the late sixties, the Hague rules were amended. The amendments were adopted at Brussels on February 23, 1968 and were known as the Visby Protocol. They represented the response to modernisation and changes that have marked the shipping industry and that were not covered by the original Hague Rules.

Even with the changes brought forth by the Visby Rules, international criticism over the Hague and Hague Visby Rules persisted. Thus, in 1978, the Hamburg Rules were adopted to answer the growing dissatisfaction of shipper interests with regard to the Hague Rules, particularly amongst developing nations. Cargo owning nations always felt that the Hague rules were pro carrier interests. Shippers felt that there was no fair balance of interests amongst parties involved. Thus the adoption of the Hamburg Rules meant the implementation of a new regime to govern the relationship between cargo owners and carriers. Furthermore, accepting these new rules implied the end of The Hague Rules era and the beginning of a new one. Any state that became a contracting state to the Hamburg convention and which is also party to the Hague rules must repeal the Hague Rules once the Hamburg convention comes into force. So long as states do not enact to adopt the Hamburg Rules the carriage of goods by sea will remain governed by the Hague Rules.  

"It is beyond cavil that the Hamburg Rules alter the scheme of carrier liability. Gone are the limited duties of The Hague Rules, as are nearly all of the seventeen defence of Hague's article 4(2)-including the nautical fault defence."  


8 René RODIERE, Emmanuel de PONTAVICE, Droit Maritime, 12e ed., Dalloz, 1997, at p. 374, Martine REMOND-GOUILLOUD, Droit Maritime, 2e édition, Pedone, 1993 p.340 « Les Règles de Hambourg coupent court aux querelles de frontière avec les texte concurrents : tout État qui y devient partie doit dénoncer la Convention de 1924 ; cette dénonciation prend effet a l'instant ou les Règles entrent en vigueur a son égard (art. 31-1). Comme elles se veulent le modèle de l'avenir pour toutes les conventions de marchandises, leur champ d’application est le plus large possible...Ainsi les Règles de Hambourg s’octroient le plus large empire : plus que la Convention de 1924, même après l’élargissement de 1968, puisque le port de déchargement y est ajouté et la référence obligée au connaissement escamotée au profit du titre faisant preuve de transport ; »

Thus, The Hague Rules, the Visby amendments and the Hamburg Rules\textsuperscript{10}, all seek the same goal, to achieve international conformity. This paper will mainly concentrate on the analysis of The Hague and Hamburg Rules regarding shipowners responsibilities, liabilities and more precisely, their use of exoneration clauses liberating them from their responsibilities and liabilities.

Each set of Rules has a different method of approaching these issues. Thus, on the one hand, we will demonstrate how each system deals with the issues at hand, and on the other hand, we will stress the strong and weak points of each system. To start, we will trace an historical overview of the carriers system of responsibility and liability with their strengths and lacunas. It will be followed by the analysis of the relevant articles in each system. Thus, a detailed study of articles III(1) and III(8) stipulating the responsibilities and liabilities of carriers.

As well as an analysis of articles IV (1) and IV (2) of the Hague Rules which proclaim the carriers rights and immunities, and in particular which lists the seventeen exceptions found in article IV (2).\textsuperscript{11}


\textsuperscript{11} article IV(2) of the Hague Rules, " 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.
Subsequently, a brief analysis of the Visby amendments and the changes they propose in the carriers system of responsibility and liability will briefly be made. Finally, we will analyse the latest proposed Rules; the Hamburg Rules. Here again, we will trace the underlying principles of the carriers responsibility and liability system. A study of article V(1) of the Hamburg Rules which stipulates that a carrier, his servants and agents, have a duty to take all measures that could reasonably be required to avoid loss and damage to the goods, as well as exonerate the shipowner, will be closely outlined. Furthermore, a distinction between The Hague and Hamburg's approach will also be made. Each part will be concluded with a critical analysis of the Rules impact, with arguments in favour of or against maintaining them.

"The overriding question which faces governments and countries today in the field of carriage by sea is whether to continue to operate on the basis of the Hague Rules of 1924 (or the Hague Rules together with the Visby amendments of 1968) or, alternatively, to go over to a totally new regime and introduce the Hamburg Rules of 1978. Both these systems are codes, which essentially impose a duty of care on shipowners. Neither is based on a strict liability concept. Both systems reject freedom of contract in favour of imposing minimum standards of liability on shipowners. However, the systems are, in many respects, rather different, and, in order to exercise an intelligent choice, it is necessary to go into some of the detail."

(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 agents or representative.
(j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.
(k) Riots and civil commotion’s.
(l) Saving or attempting to save life or property at sea.
(m) Wastage in bulk of 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."

12 Peter KHON SOON KWANG, Carriage of Goods by Sea, by Anthony DIAMOND, "Responsibility for Loss of, or Damage to, Cargo on a Sea Transit: The Hague or
Once a state adhere to the Hamburg Rules there will no longer be a choice between two or more systems but rather a new regime (Hamburg) which will solely govern the carriage of goods by sea. We will conclude by siding with one system, the Hague Rules (or Hague/Visby) or the Hamburg Rules. Establishing that they are best suited for today's carriage of goods by sea, and more importantly by demonstrating that they are the one most able to achieve world wide acceptability and uniformity.
Introductory Chapter

A. HISTORY OF THE CARRIER'S LIABILITY - THE "ABSOLUTE LIABILITY" THEORY

Shipowners are fundamental to the regular functioning of maritime trade. History has demonstrated, that over time, their role became so important that it reached a point where they had unilateral control over most shipping matters. Thus, it is not contested that they have always had great power in the shipping world. However, their status, in terms of maritime law, was not always clear. What were they? Insurers or bailee’s?13

In the early days, defining what really constituted the carriers duties, obligations and liabilities, was not always a simple task. There was no formal or precise definition to rely on. Nonetheless, the common understanding everyone agreed on was that carriers had a duty to deliver the goods in their possession. Furthermore, this responsibility implied at any risk or cost. The goods were supposed to reach destination in the same condition as they were at the start of the voyage. Thus, as a general rule, shipowners were liable for any loss or damage that occurred to the goods they carried. An important question needed to be answered what was implied by liable and to what degree? The Civil and Common Law legal systems did not approach this issue in the same manner:

13 Richard R. SIGMON, Miller's Law of Freight Loss And Damage Claims, 4th ed, Allyn and Bacon, 1974, p. 2 “Just a century before the decision in Coggs v. Bernard, it was held in Southcote v. Bennet, 4 Coke 83b, Cro. Eliz. 815 (1601), that a bailee was liable for loss of goods even though his defense was that they had been stolen from him without his fault. The Rule of absolute liability of the bailee was thus recognized in clear terms and, with a minor exception, was the rule made applicable to all bailments.”
"While in England the emphasis in early times was placed upon the care and custody of the goods in the hands of the shipowner, in France the emphasis was on the suitability of the ship: if the ship was seaworthy, the goods would be secure."\(^{14}\)

B. THE COMMON LAW APPROACH

Under the Common Law regime carriers were held liable as insurers and their liability was absolute. The responsibility was very strict, and only in exceptional cases did it allow for exoneration from liability. In the late eighteen hundreds, a number of cases confirmed this theory, and thus, paved the way to the modern understanding we have of it.

In *Liver Alkali Co v. Johnson*,\(^{15}\) Brett J., then of the Exchequer Chamber, expressly addressed the issue of shipowners liability. He clearly expressed the view that this theory was an accepted English custom, and that a shipowner carrying goods for hire, carried them at his own absolute risk. The only acceptable exception was the act of God and the Queen's enemies. Furthermore, in *Nuget v. Smith*,\(^{16}\) Brett J. reaffirmed the opinion he held in *Liver Alkali Co v. Johnson*:

"The true rule is that every shipowner or master who carries goods on board his ship for hire is, in the absence of express stipulation to the contrary, subject by implication [...] by reason of his acceptance of the goods to be carried, to the liability of an insurer, except as against the act of God or the Queen's enemies [...] not because he is a common carrier, but because he carries goods in his ship for hire."\(^{17}\)

\(^{14}\) Malcolm Alistair CLARKE, *Aspects of the Hague Rules*, the Hague, Martinus Nijhoff, 1976, p. 113

\(^{15}\) Richard R. SIGMON, *Miller's Law of Freight Loss And Damage Claims*, 4\(^{th}\) ed, Allyn and Bacon, 1974, p. 6-7


\(^{17}\) *Liver Alkali Co v. Johnson*, (1872) L.R. 7 Ex. 267, and affirmed in the Exchequer Chamber (1874) L.R. 9 Ex. 338

\(^{18}\) *Nuget v. Smith*, (1875) 1 C.P.D. 19

\(^{19}\) *ibid.*, id. note 16, p.33.
As a result, most states accept the general maritime law principle, holding shipowners absolutely responsible for loss or damage to the goods. To escape such strict liability, the shipowner needs to prove not only that the loss does not result from his negligence, but also that it falls in one of the accepted exceptions.

Each State has its own acceptable exceptions. They vary and were not uniform. In England, for a long time, the only acceptable exceptions were the act of God or the Queen's enemies. In the United States we could find more exceptions, the shipper's fault, inherent vice of the goods, public enemies and the act of God.\(^{18}\)

Hence, the general rule was based on a no-fault basis. The carrier was liable without fault, therefore, making his responsibility very onerous and severe. Thus, supporting the view that the shipowner was an insurer. As shown, some uniformity regarding liability in cases of loss or damage to the cargo did exist amongst states. However, the irony with this theory lies in the fact that such absolute liability was not at all characteristic to those times,\(^{19}\) when capitalism and freedom of contract were at their peak and clearly in contrast

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\(^{19}\) Michael F. STURLEY, ibid., id. note 11, p.5., Robert GRIME, Shipping Law., 2 ed., London, Sweet & Maxwell, 1991, p. 159, Stewart C. BOYD, Andrews BURROWS, David FOXTON, Scruton on Charterparties and Bills of Lading, Twentieth edition , London, Sweet & Maxwell, 1996, p. 202 "The liability of an insurer , said to be undertaken, in the absence of express agreement, by all shipowners lending their vessels for hire, rests on the authority of Brett J. (later Lord Esher), who expressed that opinion in 1874, in the Liver Alkali case, and repeated it in 1875, in Nugent v. Smith, where he said, Denman J. concurring, "The true rule is that every shipowner or master who carries goods on board his ship for hire is...to the liability of an insurer,...Cockburn C.J., admitting that the point was not involved in the case, took occasion to dissent entirely from the view of Brett J. in a very elaborate judgement, in which he held that no such liability existed, but that shipowners, other than of general ships, were only bailees, and bound to use ordinary care and diligence. On this two questions arise(1) as to the history of the rule; (2) as to its present position. (1) As to its history , the view of Brett J. was that the common law of England as to bailments is founded on the Roman Law, that therefore bailees are liable
with such a theory.

History has shown that the strict liability theory, was not the accepted general rule amongst authors. Some authors argued that a distinction should have been made between common carriers and charter carriers. Thus, that the strict liability principle did not apply to all carriers, but only to common carriers. Consequently, the non-common carriers were only liable as bailee’s, implying that they were only expected to use ordinary care and diligence when the goods were in their custody.

The strict responsibility was very difficult to bear and in the nineteenth century carriers tried to show that they were not common carriers or used the freedom of contract concept to cover privately the carriage of goods by sea relationship between shippers and carriers. This allowed carriers to reduce or exclude their duty to take due care of the goods.

In *Nuget v. Smith*, Cockburn, Chief Justice of the Court of Appeal, refuted the view that the strict liability theory was the general rule, and argued that it was the exception to the rule. He went on explaining its origin, dating it back to the reigns of Elizabeth I and James I, who introduced it as an exception. Thus, he was of the opinion that the general rule was based on the duty to use ordinary care in trying to avoid loss or damage to the goods, and that the strict liability theory was not the ordinary rule, and therefore, should not be considered as such.

... only for ordinary care unless they fall within certain classes, who are absolute insurers, the historical origin of these classes being found in the Praetor’s Edict. This historical view was persuasively attacked by Oliver Wendell Holmes in his work on the Common Law. Cockburn C.J. took the view that the strict liability of carriers was introduced by custom in the reigns of Elizabeth I and James I as the exception to the ordinary rule that bailees were bound to use ordinary care. Holmes maintained that the stricter liability is the older of the two and that the present liability of carriers is therefore a survival of the old rules...

20 *Nuget v. Smith*, (1876) C.P.D. 423
The authors Payne and Ivamy's support the view that a common carrier has an absolute responsibility to the owner of the goods, the common carrier has the responsibility of an insurer. Thus, if a shipowner is not a common carrier he must only use due care and diligence with the goods carried, being liable as a bailee for hire only. Mr. O.W. Holmes disagreed with this view, and expressed the generally accepted opinion that the stricter liability (the absolute liability) is the older of the two, and consequently, the present system of liability draws its legitimacy from this old rule.

Scrutton, supports the view that the absolute liability theory only applies to common carriers, and charterparty carriers are only liable if they did not use reasonable care in handling the goods in their custody. On the other hand, Carver adopts the view that a carrier, whether common or not, is liable in its strictest sense.

"Carver's view is to be preferred because the reason of policy that led to strict liability for the common carrier would seem equally relevant to the shipowner whose ship is on charter."
The one principle everyone agrees on is that shipowners who are common carriers have an absolute liability in cases of cargo loss or damage. Subsequently, Lord Wright, of the Privy Council, in *Paterson Steamship v. Canadian Wheat* (and in *Coggs v. Bernard*), reaffirmed the Common Law position regarding the responsibility associated to the carriage of goods by sea. Thus, once more we have an example of the carrier’s responsibility being that of an insurer and not a bailee. In Canada the common Law position regarding the carriers strict responsibility applied until the adoption of the Hague rules in 1936.

C. WHY SUCH A STRICT RULE?

The objective of the strict liability theory should be viewed in association with the common shipping conditions of those times. In most cases, once the goods were in transit and no longer in the hands of the shipper, the only party that could know what happened to the goods, are the carrier and his crew. Furthermore, under such conditions, it was impossible for the shipper to prove that the carrier or his servants were negligent. It therefore seemed unjust, to say the least, to put this kind of burden on the shipper. Consequently, one can clearly find a logical justification for holding the carrier absolutely

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25 Michel POURCELET, *Le Transport Maritime Sous Connaissance Droit Canadien, Americain et Anglais*, Les Presses de l’Université de Montréal, 1972, p.5-9, *Hague-Maghreb Essays 3, Carriage of Goods by Sea, Maritime Collisions, Maritime Oil Pollution, Commercial Arbitration*, T.M.C. Asser Institute, The Hague, Sijthoff & Noordhoff, 1980, p. 4-5 « It is not surprising that in those countries that could be regarded as nations of importers and exporters and where the shipowners interests played a minor role, such as the United States, Canada and Australia, the first legislations were passed to restore the disturbed balance between shippers and carriers. In the United States the Harter Act was passed in 1893 and Canada followed with the Water Carriage of Goods Act 1910. .. The Hague Rules which formed the compromise between cargo owners and maritime carriers were to a large extent inspired by the Canadian Water Carriage of Goods Act and the Harter Act...”
responsible for the safe arrival of goods under his care:

"Goods in transit inevitably run the risk of being lost or stolen, damaged or destroyed. The risk can be reduced, but not eliminated, by physical precautions taken by those persons having custody of the goods during transit, which, for this purpose, may be regarded as beginning with the preparation of the goods for carriage at the place from which they are consigned and ending with their delivery to the consignee at their destination."²⁶

Hence, the carrier and his agents are the only one's with all the answers concerning what happened to the goods in transit. Furthermore, they are the only one's that physically can do something to avoid any loss or damage to the goods. Since the goods are within their custody, it is impossible for anyone else, and in particular the shippers, to intervene, and furthermore, to really know what happened to those goods.

In Riley v. Horne,²⁷ a clear explanation was given for the Common Law rule of strict liability: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their master and themselves. To give due security to property, the law has added to that responsibility of a carrier, which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer."²⁸

This rule of strict liability was hard to bear and resulted in carriers finding ways to escape liability. Initially Common Carriers liability for the goods carried was so onerous, the law held carriers responsible for the goods they carried against all events except for the act of God or public enemy hence, the practice to insert a number of exoneration clauses in the carriage contract began.\textsuperscript{29} The Contractual freedom of the parties aloud carriers to negotiate maritime contracts on a private basis with no constraint. This situation was not altered in shipowning states in particular England who carried a substantial part of the world trade. However, nations who were substantially representative of cargo interests i.e. the US contested these maritime customs and in 1893 attained a first compromise with the Harter Act.

\textsuperscript{29} Richard R. SIGMON, Miller’s Law of Freight Loss and Damage Claims, 4\textsuperscript{th} ed., Allyn and Bacon, 1974, p 59 “One of the briefest statements of the common carrier’s Liability is that of Justice Oliver Wendell Holmes in the Common Law ([ Boston:Little, Brown and Co., 1881], p. 180): “A common carrier is liable for goods which are stolen from him, or otherwise lost from his charge except by the act of God or the public enemy.”
D. THE FREEDOM OF CONTRACT CONCEPT

The freedom of contract concept is a very old Common Law principle, well established and accepted. In modern day some of its original strength has been lost, due to legislative and judicial intervention. The Hague and Hamburg conventions both reject the freedom of contract concept and put forth a system based on minimum standards of liability. However, in the early years of maritime law, this concept was at its peak. Freedom of contract implied absolute freedom with no statutory or judicial intervention.

Since the law of contract regulated carriage by sea, the common law rule of strict liability applied only when no contract regulated the parties' relationship. Thus, the principle imposing strict liability on shipowners was not at all representative of the common practice of those times. In principle, it remained the accepted theory, but in actual reality shipowners found ways to escape such severe obligation. Liabilities were reduced by catalogues of immunities and exemptions.

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30 Robert P. GRIME, Shipping Law, London, Sweet & Maxwell, 1978, p. 80-81 “The history of the common carrier has had its effect,...He was, as it was sometimes said, the “insurer” of the shippers goods. As a result, from early times, he sought, by law and by contract, to restrict or limit this heavy liability...Another restriction was the practice of using contractual stipulations to reduce the liabilities...Uncontrolled and unpredictable exclusions meant that the rights which bills of lading represented might vary considerably and consignees or purchasers from them might be prejudiced by contracts made on disadvantageous terms by the original shipper of the goods. To bring some stability into the system, ... The Hague Rules in 1921 produced a set of rules to govern the liabilities of carriers by sea. The Hague Rules were intended to be introduced into contracts and provide a predictable and fair distribution of liabilities between carrier and cargo owner.”,
Martine Remond-Gouilloud, Droit Maritime, 2e édition, Pedone, 1993 p. 406-407,
Richard R. SIGMON, Miller’s Law of Freight Loss And Damage Claims, 4th ed., Allyn and Bacon, 1974, p. 5 ”Under the common law, a common carrier was free to contract against liability for loss or damage due to causes other than his own negligence.”,
"La détermination de l'étendue de la responsabilité de l'armateur devrait avoir une très grande importance, mais, cette importance est très atténuée, parce que l'étendue de cette responsabilité est toujours fixée à l'avance par les parties, lors de la rédaction du contrat de transport. Les chartes-parties et les connaissances, rédigés d'après des formules imprimées, prévoient avec soin toutes les hypothèses dans lesquelles la responsabilité du transporteur se trouverait engagée et suppriment ou modèrent cette responsabilité."31

The insertion of exoneration clauses became so abusive and at the same time the accepted practice, a maritime custom. What all of this meant in practice was that carriers were no longer held liable for any wrongdoing.32

E. THE CIVIL LAW APPROACH

In the Civil law, as well as in the Common law approach, the origins of the shipowners liability theory are traced back to Roman law:

"La responsabilité du transporteur, au regard du Common Law aussi bien que des codes écrits s'inspirant du droit romain, était très stricte et a survécu pendant plus de deux mille ans."33

Nonetheless, under the Civil law approach, the emphasis was not put on the care given to the goods in the carrier’s custody, but rather on the ship itself. The notion of seaworthiness was at the base of this approach. The idea was to have a ship in good condition fit to deliver the goods. This position should be viewed with the knowledge that, in the early years and in most circumstances, the shipowner was also the captain of the ship. Consequently, the captain \ shipowner was held directly responsible for the loss or damage to the goods on his ship. Furthermore, he was expected to provide a seaworthy ship, and hence, this obligation was described as a guarantee. Therefore, courts did not distinguish between captains and shipowners, and treated all captains as shipowners. As a result, the strict liability theory developed:\(^\text{34}\)

"Seaworthiness may be defined as the state of a vessel in such a condition, with such equipment, and manned by such a master and crew, that normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage."\(^\text{35}\)

The seaworthiness obligation represents the culmination of past practices of a period when shippers were part of the transit, and still in possession of the goods. The Common Law approach regarded the situation from the premise that carriers were responsible for the goods they carried regardless of the fact that shippers were part of the voyage. Consequently under the Civil Law approach the emphasis was not on the custody of the goods, but rather, on the ship itself:\(^\text{36}\)

\(^{34}\) Malcolm Alistair Clarke, *ibid., id.* note 14, p. 114, Robert P. GRIME, *Shipping Law*, London, Sweet & Maxwell, 1978, p. 103 "In effect, the absolute obligation of Seaworthiness and ‘cargo-worthiness is replaced by the Rules with an obligation to use due diligence.” (Until the advent of an international agreement limiting the carriers liability, carriers had an absolute obligation regarding seaworthiness), *Steel v. State Line* (1887) 3 A.C. 72 at p. 86, Raoul P. Colinveaux, *Carver on Carriage By Sea*, 11th ed, London, Stevens & Sons Limited, 1963, p. 108 “The shipowner is liable at common law for failure to make the ship seaworthy in fact, although he may have taken all reasonable pains and precautions to do so. He undertakes absolutely that she shall be fit, on sailing upon the voyage, to carry the cargo which she has on board....”


\(^{36}\) Malcolm Alistair CLARKE, *ibid., id.* note 14, p.114
"When something was let on hire, the primary obligation of the owner was that the thing be fit for the purpose contemplated, that the horse be sound for normal riding, and thus that the ship be fit to put to sea." 37

With maritime carrier modernisation the lack of emphasis on the goods became an apparent problem. Maritime practices and customs changed, the liner trade evolved making it unnecessary for shippers to be part of the voyage. Thus, changing the focus and with it the shipper's interests. Seaworthiness was no longer the central issue, and consequently, the Common Law approach, with its concern for the custody of the goods, resurfaced. Hence, the maritime operations of the ship were no longer the shippers concern, on the other hand, the safe arrival of the goods to destination became its main preoccupation.

Regarding the burden of proof issue, the Civil Law tradition followed a similar reasoning as the one found in the Common Law approach. It accepted the view, that, since the shipper was not part of the voyage, it had no real way of knowing what happened to the goods in transit. As a result, it should not have the burden of proving so. Thus, there appears to be a presumption that carriers are the one with this obligation. Subsequently, courts were hard on carriers since they were the one who had the upper hand when it came to evidence and knowledge on how the loss or damage to the goods occurred. 38

38 Malcolm A. CLARKE, ibid., id. note 14, p. 118, Robert P. GRIME, Shipping Law, London, Sweet & Maxwell, 1978, p. 101-102 "Common carriers were treated with very great suspicion. This was probably partly because, in medieval times, carriers were in a good position to enter into agreements with thieves and pirates and share the spoils at the expense of the cargo owner. It might also have had its origin in the political needs of trading country such as Great Britain to ensure the safety of its carrying trade for foreign merchants. It has also been argued that carriers by sea are always treated similarly to common carriers, at common law, even if their business does not properly fall within the accepted definition of a common carrier...”, E.R. Hardy IVAMY, Carriage of goods by sea, 13th ed., London, Butterworths, 1989, p. 98, Raoul P. COLINVAUX, Carver Carriage by Sea, 11th ed., Vol I, London, Stevens & Sons, 1962, p. 128
By the early nineteen hundreds, the civil law and common law approach reached a theoretical uniformity. Both systems were in agreement to hold carriers responsible in the strictest sense. Nonetheless, the similarity was mostly theoretical. In theory the Common Law and Civil Law accepted the freedom of contract approach however, in practice, the civil law tradition was not as accepting of the freedom of contract concept:

"Se basant sur le principe de la liberté contractuelle reconnu par la common law et les droits écrits, les armateurs ont cherché à insérer dans les connaissances des clauses visant non seulement les exceptions admises par la common law, mais aussi les autres risques de mer en vue d'échapper à leur responsabilité. L'usage ainsi fait de la liberté contractuelle a permis au transporteur de se dégager de presque toutes ses responsabilités même si la perte ou le dommage subi par les marchandises étaient dus à une faute ou négligence de sa part."

The two systems differed in their acceptance of the use of exception clauses and in particular the applicability of the freedom of contract concept. As a generally accepted rule, the law of contract regulated carriage by sea. However, in Civil law jurisdictions, the courts were not lenient with shipowners that were constantly trying to escape their liability. Thus, not every exception incorporated in a contract was accepted. The practical reality was such, that in States of civil law tradition some sort of liability still existed, unlike the common law system.

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Xantho (1887) 12 A.C. 503, Smith, Hogg v. Black Sea & Baltic [1940] A.C. 997,

39 Malcolm Alistair CLARKE, ibid., id. note 14, p.117 “English law had reached a position comparable to that of French law on carriage under bills of lading, ... the two countries new liability that was similar - in theory. In practice there was considerable divergence, the English shipowners had used and abused the freedom of contract allowed by English law, a freedom not accorded so readily to their French counterparts, ... the similarity of liability was apparent rather than real: a difference in degree, i.e. in the number and extent of the exceptions, had become a difference in kind, and the position of the English shipowners could almost be described as no liability with certain exceptions.”


41 Malcolm Alistair CLARKE, ibid., id. note 14, p.117
F. THE END TO THE ABSOLUTE LIABILITY THEORY AND THE PRE-HAGUE ERA

By the late eighteen hundreds, the underlying issues regarding the shipowners responsibility and liability became critical. In practice, carriers managed to escape their responsibilities and liabilities, therefore creating a situation of chaos with no uniformity and predictability in the law. The unrestricted use of exoneration clauses became a problem associated to bills of lading.

Bills of lading always held a central place in the regular course of shipping transactions, not only as a contract, but also as a document of title and trade. A person holding a bill of lading acquires rights and liabilities that usually follow with its possession. Since bills of lading are contracts of adhesion, on the one hand, they give carriers enormous advantages, and on the other hand, they limit shipper’s rights in these matters. In theory carriers and shippers were supposed to have equal economic and bargaining powers. Since their existed no mandatory legislation to govern their relationship both parties were supposed to defend their respective interests. Early on it became apparent that the market circumstances and economic conditions were more favourable to carriers who abused these advantages to escape liabilities. Over time with the maritime industry technical evolution in navigational instrument and the fact that shippers no longer required to charter the whole ship to carry their goods, they only needed a limited space for their cargo, increased carriers advantage over shippers.42

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42 *Watkins v. Rymill* (1883) 10 QBD 178, *Richardson, Spence & co and Lord Gought SS Co v. Rowntree* [1894] A.C. 217, *Crooks v. Allan* (1879) 5 QBD 38, C.F. POWERS, A Practical Guide To Bills Of Lading, New York, Oceana Publications, Inc., 1966, p. 2-8, *Esso Belgium v. Nathaniel Bacon* [1951] A.M.C. 1435 at p. 1440 (U.S. Court of Appeals) “...the individual shipper has no opportunity to repudiate the document agreed upon by the trade, even if he has actually examined it and all of its twenty-eight lengthy paragraphs...This lack of equality in bargaining power has long been recognised in our law:...”, Martine REMOND-GOUILLOUD, Droit Maritime, 2e édition, Pedone, 1993 p.331 «La position de faiblesse du chargeur – nous sommes en présence de cette formule économique déséquilibrée que l’on qualifiera plus tard de contrat d’adhésion –, lui interdit toute négociation contractuelle : il doit en passer par les clauses du transporteur...»
Thus, in practice, shipowners use standard type contracts that allow them to escape all responsibilities and liabilities, simply by inserting all sorts of exception clauses in their bills of lading. By the early nineteen hundreds, the increasing amount of exceptions that could be found in the bills of lading were so great diverse and complex, it became very apparent that the situation got out of control. It became a grave problem of international maritime law in pressing need of a remedy.

So many exception clauses could be found that an attempt to establish an exhaustive list of them turned out to be a mission impossible. Nonetheless, Scrutton has attempted to draw a detailed list establishing most of the exceptions. Demonstrating how serious the situation was and supporting the view that some sort of change was needed. The seriousness of the situation is quite obvious since any excuse to avoid responsibility found itself an escape by becoming an exoneration clause as a result Scrutton took on the task to

43 Sample of a Himalaya bill of lading clause Exemptions and immunities of all servants and agents of the Carrier “It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants from time to time (including independent contractors as afore-said) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading.”

enumerate the most commonly used exceptions. He demonstrated how over the year's carriers managed to escape responsibility and liabilities. This list encompasses almost all-case scenarios used by carriers to counter their responsibility.

**G. THE HARTER ACT**

The United States were amongst the first nations to try and settle the growing problem related to the exoneration clauses. The U.S. goal was to defend shipper interests. Until then, the general practice has been favourable to the shipowners interests. Furthermore, the bargaining balance of power between shippers and shipowners was unfair.

Shippers in need of carriers to transport their cargo had no other choice than to accept the shipowners conditions for the voyage. The situation reached a point that shippers were in such a weak position, they no longer had a say regarding which clauses should or should not be inserted in their bills of lading. However, in practice, the U.S. courts were not easily favourable and accepting of all exoneration clauses. In some instances, they simply refused to accept those clauses, and in effect, limited their applicability.45

" During the 19th century, courts of the United States and a few other countries held that carriers' bill of lading clauses that disclaimed responsibility for negligence violated public policy; other courts, notably in the United Kingdom, enforced these disclaimers. 46

45 Pan American world Airways, Inc. V. california Stevedore & Ballast Co., 559 F.2d 1173 (9th Cir. 1977), Tapco Nigeria, Ltd.. v. M/V Westwind, 702 F.2d, 1255 (5th Cir. 1983)
Since US courts were sensitive to cargo owners concerns regarding carriers use and abuse of exoneration clauses, it came as no surprise that in 1893, the United States started the movement for change. Their objective was to remedy the inequalities in the power of bargaining. Thus, they adopted a national legislation to regulate the responsibility and liability of carriers. Known as the Harter Act, and named after its founder, this legislation formalised for the first time the carrier’s duties and obligations. The U.S. Congress voted for the Harter Act on February 13, 1893. This new law put an end to the previous system, which was based on the freedom of contract principle and the voluntary agreement amongst parties. This innovative statute rendered illegal the arbitrary use of exoneration clauses. The main objective of the Harter Act was to achieve a fair balance between shippers and carriers interests. The Act limited the use of exoneration clauses. Subsequently, any clause which tried to exonerate the carrier from his obligation to care for the goods in his custody, was declared invalid.\textsuperscript{47}

"Under bills of lading incorporating the American Harter Act 1893 (which by section 1 provided that it was not lawful for the shipowner to insert in a bill of lading any clause relieving him from "liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed" to his care)..."

Furthermore, the carrier had the duty to use due diligence in supplying a seaworthy ship and, on the other hand, it would not be held liable for loss and damage due to error in the navigation and management of the ship. It was also the first time that a statute distinguished between error in management or navigation of the vessel from a commercial error associated with the management of the cargo. The Act stated that the shipowner could not exonerate himself from error in management of the cargo, but only from errors in the management or navigation of the ship, so long as due diligence was used.

\textsuperscript{48} Sir Alan Amocata et autres, ibid., id. note 2, p. 443-444
As a result, Canada, Australia and New Zealand, were some of the nations that followed the American example. And thus, the Harter Act was for its time a great innovator and predecessor to future international conventions. The Harter Act inspired Canadian Law which followed with the Water Carriage of Goods Act sanctioned May 4, 1910 and modified May 19, 1911. Furthermore, the Harter Act and the Canadian Water carriage of Goods Act served as examples and inspired the adoption of the Hague Rules. Canada did not ratify or accede the Brussels Convention of 1924. It adopted the Hague Rules into National law i.e. the Carriage of Goods by Water Act in 1936, the Canadian Act only applies to outward bills of lading i.e. carriage from a Canadian port.  

H. THE FIRST INTERNATIONAL ATTEMPTS AT UNIFORMITY

Why do we really need international uniformity? W. Tetley answered this question with 3 principles.\(^5\)

1) Uniformity of Law
2) Certainty of law
3) Justice

According to Tetley the uniformity of law is especially important in maritime law context due to the high number of ships that pass from one jurisdiction to another. Having a uniformity of law would eliminate the practice of forum shopping. The certainty of law would ensure citizens of the world would know their rights and obligation no matter where events arose. The concept of justice emanates from the ideal to attain fair, equitable and just rights and obligations for all parties concerned.

For the longest time, it was believed that a solution to the insertion of exoneration clauses in bills of lading could be resolved in practice on a voluntary basis without any state intervention. The idea was to avoid States regulation and intervention. Until then, a functional international solution to this problem did not exist, and would only occur with the adoption of the Hague rules. However, the adoption of the Harter Act by the United States, and later followed by some commonwealth states, paved the way to international conferences dealing with these issues. The future showed that the adoption of the Harter Act was of great importance in helping achieve some sort of future international uniformity and cohesion.\(^5\)

\(^5\) William TETLEY, Marine Cargo Claims, 2 ed., Toronto, Butterworths, 1978, p.40-45, at p. 41 "In the Riverstone Meat (Muncaster Castle) decision, Viscount Simonds Stated: "To ascertain their meaning (the Hague Rules) it is, in my opinion, necessary to pay particular regard to their history, origin and context..." Viscount Simonds then referred to the Conference of Brussels of 1922 and 1923, the United States Harter Act of 1893, the Australian Sea Carriage of Goods Act of 1904, and the Canadian Water carriage of Goods Act of 1910."

Attempts at solving this problem with non-regulation were unsuccessful. In the late eighteen hundreds, the Association for the Reform and Codification of the Law of Nations (which adopted its modern name in 1895, to the International Law Association) tried to find a solution and attain international uniformity in international matters and in particular, in maritime law matters. Therefore, in 1882 the Association held, in Liverpool, a conference dealing with bills of lading matters. Shippers and carriers were amongst the parties that attended the conference where a model bill of lading was adopted. Thus, the adopted standard bill of lading was to be known as the Conference form, and was available amongst parties, on a voluntary basis.\(^52\)

"The central element of this compromise was the conclusion that the carrier should be liable for negligence "in all matters relating to the ordinary course of the voyage," such as the stowage and care of the cargo, but should be exempt from liability for "accidents of navigation," even though losses might be attributable to the negligence of the crew. In addition, the draft introduced the concept of a carrier's obligation to exercise "due diligence" to make the vessel seaworthy...and included a list of specific "exceptions"... for which the carrier would not be responsible."\(^53\)

However noble the objectives were, uniformity was not attained and in practice, the model bill of lading was not working. Regardless of the fact that the goal sought was not reached, the main features adopted at the Liverpool Conference would resurface in future conferences. Thus, its objectives became an example for future attempts at uniformity. In 1885, the Association held another conference, the Hamburg conference. At this conference, the aim was to adopt a different solution to the problem. Thus, instead of adopting a model bill of lading, the idea was to adopt a set of rules that could be inserted voluntarily in the bills of lading.\(^54\)

\(^53\) Michael F. STURLEY, \textit{ibid.}, \textit{id.} note 52, p. 7
\(^54\) Please refer to Annex A for Historical Chart
Here again, the attempt to attain uniformity failed. However, the method used was the adoption of a set of rules, which also remained an example for future attempts.\footnote{55} By the early nineteen hundreds the need to find an international solution was pressing. The situation was such that more and more states were trying to handle the issue of exoneration clauses with domestic legislation. The aim to attain uniformity of law amongst nations was not a reality. The International Law Association was not successful in its attempts at finding an international solution.\footnote{56}

The Comité Maritime International (CMI created in 1897) also began work in trying to find a solution for specific maritime matters. Under the direction of the CMI, negotiations were started between shipowners, shippers and insurers. However, the International Law Association did not give up and by 1921 at The Hague meeting, the differing interests groups adopted The Hague Rules. The CMI modified these rules in 1922, and at the 1924 Brussels diplomatic conference, they were officially adopted as the current Hague Rules. It was the first time that an international approach at solving the problem succeeded.\footnote{57}

\footnote{55} Michael F. STURLEY, \textit{ibid.}, \textit{id. note} 52, p. 8
\footnote{57} G. ASSONITIS, \textit{ibid.}, \textit{id. Note} 33, p. 202, Robert P. GRIME, \textit{Shipping Law}, London, Sweet & Maxwell, 1978, p.81, Stewart C. BOYD, Andrews BURROWS, David FOXTON, \textit{Scutiton on Charterparties and Bills of Lading}, Twentieth edition, London, Sweet & Maxwell, 1996, p. 404-405, Edgar GOLD, \textit{Maritime Transport}, Massachusetts, Toronto, Lexington Books, 1981 p. 207-209 "\textit{Of great importance was the adoption in 1924 of the Bills of Lading Convention- the famous "Hague Rules"-...This convention solved a number of great problems in international contracts of affreightment caused by the diversity of national contractors and the excessive use of "negligence" and "exemption" clauses, which gave little or no protection to the shipper of goods...The need for uniform international legislation was quickly recognized, but it was to take several decades of difficult negotiations before agreement could be reached...These rules were eventually molded into a convention by the CMI and finally emerged in 1924 as the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading. It was a remarkable achievement.}"
PART I THE INTERNATIONAL SOLUTION TO THE CARRIERS LIABILITY SYSTEM: THE HAGUE AND HAGUE VISBY RULES

Chap 1 - THE HAGUE RULES

By the beginning of the twentieth century, the issue of bills of lading exception clauses divided the world in two opposing groups of nations. On the one hand, we had ship­owning nations. On the other hand, we had cargo-owning nations. The pre-Hague system was one sided, totally favourable to carriers, as was seen with the abusive use of the freedom of contract concept and the insertion of exoneration clauses in bills of lading and later with the use of standard type bills of lading. Achieving some sort of compromise between the two opposing interests groups turned out to be difficult to attain. 58

The United Kingdom was under tremendous pressure from the Dominion States who were mostly shipper interests States and who were very hostile to the contract of adhesion that the English carriers imposed on them. Therefore, under the initiative of the government of the United Kingdom, the Hague Rules were introduced. The United Kingdom, having the largest shipping fleet in the world, was in the best position to initiate such legislation.

Consequently, on August 25, 1924 the International Convention for the Unification of certain rules of law relating to bills of lading was signed at Brussels.\textsuperscript{59} The novelty with this new system lies with its mandatory effect on the contracting parties.\textsuperscript{60} The central goal of the rules was to divide cargo losses between carriers and shippers. Thus, giving concessions to one side implied taking away rights from the other side.\textsuperscript{61} The Hague Rules were perceived for a certain time at least, as an acceptable compromise between the differing interests groups. To further comprehend the compromise, one needs to look closely at the features they represent.

\textsuperscript{59} Ibid., id. Anthony DIAMOND in Peter KHON SOON KWONG, p. 110, Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N. T.S. 155, 1931 Gt. Brit. T.S. No. 17, Jean PINEAU, Le contrat de transport, Montréal, Les Editions Thémis, 1986, p.166-167, M.J. Shah, « The Revision of the Hague Rules on Bills of Lading within the UN System – Key Issues » in Samir MANKABADY, The Hamburg Rules on the Carriage of Goods By Sea, London, A.W. Sijthoff-Leyden/Boston, 1978, p. 4 « Three main points need perhaps to be particularly noted regarding the Hague Rules. First, opposition by the shipowners’ lobby was only overcome by unremitting political exhortation from the British Dominion and several Continental European countries; and much of the motivating force impelling these countries (strongly supported by United States legal and commercial philosophy) was directed against the nullification of the carte blanche afforded carriers by common law to exculpate themselves from negligence, a unique privilege denied other entities in most legal systems...Secondly, freights did not apparently rise as the direct result of the introduction of the Hague Rules...Thirdly, the Hague Rules compromise retained (and this remains the major issue today) the main carriers’ exceptions from liability, and particularly those relating to negligence in management and navigation, perils of the sea, fire, etc...”

\textsuperscript{60} René RODIERE, Emmanuel de PONTAVICE, Droit Maritime, 12\textsuperscript{e} ed., Dalloz, 1997, at p. 375 «Dans le même ordre d’idées, la Convention précise qu’elle ne s’applique impérativement qu’aux « cargaisons commerciales ordinaires, faites au cours d’opérations commerciales ordinaires »,... p.339 « Ces règles impératives s’appliquent inéluctablement à toute la période qui va depuis la prise en charge de la marchandise par le transporteur jusqu’à sa livraison à l’ayant droit. »

sec 1 THE CARRIER'S RESPONSIBILITY

The carrier's system of responsibility is outlined in article III of the Hague Rules. Rule 1 of Article III can be considered as one of the most important and also one of the most controversial.

Article III(1) reads: 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.

Article III(1) has generated some confusion and uncertainty, as well as brought up some obvious questions. The "due diligence" concept, what does it imply? On who rests this obligation? When does it apply? What is meant by "seaworthiness"?

The Hague Rules did not provide a detailed guide with specific instructions, on how to interpret these provisions. This task was left to the judiciary. Since no particular court was aimed at, national courts from around the globe took on the duty to answer these questions. Thus, the amount of cases dealing with these issues is enormous, and not always clear.

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63 Chester D. Hooper, testimony before the “Subcommittee on Surface Transportation and Merchant Marine”, “Committee on Commerce, Science and Transportation” United State Senate, April 21, 1998
paragraph 1 THE STANDARD OF CARE:- the "Due Diligence" obligation

Prior to The Hague Rules carriers had the obligation to provide a seaworthy vessel. Since it was an absolute obligation, proving that one was "due diligent" was not enough. However, with the adoption of the Hague Rules carriers only need to prove due diligence to show that the vessel was seaworthy.\(^{64}\) Thus, the new regime imposed a due diligence standard of care. It became central to the carrier's system of responsibilities and immunities. Thereafter, a search for a better understanding of the due diligence concept and its implications began.

The due diligence obligation was described in the case of *Grain Growers Export Co. v. Canada Steamship Lines Ltd.*\(^{65}\), where the court ascertained that the duty of due diligence is not merely a praiseworthy or sincere, though unsuccessful effort, but such an intelligent and efficient attempt as shall make it so, as far as diligence can serve:\(^{66}\)

"Due diligence to make the vessel seaworthy may be defined as genuine, competent and reasonable effort of the carrier to fulfil the prerequisites set out in art. 3(1)(a), (b) & (c) of the Rules."

With such a vague definition, one cannot help and ask what is a reasonable effort or an intelligent and efficient effort? There is no one formal answer, each case has to be tried on its facts and merits. As a result, the amount of cases dealing with this issue is large, and to find only one applicable definition is difficult. Consequently, the cases covering this topic are not unanimous in their findings.\(^{68}\)

\(^{65}\) (1918) 43 O.L.R. 330, (1919) S.C.R. 643
\(^{66}\) ibid., id. note 65, p. 330
\(^{67}\) William TETLEY, *ibid.*, id. note 35, p. 165

Chester D. Hooper, testimony before the "Subcommittee on Surface Transportation and Merchant Marine", "Committee on Commerce, Science and Transportation" United State Senate, April 21, 1998, "*In addition, several nations have amended their laws governing the carriage of goods by sea to laws other than Hague/Visby or Hamburg.*"
The due diligence obligation is essential to the carrier’s regime of responsibility. In 1950, the Canadian case of Toronto Elevators Ltd. v. Colonial SS. Ltd. set a precedent. The court explained that the obligation stipulated in article III(1), was not a simple obligation but a pre-condition to article IV(2). Thus, to benefit from the provisions of article IV(2), the "due diligence" obligation first must be fulfilled.

The famous case of Maxine Footwear v. Canadian Government Merchant Marine confirmed the opinion of the Canadian court. Lord Somervell of the Privy Council restated the accepted view that article III(1) was an overriding obligation and a prerequisite to article IV(2). It established that "before and at the beginning of the voyage" meant before the loading of cargo has commenced and until the ship weighs anchor to sail.

The American jurisprudence is unclear and confused on this issue. This confusion stems from the fact that American justices were exposed to the Harter Act before the Hague Rules adoption. The US Congress enacted the Carriage of Goods by Sea Act. As a result their decisions demonstrate a confusion to distinguish between the differing rules set in each Act. Demonstrated in Firestone Syn. Fibers Co. v. Black Heron and in Bernstein Co. v. M/S Titan, two of the many cases.

Over the years, various courts of various countries have interpreted the Hague Rules and Hague/Visby Rules somewhat differently. As a result, the law governing the carriage of goods is now confused.”

[1950] Ex. C.R. 371
[1959] 2 Lloyd’s Rep. 105
[1964] A.M.C. 42
[1955] A.M.C. 2040
The Harter\textsuperscript{75} Act stipulated that the duty of due diligence had to be proved in every respect. On the other hand, the American national law COGSA\textsuperscript{76} which is the Hague Rules with slight modifications stipulated that due diligence need only be proved in respect to the loss claimed. The enactment of the US COGSA in 1936 limited the applicability of the Harter Act to domestic trade, the COGSA applies from the time the goods are loaded on board, and from the time they are discharged from the ship until proper delivery has occurred. The Harter Act can still apply before the goods are loaded and after they are discharged from the vessel. Not directly exposed to the Harter Act, the Canadian and English positions are clearer and more constant. Therefore, they are the one that should be followed.\textsuperscript{77}

\textsuperscript{75} Harter Act, 1893, 46 U.S. Code App. 190-196
\textsuperscript{76} Carriage of Goods by Sea Act 1936, 46 U.S. Code App. 1300-15
\textsuperscript{77} William TETLEY, Marine Cargo Claims, 2 ed., Toronto, Butterworths, 1978, p. 154, Jean PINEAU, Le contrat de transport, Montréal, Les Editions Thémis, 1986, p.169, Union Steel America Co. v. M/V Sanko Spruce, 14 F. Supp.2d 682, (D.N.J. 1998), the court held that the Harter Act imposed a duty on carriers to deliver the cargo from wharf to wharf, to notify the consignee of the arrival of the ship, and to protect the goods until the consignee removes it in reasonable time. Wemhoener Pressen v. Ceres Marine Terminals, Inc., 5 F.3d 734, (4\textsuperscript{th} Cir. 1993), The Harter Act will apply to damage which happened before loading and after discharge of goods until proper delivery, since COGSA does not cover those periods. Nonetheless, the COGSA permits the parties (carriers and shippers) to enter into a special agreement that extends the responsibility and liability coverage of the COGSA to the periods before loading and after discharge of the goods. Neither the Harter Act or the COGSA apply once proper delivery has occurred, Allied Chemical Int'l Corp. v. Companhia de Navegação Lloyd Brasileiro, 775 F.2d 476, (2\textsuperscript{nd} Cir. 1985). 89 L. Ed.2d 903 (1986), B. Elliott (Canada) Ltd. v. John T. Clark & Son, 704 F.2d 1305 (4\textsuperscript{th} Cir. 1983)
A. When should "due diligence" be exercised?

The case of *Maxine Footwear Co. Ltd. v. Canadian Government Merchant Marine Ltd.*[^78] defined the meaning of art. III(1) "before and at the beginning of the voyage". Meaning the period from at least the beginning of the loading until the vessel starts her voyage, it covers the whole period from beginning of loading until sailing. It could also include the time before loading.[^79] In the court opinion, the word "before" does not only mean at the commencement of loading since it is not stated as such, it could also be before loading started when the goods were still in the custody of the carrier. However, if unseaworthiness is detected after the required period, the carrier will not be responsible, so long as due diligence was exercised.

"Due diligence must be exercised “before and at the beginning of the voyage” which means before loading of cargo has commenced and until the vessel weighs anchor or slips. The exact moment of the beginning of the voyage is difficult to determine. One gathers it is when all hatches are battened down, visitors are ashore and orders from the bridge are given so that the ship actually moves under its own power or by tugs or both. Thus it is submitted that the controversial decision in *SS. Sud* is correct. There the vessel, while leaving a dock with the assistance of a tug, was swung around and struck the dock. It was held that the voyage had commenced. It has been held that when some act to make a vessel seaworthy can be done at sea and is properly planned to be done at sea, then the vessel is not unseaworthy when she sails."[^80]

[^78]: [1959] 2 Lloyd’s Rep. 105,
B. What happened to the common law theory of stages?

The common law theory of stages implied that a ship needed to be seaworthy at each stage of the voyage. If it were not, it would be held responsible for the loss or damage to the goods it carried. However, with the adoption of the Hague Rules, this theory no longer applied. Article III(1) of the Rules clearly expressed when the carrier's duty applied. The obligation is only at the port of loading. But a controversy remained over the timeframe between the operation of loading and the start of the voyage. Does the duty of due diligence apply to the period of time between those two activities?

"Le Conseil privé a retenu la responsabilité du transporteur en énonçant que l'obligation de navigabilité devait être exercée durant toute la période s'étendant du début du chargement jusqu'au départ du navire. Les juges ont renoncé à appliquer la doctrine des "stages" en invoquant le principe de l'uniformité internationale. Ils interprétèrent le texte des "Règles de la Haye" en faisant abstraction des décisions judiciaires antérieures. De plus, ils estimèrent qu'il serait pour le moins étonnant que le devoir d'exercer une diligence raisonnable cesse dès le début des opérations de chargement pour réapparaître ensuite juste avant le départ du navire."  


arrange for adequate bunkers of a proper kind at San Pedro."
C. On whom does the obligation of due diligence apply?

The carrier has the obligation to exercise due diligence in his operations to make the ship seaworthy. However, one wonders if this obligation is a unilateral one dependant solely on the carrier, or can it be delegated to others. In cases of delegation, the responsibility rests on the carrier in the advent of loss or damage to the goods. 82

In the well-known case of *The Muncaster Castle- Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co.* 83, the court gave the answer. It held, that the duty of due diligence was non-delegable. That the carrier had a vicarious liability for the default of his agents and servants in their due diligence duty to make the ship seaworthy. Furthermore, in cases of sub contractors hired by him, and failing to exercise due diligence, the carrier remains liable, and is therefore, not entitled to the benefits of article IV(2) found in the Rules. The argument was, that a shipowner cannot shed his obligation of due diligence by hiring a competent firm to make his ship seaworthy. Thus, their failure to use due diligence is his failure.84 The reality is such, that it is in the courts hands to decide upon looking at the facts, if due diligence was used or not by the sub-contractors:

82 William TETLEY, *Marine Cargo Claims*, 2 ed., Toronto, Butterworths, 1978, p. 168 « *The carrier may employ some other person to exercise due diligence, but if the delegate is not diligent, then the carrier is responsible. It is not sufficient to declare that the delegate was chosen with diligence or that the delegate was a responsible person...* »


"Le transporteur ne peut s'exonérer de responsabilité en prouvant qu'il a exercé cette diligence raisonnable en confiant à des experts le soin de mettre le navire en état de navigabilité. A cet égard, on doit se demander quelle est la valeur des certificats de navigabilité ou d'inspection émis par l'inspecteur du lloyd ou par les experts des chantiers navals où le navire fait périodiquement l'objet d'une inspection. La production de certificats de visite et d'inspection ainsi que les attestations d'experts constituent une présomption favorable pour le transporteur, mais il ne s'agit pas d'une présomption irrefragable..."\(^85\)

Consequently, it is up to the judiciary to decide when due diligence was used or not, since the "due diligence" test was not commonly used in maritime law cases prior to its incorporation. There is no formal rule or guide that we can follow to determine what is implied by the due diligence concept in maritime matters, and therefore, the domain remains unpredictable.\(^86\)

"La multiplicité des causes d'exonération ouvertes au transporteur fait parfois taxer La loi maritime d'indulgence excessive. Mais d'une part ces cas d'exonération ne sont admis, a l'étranger au moins, que si le transporteur prouve avoir fait diligence."\(^87\)

\(^85\) M. POURCELET, Le transport maritime sous connaissance, Montréal, Les presses de l'Université de Montréal, 1988, p. 67

\(^86\) The Convention for the Unification of Certain Rules Relating to International Carriage by Air October 12, 1929 478 U.N.T.S. 371 also known as The Warsaw Convention. Under the Warsaw Convention the carrier is presumed liable upon simple proof of damage or loss to the cargo. The International Convention Concerning the Carriage of Goods by Rail, May 9, 1980 also known a CIM. The Liability system under the CIM has been assessed to be based on absolute liability, strict liability or system of liability without fault i.e. art. 27(1). As for the Convention on the Contract for International Carriage of Goods by Road, Geneva, May 19, 1956 also known as CMR the basis of liability is a presumption of liability against the carrier once the cargo owner has established the fact of the loss or damage.

\(^87\) Martine REMOND-GOUILLOUD, Droit Maritime, 2\textsuperscript{e} édition, Pedone, 1993 p.374
paragraph 2 THE SEAWORTHINESS THEORY

The notion of seaworthiness is not a novel one. It dates back to the beginning of shipping time, when shipowners had the absolute duty to make their ship seaworthy. What does seaworthiness mean? On a great number of occasions the courts have had the opportunity to ponder this issue.

"Seaworthiness means many things - a tight hull and hatches, a proper system of pumps, valves and boilers, and engines, generators and refrigeration equipment in good order. A seaworthy vessel must be equipped with up-to-date charts, notices to mariners and navigating equipment; the crew must be properly trained and instructed in the ship's operation and idiosyncrasies. Equipment must be properly labelled; diagrams must be available and posted." 88

In Reed v. Page 89, Lord Scrutton explained why the theory of seaworthiness can cause confusion. The confusion stems from the fact that seaworthiness implies two obligations. The first is to have a ship fit for sail or the expected voyage, and the second is, to have a ship fit to receive the goods carried (to have sufficient ventilation, refrigeration...).

89 (1927) 1 K.B. 743
Hence, the notion of seaworthiness covers many things, an efficient and adequate system of pumps, boilers, generators, valves, engines, refrigeration machinery, a staunch hull and hatches. It also covers the crew, officers and master, who must be adequately qualified and properly trained in all the relevant and necessary features of the operation of the vessel. Furthermore, equipped with instruction manuals and guides, and able to counter any reasonable and foreseeable eventualities.

"Seaworthiness may be defined as the state of a vessel in such a condition, with such equipment, and manned by such a master and crew, that normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage".

The judiciary has had a great task, and in many cases a difficult one, in interpreting article III(1). Nonetheless, today we can state with enough confidence, that most questions have been answered, and most concepts are not as abstract or unclear. Thus, equipped with an enormous case law from world-wide spectra, can we now state, that we have reached universal conformity on the issue? Unfortunately history has demonstrated that such is not the case.

"In 1978, the United Nations Commission on International Trade Law finished drafting a completely different set of rules, the Hamburg Rules. Uniformity suffered as a result. In addition, several nations have amended their laws governing the carriage of goods by sea to laws other than the Hague/Visby or Hamburg. Over the years, various courts of various countries have interpreted the Hague Rules and Hague/Visby Rules somewhat differently. As a result, the law governing the carriage of goods is now confused."

90 William TETLEY, ibid., id. note 35, p. 157, Canada Steamship Lines Ltd. V. Desgagne [1967] 2 Ex C.R. 234
91 Chester D. Hooper, testimony before the "Subcommittee on Surface Transportation and Merchant Marine", "Committee on Commerce, Science and Transportation" United State Senate, April 21, 1998, Roger Clarke, "Cargo Liability Regimes", prepared for the OECD (Organisation for Economic Co-Operation and Development) Maritime Transport Committee, January 2001 p.11 "There is consequently a growing concern among governments and industry over the unnecessary complexities, delays and costs that the growing diversities inflict on international trade, and there is a correspondingly enhanced desire for the establishment of a single regime that countries around the world would agree to apply consistently."
A. THE HAGUE RULES AND BILLS OF LADING CLAUSES (i.e art III(8), IV(1), and IV(2)).

Article III(8)\(^{92}\) states that it is not acceptable to insert any clause covenant or agreement in a contract of carriage aiming the exoneration from liability or the lessening of liability for the loss or damage that arose from the carrier or ship’s negligence, fault or failure in fulfilling the duties and obligations, that are set out in this article. This article therefore limits the carrier’s ability to escape liability and thus, such clauses are considered null and void and given no effect.

The main goal of article III(8) is to eliminate conflict and confusion regarding the effect of any bills of lading clauses, and hence, to bring some security in a field where such cohesion was long overdue. Thus, once a bill of lading is issued, any incorporated clause derogating from the standard set in the Hague Rules, will be held invalid and given no effect. The novelty of such an article lies in the fact that, for the first time, a formal document at the international level set mandatory-standards to be followed uniformly by carriers issuing bills of lading.\(^{93}\) The Rules established basic standards of responsibility to which carriers could not escape simply by using exoneration clauses. Furthermore, in cases of conflict between a bill of lading clause and the Hague Rules, the Rules will prevail:


\(^{93}\) René RODIERE, Emmanuel de PONTAVICE, Droit Maritime, 12\(^{e}\) ed., Dalloz, 1997, at p. 339 and p. 379 « La Convention établit, comme notre loi interne, un système impératif de responsabilité. Elle pose le principe que « le transporteur sera tenu, avant et au début du voyage, d'exercer une diligence raisonnable' pour mettre le navire en bon état de navigabilité, l'armer, l'équiper et l'approvisionner et, pour mettre en état convenable les lieux où la marchandise sera entreposée (cals, magasins, chambres frigorifique...), Jean PINEAU, Le contrat de transport, Montréal, Les Éditions Thémis, 1986, p.197 « On rappellera, enfin, que ces dispositions s'appliquent impérativement durant le temps qui s'écoule depuis le chargement des marchandises a bord du navire jusqu'à leur déchargement du navire (art. I (e) R.L.H.). », Martine REMOND-GOUILLOUD, Droit Maritime, 2\(^{e}\) édition, Pedone, 1993 p.373 « Aussi ce régime est-il
"The Brussels Convention of 1924, by limiting the carrier's power to exculpate itself, was a very early precursor of modern thinking in this respect. The Harter Act, adopted 31 years before the Hague Rules, was an even more extraordinary forerunner." 94

The objective of the Hague Rules and particularly article III(8) of the Rules, was to create a sense of fairness and balance amongst shippers and carriers. Incorporating this article made such an objective a reality. Furthermore, in practice, the judiciary that dealt with it (art. III(8)), found it to be a straightforward rule with no hidden meaning or ambiguous interpretation. The article is concise, clear, simple and to the point. Whenever, a bill of lading clause tries to exculpate carriers from their responsibilities below the minimum standard set in the Hague Rules, art III(8) will intervene and nullify it. In Can National SS v. Bayliss, the court expressed the opinion regarding the use of exception clauses within the Hague Rule system.

"The defence resting upon the bill of lading exception referred to can have no separate effect and becomes merged in the exceptions contemplated by art. IV rule 2(q). In other words, such clause does not give to the carrier any greater protection than he has under said subsection (q)." 95

Thus, the carrier cannot allot himself more security than the rules permit, and in the case he does, it will be nullified with the application of Hague's art. III(8).

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Sec 2 - THE CARRIERS RIGHTS AND IMMUNITIES

Article IV of the Hague convention\(^\text{96}\) covers issues of carrier responsibilities and immunities. It starts with art. IV rule (1) which restates the carriers duties and obligations.

"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 provision of paragraph 1 of art. 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."

As stated, art. IV (1) sets the basic framework of carriers rights and immunities. Its purpose has been to serve as a review of art. III and a preview of art. IV (2) and its list of exceptions. Article IV(1) serves as a reminder, of all the carriers responsibilities, outlining once more the importance of the seaworthiness concept, as well as, the carrier’s due diligence obligation and burden of proof in cases of loss or damage to the goods carried.

A memory check is one way to construe the reiteration of the carrier duties and obligations, set forth in art. IV (1). Thus, avoiding misunderstanding with interpretation and application. Furthermore art. IV (1) serves as a pre-requisite for carriers wanting to use art. IV (2) and its list of exceptions. The message is clear, carriers have a mandatory duty to fulfil their obligations, before any successful use of art. IV (2) can be made. Thus, articles III and IV (1) are used to set the minimum standard carriers issuing bills of lading must observe. Once such obligation is fulfilled, carriers can try and escape liability by using one of the exceptions found in art IV (2). Consequently, an essential element of the Hague Rules is to be found in art. IV (2).

Since the early days of shipping and long before the adoption of The Hague Rules, the list of exceptions that are found in art 4(2) were part of the every day maritime reality. One may then wonder why such controversy, conflict and more precisely, division in the shipping world, over the interpretation and importance allotted to this rule. Thus, to comprehend the complexity more accurately, one needs to know what this particular article stipulates.

Art. IV (2) reads as follow:

"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 commotion.
(l) Saving or attempting to save life or property at sea.
(m) Wastage in bulk of 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 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 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. "

No. 17
Upon reading art. IV (2), one is not surprised that so much has been said and re-said regarding this article. At first glance, one might get the impression carriers can escape any responsibility and exonerate themselves with no great difficulty. In practice the enormous caseload on the issue has shown that the applicability of art. IV (2) is not so simple, nor easy. One must always keep in mind that art. IV (2) of The Hague Rules does not work alone, the carriers obligations of seaworthiness and due diligence are not easily proven, and consequently without it the use of art. IV (2) is impossible. Furthermore, the carrier has the duty to prove what caused the loss or damage to the goods before he could make use of any one of the 17 listed exceptions. Hence, if the cause of loss or damage to the goods does not fall within one of the 17 listed exceptions, the carrier cannot exculpate himself.

Article. IV (2) is by far the most tried rule of the Hague Rules and therefore, the most heard of and known within the industry. Since the adoption of The Hague Rules, carriers have always tried to exculpate themselves by referring to the Hague list of exceptions. Thus, the courts have had ample opportunity to try and retry all of these exceptions. Consequently, culminating with controversy surrounding the Hague Rules lack of cohesion and unanimity regarding the meaning given to each of the exceptions. ⁹⁷

paragraph 1 - THE EXCEPTIONS TO LIABILITY

ARTICLE IV (2) AND THE LISTED EXCEPTIONS

A. Art. IV (2)a, i.e. also known as: ERROR IN THE NAVIGATION OR IN THE MANAGEMENT OF THE SHIP

Article IV (2) a, is considered the most important exception of the Hague Rules. It gave rise to an enormous caseload and a multitude of interpretations. The origin of this rule goes a long way back, further back than the Hague Rules adoption in 1924. It can be traced to the common practices of the early shipping days, when carriers incorporated in their bills of lading similar exception clauses, a.k.a "negligence clauses". Years later the American Harter Act of 1893, in art. III. adopted a similar rule.

The origin of this rule can be linked to the early days of sail when the owner lost control of his ship once it vanished in the horizon. It can also be linked to the "accident of navigation excepted” clauses seen in the early bills of lading forms and later in the 1880's inserted by the P&I clubs. One thing is sure, “accident of navigation” or “errors of navigation” clauses excusing the carriers were common practice.98

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The interesting aspect of this rule lies in the distinction it makes between, error in the management and administration of the ship on the one hand, and error in the handling of the cargo, on the other hand. Article IV (2) a. of the Rules, is specific on at least one issue, clearly stating, that only in cases of error in the navigation and management of the ship, the carrier/shipowner will not be held responsible. By omission it implied that fault in the handling of the cargo is not covered, and therefore, not exemptible.99

"Faute nautique et faute commerciale ne sont pas placées sur le même plan. La faute nautique se détache sur un fond de faute ou de faits qui engagent la responsabilité du transporteur. Il faut la définir avec l'idée sous-jacente que ce qui n'entrera pas dans cette définition tombera dans le sort commun, c'est-à-dire dans la masse des causes, connues ou inconnues, qui engagent la responsabilité du transporteur." 100

The courts stipulated that a clear distinction should be made between error in management of the ship on the one hand, and error in the handling of the cargo on the other. Such distinction being none existent in the formal text of The Hague Rules. Consequently, the courts agreed that since the rules were silent on the issue of error in the handling of the cargo it meant that carriers should be responsible in such cases. The difficulty with this rule has been to define what is meant by error in the management of the ship, from error in management of the cargo. Practice has demonstrated that fulfilling this task is far from being simple;101

99 Martine REMOND-GOUILLOUD, Droit Maritime, 2e édition, Pedone, 1993 p.376 « En acquérant valeur légale l'exonération s'est précisée : il s'agit seulement de « l'erreur in the navigation and the management of the ship » soit d'une faute dans la navigation ou l'administration du navire ; par opposition, le transporteur reste tenu des fautes commerciales, les « errors in the management of the cargo ». L'interprétation de ces formules a donné lieu à d'innombrables difficultés. »
100 René RODIÈRE, « Faute nautique et faute commerciale devant la jurisprudence Française », (1961) 13 D.M.E., 451-452
101 Kalamazoo Paper Co. v. C.P.R. [The Nootka] [1950] S.C.R. 356; [1950] 2 D.L.R. 369, [1951] A.M.C. 165 The Supreme Court held that failing to pump efficiently is an error in the management of the ship on the ground that the purpose of the pumping was to save the ship.
"... le réclamateur et le transporteur donnent aux fautes qui sont l’antécédent du dommage une qualification différente, le transporteur soutenant qu’il faut y voir une faute nautique et son adversaire qu’il n’en est rien." ¹⁰²

The first step the courts follow is to determine what was the cause of loss or damage to the goods, then to decide whether such cause was the result of error in the navigation or management of the ship or error in the handling of the cargo; ¹⁰³

"La difficulté naît en pratique de l’absence de démarcation très nette entre la faute nautique et la faute commerciale ainsi qu’en témoignent les décisions jurisprudentielles en la matière. En effet, une faute dans la navigation ou l’administration du navire peut avoir des conséquences désastreuses à l’égard de la cargaison transportée ; l’erreur ou l’omission constitue-t-elle effectivement une faute nautique ou n’est-elle pas plutôt une négligence dans les soins à apporter dans le transport de la marchandise ? À défaut de précisions dans les textes de lois tant à l’échelon national qu’international, il faut dans l’appréciation de la faute à l’origine du dommage et pour la détermination de sa nature véritable se référer à certains critère désormais bien établis par les tribunaux." ¹⁰⁴

The difficulty in dealing with this rule lies in the fact, that no clear definition to work with was given to the courts. Consequently, a grey zone exists regarding what constitutes an act or omission affecting the ship, from one that affects the cargo. On the

¹⁰² René RODIERE, ibid.id., note 100, p. 452
¹⁰³ Gosse Millerd Ltd. v. Can. Government Merchant Marine 29 Ll. L. Rep. 101 and 190; [1928] 1 K.B. 717. The dissenting opinion of Greer L.J., in the court of appeal (and upheld in the House of Lords 32 Lloyd L.R. 91; [1929] A.C. 223) at p. 200 “If the cause of the damage is solely, or even primarily a neglect to take reasonable care of the cargo, the ship is liable, but if the cause of the damage is a neglect to take reasonable care of the ship, or some part of it, as distinct from the cargo, the ship is relieved from liability; for if he negligence is not negligence towards the ship, but only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved.” In the case at hand the court held that it was not an error in the management of the ship since the repairman working on the ship made an error in taking off tarpaulins used to cover the cargo and thus affecting the cargo who was damaged by rain, Foreman & Ellams Ltd. v. Federal Steam Navigation Co. 30 Lloyd L.R. 52 at p. 62, [1928] 2 K.B. 424
¹⁰⁴ M. POURCELET, Le transport maritime sous connaissance, Montréal, Les presses de l'Université de Montréal, 1972, p. 97
other hand, the process of determining what constituted error in the navigation of the ship
did not cause the courts difficulty or confusion. It was performed with no great complexity,
unlike the task of defining what constituted management of the ship.

"La faute dans la navigation est une négligence, une erreur, une omission dans la
conduite du navire. Il s'agit donc d'une faute purement technique : sont considérés
comme des fautes dans la navigation, l'erreur de manœuvre aboutissant à
l'échouement du navire, le mauvais choix du mouillage, un accostage défectueux,
une vitesse excessive par temps de brouillard, une faute dans le choix de la route
maritime, etc."\textsuperscript{105}

Thus, defining "error in the navigation" has not been a very complicated task and
has not given rise to much confusion. The courts in dealing with this issue refer to national
and international rules and conventions relating to navigational matters. Canadian courts
followed the Carriage of Goods by Water Act of 1936 (national law) and the Hague Rules
(international convention). The United States use the Carriage of Goods by Sea Act of 1936
Th UK use the Carriage of Goods by Sea Act 1924 and 1971. France also adopted a national
Law in 1936 and later modified it in 1966. Prior to this, courts used the 1900 Merchant
Shipping Act, the parties contract of carriage and the negligence clauses that were inserted
to determine what was meant by error in the navigation, since carriers inserted clauses that
were able to exonerate them from such error in the navigation.

However, the same cannot be said for error in the management of the ship. Defining
management of the ship has turned out to be more complex and burdensome. It did not
follow a pre-established meaning and did not have a specific or technical definition
explaining the ambiguity in such a task.\textsuperscript{106}

\textsuperscript{105} M. POUCELET, \textit{ibid.,id.} note 104, p. 97, Jean PINEAU, \textit{Le contrat de transport},
Montréal, Les Éditions Thémis, 1986, p. 201-203
\textsuperscript{106} Stewart C. BOYD, Andrews BURROWS, David FOXTON, Scrutton on Charterparties
The courts might face an additional problem when they encounter cases in which the cause of loss is traced, to an error that results from negligence that can be seen as both, error in the management of the ship, and default in the handling of the cargo. Courts dealing with similar situations, expressly stated, that an error cannot be defined at the same time as both a fault in the management of the ship and of the cargo. Nonetheless, in practice the same error can affect both the ship and the cargo, and in these cases, the carrier can avoid responsibility only if it can prove that the original purpose of the error/act was aimed towards the ship and not the cargo. 107

"En d'autre termes, il faut se demander à quoi tendait l'acte au cours duquel la faute a été commise et distinguer ce qui devait intéresser le navire de ce qui devait intéresser la cargaison. Intéresser n'est pas concerner. Un acte intéresse le navire lorsqu'il est entrepris dans son intérêt et non pas lorsqu'il concerne les organes du navire." 108

In Gosse Miller Ltd. v. Can. Government Merchant Marine,109 the dissenting opinion of Greer L.J. stated that the carrier will be held liable, only if the damage is linked to neglect in taking reasonable care of the cargo. But, if the damage is linked to neglect in taking reasonable care of the ship, distinct from the cargo, the carrier will be relieved from liability. However, if the neglect in failing to use the apparatus of the ship was to protect the goods, the carrier will be held liable.110

108 René RODIERE, ibid., id. note 100, p. 454
110 ibid., id. note 109, p. 200, Jean PINEAU, Le contrat de transport, Montréal, Les Editions Thémis, 1986, p. 201
Therefore, in determining what constitutes an error in the management of the ship, the courts need to decide what was the primary purpose of the act or omission that caused the loss or damage to the goods carried. Hence, in *Kalamazoo Paper Co. v. C.P.R.*\(^{111}\) the court stipulated once more, that in determining what can be considered management of the ship, it is of the outmost importance for the courts to look at the original purpose of the act or omission.

In the case at hand, the ship servants failed to efficiently pump the ship, such an act would of saved the vessel and the cargo it carried. Hence, the primary function of the act was to save the vessel, even if, with it, the cargo carried was also saved. Consequently, the error was primarily in the management of the ship and not the cargo.

The courts, dealing with the issue of error in the management of the ship, faced a long and hard road ahead of them. Since the causes of loss are not always clear in order to be able and decide whether the origin of the loss or damage was really an error in the management, or rather an error in the care given to the cargo, it was necessary for them to define each act or omission.

In dealing with these issues, the controversies and difficulties arose. Courts from around the world, with differing backgrounds and legal systems, were expected to interpret acts and omissions with the same end results. In practice it was not possible to attain uniformity and cohesion. The caseload demonstrates the difficulties encountered trying to reach the desired uniformity. For instance in the cases of *Gosse Millerd Ltd. v. Canadian Government Merchant Marine*\(^{112}\) and *International Packers London Ltd. v. Ocean Steamship Co. Ltd.*\(^{113}\) the courts arrived to contrary decisions for similar situations. In the first case the court held that taking off tarpaulins used to cover the cargo was not an error in the management of the ship but rather an error in the management of the cargo, since the error only affected the cargo. In the latter case the court found that it is erroneous to

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\(^{111}\) [1951] A.M.C. 165  
\(^{112}\) [1929] A.C. 223
consider that tarpaulins and wedges are primarily intended for the protection of the cargo and thus judged the error as an error in the management of the ship.

"Le point de savoir si l'on est en présence d'une faute nautique " est souvent discuté devant les tribunaux et les solutions de notre jurisprudence n'ont pas été toujours cohérentes."114

For example, in Hershey Chocolate Corp. v. SS. Mars115, the court held that heading into a storm and consequently closing off ventilators, resulting in the loss of the cargo, was an error in the navigation and management of the ship. However, in C.N.R. v. E. & S. Barbour Ltd.116, the court held that a ship maintaining his course, in view of bad weather and ice, was not considered an error of navigation.

Nonetheless, over time and with an increased number of tried cases, some sort of general acceptance in the interpretation of the rule was reached. Thus, the act of "ballasting" was defined as error in the management of the ship117 (subject to some exceptions)118. The act of maintaining course through a storm, instead of slowing down, causing the loss or damage to the cargo was defined as error in the handling of the cargo.

"Les tribunaux ont retenu la faute nautique dans les cas suivants : introduction d'un tuyau d'eau en vue du ballastage du navire, dans un réservoir destiné à recevoir la

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113 [1955] L.L.L.R. 218
117 Bernstein Co. v. Wilhelmsen [1956] A.M.C. 754., “The sea water would not have been in the deep tank, had not it been determined that the ship should be ballasted to trim her for heavy weather...the act of ballasting to trim had as its main and principal aim the general care and safety of the whole vessel to protect ship, crew, cargo, freight...” McKinnon Co. v. Moore-McCormack Lines [1959] A.M.C. 1842., Orient Ins. Co. v. United SS. Co. [1961] A.M.C. 1228., Tribunal de Commerce de Marseille July 7, 1950; 1951 D.M.F. 398., Point Chico [1941] A.M.C. 1468
However, in cases where two separate errors exist, one in the management of the ship and the other in the care of the cargo, the carrier will be held responsible, so long as he does not prove the damage done by each separate error. Thus, the carrier must prove the cause of loss, as well as demonstrate that the loss derives from only one type of error, error in the navigation or management of the ship, and not error in the care of the cargo. The carrier, first of all, must prove the cause of the loss, then due diligence to make the vessel seaworthy and, finally, the defence of error is open to him. The onus of proving that the act or omission was, in effect, an error in navigation or management of the ship is on the carrier; (the person relying on an exception, usually must prove the exception).


120 William TETLEY, Marine Cargo Claims, 2 ed., Toronto, Butterworths, 1978, p. 173 “As pointed out above, where the single error is both in the management of the ship and in the care of the cargo, the carrier normally is not responsible, because the error is, in effect, relative to the whole venture. Where, however, there are two separate errors, one in the management of the ship and one in the care of the cargo, the carrier must be able to separate the damage done by each, otherwise he will be responsible for all damage.”, (Oak Hill) Eisenerz-G.m.b.H. v. Federal Commerce & Navigatio Co. Ltd. [1975] 1 Lloyd’s Rep. 105 the supreme court held that in case there are two errors and that you cannot separate the two the carrier will be held responsible.

121 William TETLEY, ibid., id. note 64, p. 104, Jean PINEAU, Le contrat de transport, Montréal, Les Editions Thémis, 1986, p.198
The caseload on rule IV (2)a is enormous, it is the most known, used and controversial. Its adoption was followed by years of hard labour, first by trying to understand it, define it, set its boundaries, and later, most importantly, in trying to create some universal interpretation, accepted and followed by all judiciaries world wide.

Today, we can state with enough confidence that some of the goals set early on, were met. The maritime world today, in dealing with art. IV (2)a, has a better and clearer image of what the article stands for, due in great part to the work of the judiciary.\(^{122}\) However, for the few situations where the rule is not clear, where no uniformity exists, cargo interests (in shipping states and developing countries) step forward and argue that formal guidance is needed, with well established definitions, accepted by all parties involved (cargo and carrier interests) to be followed globally.

"... notre jurisprudence... Privée de guide, elle a généralement donné la solution équitable. Mais ses décisions donnent trop souvent, par la pauvreté de leurs motifs, l'impression que les tribunaux disent la faute "nautique" lorsqu'ils leur paraît juste de libérer le transporteur et la qualifient de "commerciale" quand il leur paraît équitable de le condamner."\(^{123}\)

Shipping states request a more precise rule to quiet the insecurities and controversies emanating from the adoption of the error in the navigation and management of the ship exception. Some shipper oriented states further argue that the best solution to avoid confusion would be to eliminate this exception altogether.\(^{124}\)

\(^{122}\) Chester D. Hooper, testimony before the “Subcommittee on Surface Transportation and Merchant Marine”, “Committee on Commerce, Science and Transportation” United State Senate, April 21, 1998, “Uniformity with regard to cargo loss and damage existed in a great majority of the maritime world when COGSA 36 was enacted by the United States. The unity was based on the Hague Rules which were finalized in 1924. They were enacted domestically, with minor exceptions, as the United States Carriage of Goods by Sea Act in 1936, and were ratified by the United States with the same exceptions in 1937.”

\(^{123}\) René RODIÈRE, \textit{ibid.},id note 100, p. 459

\(^{124}\) Chester D. Hooper \textit{ibid.},id. note 122
B. THE FIRE EXCEPTION IV (2)b

The fire exception is the only immunity in the Hague Rules that departs from the other listed exceptions. Also known, as the special exclusion of The Hague Rules, this article got preferential treatment long before the rules were adopted. From the early days of shipping, fire has been the greatest and most devastating peril of the seas. As a result, this exception has been treated differently. Before the adoption of the Rules, the fire issue was already legislated in Britain and the U.S., and was also given a special status. The early legislation’s exempted the carrier in cases of loss and damage due to fire. Therefore, it came as no great surprise that the fire exception was treated differently, when the Hague Rules were adopted:

"Fire has always fallen into a special category because of the introduction into the law of special statutes excusing shipowners from liability for loss of or damage to cargo caused by fire. For example, the British government passed a fire statute as early as 1786. The U.S. Fire Statute was passed in 1851 as a part of the Shipowners Limitation of Liability Act. These statutes, which predate the Hague Rules, and are still in effect, excuse a shipowner in respect of loss or damage by reason of fire."

Hence, art. IV (2)b of the Hague Rules exonerates maritime carriers for loss or damage to cargo caused by fire. However, other carriers are not subject to such exoneration. Land and air carriers are not entitled to the same fire exemption. Maritime carriers are getting privileged treatment, and are only held responsible in cases where the fire is caused by their actual fault or privity. The courts trying this article needed to interpret its scope and

127 William TETLEY, ibid., id. note 64, at p. 111 “Under the Hague Rules, carriers by water are not responsible for damage to cargo caused by fire. This is a special right which is not given to land carriers and bailees, who usually have little defence for damage by fire.”
meaning. What does fire and actual fault or privity imply?
Under the Hague Rules a carrier who is trying to exonerate himself with art. 4 (2)b of the Rules, must first establish the actual cause of loss and that he used due diligence\textsuperscript{128}, before being able to benefit from any of the 17 exceptions, this includes the fire exception. Once these requirements are fulfilled, carriers must make sure that fire was the actual cause of loss. Thus, "fire" implies some glow and flames, not mere heat. In the case of \textit{Buckeye State}\textsuperscript{129} the court held that damage to the goods carried i.e. grains due to heat emanating from light bulbs left on in the holds was not damage caused by fire, and therefore, the fire exception did not apply. In \textit{Tobacco Co. v. SS. Katingo Hadjipatera}\textsuperscript{130} the court held that the carrier is responsible to damage that is the result of actual fire. Smoke is not sufficient to exonerate the carrier under art. 4(2)b of the Rules, it is necessary for the fire to engage flames that actually damaged the goods.

Maritime law has undergone considerable development in recent years and moved away from the more lenient attitude adopted in the early days of shipping. Initially, courts were willing to construe this exception liberally. However, over the years, courts also went through changes, and thus, were no longer so tolerant in their application of the exception.

Today, courts interpret the fire exception narrowly. Thus, fire implies some flames, not only heat or smoke\textsuperscript{131}. Furthermore, the fire exception applies to carriers and owners of the ship not guilty of actual fault or privity\textsuperscript{132} in causing the fire, and does not apply to the master and crew i.e. employees or agents. Therefore, there is a need to establish a direct link between the carrier, the cause of fire and the loss or damage to the goods carried. Carriers

\textsuperscript{128} \textit{American Mail Line v. Tokyo M. & F. Insurance Co.} [1959] A.M.C. 2220 “...it is the duty of the carrier to use reasonable precaution...the carrier failed to take the measures which a reasonably prudent person would have taken to control the fire after it knew or should have known of the existence in No.1 hold. This duty exists irrespective of who was primarily responsible for the setting of the fire...”

\textsuperscript{129} [1941] A.M.C. 1238.

\textsuperscript{130} [1949] A.M.C. 49.

\textsuperscript{131} \textit{American Tobacco v. SS. Katingo Hadjipatera}, [1949] A.M.C. 49.

\textsuperscript{132} William TETLEY, \textit{ibid.}, id. note 64, at p. 112-113 “The fault and privity of the carrier must be the fault of the carrier himself and not merely of an employee or agent. This means normally a senior employee or officer of the company”, \textit{Maxine Footwear co v. Can. Government Merchant Marine} [1956] Ex. C.R. 234.
are not responsible, for the fault of their officers and crew in starting the fire. However, the carrier has a duty to use due diligence in making the ship seaworthy, hence, hiring able and competent crew to deal with such hazards.\textsuperscript{133}

One cannot forget the obligation of due diligence, irrespective of which exception we are going to use. The carrier's duty of due diligence and seaworthiness art. III (1) of the Hague Rules still apply, and represent a mandatory standard the carriers cannot escape. The court clearly stated its view on this issue in \textit{Maxine Footwear c. Canadian Government Merchant Marine Ltd}\textsuperscript{134} where it stated that art. III(1) of the rules is an overriding obligation. Consequently, courts dealing with the fire exception must be able to decide upon looking at the facts what is the actual cause of fire. They must also be convinced that the carrier is himself (and not his employees) guilty of such cause and therefore that the cause is directly linked to the carrier and that the privity and fault requirement is fulfilled. Above all, they must make sure that the carriers duty of seaworthiness and due diligence i.e. Article III(1) has been proven before granting any immunity\textsuperscript{135}.

In cases where the cause of fire cannot be established, the carrier is exonerated of any responsibility. Carriers manage to escape responsibility and cargo owners have no way to prove actual fault or privity. The fire exemption is far from being uncontroversial. When the carrier is a corporation there is difficulty in establishing actual fault or privity since it implies persons. However time and tradition has granted this exception a special status and legitimacy.\textsuperscript{136}

\textsuperscript{134} [1959] 2 Lloyd's Rep. 105, the issue can also be found in \textit{Riverstone Meat Co. Pty Ltd. v. Lancashire Shipping Co.} [1961] 1 Lloyd's Rep. 57.
\textsuperscript{136} E.R. Hardy IVAMY, \textit{Payne and Ivamy's Carriage of Goods by Sea},\textsuperscript{10}th ed., London, Butterworths, 1976, at. p.160, "The fault or privity of his servants (e.g. officers on board) is not sufficient to render the shipowner liable. Where the shipowner is a company, the fault or privity must be that of "the person who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation... Fault or privity of the shipowner includes culpable acts of omission on the part of a managing
In recent years, cargo owning states i.e Canada, New Zealand, Australia, the US, and most developing countries are dissatisfied with such a rule and have expressed their opinions loudly. Nonetheless, the roots of this rule are so strong and well established that departing from them remains a difficult task. The burden of proof regarding the issue of “fault or privity of the carrier” in the fire exception has also been cause for confusion. The United States and Great Britain both have national statutes regulating this issue. Canada and France on the other hand have no fire statute and rely solely on the Hague Rules. In the US the burden of proof is on the cargo claimant and in Great Britain the carrier has the burden of proving that there was no fault or privity on his part. For cases under the Hague Rules the courts follow precedents found in their respective national laws.


137 The U.S. Fire Statute, 46 U.S. Code, s. 182, R.S. 4282, “No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.” The Merchant Shipping Act, 1894, s. 502(1) “The owner of a British seagoing ship or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely:- (1) where any goods, on board his ship are lost or damaged by reason of fire on board the ship....” René RODIERE, Emmanuel de PONTAVICE, Droit Maritime, 12e ed, Dalloz, 1997, at p. 351

138 Sandgate Castle [1939] A.M.C. 463, The Shell Bar (Fire) [1955] A.M.C. 1429, Lennard’s Carrying Co. v. Asiatic Petroleum Co. [1915] A.C. 706 at p. 713 “A ship was sent to sea in an unseaworthy state, and as a result she stranded and her cargo was destroyed by fire. The vessel belonged to a limited company of which a Mr. Lennard was a director. He took an active part in her management. Held, that Lennard was the “alter ego” of the company and not merely a servant. The Company could not therefore exclude its liability for loss by fire under the Merchant Shipping Act 1894, s. 502, for it had not shown that the loss had occurred “without its actual fault or privity. The action of Lennard was the very action of the company, and he was at fault.” Edmund Fanning [1953] A.M.C. 86, Silverscypress [1943] A.M.C. 224.
The Hague Rules differ on two issues from the American and British Fire Statutes. The duty of "due diligence" is only required under the Hague Rules. Further, under the Hague the carrier is responsible if his agents or servants have not exercised due diligence in making the ship seaworthy. In Canada the carrier will be responsible for fire damage if his servants or agents have not exercised due diligence.\textsuperscript{139}

C. PERILS, DANGERS AND ACCIDENTS OF THE SEA OR OTHER NAVIGABLE WATERS, art. IV (2)c

At first glance, in theory this exception seems to be very wide and an easy escape for carriers. However, practice has demonstrated otherwise. In its application, art. IV (2)c, is very complex and ambiguous. As in the other exceptions, there is no clear definition or standard. The courts facing this issue must work on a case by case basis with no predetermined interpretation of the rules. Therefore, trying to determine what is meant by "perils of the sea" is a difficult task. The caseload on the subject is abundant. Nonetheless, to find a uniformly accepted view is difficult. Some argue that this rule implies an element of extraordinary nature, others disagree. Some apply the reasonable mariner in the same situation test, and others argue the test should be more onerous.\(^{140}\)

Furthermore, the definition may depend on geographic, weather, season, location etc... The result is differing opinions and views amongst the courts. Thus, the trend within the U.S. courts has been to be very strict, interpreting this exception narrowly. The English courts have been more balanced and less rigid than their American counterpart. The Canadian courts have been the most lenient in their interpretation of art. IV (2)c.

\(^{140}\) E.R. Hardy IVAMY, Payne and Ivamy’s Carriage of Goods by Sea, 10th ed., London, Butterworths, 1976, at. p.153-154, also refer to Supreme Courts judgements Falconbridge Nickel Mines, Ltd., Janin Construction, Ltd. and Hewitt Equipment, Ltd. v. Chimo Shipping, Ltd., Clarke S.S. Co., Ltd. and Munro Jorgensson Shipping, Ltd., [1973] 2 Lloyd’s Rep. 469, Charles Goodfellow Lumber Sales, Ltd. v. Verreault Hovington and Verreault Navigation Inc., [1971] 1 Lloyd’s Rep. 185, [1971] S.C.R. 522 at p. 528 “...even if the loss is occasioned by perils of sea, the ship owner is nevertheless liable if he failed to exercise due diligence to make the ship seaworthy at the beginning of the voyage and that unseaworthiness was a decisive cause of the loss.” At p. 535 “... by invoking art. 4(2)c ...and raising the defence of perils of the sea, the respondents assumed the onus of showing that the weather encountered was the cause of the damage and that it was of such a nature that the danger of damage to the cargo arising from it could not have been foreseen or guarded against as one of the probable incidents of the voyage.”, U.S.A. v Eastmount Shipping (The Susquehanna) [1974] A.M.C. 1183, [1975] 1 Lloyd’s Rep. 216
The French do not have this exception in their national version of the Hague Rules.141 Hence, according to Tetley, "Whether or not a storm is a peril has depended on the geographic area, the time of the year and the intensity of the storm. Any analysis of the decisions of the Courts of various countries have consistently defined a peril as a much more severe storm than other countries."142

The American Courts have defined peril of the sea as severe weather, catastrophic in magnitude, unexpected, and where an efficient crew was not negligent and could not stop the loss or damage.143 Therefore, the recurring element in the American cases is the courts severity and narrow analysis in determining whether the situation was catastrophic, extraordinary and unanticipated.144 In England, the similarities are few.

141 William Tetley, ibid., id. note 64 p. 117 "A "peril of the sea" is the most common defence of the carrier and has been described as "the carrier's best though least dependable friend". If a carrier can prove that a peril of the sea caused damage to cargo under his care, then the carrier is not responsible for the loss under the Hague Rules. The definition of "peril of the sea" is, therefore, very important. Unfortunately, it is difficult to define a peril, because more fact than law is involved.", Stewart C. BOYD, Andrews BURROWS, David FOXTON, Scruton on Charterparties and Bills of Lading, London, Sweet & Maxwell, Twentieth edition, 1996, p.225, The Arakan [1926] A.M.C. 191, René RODIERE, Emmanuel de PONTAVICE, Droit Maritime, 12e ed., Dalloz,1997, at p. 348


The British courts showed a little more tolerance toward this exception, making it less of a rarity in England. 145

Scrutton's definition of perils of the sea clearly demonstrates the difference in interpretation and application that exist between the British and the Americans: "The term "perils of the sea" whether in policies of insurance, charterparties, or bills of lading, has the same meaning, and includes any damage to the goods carried caused by sea water, storms, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen and guarded against by the shipowner or his servants as necessary or probable incidents of the adventure. 146

The Canadian's lenient position has been demonstrated in Keystone Transport Ltd. v. Dominion Steel & coal Corp147 where Justice Taschereau stipulated: "...to constitute a peril of the sea the accident need not be of an extraordinary nature or arise from irresistible force. It is sufficient that it be the cause of damage to goods at sea by the violent action of the wind and waves, when such damage cannot be attributed to someone's negligence." 148


148 ibid., id. note 147, p. 505
Hence, we can see that the Canadian standard is less rigid, and not as onerous as their American or British counterparts. We need not find the cause of loss or damage to be catastrophic, extraordinary or even unexpected. It should be added, that with such differing views, it is of no great surprise that the caseload on the issue is far from uniform. Consequently, the problem in dealing with this exception lies in the fact that the same facts in different countries can result in conflicting outcomes.

There is no recognised standard that defines this exception. The standard varies with seasons, weather, location, time, as well as different countries having differing judiciary views. Therefore, supporting the view that confusion and unpredictability surrounds the applicability of the Hague Rules. The perils of the sea exception, is one of the most often raised exception, nonetheless, it can be said with certainty that it is the hardest one to succeed with. The difficulty with this defence rests on the fact that proving the fulfilment of art. III (1) and its requirements, together with this rule, can be onerous. The argument being, if the ship would of been seaworthy it should of escaped the encountered perils since it did not, it must of been unseaworthy. Thus, the use of article IV (2)c might appear like a sure ticket to success, however reality proved otherwise.

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D. ANY OTHER CAUSE ARISING WITHOUT THE ACTUAL FAULT OR PRIVITY OF THE CARRIER... ART. IV (2)q

This exclusion is the last of the 17 Hague exceptions. Its main attraction lies in the fact that it appears as a great escape clause, a catch-all rule. Shipowners will resort to this exception when none of the others apply. Its scope might be broad. However, to be able to discharge the burden of proof required, is another matter altogether.\textsuperscript{152}

Since most of the causes of loss or damage are covered by the previous exceptions (art's. IV (2)a-p), art. IV(2)q is not as wide as it would seem at first glance. Thus, when a cause of loss does not fall in one of the enumerated exceptions, the carrier will turn to this last resort (art. IV (2)q) . Since pilferage and theft were not included in the Rules or in art 4(2) (a to p), courts have included them under the 4(2)q exception.\textsuperscript{153} The goal behind art IV (2)q is to exonerate the carrier in cases where he, his crew or agents, are not at fault or are not negligent in causing the loss or damage to the goods they carried.

This catch-all exception, imposes the burden of proof on the one claiming the defence i.e. the carrier. The Supreme Court of Canada has addressed this issue, and explained why art. IV (2)q of the Rules is not so easy to apply. The court ascertained that demonstrating the duty of due diligence alone was not enough. The carrier must explain the

\textsuperscript{152} Jean PINEAU, Le contrat de transport, Montréal, Les Editions Thémis, 1986, p. 206 «Le péril de mer est une cause d’exonération fréquemment invoquée par les transporteur, mais a l’égard de laquelle les juges font preuve, avec raison, d’une extrême prudence; compte tenu de l’évolution de la technique, des progrès accomplis par les services météorologique, les dangers de la mer ne sont plus ce qu’ils étaient jadis : pour que le mauvais temps, cause du dommage, soit considéré comme un péril de mer, encore faut-il qu’il soit tel qu’on n’aurait pas pu prévoir ou prévenir, comme un incident probable, le danger d’avaries a la cargaison que ce mauvais temps comportait. Le danger inhérent a l’aventure maritime, tels les vents, les courants, les tempêtes, les brouillards, est désormais insuffisant pour constituer un cas d’exonération: il doit revêtir les caractères d’imprévisibilité et d’irrésistibilité qui caractérisent le cas fortuit:... », Michel POURCELETT, Le Transport Maritime Sous Connaisssement Droit Canadien, American et Anglais, Les Presses de l’Université de Montréal, 1972, p. 128-129 and 134-137

\textsuperscript{153} William TETLEY, ibid.,id. note 35, p. 249
cause of loss.

An inexplicable cause will not do. The courts have endorsed the view that in cases where the cause of loss is inexplicable, the carrier could establish some alternative explanation to discharge his burden of proof.

In general, if the cause of loss is unknown, the carrier will be held responsible. It would appear difficult to deny fault or negligence of the carrier in cases where the actual causes of loss are not clear. In Pendle & River Ltd. v. Ellerman Lines Ltd. the court addressed the issue of unexplainable loss: Therefore, in cases where the carrier cannot disclaim negligence or explain the cause of loss, the court will rule in favour of the cargo owner. In the famous case of the Lady Drake, the court clearly stated the carrier’s duty to establish the cause of loss: "The breakage must have a cause and it is for the shipowner to show what the cause is.”

Thus, to be able and exempt itself, the carrier must prove three things. That the duty of due diligence was fulfilled, what the actual cause of loss was or an alternative explanation, and that, he and his crew or agents were not at fault or negligent in causing the loss or damage to the goods. Again, one realises that this article is not clear-cut.

155 Phillips & Co. v. Clan Line Steamers Ltd. [1943] 76 Lloyd's L.R. 58
156 [1927] 29 Lloyd L.R. 133
157 Bayliss v. CAN. National SS. (Lady Drake) [1935] A.M.C. 427 at p. 434, and at [1937] S.C.R. 261 at p. 264 "...it will be observed that the burden resting upon the carrier under this clause is a very heavy one”, B stos of Canada Ltd. v. Guilbault Transport Inc. [1978] A.C. 393
158 (The Chyebassa) Leesh River Tea Co. v. British India Steam Navigation Co. [1966] 1 Lloyd’s Rep. 193 this case is one of the rare times art. 4(2)q can be invoked. At p. 200 “If a complete stranger had entered the hold unobserved and removed the plate, par. (a) would I think apply if the shipowner could prove that it was a stranger who removed the cover, and reasonable care had been taken to prevent strangers getting on board the ship and due diligence generally had been exercised. In the present case the act of the thief ought to be regarded as the act of a stranger. The thief in interfering with the ship and making her, as a consequence, unseaworthy, was performing no duty for the shipowners at all, neither negligently nor deliberately nor dishonestly.”, Hourani v. Producers Ltd. 49 L.I.L. Rep. 421 at p. 428, The courts have restricted the interpretation of this article by
For some, this would seem a good thing. For others, it symbolises a deficiency with the system. Thus, the US, Canada, France, Australia, and other shipping states argue that this unpredictability in the law must be remedied with reforms or the adoption of new rules. It should be noted that the French version of the Hague rules and its amended version in 1966 do not include this exception in their law.159

ARTICLES IV (2)d-p

The remaining exceptions of the Hague Rules are not as prone to confusion, and are mostly self-explanatory. Over the years, the judiciary has not experienced many difficulties in applying them. Nonetheless, these exceptions were open to judicial interpretation, and consequently, were, like the rest of the Hague Rules exceptions, subject to scrutiny and criticism.

a. Article IV (2)d:

The Act of God, art. IV(2)d, implies accidents that are the result of natural causes and which are out of the human control. Since no particular cause is expressly aimed at, one might consider this exception as an extension of the perils of the sea exception (art. IV(2)c), and a preview to the catch all IV(2)q, exception. All three exceptions deal with events that are in some way out of the carrier control, and further, have an element of "beyond ordinary circumstances".

stipulating that the “or without the fault ...” should be construed to mean “and without the fault...”, in Brown & Co., Ltd v. Harrison [1927] All. E.R. Rep. 195, the court held the carrier liable and denied him the use of art. 4(2)q on the ground that he (the shipowner) did not prove that the loss did not occur without the “actual fault or neglect of the agents or servants of the carrier”, furthermore, the court held that the second word “or” in art.4(2)q had to be read conjunctively, to mean “and” and not to be read disjunctively like the shipowner argued. 159 L. 9 avril 1936, L. 18 juin 1966 (The French Local Law of April 9 1936 and of June 18, 1966), Martine REMOND-GOUILLOUD, Droit Maritime, 2e édition, Pedone, 1993 p.332
Thus, the Act of God encompasses an unexpected and irresistible event, unable to be resisted by any reasonable precautions, i.e. earthquake, lightning, volcanic eruption etc... Carriers have the burden of proving that the cause of loss or damage is due to the Act of God, and further, that no reasonable measure could of been taken to avoid such occurrence. Being one of the oldest exceptions, its legitimacy dates back many years before the Hague Rules adoption. However, over the years its applicability has diminished. Technology has enabled the maritime industry to know when major natural events (i.e. storms etc...) are coming, and therefore in most cases be ready for the eventuality. Furthermore, this technology has empowered carriers with better built ships, more resistant and better equipped to deal with all sorts of unexpected natural events. Consequently, proponents of change want to eliminate this rule. Nonetheless no matter what the act of god exception will always exist.

b. Article IV (2)e

The Act of war, art. IV(2)e, is one of those self explanatory exceptions. Since no real problem of interpretation exist, the caseload on the issue is minimal. The Act of war does not only encompass war. International tension and hostility are also covered, so long as the carrier does not knowingly expose himself to the encountered events:

"L'exonération de responsabilité pour faits de guerre ne joue qu'à la condition que ces faits n'ait pas pu raisonnablement être prévus et évités. Si, au contraire, le transporteur, dans le but de gagner un fret élevé, expose volontairement une cargaison qui devait être tenue en dehors du conflit, il perd le bénéfice de ce cas excepté."\textsuperscript{161}

Thus, to prevail, a carrier discharging his burden of proof must show that the Act of war was the cause of loss or damage. Furthermore, the carrier will not be held responsible in cases where the war is a civil one.\textsuperscript{162} The Act of war has not been controversial, problematic or ambiguous, its application has almost become a rarity. Since no one ever uses this article anymore the view that The Hague Rules are outdated, unsuited for today's maritime realities is enhanced.

c. Article IV (2)f

The Act of public enemies (art. IV (2)f), is one of these exceptions with no set definition and problematic interpretation that are ambiguous and vague. Hence, its meaning remains uncertain. However, in practice, the general acceptance has been to incorporate piracy, robbery, acts of violence etc. within its scope of application:

"Il n'est pas facile de donner une définition juridique de ce terme "ennemis publics". Les auteurs de la Convention ne paraissent pas en la circonstance avoir eu des notions très nettes à cet égard. Qu'il nous soit permis de citer le passage suivant extrait du rapport de la conference de La Haye, 1921:Quelle est, demanda Lord Philimore, la signification de l'expression "faits d'ennemis publics" - Pirates? Sir Norman répondit : - "Cela est pris du Harter Act, "du Canadian et de l'Australian Act. Je ne sais pas?" Lord Philimore: - "Cela peut signifier pirates?" Sir Norman Hill. -"Cela peut signifier pirates. Je le suppose "....\textsuperscript{163}


\textsuperscript{162} Pesquirias y Secaderos \textit{v.} Beer (1949) 1 All E.R. 845.

\textsuperscript{163} Georges MARIS, \textit{ibid.}, id. note 160, p. 156, Stewart C. BOYD, Andrews BURROWS,
Before being able to use this exception, carriers must demonstrate (like in all of the exceptions) that they used reasonable care in trying to avoid the loss or damage to the cargo. The success of this exception will depend on the individual facts of each case, since no general definition can be found. However, our days, this exception has lost its momentum and is never applied. According to shipping states maintaining such an exception is useless therefore, they have incorporated it on their list of elimination. Once again, stressing the necessity for change. On the other hand the CMI statistics demonstrate that acts of piracy are constantly on the rise and thus we should not be so eager to eliminate this exception.

d. Article IV (2)g

Article IV (2)g, arrests or restraint of princes, rulers or people, or seizure under legal process. This article applies to public acts, acts of government.

"... restraints of princes includes any acts done, even in time of peace, by the sovereign power of the country where the ship may happen to be. It covers any restrictions imposed by order of an established government on importation or exportation, e.g. quarantine regulations, embargoes, blockades or seizure of contraband goods."


In the case of *Nobel's Explosive Co. v. Jenkins*\(^{165}\), the court addressed the restraint of princes issue. In the case at hand, a ship sailing with goods to be delivered in Japan, reaches Hong-Kong. That same day, war was declared between China and Japan. As a result, the ship captain left the contraband goods in Hong Kong.

"A large body of evidence was laid before me to show that if the vessel sailed with the goods on board, she would in all probability be stopped and searched. It was certain in that case that the goods would of been confiscated, and quite uncertain what course the captors would take with the ship and the rest of the cargo. I am satisfied that if the master had continued the voyage with the goods on board, he would of been acting recklessly."\(^{166}\)

Thus, this rule will only work when some sort of government or state intervention is involved. Hence, import and export restrictions, blockade and embargoes are all within its applicability. Furthermore, carriers who wish to apply this exception should not have, at the beginning of the voyage, knowledge of the situation. A prior knowledge of the situation eliminates the rules applicability. Thus again, for some it would seem that the rules did not reach their goal, since no real sense of security exists. For many, the only solution is the adoption of a different system or at least to reform the existing one.

e. **ARTICLE IV (2)h, (Quarantine)**

The quarantine exception is very similar to the arrest or restraint of princes' exception, since similar elements are required in both exceptions. It takes some government restriction for the rule to apply. The objective being to emphasise the health hazards carriers might be exposed to. Again, for this exception to apply, carriers should not have prior

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\(^{165}\) [1896] 2 Q.B. 326 "goods were shipped in England for Japan under a bill of landing excepting "restraints of princes". On the day the ship reached Hong Kong, war was declared between Japan and China. The captain, therefore, landed at Hong Kong such part of the cargo was contraband. Held, the delivery of the contraband goods in Japan was prevented by the excepted peril."

knowledge of the quarantine.

f. ARTICLE IV (2)i Act or omission of the shipper...

This exception was adopted to protect carriers from negligent shippers. Thus, in cases where the shipper or his agents were negligent, there would be no basis of claim against carriers. Article III (5) of the Rules imposes a duty on shippers to act reasonably and deter them from being negligent. Thus, art IV(2)i reinforces this duty imposed on shippers. Furthermore, Hague's art. IV(2)o also mentions this rule. The aim being to ensure carriers that shippers will not act negligently in sending their goods with insufficient marking, number, weight or quantity, and later on, sue for damages.167

g. ARTICLE IV (2)j. Strikes or lockout...

The strike exception is available to carriers in cases where the loss or damage to the cargo is shown to be the result of strike, and not related to other causes. Thus, in General Foods Corp. v. U.S.A.168 the court held that since the carrier failed to show strike as the cause of loss, he therefore could not exonerate himself. Consequently, in the case at hand, the carrier will not prevail if he cannot prove the loss resulted from the delay occasioned by the strike and was not the result of negligent care given to the goods.

168 [1952] A.M.C. 310, René RODIERE, Emmanuel de PONTAVICE, Droit Maritime, 12e ed, Dalloz,1997, at p. 351,
Furthermore, as in the previous exceptions, to succeed, carriers should not be aware of any strike. This view was clearly expressed in *Bastos of Canada Ltd. v. Guilbault Transport Inc.* The idea was to protect carriers from unpredictable events that were beyond their control. In the important case of *J.Vermaas' Scheepvaartbedrijf N.V. v. Association Technique de l'importation Charboniere: The "Laga"*, the court added that the word "strike" included a sympathetic strike:

"Strikes in every sense of the word occurs today and are not concerned directly with wages. They are concerned, for instances, with working conditions; and so I think one has got to bear in mind that the meaning of the term "strike" must change with the progress (if that is the right word) of industrial history, and it may have a different meaning today from the meaning given to it a century ago."

Thus, the jurisprudence clearly pointed out that the word "strike" cannot be given an exhaustive definition. In the early days of shipping, it would of only covered stoppages arising out of trade disputes. However, today the word encompasses a broader meaning. As a result, in the *Tramp Shipping Corporation v. Greenwich Marine Inc.* the court held that a refusal to work part of the day was within the meaning of the word "strike". The fact that the word “strike” is constantly redefined by the courts (even if it is to adapt to today’s maritime industry) creates a certain ambiguity with the rules. Consequently, making them an easy target for criticism.

h. ARTICLE IV (2)k. Riots and civil commotion

Similar to the previous exception, it covers, damage or loss caused by strikers picketing. Protecting carriers against uncontrollable violent acts of third parties, was the Rules initial goal.

"Les émeutes et les troubles civils ne jouent le rôle de cas d'exonération de responsabilité du transporteur que s'ils présentent le caractère de cas fortuit ou de force majeure, c'est-à-dire s'ils n'ont pu être ni prévus, ni évités par le transporteur."173

i. ARTICLE IV (2)l, Saving or attempting to save life or property at sea

Article IV (2)l of the Rules, protects carriers in their attempts to respond to emergencies at sea. Thus, it allows carriers to save life or property at sea, without having to worry about the consequences of what will happen to the goods carried. The objective was to avoid situations in which carriers in fear of losing the goods they carry would no longer attempt to save life or property.174

Therefore, with such protection, carriers will be less hesitant to save life or property at sea. Furthermore, this rule should not be studied alone, it can also be seen in conjunction with art. IV (4) of the Rules which protects carriers in cases of deviation responding to distress calls. The, primary objective is not to lose sight of what is

174 Martine REMOND-GOUILLoud, Droit Maritime, 2e édition, Pedone, 1993 p.382 « Si l'on veut que la solidarité en mer ne reste pas un vain mot, le transporteur qui se déroutte et dépense ses soins pour tenter de sauver des personnes ou des biens ne doit pas
necessary to do in a crisis situation. Carriers must attempt to save life or property even if it would imply loss of cargo.

"Ils nous paraient certains qu'ils s'appliquent exclusivement, comme cas d'exonération de responsabilité, aux opérations d'assistance prêtée en mer aux navires en danger de perdition sur lesquels se trouvent des êtres humains. Il n'est pas concevable qu'en dehors de cette hypothèse la Convention de Bruxelles du 25 Août 1924 ait songé à établir une présomption d'exonération de responsabilité pour des opérations de sauvetage qui seraient dépourvues de tout sentiment de solidarité humaine et qui seraient au contraire inspirées par des considérations d'ordre commercial. Ainsi, dans cet ordre d'idées, l'exonération de responsabilité n'existerait pas si un sauvetage était tenté après un abordage avec un navire abandonné.«

175 Georges MARAIS, *ibid., id.*, note 160, p. 165
j. ARTICLE IV (2)m, Inherent defect...

This particular exception, although used often by carriers, led to some confusion and has been difficult on the courts. The problem stems from having to determine what is implied by the words inherent defect. The French had the clearest definition for "inherent defect".176

"Le terme "freinte de route" a une signification bien précise et, comme toute marchandise soumise à un transport par mer de quelque durée, celle-ci est sujette (à part des exceptions) à des différences de poids, en plus ou en moins, soit par suite à l'évaporation que subit la marchandise sous l'influence notamment de la chaleur des cales, soit par l'absorption de l'humidité de l'air. Il n'y a d'exception à cette règle que pour quelques rares marchandises qui ne subissent pas d'influences caractérisées, tels que des lingots ou des barres de fer ou d'acier... Il ne saurait être question de mettre à la charge du transporteur les diminutions de poids ou de volume qui ne seront que la conséquence normale et naturelle du voyage, sans qu'il y ait fait ou faute aucune du transporteur ou de ses agents."177

"The French official version of the Hague Rules uses the proper terms "vice caché" which means "hidden defect" and "vice propre" which means "inherent vice". The French text also makes it clear that the exception refers to both hidden defect and inherent vice....Unfortunately, the erroneous English composite, "inherent defect" has become commonplace in the jurisprudence. Nevertheless, if one must use a single term in English, "inherent defect" seems to cover both "hidden defect" and "inherent vice". ,. Jean PINEAU, Le contrat de transport, Montréal, Les Éditions Thémis, 1986, p. 208, William D. Branson Ltd. v. Jadranska Slobodna Plovidba [1973] 2 LL.L.R. 535, Westcoast Food Brokers Ltd. v. The Ship « Hoyanger » [1980] 31 N.R. 82 (F.C. App Div), René RODIERE, Emmanuel de PONTAVICE, Droit Maritime, 12e ed , Dalloz,1997, at p. 352-353
The difficulty arose in determining when the defect was inherent or hidden, in contrast, to one resulting from lack of care to the goods carried, which is the carrier’s fault. The Hague Rules exception, art. IV(2)m, covers both the hidden defect and the inherent vice. Thus, to be exonerated carriers must convince the court that the loss or damage to the goods was the result of some hidden or inherent defect in the goods themselves, and not the consequence of a lack of care from their part.\textsuperscript{178}

In \textit{John (trading as C.F. Otto Weber) v. Turnbull, Scott Shipping Co., Ltd. and Nigerian National Line, Ltd.: The "Flowergate"},\textsuperscript{179} the court held that as long as the carrier shows on a balance of probabilities that the damage arose from the inherent or hidden defect of the goods, and that art III(2) was fulfilled, the carrier is exonerated. In this case, the court had to determine whether moisture, which was the cause of damage to the goods (cocoa), was the result of an inherent vice or was due to improper stowage of the cargo.

"In my view the defendants have shown on a balance of probabilities that the source of the water which damaged the cocoa in No. 5 lower hold was the cocoa itself. They have shown that the voyage was an ordinary voyage. [...] They have shown that the vessel was both seaworthy and cargoworthy. [...] They have shown that her officers were, as I think, both competent and careful. They have shown that the damage and matting were sufficient. [...] They have shown that the system of ventilation adopted was [...] proper. [...] In addition, they have shown that the cocoa in No. 5 lower hold was a potential source of moisture which could damage the cargo and in the end they have convinced me that it did."\textsuperscript{180}

The inherent or hidden defect in the goods imply that the goods carried are unfit to withstand the contracted voyage, regardless of the carriers diligent care. Thus, in the case of \textit{Albacora S.R.L. v. Westcott & Laurance Line, Ltd.},\textsuperscript{181} the court stipulated that:

\textsuperscript{179} [1967] 1 Lloyd's Rep. 1
\textsuperscript{180} ibid., id. note 179, p. 45.
\textsuperscript{181} [1966] 2 Lloyd's Rep. 53.
"It follows that whether there is an inherent defect or vice must depend on the kind of transit required by the contract."\textsuperscript{182}

Furthermore, when the inherent vice is known to carriers, they have a duty to give the required care for the specific goods carried. If such required care is not given, carriers cannot turn to art. IV (2)m to exonerate themselves.\textsuperscript{183} Thus, as was seen, courts dealing with art. IV (2)m need to determine what kind of vice or defect they're facing. Furthermore, they need to be convinced that carriers fulfilled all of their required obligations, i.e. due diligence and seaworthiness, and that they had no knowledge of any needed special care. Consequently, the jurisprudence on the issue has not been consistent. Resulting in confusion and uncertainties with the working of the regime.

\textbf{k. ARTICLE IV (2)n, Insufficiency of packing and}

\textbf{l. ARTICLE IV(2)o Insufficiency or Inadequacy of Marks}

This Hague Rule exemption has also been marked by some confusion. Carriers using this rule must show that the insufficiency of packing was not apparent and consequently, the information was not mentioned on their bill of lading. The objective was the protection of carriers in cases where the insufficiency of packing was unknown. As a result, carriers could not be expected to give more care than the reasonable care expected of them:

"Sufficient packing is normal or customary packing in the trade. Such packing invariably prevents all but the most minor damage under normal conditions of care and carriage. Some objects are packed very lightly, for example, steel rods are normally tied in bundles without other packing, while some objects, such as automobiles, are not packed at all. Nevertheless, what is customary is sufficient packing, and the carrier is responsible for all but minor damage when cargo is sufficiently packed."\textsuperscript{184}

\begin{flushleft}
\textsuperscript{182} ibid., id. note 181, p. 59.
\textsuperscript{183} Levatino Co. v. S.S. President Hayes [1964] A.M.C. 1247.
\end{flushleft}
The court ascertained that as long as the packing used was customary in the industry, carriers will be held responsible for any loss or damage.\textsuperscript{185} The underlying idea was to try and establish some sort of balance between carrier's duty of care and shipper's duty to pack sufficiently. In \textit{Bach v. Silver Line (Silversandal)}\textsuperscript{186} the court explained what was perceived by the notion of insufficient packing. The court stipulated that if carriers show that the appropriate care was given to the goods, carriers could use art. IV (2)n to exonerate themselves. In the case at hand a customary stowage of the goods carried was the appropriate care.

In the \textit{Silversandal} case, the court ruled that the carrier had used the customary stowage and that the shipper also used the customary packing for such goods, i.e. bales. However, in this case, the customary stowage was not enough to sustain the goods. Consequently, the court clearly stated that in cases where the shipper knows that the customary stowage of the goods would result in damage, he couldn't expect the carrier to be responsible for such damage. If shippers want more they must provide for it.\textsuperscript{187}

Thus, carriers will not be held responsible for damages occurring when customary care is used. Furthermore, carriers have the obligation to mention in their bills of lading any apparent insufficiency\textsuperscript{188}, if not, they will not be able to apply art. IV (2)n, unless they prove the insufficiency was not apparent.

As for art. IV(2)\textsuperscript{o} it refers to marks and markings on cargo being so unclear or insufficient that cargo is lost or damaged. The carrier has the burden to prove that the marks were insufficient. This rule is linked to article III(5) of the Hague Rules which states that the

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{186} [1940] A.M.C. 731
  \item \textsuperscript{187} \textit{ibid.}, \textit{id.}, note 186, p. 731
  \item \textsuperscript{188} Tribunal de Commerce de Rouen, June 19 [1959], [1960] D.M.F. \textit{v.12}, p. 231
\end{itemize}
\end{footnotesize}
shipper guarantees the marks, number, quantity and weight of the cargo.\textsuperscript{189}

m. ARTICLE IV (2)p, Latent defects

"Latent defect" is one of the least understood of all the exculpatory exceptions available to carriers under the Hague Rules. It only applies to defects in ships, and not in the cargo, which is a "hidden defect" or an "inherent vice". A latent defect is usually a defect in construction and is rarely due to wear and tear.\textsuperscript{190}

Again, the objective was to protect carriers in cases of loss or damage, due to some construction defect in the ship beyond their control. Hence, for the exoneration to apply, carriers, after a diligent inspection of the ship, must have no knowledge of the defect. Accordingly, this exception particularly puts to the test the duty of seaworthiness. To succeed, carriers must therefore demonstrate that the ship was seaworthy, and further, that the defect could not of been discovered with a competent examination accepted under industry standards. Therefore, by proving these elements, carriers fulfil their obligation of due diligence i.e. art. III(1) of the Rules.

\textsuperscript{189} William TETLEY, Marine Cargo Claims, Toronto, Carswell, 1965, p.131, Else-Skou [1962] D.M.F. 660, the court of appeal of Alger held on December 12, 1961 that since the cargo was improperly marked the shipper was responsible for part of the loss., E.R. Hardy IVAMY, Payne and Ivamy's Carriage of goods by sea, 10th ed., London, Butterworths, 1976, p.155, Michel POURCELET, Le Transport Maritime Sous Connaissement Droit Canadien, Americain et Anglais, Les Presses de l'Université de Montréal, 1972, p.109-111 «Les marques sont importantes pour l'identification des marchandises à l'arrivée et pour permettre au destinataires d'en prendre livraison. D'autre part, les marchandises qui sont placées dans des sacs, des cartons ou des conteneurs voyagent souvent dans les mêmes cales si bien que les marquage permet au transporteur d'identifier aisément et rapidement la marchandise qu'il doit décharger a tel port sur la route maritime...Les marques doivent être lisible jusqu'à la fin du voyage ...»

\textsuperscript{190} W. TETLEY, ibid., id. note 35, René RODIERE, Emmanuel de PONTAVICE, Droit Maritime, 12\textsuperscript{e} ed., Dalloz,1997, at p. 347-348, Michel POURCELET, Le Transport Maritime Sous Connaissement Droit Canadien, Americain et Anglais, Les Presses de l'Université de Montréal, 1972, p.116-117 «Le régime légal instituant une exonération pour vice caché échappant à la diligence raisonnable, il faut admettre que le vice caché du navire est celui qui ne peut être décelé par un examen attentif et méticuleux... il n'incombe pas au transporteur de procéder a un examen du navire dans ses moindres détails et a l'aide d'appareils dont l'utilisation aurait peut-être éventuellement permis de découvrir la faiblesse de telle ou telle partie du navire.»
Hence, the difficulty with this exception lies in the task of distinguishing between a loss that is really due to a latent defect and one that is due to negligence, unseaworthiness and lack of due diligence. Courts have encountered the concept of latent defect in Real Estate Law, however, in maritime law it was a novelty and accordingly there were no real maritime precedents or guidelines to direct the courts in such a complex task. Consequently, courts have not been able to establish a coherent and uniform caseload on the issue.

F. THE EFFECT OF NEGLIGENCE ON THE EXCEPTIONS

Courts have expressed the view that even if the cause of loss is within the list of exceptions, if negligence is proven, carriers cannot rely on the exception, unless they can refute the evidence, and show that negligence was not involved.

In Ismail v. Polish Ocean Lines: The "Ciechocinek"\textsuperscript{191}, the court ascertained that exoneration clauses would not apply if negligence has been demonstrated.

"A shipowner will not be exonerated from losses arising from any of these excepted causes where there has been any neglect on his part to take all reasonable steps to avoid them; or to guard against their possible effects; or to arrest their consequences. Thus, where cargo was damaged by water escaping from a boiler pipe cracked by frost, it was held that the loss was occasioned by the negligence of the master in leaving the boiler full on a cold night..."\textsuperscript{192}

A. The carriers burden

One of the main problems found in The Hague Rules is their silence regarding the burden of proof issue. Consequently, under such circumstances, the judiciary experienced difficulties in dealing with this situation. However, they did the best they could under these conditions. Thus, the case law and doctrine on the issue have not always been clear and uniform.

The solution put forth by maritime authors\(^{193}\) i.e. William Tetley, Payne and Ivamy, J.Pineau, M. Remond-Gouilloud, Scrutton, R.Rodiere, De Pontavice, led to the conclusion that most cases dealing with responsibilities and immunities of carriers should be resolved with carriers discharging the burden of proof. The argument advanced was based on the premise that carriers were the only ones with most, if not all, of the crucial facts and information relating to the cause of loss or damage.

In great part, the caseload on the issue has tried to follow the solution put forth by most of the maritime authors\(^{193}\). Accordingly, since carriers are the only ones with the knowledge of what happened or could of happened, the burden of proving what the cause of loss or damage is, rests on them. However, their duties do not start here.

\(^{193}\) William TETLEY, Marine Cargo Claims, Toronto, Carswell, 1965, p.90, Martine REMOND-GOUILLoud, Droit Maritime, 2\(^{e}\) édition, Pedone, 1993 p.372-373, Stewart C. BOYD, Andrews BURROWS, David FOXTON, Scrutton on Charterparties and Bills of Lading, London, Sweet & Maxwell, Twentieth edition, 1996, p.205 “Instead the carrier will generally be liable for loss, damage or delay occurring when the goods are in his charge, unless he establishes that all measures that could reasonably be required to avoid the occurrence causing the loss, damage or delay were taken”, Jean PINEAU, Le contrat de transport, Montréal, Les Éditions Thémis, 1986, p. 197-198, René RODIERE, Emmanuel de PONTAVICE, Droit Maritime, 12\(^{e}\) ed , Dalloz,1997, at p. 340 and 355
The Hague Rules are very clear on this issue explaining how carriers need to demonstrate that art. III (1)(2) has been respected. The Rules are adamant about the prerequisite nature of art. III, and the carriers' ability to use art. IV (2) and its list of exceptions. Therefore, before any issue of exoneration can be discussed, carriers must convince the court that the ship was seaworthy and the due diligence standard was respected. Up to this point, the Rules are more or less cohesive. However, complications surface with the adoption of art. IV (2) and its list of exceptions. The core questions are who proves what and when?

In *Maxine Footwear v. Canadian Government Merchant Marine*¹⁹⁴, the court expressly stated that, if art. III (1) is not fulfilled, carriers cannot rely on the exceptions of art. IV (2). In *Toronto Elevators Ltd. v. Colonial SS. Ltd.*¹⁹⁵, the court said the obligation to exercise due diligence is also a prerequisite to using art. IV (2). Therefore, the burden is on carriers.

In *Pendle & Rivett Ltd. v. Ellerman Lines Ltd.*¹⁹⁶, the court tackled the question of knowing who has the burden of proving the cause of loss or damage to the goods carried. It ascertained that in cases where the court is uncertain about the cause of loss or damage, the party on whom the burden rests must lose:

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¹⁹⁵ [1950] Ex. C.R. 371, William TETLEY, Marine Cargo Claims, Toronto, Carswell, 1965, p.90, Martine REMOND-GOUILLOUD, Droit Maritime, 2e edition, Pedone, 1993 p.372-373, Jean PINEAU, Le contrat de transport, Montréal, Les Éditions Thémis, 1986, p. 197-198 « A la manière anglaise, l'article IV(1) vient ajouter que le transporteur ne sera pas responsable (la forme négative produit, en anglais, meilleur effet que la forme active) des dommages résultant de l'état d'innavigabilité « a moins qu'il ne soit imputable a un manque de diligence raisonnable de la part du transporteur a mettre le navire en état de navigabilité [...] le tout conformément aux prescriptions de l'article III(1) » ce même article IV(1) poursuit : « Toutes les fois qu'un [...] dommage aura résulté de l'innavigabilité , le fardeau de la preuve en ce qui concerne l'exercice de la diligence raisonnable tombera sur le transporteur. »

¹⁹⁶ [1927] Lloyd L.R. 133
“The jurisprudence is not always to the effect that the carrier must prove what caused the loss or damage, but the law would seem properly set out in Pendle & Rivett Ltd. v. Ellerman Lines Ltd., where it was held that the carrier has the onus of explaining the cause of loss or damage. The contrary jurisprudence is vague, and, it would seem, faulty, particularly because virtually all the information, if available at all, is available to the carrier alone. To exculpate a carrier when the cause of the loss is unknown is to make it beneficial for carriers not to discover the cause.”

Thus, in practice the burden of proof is on carriers even if the rules are silent on the matter. Nonetheless, this burden should not be seen as "going so far as to make the carrier prove all the circumstances, which explain an obscure situation." The idea is not to turn this duty into an impossible task. Therefore, the carrier will be responsible for proving due diligence, seaworthiness or the cause of loss in cases where such proof is connected to the loss or damage claimed. In Bernstein Co. v. M/S Titania the court made its opinion very clear:

"The carrier's burden does not extend to proving diligence to make the vessel seaworthy in all respects not causally connected with the ensuing damage, as under the Harter Act."

Consequently, a carrier who resorts to the use of art. IV(2) and its list of exceptions, must prove:

1. The cause of loss
2. Due diligence to make the ship seaworthy and,
3. That the cause of loss is one of the listed exception (the one relying on the exception,

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197 W. TETLEY, ibid., id. note 64, p. 90.
200 Ibid., id. note 199, p. 2044.
must prove the exception).\textsuperscript{201}

\textbf{B. The shippers burden}

The shipper’s burden, as in the carrier’s case is not defined anywhere. However, common sense led to the accepted view that shippers must prove their goods were damaged. They must also show that they were the holders of a clean bill of lading. Furthermore, they need to show that the goods received were not in the same condition as when shipped. As a result, carriers did not fulfil their contract to deliver the goods in the same condition as when they got hold of them. Once shippers prove this, the onus shifts to carriers.\textsuperscript{202}

As was seen the accepted practice has been to spare the shipper/cargo owner of the burden of proving the cause of loss, unseaworthiness or due diligence. However, the fire exception differs from all the listed exceptions, shifting part of the burden from carriers to shippers. Here again, the Rules were silent on whom lies the burden of proof. Nonetheless, common practice and national fire statutes paved the way to the ambiguous modern view.

Hence, carriers must prove the cause of loss (i.e. the fire) and the duty to exercise due diligence. The shift in the onus of proof occurs at this level. Once carriers prove that the cause of loss is due to fire and that they exercised due diligence, shippers must prove that the fire was the result of fault or privity of the carrier. On this fact opinions are divided amongst nations. On the one hand, the American courts follow the view that the shipper has the burden to prove fault or privity of the carrier and on the other hand, the English put the burden on the carrier and the French courts put the burden on the shipper except for the fire exception where the burden is shifted to the carrier. These two courts (French and English) hold the carrier responsible to disprove fault or privity regarding the fire exception.\textsuperscript{203}

\textsuperscript{201} W. TETLEY, \textit{ibid.}, \textit{id.} note 64, p. 104 "The carrier, first of all, must prove the cause of the loss, then due diligence to make the vessel seaworthy and, finally, the defence of "error" is open to him...; (the person relying on an exception, usually must prove the exception)."

\textsuperscript{202} Robin Hood Flowers Mills Ltd. v. N.M. Patterson & Sons Ltd. [1967] A.M.C. 1451.

\textsuperscript{203} W. TETLEY, \textit{ibid.}, \textit{id.} note 64, P.112 "In Great Britain, where the fire statute is set out in the Merchant Shipping Act, 194, s. 502(1), the courts have placed the burden on the
As a result, the "burden of proof" issue remains unclear and with no definite guidelines, leading to uncertainty in the law. The burden of proving absence of negligence is another ambiguous issue of the Hague Rules, there is no clear indication of when such proof must be made and by whom? Nevertheless, the courts gave their opinion on the issue. In *Svenska Traktor Aktiebolaget v. Maritime Agencies (southampton), Ltd.*[^204^], the court held that carriers will not be able to use the excepted perils exception as long as they have not proven proper care was used.

On the other hand, the House of Lords in another decision the *Albacora S.R.L. v. Wescott and Laurance Lines, Ltd.*[^205^], expressed a different view. It stated that the duty or burden to prove no negligence, as a precedent before being able to use art. IV (2) and its exceptions, is not stipulated anywhere. The Hague Rules make no mention of this specific obligation. Nonetheless, in practice carriers must prove the cause of loss and in the process can give proof excluding their negligence. The burden of proof issue, is one of a great number of issues that have led to confusion and worldwide conflicting jurisprudence. This lack of cohesion and formal guidelines made the need for reform more pressing.

[^204^]: [1953] 2 All E.R. 570.
THE EXONERATION CLAUSES:

A. WHEN ARE THEY VALID?

The idea pertaining to incorporating exoneration clauses was to limit or eliminate carrier's responsibilities for the loss or damage to the goods they carried. However, with the adoption of The Hague Rules, these old ways of conducting shipping business were no longer acceptable and were now considered part of the past. The arrival of a new maritime regime put an end in theory at least, to the arbitrary and constant use of exoneration clauses. Thus, with this new system, the validity of many incorporated clauses was put to the test and resulted with an increased amount of groundless clauses. In practice, courts applying The Hague Rules found themselves invalidating a great amount of exoneration clauses:

"To permit the carrier to limit its liability by limitation clauses would be to destroy the fair balance intended by the Rules, as well as any real meaning that the Rules would have."

Therefore, for a clause to be valid, it should not be contrary to the Hague Rules. Article III (8) of the Rules, clearly stipulates that a clause relieving carriers of their duties and responsibilities shall be null and void and of no effect. However, the clause will be valid if it is not found to be contrary to the Hague Rules or if the contract of transport is not covered by The Hague Rules. Thus an example of this can be found in in C.S. Petrochemical Co. v. Montpellier Tanker Co., where the court ascertained that the validity of the clause at hand was not problematic. Since the transport contract was not covered by The Hague Rules, the validity of the clause could not be tested or held invalid. However, under the Hague regime such a clause would not of been acceptable.

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206 W. TETLEY, *ibid.*, *id.* note 35, p. 410
207 [1970] A.M.C. 1183
In a recent case, the appeal court of Aix-en-Provence\textsuperscript{208} accepted as valid the exoneration clauses found in a bill of lading, even if it was contrary to the Rules, since the parties to the contract were two African states not members of the Hague Convention. Furthermore, there was no mention in their contract of any applicable law clause in cases of conflict. \textsuperscript{209} The Rules applicability did not come into effect and the clauses were therefore held valid. Thus, the accepted view is to validate exoneration clauses only when the Rules do not apply or when the clauses are within the Rules scope. Thus according to Ivamy:

"It must be born in mind that, where the Act applies, no exception which does not appear in the foregoing list can be included, except where a special contract is permitted in the case of unusual shipments of particular goods; for to incorporate some further exception would be to increase the carrier's immunity and diminish his responsibility."

\textsuperscript{209} As of November 7, 2001 The Hague and Hague Visby had a combined membership of 79 states (please refer to Annex B.)
\textsuperscript{210} E R Hardy. IVAMY, Payne and Ivamy's Carriage of goods by sea, 13 ed., London & Edinburgh, Butterworths, 1989, p. 199-200
B. WHEN ARE THEY INVALID?

On this issue, the law has been clear. Art. III (8) of The Hague Rules stipulates that any clause contrary to the Hague Rules will be invalidated. The objective was to ensure a minimum standard to be followed unanimously by all carriers (issuing bills of lading). Ensuring that shippers are protect against inequalities of bargaining powers between parties. 211

Furthermore, since the use of these clauses became so abusive, they required some sort of legislation. Hence, the adoption of the Hague Rules set the limit of what was going to be considered a valid clause or an invalid one. 212 However, in practice, the coming into force of the Hague Rules did not diminish the use of exoneration clauses. Carriers were still incorporating all sorts of clauses in their bills of lading. 213 As a result, courts found themselves ruling on the validity of many of these clauses. Judges were very strict in their rulings whenever carriers tried to escape their legal responsibilities. The judiciary was fast to annul these clauses and remind parties that The Hague Rules were the standard to be followed. Therefore, if a clause in question went beyond the boundaries of article's III (8) and IV(2) a-q, such clause would be held invalid. 214

214 Canadian National SS. v. Bayliss (the Lady Drake) [1937] S.C.R. 261., the carrier has the burden of proof, Lekas & Divas, Inc. v. Goulardris, 306 F.2d 426, 432 (2d Cir. 1962), Hecht, Levis & Kahn, Inc. v. S.S. President Buchanan, 236 F.2d 627, 631 (2d Cir. 1956)
Thus, rust, decay, vermin, and negligence clauses were all found to be invalid and given no effect. In all these cases, the clauses were held to be contrary to the Carriage of Goods by Sea Act. It further strengthened the view that clauses should not give carriers more immunity than what The Hague Rules have established.215 Consequently, the validity issue of exoneration clauses is directly linked to the rules set by the Hague Convention. Whenever the Rules applicability does not extend to the contract of carriage, the validity or invalidity of the clauses is not an issue. On the other hand, if the rules do apply, the courts have a duty to ensure that the exoneration clauses stay within the boundaries of the Convention.216

In Canada, The Carriage of Goods by Water Act of 1936 applies to any contract of internal transport or any transport that commences in Canada. Thus, goods that are loaded at a port outside of Canada are not subject to the Hague Rules, unless it is clearly stipulated in their contract, and hence, any clause inserted in the contract for carriage of goods is valid. In order for the Hague Rules to apply the parties must stipulate in their clause paramount that the Hague Rules will cover their contract.217

A. THEIR STRENGTH

As a system regulating maritime affairs, The Hague Rules innovated, changed and more precisely modernized the shipping world as it was known. Their adoption was the culmination of many years of hard labor and needed change. The pre-Hague shipping industry was marked by the strong influence of shipowning nations. Thus, the Hague Rules coming into force was seen as the solution to the inequality problem amongst cargo owning and shipowning states and for a great number of years it was:

"The Hague Rules were for their time a remarkably successful achievement in laying the basic ground rules for a shipowner's liability for loss of, or damage to, cargo. The chief merit lay in their pragmatism. They focused on a relatively few essential subjects and set out practical solutions with an economy of effort and in traditional language well known to the maritime law. Legislation, like politics, is the art of practical. Partly for this reason, the Rules achieved a remarkable success and, by about 1960, had been incorporated in legislation enacted by the great majority of maritime nations all over the world."  

Thus, one of The Hague's primary objectives was to create a worldwide cohesive maritime system. In theory, the goal was more or less achieved since by the mid-twentieth century a large number of maritime states adhered to this system giving it an international status.

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219 Please refer to Annex B for the list of membership to the Hague Rules Convention.
220 Roger Clarke, “Cargo Liability Regimes”, prepared for the OECD (Organisation for Economic Co-Operation and Development) MTC Maritime Transport Committee, January 2001, p.11 “Because of the wide use of the Hague and Hague-Visby rules over many years, their interpretation has been well established by case law..."
"The most common argument against the adoption of the 1978 Hamburg Rules was the fear that a new regime would unsettle the law. Opponents stressed that 5 decades of applying the 1924 Hague Rules have produced an enormous caseload and have finally reached an internationally uniform regime. Adopting a new regime would only create confusion and increase conflict as well as expenses."²²¹

More than half a century later, one realizes that The Hague Rules cleared the way to future maritime reforms. As the first worldwide compulsory legislation, the Rules were able to establish some sort of compromise between shipowning and cargo owning nations (even if only a minimum one). The caseload has demonstrated that courts rulings were very strict, narrow, and tough in their application of the law, making it hard on carriers to escape their responsibilities and obligations.

Hence, in practice, the Rules were of some assistance to shippers and did alter the pattern of abuse that existed prior to their adoption. A major argument for maintaining them is based on the fact that unanimity on certain issues was achieved. Consequently, some argue it would be a loss of valuable work to let the effort of over fifty-year's go to waste. It took the maritime industry half a century to achieve some sort of cohesion, why do we need to go backward, and start all over. Furthermore, by now, courts are familiar with the system and its framework. They know the positive and negative aspects of the regime. After years of jurisprudence, they have reached the stage of unanimity in most of their decisions. Thus, to change and adopt a new regime means going back to many years of chaos and uncertainties. It would also imply stepping back to times of insecurities and unpredictability in the law.

²²¹ John O. HONNOLD, "Ocean carriers and cargo; Clarity and fairness - Hague or Hamburg?", 24 J.Mar. L.& Com., (1993), 81
It took the judiciary a great number of years to achieve some predictability in the application and interpretation of the rules. Changing regimes would mean having to go through the process of interpreting a new system together with the task of trying to attain unanimity. Therefore, the argument was to maintain the rules. Since so much progress has already been made why not go forward and further what has already been achieved. The idea was to work within what was already available and more importantly with what we already knew and were familiar with.\textsuperscript{222}

The problem associated with the rules was based on the fact that their adoption did not alter the old view of the industry being led by shipowners. Thus, according to some the tendency remained favorable to shipowners/carriers interests. The Hague list of exceptions found in art. IV (2) of the Rules helped strengthen this view. Therefore, in theory, it would seem that the rules are more favorable to the shipowners/carriers interests. However, practice has proven this argument not to be totally true, according to Goldie:

"Even when The Hague or Hague Visby Rules are applied, in practice the defences available to the carrier become even more restricted. In the context of the Hague Rules this means that in many countries it is increasingly difficult for the carrier to prove the exercise of due diligence to make the ship seaworthy, and it is also more difficult for him to rely on the exceptions listed in Article 4 Rule 2, in particular (b) Fire, (c) Perils of the sea, (i) Act or omission of the shipper, etc..."\textsuperscript{223}

Another argument put forth was to reform the Rules and not to eliminate them. Consequently, maintaining the core of the Rules and adapting them to the realities of today's maritime trade. As a result, courts and parties would be working within a known framework, since all parties are already familiar with the system and its working. Avoiding the need to go through a transitional period of discovery and adjustment.

\textsuperscript{222} Roger Clarke, "Cargo Liability Regimes", prepared for the OECD (Organisation for Economic Co-Operation and Development) Maritime Transport Committee, January 2001

"...the introduction of the Hamburg Rules would put the law into a state of confusion and uncertainty for some decades. It would be many years after the introduction of the new Rules before the law on carriage by sea would, once again, be likely to crystallize. It is, in a sense, a choice between idealism and practical common sense."

B. THEIR SHORTCOMINGS

Arguments against The Hague Rules were based on the premise that the rules no longer suited today's shipping industry's needs. This view derived from the fact the rules were outdated, cargo owning nations were not satisfied, no practical unanimity was attained, maritime law was still an uncertain domain and unpredictability remained a problem.

The most common criticism attributed to the rules was linked to the Hague Rules list of exceptions (art. IV (2)), and more precisely the error in navigation and management of the ship exception. Opponents have argued there is no reason to maintain a defence, which exempts carriers in cases of negligence. Carriers have certain duties, one of which is to deliver the cargo safely to destination, therefore allowing such defence to exist by treating this type of negligence differently from others departs from the carriers primary duty of care:

"Much ingenuity has been devoted to trying to justify these exceptions but, it is submitted, there has not been any argument that really gets off the ground. It is difficult to see why negligence in navigating a ship should have different legal consequences from any other kind of negligence...The exception of negligent navigation and negligent management of the ship are distinctly out of place in a regime based on a duty of care."

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224 Anthony DIAMOND, *ibid.*, *id.* note 218, p.120
226 Anthony DIAMOND, *ibid.*, *id.* note 218, p. 111-112
For its part the fire exception art. IV (2)b of the Hague Rules, did not escape criticism. Proponents of change (shipper interest states) expressed their opinions loudly, calling this article unfair and out of place. Since carriers are the only one's with relevant evidence and real knowledge of what or who started the fire, it is difficult to comprehend why it is the claimant's burden of proof. Thus, showing once more the Rules lack of justice, sense and balance between the interests involved. Consequently, pressing the need for reform. The issue of burden of proof has also been added to the list of complaints. The problem with this issue rests on the fact that no one knows for sure on whom lies the burden of proof, and what must be proven. Thus again, creating situations of uncertainties.

"For nearly all the items in the lists of responsibilities and immunities, Hague fails to deal with burden of proof, an issue that is especially vital since, in most cases, only the carrier has the facts. The few exceptions to Hague's silence, summarized in a footnote, divide the burden of proof between the parties; in common situations the dividing lines are far from clear. This lack of clarity and Hague's total silence on most points have led to conflicting case-law and international disharmony." 227

Consequently a consensus developed, on the one hand, the rules were not practical and on the other, they did not reach their objective of worldwide unanimity, and thus, needed improvement. Confusion and unfairness marked the industry's practical reality. Accordingly, the situation led to new proposals intending to modify or replace the Hague regime. 228

As a legal document the Rules have another negative aspect to them, they are ambiguous, unclear and with no pre-established definitions. Consequently, in practice, courts from across the world found themselves facing broad theories with no set standards or directives, resulting in lack of comprehensiveness.

227 John O. HONNOLD, ibid., id. note 221, p. 98-99
"Since the Hague Rules do not address the problems that result from the interplay of its complex lists of carrier immunities and responsibilities, interpretations in other countries come to various conclusions; these divergences lead to complex and unpredictable problems of conflict of laws and more grounds for forum-shopping."^{229}

Hence, the application of The Hague Rules led to different interpretations in different countries. In many cases, the same facts resulted in different solutions and conflicting solutions. Therefore, creating a regime built on uncertainties and unpredictability. Thus, failing to attain the desired goal of having a universally applied regime.^{230}

Another strong argument has been retained in the fight against the Hague Rules. The current maritime industry is different from the one that existed at the time the Rules were adopted. Thus, with modernization and advanced technology, modern day carriers are no longer facing the same dangers, perils or accidents. Modernity has enabled them to face their voyages with more security and with less risk. Reaching destination safely is no longer a big issue. Thus, allowing carriers to make use of the Hague Rules exceptions seems contradictory and arcane. The exceptions were adopted to protect carriers from unexpected risks and dangers. However, with modern technology, these risks were diminished and are no longer a big part of maritime reality. Consequently, cargo-owning interests have pressed for changes and in many instances for the adoption of a different Regime.^{231}

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^{229} John O. HONNOLD, *ibid.*, *id.* note 221, p. 97
^{230} C.W.H. GOLDIE, *ibid.*, *id.* note 223, p. 111
^{231} Georges ASSONITIS, *ibid.*, *id.* note 33, p. 202-203, Roger Clarke, “Cargo Liability Regimes”, prepared for the OECD (Organisation for Economic Co-Operation and Development) Maritime Transport Committee, January 2001, Chester D. Hooper, testimony before the “Subcommittee on Surface Transportation and Merchant Marine”, Committee on Commerce, Science and Transportation, United State Senate, April 21, 1998, “Uniformity with regard to cargo loss and damage existed in a great majority of the maritime world when COGSA 36 was enacted by the United States. The unity was based on the Hague Rules which were finalized in 1924. They were enacted domestically, with minor exceptions, as the United States Carriage of Goods by Sea Act in 1936, and were ratified by the United States with the same exceptions in 1937.”
Paragraph – 1 Why was there a need for change?

The Hague Rules were under intense scrutiny. For many years the Rules were criticized for not standing up to their original scheme. The demand for change became more and more pressing. Cargo owning states were not satisfied with the working or more precisely failure of the Rules. In the late fifties talks of reform were becoming more urgent and the need for change was no longer an option but a reality. Hence, in response to the increasing use of containerization in maritime transport and the general dissatisfaction with the per-package limitation the CMI (Comité Maritime International) held in 1963, a conference in Stockholm to discuss the possible changes to the Hague Rules.

Those talks finally led to the Brussels Diplomatic Convention on Maritime law where amendments to the Hague Rules were adopted. As a result, on February 23, 1968, the signature of the Brussels Protocol came into force. The adopted amendments came to be known as the Hague-Visby Rules.\(^{232}\) For the Visby amendments to apply, they needed to be enacted or adopted in each of the respective states. The United Kingdom and France were amongst the first to adopt the reforms, as well as Japan, New Zealand and Australia. However, States that did not enforce these amendments i.e. India, Malaysia, the U.S., were still governed by the previous Hague Rules regime, (if such regime applied in the first place).\(^{233}\)


\(^{233}\) Chester D. Hooper, testimony before the “Subcommittee on Surface Transportation and Merchant Marine”, “Committee on Commerce, Science and Transportation” United State Senate, April 21, 1998, “Uniformity with regard to cargo loss and damage existed in a great majority of the maritime world when COGSA 36 was enacted by the United States. The unity was based on the Hague Rules which were finalized in 1924. They were enacted domestically, with minor exceptions, as the United States Carriage of Goods by Sea Act in 1936, and were ratified by the United States with the same exceptions in 1937.”
The adoption of the Hague-Visby rules did not change the existing Hague system of responsibility and the carriers obligations, it did not replace the rules, it simply modified some minor issues. The majority of the caseload decided over the years under the Hague regime remained. The carrier's duty of care did not change, his obligation to exercise due diligence to make the ship seaworthy, properly manned, equipped and supplied did not change either. Thus, any issue that was not modified in the Visby Amendments continued to be governed by the Hague Rules Regime:

"The Visby Rules were adopted to rectify certain flagrant inconsistencies which had arisen over time in the Hague Rules and in particular, a) the diminution of the real value of the per package limitation, b) a proper definition of "package" in respect to containers, c) the by-passing of the contract (including the provisions of the Hague Rules) by suits in delict and tort against the carrier, its servants or agents." 234

However as a whole, the Visby amendments did not bring about great change. The amendments were few and minimal. The list of 17 exception found in art.4(2) of the Hague Rules remained unchanged.

Samuel Robert Mandelbaum, ibid., id. note 1, p. 480
A. The effect of the Visby amendments

In practice main issues such as burden of proof, limitation of liability, carrier’s responsibility and immunity (art. III(8) and art. IV(2) of the Hague Rules) were not addressed by the amendments. As a result, many States refused to adopt the Hague-Visby Rules, dissatisfied with the minor reforms that were brought about.235

"The Visby amendments have certainly mitigated but they have not removed the technical defects inherent in the Hague Rules and in most Hague Rules legislation. This is due partly to the fact that many Hague Rules countries have not ratified the Protocol and partly to the fact that those responsible for the Protocol adopted an excessively cautious approach to the task of reforming the Hague Rules and only recommended the minimum of change."236

Concerning the topic of this paper "the carriers rights, responsibilities and immunities" the Visby Protocol did not depart from its predecessor the Hague Regime and accordingly there is no change to signal. The Protocol simply modified the per-package limitation to $663 or $2 per kilogram of lost or damaged goods. The amendments clarified the definition of the term package found in the rules. Defining package as the number of packages or units inserted in the bill of lading as packed in such article of transport. The amendments also established that a carrier could no longer limit his liability for intentionally caused damage or recklessly caused damage in cases where the result of such damage was known.

The Visby amendments did not allow changing the bill of lading original conditions by inserting contrary conditions when the bill is transferred to a party in good faith. The amendments made it possible to extend to one-year the time limitation. It also broadened the definition of carrier to include the owner or the charterer who enters into a contract with a shipper.
Shipper States viewed the Visby amendments as a failure. The changes were not representative of the needed reforms. These States that pressed and waited for these changes for a great number of years found the result disappointing.

"Now in the years while the Visby amendments were being negotiated, and indeed for some time after their conception in 1968, it was common to refer in a somewhat condescending or disparaging tone of voice to those amendments since it seemed to many people, even in the traditional maritime countries of the West, that the amendments had missed a golden opportunity to conduct a comprehensive revision of the Hague Rules so as to bring them up to date and to ensure that they were as successful for the next forty or fifty years as they had proved to be in the years which had elapsed since 1924."237

Consequently, the lack of success and adherence to the Visby amendments is linked to the reaction of a number of States, refusing to accept such little progress. Thus, many countries, in particular developing countries, prevented the ratification of the Visby amendments. Hoping to pressure the maritime community to prompt the real reforms needed.

"For the developing countries one major cause of dissatisfaction was that the Hague Rules system, together with the bill of lading forms in use, meant that shippers in developing countries, due to lack of expertise and weaker bargaining power, were often unable to enforce the liability imposed on carriers by the Hague Rules. In fact, it may have been overlooked that the effect of the Hague Rules have not necessarily been the same in all parts of the world, and that demand for a new, simplified and amplified regime of liability were based on experiences somewhat different from those of industrialized countries."238

Shipper interest sought for greater change and the Visby amendments did not measure up to their expectations. Accordingly, campaigning against them seemed the only acceptable way to voice their dissatisfaction and request some real reforms. Hence, the Visby failure paved the way to the coming forth of a totally new regime, known as the Hamburg Rules. Regardless, one cannot lose sight that even if not very successful in their efforts to reform, The Visby amendments remain a better alternative than The Hague Rules.
PART II: THE HAMBURG RULES 1978

A. PREPARATION AND ADOPTION OF THE HAMBURG RULES
Its origins: the role of UNCITRAL and UNCTAD

As of November 1, 1992\textsuperscript{239}, the Hamburg Rules became more than just a subject of debate. They are a practical reality of maritime law. With their adoption by 20 States (Barbados, Botswana, Burkina-Faso, Chile, Egypt, Guinea, Hungary, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, Senegal, Sierra Leon, Tunisia, Uganda, Tanzania and Zambia) they came into force, and now represent the latest attempt at modernizing the international conventions governing the carriage of goods by sea. As of November, 2001 the list of membership to the Hamburg Rules is 26 States.\textsuperscript{240}

The new regime was adopted on March 31, 1978, by a diplomatic conference held at Hamburg Germany. The new Convention came into force by a vote of 68 in favor, none against and three abstentions. The adopted text was based on the draft convention by UNCITRAL (the United Nations commission on international trade law).\textsuperscript{241}

\textsuperscript{239} Report to Parliament on the Carriage of Goods by Water Act, Transport Canada, December 1999, p.4 "In November 1992, the Hamburg Rules entered into force but none of the world's major trading nations has acceded to the Rules, nor has implemented its provisions in national legislation."

\textsuperscript{240} Please refer to Annex B for a list of the Hamburg Rules membership, Report to Parliament on the Carriage of Goods by Water Act, Transport Canada, December 1999, p.8 "The long period of time – 15 years – before the Hamburg Rules finally came into force, shows the reservations and reluctance of governments to adopt them. Indeed, none of the industrialized countries has ratified the Hamburg Rules."


Samuel Robert MANDELBAUM, \textit{ibid.}, id. note 1, p. 484
However, the path to their adoption and implementation was not simple. These Rules symbolized the light at the end of a long road, a road that was shared by many States and organizations, which labored for decades, to attain the desired goal of a maritime responsibility and liability regime that conciliates all interests. Bringing about the adoption of the Hamburg Rules began with the realization that the old regime was not working and did not comply with the maritime realities of modern times. It was obvious that change was necessary. With a failed attempt at modifying the Hague Rules (i.e. the Visby amendments), timing was right to campaign for a novel regime more adapted for today’s maritime trade.

"So the first historical factor which led, in my view, to a demand being expressed for a totally new cargo convention was the disappointment experienced by many people at the outcome of the conferences held in the period between 1959 and 1968 for the purpose of bringing the Hague Rules up to date. This disappointment was supplemented in some cases by the view that the Visby amendments did not go nearly far enough to redress the traditional imbalance between ship and cargo and to impose greater liabilities on shipowners."^242

The developing countries, at this point, were wearied with the existing system. The dissatisfaction with the balance of responsibility between ship and cargo interests remained. They requested the adoption of a new regime. One that would represent a consensus of all views i.e. shippers, carriers, insurers, governments. Ending the old perception of a one sided system favoring the interests of the carriers.

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^242 Anthony DIAMOND, ibid., id. note 237, p. 2, Report to Parliament on the Carriage of Goods by Water Act, Transport Canada, December 1999, p.3 “The adoption of the Hamburg Rules is considered to have a more broadly based political background than the Hague/Visby regime since they were adopted under the auspices of the united Nations with the participation of the traditional maritime countries and large shipper nations, as well as the developing countries which were convinced that the prevailing system was running contrary to their interests. Their argument was that the 1924 Hague Rules and the 1968 Hague/Visby Rules had been prepared in fora where they had not been represented at the time.”
"Already by 1968 it had become clear that the Hague Rules were unpopular among the developing countries partly because they were thought to have been drafted in the interests of the so-called colonialist or shipowning nations... because they had been negotiated as a compromise between the major self-governing powers in 1924 at a time when the great colonial empires were still intact and had then, as most cases, been imposed on their colonies before those colonies had gained their independence. It was urged by the developing countries and - even more - by those devoted to their interests, that they were entitled to a share in the formulation of those laws which should govern their maritime affairs."243

Accordingly, the growing dissent within the developing countries culminated to such a degree that they felt it was the appropriate time to work for change. The existing system failed them. Hence, in the early seventies, under the initiative of the developing countries, the United Nations was called in, and thus, their participation in the search of a preferred system began. Their involvement would become central to finding a maritime system that would be to the liking of all parties. Up until that time, the CMI was the primary organization involved in finding solutions to the broadening maritime issues. However, the developing countries were not really involved within the organization, and did not feel it was in a good position to defend their interests as best as possible.244

243 Anthony DIAMOND, ibid., id. note 237, p. 2
244 Report to Parliament on the Carriage of Goods by Water Act, Transport Canada, December 1999, p.3 “By the 19970s, the Hague Rules were considered largely outdated having been developed in the 1920s by maritime nations seeking to establish a balance among their maritime interests, notably between shipowners and shippers, and their respective responsibilities for carriage of goods. Notwithstanding the revisions adopted by the 1968 Hague/Visby Rules, pressures from developing countries and major shipper nations for a full re-examination of cargo liability regimes has led to the development of a new regime, the 1978 Hamburg Rules.”
"The UNCTAD initiative is explained by the fact that the Hague/Visby amendments were considered far too modest. C.M.I. has been criticized for its desire to retain status quo instead of taking into consideration the need for changes caused by modern transportation techniques and, in particular, required by the developing countries. In addition, the C.M.I. is generally considered to take care of shipowner's interests by resisting any changes in favor of the shipper." 245

In the late sixties, UNCTAD (United Nations Commission on Trade and Development) set up a working group to examine the issue of carriage of goods by sea, and more precisely to see if the existing regime was unfair to developing countries. Thus, UNCTAD studied all existing legislation relating to bills of lading and carriage of goods by sea, and determined whether the developing countries economic development and interests were met.

"The Working Group on International Shipping Legislation of UNCTAD has suggested some basic amendments to the Hague Rules, in relation to the:
(i) period of responsibility;
(ii) basis for liability (in particular the excuses for loss or damage caused by error in the management of the vessel and by fire);
(iii) deck cargo;
(iv) jurisdiction and arbitration." 246

Thus, on December 1970, UNCTAD published a report on Bills of Lading, stating its finding on the issue. UNCTAD found that the Hague Rules were unfavorable to cargo owners. They criticized the list of exceptions found in art. 4(2) of the Hague Rules. It also found the Hague Rules to be ambiguous, and not cost effective, with overlapping insurance costs.

246 Jan RAMBERG, Revision of the Hague/Visby Rules on Bills of Lading, C.M.I. Doc. 1973, p. 60
Consequently, the Hague system was not working in the interest of the developing countries, placing undue economic burdens on them.\textsuperscript{247} Developing countries were tired of the old system, they had determined views on the direction they wanted a new regime to take. The Hague system of responsibilities and immunities was the first item on their list of changes. These States wanted the new system to have a different and more equitable sharing of the risks in maritime transport. On the one hand, they demanded that carrier's responsibilities be increased, and on the other hand, that cargo owner's burden be decreased. Hence, most of the African, Asian and South American States were amongst the proponents for the adoption of a new system, one more representative of their interests. Consequently, it was felt that the United Nations was the only international body able to answer their demands.

However, UNCTAD's work was seen to be too politically oriented and not legal or technical enough. Thus, another organization within the United Nations was called in. February 1971 marked the beginning of UNCITRAL's (United Nations Commission on International Trade Law) involvement in trying to develop a new system. Hence, the task was now divided between the two UN organizations, with UNCITRAL in charge of economics and commercial maritime aspects.\textsuperscript{248}

UNCITRAL a well-known international body with the mandate to reduce obstacles to international trades whom from conflicting and inadequate laws has established an enviable reputation for professional, non-political and successful work. Thus, UNCITRAL put forth a Working Group of 21 States representing each region and legal system. This Working Group with the help of international organizations and experts in the field completed after 5 years of labor a draft convention which was then

\textsuperscript{247} Anthony DIAMOND, \textit{ibid.}, id. note 237, p. 3
\textsuperscript{248} Report to Parliament on the \textit{Carriage of Goods by Water Act}, Transport Canada, December 1999, p.4 "In the case of the Hamburg Rules, the preparatory work was done by the United Nations Commission on International Trade Law (UNCITRAL) at the request of and in Cooperation with the committee on shipping of the United Nations Conference on trade and development (UNCTAD)."
transmitted to all governments and interested international organizations for comments.\textsuperscript{249}

Thus, from 1971 to 1976 UNCITRAL and its Work Group reviewed a number of important issues dealing in great part with carrier responsibilities and exoneration, burden of proof, and jurisdiction, amongst others. Each question was analyzed and examined in detail. The parties’ opinions, comments and criticisms were heard and taken into account, thus trying to represent all the interested views. Each association was given the opportunity to be heard and to voice its preferences in the choice of alternative solutions. In regard to the question dealing with the basis of liability regime, opinions from all sides were heard.

Thus, the Maritime Law Association of the US, UK, Federal Republic of Germany, German Democratic Republic and Canada, all favored a system of liability based on a list of defences. The main reason being, that a voluminous case law has been established and, therefore, it would be a great loss to abandon it. However, States like Italy and Sweden preferred a more general formula.\textsuperscript{250}

Early on, the UNCITRAL Work Group opted to work toward the adoption of a new maritime regime, rather then to modify the old one. The reason was clear considering the reality that the Hague Rules were the subject of so much opposition and criticism, and over the years became unpopular amongst a great number of States. Furthermore, the old system did not cover a number of new issues that needed to be addressed.\textsuperscript{251}

\textsuperscript{251} Michel ALTER, Les travaux de la CNUDCI, " La convention sur les transports de marchandises par mer", p. 739
The commission therefore, adopted a Draft Convention on the Carriage of Goods by Sea. Thus, in May 1976 UNCITRAL published its final draft of the new proposed system. April 30, 1979 represented the Convention's deadline for its signature. Thus, in 1976 all governments and interested organizations were given a copy of the Draft Convention, to look over and to bring forth their various comments, opinions and views on all relevant issues.

Not surprisingly, the Draft Convention was the object of heated comments in the years preceding their adoption. A number of delegations confronted each other on the most controversial issues, one of which being, the carrier's responsibilities and immunities issue. The Germans, the Soviets, the Japanese and the British, were amongst the delegations that did not want change in the existing system of responsibilities. However, the majority of delegations were in favor of such a change that was at the heart of the new system, and hence, defeated the mounting opposition against its adoption. Once all the voices were heard, it was time for the Convention to be approved by all States. Consequently, in 1978 a diplomatic conference was held in Hamburg Germany, to adopt this new system.252


252 Roger Clarke, “Cargo Liability Regimes”, prepared for the OECD (Organisation for Economic Co-Operation and Development) MTC Maritime Transport Committee, January 2001, p.24 “The Hamburg rules, on the other hand, place on the carrier a wider and more general liability for the goods while in the carrier’s charge; and they replace the 17 Hague defences with three (art. 5(1,4&6), the main one being that the carrier ‘took all measures that could reasonably be required to avoid the occurrences and its consequences’.”

253 John O. HONNOLD, ibid., id. note 221, p.79-80
chap 1 THE CARRIER'S LIABILITY REGIME

sec 1 - Maintaining the principle of the Hague Rules: the responsibility of the carrier should be based on fault and neglect

The Hamburg Rules represent a departure from the previous system. However, no one will argue that some continuation endures between the two systems. The Hamburg and the Hague Rules are based on the same basis of responsibility. In both systems, carriers are not strictly liable in cases of loss or damage to the goods. Furthermore, the carrier basis of responsibility is based on fault or neglect, even if in each system it's expressed differently. Nonetheless, the overall understanding is the same and the underlying idea follows the same objective.

"Although the carrier liability regime of the Hamburg Rules does differ in a number of important respects from Hague and Visby, there is some continuity between the Hamburg Rules and its predecessors. First, the standard of reasonableness and fault of the Hamburg Rules may also be found in Hague and Visby, albeit much less prominently. In addition, both Hague and Visby place affirmative duties upon carriers. In effect, what the Hamburg Rules have done in article 5(1) is to take the catch-all "exception" of Hague's article 4(2)(q), and to turn it into a general duty with the burden of proof being on the carrier to disprove fault. This general duty is thus allowed to swallow nearly all the defences of Hague."254

Thus, by looking closely at The Hague and Hamburg Rules one realizes that both systems are somewhat similar. Article IV(1) of The Hague Rules clearly states, that if the carrier uses due diligence, he will not be held liable. Furthermore, some exceptions in art. IV(2) of the Hague Rules, use the basis of fault to hold the carriers responsible for loss or damage to the goods they carry. The same can be found in the Hamburg Rules.

The fact is demonstrated again in art. IV(2)b of the Hague Rules which stipulates carriers will not be held liable, unless the loss or damage is caused by their actual fault or privity. Hague’s art. IV(2)p stipulates carriers will not be responsible for latent defects undiscovered by due diligence, and most importantly, the catch-all exception found in article IV(2)q of the rules, stipulating that carriers will not be held liable for any cause of loss that arose without their actual fault or privity. Consequently, one easily realizes that the Hague Rules are not based on a system of strict or objective liability. They are based on a system of fault and neglect, even if they don't formally stipulate it. Therefore, by comparing and analyzing both systems, one can observe some sort of continuity in the newer system, even if in theory it’s worded differently.\(^\text{255}\)

"Insofar as the basis of the liability regime is concerned, however the Hamburg Rules represent a continuity of the traditions of maritime law while at the same time providing for a moderate increase of the level of liability of carriers by sea and the removal of peculiarities inherent in the existing law. This was the basis for the "package deal" at Hamburg... The liability of the carrier is still based on the principle of fault and neglect. This principle has been incorporated into the Hamburg Rules in the affirmative and general form of liability for presumed fault or neglect (Article 5, parag. 1)."\(^\text{256}\)

\(^{255}\) Please refer to Annex F for a draft copy of The Hamburg Rules, i.e art. 5

sec 2 - THE BASIS OF LIABILITY: ARTICLE 5(1) OF THE HAMBURG RULES

parag 1 – THE SCOPE, OBJECTIVE AND SIGNIFICANCE OF ART. 5(1)

The Hamburg system of liability is based on the premise of presumed fault or neglect. Thus, to escape liability, the carrier must prove he was not negligent or at fault. Hence, the Hamburg Rules are based on a general formula, unlike the Hague Rules that are based on a long list of defences. It also implies that as a general rule the burden of proof rests on the carrier. The carrier's general responsibility is to be found in article 5(1) of the Hamburg Rules, which expressly outlines their basis of liability. Thus, carriers will be held liable if the occurrence that caused the loss or damage to the goods took place while the goods were in their charge.

Article 5 of the Hamburg Rules stipulates that:

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. Hence, to escape liability a carrier must prove that he, his servants or agents, took all measures that could reasonably be required to avoid the loss and damage to the goods it carried.  

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257 Report to Parliament on the Carriage of Goods by Water Act, Transport Canada, December 1999, p.4 “The Hamburg Rules introduced a new approach to cargo liability according to which the carriers are held responsible for the loss or damage to goods while in their charge, unless they can prove that all reasonable measures to avoid damage or loss were taken. Carrier liability is extended to reflect the different categories of cargo now carried, new technology and loading methods, and other practical problems affecting the shippers such as losses resulting from delays in delivery.”
"The carrier is liable unless he proves that "he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences". This general rule - at least if interpreted on the basis of the "common understanding" attached to the convention - expresses a principle of fault liability and not of strict liability. It has also made possible a simplification of the liability regime, because it became unnecessary to retain the catalogue of exceptions and certain other provisions specifying the duties of the carrier, which are now contained in the Hague Rules."258

The Hamburg Rules wanted to depart from the previous system, and thus, by adopting a general formula, it simplified the system of carrier's responsibility and liability. Consequently, the objective of the new system, as well as the essence of carrier's liability, can be found in article 5(1) of the Hamburg Rules.

"The carrier's core liability is for loss or damage to goods and for delay in their delivery caused during his period of responsibility. That period begins with taking the goods over at the port of loading, and continues throughout carriage and until delivery at the port of discharge."259

Another breakthrough found in the Hamburg Rules can be found in article 4 Period of responsibility. Article 4 states that:

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.

The new convention clearly extends the time frame of the carrier's responsibility. No longer from reception/loading of the goods to their discharge but it now covers the period when the goods are at the port of loading thus before loading and after discharge. The Hamburg Rules took into account the modern shipping practice of carriers taking custody of the goods in port before and after the actual sea carriage also known as i.e. port to port.

Accordingly, ensuring that during this time any loss to the goods rests on the party in control and who is most able to guard against such loss or damage.

The Hamburg Rules opted for a much simpler formula i.e. article 5(1) of the Rules. Nonetheless, this new set of Rules, even if simpler than the previous system, are not perfect and like The Hague Rules are also subject to criticism. The Hamburg system of liability has been described as a two-part formula. In the first part, one must define what is meant by the terms of "occurrence" and "agents" and further, on whom lies the burden of proof. On the other hand, what is meant by "all measures that could reasonably be required", what kind of standard of care are the rules aiming at.

"I pause only for a moment to draw your attention to the fact that this dual test, set out in words of extreme simplification, replaces all the provisions of the Hague Rules with regard to seaworthiness, as well as all the provisions of the Hague Rules setting out the carrier's duty "properly and carefully" to look after the goods in other respects, together with the so-called catalogue of exceptions" which qualify the latter duty."260

Article 5(1) of the Hamburg Rules has generated some discussion on the interpretation it must be given. The fear among some States was that their courts would interpret art. 5(1) too strictly, or that there would be some confusion with its application. As a result, and to quiet the mounting opposition to the new system of liability, the drafters of the Hamburg convention decided to include an annex, giving a more detailed definition to some of the troublesome issues.

260 Anthony DIAMOND, ibid., id. note 218, p. 9
Since article 5 (1) stipulates that the carrier must use the reasonable carrier test to avoid loss or damage to the goods he carries, courts facing such an article, must decide what is a reasonable carrier, and not what was the necessary action to take to avoid the loss or damage. Hence, to escape liability the carrier must demonstrate that he took all reasonable measures (not the necessary measure) to avoid the loss or damage.

However, in cases where the circumstances of the loss or damage are unknown or uncertain, the carrier cannot prove that he took all the reasonable measures to avoid liability, and therefore, cannot escape liability. Since, the system is based on a presumed fault, the carrier that does not disprove fault, cannot escape liability.\(^{261}\) Thus, in some manner, the Hamburg Rules are tougher and stricter on carriers. However, in other ways, the system can only work on a case by case basis, since courts will base their decisions on facts and not on a universally accepted formula. Consequently, one realizes, although the rules were simplified, uncertainties remain. Only over time, could some sort of secure understanding be achieved. In the meantime, courts are dealing with a new system and new interpretations need to be put to use. Thus, a common universal understanding is not yet a reality, and will not be for a long time.

As in the case of The Hague Rules, only after decades of applicability, could it be said, that a certain unanimity, consistency and degree of predictability in the outcome of some cases was achieved. The Hamburg Rules success, on a practical level, will only be known in the years to come. However, for a great number of countries, the Hamburg Rules are already a great success, even if only in theory.

\(^{261}\) George ASSONITIS, *ibid.*, id. note 33, p. 215.
A. On whom lies the burden of proof?

The Hamburg Rules are based on a system of fault liability, accordingly, the burden lies on the carrier, and to escape such presumed fault he must disprove his fault in the events that led to the loss or damage to the goods he carried. Hence, art. 5(1) of the Hamburg Rules, outlines the ordinary course of the required procedures needed for a carrier to escape liability. Article 5(1) asserts that the onus of proof is on carriers.

"The only help given by the Rules is to be found in Annex II. This set's out a "common understanding" adopted in the course of the diplomatic conference. The Annex reads that "it is the common understanding that the liability of the carrier under the Convention is based on the principle of presumed fault or neglect". It is almost as though the delegates felt themselves to be drowning when they came to consider the meaning of Article 5, Rule 1 and, at the last moment, set out their "common understanding" in the hope that it might act as a kind of raft in a shipwreck. But though Annex II points in favor of the solution that the burden usually rests on the Carrier, it does not really answer the question "What is to give rise to the presumption of fault or neglect"?262

The carrier's representatives at the Hamburg Conference were worried that the interpretation of Article 5(1) will lead to a stricter interpretation of the burden of proof issue. The fear was based on the apprehension that in practice courts were going to interpret this Article as a strict or objective liability. Depicting the liability more severely than the actual basis (of fault or neglect) intended by the drafters of the system. Accordingly, incorporating Annex II to the rules appeased the apprehension of most parties.

262 Anthony DIAMOND, ibid., id. note 237, p. 10
Thus, as a general practice it came to be accepted, that the initial burden must be discharged by carriers who must prove that they took reasonable care of the goods. Furthermore, it only seemed logical to presume such fault or neglect, since the goods got damaged or lost while they were in the carriers custody, as the Rules state, "if the occurrence which cause the loss or damage ... took place while the goods were in his charge..."

The rational behind such a rule, is based on the premise that primarily carriers are the ones with the most information of what happened to the goods or what could of happened to them, therefore, avoiding the imposition of such unfair and difficult burden on shippers. In contrast to cases tried on the basis of the Hague Rules regime.

In comparison, the Hamburg Rules have made great progress in the burden of proof area. The new Rules have simplified and unified a very complex area of the Hague system. One of the most common Hague Rules criticism, related to the fact that they were unclear and uncertain on the burden of proof issue. The Hague Rules had no clear mention on whom should bear the onus of proof. Furthermore, in practice, the Hague Rules led to so many interpretations that the onus of proof was shifted from one party to the other. Due to the lack of guidelines and set standards, the results were unclear and unpredictable in law. Consequently, the search to have a unified international maritime convention, failed, at least regarding the issue of burden of proof.

The Hamburg Rules provided a welcomed improvement in the law. Even though the new Rules did not expressly stipulate that in most cases, the onus of proof was on carriers, (Fire being one of the exceptions). The adoption of Article 5(1) and Annex II, eliminated any doubt, accordingly, there was no longer place for mistake, ambiguous and divergent interpretations.
The carrier will be responsible for the loss or damage to the goods, if they were under his charge when the loss occurred, and if he does not prove that he took the required reasonable measures to avoid such loss. Hence, he must prove that he was not negligent or at fault. Therefore, the Hamburg Rules are stricter on carriers and are more shipper friendly, Accordingly, satisfying the demands of cargo owning and developing States. As in all compromises, an exchange must be reached in order to attain the favored outcome. In Hamburg the Hague Rules Fire exception was the compromise. The old fire exception remains unchanged. The onus of proof is on shippers and not carriers, this setback is minimal, the Hamburg Rules burden of proof remaining a more just and uniform system.
sec 3 - UNDER HAMBURG: WHAT HAPPENS TO THE SEAWORTHINESS THEORY?

In the early days of shipping, the duty of seaworthiness was onerous. Carriers had an absolute duty to provide a seaworthy ship. Since carriers were the only one's with control of the ship's seaworthiness, it only seemed normal to hold them responsible for such a duty. Hence, when time came to regulate the issue of carriage of goods by sea, and consequently, adopt some international convention dealing with maritime issues, incorporating the seaworthiness concept in these legislation's was readily accepted. Accordingly, the Hater Act and the Hague Rules have both included the carrier’s obligation of seaworthiness.

"The concept that a vessel must be seaworthy upon commencement of the voyage is of ancient origin. Long before there were any international conventions, the general maritime law recognized an implied warranty of seaworthiness. Decisions in the U.S. courts recognized this warranty as absolute, and as one which did not depend upon the owner's knowledge or his diligence. It was not even to be displaced by clauses in a common carrier's bill of lading excusing a carrier from latent defects. Both the Harter Act and the Hague Rules reduced this duty of the carrier from an absolute to one of exercising "due diligence" before and at the beginning of the voyage. The Hamburg Rules do not mention unseaworthiness at all. Liability of the ship is placed upon an entirely different basis."

The seaworthiness theory is part of the Hague Rules system of carrier's liability and immunity. This duty is clearly stipulated in the Rules, as a result, courts are very familiar with its applicability. Consequently, the duty has a central role in the working of the Hague system. Notwithstanding, this very old tradition has been abandoned by the Hamburg Rules. The new Rules have opted to eliminate any mention of seaworthiness, and preferred to go with a different system of responsibility, based on "reasonableness" rather then seaworthiness.

The rationale behind the shift was based on practical facts. Modern shipping practice is not what it used to be. The early days of maritime trade carried more risks and dangers: ships were not as solid, well equipped or modernized with the latest technology. Today voyages are much less dangerous and hazardous, the timing of the voyage is more predictable. The ships are more solid, resistant and no longer built in the same manner, out of wood. As a result, reducing the probability of unseaworthiness. To accommodate the demands of shipping nations and to adapt to the industry's evolution, the Hamburg Rules were drafted without the seaworthiness theory.

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264 Roger Clarke, “Cargo Liability Regimes”, prepared for the OECD (Organisation for Economic Co-Operation and Development) MTC Maritime Transport Committee, January 2001, p.17 "...delay in delivery is as much a legitimate concern of cargo interests as is loss or damage to the goods themselves; the timing of sea journey is less unpredictable than it was 80, or even 40, years ago; customers expect great punctuality;..."

265 ibid., id. note 264, at p. 18-19 "Businesses, including shipping, are rapidly adapting themselves to electronic communications and documentation. Governments are having to update their laws to recognise these new business methods. Of the more modern regimes, the Hamburg rules make provision, taken up in the Nordic Code, for electronic signatures on bills of lading, ..But the Hague and Hague-Visby rules, drafted as they were before the electronic age, contain no reference to electronic media."
chap 2 - DEPARTING FROM THE HAGUE RULES EXCEPTIONS

sec 1 - ERROR IN MANAGEMENT AND NAVIGATION OF THE SHIP

Article IV (2) of the Hague Rules, provides a long list of defences available to carriers. The error in management and navigation of the ship, has by far, been the most controversial defence available to shipowners. As a general rule, maritime law has always held carriers responsible for their negligence. However, shipowners found ways to escape their responsibilities, and hence, adopted in their bills of lading exculpatory negligence clauses. Thus, explaining the origin of the error in management and navigation of the ship defence. The incorporation of this exception in The Hague Rules results from compromise. Carriers accepted responsibility for negligence in most cases, in exchange for exoneration relating to negligence in the management and navigation of the ship. Today, such compromise does not make sense on a legal or moral basis. In practice the effect of such exoneration results in injustice and could no longer be tolerated. 266

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266 Chester D. Hooper, testimony before the “Subcommittee on Surface Transportation and Merchant Marine”, “Committee on Commerce, Science and Transportation” United State Senate, April 21, 1998, “At the outset, those interests favoring the Hamburg Rules insisted that the error of navigation or management defense be eliminated. The defense would exonerate a carrier if cargo were lost or damaged as the result of an error in the navigation of a vessel or the management of a vessel at sea. The drafters of the Hague Rules in the 1920s reasoned that an error of navigation or management at sea was beyond the control of either the shipowner or the cargo owner. They decided not to assign liability for matters not under the control of either party to a contract for carriage of goods by sea. Thus, any damage to or loss of cargo caused by an error of navigation or management of a vessel at sea effectively would be suffered by cargo interests. Correspondingly, any damage to the vessel caused by an error of navigation or management would be suffered by the carrier. ... sectors of the maritime industry favoring the Hamburg Rules insisted on the elimination of the error of navigation and management defenses,...”
"It is difficult to see why negligence in navigating a ship should have different legal consequences from any other kind of negligence... The exceptions of negligent navigation and negligent management of the ship are distinctly out of place in a regime based on a duty of care. They were, of course, essentially a trade-off, a concession to shipowners in return for the annulment of other traditional exception clauses... But whatever the historical reasons for the exceptions, it is submitted that they cannot any longer be justified."²⁶⁷

Since its inclusion in The Hague Rules, this exception has been the object of heated debates. Shipping and developing States argued for its abolition. Over the years, this article became a major obstacle in the negotiations for reform. Nonetheless, refusing to back away from this issue, cargo-owning nations ultimately succeeded. During the UNCITRAL negotiations, the error in management and navigation of the ship defence was at the core of the discussions that led to the adoption of the Hamburg Rules. The delegates were basically divided in two groups. On the one hand, those in favor of abolishing this defence, and on the other, those in favor of maintaining it. The debate went from suggestions of maintaining the defence, to partial abolition, hence, eliminating the error in management of the ship, since this was the part of the defence that caused confusion, and retaining the latter part of the defence, error in the navigation of the ship, since this part generated no confusion. However, the demand for total abolition, by the majority of states, represented the most common suggestion.²⁶⁸

One of the CMI recommendations regarding the error in the management and navigation of the ship was:

²⁶⁷ Anthony DIAMOND, *ibid., id.* note 218, p. 111-112
"Considering that the particular risk pertaining to carriage of goods by sea resulting from perils of the sea and the accumulation of risks, as well as any change of the present risk allocation, could be met by an adaptation of the present system of insurance and, in order to achieve a better harmonization of the different branches of the law of carriage of goods, the CMI RECOMMENDS that the particular defences for error in the navigation and the management of the ship as well as for fire be deleted."

In the end, the decision was to abolish the defence of error in the management and navigation of the ship, and work toward a new system of liability. A system more objective, just and representative of all parties concerned. Thus, the Hamburg Rules system of responsibility based on a general formula of liability left behind the long list of the Hague exceptions. Error in management and navigation of the ship is no longer acceptable.

"Error in the navigation and management of the ship would no longer be a defence for the carrier under UNCITRAL. Carriage by sea under the Hague/Visby Rules is virtually the last legal sphere where a carrier is not responsible for its faults. It is felt by many that it is now time to withdraw this exception granted long before the advances of technology. Error in navigation, too, is being interpreted more and more restrictively by the expansion of the seaworthiness provision to the whole voyage... society would probably benefit by the removal of the "error" exception because it is a rule of commerce that the person responsible for a loss should be held responsible in law; otherwise the negligent practices will be repeated and never corrected."

270 Roger Clarke, "Cargo Liability Regimes", prepared for the OECD (Organisation for Economic Co-Operation and Development) MTC Maritime Transport Committee, January 2001, p. 26 "Moreover, in view of technological advances over 80 years and of the far more demanding safety standards that shipowners now have to meet (not least under the international Safety Management Code), is it any longer acceptable for carriers to escape liability by pleading the "act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship? Such a defence would be grotesque and inadmissible if pleaded in a case of liability for injury to a ship's passenger or for environmental damage from an oil spill, and I believe that democratic governments would find it hard to justify to their legislatures today re-enacting any exemption from carrier liability in these terms."
Consequently, after years of pressure from developing States as well as shipping nations, the Hamburg Rules adopted a system based on fault or neglect, and not tolerant of negligence in any sort of way. Accordingly, aligning themselves to other transport legislation’s. 272

see 2- FIRE: THE EXCEPTION TO THE NEW RULE

Fire always held a special status in maritime law. The reason being most fires arise due to unknown causes, and result in difficulties establishing responsibility. Consequently, carriers find themselves in a vulnerable position. Hence, to correct the situation, the industry dealt with this issue differently and more leniently. Distinguishing the fire exemption with special treatment. The Hague Rules upheld this tradition. The exemption favored carriers so long as the loss or damage due to fire was not actually caused by their fault or privity. Accordingly, imposing a very heavy burden on shippers. Shippers were required to demonstrate that the fire resulted from the carrier's fault or privity. In effect a very difficult task. Cargo owners are not part of the voyage, and thus, do not have access to pertinent information's regarding the carriers involvement (or not) in the way the loss occurred. Nonetheless, for the greater good, the fire exception was ultimately accepted as a compromise. 273

The Hamburg Rules did not depart from this tradition, and like The Hague Rules also maintained the fires special status.

272 Martine REMOND-GOUILLOUD, Droit Maritime, 2e édition, Pedone, 1993 p. 334 « Surtout le texte se rapproche d'autres Conventions régissant le transport :Varsovie et Convention routière CMR, ce qui facilitera l'harmonisation, le jour venu. »  
273 René RODIERE, Emmanuel de PONTAVICE, Droit Maritime, 12e ed , Dalloz,1997, at p. 386
"Under art. 4(2)(b) of The Hague Rules the carrier was not responsible unless he was at fault. UNCITRAL at article 5(4) makes two major changes and retains a defect of the Hague Rules. Firstly, as under the Hague Rules, the claimant must prove the fault or neglect. This is particularly burdensome because the facts are available to the carrier and not to the cargo owner. Secondly, the claimant must prove that the fire only 'arose' from the fault or neglect of the carrier. Once the fire starts the carrier is presumably not responsible if it or its servants or agents are negligent in putting out the fire or preventing it from spreading. Thirdly, UNCITRAL does extend the fault of the carrier under the Hague Rules 4(2)(b) to faults of the servants and agents."²⁷⁴

One would think, such anachronism would no longer exist under a modern regime. However, reality demonstrated otherwise. To the dismay of many, the Hamburg Rules did not abolish this carrier privilege, so once again, this exception got a special status. At the center of the Hamburg negotiations, we found the fire issue along with the error in management and navigation of the ship. To reach some sort of harmony, a compromise was reached, to maintain the fire exception. The Hamburg Rules fire provision was thus incorporated with some minor variations. Nonetheless, the main objective remained the same, and therefore, shippers lost this round.

"The Hamburg fire exception appears to have grown out of a "horse-traders compromise" proposed by Nigeria, under which the defence of negligent navigation would be removed and the fire exception retained."²⁷⁵

Accordingly, the new Rules were adopted without opposition from any major maritime nation. As a result, this new system symbolizes evolution and progress in maritime trade. Except for the fire exemption which does not make sense in modern maritime law. The fire exemption remained to attain balance in the negotiations and for consensus to be reached.

²⁷⁴ William TETLEY, ibid, id. note 271, p. 266
²⁷⁵ R. Glenn BAUER, ibid, id. note 263, p. 67, René RODIERE, Emmanuel de PONTAVICE, Droit Maritime, 12e ed, Dalloz, 1997, at p. 386 « L'incendie, par une mesure de transaction hâtive et sans valeur, donne lieu a un traitement spécial, qui constitue en soi un contresens puisque les Règles ont voulu poser une règle générale et ne plus s'encombrer de cas exceptés et qui paraît se ramener a ceci que l'incendie constitue une présomption simple favorable au transporteur. »
Like the adoption of any new convention, the Hamburg Rules were and still are the object of scrutiny. This new regime will be the subject of many debates, analysis, criticism and praise. The opinions in favor or against them are endless. Nonetheless, an examination of a large number of comments, written about them, makes it possible for us to find some overall agreement. No one can contest that the Hague Rules were outdated and no longer suited to answer a number of new modern day shipping problems. Thus, the adoption of a new system was necessary. The Hamburg Rules were therefore the logical step in the process of modernizing maritime trade. The Rules attempted to update the system, modify the failures found in the old one, and complete some of the obvious lacunas. 276

"The revision of The Hague Rules within the UN system was based on a widely held dissatisfaction with both the substance and the form of the existing law. Although the need for a thorough revision was evident to many by the early nineteen sixties, when the question was discussed within the Comité Maritime International, it was not until later that the issue became one of political importance. The fact that the Visby Rules amounted to a mere face-lifting triggered off the comprehensive revision which was later undertaken by UNCTAD and UNCITRAL based on a conviction that the Hague Rules "were being exploited more to evade liability than to anchor responsibility." 277

277 Erling SELVIG, ibid.,id. note 256, p. 302
One of the greatest accomplishments of the Hamburg Rules is the abolition of the Hague Rules system of liability and their long list of exemptions. In particular, the deletion of the error in the navigation and management of the ship exception, which put an end to the long and controversial debate over their existence. Furthermore, the simplification of the carrier basis of liability, based on fault or neglect, has replaced the view that the maritime transport regime is a privileged one, not resembling other transport carriers.\textsuperscript{278}

The notion that maritime carriers could in many instances escape their liability in cases of negligence did no longer suit modern maritime ideology. Therefore, eliminating the Hague exceptions, even if perceived as an excessive move, was the only adequate alternative.

"Proponents of the Hamburg Rules view them as a welcome change. They assert that the Hamburg Rules more equitably distribute risk of loss between carriers and cargo, particularly with respect to abolishing the nautical fault defense. This defense alone very well could have been the impetus for the United Nation's action.\textsuperscript{279}"

The Hamburg Rules have also improved the burden of proof issue. No more uncertainties regarding on whom lies the burden of proof. The issue under the new Rules is clearer. Once it has been established that the loss or damage to the goods occurred while they were in the carriers charge, the carrier has the obligation to show that he was not negligent or at fault in the cause of loss. Furthermore, the carrier must show that he used the reasonable means to avoid such loss. Thus, the new system departs from the difficulties that were symbolic of the previous Hague system. Under Hamburg the carrier's system of liability is influenced by the other conventions covering the international transport of cargo


by air, rail and road.280

Shipper oriented nations expressed the view that with a new carrier's liability regime, and a simplified burden of proof, the number of litigated cases are bound to decrease, and courts interpretations will be less unpredictable. They further argued that the Hague/Visby system of exoneration led to lower standards of care, and uneconomic results. The Hamburg proponents also stressed the point that the new Rules adoption is not the result of unprecedented legislation. The Rules were inspired by the Hague/Visby Rules, as well as other international conventions, and thus, reflect a broad spectrum of already known legal texts, hence, facilitating their interpretation.281

"The Hamburg Rules shift the risk of loss from cargo to carrier in other ways as well: they place the burden of proof more firmly upon the carrier; increase the liability limit; extend the period of time during which the carrier's duties attach; and double the period during which suit may be brought. In addition, Hamburg permits recovery for loss or damage caused by delay, and clarifies the "container/package" and other issues which in the past have helped carriers evade responsibility."282

On the other hand, the Hamburg Rules are, from a political standpoint, a unifying force. For the first time, all nations, shippers and carriers, decided what will govern their carriage of goods by sea, gone are the feelings that the maritime industry is led by shipowning States, regarding their sole interests. In theory, the Hamburg Rules permitted a political unity that was not achieved with the adoption process of the Hague Rules.

280 The Convention for the Unification of Certain Rules Relating to International Carriage by Air October 12, 1929 478 U.N.T.S. 371 also known as The Warsaw Convention. Under the Warsaw Convention the carrier is presumed liable upon simple proof of damage or loss to the cargo. The International Convention Concerning the Carriage of Goods by Rail, May 9, 1980 also known a CIM. The Liability system under the CIM has been assessed to be based on absolute liability, strict liability or system of liability without fault i.e. art. 27(1). As for the Convention on the Contract for International Carriage of Goods by Road, Geneva, May 19, 1956 also known as CMR the basis of liability is a presumption of liability against the carrier once the cargo owner has established the fact of the loss or damage.

281 Douglas A. WERTH, ibid., id. note 254, p. 73, Martine REMOND-GOUILLOUD, Droit Maritime, 2e édition, Pedone, 1993 p. 333

282 Douglas A. WERTH, ibid., id. note 254, p. 72
This convention took into consideration the interests of developing States along with those of shipowning States. At once unifying (in theory) interests relating to carriage of goods by sea. Moreover departing from the disapproving feeling developing States expressed all those years.283

"... the developing countries have become increasingly active in international cooperation, also in the field of transport. As a rule these countries take a skeptical attitude towards conventions in the making of which they had no say, and the Hague Rules were no exception. In addition, Western shipowners have for a long time, through the liner conferences, dominated the carriage of general cargo to and from developing countries. It is not surprising, therefore, that these countries were inclined to regard the Hague Rules as a convention by which a number of privileges had been bestowed upon the shipowners in charge of their foreign trade transport. From this point of view a revision of the Hague Rules was needed in order to redress inequities in international law and to establish a liability regime for carriage by sea in conformity with accepted principles of justice."284

In practice, the Hamburg Rules are not universally accepted. Their adoption was gradual, if not slow. The adopting members are mostly developing States thus, making it, a shipper dominated convention. Industrialized States have shown no hurry to adhere the new system, and in the process kept their opposition and criticism well known.

"Although many shippers have always individually favored the Hamburg Rules, they were, until recently, not sufficiently organized to present their case effectively. By contrast, the opponents of the Convention have been well organized and effectively campaigned against it. They have traditionally included the closely-knit fraternity of ocean carriers, concerned that the shift in the allocation of risks and responsibilities effected by the Hamburg Rules would increase their costs and thus add to the commercial pressure to which they were already subject..."

Thus, opponents of the convention managed to install doubts in governments regarding the effect such adherence would have on their national interests. Therefore, the Hamburg Rules were and still are the subject of opposition. One of the arguments against the Hamburg Rules refers to their new basis of liability at art. 5(1). The objection is based on the fact that the basis of liability is new and has never been tested before. Thus, interpretation will not be so simple, it will lead to unnecessary and expensive litigation due to more confusing and unclear provisions. Consequently, opponents feel it is not very smart to leave one uncertain system the "Hague" for another "Hamburg".

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285 Please refer to Annex B for a list of membership to The Hamburg Rules
286 Report to Parliament on the Carriage of Goods by Water Act, Transport Canada, December 1999, p.8 “Only three OECD countries have ratified the Hamburg Rules (Austria, Czech Republic and Hungary) while nine countries do not plan to ratify them (Belgium, Greece, Ireland, Japan, the Netherlands, the United Kingdom, the United States, Korea, Poland) and eight countries (Australia, Canada, Denmark, Finland, France, New Zealand, Norway, Sweden) would consider ratification if there ere sufficient number of countries in favour of the Rules.”
"They see the Hamburg Rules as more confusing and less clear than the alternatives, and believe that the adoption of the Hamburg Rules would lead to unnecessary and expensive litigation."²⁸⁹

Therefore, some prefer to stay with a system that they already know, the idea being, to avoid uncertainty, expensive and unnecessary litigation, confusing and less clear provisions, exacerbating a double insurance expense, higher costs in liability insurance.

"Long-term predictability would suffer because the Hamburg Rules make claims more dependent on fact and less dependent on the law."²⁹⁰
This view has been supported by a number of authors\textsuperscript{291}. It has been demonstrated that the Hague Rules regime has achieved some sort of certainty in their results, and this would no longer be under the new Hamburg regime. For example, in the known case of \textit{Yawata Iron & Steel v. Anthony Shipping}\textsuperscript{292} the court found that error in the navigation was the cause of loss, since the master of the ship opted to go forward, in time of severe wind and storm. The result was failure of one of the ship hatches, water entering the ship, and eventually sinking it. Under Hague, the carrier is exonerated under the error in the navigation defense. However, under Hamburg the outcome is uncertain. It will depend on the court’s interpretation of the facts at hand.\textsuperscript{293}

"Under the Hamburg Rules, this case might go either way. Negligence of the master would no longer be a defense, but his error may have been only an error in judgment. The issue would become whether he acted in all ways "reasonably" required under the circumstances."\textsuperscript{294}


\textsuperscript{292} 1975 AMC 1602, 1976 AMC 2685

\textsuperscript{293} R. Glenn BAUER, \textit{ibid.}, id note 263, p. 61

\textsuperscript{294} R. Glenn BAUER, \textit{ibid.}, id note 263, p. 61
This case is only one example among many, demonstrating that ambiguities and uncertainties in the law have not miraculously vanished. The application of the Hamburg Rules will face contradiction in the outcome of carriage by sea cases. The irony lays in the fact that the adoption of the new regime was the answer to unclarity, ambiguity and confusion that existed in the old system. However, the Hamburg Rules solution has not painted a brighter picture. Hence, giving the impression that all the previous efforts were for nothing.

"The new Rules are not just an amendment of the Hague Rules. They are a totally new cargo convention expressed in novel and unclear language unknown to the maritime law. Far from imitating the pragmatism of the Hague Rules with their limited objectives, the new Rules would cover virtually the whole topic of the carriage of goods by sea. The drawback to the adoption of the Hamburg Rules is that the maritime community would be throwing away the work of clarification done by the courts over the years and would be creating uncertainty and ambiguity in areas where none existed before." 295

Furthermore, opponents argue that the new Rules are the result of the "economic warfare mentality of the developing States". They express the opinion that such Rules overlook existing laws, they are revolutionary and too radical, and consequently, will lead to higher conflicts and litigation costs. 296

Another criticism of the new Rules is the fact that they abandoned the seaworthiness theory, as well as all of the listed carrier defences. According to the Hamburg opponents, the problem lies in the fact that most defences and carriers duties have already been interpreted by the courts, therefore, to overlook their work would only lead, again, to unnecessary years of confusion.

295 Anthony DIAMOND, *ibid.*, *id.* note 218, p. 118
296 Douglas A. WERTH, *ibid.*, *id* note 254, p. 64
Introducing a new system of liability (art. 5(1) of the new Rules), will bring the maritime industry to "ground zero and require many settled questions under Hague and Visby to be re-litigated." Furthermore, the new Rules and their ambiguous standard of care, based on reasonableness, will surely lead to a greater number of conflicts and confusion.297

The Hamburg Rules have also been faulted for increasing the overall insurance costs. Opponent's view is that even if the shift in risk of loss to carriers will lead to higher Protection & Indemnity (P&I) insurance costs, it does not necessarily imply that cargo insurance rates will consequently be reduced. Thus, in the end increasing the consumer costs. Another negative aspect of the Hamburg Rules is reflected in the vagueness that marks the meaning of the new basis of liability. According to some authors298, the wording of the new convention can lead to different understanding. In some legal jurisdictions, it might be interpreted as a system based on the presumption of fault or neglect. However, in other jurisdictions it might be interpreted as an objective or strict liability system. Therefore, giving rise to a new wave of uncertainties. Consequently, opponents of the new system refuse to adhere to it and keep campaigning against it.

A major argument against the Hamburg Rules is their minimal economic impact on world trade in comparison to the Hague and Hague/Visby regime. In Canada, the value of trade with countries that adopted the Hamburg Rules is only 3%, more than 50% of Canadian maritime trade is with countries that maintain either the Hague Rules i.e. the US299 or the Hague/Visby Rules.300

297 Douglas A. WERTH, ibid., id note 254, p. 71
299 Maritime Transportation System, An Assessment of the U.S. Marine Transportation System A Report to Congress, September 1999 “The United States is the world’s most active trading nation, accounting for 1 billion metric tons or nearly 20 percent of the annual world oceanborne overseas trade.”
300 Please refer to Annex D for a chart of Percentage of Canadian Waterborne, Trade and Legislation on Carriage of Goods Implemented by Canada's Trading Partners, Report to
CONCLUSION

In the last few decades, maritime law has been going through various reforms and major changes. Today, the shipping industry faces three (or two if one considers the Hague and Hague/Visby as one and the same regime) carriage of goods by sea regimes, the Hague or Hague/Visby Rules and the new Hamburg Rules. Since the beginning of the century, the maritime industry, with the help of a number of international and national organizations, have been working toward "one goal", the adoption of a universal convention regulating maritime trade.

From the onset, the objective was to reach acceptability, predictability, certainty, clarity and unanimity among all the parties involved i.e. shippers, carriers and insurers. In an ideal world, we could hope for and even succeed in reaching the desired goal of fulfilling the expectations of all parties involved. However, in the maritime industry, as in any other industry, we can only deal with what is, and not what should have been, i.e. the "practical reality" we all must face. Hence, time and experience have demonstrated that such an idealistic goal could not be attained. However, for a time, the Hague Rules were considered the universal convention regulating maritime matters. Their adoption in the early twentieth century represented a great evolution and progress in the maritime shipping world.

Parliament on the Carriage of Goods by Water Act, Transport Canada, December 1999, p.8 “To sum up, the Hamburg Rules have not contributed to the harmonious development of a widely accepted international regime on cargo liability as the supporters of the Rules expected in the early years following their adoption...The recent developments in international law on cargo liability, the stagnant position of the Hamburg Rules internationally and their minimal impact on Canadian seaborne trade, make the decision to move to the Hamburg Rules less likely.”
For the first time, a mandatory convention was going to regulate affairs of carriage by sea. This was a novelty in such an old industry, whose working was based on customs and the freedom of contract basis. Thus, it seemed natural to praise such an accomplishment and indeed no one can contest that in those days, it was an accomplishment. In the early nineteen hundreds, the maritime world was faced with the problem of bills of lading exception clauses. Shipowners were in control. Standard type bills of lading exonerated carriers from almost all imaginable causes of loss.

Shippers were at a low point, disadvantaged and with no means to counter such power. As a result, the goal of the Hague and Hamburg Rules was to apportion cargo losses between all parties involved, and to further, attain a balance among their responsibilities. Thus, Hague Rules article 3, set the carriers standard of care and basis of responsibility. The concepts of seaworthiness and due diligence were inserted, imposing mandatory duties on carriers. Duties that could no longer be escapable. Furthermore, the Rules imposed certain pre-requisite duties on carriers before they could make use of any available exoneration. Thus, Hague Rules article III(1) is a pre-requisite to art. IV (2) and its list of exceptions. The seaworthiness and due diligence concepts, two of the most important aspects found in the Hague Rules, represented the pre-requisite for discharging the carriers responsibilities. All of those duties were tried and retried, and hence, over-time, were no longer abstract concepts.

The 1924 convention was a great innovator. For the first time in maritime history, an international convention limited the carriers practice of exemption. Article III(8) of the Hague Rules regulated the issue in clear and simple terms. Any exemption clause found to be contrary to the Rules would be null and void. The aim was to change the pattern of abuse that existed and promote fairness and balance between shippers and carriers. Carrier's rights and immunities are expressed in art. IV of The Rules. Here again, the convention outlines the importance of the carriers responsibilities found in art. III by restating them in art. IV(1). Only after discharging such duties, are carriers allowed to follow with the use of available defences (art. IV (2)).
No one can argue the fact that Art. IV (2) of the Hague Rules was and still is the object of heated debates and criticism. Regardless of this fact, the Hague Rules still managed to limit the carriers immunities to 17 listed defences. However, many still found it to be too much, and consequently, the Rules became known as carrier oriented.

Nonetheless, the enormous caseload on the issue has demonstrated that escaping liability was far from simple. Furthermore, in practice the Rules achieved some sort of fair balance and predictability. A number of supporters went even further, expressing the view that the Rules achieved a certain degree of certainty and universality. Consequently, it appeared useless to have to start all over again with the adoption of a new convention. Thus, the solution according to some was to modify the Hague Rules. The Visby amendments were therefore an attempt to modify and at the same time quiet the mounting criticism over the regime. However, the modifications were far from what was necessary and expected. They did not address a number of important issues such as the carrier’s system of responsibility and immunity, as well as the burden of proof and conflict of jurisdictions among others.

On the one hand, the result brought cargo interests greater dissatisfaction with the present system. On the other hand, this failure encouraged the implementation of a new convention, and the momentum to go forward with their plans for change. They argued that the Hague Rules were no longer fit for modern time’s maritime industry and its advanced technology. They further argued that the system’s basis of liability was archaic and did not suit the needs of all parties concerned.

The Hague Rules list of exceptions and in particular the error in management and navigation of the ship defense could no longer be tolerated or justified. Furthermore, proponents for change argued that the Hague system lacked cohesion, clarity and predictability on a majority of issues. They stressed the point that the rules were ambiguous and uncertain in particular on the burden of proof issue, and also on the interpretation to be
given to a number of defences and obligations.

Furthermore, since the adoption of the Hague Rules was the consequence of industrialized maritime States at work, developing countries did not have a say in their creation, and therefore, resented their adoption and applicability. Those States campaigned for a new convention, one in which they would have a say, and one that also answered some of their own concerns and represented their interests. The Hamburg Rules were the solution. The consequence of developing countries at work. They were in direct response to the growing dissatisfaction with the Hague regime.

The UN's UNCTAD and UNCITRAL were therefore called in. Their involvement and hard work made it possible for the Hamburg Rules to be implemented. The UN's participation gave them formal international coverage and acceptability. It further legitimized their adoption. Consequently, the adoption of the Hamburg Rules modernized the transit of cargo by ships. They replace the Hague Rules as well as clarify and simplify maritime shipping matters. It abolished the list of available defences as well as the seaworthiness/due diligence theory. It also changed the carrier basis of liability and clarified the burden of proof questions. It shifted the risk of loss from shippers to carriers, evening the balance between the parties and getting the approval of developing countries. It also adapted maritime transport to all other types of transport.

No longer will exoneration, in cases of fault or neglect, be accepted. The new system is based on the presumption of fault or neglect. This issue is made clear in article 5(1) of the Hamburg Rules, which states that the carrier will be held responsible for the loss or damage to the goods under his charge, until he proves he was not at fault and that he used the reasonable required measures to avoid such loss or damage. According to C.W.H. Goldie:
"... it is probable that Article 5 of the Hamburg Rules, imposing liability on the shipowner unless he can prove that he was not at fault, will increase the already considerable difficulties facing the ship owner defending a large claim. Even if, as mentioned earlier, the defences now available are often not of much help in practice, the removal of those defences weakens the ship owner's position; the possibility of successful reliance on Article 4 Rule 2 of the Hague Rules has in the past at least encouraged cargo interests to accept reasonable settlements."\(^{301}\)

Except for the fire defence, which imposes the burden of proof on the cargo owner, the new Rules are a step in the right direction. They represent the necessary evolution that the Hague Rules and their modification did not attain. They adapted the realities of modern maritime trade and eliminated the elements that were no longer tolerable in today's industry.

Many express the view that the adoption of a new convention can only lead to greater litigation, more interpretations and thus, to confusion and uncertainties. As a result, it will be like stepping back to the early nineteen hundreds. With the added disadvantage of losing half a century of experience and judicial interpretation. On the other hand, reality has also shown that even if in some cases predictability was achieved, it was expectable within such an enormous caseload. However, no one will contradict that no overall unanimity has been reached, controversy remains and the technological evolution factor has not been resolved. Whether we agree with the new regime or not, we cannot refute that The Hague Rules needed some modernizing.

Nonetheless, their merits cannot be forgotten. They reflected the realities of maritime trade of the early twentieth century and they answered a number of pressing concerns, one of which was the bills of lading exoneration clauses problem. However, over the years, the needs of maritime trade have progressed and with them the need to adapt their regulation. Thus, The Hague Rules were not able to answer this evolution, and therefore the necessity to adopt a new system became urgent. Shipping states wanted a new regime, they did not want to modify the existing Hague Rules and their modified version the Visby Protocol. Trying to modify the existing system has not been successful in the past, accordingly the solution seemed to point toward the adoption of a totally new system, detached from past perception of favoritism and dissatisfaction. Hence, as of November 1, 1992, with the adhesion of the required 20 States, the Hamburg Rules came into force. Consequently, today’s maritime world faces three applicable conventions.

The question on everyone’s mind is, which system should be the one to lead? Until everyone agrees on the acceptable solution, if ever, we will have to face an industry being regulated by three systems. As we have seen, all systems seek the same objective to legislate the carriage of goods by sea in a fair and equitable manner and to the satisfaction of all parties concerned. These systems are based on fault or neglect and also aim to apportion the risk of loss between carriers and shippers, in a balanced way. However, the actual working of a regime can only be known over time. Thus, it is easier to conclude on the faults and merits of the Hague Rules (and Hague/Visby) since we are facing over fifty years of its application, rather than the Hamburg Rules which has not been put to the practical test much.

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Nonetheless, a few observations are appropriate to make. The Hamburg Rules are more suitable for modern maritime shipping needs, they expanded into areas that Hague did not cover. They are more representative of all interests involved. For the first time developing States are in unanimous agreement over a maritime convention that regulates them. The Rules have therefore gone beyond the scope of possibilities available under the Hague or Hague/Visby Rules. According to D.A. Werth:

"If any consensus can be reached regarding this whole business of Hague, Visby and Hamburg, perhaps it is this: that the Hague Rules are no longer sufficient to meet the demands of modern conditions of ocean carriage; that the Visby Amendments standing alone are some improvement; and that the Hamburg Rules are a mixed bag of improvements and regressions. Beyond these points, there is little agreement."

Ultimately, these maritime conventions seek to achieve international unanimity. But, since there will always be shippers, carriers and insurers, and since their interests will always differ or be in conflict with one another, there can never be a convention that will completely satisfy all parties. To wish and hope for such a convention is unrealistic.

The Hamburg Rules are far from being universally accepted. Nevertheless, over time, there is a possibility of greater cohesion and acceptance, then there was under the Hague Regime.

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303 Douglas A. WERTH, ibid., id note 254, p. 69
304 Report to Parliament on the Carriage of Goods by Water Act, Transport Canada, December 1999, p.8 “Only three OECD countries have ratified the Hamburg Rules (Austria, Czech Republic and Hungary) while nine countries do not plan to ratify them (Belgium, Greece, Ireland, Japan, the Netherlands, the United Kingdom, the United States, Korea, Poland) and eight countries (Australia, Canada, Denmark, Finland, France, New Zealand, Norway, Sweden) would consider ratification if there ere sufficient number of countries in favour of the Rules.”
"None of the many proposals of the past century has been free from controversy. Some were so controversial that they were never enacted. The Hague Rules were so controversial in the United States that it took Congress twelve years to enact them. The Visby Amendments have given us a quarter century of controversy, with no end in sight. And the Hamburg Rules have been controversial practically since the United Nations first began work on them over twenty years ago. Throughout this century of controversy, certain arguments have reappeared virtually every time that the subject has been discussed."\(^{305}\)

Hence, with or without controversy, the Hamburg Rules do represent the best alternative for today's maritime carriage of goods by sea. No one claims that the Rules are perfect or that they will not have to face a period of transition or that courts as well as the parties involved will all have to get adjusted to them. Undoubtedly, there will be problems of interpretations and a certain period of confusion. However, it is only natural that the adoption of any new legislation will be marked by a period of uncertainty. Regardless of these facts, the Hamburg Rules are currently the only viable choice for today's maritime industry. It may not be the best choice, but it is the only acceptable one the industry has at this time.

Whether coveted or not, at some point, everyone will be faced with a choice to make. Some nations are more innovative and will therefore progress at a faster pace, others who need more time, will move at a slower pace. At whatever speed they change, there is no way to avoid evolution; it will always catch up with everyone. The Hamburg Rules caught up with some, and the rest will have to follow, at their own time and pace or take up a new regime altogether. A new regime that departs from Hamburg or the original Hague Rules and their modified version the Hague / Visby Rules or once again opt for a regime that favours the route of reform.

305 Michael F. STURLEY, *ibid.*, *id* note 18, p. 120
Thus the US is one example of a state that would like to adopt a new regime based on reforming the Hague Rules by adjusting to current maritime realities covered in the Hamburg Rules. Australia is also working on a system based on combining elements from both the Hague/Visby and Hamburg Rules. Thus, even in the eventuality that the Hamburg rules end up not being universally adopted, they will remain as a model for future regimes.

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306 Roger Clarke, “Cargo Liability Regimes”, prepared for the OECD (Organisation for Economic Co-Operation and Development) MTC Maritime Transport Committee, January 2001, p. 11 “There are at present at least three international regimes of maritime cargo liability in force in different countries of the world – the original Hague rules (1924), the updated version known as the Hague-Visby rules (1968, further amended 1979), and the Hamburg rules (1978). The principal country with a system still based on the original Hague Rules is the United States. Most of the other major trading nations of North and Central America, Europe, the Far East and Australia, and south Africa, follow the Hague-Visby rules or an adaptation of them....There is, however, considerable dissatisfaction with each of these regimes – with Hague and Hague Visby because they are often seen as in need of modernization and as too restricted in scope, and with all three because of disagreement over the substance. Over recent years, in the absence of an approach to these difficulties that commands widespread international agreement, countries have tried to deal with them nationally in different ways;...The Nordic Maritime Code, for example, in force in Denmark, Finland, Norway and Sweden, incorporate a number of features of the Hamburg rules, although the four countries continue to regard themselves as part of the Hague-Visby system...there are now moves in the United States to bring in a new national regime there to replace the legislation of 1936 based on the Hague Rules.”
ANNEX A
1873 The International Law Association was founded, to prepare a “code of international law.”

1882 Liverpool Conference, attempt to prepare a draft model Bill of Lading known as the “Conference form”

1885 The International Law Association proposed a set of rules that parties could voluntarily incorporate by reference into their bills of lading (known as the Hamburg Rules of affreightment)

1893 The US Harter Act

1897 CMI (Comite Maritime International was founded)

1905 CMI first diplomatic conference on maritime law, CMI began preparatory work on the laws concerning carriage of goods by sea

1921 General secretary of the Maritime Law Committee of the International Law Association attempts to draft a uniform bill of lading i.e. Lloyd’s list article

1924 The adoption of the Hague Rules by the International Law Association

1968 The adoption of the Hague Visby Rules

1978 The adoption of the Hamburg Rules

1993 1993 COGWA, Canadian attempt to adopt the Hamburg Rules (today does not longer seem likely), China introduced a new civil code of Maritime Law, it includes elements from Hague/Visby and Hamburg.

1994 The Scandinavian states (Denmark, Finland, Norway and Sweden) adopted the Nordic Code a combination of Hague/Visby and Hamburg,
Historical Chart: Carriage of Goods by Sea Responsibility and Liability regimes

1994

and OECD (Organisation for Economic Cooperation and Development) MTC (Maritime Transport Committee) held a “tour de table” for an exchange of views for a coordinated approach to the adoption of the Hamburg Rules.

1995

CMI (Comite Maritime International) made a survey of national maritime associations on the future of the Hamburg Rules (doc.DSTI/STI/MTC (95) 15)

1997

Australia modified its COGWA, including some elements from the Hamburg Rules

1998/1999

COGSA 98 & COGSA 99 US attempt to adopt a modified version of the Hague Rules

1999/2001

CMI & OECD (Organisation for Economic Cooperation and Development) MTC (Maritime Transport Committee) are back trying to find a solution to cargo liability
## Membership list to the Hague, Hague Visby and Hamburg Rules

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Membership list to the Hague, Hague Visby and Hamburg Rules

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- not ratified
X ratified
+ ratified the protocol SDR too
= not ratified, but the country applies a national law

Source: InfoMare, November - 7- 2001
Http://www.infomare.it/dbase/convuk.htm
Comparison of the Hague / Hague-Visby Rules and the Hamburg rules

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<th>Applicability</th>
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<tbody>
<tr>
<td><strong>Hague/Hague-Visby Rules</strong></td>
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<tr>
<td>Applies to contracts for the carriage of goods by sea that are evidenced by a bill of lading or a similar document of title, if:</td>
</tr>
<tr>
<td>1. The bill is issued in a Contracting State;</td>
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<tr>
<td>2. The carriage is from a port in a Contracting State; or</td>
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<tr>
<td>3. The contract States that these rules apply. Does not apply to charter-parties.</td>
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<table>
<thead>
<tr>
<th>Scope of Coverage</th>
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<tr>
<td><strong>Hague/Hague-Visby Rules</strong></td>
</tr>
<tr>
<td>Covers the period of time when the goods are loaded on the ship to the time they are discharged from the ship. (Tackle-to-Tackle).</td>
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<table>
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<th>Carrier Liability/Duty of Care</th>
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<td><strong>Hague/Hague-Visby Rules</strong></td>
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<tr>
<td>The carrier must exercise due diligence to:</td>
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<tr>
<td>1. To make the ship seaworthy;</td>
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<tr>
<td>2. Properly man, equip and supply the ship;</td>
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<tr>
<td>3. Make the parts of the ship in which goods are carried, fit and safe for the receipt, carriage and preservation of the goods.</td>
</tr>
<tr>
<td>The carrier shall properly load, handle, stow, carry, keep, care for, and discharge the goods carried.</td>
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</table>
Comparison of the Hague / Hague-Visby Rules and the Hamburg rules

**Carrier Defenses to Liability**

<table>
<thead>
<tr>
<th>Hague/Hague-Visby Rules</th>
<th>Hamburg Rules</th>
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<tbody>
<tr>
<td>Loss or damage resulting from:</td>
<td>The carrier must prove that he, his servants or agent took all measures that could reasonably be required to avoid the occurrence and its consequences</td>
</tr>
<tr>
<td>1. Unseaworthiness (but the carrier must show that the unseaworthiness did not result from carrier's lack of due diligence)</td>
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<tr>
<td>2. Error in navigation or management of the ship</td>
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<td>3. Fire (unless caused by fault of carrier)</td>
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<td>4. Perils, dangers and accidents of the sea</td>
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<td>5. Act of God</td>
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<td>6. Act of war</td>
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<td>7. Act of public enemies</td>
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<td>8. Arrest or restraint of princes, rulers or people, or seizure under legal process</td>
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<td>9. Quarantine restrictions</td>
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<tr>
<td>10. Act or omission of the shipper or owner of the goods, his agents or representative</td>
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<td>11. Strike, Lockouts, stoppage or restraint</td>
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<td>12. Riots and civil commissions</td>
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<tr>
<td>13. Saving or attempting to save life or property at sea</td>
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<tr>
<td>14. Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods</td>
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<tr>
<td>15. Insufficiency of packing, insufficiency or inadequacy of marks</td>
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<td>16. Latent defects not discoverable by due diligence</td>
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<tr>
<td>17. Any other cause arising without the actual fault or privity of the carrier or its agents or servants but the carrier bears the burden of proof to show it was not at fault</td>
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</table>

### Percentage of Canadian Waterborne Trade and Legislation on Carriage of Goods Implemented by Canada's Trading Partners

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<tr>
<th>Countries</th>
<th>% of CDN waterborne trade</th>
<th>Countries</th>
<th>% of CDN waterborne trade</th>
<th>Countries</th>
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<td><strong>HAGUE RULES</strong></td>
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<td>Australia</td>
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<td>Argentina</td>
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ANNEX E
The Hague-Visby Rules
The Hague Rules as Amended by the Brussels Protocol 1968

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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 of 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, 30 March 1978  
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UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA
(THE HAMBURG RULES) HAMBURG, 30 MARCH 1978

[Preamble]

The States Parties to this Convention,

Having recognised 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 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 shipment 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 kilogram 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 no 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 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 statement the carrier has the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier is not entitled to invoke such an agreement against a third party, including a consignee, who has acquired the bill of lading in good faith.

3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this Article or where the carrier may not under paragraph 2 of this Article invoke an agreement for carriage on deck, the carrier, notwithstanding the provisions of paragraph 1 of article 5, is liable for loss of or damage to the goods, as well as for delay in delivery, resulting solely from the carriage on deck, and the extent of his liability is to be determined in accordance with the provisions of Article 6 or Article 8 of this Convention, as the case may be.

4. Carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of Article 8.
Article 10 - Liability of the carrier and actual carrier

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

2. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of paragraphs 2 and 3 of Article 7 and of paragraph 2 of Article 8 apply if an action is brought against a servant or agent of the actual carrier.

3. Any special agreement under which the carrier 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 any other mechanical or electronic means, if no 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 (h) 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 surveyor inspection by the parties, notice in writing need not be given of loss or damage ascertained during such surveyor 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 carriers' behalf, including the master or the officer in charge of the ship, or to a person acting on the shipper's behalf is deemed to have been given to the carrier, to the actual carrier or to the shipper, respectively.

**Article 20 - Limitation of actions**

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

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

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

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

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

**Article 21 - Jurisdiction**

1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

   (a) The principal place of business or, in the absence thereof, the habitual residence of the defendant; or

   (b) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or

   (c) The port of loading or the port of discharge; or

   (d) Any additional place designated for that purpose in the contract of carriage by sea.

2. (a) Notwithstanding the preceding provisions of this Article, an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules.
of the law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this Article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgment that may subsequently be awarded to the claimant in the action.

(b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest.

3. No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this Article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.

4. (a) Where an action has been instituted in a court competent under paragraph 1 or 2 of this Article or where 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 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 charterparty 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 paragraph 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 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 that 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 kilogram 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 milligrams 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

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 the deposit of the 20th instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

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

Article 31 - Denunciation of other conventions

1. Upon becoming a Contracting State to this Convention, any State party to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924 (1924 Convention) must notify the Government of Belgium as the depositary of the 1924 Convention of its denunciation of the said Convention with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

2. Upon the entry into force of this Convention under paragraph 1 of article 30, the depositary of this Convention must notify the Government of Belgium as the depositary of the 1924 Convention of the date of such entry into force, and of the names of the Contracting States in respect of which the Convention has entered into force.

3. The provisions of paragraphs 1 and 2 of this Article apply correspondingly in respect of States parties to the Protocol signed on 23 February 1968 to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924.

4. Notwithstanding Article 2 of this Convention, for the purposes of paragraph 1 of this Article, a Contracting State may, if it deems it desirable, defer the denunciation of the 1924 Convention and of the 1924 Convention as modified by the 1968 Protocol for a maximum period of five years from the entry into force of this Convention. It will then notify the Government of Belgium of its intention. During this transitory period, it must apply to the Contracting States this Convention to the exclusion of any other one.

Article 32 - Revision and amendment

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

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention, is deemed to apply to the Convention as amended.
Article 33 - Revision of the limitation amounts and unit of account or monetary unit

1. Notwithstanding the provisions of Article 32, a conference only for the purpose of altering the amount specified in Article 6 and paragraph 2 of Article 26, or of substituting either or both of the units defined in paragraphs 1 and 3 of Article 26 by other units is to be convened by the depositary in accordance with paragraph 2 of this article. An alteration of the amounts shall be made only because of a significant change in their real value.

2. A revision conference is to be convened by the depositary when not less than one-fourth of the Contracting States so request.

3. Any decision by the conference must be taken by a two-thirds majority of the participating States. The amendment is communicated by the depositary to all the Contracting States for acceptance and to all the States signatories of the Convention for information.

4. Any amendment adopted enters into force on the first day of the month following one year after its acceptance by two-thirds of the Contracting States. Acceptance is to be effected by the deposit of a formal instrument to that effect, with the depositary.

5. After entry into force of an amendment a Contracting State which has accepted the amendment is entitled to apply the Convention as amended in its relations with Contracting States which have not within six months after the adoption of the amendment notified the depositary that they are not bound by the amendment.

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

Article 34 - Denunciation

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

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

[Post Provisions]

[Post Clauses (If any: Signed; Witnessed; Done; Authentic Texts; and Deposited Clauses)]

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 authorised by their respective Governments, have signed the present Convention.

Common understanding adopted by the United Nations Conference on the
Carriage of Goods by Sea (A/CONF.89/13, annex 11)

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.


The United Nations Conference on the Carriage of Goods by Sea,

Noting with appreciation the kind invitation of the Federal Republic of Germany to hold the Conference in Hamburg,

Being aware that the facilities placed at the disposal of the Conference and the generous hospitality bestowed on the participants by the Government of the Federal Republic of Germany and by the Free and Hanseatic City of Hamburg, have in no small measure contributed to the success of the Conference.

Expresses its gratitude to the Government and people of the Federal Republic of Germany, and


Expresses its gratitude to the United Nations Commission on International Trade Law and to the United Nations Conference on Trade and Development for their outstanding contribution to the simplification and harmonisation of the law of the carriage of goods by sea, and

Decides to designate the Convention adopted by the Conference as the: “UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA, 1978”, and

Recommends that the rules embodied therein be known as the “HAMBURG RULES".
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