LEGAL OVERVIEW OF CARGO LOSS OR DAMAGE TO GOODS BY SEA EVIDENCED BY A BILL OF LADING: A CASE STUDY OF NIGERIA

BY

TEMITAYO ADESOLA ADEEEKO

REGIONAL MARITIME UNIVERSITY STUDENT NUMBER: MPS0001811

UNIVERSITY OF GHANA STUDENT NUMBER: 10360669

This dissertation is submitted to the University of Ghana Legon in partial fulfillment of the requirement for the award of the degree of Master of Arts in Port and Shipping Administration
DECLARATION

I hereby declare that except for reference to other people’s work which has been duly acknowledged, this work is the result of my own research under the supervision of Professor Max. Assimeng and Mrs. Bernadette Esa Chinery - Hesse.

I further declare this dissertation has not been submitted anywhere for the award of Masters Degree.

Mrs. Temitayo Adesola Adeeko
Student

(Professor Max. Assimeng)
Supervisor 1

(Mrs. Bernadette Esa Chinery - Hesse)
Supervisor 2
ABSTRACT

Shipping if not the oldest profession in the world it is the second oldest profession. It serves as a means of moving people and cargo from point A to point B which happens to be the cheapest means of transporting cargoes. The reason for this is that natural resources are limited and so people tend to engage in trade by barter as a means of survival.

Carriage of goods by sea simply means when a ship owner, either directly or through an agent, undertakes to carry goods by sea, or to provide a vessel for that purpose, the arrangement is known as a contract of affreightment. Such contracts may take a variety of forms, although the traditional division is between those embodied in the charter parties or those evidenced by bills of lading. Where the ship owner agrees to make available the entire carrying capacity of his vessel for either a particular voyage or a specified period of time, the arrangement normally takes the form of a charter party. On the other hand, if he employs his vessel in the liner trade, offering a carrying service to anyone who wishes to ship cargo then the resulting contract of carriage will usually be evidenced by a bill of lading.

Prior to the Hague rules, bills of lading were subject to common law and the express and implied terms of the contract of carriage. The unsatisfactory nature of the situation for the cargo owner had become a major issue. The underlying philosophy behind the Hague Rules was the protection of the cargo owner by granting to him certain entrenched rights in his relationship with the ship owner.

The main purpose of this work is to examine the International maritime conventions and their relations to Nigeria maritime legislature as it relates to cargo loss and damages claim before a Court of Law.
The analysis of the bills of lading as an evidence of carriage issued under, the Hague rules, Hague-Visby rules and the Hamburg rules. The admiralty proceedings in Nigeria Court will also be examined on how the Court interprets the privity of contract in relation to carriage of goods by sea.

Note that at the time of writing this research a new rule was already in existence which Nigeria was already a signatory to it, but yet to ratify it into her local laws (Rotterdam rules). That is, it was not yet in operation in Nigeria at the time of carrying out this research.

Finally, conclusion and recommendations will be given on the best procedure to use, in order to ensure fast and speedy hearing of maritime cases.
DEDICATION

This work is dedicated to Almighty Allah, for his guidance and protection over me throughout the duration of the course.
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CHAPTER ONE

1.0 INTRODUCTION

Shipping in the world is one of the oldest professions. It serves as a means of moving people and cargo from point A to point B which happens to be the cheapest means of transportation. The reason for this is that natural resources are limited and so people tend to engage in trade by barter as a means of survival.

Shipping or admiralty practice has over the years evolved essentially from the time-honoured unwritten trade practices which prevailed among European merchants in the carriage of goods by sea from one port to another. Shipping can be said therefore to constitute the philosophy, principles and established customs of sea merchants which have become recognised and accepted in the shipping industry as the basis for orderly international trade and sea transportation of goods and passengers and the resolution of disputes arising from such endeavour.\(^1\)

Admiralty law (also referred to as maritime law) is a distinct body of law which governs maritime questions and offenses. It is a body of both domestic law governing maritime activities, and private international law governing the relationships between private entities which operate vessels on the oceans. It deals with matters including marine commerce, marine navigation, shipping, sailors, and the transportation of passengers and goods by sea. Admiralty law also covers many commercial activities, although land based or occurring wholly on land, that are maritime in character.

Carriage of goods by sea simply means when a ship owner, either directly or through an agent, undertakes to carry goods by sea, or to provide a vessel for that purpose, the arrangement is known as a contract of affreightment. Such contracts may take a variety of

\(^1\) Ilogu Chidi (1998) *Admiralty practice and carriage of goods by sea*
forms, although the traditional division is between those embodied in the charter parties or those evidenced by bills of lading. Where the ship owner agrees to make available the entire carrying capacity of his vessel for either a particular voyage or a specified period of time, the arrangement normally takes the form of a charter party. On the other hand, if he employs his vessel in the liner trade, offering a carrying service to anyone who wishes to ship cargo then the resulting contract of carriage will usually be evidenced by a bill of lading.²

It must be recognised that it is this shipping practice that have evolved into a number of International Maritime Conventions and which in turn has subsequently become implemented as National legislation or laws by countries who have ratified such Conventions. These states thereafter confer admiralty jurisdiction on their courts in other to protect and promote the shipping industry by ensuring strict adherence to this maritime practices.³

Foremost among these maritime conventions for the purpose of this research are the International Convention for the Unification of certain rules relating to Bills of Lading The Hague, Hague-Visby and Hamburg Rules (UN Convention on the Carriage of Goods by Sea).³

Prior to the Hague rules, bills of lading were subject to common law and the express and implied terms of the contract of carriage. The unsatisfactory nature of the situation for the cargo owner had become a major issue. The underlying philosophy behind the Hague Rules was the protection of the cargo owner by granting to him certain entrenched rights in his relationship with the ship owner.

An International Conference was convened in Brussels in 1924 for the purpose of preparing a convention on Bills of Lading. After discussing and amending some rules drafted in 1921 in

² John F Wilson (2008) carriage of goods by sea
The Hague (Amsterdam) by the international law association (the Hague Rules) a convention was adopted which was signed in August 1924. The convention has now been acceded to by almost every maritime nation and most bills of lading embody the “Hague Rules”.

After four decades of operation, the need for the amendment of the Hague Rules gathered momentum. Consequently a further conference was convened in Sweden (Stockholm 1963), and at Visby (Brussels) in 1968 it adopted a protocol to the Hague Rules. The amendments introduced by the Protocol became known as the Hague-Visby Rules. They have been adopted by a number of countries and it favours the ship owning and industrial countries. Though the Visby amendments are significant, they do not mark a radical departure from the Hague Rules.

Meanwhile, a move to create a more radical system was initiated by the United Nations. Following the United Nations Conference on the Carriage of Goods by Sea held at Hamburg 1978, the convention was adopted which introduced what became known as the Hamburg Rules. The effect of the Hamburg Rules has been to introduce a new system which poses a challenge to The Hague and Hague-Visby systems.

Furthermore the Hamburg Rules favour the developing (cargo owning) nations such as Nigeria. The scenario created by the introduction of the Hamburg Rules was summarised by Professor Tetley in an article in Lloyds Maritime and Commercial Law Quarterly in 1979 as follows:

*The Hamburg Rules in many respects are an improvement over the Hague rules and the Hague-Visby Rules but in other respects they are retrograde. They are an advance in respect of defining some responsibility and in clarifying certain problems of past law but they are at other times retrograde*

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4 Ibid
5 Ibid
6 Professor Tetley, *The Hamburg Rules*
in the placing of responsibility, in the creation of new complicated technical procedures and in confusing drafting. Most important of all, if it come into force, they will not be universal but will create a third carriage of goods by sea convention existing simultaneously with the Hague Rules and Hague-Visby Rules on the shipping lanes of the world. The ensuing contradictions and disputes will frustrate carriers and shippers, confound Admiralty lawyers ensnarl the courts of the world and only please the occasional professor of conflicts of law.

1.1 BILL OF LADING

A bill of lading is a document signed by a carrier (a transporter of goods) or the carrier’s representative and issued to a consignor (the shipper of goods) that evidences the receipt of goods for shipment to a specified destination and person.

Carriers using the sea mode of transportation issue bills of lading when they undertake the transportation of cargo. A bill of lading is, in addition to a receipt for the delivery of goods, an evidence of contract for their carriage and a document of title to them. Its terms describe the goods for identification purposes; state the name of the consignor and the provisions of the contract for shipment; and direct the cargo to be delivered to the order or assigns of a particular person, the consignee, at a designated location.

The Supreme Court in Boothia Maritime Inc & Ors v. Fareast Mercantile Co. Ltd\(^7\) defined the a bill of lading as a document of title to the goods specified in it in the sense that when the owner of the goods endorses the bill of lading in favour of a purchaser for value and transfer same to him, the owner of the goods transfers the property in the goods to the purchaser. The

\(^{7}\) [2001] 4 S.C. 124
purchaser may then be referred to as the ‘transferee’, ‘consignee’ or ‘indorsee’ of the bill of lading as the case may be, while the bill of lading may be said to have been negotiated.

There are two basic types of bills of lading. A straight bill of lading is one in which the goods are consigned to a designated party. An order bill is one in which the goods are consigned to the order of a named party. This distinction is important in determining whether a bill of lading is negotiable (capable of transferring title to the goods covered under it by its delivery or endorsement). If its terms provide that the cargo is to be delivered to the bearer (or possessor) of the bill, to the order of a named party, or, as recognized in overseas trade, to a named person or assigns, a bill, as a document of title, is negotiable. In contrast, a straight bill is not negotiable.

A bill of lading is a type of document that is used to acknowledge the receipt of a shipment of goods. A transportation company or carrier issues this document to a shipper. In addition to acknowledging the receipt of goods, a bill of lading indicates the particular vessel on which the goods have been placed, their intended destination, and the terms for transporting the shipment to its final destination. A bill of lading can be used as a traded object. The standard short form bill of lading is evidence of the contract of carriage of goods and it serves a number of purposes:

- It is an evidence that a valid contract of carriage, or a chartering contract, exists, and it may incorporate the full terms of the contract between the consignor and the carrier by reference (i.e. the short form simply refers to the main contract as an existing document, whereas the long form of a bill of lading (connaissagement intégral) issued by the carrier sets out all the terms of the contract of carriage);

• It is a receipt signed by the carrier confirming whether goods matching the contract
description have been received in good condition (a bill will be described as clean if
the goods have been received on board in apparent good condition and stowed ready
for transport); and
• It is also a document of transfer, being freely transferable but not a negotiable
instrument in the legal sense, i.e. it governs all the legal aspects of physical carriage,
and, like a cheque or other negotiable instrument, it may be endorsed affecting
ownership of the goods actually being carried\(^9\).

The bill of lading must contain the following information-:

- Name of the shipping company;
- Flag of nationality;
- Shipper’s name;
- Order and notify party;
- Description of goods;
- Gross/net/tare weight; and
- Freight rate/measurements and weight of goods/total freight

1.2 NIGERIA

Nigeria is a large country in the West African region, covering 356, 668sqm. The country is
bordered to the South by the Bights of Benin and Biafra, which are on the gulf of Guinea. On
the West, Nigeria is bordered by Benin, on the North by Niger, and on the east by
Cameroon.\(^10\)

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10 Falola Toyin, Matthew M. Heaton *A history of Nigeria* (2008)
Admiralty law or Maritime law has been defined as a system of law which particularly relates to marine, commerce and navigation, to business transacted at sea or relating to navigation to ships and shipping, to seamen, to transportation of persons and property at sea and to marine affairs generally. Admiralty law in Nigeria has evolved in the last fifty (50) years from the adaptation of the law and practice in the United Kingdom.\(^\text{11}\)

Nigeria is a country with over 800 nautical miles of coastline and with over 200 nautical miles of exclusive economic zone obviously possesses the potential of becoming a maritime nation in the area of international and coastal shipping, \(^\text{12}\)

Port operations and development in Nigeria began in the middle of the 19th century. Effort towards the provision of facilities for ocean going vessels started in the early 1900 with the construction of the Lagos breakwater (east and west moles), Capital dredging activities aimed at opening up the Lagos Lagoon commenced in 1906.

Nigeria, like most other nations, regards the maritime sector as a key factor in the country's pursuit of economic and political independence. Successive governments have put considerable financial resources into establishing and maintaining a merchant marine and acquiring the necessary expertise in maritime operations through the state-owned Nigerian National Shipping Line (NNSL).

The Nigerian National Shipping Line (NNSL) was a national shipping carrier that was incorporated in 1959 with the Federal Government of Nigeria originally owning 51% of the equity and the rest shared between Elder Dempster and Palm Lines, the latter, a division of

\(^{11}\) Ilogu Chidi (1998) *Admiralty practice and carriage of goods by sea*

\(^{12}\) http://www.ddhmag.com/1stqtr09folarininterview.htm
the United African Company. On September 1, 1961, the government gained outright control of the firm.  

The NNSL, established soon after the country attained independence in 1960, owned a fleet of 24 oceangoing ships by 1979, nineteen of which in that year were new buildings. Despite a boom in the 70s and 80s, and despite being able to point to membership of five conference lines, the government's massive investment in shipping failed dismally. The NNSL, beset by crippling debts, went into liquidation in September 1995, ending Nigeria's earliest and longest implementation of a major policy initiative in shipping. However, another shipping line was set up later that year to replace the NNSL - the National Unity Line, which owns one ship, M/V Abuja.

1.3 Problem Statement

The problem often faced by the Nigerian courts when it comes to maritime claims is that of CONFLICT OF LAWS, it causes most consignees to be at the mercy of the courts for proper interpretations of the international conventions, which if not interpreted properly would cause their case to be dismissed.

A conflict of law arises where the court in one jurisdiction is obliged to adjudicate over a matter having a "foreign element", with a view to implementing the reasonable and legitimate expectations of the parties to a transaction.

Foreign element in the stance means contact with some system of law other than that of the trial court in any given situation. This may involve in a contract made or to be performed in a foreign country and or by foreign parties.

Three issues arise in conflict of laws cases in Nigeria namely;

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13 Okechukwu Chris Iheduru. *The Political Economy of International Shipping in Developing Countries*


15 Dicey and Morris *The conflict of laws*
a. Jurisdiction or choice of forum

This is usually the first step, the court has to ascertain that it has power or authority to try the subject matter presented by the contending parties under the applicable national legislation establishing the court or relating to the subject matter. Where the court does not have such authority, jurisdiction will be declined.

However, where the matter falls within the competence of the court, it may still decline jurisdiction due to other related issues often referred to as "connecting factors", forum or arbitration clause in a contract, forum non conveniens or lis alibi pendens (double litigation).

b. Choice of law

Where it has been determined that a court has jurisdiction, the next question in a case having foreign element is: What law will apply?

Several choices of law and rules have been evolved and of primary importance among these in relation to maritime claims are:-

- Lex fori: which means the domestic or national law of the forum
- Lex causae: which denotes the law which governs the question or transaction. The issue of lex causae may further be reduced to the particular law of domicile (lex domicili) or law of the contract (lex-loci contractus).

It is observed that whilst some countries endeavour to apply foreign law where foreigners and foreign transactions are involved, others notably (UK and France) tend to refuse to recognise foreign law on grounds of public policy unless it is identical to the local law (lex fori)
Generally, it is recognised as a principle of international law that substantive rights of the parties to an action may be determined by foreign law (lex causae) while matters of procedure are determined by the lex fori.\textsuperscript{16}

The lack of uniform international approach in resolving choice of law problems tends to encourage forum shopping by claimants on one hand and the other hand causes inequity or injustice.

c. Recognition of foreign judgment

As a general rule the judgement of a court of a foreign country has no direct application in another country unless enforced or recognised.\textsuperscript{17} The procedure for enrolment or registration are issues of national law and vary from jurisdiction to jurisdiction, but generally the need to establish that due process of law has been complied with and that it must be a final judgement, are common factors for consideration.

1.4 Aim and objective

The objective of this research is to evaluate The Hague, Hague-Visby and Hamburg rules and the interpretations given to it by the Nigerian courts. The study seeks to assess the quality of the adjudication being offered by the Federal High Court to parties in maritime claim.

This objective stated above will be achieved by;

- Assessing the Admiralty and Jurisdiction Act, which empowers the Federal High Court to be the court of first instance in any maritime claim
- Identifying the cumbersome nature of litigation and how the process is frustrated.
- Critically analyse judgments given by the court.

\textsuperscript{16} The Halcyon Isle [1980] 2 Lloyds Report 325
\textsuperscript{17} Dicey and Morris chap 14
1.5 Methodology

This study will conduct a comparative study on Hague, Hague-Visby and Hamburg Rules and the interpretation given to them by the Federal High Court when maritime claims come before it. The research is going to be a secondary based research, where text books, articles, journals and Law reports will be used.

The issue of collecting data and giving out questionnaires does not really work in Nigeria judicial system, because we practice the adversarial system of law and where advocacy is the ball game, every counsel keeps his tactics to himself until the day the Judge, witnesses and all parties are present in court.

This research raises the question why the judicial authorities in Nigeria apply the International Conventions even when the lapses are obvious and the claimant is at the mercy of the court for proper interpretations.
CHAPTER TWO

LITERATURE REVIEW

2.0 Introduction

This chapter tends to discuss the International Conventions governing the carriage of goods by sea. What led to their emergence and the vital role of the bill of lading in international commerce and the comparative analysis of the three rules that is the Hague, Hague-Visby and Hamburg Rules will be discussed. So also will the new Rotterdam rules be discussed. Though not in operation yet but Nigeria is already a signatory to it.

Nigeria has been party to the Hague rules since 1930 and became party to the Hamburg rules by accession on November 7, 1988. Nigeria is not party to the Hague-Visby rules.

The scope and application in Nigeria of International Conventions of the carriage of goods by sea is best understood by examining the nature of the contract of carriage. The carriage of goods by sea will usually involve an agreement on the part of the owner of a vessel or carrier to transport a specified cargo, for commercial reward, on the instruction of the shipper of the cargo.\(^\text{18}\)

The type of agreement or contract between the shipper and the carrier will depend to a large extent on the nature and quantity of cargo to be shipped. If the cargo is in very large quantities, sufficient to constitute a shipload, a charter of the vessel may be a most suitable arrangement. The contract that evidences this type of agreement is known as a charter party.

For smaller quantities of cargo, the shipper will usually use one of the regular liner services that ply the port. A liner service is one that provides vessels on a regular schedule

\(^{18}\) A.F. Aluko (1998) *The scope and application in Nigeria of International Conventions of the carriage of goods by sea*
irrespective of the amount of cargo available. The shipper is issued a bill of lading by the
carrier as evidence of the fact that the cargo was received on board. The bill of lading also
contains the terms and conditions of the contract of carriage.¹⁹

A shipper placing his cargo on board a liner service will usually be just one of very many
shippers. However, regardless of how varied may be the cargo, in nature, quantity, or value
all the shippers will enter into a standard contract of carriage with the carrier. With the
exception of freight (which will vary depending on the amount of cargo), all other terms and
conditions between the carrier and all the shippers are usually identical. The contract is at the
instance of the carrier. It is only in very rare and exceptional circumstances that this standard
contract is varied to meet particular needs. For the prospective shipper more often than not it
is a take it or leave it choice. There is no negotiation between the parties.

The bill of lading plays a vital role in international trade and commerce. As a result, despite
the stronger negotiating position of the carrier, effort to protect cargo interests and the
efficacy and negotiability of the bill of lading emerged. These efforts initially at the domestic
level soon gathered international momentum. The result was the emergence of two
international conventions. The Convention for the Unification of Certain Rules of Law
relating to Bills of Lading signed in Brussels in 1923 with its protocol drafted in Visby in

The scope and application of these International Conventions in Nigeria will be examined
under the following headings:-:

- Factors that led to the emergence of international conventions
- Framework of minimum rights and responsibilities for the carrier and cargo owner

¹⁹ ibid
²⁰ Supra pg. 2
2.1 Factors that led to emergence of international conventions

Two key factors led to the emergence of the Conventions. These were (a) the abuse of the freedom of contract enjoyed by the carrier and (b) the vital role of the bill of lading in international commerce.

(a) Abuse of Freedom of Contract by Carriers

Under the common law, the ship owner was regarded as a common carrier subject to a strict liability to ensure that goods taken into his care were redelivered in like condition as they were received. Consequently the carrier was liable for every accident that befell the goods unless the accident occurred by an act of God or an act of the King’s enemies. The risk of the shipping adventure as regards the cargo transported lay heavily on the carrier.

While this made a lot of sense to the owner of the goods, it did not make economic sense to the carrier who was in a potentially stronger negotiating position in which he could dictate the terms under which cargo would be carried.

The practice developed whereby the carrier, by use of exemption clauses, exempted himself from specified contingencies and perils. As any new incident occurred so also did the list of exemptions grow. Eventually, the carrier had in effect virtually contracted completely out of any liability under the common law. The principle of freedom of contract, were vigorously decided by the English courts, ensured the rights of the British ship owners to contract out of liability, was upheld and defended. This was significant because Britain truly ruled the waves and set the pace in maritime affairs as one of the maritime nations of the world. 21

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21 Abiola O. Falase Applicability of Hague, Hague-Visby and Hamburg rules in Nigeria
The effect of such exemptions from liability on trade and commerce was not easily accommodated. By allowing the ship owner to contract out of virtually all liability, the risk of the shipping adventure now lay heavily on the shipper who had no recourse if the goods were lost, damaged or destroyed. Shipping in such circumstances was akin to a gamble and the bill of lading stood the risk of becoming a worthless piece paper. In essence, there was no legal resort for the shipper, since the ship owner could escape or limit his liability making the shipper suffer huge losses. This imperilled international trade, finance and insurance interests. There were soon calls for reform.

(b) The Vital Role of a Bill of Lading.

A key factor that led to the emergence of the international conventions was the increasing importance of the bill of lading in international trade. This importance stemmed from the nature and characteristics of the bill of lading, which emerged in a historical process from the 14th century. From very early times, transportation by sea became more and more popular. The traditional pattern, whereby merchants physically accompanied their cargo for the voyage, gave way to a more practical alternative. The carrier of the goods would issue to the merchant a document stating that he had received the merchant’s goods into his custody. This document became known as a bill of lading and evidence of receipt of the goods by the carrier.

It was not long before the practice developed of dealing in the cargo shipped prior to its arrival at destination. The goods could be sold to a third party who would then take possession of the bill of lading and thus ultimately of the goods themselves. Out of these practices two further characteristics of the bill of lading emerged. Firstly, it was good evidence of the terms of the contract of carriage, because the carrier became accustomed to inserting at the reverse side of the bill of lading the terms and conditions under which they
had agreed to carry the goods. Secondly, it became a negotiable bill representing the goods themselves.\footnote{22}

These characteristics of the bill of lading made it a vital element of international trade. Not only the carrier and shipper were interested in and affected by the terms of the bill of lading, but also the eventual consignee of goods, that is the person to receive the goods at the port of discharge, the bank that financed what eventually became a documentary credit transaction (where money for the transaction was gotten from the bank through loan) and other parties that participated in the contract of carriage such as brokers, agents, stevedores, insurers etc. All these parties were interested in the manner in which risks were distributed in the contract of carriage covered by a bill of lading.\footnote{23}

2.2 Framework of minimum rights and responsibilities for the carrier and cargo owner.

In the light of the above mentioned factors, it is not surprising that there were urgent calls for reforms. These reforms took the shape of restricting the right of the carrier to exempt itself from liability. Thus the idea of defining basic minimum obligations that the carrier could not evade by contract was born. In the United States for example the US Congress passed the Harter Act of 1893 which prohibited any exculpatory clause that exempted the carrier from liability arising out of negligence or fault improper loading, stowage, custody, care, delivery of cargo or failure to provide a properly equipped and seaworthy vessel.\footnote{24}

In Nigeria, the debate whether we should in the long term regard ourselves as a ship owning or cargo owning nation is more relevant now following the recent legislation giving effect to the government shipping policy. A more valid reason for Nigeria’s adopting the Hamburg Rules

\footnote{22}{Ibid}
\footnote{23}{Supra}
\footnote{24}{See 5.2 Harter Act}
would be that they offer us an opportunity to develop a system, which will be tailored to our experience and which will accommodate our peculiar problems and limitations. In other words, they will enable us to start afresh and depart from a system which has been thoroughly tested by the British and the other courts and found to have limitations.25

The choices now facing Nigeria and other African countries are whether to retain the old Hague Rules; adopt the Hague-Visby Amendments, or opt for the Hamburg rules.26

The example laid down by the Harter Act was followed on the continent. In 1921 the Comite Maritime International (CMI) and the International Law Association set into motion a sequence of meetings and conferences that culminated in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading which was signed in Brussels on August 25th, 1924. Because the initial draft of the rules was first presented in the Hague, the rules are known as the Hague Rules.

2.3 The Hague rules

The Hague rules in a similar vein to the Harter Act, sets down a framework of minimum obligations on part of the carrier with regard to the transporting ship and also with regard to the cargo carried. This obligations are described as minimum because any attempt by a party to contract out of such obligations is null and void and of no effect.27

Minimum Obligation in Respect of Ship

There are three practical obligations that the carrier must fulfil with regard to the ship to be used in the contract of carriage. The carrier is bound before and at the beginning of the voyage to exercise due diligence to

25 Louis Mabanefo (supra) pg 13
26 Ibid
27 Art III (8)
a) Make the ship seaworthy
b) Properly man, equip and supply the ship.
c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation. \(^{28}\)

A caveat must be entered here, the carrier is not liable for any claim that an unseaworthy ship was provided for the transportation of the cargo unless it can be shown that the unseaworthiness of the vessel resulted from want of due diligence on the part of the carrier. However all the claimant needs to do is to establish that the loss or damage resulted from unseaworthiness. See *Fiumana Societa di Navigazione v. Bunge & Co Ltd* \(^{29}\) the vessel was held to be unseaworthy, where she was provided with low grade coal that was liable to spontaneous combustion during the voyage. The burden of showing that the unseaworthiness did not result from lack of due diligence rested on the carrier. \(^{30}\)

**Minimum Obligation in respect of Cargo**

The carrier has two primary obligations in respect of cargo transported.

1. To properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. \(^{31}\) This duty has the words expressed cover the entire time the goods were in custody. In *Albacora SRL v. Wescott & Lauranc Line Ltd* \(^{32}\) it was held that this duty of care makes the carrier responsible for the acts of the master, crew, stevedores and his other agents. The carrier must provide a sound system for the carriage of the cargo.

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\(^{28}\) Art III (1)
\(^{29}\) [1930] 2 KB 47
\(^{30}\) Art IV (1)
\(^{31}\) Art III (2)
\(^{32}\) [1966] 2 LLR 53
If the goods are lost or damaged in the course of a voyage and the cargo owner can show that the goods have been lost, that is by the production of a clean bill of lading, the burden of proof rests on the carrier to show that the loss or damage was caused by an event which falls within the catalogue of exceptions to the carrier's liability provided under the rules. If not, the carrier is in breach of his obligation under Art III (2) and consequently liable.

2. 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 the identification of the goods.
   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 and the apparent order and condition of the goods.\(^{33}\)

The bill of lading is prima facie evidence of the receipt by the carrier of the goods as therein described. This is subject to the rule in *Grant v. Norway*\(^{34}\) whereby a carrier is not liable on a bill of lading if it can be shown that the goods had not been shipped at all. This reduces the evidential value of the bill of lading, especially in the hands of a third party to which the bill may be endorsed.

**Exceptions to the Carrier's Liability**

The ship owner is not liable in all circumstances. Where loss or damage to the cargo arises as a consequence of events exacted under the rules, the carrier is exempted from liability under Art. IV (2). The exempted perils are as follows:

\(^{33}\) Art III (3)
\(^{34}\) (1851) 10 C.B 665
• Any act, neglect or default of the master, mariner, pilot, or servant of the carrier in the navigation or in the management of the ship. Even if it is shown that the master or other servant of the carrier is at fault, once the act relates to navigation or management of the ship, the carrier is not liable. Management in the sense means an act or omission that relates principally to the ship itself and not to the cargo. See \textit{Gosse Millard Ltd v. Canadian Merchant Marine Ltd}\textsuperscript{35}. The vessel, whilst in port discharging, opened her holds allowing rainwater to reach the referred cargo of tin plates causing them to be damaged. The ship owners pleaded the exception that this damage was due to the act, neglect or default of their servants in the management of the ship. It was held that the ship owner failed properly and carefully to carry, keep and care for the tin plates as required by the carriage of goods by sea act of 1924 by failing to cover the hatches properly during the period of rain. This exception has been much protested against. It seems somewhat unfair to saddle the cargo owner with the consequence of the negligence of the carrier's servant.

• Fire unless caused by the actual fault or privity of the carrier; perils dangers and accidents of the sea or other navigable waters. Acts of God – In \textit{R.T. Jones Lumber Co. v. Roen Steamship Co.}\textsuperscript{36} perils of the sea were defined as those perils which are peculiar to the sea and which are of an extraordinary nature or arise from irresistible force or overwhelming power and which cannot be guarded against by the ordinary exertions of human skill and prudence e.g. (hurricane, storm, typhoon, lightning). In \textit{Nugent v. Smith}\textsuperscript{37} Acts of God are losses attributable solely to natural causes without human intervention and which could not have been prevented by any amount of foresight or care for example storms, hurricane, earthquake, high winds or lightening.

\textsuperscript{35} [1929] AC 223 HL
\textsuperscript{36} [1959] 270 F2d 456, 458 2d Cir.
\textsuperscript{37} [1876] 1 C.P.D. 423 at 444
• Acts of war; acts of public enemies, arrest or restraint of princes, rulers or people; or seizure under legal process; quarantine restrictions; strikes or lock-outs or stoppage or restraint of labour from whatever cause whether partial or general; riots and civil commotions. All these are events outside the control of the carrier caused by human acts as opposed to the acts of God. The carrier is not responsible for losses or damage arising from the same. Acts of war are acts committed by states subject with whom the carrier's state is at war. Any steps taken by the carrier in consequence or avoidance of such acts, which results in loss or damage to cargo falls within these exceptions.

• Any act or omission of the shipper or owner of the goods, his agent or representative; insufficiency of packing; insufficiency or inadequacy of marks. Packaging and identification marks are usually the responsibility of the shipper. If the carrier exercises reasonable care in stowage and the goods get damaged or lost as a result of improper packaging or identification the carrier will not be liable.

• Saving or attempting to save life or property at sea – Article IV (4) provides that any deviation to save life or property at sea or any reasonable deviation shall not be deemed an infringement of the rules. Any other deviation will allow the cargo owner to repudiate the contract.

• Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods, latent defects not discoverable by due diligence. Any deterioration of cargo occasioned by the characteristic of the cargo itself. For example the tendency of some cargoes to dehydrate, to absorb moisture from the atmosphere, to rust and to become discoloured etc.
• 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. The burden of proof under this exemption lies on the carrier who must prove that there was no fault, privity or neglect. This is usually a burden and it is more usual to seek to avoid liability by recourse to the other exceptions. It is usually easier to establish that the events that will trigger the application of an exemption did or did not occur than to prove that there has been no fault, privity or neglect where goods are lost, damaged or destroyed.

The carrier may surrender all or any of these rights and immunities or increase his responsibilities under the rules

Limitation of Liability

The carrier may limit his liability under certain circumstances where there is no estoppel or fundamental breach. This limitation is expressed in terms of a monetary limit. The carrier's liability under the Hague rules is limited to one hundred pounds (100) per package or unit or the equivalent of that sum in other currency. This is so unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading. The rules also allow the ship owner the benefit of any rights and obligations under any statute in force relating to the limitation of the liability for the owners of sea going vessels. The use of the term 'package' caused great problems in interpretation. When the rules were drafted containerisation was not in vogue. Nowadays, it is the order of the day. Is a container a package? Under the Hague rules in the absence of clear definition, judges try to resolve this issue in as fair a manner as possible.

38 Art V
39 Art IV (5)
In 1924 £100 was a substantial sum and in maritime tradition, the definition of the word "package" gave few problems. It referred to something packed in a bale or box which could be carried on board a vessel by a stevedore. In modern times the interpretation of Art.4 r. 5 has created difficulties.

Article 9 of the Hague rules provides:-

"The monetary units mentioned in these rules are to be taken to be gold value".

Between 1926 (when the Hague rules came into effect in Nigeria) and 1971 when our currency changed from the pound sterling, there was no problem in applying the £100 stipulation. The question subsequently raised was whether the £100 should be converted into Naira in 1971 (when the pounds became Naira) or at the time of judgement. In Adikibi v. NNSL\\^40 Mohammed J as he then was said at page 161:-

"It is my considered opinion that the nature and value of goods must be declared to deprive the defendants of the benefit of Article 4 Rule 5. In this case the value has not been declared. The limit provided by Article 4 Rule 5 is therefore available to the defendants. Only one case was shipped by the plaintiff. I therefore find the defendants liable to the equivalent of £100 in Nigeria Naira."

"Judgement is therefore entered for the plaintiff against the defendant in the sum equivalent of £100 in Naira at today's current rate"

In NNSL v. Gilbert Emenike\\^41 Nnaemeka Agu JCA said at page 172:-

"Applying the gold clause provision as well as Article 9 of the rules made under Cap.29 laws of the federation 1958. I should take into account the current Naira equivalent of pound sterling which is one to seven."

\\^40 [1987] 3 N.S.C. 152
\\^41 [1987] 3 NSC 163
The decimal currency act 1971\textsuperscript{42} provides:

"S.1 (2) every... transaction, dealing, matter and thing... done.... in relation to the Nigerian Pound shall in Nigeria be deemed instead to be made, executed .... in relation to Naira on the basis that one Nigerian pounds equals two Naira.

S.2 (1)..... The parity of the Naira shall be equivalent to 1.24419 grams fine gold."

It therefore goes without saying that in 1971, the £100 referred to in Article 4(5) became =N= 200; and its gold parity was fixed at 1.24419.

In \textit{M/V Caroline Maersk v. Nokoy Investment Ltd}\textsuperscript{43} Galadima JCA referred to the aforementioned judgement of Nnaemeka Agu JCA. He drew attention to the fact that 'the court took judicial notice of the fact that at September 1987, the Naira equivalent of pounds sterling was one to seven.' He continued at page 606:-

"The appellant have submitted that the gold value clause is excluded ...... by fixing a specific amount of £100."

I think the appellant misconstrue the clear provision of COGSA which provides that =N= 200 per package in article 4(5) is subject to the gold clause in Article 9. The purpose of the gold value clause, which is equivalent to a clause of living cost index clause, is to take care of inflation.

If the commencement of COGSA Cap.44 was 18/3/1926 as stated clearly in the legislation, then the =N= 200 per package, if applied will mean that each package would be assessed on the value of gold sold for =N=200 in 1926 not definitely in 1998 or any other subsequent date. The gold clause provision has been done away with by some European countries; for instance United Kingdom. Nigeria and Italy have not done so. Italy, in the case of Fiat

\textsuperscript{42} Cap. 92 Laws of the Federation 1990

\textsuperscript{43} [2000] 7 NWLR Pt666, pg 587
Company v. American export Inc. calculated 100 pounds sterling in gold as equivalent to US $824 per package.

It would appear that 100 pounds per package that appear in a bill of lading is merely expressing in sterling that Naira equivalent in the year 1926. The carrier is responsible for 100 pounds sterling per package under the Hague rules or its equivalent under the National law which is applicable.

Nigeria has not done away with Article 9 that provides for the old gold clause. It cannot be ignored in this case.

A plain reading of Article 4(5) is that the limitation figure is =N= 200 into other currency such as the British sterling we may approximately have one pound, twenty-five pence. In Ghanaian Cedi, its equivalent will be Ghc 2.

Anomalous as the rate of exchange appears, it represents a failure on the part of our legislature to update fixed monetary enactments in line with inflation. Obvious examples abound in the Merchant Shipping Act where maximum penalties for heinous offences, such as operating an unseaworthy ship, still amount to the sum of one thousand naira that is Ghc10!

Time bar

Another aspect of limitation is the time bar. Any action against the ship owner must be brought within one year of actual or due delivery. Any action brought after this period would be statute barred. Statute barred in the sense that when the law governing the transaction says for example in The Hague rules that claim for loss or damage to goods must be brought within one year of delivery of such goods. If the consignee receives the goods on

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44 [1965] AMC 384
45 Art III (6)
the 1st day of May 2010 and he noticed any damage or loss, for him to lay a claim for compensation to be paid he must file a suit against the carrier or ship owner within one year (1st of May 2010 – 30th of April 2011) any action brought after this date becomes statute barred and no claim can be made against the ship owner or carrier.

In order to avoid the limitation provisions the cargo owner could sue the servants or independent contractors of the carrier in tort for negligence. This was due to the loophole created by the doctrine of privity of contract that prevented persons who are not parties to a contract from benefitting under it. This loophole is bridged by use of the Himalaya clause which extends to the servants or agents of the carrier all the protection offered to the carrier under the bill of lading.

The Hague rules apply to the contract of carriage, which is defined as starting from the time when the goods are loaded on the ship to the time when they are discharged from the ship. This is often referred to as the ‘tackle to tackle’ period. The rules are, however silent as to the circumstances or voyages to which it would apply. The application of the rules is left to the enabling legislation of the contracting states.

The rules apply only to contracts covered by the bill of lading. It does not apply to charter parties.

There were certain deficiencies in The Hague rules, especially in the areas of limitation of liability, the evidential effect of the rules, the application of the rules and liability in tort called for urgent review. In 1968 the Hague-Visby amendment was introduced.
2.4 The Hague-Visby rules

At the Stockholm conference of the Comite Maritime International in June 1963 the Visby rules were drafted to amend the existing Hague rules. The principal amendments were as follows:

Limitation of Liability

Under the Hague-Visby the limitation of the carriers' liability in pounds or equivalent was dropped. Liability is limited to 666.67 units of account per package or 2 (two) units of account per kilogram weight of the goods lost or damaged, whichever is higher. The unit of account is the special drawing right as defined by the International Monetary Fund.\(^{46}\)

Evidential Effect of a Bill of Lading

Under the common law the master of a vessel has no authority to sign for goods not shipped. In \textit{Grant v. Norway}\(^{47}\) it was held that the usual rule that the master's signature binds the ship owner would not apply where the goods had not been shipped at all. Under the Hague-Visby rules, the bill of lading is conclusive evidence of the terms, once the bill has been transferred to a third party acting in good faith. Art. III (4) provides that once the bill of lading has been transferred to a third party acting in good faith, the bill of lading is prima facie evidence of receipt of the goods as therein described and proof to the contrary will not be allowed.

Liability in Tort

The defences and limits of liability provided for by the Hague-Visby rules in any action against the ship owner will apply whether the action is founded in contract or tort. Art.IV bis provides that the defences and limits of liability provided for in the rules shall apply in any action against the carrier in respect of loss or damage to the

\(^{46}\) Art.IV(5)(d)
\(^{47}\) Op cit
goods covered by the contract of carriage whether the action is founded in contract or tort.

The Hague-Visby also protects servants or agents of the carrier and provides that if an action is brought against a servant or agent of the carrier, such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to.

**Time bar**

The time limit for bringing a claim under the Hague-Visby rules remains one year from actual delivery or due delivery. However Art. III rule 6 provides that an action for indemnity may be brought outside the 12 month period if it is commenced within the time allowed by the law of the court seized of the case and not more than three months from the time the person seeking the indemnity has settled the claim or has been served with the process in the action against himself.

**Application of the rules**

The Hague-Visby rules define the instances of its application. The rules apply to bills of lading relating to carriage of goods issued between two ports in two different states if;

a) The bill of lading is issued in a contracting state

b) The carriage is from a port in a contracting state

c) The contract contained in or evidenced by the bill of lading provides that these rules or legislation of any state giving them effect are to govern the contract.48

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48 Art. X
2.5 Hamburg Rules

There was yet another call for review, this time on a totally different line. Cargo owning nations regarded The Hague and Hague-Visby rules as being unduly in favour of ship owning interests. Among other things, it was felt that the burden of proof lay heavily on the party that had the less resources and less access to means of proof. The whole basis of liability was sought to be reviewed. Under the auspices of UNCITRAL conference in Hamburg the United Nations Convention on the Carriage of Goods by Sea was drafted. The convention also known as the Hamburg Rules became effective on 1 November 1992.

Application

The Hamburg rules apply to any contract whereby the carrier undertakes against the payment of freight to carry goods by sea from one port to another.49 This is wider than the previous conventions that are restricted to contracts of carriage covered by a bill of lading or similar document of title. The convention is applicable to all contracts of carriage 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 in the contract of carriage by sea is the actual port of discharge and such port is located in a contracting state; or

49 Art I rule 6
d) The bill of lading or other documents evidencing the contract of carriage by sea is issued in a contracting state; or

e) The bill of lading or other documents evidencing the contract of carriage by sea provides that the provisions of the convention or the legislation of any state giving effect to them are to govern the contract. This is similar in scope to the Hague-Visby rules.

**Liability of the Carrier**

The Hamburg rule bases the carrier's liability exclusively on presumed fault. The carrier is liable for any loss resulting from loss or damage to the goods as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge. Unless the carrier can prove that he or his servants took all measures that could reasonably be required to avoid the occurrence and its consequences, such a carrier will be liable. Thus the ship owner is presumed to be at fault in all cases of loss or damage and the burden of proof rests on the ship owner if he seeks to avoid liability.

**Limitation of Liability**

A new formula for limitation of liability is adopted under the Hamburg rules. The liability of the carrier for loss resulting from loss or damage to goods is limited to an amount equivalent to 835 units of account per package or other shipping units or 2.5 units of account per kilogram of gross weight of the goods lost or damaged, whichever is higher. The unit of account is the Special Drawing Right (SDR) as defined by the International Monetary Fund. In countries where SDRs are not applicable the limits of liability are fixed at 12,500 Poincare francs per package or other shipping unit or 37.5 Poincare francs per kilo of gross weight of

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50 Art II
51 Art 5
the goods. These figures represent a 25% increase on the limits presently prescribed under the Hague-Visby rules.\textsuperscript{52}

The Hamburg rules came to the rescue. It means that the limitation per package will increase from \( \text{=N= 200} \) to \( \text{385 'special drawing rights'} \) which is the equivalent of $1.5-1.6. So we are talking about approximately one thousand dollars or its naira equivalent.

**Meaning of Package**

In *M/V Caroline Maersk*,\textsuperscript{53} Galadima JCA considered the question whether a container was a package for the purposes of limitation. He disagreed with the counsel's submission it was a package on the grounds that:

"Historical background indicated that containerisation in merchant shipping began in the 60s and 70s long after the Hague rules came into effect in the 20s and 30s."

He cited, with approval, the 5\textsuperscript{th} edition of Odger's construction of deeds and statutes\textsuperscript{54} where the learned author stated:

"In other words package must in all cases be given etymological and historic meaning. It is only in relevant cases that the meaning will be extended to the special meaning. A package is a number of things packed together"

The learned Justice concluded that it is the intention of the parties, as declared on the face of the bill of lading that determines what a package is.

Nnaemeka Agu JCA in *NNSL v. Gilbert Emenike*\textsuperscript{55} leaves us no wiser as to how to determine what constitutes a package he said:--

\textsuperscript{52} Wilson J. *Carriage of goods by sea.*

\textsuperscript{53} supra

\textsuperscript{54} Odgers C.E. 1964 sweet & Maxwell, London

\textsuperscript{55} supra
“Decided cases on the point are not easy to reconcile”

He examined some British and American decisions and concluded that the law was due for a rational amendment by an international convention.

Muhammed J in Adikibi v. NNSL56 wisely declined from venturing into “the slough of despond” and “leaping from tussock to tussock” in an endeavour to define “package”

Judges in Australia, United States and Canada attempted to so, at their peril. In Standard Electrica S.A. v. Hamburg SDG57 the US Court of Appeal (second circuit New York) discussed the subject. The case concerned nine pallets, made up by the shipper, with each pallet having six cardboard cartons attached to it and each cardboard carton containing 40 television tuners. The relevant bill of lading and other documentation described the goods as “nine pallets”. The court, by a majority verdict held that since the parties have described the goods as ‘nine pallets’, each pallet was a package. A dissenting judge argued however that though the majority defined a pallet as a package, it was equally feasible to designate the cardboard boxes as being the packages. He opined that though the interpretation adopted by the majority made for greater certainty, it did not carry out the intention of the drafters of the section of the law.

In International Sales Service Ltd v. M/V Aleksandr Serafimovich58 the Federal Court of Canada said:-

“... while those who set the $500 per package rule no doubt had in mind the types, sizes and shapes of packages in common use at that time, technological changes have completely altered the situation.

55 supra
56 Supra
57 [1967] 2 Lloyds Rep 193
58 [1975]2 Lloyd’s Rep. 346
It appears that pallets, of the kind with which we are concerned, were not in use at that
time and more particularly the large metal containers only appeared on the scene in
fairly recent years. These containers vary greatly in size, being often 8ft wide and 8ft
high but having a length that may be 40ft or more. It further appears that other, even
larger receptacles for goods are being developed. When we note that a container
measuring 8ft by 8ft by 40ft contains 2640 cubic feet shipping space, we readily see that
if a fully stuffed container is held to be a package under Rule 5 of Art. IV...... there will be
few, if any, cases in which the $500 rule affords reasonable protection to the cargo
owner”.

In Leather’s Best Inc. v. SS. Mormalynx\textsuperscript{59} the US Court of appeal, second circuit, held that
package was more sensibly related to the unit in which the shipper packed the goods and
described them than to a larger metal object, functionally a part of the ship, in which the
carrier caused them to be contained. In that case, the wording used in the bill of lading was
“1 container S.T.C. [said to contain] 99 bales of leather”.

An interesting test known as the “functional economies test” was introduced by the aforesaid
court in Royal Typewriter Co. v. M/V Kulmerland\textsuperscript{60} the test was formulated thus;-,

Could the contents of a container have feasibly been shipped overseas in the individual
packages or cartons in which they were packed by the shipper?

The case concerned 350 adding machines placed in corrugated cartons which were placed
inside a smaller container. The relevant bill of lading contained the words: “one container
said to contain machinery”

The numbers of units or packages or cartons in the container were not specified. The trial
judge had held that the entire container constituted the package and he accordingly adjudged
the carrier to be entitled to limit his liability to $500. Applying the functional economics test,

\textsuperscript{59} [1971] 2 Lloyds Rep. 476
\textsuperscript{60} [1973] 2 Lloyd’s Rep. 428
the appeal court reasoned that the adding machines were placed in cartons which had never been used for export packing. Therefore, the logical conclusion was that it was the container itself that constituted the package.

Carruthers J. Of the Admiralty division of the Supreme Court of New South Wales Australia had cause to consider the functional economics test in *P.S. Chellarams & Co. Ltd. V. China Ocean Shipping*61 However, he concluded that on the whole the American authorities were inclined to the view that if each carton in the container were listed on the bill of lading, then each was a package. He justified his resort to American authorities on the grounds that Article 4(5), being an International convention, required a uniform international approach to its interpretation.

In the Canadian case of *J.A Johnston Ltd. v. Tindefself*62 The learned trial judge, having reviewed some of the fore-mentioned decisions, concluded that :-

"The rationale of these decisions, it seems to me, is found in the intention of the parties. Where the shipper knows his goods are to be shipped by a container and specified in the contract (usually by means of the bill of lading) the type of goods and the number of cartons carried in the container, and where the carrier accepts the description and count, then in my opinion, the parties intend that the number of packages for the purpose of limitation of liability should be the number of cartons specified.

I hasten to add that the intention must be ascertained from consideration of all facts and not merely the words used in the bill of lading: the type of container, who supplied it, who sealed it – if it was sealed on delivery to the carrier, the opportunity for count by the carrier, previous course of dealing - all these matters, and many others which I have not enumerated, may be relevant in arriving at what the parties, by the particular contract intended."

The above cited cases gave an insight into the problems generated by Article 4(5) of The Hague rules in determining what constitutes a package.

62 [1973] F.C 1003
Package under the Hamburg Rules

Article 6(2) of the Hamburg rules provides:-

a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping unit 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. Excepts as aforesaid the goods in such article of transport are deemed one shipping unit.

b) In cases where the article of transport if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.

The foregoing analysis has shown that currently, the Hague rules provisions on 'per package' limitation do not serve us well, that is the party claiming damages for goods loss or damage in the course of carriage by sea before the law court.

Time bar

Actions are time barred, if judicial or arbitration proceedings have not been instituted within a period of two years from the time the goods were delivered or ought to have been delivered. The Hamburg rules give a wide range of courts where judicial or arbitration proceedings can be commenced.

Period of Responsibility

The period of responsibility for cargo is wider under the Hamburg rules and extends from the time goods are taken from the shipper to the time they are delivered to the consignee that is 'warehouse to warehouse'. Any provision that conflicts with the Hamburg rules is void.

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63 Art 20 rule 1
64 Art 21
2.6 Rotterdam Rules

The Rotterdam Rules are the first rules governing the carriage of goods by sea and also connecting transport by land. This land leg used to require separate contracts. Responsibility and liability during the whole transport process are clearly demarcated. Furthermore, the Convention puts in place the infrastructure for the development of e-commerce in maritime transport. This will lead to less paperwork. The shorter turnaround times will reduce the chance of errors and lower costs.

The Rotterdam Rules are the result of inter-governmental negotiations that took place between 2002 and 2009. These negotiations took place within the United Nations Commission for International Trade Law (UNCITRAL) after the Comité Maritime International (CMI) had prepared a basic draft for the Convention. On 11th December 2008, the General Assembly of the United Nations adopted the Rotterdam Rules. 65

The Rotterdam Rules, adopted by the United Nations Commission on International Trade Law (UNCITRAL) will replace the existing cargo liability regimes such as the Hamburg and Hague/Visby Rules. Ship owner organisations firmly believe that this will achieve greater global uniformity for cargo liability, facilitating e-commerce through use of electronic documentation, reflecting modern ‘door to door’ services involving other modes of transport in addition to the sea-leg and ‘just in time’ delivery practices.

The Rotterdam Rules bring more clarity regarding who is responsible and liable for what, when, where and to what extent when it comes to transport by sea. The Rotterdam Rules will give world trade a boost considering that 80% of world trade is conducted by sea. If the same law applies all over the world, this will facilitate international trade by making its underlying contracts and documentation more efficient and clearer.

The signing ceremony was held in Rotterdam from 20 to 23 September 2009. In the meantime the following (24) countries have signed the Convention; Armenia, Cameroon, Congo, Democratic Republic of the Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, Luxembourg, Madagascar, Mali, the Netherlands, Niger, Nigeria, Norway, Poland, Senegal, Spain, Sweden, Switzerland, Togo, and the United States of America, all together representing 25% of the world's trade.

The Convention will come into force one year after ratification by the 20th UN Member state. In the meantime Spain has become the first nation to ratify the Rotterdam Rules.

The Differences between the Rotterdam rules and the existing rules.

1. The Rules use descriptions such as "volume contract" and "maritime performing party" which will need to be clarified.

2. The Rules seek to establish lines of liability for carriage from door to door. The emphasis in the Hague Visby Rules was from port to port from the point of loading to the point of discharge. The Rotterdam Rules seek to push responsibility for a wider carriage onto the carrier who would be responsible for the goods from the point of "receipt" until the point of "delivery".

3. In addition, the number of defences available to a carrier from door to door is intended to be reduced. A carrier's ability to rely upon the negligent act of an employee due to a navigation error will be cut down.

4. The liability compensation levels in the new convention have been raised. Under the Hague Visby Regime, the maximum liability for a carrier is limited to two special drawing rights (SDR's) per kilo or 66 SDR's per package, whichever is deemed to be the higher of the two. The Hamburg Rules attempted to increase those levels to 835
SDR’s. Under the new convention, the carrier’s liability is now limited to three SDR’s per kilo and/or 875 SDR’s per package.

5. The time limit for initiating legal proceedings for claim has been extended from one to two years.66

Supporters of the Rules hope that they will achieve widespread adoption and thereby bring greater uniformity to sea and ‘wet multimodal’ carriage contracts (i.e. multimodal transport including a sea leg). They argue that, by replacing the current 'patchwork' of maritime and unimodal conventions for road/rail/inland water transport, the unnecessary costs that inevitably arise out of legal complexity will be eliminated. Many supporters also think that, if the provisions in the Rules seeking to promote electronic bills of lading are successful, further cost reductions will be achieved.

Those opposed to the Rules criticise them for being poorly drafted, ill-conceived and too ambitious. Some critics have suggested that, rather than introduce a new set of rules, the United Nations should just update the Hague-Visby Rules and campaign for greater adoption of existing unimodal conventions such as CMR.67

The aim of this dissertation is not to say which view is right and which is wrong but, instead, to consider some of the potential 'real world' impact that the Rules will have on ship owners if they come into force. The Rules can no longer be changed, which means that they must either be adopted 'as is' or rejected in full. The Rules present both strategic threats and opportunities and it is essential that owners start planning for their possible introduction as soon as possible. The Rules will require owners to undertake a review of all their contractual arrangements and operating procedures to ensure compliance. Where necessary, commercial,

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66 http://www.mondaq.com/article.asp?articleid=81002&login=true&nogo=1
67 ibid
operational, insurance and legal staff will have to be given extensive training. The Rules will also have an impact on day to day cargo claims handling by ship owners and P&I Clubs.

New definitions

The Rules introduce a large number of new definitions and it is important to keep four of these in mind when reading this dissertation. The first important new definition is 'liner transportation' (Article 1(3)). This definition captures shipping services provided in accordance with published timetables and will therefore cover most container, ro-ro, car carriage and scheduled break bulk shipping. The converse of 'liner transportation' is 'non liner transportation' (Article 1(4)). This is the second new definition and will mainly cover tramp services.

The third new definition is the 'volume contract', which is defined as 'a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range' (Article 1(2)). The definition is wide enough to cover Carriage Service Agreements entered into by container shipping lines with supermarkets and manufacturers (i.e. liner transportation), and long-term contracts of affreightment entered into between bulk ship owners and commodity houses (i.e. non liner transportation).

The fourth new definition to consider is 'maritime performing party' (Article 1(7)). This definition covers the carrier's subcontractors who exclusively undertake their services between the time that the goods arrive at the load port and leave the discharge port. The definition will therefore capture ship owners who charter their vessels to ship operators who issue operator bills, operators providing space to other operators under
alliances/consortia/slots, feeder vessel operators and terminal operators. It will, however, rarely cover inland carriers such as road or rail providers as explained below.

Applicability

The Rules will not apply compulsorily to demise or time charter parties in either liner transportation (Article 6(1)(a)) or non-liner transportation. Ship owners who charter their vessels out to charterers and do not allow the charterers to issue owners' bills may therefore conclude that the Rules are of no concern to them. This is incorrect. As explained below, the Rules provide that ship owners chartering out tonnage can be 'maritime performing parties' and that cargo claimant can bypass time charterers issuing time charterers' bills and sue owners directly for cargo loss, damage and delay. Some ship owners may actually consider this to be advantageous because the Rotterdam Rules can then be used by the ship owner to defend and/or limit claims brought by cargo claimants in tort.

The same principle applies to slot charters and alliances/consortia arrangements. They will not be compulsorily subject to the Rules (Article 6(1)(b)) but disponent owners under slot charters will be liable to claims by cargo interests on the terms of the Rules because they will be 'maritime performing parties'. Maritime performing parties (unlike performing parties) have joint and several liabilities with the carrier under the Rotterdam Rules.

The Rules will not apply compulsorily to voyage charter parties. Ship owners who charter their vessels to voyage charterers may similarly be under the apprehension that the Rules are therefore of no concern to them. Again this is incorrect. The Rules will actually apply to all claims brought by consignees/transferees against owners under bills of lading issued pursuant to the voyage charter (Article 7). An example of how this would happen will assist. A typical scenario would be in the context of a CIF sale contract where the master issues, say, a
CONGENBILL to the charterer (the CIF seller) pursuant to a GENCON charter party. Once the CONGENBILL is handed over by the charterer to the named consignee, or the bill is transferred to an endorsee (the CIF buyer), the CONGENBILL will be a contract of carriage as between the owner and the consignee/endorsee and the Rules will govern the owner's liability.68

Finally, the Rules will also apply to those contracts the draftsmen mainly had in mind when preparing the wording: any international contract of carriage (port to port bill of lading, multimodal bill, waybill, ship's delivery order, standard terms, etc.) where any of the following are in a Rotterdam state: the place of collection, port of loading, port of discharge or point of delivery (Article 5(1)). Bills of lading issued by ship owners operating their own ships may therefore be subject to the Rules, as will bills issued by operators chartering in tonnage.

Liability regime

The three 'fundamental duties' of the carrier are under (Articles 11, 13 and 14), the burden of proof when claims arise (Article 17), the excepted perils and the abolition of the 'negligent navigation/management' defence (Article 17(3)), incidents arising out of a combination of causes (Article 17(6)), the compulsory application of the Rules to deck cargoes including on break bulk vessels (Article 25), how the Rules interact with non-sea unimodal conventions (Articles 26 and 82), the increased limits of liability (Article 59) and the extended time bar (Article 62).

The concerns about these areas have been well made and if the Rules come into effect, the courts will need to consider a number of test cases to establish guiding principles on their

68http://www.mondaq.com/article.asp?articleid=81002&login=true&nogo=1
application. Fundamentally, however, the world will not change. Under a ‘transport
document’ (the new definition to cover bills, waybills and other types of carriage contracts),
there will still be a carrier and there will still be shippers and consignees. If a claim arises,
someone will still have the burden of proving a breach of the contract and causation. There
will still be defences, limits of liability and time bars.

There is no doubt; however, that there will be a period of increased claims activity and
litigation as the courts seek to clarify the effect of the Rules in the real world. In the short
term, the overall effect will probably be to increase legal expenditure on cargo claims and
waste management time.

For the vast majority of cargo claims arising outside volume contracts, where breach and
causation are clear, the reality for ship owners and P&I claims handlers is that life will
largely be ‘business as usual’. For example, if it is clear that the cargo has been damaged
owing to poor lashing or negligent terminal handling, there will be no need to debate the
complex wording in the Rules about the burden of proof. A lot has also been made about the
extension of the seaworthiness obligation. The reality, however, is that ship owners already
have an ISM obligation to maintain a seaworthy ship, so the impact of the extension may not
be as great as some commentators have suggested. Whilst there will be some grey areas in
relation to the extension of the seaworthiness obligation (e.g. reefers failing during a voyage),
we will have to await guidance from the courts before we can assess the true impact of this
change.

Volume contracts

Volume contracts are a controversial innovation of the Rules. This is because the Rules say
that parties to a volume contract have almost unlimited freedom of contract to contract out of
the Rules' 'general' liability regime. Parties can agree higher limits of liability, uncapped liability or even carrier responsibility for consequential losses. Alternatively, parties can agree that the carrier benefits from lower limits or additional defences. Because freedom of contract is being given such a powerful 'conventional blessing', it is suspected that parties who had hitherto shield away from bespoke contracts may find a renewed enthusiasm for them.

Jurisdiction/arbitration

The basic provisions relating to jurisdiction and arbitration are optional for state signatories (Articles 74, 78 and 91). This means that certain Rotterdam states will adopt them but others will not.

Because the Rules do not apply to charter parties per se, owners can be confident that the Rules will not cut through jurisdiction or arbitration clauses in their time and voyage charters. Furthermore, in those Rotterdam states not implementing the optional jurisdiction and arbitration provisions, exclusive jurisdiction clauses and arbitration clauses found in the transport document (i.e. the bill of lading) will be unaffected by the Rules. Finally, even in Rotterdam states adopting the arbitration chapter, the Rules will not affect arbitration agreements in non-liner transportation contracts of carriage, for example owners' bill issued pursuant to charter parties, providing the bill identifies the parties to the relevant charter party, its date and specifically incorporates the arbitration clause (Article 76).

While in those states which adopt the jurisdiction and/or arbitration chapters, the only exclusive jurisdiction or arbitration clauses in liner transportation bills (as opposed to charter parties) which will be enforced as between the carrier and customer will be those which:
1. Specify a Rotterdam state for jurisdiction/arbitration (Articles 66(b)); and

2. Are contained in volume contracts (Articles 67(1) and 75(3)).

There are also specific rules which, if followed, can make the jurisdiction and arbitration clauses enforceable as between the carrier and the transferee/endorsee of a bill or waybill issued under a Volume Contract (Articles 67(2) and 75(4)). These need to be followed if owners want to preserve the wider integrity of their exclusive jurisdiction clauses.

Owners need to be prepared for these challenges – by evaluating, as best they can, the potential impact that the Rules could have on the specific trades with which they are involved. Unfortunately, of course, much of that work cannot be undertaken until it is known precisely which States sign up to the Rotterdam Rules and whether those States decide to 'opt in' or 'opt out.' In any event, it is unlikely that the Rules will put an end to 'forum shopping'; and there are likely to be cases where the courts in a Rotterdam State that enforces jurisdiction clauses will end up in dispute with the courts in another Rotterdam state that does not.

**Pure economic loss for delay**

Where a delay under a contract of carriage has caused cargo loss or damage, cargo interests and carriers are usually able to have relatively straightforward discussions about whether the carrier was liable or not. Where, however, there has just been pure economic loss suffered by cargo interests because of a delay in the ocean carriage, the position has always been much more arguable. As part of the 'general' liability regime, the Rotterdam Rules seek to address this issue by providing for a separate limit of liability for pure economic loss caused by delay. It is suspected that courts will be generous to claimants when applying the delay provisions
and less generous to carriers seeking to escape liability by relying on liberty clauses that
entitle them to proceed by any route, at any speed, etc.

Whilst the damages payable in respect of delay will be limited to 2.5 times the freight costs
for the relevant shipment, with margins so tight in certain areas of shipping, carriers may
need to think seriously about how they might minimise exposure to delay claims by
operational changes in their services. Again, much will depend on the specific trades in which
an owner is engaged.

Deck cargoes

Although most container operators treat on-deck and under-deck cargo on the same basis for
liability purposes, many break-bulk operators do not. With break-bulk movements, it is not
unusual to see carriers making deck carriage at 'shipper's risk'. Because Rotterdam does not
apply to charter parties, break-bulk owners entering into a charter party can still exclude on-
deck liability in a charter and this will bind the charterer. Where, however, a bill of lading
issued under the voyage charter has been transferred to a third party, the exclusion clause will
be invalid in respect of claims brought by the transferee. Similarly break bulk operators
offering liner services without a charter will also be unable to exclude liability to shippers
and consignees in their standard liner bills.

Given that most break-bulk operators build the deck exclusion into their freight charges, they
will need to think very carefully about whether to buy additional cover or, where possible, to
enter into volume contracts with customers to maintain the exclusion.
Pre and post ship's rail

The Hague and Hague-Visby Rules were tackle-to-tackle conventions. It was therefore open to owners to exclude liability pre or post ship's rail.

The Rotterdam Rules, however, go much further and, subject to agency and FIOS clauses discussed below, makes the carrier liable for sea carriage, terminal handling and inland carriage (in multimodal contracts) on exactly the same basis.

In non-liner trades, FIOS ('free in/out, stowed') terms are usually incorporated into owners' bills, making charterers/receivers responsible and liable for all terminal handling. This was permitted under The Hague and Hague-Visby Rules. Fortunately, these clauses will still be recognised and enforced under the Rotterdam Rules (Article 13(2)). Indeed, it is probable that FIOS clauses may become even more popular after the introduction of the Rotterdam Rules, given that 'gross terms' (which make owners responsible/liable for loading/discharging) will probably mean higher damages if cargoes are damaged in a terminal.

In early liner bills, many operators excluded liability pre and post rail and also defined themselves as agents when engaging road, rail or barge operators for inland carriage. The net effect was that the owner could only ever be liable for the sea carriage itself. Most modern liner bills no longer include the agency provision, but it is still the case that very few assume liability pre or post ship's rail on the same basis as the sea carriage. In most modern bills, unless a unimodal convention applies, the carrier has less liability for terminal handling and inland carriage than sea carriage.

Under the Rotterdam Rules, however, liner operators will need to carry out a cost/benefit analysis about whether they should revert to limiting their responsibility as carrier to sea transport and loading/unloading only. They may even want to think about adopting FIOS
terms. The Rotterdam Rules appear to allow owners to enter into contracts making them carrier for the sea and terminal elements only and agent for the inland legs. An FIOS or agency approach may bring cost savings in terms of both below and above deductible claims. Owners will need to consider, however, whether their customers will accept an FIOS or agency approach in today's 'one stop' service world.

Terminal handling subcontractors

In liner trades, the liner operator usually contracts with the load and discharge port terminal operators. Bulk owners carrying 'dry' cargoes entering into 'gross terms' voyage charters and issuing charter party bills which the charterer transfers, also contract directly with the terminals. The Rotterdam Rules make such terminal operators 'maritime performing parties' (Article 1(7)). By becoming maritime performing parties, the terminal potentially assumes joint and several liabilities to cargo interests for any loss or damage occurring during the terminal services (Articles 19 and 20).

For the first time, the Rotterdam Rules will therefore put many terminals directly in the firing line for cargo claims. At the moment, cargo claimants normally bring their claim against their contractual counterparty, the ship owner. The carrier then seeks an indemnity from the terminal – in accordance with either the terms of a bespoke terminal handling agreement or local law. In short, at the moment, terminals normally only have to deal with a small number of claimants, namely the shipping lines, rather than the individual cargo claimants. All that is about to change.

Because of the direct right of action against them, terminals will want to open discussions with carriers about how direct claims against the terminal should be managed, whether the terminal should carry any extra Rotterdam Rules exposure or obtain an indemnity from the
owner in respect of Rotterdam Rules liabilities to cargo interests. At the moment, most terminals are simply not prepared to deal with claims from a large number of cargo claimants. Their systems and processes are geared up towards dealing with claims 'funnelled' through shipping lines. Because the Rotterdam liability provisions are also likely to be largely more generous than the terminals' current exposure to the shipping lines, the terminals are also likely to end up with worse claims and this may impact their insurance programmes. Some terminals are already talking about the need to pass on the extra cost of supporting a larger claims department to their shipper/operator clients and/or asking for the shipping lines to agree contractually to take over the handling of claims on behalf of the terminal. Other terminals are considering asking lines for indemnities in respect of any extra liability that a terminal may incur resulting from the compulsory application of the Rotterdam Rules. Carriers therefore need to start thinking about how they would deal with these issues if the Rules come into effect. Early discussions with terminal operators would be prudent.

**Feeder vessel operators, alliances/consortia and slots**

Shipping lines tend to subcontract to each other and to specialist feeder vessel operators. Like terminals, these companies will also be considered as 'maritime performing parties' within the meaning of the Rules, making them exposed to direct claims from cargo interests if the cargo carried is lost or damaged during the performance of their services.

At the moment, many feeder vessel operators contract with main liner shipping companies on the basis of a frame agreement incorporating the feeder vessel operator's standard bill of lading to define its liability to the main line operator. Similarly, alliance/consortia agreements and vessel sharing agreements between large liner operators also define the liability of the performing carrier to the carrier whose boxes it is carrying. Most of the current agreements provide that the subcontractor will be liable to the principal carrier in accordance with the
provisions of the Hague or Hague-Visby Rules. They also generally provide that the principal carrier will handle all claims brought by cargo interests and then pass on the claims to the performing carrier on the terms of the relevant agreement. The same principle applies in most slot agreements.

If the Rotterdam Rules come into effect, there could be at least two consequences. First, because the Rotterdam Rules (with their higher limits etc.) will govern the principal carrier's liability to the claimant, but the old alliance/slot agreement will govern his recovery, there may be a shortfall under the alliance/slot agreement. Second, because cargo interests can arguably make direct claims against the feeder vessel operator or alliance partner (because the subcontractor is a 'maritime performing party'), the subcontractor may demand an indemnity from the principal.

Sub-contracted hauliers

The Rotterdam Rules will rarely apply to hauliers, because they can only be 'maritime performing parties' where they perform their services 'exclusively' within the terminal area. Most hauliers provide services both inside (collection) and outside the terminal (carriage to the consignee). In these circumstances, there could potentially be significant shortfalls between what an ocean carrier has to pay its customer under the Rotterdam Rules and what they can recover from subcontracted hauliers under the haulier's standard terms.

Liner operators therefore need to think about whether they should be demanding Rotterdam limits of liability and imposing time bars from subcontracted hauliers. Alternatively, they will need to recognise that there is a potential shortfall and build this into their freight costs.
General average

Whilst the Rotterdam Rules expressly state that they are not seeking to regulate or change general average (Article 84), in reality they will. General average payments are only due to ship owners from cargo interests when there has been no breach of the contract of carriage.

Currently, under the Hague and Hague-Visby Rules, an error of navigation or management of a ship (Hague/Visby Article IV, Rule 2(a)) will not constitute a breach of contract providing due diligence to make the vessel seaworthy has been exercised. In contrast, because Article 17 of the Rotterdam Rules abolishes the so-called 'nautical defence', if a casualty causing cargo damage arises because of negligence of the master or crew, no general average contributions will be payable.

In these circumstances, it is to be suspected that owners carrying cargo under Rotterdam Rules contracts will be more reluctant to declare general average and demand contributions from their customers. A number of liner operators are already reluctant to do so because of the pressure it can put on customer relations and it is suspected that the Rotterdam Rules may add extra momentum to this trend. It is to be suspected that, if the Rules come into effect, more carriers will be looking to either add a general average absorption clause to their hull policy or to increase the size of the limits on their absorption clause.

Electronic bills of lading

The Rotterdam Rules seek to create the 'legal architecture' for the increased use of electronic documentation in maritime supply chains including electronic transport documents (bills of lading, waybills, etc.). The Rules in themselves will not deliver maritime e-commerce but they should provide a safe legal backdrop between those states who are party to the Rules for the recognition of any IT systems which satisfy the provisions within the Rules. Although
there will be costs adopting any new IT systems and processes, carriers who are first adopters may be able to steal an advantage over their competitors.

Operational issues

The Rules will have a substantial impact on day to day operations. For example, the Rules deal comprehensively with (a) releasing goods at the discharge port and (b) who has the right to give instructions to the carrier during the carriage contract.

Traditionally, release procedures have been dealt with by the law governing the relevant contract of carriage and/or by the small print in the carrier's bill of lading. The Rules seek to impose a uniform regime (Chapter 9). Ship operators operating in Rotterdam states will therefore need to train their staff on how these procedures are supposed to work and, given that there are some problems with the drafting of the Rules, when matters should be escalated to in-house or external legal teams for guidance to avoid extra exposure.

The same also applies regarding who has the right to give instructions to the carrier during the carriage. There are comprehensive provisions in Chapters 10 and 11 of the Rotterdam Rules. Operating procedures will need to be developed in this area and staff will need to be trained accordingly.

2.7 Application of the International Conventions in Nigeria

The carriage of goods by sea in Nigeria is governed by the Carriage of Goods by Sea Act (COGSA) 192669 This Act incorporates as a schedule the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading- that is the Hague rules.

69 Cap 44 Laws of the Federation
Neither the Hague-Visby nor Hamburg rules have statutory force in Nigeria, as they have not been domesticated in a similar manner to the Hague rules.

Under the Nigeria law, the Hague rules are not applicable in all carriage of goods by sea claims. Section 2 of COGSA stipulates the circumstances when the Hague rules are to be applied by Nigerian Courts. It provides;

"subject to the provisions of this Act, the rules shall have effect in relation to and in connection with carriage of goods from any port in Nigeria to any other port whether inside or outside Nigeria."

The Courts are instructed to apply the Hague rules only to outward shipment from Nigeria. Applying the Hague rules in any other circumstances is a contravention of the express provisions of the statute and arguably of no effect.

Incorporating the Rules Contractually

Though the rules may not always apply by force of law in Nigeria, it is possible for them to apply to claims arising under a bill of lading by agreement of the parties. A convention may be incorporated into a bill of lading by means of a paramount clause. Section 4 of COGSA provides, for example, that every bill of lading issued in Nigeria shall contain a clause stating that it shall have effect subject to Hague rules. It is common to find a clause paramount included in most bills of lading.

"The contract evidenced by this bill of lading shall have effect:

a) Where the port of loading, whether local or otherwise as the case may be, is situated in or where the bill of lading is issued in territory where the legislation is giving compulsory effect to the Hague-Visby rules is in force, subject to such legislation;

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70 See allied trading co v. elder dempster shipping lines Volume 1 NSC 277
b) Subject to (a) above where the port of loading whether local or otherwise as the case maybe is situate in territory where legislation giving compulsory effect to the Hague rules is in force subject to such legislation;

c) In any other case, as if the Hague rules applied, the carrier shall be entitled to the benefits of all the privileges, rights and immunities conferred by the said legislation of rules as if the same were herein specifically set out. Nothing herein contained shall be deemed to be a surrender by the carrier of any of its privileges, rights or immunities or an increase of its responsibilities under the said legislation or rules. If and to the extent that any provision had never been inserted herein and that provision shall be void but only to the extent of such repugnancy or inconsistency and no further."

In this instance the Hague-Visby rules are directly incorporated into the bill of lading by clause (a). Where this does not apply then the Hague rules will be applicable by virtue of clause (b) and (c). A Nigerian court, in an inward shipment matter based on such a bill of lading will not be able to apply the local COGSA. The court will be obliged to apply the Hague or Hague-Visby rules as stipulated despite the fact that the Hague-Visby rules are not domesticated in Nigeria. The Hague-Visby rules will be applied as foreign law and proved as such. This reasoning will also cover a bill of lading containing a paramount clause that gives effect to the Hamburg rules.

2.8 Comparative analysis of The Hague, Hague-Visby and Hamburg rules.

In this section of the paper we take a comparative look at the main provisions of the three regimes.

1. What is contract of carriage?
**Hague Rules** - contract covered by a bill of lading or similar document of title (Art 1)

**Hague-Visby Rules** - same as Hague rules

**Hamburg Rules** - any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another. (Art 1)

2. Definition of carriage

**Hague Rules** – period from time when the goods are loaded to the time when they are discharged from the ship i.e. tackle to tackle (Art 1)

**Hague-Visby Rules** - same as Hague Rules

**Hamburg Rules** - period when the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge i.e. port to port (Art 4)

3. Definition of carrier

**Hague Rules** - includes the owner or the charterer who enters into contract of carriage with the shipper (Art 1)

**Hague-Visby** - same as Hague Rules.

**Hamburg Rules** – any person by whom or in whose name a contract of carriage of goods by sea has been concluded with the shipper – includes actual or contractual carrier (Art 1)

4. Definition of goods

**Hague Rules** - goods and merchandise of all kinds except for live animals and deck cargo

**Hague-Visby** – includes live animals and container pallets or similar items of transport. (Art 1)

**Hamburg Rules** - Same as Hague Rules

5. Responsibilities of the Carrier
Hague Rules – to make ship seaworthy; to properly man equip and supply the ship; to make the holds, refrigerating and cool chambers and all other parts of the ship in which the goods are carried fit and safe for their reception, carriage and preservation; to carefully load, handle, stow, carry, keep, care for and discharge the goods carried; to on demand of the shipper, issue a bill of lading showing lead marks, number of packages or the quantity or the weight of the goods carried, the apparent order and condition of the goods. (Art III)

Hague-Visby – same as Hague Rules (Art. III)

Hamburg Rules - carrier must take all measures that can reasonably be required to avoid any loss or damage to the goods or delay in delivery which take place while the goods are in his custody. (Art 5 (1)

6. Evidential value of bill of lading

Hague Rules – prima facie evidence of receipt. (Art III (4)

Hague-Visby Rules – prima facie evidence of receipt but conclusive if bill has been transferred to a third party acting in good faith. (Art III (4)

Hamburg Rules - same as Hague-Visby Rules. Art. 16 (3)

7. Indemnity for inaccuracies in bill of lading

Hague Rules - shipper is deemed to have guaranteed the accuracy of statements furnished by him in bill of lading and shall indemnify the carrier against all loss, damage or expense arising from inaccuracies in such particulars. This right of the carrier to indemnity does not limit his responsibility under the contract of carriage to any person other than the shipper. Art III (5)

Hague-Visby – same as Hague Rules

Hamburg Rules – same as Hague Rules. (Art 17)

8. Notice of loss or damage
**Hague Rules** – notice to be given in writing to the carrier at the port of discharge or at the point where goods are removed from custody of the carrier by the person entitled to such removal. If loss or damage is not apparent within three days of such removal. This notice may be dispensed with if there has been a joint survey at the time of the receipt. Art III (6)

**Hague-Visby Rules** – same as Hague Rules

**Hamburg Rules** – notice to be given in writing by the consignee to the carrier no later than the working day after the day when the goods were handed over to the consignee. If loss or damage is not apparent within 15 consecutive days after delivery. If loss arising from delay in delivery, within 60 consecutive days from delivery. Carrier must give notice to the shipper within 90 days of delivery. Art 19

9. Effect of failure to notify carrier of loss

**Hague Rules** – removal is prima facie evidence of delivery by the carrier of the goods as described in the bill of lading. Art III (6)

**Hague-Visby** – same as Hague Rules

**Hamburg Rules** – failure to give notice is prima facie evidence of delivery of the goods as described in the bill of lading. Art 19

10. Statutory bar of suits against the carrier

**Hague Rules** – carrier discharged from all liability, if suit is not brought within one year of the date of delivery of the goods or the date when they should have been delivered. Art III (6)

**Hague-Visby Rules** - same except that one year time bar may be extended by agreement of the parties and an indemnity action may be brought even after one year, if brought within the time allowed by the law court seized of the case but not less than
three months from the date when the person bringing the indemnity action has settled
the claim or has been served with process in the action against himself. Art III (6) bis
Hamburg Rules - suit against carrier must be brought within two years from delivery
or the date when the goods should have been delivered. An indemnity action may be
brought within the time allowed by the law court seized of the case but not less than
90 days from the date when the person bringing the indemnity action has settled the
claim or has been served with process in the action against himself. Art 20

11. Clauses that conflict with the rules

Hague Rules – null, void and of no effect Art. 8

Hague-Visby – same as Hague Rules

Hamburg Rules – null and void. If a claimant has suffered loss as a result of a
stipulation that conflicts with the rules, the carrier must pay compensation.

12. Rights and Immunities of the carrier

Hague Rules – carrier not liable for loss or damage arising from unseaworthiness or
failure to properly man the ship or to provide a fit ship unless caused by lack of due
diligence on part of the carrier. Defences to carrier’s liability are that the loss or
damage resulted from – act, neglect or default of the master or crew in the navigation
or management of the ship; fire unless caused by the fault or privity of the carrier;
perils, dangers and accidents of the sea; acts of God; act of war; acts of public
enemies; arrest or restraint of princes; rulers or seizures under legal process;
quarantine restrictions; acts or omission of the shipper or owner of the goods; strikes
or lockouts; riots and civil commotion’s; saving or attempting to save life at sea;
wastage in bulk or weight or other loss or damage arising from inherent defect;
quality or vice of the goods; insufficiency of packing; insufficiency or adequacy of
marks; latent defect not discoverable by due diligence; any other cause arising without the actual fault or privity of the carrier. Art IV (1 & 2)

**Hague-Visby** – same as Hague Rules

**Hamburg Rules** – carrier must take all measures that can reasonably be required to avoid any loss or damage to the goods or delay in delivery which take place while the goods are in his custody. Art 5(1)

13. Deviation

**Hague Rules** – any deviation to save life at sea or any reasonable deviation shall not constitute a breach of the rules or the contract of carriage and the carrier shall not be liable for any loss or damage resulting there from. Art IV (4)

**Hague-Visby** – same as Hague Rules

**Hamburg Rules** – no specific provisions, but the carrier is not liable where the loss or damage arises from measures to save life or property at sea. Art IV (5)

14. Limitation of Liability

**Hague Rules** - £100 per package or its equivalent sum in other currency unless the nature and value of goods have been inserted in the bill of lading. Art IV (5)

**Hague-Visby** – 666.67 SDR’S per package or unit or 2 SDR’S per kilogram of gross weight of the goods lost or damaged, whichever is higher. Art IV (5)(a)

**Hamburg Rules** – 835 SDR’s per package or shipping unit or 2.5 SDR’s per kilogram of the gross weight of the goods lost or damaged, whichever is higher.

Where loss arises from delay, two and the half times the freight is payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage. Art. 6

15. Increased Responsibility

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Hague Rules – the carrier may increase any of his responsibilities and surrender any of his immunities provided that such increase is recorded in the bill of lading. Art V

Hague – Visby – same as Hague Rules

Hamburg Rules – same as Hague Rules

16. Loss of right to limit liability

Hague Rules – no special provisions

Hague-Visby Rules – the carrier is not entitled to limitation of liability 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. Art IV (5)(e)

Hamburg Rules – same as Hague-Visby. Carriage of cargo on deck contrary to express agreement for carriage under deck will result into loss to limit liability. Art. (8& 9)

17. Claims in Tort

Hague Rules – Rules are silent. Rules will seem to apply only to contract claims.

Hague-Visby - apply to both contract and tort claims. Art IV bis

Hamburg Rules – applies to both contract and tort claims. Art 7

18. Application of the Rules

Hague Rules – Rules silent

Hague-Visby – Rules to apply to every bill of lading relating to carriage of goods between ports of two States if: (a) the bill is issued in a port in a contracting State (b) the carriage is from a Port in a contracting State; or (c) the contract contained in the bill of lading provides that the rules or legislation of any state giving effect to them are to govern the contract. Art X
Hamburg Rules – Rules to apply to every bill of lading relating to carriage of goods between ports of two States if: (a) the port of loading is in a contracting State, or (b) port of discharge is in a contracting State, or (c) optional ports of discharge provided in the contract of carriage in a contracting State, or (d) the bill of lading provides that the Rules are to apply.

19. Judicial proceedings

Hague Rules – silent as to locality where cargo owner may commence proceedings

Hague-Visby – same as Hague Rules

Hamburg Rules – A competent court situated in the locality of (a) the principal place of business of the defendants, or (b) the place where 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. Art 21

20. Arbitration

Hague Rules – Rules silent

Hague-Visby – Rules silent

Hamburg Rules – Arbitration proceedings may be commenced in (a) a place in a State within whose territory is situated: (i) the principal place of business of the defendant or the habitual place of residence of the defendant, or (ii) the place where the contract was made, or (iii) the port of loading or the port of discharge, or (iv) any place designated for the purpose in the arbitration agreement. Art. 22

In conclusion the three Rules still do not satisfy the needs of the shipper but the Hague-Visby and Hamburg Rules are fair improvements on the Hague Rules. It only offers limited compensation to the shipper in terms of cargo loss or damage. It is best to say half bread is better than none.
CHAPTER THREE

BILLS OF LADING

3.0 Introduction

This chapter tends to define what a bill of lading is, its functions and relevance in the contract of carriage. The legal implication it has when loss or damage has occurred. The bill of lading is very essential in any contract of carriage between the shipper and the carrier. It sets out the applicable laws, terms and conditions to govern the contract of carriage and the bill of lading will be resorted to in case of loss or damage to cargo.

When a ship owner or another authorized person, for example an agent, agrees to carry goods by sea, or agrees to furnish a ship for the purpose of carrying goods in return for a sum of money to be paid to him, such a contract is a contract of affreightment and the sum to be paid is called freight. Shipment of the goods is usually evidenced in a document called a bill of lading.

The bill of lading has been defined as a receipt for goods shipped on board a ship, signed by the person (or his agent) who contracts to carry them, and stating the terms on which the goods were delivered to and received by the ship. It is not the actual contract, which is inferred from the action of the shipper or ship owner in delivery or receiving the cargo, but forms excellent evidence of the terms of contract.

The bill of lading starts its life as (in almost all cases) containing or evidencing the contract of carriage between the carrier and the shipper, under which the carrier and the shipper promise that the goods will be carried from the port of loading and safely delivered at the port of discharge.
During the voyage the ownership of the goods will be normally transferred from the original seller to the ultimate receiver who will take delivery of the goods from the ship. There may in exceptional cases be 100 (one hundred) or more buyers who (or whose banks) will pay for the goods and then receive payment from the next buyer in the chain. During this process the goods are not in the possession of any of the parties. They are, or should be safely on board the ship, steadily crossing the ocean. Neither the buyer of an unascertained portion of a bulk cargo nor an endorsee after discharge had rights against the carrier.

The defect at the heart of the Bills of Lading Act 1855 was considered to be the linkage between property in the goods and the right to sue on the bill of lading contract. Under the Bill of lading Act 1992 (U.K) this was removed.

The 1992 Act provides that any lawful holder of a bill of lading has the right of suit but that only he/she has the right (thus preventing more than one claimant for the same breach of contract). If, the actual loss has been sustained by someone other than the holder of a bill of lading, the holder must account for the damages to the person who has suffered the actual loss.

The act also recognises the right of suit of someone who became holder of the bill of lading after discharge of the cargo, provided that he did so under arrangement made before that date (thereby preventing trading in bills relating to goods known to be damaged – in effect, trading in causes of action).

3.1 Salient points of a bill of lading

The salient points incorporated in a bill of lading are listed as follows:

1. The name of the shipper (usually the exporter).

2. The name of the carrying vessel.
3. Full description of the cargo (provided it is not bulk cargo) including any shipping marks, individual package numbers in the consignments, contents, cubic measurement, gross weight, etc.

4. The marks and numbers identifying the goods.

5. Port of shipment.

6. Port of discharge.

7. Full details of freight, including when and where it is to be paid – whether freight paid or payable at destination.

8. Name of consignee or, if the shipper is anxious to withhold the consignee’s name, shipper’s order.

9. The terms of the contract of carriage.

10. The date the goods were received for shipment and/or loaded on the vessel.

11. The name and address of the notify party (the person to be notified on arrival of the shipment, usually the buyer).

12. Number of bills of lading signed on behalf of the Master or his agent, acknowledging receipt of goods.

13. The signature of the ship’s Master or his agent and the date.

3.2 Types of bill of lading

There are several types and forms of bill of lading and these include the following:

a) Shipped bill of lading

Under the Carriage of Goods by Sea Act 1971 (Hague-Visby Rules), the shipper can demand that the ship owner supplies bills of lading proving that the goods have been actually shipped. For this reason, most bill of lading forms are already printed as
shipped bills and commenced with the wordings: 'Shipped in apparent good order and condition.' It confirms the goods are actually on board the vessel.

This is the most satisfactory type of receipt and the shipper prefers such a bill as there is no doubt about the goods being on board and, in consequence, dispute on this point will not arise with the bankers or consignee, thereby facilitating earliest financial settlement of the export sale.

b) Received bill of lading

This arises when the word 'shipped' does not appear on the bill of lading. It merely confirms that the goods have been handed over to the ship owner and are in his custody. The cargo may be in his dock, warehouse/transit shed or even inland. The bill has, therefore, not the same meaning as a 'shipped' bill and the buyer under a CIF contract need not accept such bill for ultimate financial settlement through the bank unless provision has been made in the contract.

c) Direct and Through bills of lading

In many cases it is necessary to employ two or more carriers to get the goods to their final destination. The on-carriage may be either by a second vessel or by a different form of transport (for example to the destinations in the interior of Nigeria). In such cases it would be very complicated and more expensive if the shipper had to arrange on-carriage himself by employing an agent at the point of transhipment. Shipping companies, therefore, issue bills of lading, which cover the whole transit and the shipper deals only with the first carrier. This type of bill enables a through rate to be quoted and is growing in popularity with the development of containerization. Special bills of lading have to be prepared for such through-consigned cargo.
A through bill of lading may be of two kinds, one being where the bill of lading constitutes a contract for the carriage of goods from A to B only or from B to C only, but with an obligation on the carrier as agent for the cargo owner to arrange for the forwarding of the goods from B to C (where the contract is for carriage from A to B only) or bringing the goods forward from A to B (where the contract is for carriage from B to C only). In this type of case the contract of carriage will usually provide that the carrier's liability is restricted in the first case to the carriage from A to B and in the other case from B to C.

In the other type of through bill of lading, the bill of lading constitutes a contract of carriage from A to C but expressly provides for transhipment at B. In this type of case the carrier will generally remain responsible for the entire carriage.

Transhipment may also take place under a direct bill of lading in pursuance of an express or implied liberty to do so, contained in a bill of lading, but where it is known before shipment that the goods will be transhipped at a particular port or place, a through bill of lading should be issued.

In the case of a direct shipped bill of lading and in the case of the second type of through bill of lading which has being referred to, there is a single contract of carriage and the carrier will remain liable, apart from any express provision which is not rendered invalid by law, (e.g. by the application of the carriage of goods by sea act, for any loss, or damage the goods may suffer during the entire journey). In *Crawford & Law v. Allan line* – where a parcel of 41,000 bags of flour was despatched under a through bill of lading from Minneapolis to Glasgow via New York and was signed for 'in apparent good order and condition'. The several carriers were only liable for loss or damage occurring.

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72 (1912) A.C 120
on their own portions of the route. The receipts signed by the ship owner’s agent at New York and given to inland carriers stated that only 110 bags of flour were damaged by caking. On arrival at Glasgow 4,132 bags were found to be damaged by caking. The House of Lord held that the ship owners were bound by the statement contained in the bill of lading that the goods were received by them in ‘in apparent good order and condition’ and so the ship owners were found liable.

In *Greeves v. West India Co.*\(^7^3\) it was held that if under such a bill of lading freight in respect of the whole journey is to be paid in advance, and loss occurs at one stage of the journey, no pro rata freight is recoverable by the shipper in respect of the unperformed stages.

d) Stale bill of lading

It is important that the bill of lading is available at the port of destination before the goods arrive or, failing this, at the same time. Bills presented to the consignee or his bank after his goods are due at the port are said to be stale. A cargo cannot normally be delivered by the ship owner without the bill of lading and the late arrival of this all important document may have undesirable consequences, such as warehouse rent.

e) Groupage and house bills of lading

A growth sector of the containerized market is the movement of compatible consignments from individual consignors to various consignees usually situated in the same destination (country/area) and forwarded as one overall consignment. The goods are consolidated into a full container load and the shipping lines issue a groupage bill of lading to the forwarder.

\(^7^3\) (1870) 22 L.T. 615
This is the ocean bill of lading and shows a number of consignments of groupage of a certain weight and cubic measurement in a cargo manifest form. The forwarder issues a house bill of lading cross referring to the ocean bill of lading. It is merely a receipt for the cargo and does not have the same status as the bill of lading issued by the ship owner. A shipper choosing to use a house bill of lading should clarify with the bank whether it is acceptable for letter of credit purposes, and ideally ensure it is stipulated as acceptable before the credit is opened. Advantages of groupage include: less packing; lower insurance premium; usually quicker transits; less risk of damage and pilferage; and lower rates when compared with such cargo being dispatched as an individual parcel/consignment.

f) Transhipment bill of lading

This type is issued usually by shipping companies when there is no direct service between the two ports, but when the ship owner is prepared to transship the cargo at an immediate port at his expense.

g) Clean bills of lading

Each bill of lading states ‘in apparent good order and condition’ which of course refers to the cargo. If this statement is not modified by the ship owner, the bill of lading is regarded as clean or unclaused. By issuing a clean bills of lading, the ship owner admits his full liability for the cargo described in the bill under the law and his contract. This type is much favoured by banks for financial settlement purposes.

h) Claused bill of lading

If the ship owner does not agree with any of the statements made in the bill of lading he will add a clause to this effect, thereby causing the bill of lading to be termed as ‘unclean’, ‘foul’ or ‘Claused’. There are many recurring types of such clauses including: inadequate
packaging; unprotected machinery; second-hand cases; wet or stained cartons; damaged crates; cartons missing, etc. The clause ‘shipped on deck at owner’s risk’ may thus be considered to be Claused under this heading. This type of bill of lading is usually unacceptable to a bank.

i) Negotiable bill of lading

If the words “or his or their assigns” are contained in the bill of lading, it is negotiable. They are, however, variations in this terminology, for example the word ‘bearer’ may be inserted, or another party stated in the preamble to the phrase. Bills of lading may be negotiable by endorsement or transfer.

j) Non-negotiable bills of lading

When the words “or his or their assigns” are deleted from the bills of lading, the ill is regarded as non-negotiable. The effect of this deletion is that the consignee (or other named party) cannot transfer the property or goods by transfer of the bills. This particular type is seldom found and will normally apply when goods are shipped on a non-commercial basis, such as household effects.

k) Container bills of lading

Containers are now playing a major role in international shipping and the container bills of lading are becoming more common in use. They cover the goods from port to port or from inland point of departure to inland point of destination. It may be an inland clearance depot, dry port or container base. Undoubtedly, to the shipper, the most useful type of bill of lading is the clean, negotiable ‘through bill, as it enable the goods to be forwarded to the point of destination under one document, although much international trade is based on free carrier (named place).
I) Bill of lading in association with a charter party

With the development of a combined transport operations, an increasing volume of both liner cargo trade and bulk cargo shipments will be carried involving the bill of lading being issued in association with a selected chartered party.

Where a bill of lading is issued by a ship trading under charter, it is very common for the terms of the bill of lading to differ from those of the charter party. It may therefore be necessary to determine whether the relevant contract of carriage is contained in the bill of lading or in the charter party. It was held in Rodoconachi v Milburn that where a bill of lading is issued to the charterer the position is that the bill of lading is in law a mere receipt and not a contractual document. Accordingly, so long as the bill of lading remains in the hands of the charterer, the goods are carried on the terms of the charter party.

But as soon as the charterer transfers the bill of lading to a third party who is a stranger to the charter party, a new contract springs into existence between the ship owner and the third party on the terms of the bill of lading. There are then two contracts of carriage, one with the charterer as set out in the charter party, the other with the holder of the bill of lading in the terms contained in that document. In such cases the bill of lading will be binding on a ship owner, even if the charter party contains a provision that the Master has no authority to sign the bills of lading in different terms from the charter party. Moreover the charterer may sue the ship owner under the charter party for loss or damage to cargo, although the property in the goods has passed to the bill of lading holder on the transfer of the bill lading. See Gardano & Giampieri v Greek Petroleum where the shipment was made under a C&F sale contract, a straight bill of lading, pursuant to a charter party between the defendant and the claimant ship owner, Gardano. The bill named the Greek Ministry as consignee. The ship

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74 (1886) 18 Q.D.B. 67
75 (1962) 1 W.L.R. 40

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owner argued, relying on the 1855 Act, that the shipper had lost its title to sue by the transfer of the bill of lading to the consignee. Held: That argument failed. The section did not operate where property had passed under the express terms of the sale contract not on or by reason of the consignment but ex the loading installation. In an ordinary contract of sale in the traditional C.I.F or C & F. form, the seller discharges his obligations as regards delivery by tendering a bill of lading covering the goods. The contract is one which, though not a sale, is a sale of goods performed by delivery of documents, and the property passes when the documents are taken up.

The position is more doubtful, however, where bills of lading are originally issued to a shipper, who is not the charterer or his agent and this shipper subsequently endorses them to the charterer. In such cases it is clear that the charter party is not superseded by the issue of bills of lading and it appears to be a question of fact whether the shipment is made under the charter party or under the bill of lading. In *Calcutta S.S. Co. v. Weir*\(^7\) - where the title to a parcel of goods passes to the charterer on the endorsement of the bill of lading, the position appears to be that the goods are carried on the terms of the bill of lading and the charterer is not entitled to invoke the terms of the charter party in an action against the ship owner for loss of or damage to the parcel. But in the case of a single bill of lading covering a full and complete cargo, which is similarly indorsed, the position is most uncertain. It is submitted that if the charterer acquired his title to goods under and on the terms of the bill of lading, the bill of lading and not the charter party is the governing document. As a general rule the title to goods passes with the bill of lading unless the charterer bought the goods on free on board terms (FOB).

m) Negotiable FIATA combined transport bill

\(^7\) *(1910) 1 K.B 759*
This document is becoming increasingly used in the trade and it is a FIATA bill of lading (FBL), employed as a combined transport document with negotiable status. It has been developed by the International Federation of Forwarding Agents Association and acceptable under the ICC Rules on the uniform customs and Documentary Credits.

FIATA states that a forwarder issuing a FIATA bill of lading must comply with the following:

a) The goods are in apparent good order and condition.

b) The forwarder has received the consignment and has sole right of the disposal.

c) The details set out on the face of the FIATA bill of lading correspond with the instruction the forwarder has received.

d) The insurance arrangements have been clarified – the FIATA bill of lading contains a specific delete option box which must be completed.

e) The FIATA bill of lading clearly indicates whether one or more originals have been issued.

3.3 Functions of a bill of lading

There are four functions of a bill of lading. Broadly it is a receipt for the goods shipped, a transferrable document of title to the goods thereby enabling the holder to demand the cargo, evidence of the terms of contract of affreightment but not the actual contract, and a quasi-negotiable instrument.

Once the shipper or his agent becomes aware of the sailing schedules of a particular trade, he communicates with the ship owner with a view to booking cargo space on the vessel or container. Bills of lading are made out in sets, and the number varies according to trade,
generally it is three or four- one of which will probably be forwarded immediately and another by a later mail in case the first is lost or delayed.

In the event of the bill of lading being lost or delayed in transit, the shipping company will allow delivery of goods to the person claiming to be consignee, if he gives a letter of indemnity countersigned by a bank, and relieves the shipping company of any liability should any person eventually come along with the actual bill of lading.

The following items are common discrepancies found in bills of lading when being processed and should be avoided:

a) Documents not presented in full set when required.

b) Alteration not authenticated by an official of the shipping company.

c) The document is not endorsed ‘on board’ when so required.

d) The ‘on board’ endorsement is not signed or initialled by the carrier or agent and likewise not dated.

e) Shipment made from a port or to destination contrary to that stipulated.

f) The bill of lading details merchandise other than that prescribed.

g) The bill of lading is made out ‘to order’ when the letter of credit stipulates ‘direct to consignee’ or vice versa.

h) The document is dated later than the latest shipping date specified in the credit.

3.4 Bills of lading terms do not avail a third party

The general rule is that only a party to a contract may find a right of action upon it terms. But until recently there was some doubt whether someone who was not a party to the contract, but whom one of the contracting parties had delegated performance of some of his
contractual obligations, could, if sued in tort, claim the same protection in the exceptions clause in the contract afforded his principal. It is now however, well established that in general no agents of the ship owner, such as the stevedores or the master, may claim the protection of the bill of lading, unless they are themselves parties to it. In *Midland Silicones v. Scruttons Ltd* 77 - a drum of chemical was carried from the United States to London under a bill of lading, which incorporated the U.S. Carriage of Goods by Sea Act. After discharge at London the drum was negligently damaged by stevedores employed by the ship owner. If the consignees had sued the ship owners, they would have recovered no more than $500, the general limit under the U.S. statute. They, therefore, sued the stevedores for the tort of negligence. The stevedores, however, contended that they were entitled to rely on the provision of the U.S. statute, which was incorporated in the contract made between their principal and the consignees. It was held by the House of Lords that the stevedores were strangers to the contract made between the ship owners and the owners of the goods and that they were not entitled to rely on its terms. Accordingly, the consignees recovered damages in full from the stevedores.

3.5 Implied Contracts

An exception to this general rule occurs when bills of lading are issued by the charterers of a vessel. In such a case it appears that, although the ship owners are not parties to the bill of lading contracts, nevertheless a contract is to be implied between the ship owners and the owners of the cargo that the ship owners are entitled to rely on any exceptions contained in the bill of lading. See *Elder Dempster v. Patterson Zochonis* 78 where the question was asked whether, as a defence to a shipper's action in tort for negligently stowing cargo, ship owners could rely on an exclusion clause in the bills of lading, despite the fact that the contract of

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77 (1961) 1 Q.B. 106. see also Adler v. Dickson (1955) 1 Q.B 158
carriage was between the shipper and the charterer. Held: They could do so. The House accepted the principle of vicarious immunity, under which a servant or agent performing a contract is entitled to any immunity from liability, which his employer or principal would have had. Although the ship owners may not have been privy to the contract of carriage (between shipper and charterer) they took possession of the goods on behalf of, and as agents for, the charterers and so could claim the same protection as their principals. Similarly where goods are shipped by a shipper who is the seller under an FOB contract and bills of lading are issued to the buyer, a contract is to be implied between the shipper and the ship owner that in the case of loss or damage to the goods in the course of shipment, the ship owner shall have the protection of the exceptions contained in the bill of lading. See *Pyrene v. Scindia Navigation Co. Ltd*\(^9\) where the cargo (a fire tender) was dropped and damaged by the negligence of the ship owner during loading. At this stage, before the goods had passed the ship's rail, they were still (or so it was supposed) the property of the seller. The seller sued the carrier, for the full value of the damage (£966), in the tort of negligence. The issue was whether the ship owner could claim the benefit of an exemption clause written into the contract of carriage by virtue of the Hague Rules, the effect of which was to limit his liability to £200. It was essentially a question of privity of contract, in effect whether the seller was party to the contract of carriage. The seller claimed that he was not, and that therefore he was not bound by the exemption clause.

It was held that from inception the contract of carriage is governed by the terms which the parties know or expect the bill of lading to contain, even though in the event circumstances prevent the issuing of a bill of lading and so, the ship owner can limit his liability.

\(^9\) (1954) 2 Q.B. 402
In conclusion, bills of lading play an important role in international trade. Depending upon the rules, which are followed, there are different implications for different parties, which are involved. Without the bill of lading there is no evidence of the contract of carriage and the carrier can escape liability.
CHAPTER FOUR

CARGO CLAIMS AND PROBLEMS OF PRIVITY OF CONTRACT

4.0 Introduction

What is meant by the doctrine of privity of contract? What problems does it present in the handling and settlement of cargo claims? What is cargo claim? What has been the approach of our Courts to the operation of the doctrine in the shipping context? How should the various parties involved in the shipping transaction protect their respective interests? These are the questions which I hope will be resolved by the conclusion of this research.

For those who have no legal background, it is necessary to emphasize the privity of doctrine which has been variously described as a “fundamental assumption” or “determining factor” in contract law. The principle is straightforward enough: a person who is not a party to a contract cannot sue or be sued upon its terms.

But shipping is a business which by its nature lends itself to the use of agents and subcontractors. Also, certain carriage documents\(^8\) are usually delivered to a third party other than the original shipper. Evidently, in some cases, hardship or inconvenience will result from the rigid application of the privity doctrine. Thus, various devices, some under the authority of statute, others through judicial intervention, have evolved to minimise the problems presented by this theory of contract.

4.1 Meaning of Cargo Claim

The term “cargo claim” is not defined in any shipping related legislation. Even if its usage is seemingly so commonplace as to deny it the status of a term of art with a technical meaning,

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\(^8\) Example bills of lading. The bill of lading is a negotiable document the delivery of which transfers constructive possession of the goods being carried. The holder is entitled to claim the goods at the port of discharge upon the presentation of the bill.
it is necessary because of the constraints of time and space to define its parameters for the purpose of this research.

First, in view of the preface “cargo claim” it should not be regarded as equivalent to ‘maritime claim’ which term is defined in the Admiralty Jurisdiction Act (AJA) S. 2(1) for with wide-ranging subject embracing, inter-alia, claims in respect of proprietary interests in a ship; contingent liabilities and other ancillary claims arising from the operation of ships, e.g. pilotage, salvage, towage and collision claims; seamen’s wages; ship repair and construction claims; claims for supplies of materials and services; master/agent’s disbursements; and port dues. The term maritime claim clearly has a much wider ambit.

Secondly, although “cargo claim” in a wide sense may encompass claims for premium or indemnity upon a marine insurance policy, the various devices which will be covered in this research do not have any bearing on the contract of marine insurance. Accordingly, it suffices to confine the term “cargo claim” to carriage related claims such as the following:

a. Loss or damage to goods carried by a ship; the Admiralty Jurisdiction Act has introduced subjects of admiralty jurisdiction, which were not available under the previous law, that is Administration of Justice Act (AJA) 1956 (UK). Nevertheless, the case law under AJA is still relevant in respect of those subjects which have been retained by the Admiralty and Jurisdiction Act. In Aluminium Manufacturing Co. Limited v. Nigerian Ports Authority in which the Supreme Court held that the term “loss or damage to goods carried by a ship” refers to loss or damage in the carrying ship before discharge. Also in Unipetrol Nigeria Limited v. Prima Tankers Limited.

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81 No. 59 of 1991
82 Marine Insurance Act (1990) Cap. 216, s.17(1)
83 (1987) 1. S.C. 198
84 2 N.S.C. 647 (C.A. 1986)
it was held that such loss or damage is not confined to physical destruction of the goods or claims arising out of an agreement.

b. Delay in their delivery
c. Freight, charter hire, demurrage, damages for detention; or
d. Any other claim out of an agreement relating to the carriage of goods by sea.

4.2 Bypassing the Privity Doctrine (Enforcing the Cargo Claim)

In this scenario, goods would have been shipped under a bill of lading and it is the transfer of the bill of lading to a third party, such as a consignee or endorse or other holder\textsuperscript{85} which present difficulties. The contract of carriage concluded by the original shipper would have in the normal course preceded the issue of the bill of lading. Consequently, in \textit{Anglo-French Steel Corp v. Panfixing shipping Co. Ltd}\textsuperscript{86} it was held that the bill in the hands of the third party, without more, merely provides prima facie evidence of the terms of the contract between the carrier and the shipper. In order to bypass the privity doctrine and to enable the third party to sue the carrier upon the terms represented in the bill of lading, the following devices may be relied upon:

1. Statutory Assignment of Contract of Carriage under Merchant Shipping Act (MSA) s. 375(1) provides:

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"Every consignee of goods named in a bill of lading, and every endorsee of a bill to whom property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and be
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\textsuperscript{85} The holder may have bought the goods in question, perhaps after discharge, and in consequence acquired the bill without being represented on its face as the consignee or indorsee.

\textsuperscript{86} (1978)N.C.L.R. 149
subject to same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself”.

The section has as its antecedents in the Bill of Lading Acts (BLA) 1855, a United Kingdom enactment which had until 1988 applied in Nigeria as a pre-1900 statute of general application. Its intent is to statutorily assign all rights of suit in respect of the goods to the consignee or endorsee as if he had been an original contracting party.

What requires emphasis is that the contract assigned under s. 375(1) is in the terms set out in the bill of lading. This means that the shipper can adduce evidence that the terms of the contract of carriage are not exclusively represented by the bill of lading. But by express language of statutory assignment, such extraneous terms will not affect or bind the consignee or endorsee.

This contractual nexus with the carrier afforded by s. 375(1) is vital where insurance policies have not been taken out at all or where having been affected, they cannot compensate for the loss or damage suffered. However, it is now perceived that the statutory assignment device has failed to keep abreast of modern trends in shipping. The fundamental shortcoming is that the transfer of rights of suit is predicated on the transfer of the property that is (ownership/title) in the goods upon or by reason of the consignment or indorsement. The difficulties in the terminology of s. 375(1) which hamper its efficacy are now briefly summarised.

a. The fact that s.375(1) pertains to bill of lading only

This means that sea waybills, ship’s delivery orders that is a document issued by or directed to the ship owner by whom the ship owner undertakes to deliver smaller quantities out of an undivided bulk cargo to the holder or to the order of a named person. Unlike a bill of lading,
it is not issued upon shipment and combined/through bills of lading are employed to effect delivery, third party holders of such documents are precluded from relying on s.375(1).

b. The linkage of third party rights of suit with the transfer of property in the goods upon or by reason of the consignment or endorsement

In order to rely on S.375 (1) it will not suffice to be a mere holder of the bill of lading or a notify party. The provision, by its express language, protects consignees or indorsee who establish the necessary linkage in respect of the transfer of property, consignment or indorsement. Importantly, decisions of the Court of Appeal have emphasised this linkage, in contrast to the preponderant approach in earlier authorities which have conferred rights of suit on consignees or indorsee simpliciter.

In essence the Onwadike and Nigerbrass cases exemplify the correct approach in accordance with the express terms of s. 375 (1). It involves an inquiry into the factual circumstances surrounding the transfer of the bill in order to determine the real intention of the parties as to the passing of the property in the goods. That it will no longer be enough to confine the inquiry to the description of, or reference to the third party in the bill of lading is illustrated by this extract from the Niger brass case:

"... A court of law cannot simply rely on an endorsement on a bill of lading without more in coming to a decision as to who may sue on it. The court has the duty to go beyond the mere formal endorsement to determine the legal and factual aspect as to whether the property mentioned in the bill of lading really passed upon or by reason of such consignment or endorsement"

Supra fn 84

Niki- Tobi, J.C.A at p. 744.
By rendering such an inquiry unnecessary, the position adopted in the earlier authorities was more beneficial to consignees and indorsee, although it did not address the hardship which may ensue from the application of the privity of contract. The upshot is that where property in the goods passes independently of consignment or indorsement, contractual privity under s. 375 (1) is excluded. This may happen in a number of ways:

4.3 Undivided bulk cargoes

Where the shipper’s intention is to sell off smaller quantities, property in the individual parcel do not pass until they are separated from the bulk at the discharge port. In such a case, the passing of property in the goods is entirely unconnected with consignment or indorsement. In the *ARAMIS*, as a result of the over-discharge of parcels from the undivided bulk cargo at intermediate ports, the ship owner made a short delivery to one of the third party buyers at the final discharge port. In the buyer’s action, it was argued that despite the fact that property in the goods did not pass until after ascertainment at the final discharge port, the buyer was entitled to sue. The argument was rejected.

4.4 Short sea voyages or long chains of sales

Where the ship arrives in advance of the shipping documents, delivery may be made against letters of indemnity. Subsequently, the bill of lading may be indorsed to the third party. The problem relates to this indorsement after delivery because by mercantile custom, the bill of lading only operates as a document of title, capable of transferring property in the goods, if delivery has not been completed. Once delivery has been effected, it ceases to be a document of title. This was the decision in *The Delfini* where those holders whose bill of lading had been indorsed a considerable period after delivery were precluded from bringing an action.

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93 See, Sale of Goods Act 1893, s.16.
95 [1990] 1 Lloyd’s Rep. 252, 261 & 274
against the carrier. The Court held that the indorsement could not be regarded as a causal element in the passing of property, which in fact had occurred at an earlier date.

4.5 The bill of lading is made out to the order of the seller or his agent

This amount to a reservation of the right of disposal⁹⁶ and property will usually pass upon payment or by some act required by the seller. In the ALIAKMON⁹⁷ it was held that the plaintiff-buyer did not have property in the goods upon or by reason of the consignment because the seller (after re-negotiations) had reserved a right of disposal by having the bill of lading drawn up to his order. This meant that property could not pass to the plaintiff until payment. It was further held that the fact that the plaintiff was able to take delivery was not material since this was done as agents for the seller. In this case, the bill had not been indorsed so it could not be argued that property passed upon or by reason of indorsement.

4.6 Property under s. 375 (1) means absolute ownership

Thus where limited ownership passes, for example, where the bill of lading has been delivered to a bank or other financial institution as security in the course of obtaining a documentary credit, the application of s. 375 (1) is excluded until the bank or financial institution attempts to realize the security in the event of a default, absolute ownership does not pass and even then, it passes by the underlying documentary credit agreement and not with connection with consignment or indorsement. Therefore, the bank or financial institution qua holder cannot sue or be sued upon the bill of lading under s. 375(1) unless contractual privity can be established by other means, that is by means of implied contract device.

c. The way forward

⁹⁶ Sales of goods Act 1893, s.19(2)
⁹⁷ [1989] 2 W.L.R. 902 (H.L)
The statutory foundation for third party rights of suits merits immediate reform by way of an outright repeal of s. 375(1). It is ironic that although the Bill of Lading Act from which s.375 (1) is derived has been repealed in its country of enactment\(^8\) it has continued to be applied in Nigeria despite the fact that its well-known shortcomings adversely affect Nigerian shipping interests. Its inadequacies are such that no amount of judicial engineering will meet the widely accepted need to provide relief to third parties in shipping transactions.

The reasonable commercial expectation of the Nigerian importer is that having settled the foreign exchange obligation for the price and being the holder of the bill of lading or some other carriage document, he or (his insurer) should be able to exercise right of suit against the carrier in respect of a cargo claim. Similarly for the banker or financier who is in possession of the carriage document when there is a default. To be informed by legal advisers that no right of suit exists because the carriage document in question is not a bill of lading or if it is a bill of lading no right of suit exist on the ground that property in the goods passed independently of consignment or indorsement seems unnecessary and unfair legal nicety. One may question why right of suit upon a bill of lading should depend on the holder establishing that he has acquired proprietary rights in line with the requirement of s. 375 (1). But to collect the goods in the first place, he would have only needed to present the bill and certainly would not need to prove ownership.

The way forward must surely be to discard any linkage between the rights of suit and the passing of property in goods. This will bring our law in line with the provisions in other commercially significant jurisdictions.\(^9\) What should happen is that rights of suit against the carrier are conferred on any person who is in lawful possession of a bill of lading. In the same way, third parties taking delivery of goods under other documents such as letter of

\(^8\) See Carriage of goods by sea Act 1992 (U.K.) which repealed the bill of lading act
\(^9\) See, carriage of goods by sea act 1992 (UK) which repealed the BLA and which took effect on September 16, 1992. Also, Federal Bills of Lading Act 1916 (U.S.A)
indemnity, ship's delivery orders and other documents commonly employed in the carriage of goods by sea should benefit from direct rights of suit upon the terms represented in their respective carriage documents. Conversely, liabilities should attach to third parties who assert rights or who claim against the carrier.

4.7 Implying a contract (de novo) at the discharge port

An alternative device by which contractual privity may be established between the carrier and the third party holder of a bill of lading or other carriage document is the implication of a contract de novo at the discharge port. Applying traditional contractual principles of consensus ad idem and consideration, the tender of a bill of lading or (other carriage documents) in exchange for some or all of the goods, in circumstances where freight or other charge such as demurrage/damages for detention is outstanding appears to be prerequisite for the implication of such a contract.

Awolaja & Ors v. Seatrade Groningen B.V100 involved two vessels with consignments of frozen fish which had arrived at Apapa port in December 1987 and January 1988 respectively. The plaintiff-shipowner alleged that both vessels had been delayed because the first defendant (who had handled the underlying sales transactions for the other defendants) had not timeously taken delivery of the consignments. A claim was brought for demurrage/damages for detention. The vessels were chartered. Thus, the defendants were not the charterer that is the original contracting parties. The gravamen of the plaintiff's case was that the provisions of the charter party had been incorporated in the bills of lading held by the defendants.

100 [1993] N.W.L.R. PT 280 126
It is also instructive that the plaintiff’s claim was founded in contract. Perhaps mindful of the difficulties with statutory assignment, the plaintiff elected to find contractual privity on the implication of a contract at the discharge port.

Sowemimo J., at first instance, approved the implication of the contract at the discharge port and allowed the claim. An appeal subsequently ensued and the Court of Appeal affirmed the decision of the lower court. The appellate court did not directly address the issue of the basis of contractual privity between the parties. But its decision is clearly consonant with the implication of a contract at the discharge port.

The Awolaja case was concerned with the converse situation that is suit by the carrier to recover from a third party outstanding liability under the contract of carriage. Nevertheless, the device employed is undoubtedly available to a third party where all the prerequisites for implied contract are satisfied.

What then are the limitations of this device? It has been said that implied contract has been pleaded more than it is established by judicial decisions. Essentially, there must be clear proof of the consensual intention of the parties and consideration. It is not sufficient to merely establish presentation and acceptance of the bill of lading or (other carriage document). The contract of carriage will not be implied if goods are not delivered at all or if the bill of lading is presented by the third party in the capacity of the shipper’s agent. In the Aliakmon an alternative ground for the third party buyer’s claim was based on the implication of a contract at the discharge port. This claim was rejected on the ground that the buyer had collected as the agent of the shipper. Evidently, resort to the implied contract may

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101 It would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied upon is no more consistent with an intention to contract than with an intention to contract... put another way, I think it must be fatal to the implication of contract if the parties would or might have acted exactly as they did in the absence of a contract.” Per Bingham, L.J. in the Aramis, supra footnote 23 at p. 224.
102 The Aramis, op cit, p. 230.
103 Supra fn 72.
not be a panacea for the restrictions imposed by the privity doctrine and bearing in mind the Awolaja's case, the true scope of the implied contract still remains to be authoritatively determined by our appellate courts.

4.8 Action in tort for Negligence

To the third party suing the carrier in tort for negligence may appear to be a viable option in the enforcement of the cargo claim. The contention is that the carrier is bound to deliver the goods in the state and condition that they were received, and if he fails in this respect, he is liable under the duty of care principle established in cases such as *Donoghue v. Stevenson* \(^{104}\) the onus is on the plaintiff to prove the negligence by evidence which shows that he is owed a duty of care by the carrier and he has suffered loss from a breach of that duty.

In *Sea trade (owners of M.V Joint Frost) v. Fliogret Limited* \(^{105}\), a case brought by the third party buyer for short delivery and/or cargo damage, the bill of lading was drawn up “to the order of the shippers.” Therefore, by virtue of the sales of goods act 1893, s.19 (2), property in the goods could not have passed in connection with the consignment or indorsement but by payment of the price in the normal course or by compliance with the other condition. Notwithstanding the trial judge had been prepared to allow a claim in tort which was based on the duty of care principle. However, the Court of Appeal rejected the claim. It ruled that it would jeopardize commercial certainty if actions in tort were extended to international maritime transactions.

The policy objection is that an action in tort will bypass the stipulations in international conventions, for example Hague rules/ Hague-Visby rules, on rights and immunities of carriers which usually apply to carriage under bills of lading. The carriers exception is that

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\(^{104}\) [1932] A.C. 562 (H.L)

\(^{105}\) [1989] 3 N.S.C. 453 C.A.
the limit of his liability is fixed by this mandatory stipulations and it is on this basis that the freight is computed and insurance arrangement are concluded. If an alternative claim in tort is routinely allowed, it will clearly undermine these international conventions.

In addition the Court of Appeal held that the claim in tort could not succeed because the appellant was not the owner of the goods in question or the person entitled to immediate possession at the time of loss or damage.

For all these reasons, the right of recourse in tort may in actual fact have limited effect.

4.9 Action in Bailment

The decision of the Supreme Court in Broadline Enterprises Limited v. Monetary Maritime Corp. & anor\textsuperscript{106} appears to raise the prospect of third parties successfully enforcing cargo claims against a carrier by the mere expedient of framing it in terms of the breach of the carrier's duty of care as bailees for reward.

This was a case by the indorsee for the short delivery of bags of sugar in a consignment which had been shipped to Lagos from Rotterdam. After the conclusion of the plaintiff's case, the defendant decided to rest its defence on the plaintiff's evidence. The plaintiff was to later abandon its claim upon contract. The result was that the action was framed in bailment and not specifically in tort of negligence.

Before the trial court and the Court of Appeal, the action failed. But before the supreme court, it succeeded\textsuperscript{107}. It is submitted that the correct decision was reached by the apex court in light of the failure by the defendant to discharge the onus of proof by showing that the loss occurred in some other way not involving their negligence despite all reasonable precautions.

\textsuperscript{106} [1995] 9 N.W.L.R (Pt 417) 1

\textsuperscript{107} If the claim had proceeded in contract, the same result would have ensued. It is trite that where the other side in the proceedings gives no evidence at all, the onus of proof, facts not challenged will be treated as admissions which require no further proof.
that were taken on their part to ensure the safety of the goods. For in a case of bailment, the plaintiff need only establish facts, which prima facie raise evidence of negligence against the defendant.

In the instant case, the unchallenged evidence meant that the presumption of negligence had not been rebutted by the defendant.

For this reason, it is submitted that the case must be confined to its narrow facts and should not be regarded as introducing any fresh principle. As with actions in tort for negligence, the policy objection is that allowing independent actions in bailment by third parties without any reference to the terms of the shipment, will derogate from the allocation of risk which the various carriage conventions seek to achieve.

Moreover, although the apex court was right to emphasize that bailment is a relationship sui generis which arises from voluntary acceptance of goods on the understanding that the recipient (bailee) will restore them in accordance with the bailor’s directions, in the context of shipping it is more rather than less likely that terms will be introduced into the bailment.

In other words, the foundation for bailment is independent of contract or tort. But as between the carrier and a third party, the terms of the bailment relationship should be extracted from the bill of lading or other receipt of shipment for the following reasons. It is always the case that the carrier takes possession of the goods on certain terms, viz exceptions, limitations and defences which are clearly an essential consideration for engaging in the carriage. Thus as between the original contracting parties that is the shipper and the carrier, there is a bailment which is accompanied by a contract and those terms may be evidenced by a receipt such as a bill of lading. In Broadline’s case, the indorsee was the “succeeding” bailor to whom the bills had been delivered for the purpose of conferring constructive possession and the right of delivery in respect of the goods. There is every reason to argue that as between the carrier
and succeeding bailor, the terms of the original bailment represented in the receipt of shipment have effect. Support for this viewpoint is drawn from cases such as the Aliakmon\textsuperscript{108} which refer to the principle that where a ship owner as bailee attorns to a third party holder of a bill of lading, so that the latter becomes the bailor in place of the shipper, the terms of the original bailment will take effect as between the ship owner and the third party.

4.10 By passing the privity of contract in defending the claim

Another possibility is that the third party brings suit in tort for negligence against the agent or sub-contractor of the carrier. Under the privity doctrine, such a defendant being a non-party to the contract of carriage will not be entitled to rely on its provision which limits or excludes liability for negligence. This type of action enables the third party to sidestep the allocation of risk in respect of which the carriage conventions aim to achieve uniformity. With reference to sub-contracting, the third party will not be bound by the terms of the sub-contract being a non-party.

i. The Himalaya\textsuperscript{109} Clause

The intent of the Himalaya Clause in a bill of lading is to set up a direct contractual relationship between the agent or sub-contractor and the third party (shipper). This is achieved by constituting the carrier the agent on behalf of and for the benefit of all persons who are or might be his agent or sub-contractors from time to time. Thus the agent or sub-contractor is made a party to the contract of carriage and is protected by every right, exemption, limitation, defence, condition and liberty to which the carrier is entitled in the event of any cargo claim arising from neglect or default in the course of or in connection with his employment.

\textsuperscript{108} supra
\textsuperscript{109} Derived from the name of the ship in Alder v. Dickson [1955] 1 Q.B. 158 (C.A)
The device was first upheld by a majority decision of the Privy council in the Eurymedon case. It has continued to generate debate and it is by no means universally recognized. However, it was given effect for the first time in Nigeria in the case of *Comet Shipping Agencies (Nig.) Limited v. Panalpina World Transport (Nig) Limited*. For this reason, it may be an effective device in deflecting cargo claims in local actions, particularly where the intent of the agent or sub-contractor is to benefit from excluding or limiting terms in the contract of carriage.

In the *Mukhutai*, the Privy Council determined that the particular Himalaya clause under consideration, by its express wording, could not be relied upon for the purpose of obtaining the protection of an exclusive jurisdiction clause (EJC) in the contract of carriage. The court took the view that an EJC creates mutual rights and obligations. Consequently, as it does not ensure solely for the benefit of the carrier, it was outside the scope of the Himalaya Clause in question.

It should be noted that in so far as Nigerian law is concerned, even if a suitably worded Himalaya clause extends its scope to clauses of mutual agreement and even if the courts are prepared to recognize the extension, the effect of the Admiralty and Jurisdiction Act (AJA), s. 20 is to render the EJC void, so that neither the carrier nor his agent or sub-contractor would in effect be able to benefit from an EJC. A further point relates to the facts that under the Hamburg Rules and Hague-Visby Rules, the defences and limitations of the carrier are expressly extended to agents and sub-contractors, regardless of whether the action is in contract or tort. By this innovation, it is intended to meet the problem of actions in tort by cargo owners against the carrier's agents or sub-contractors. Therefore, where these regimes apply, the

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110 [1975] AC 154 (P.C.)
111 [1989] 3 N.S.C 483 (C.A)
112 [1996] A.C. 650 (P.C)
113 In this case, the defendant was the shipowner who was being sued by the cargo owners under the charterer's bill. It was the EJC in the charterer's bill that the shipowner was attempting to rely on.
Himalaya clause has limited use except in relation to claims against sub-contractors because with this class of defendants, there has been no extension of the defences and limitations in the contract of carriage.

In view of the fact that Hague rules do not contain similar provisions, the Himalaya clause continues to be relevant where the rules apply to a contract of carriage, whether by law or contract.

ii. Conclusion

In shipping transactions, it is of crucial importance that third parties should have right of suit against carriers. It is also abundantly clear that the statutory assignment device under the Merchant Shipping Act (MSA) is right for repeal. I hold the view that it is preferable to have actions in contract rather than upon other grounds, which may allow the third party to bypass contractual defences and limitations, which in many cases are mandatory under the Hague/Hague-Visby Rules.

For this reason I hope shippers will not wait long before appropriate action is taken in respect of S. 375(1).

In connection with the Himalaya clause, its significance may be diminished when the Hamburg Rules take local effect. The Hamburg Rules do not extend the carrier’s defences and limitations to sub-contractors and it is in this regard that the Himalaya Clause may continue to be relevant.
CHAPTER FIVE

CONCLUSION

5.0 Introduction

Notwithstanding the advantages of International trade to economic and social development, there are number of problems associated with its regulation. Firstly, parties to international trade contracts are usually of different countries which may have different cultural and ideological persuasions.

Secondly, regulation is by many independent nation states, each having its own legal system. These problems result in dichotomy or isolated principles in the regulation of international trade by various legal systems.

The crucial consideration for developing countries like Nigeria is to structure our legal system to move in tandem with the developed nations in order to avoid being ostracized.

An overview of the laws regulating international trade transactions in Nigeria has revealed the fact that the bulk of the law is not codified.

The maritime field is being regulated mainly by the rules of common law and equity. The few local legislations are in dire need of review. Some of them are pre-colonial statutes, which have become obsolete in the face of modern economic realities.

The foregoing analysis has shown that currently The Hague rules provisions on ‘per package’ limitation does not serve us well. The limitation figure specified therein is abysmally low. And they do not enlighten us in any way as to what constitute a package. The Hamburg rule is clearly a substantial improvement. The text of the rules has raised the limitation figure from less than US$2 to US $1000 per package. However we must bear in mind that the
Hamburg rules was drawn up in 1979 – 32 years ago and it should seriously be considered whether the proposed Nigerian legislation should contain an increased figure in line with inflation – say $5000 per package.

The Hamburg definition of package undoubtedly promotes greater certainty, but whatever benefits the Hamburg rules may introduce, the uninsured shipper of goods is unlikely to receive adequate compensation for loss or damage to his cargo. Most carriers will not be eager to get involved in counting the exact number of packages stored in a container. And where a large piece of equipment, such as a generator is the package but its weight is not specified, US$1,000 will not provide a viable replacement, though it might pay the electricity bills for some weeks.

The shipper is usually at the mercy of the carrier, because the terms governing the contract of carriage is usually at the back of a bill of lading, which one will need a magnifying glass to read and also, the bill of lading is not issued until the goods are on board the vessel on their way to the port of destination.

The delay caused by our courts makes the shipper helpless and at the mercy of the court. Proceeding in the courts are governed or regulated by two concepts of law namely:

- Substantive law and
- Procedural law

The former goes to the root of the action and non-compliance renders the action or suit void. While non-compliance with the latter may be regarded as an irregularity, it is the latter (procedural law) we are concerned with in this research. Procedural law is usually referred to as rules of procedure of court. They are important in that the jurisdiction conferred on a court by statute can only be exercised in accordance with its rules and procedure.
In Nigeria the adversarial system of confrontation is the live wire, blood and cornerstones in civil proceedings. The rule is based upon the ancient rule of natural justice or AUDI ALTERAM PARTEM (that is to hear the other side). It is for this reason that a party must know in advance what he or she is going to say in court and to prepare for his or her defence by a fore knowledge of what the adversary is going to confront him with and to prepare for it rather than be groping in the dark and to avoid element of surprise.

Exchanging of pleadings between parties take as long as two years for parties to settle it amongst them before proceeding to trial. The main function of the pleading is to bring to focus with much as certainty as far as possible the various matters actually in dispute between the parties and those in which there is agreement between the parties by avoiding the element of surprise being sprung on the other party. It is this important role that pleadings play in Nigerian civil Jurisprudence that gives rise to the rule that both the court and parties are bound by the pleadings whilst unpleaded facts go to no issue. In essence, for any rectification of mistake, it must be ordered by the court, coupled with the high traffic of cases, public holidays, court vacation etc. the case may take between four (4) to six (6) years and the losing party may decide to appeal as of right and the minimum year an appeal as of now is six years and further appeal to the supreme court might take six (6) to eight (8) years or more.

5.1 Conclusion

In conclusion with the cumbersome nature of the litigation process, coupled with the fact that most shippers take out loan to facilitate their business and which the interest do not stop running until final payment has been paid the shipper is always at the mercy of the court for accelerated hearing of his case. But in reality it does not happen, they end up closing down or liquidating for not being able to pay back the loan, and are forced to settle out of court based
on the terms of the carrier for fear of being out of business to them half bread is better than none.

5.2 Recommendation

Lastly I would suggest Alternative Dispute Resolution (ADR). ADR is a term generally used to refer to an informal way of resolving disputes in which the disputing parties meet with a third party who is mostly a professional who helps them in resolving their dispute in a less formal way. Such ways are more consensual than it is done in the courts via litigation.

The most common forms of ADR are Mediation and Arbitration, although there are many other forms such as judicial settlement conferences, fact-finding, conciliation, special masters, and mini trials, among others. The process of ADR is a voluntary one but sometimes the courts mandate that disputants to try mediation before they take their case to court.

Processes like Mediation and Arbitration are popular ways to deal with a variety of conflicts, because they helped relieve pressure on the overburdened court system. The most popular form of ADR is mediation.

Mediation is a process of dispute resolution focused on effective communication and negotiation skills. The mediator acts as a facilitator assisting the parties in communicating and negotiating more effectively, thereby enhancing their ability to reach a settlement. It is not the mediator's role to adjudicate over the issues in dispute and indeed the mediator has no authority to do so.
It is not a process to force compromise, although compromise is an element of the process. Each party's limitations are respected and a party is only expected to make a shift in its approach to the problem if it becomes convinced that it is reasonable to do so.

Today, mediation is rapidly growing being actively utilized in almost every conceivable type of dispute resolution and it comes in various forms. The process has also been effectively adapted for multiple party dispute resolution with tremendous success.

The advantages of mediation are more over litigation, some of the most compelling benefits include:

**Efficiency** - Successful mediation avoids time consuming litigation and allows parties to achieve a prompt resolution. The majority of mediations are completed in one session, which usually lasts for one and a half to three hours. It enjoys an 80%-85% success rate. This is unlike litigation which takes a whole lot of time before judgment is finally made. Sometimes when judgment is delivered in litigation, parties may go ahead to challenge such decision at a superior court. All these may take years before reaching a final decision.\(^\text{114}\)

**Economical** - There are no filing or related fees. Mediation is free to the parties. Litigation on the other hand gulps money starting from the filing fee, legal practitioners' bill, transportation fare just to mention a few. When the cost of litigation is considered at the end of a suit, it is always on the higher side compared to the amount expended on Arbitration. The money expended on litigation is always determined by the duration of time which such the suit was pending.

Privacy – Unlike litigation where hearing and judgment is given in an open court, in mediation, no one but the pertinent parties are present and participate in the mediation. Notes taken during the mediation are confiscated and discarded. This to a great extent gives maximum privacy to the personality of people involved in the conflict resolution, so also their subject of conflict is protected.

Practical – Parties in mediation reach agreements that fit their economic, personal or professional circumstances, the situation is not like this in litigation as parties are bound the law regulating the subject of litigation. Also, decision of the court is not bound by the economic circumstances of the parties rather the provision of the law.

Similarly, Arbitration is a procedure for the resolution of disputes on a private basis through the appointment of an Arbitrator, an independent, neutral third person who hears and considers the merits of the dispute and renders a final and binding decision called an award. The process is similar to the litigation process as it involves adjudication; however, the parties choose their arbitrator and the manner in which the arbitration will proceed. For example, if the dispute is fairly straightforward and does not involve any factual questions, the parties may agree to waive a formal hearing and provide the arbitrator with written submissions and documentation only, whereas in other cases the parties may wish a full hearing.

Therefore, the parties create their own adjudicatory forum which is tailored to the particular needs of the parties and the nature of the dispute. It should be noted that this is never so in litigation. The advantages of arbitration over court adjudication include the following:
Expertise of the Decision-Maker: The parties can choose an arbitrator who has expert knowledge of the law, business or trade in which the dispute has arisen but in litigation, parties do not have right to choose the judge that will sit on their matter.

Low Cost: Arbitration is not expensive if the process is kept simple. This is because it does not entail any filing and at the same litigation fee is not included. Most importantly, conflicts could be resolved in no time, if the parties are present and provides the necessary information on time. This to a great extent reduces cost.

Speed: Arbitration can be arranged within days, weeks or months and does not take as long as litigation. It is very rare for parties to go through a litigation process within few days or weeks, this is because of the piled up cases we have in our courts. A lot of factors had been traced to this. Since arbitration is a personal arrangement, Parties fix time most convenient for them and the arbitrator and such conflict is resolved on time.

Alternative Dispute Resolution involves methods of resolving disputes other than through litigation which is a court process. Knowing fully well that parties do not return from court and still remain friends but the practice of ADR has given room for parties to resolve their differences without losing their relationship. It is always a win-win situation.

The methods are in addition to litigation and are by no means intended to replace litigation. Even the strongest proponents of ADR agree that certain matters must be resolved through the courts. However, there are other methods for resolving dispute which offer many
advantages over the adversarial route, which should be explored before litigation is commenced or proceeds too far.\textsuperscript{115}

Though Alternative Dispute Resolution has now been introduced into the legal system, but lawyers do not want it simply because they get paid once and for all, unlike litigation where you get more money over the years until the case ends. I suggest that more awareness should be given, as most litigants do not know or have not heard of Arbitration and Mediation. Its awareness will also help reduce the congestion of cases we have in court, which has made the judicial system slow.

TEXT BOOKS


ARTICLES

2. A.F. Aluko (1998) *The scope and application in Nigeria of International Conventions of the carriage of goods by sea*

(Brussels, 25 August 1924)

The President of the German Republic, the President of the Argentine Republic, His Majesty the King of the Belgians, the President of the Republic of Chile, the President of the Republic of Cuba, His Majesty the King of Denmark and Iceland, His Majesty the King of Spain, the Head of the Estonian State, the President of the United States of America, the President of the Republic of Finland, the President of the French Republic, His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, His Most Supreme Highness the Governor of the Kingdom of Hungary, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Latvian Republic, the President of the Republic of Mexico, His Majesty the King of Norway, Her Majesty the Queen of the Netherlands, the President of the Republic of Peru, the President of the Polish Republic, the President of the Portuguese Republic, His Majesty the King of Romania, His Majesty the King of the Serbs, Croats and Slovenes, His Majesty the King of Sweden, and the President of the Republic of Uruguay,

HAVING RECOGNIZED the utility of fixing by agreement certain uniform rules of law relating to bills of lading,

HAVE DECIDED to conclude a convention with this object and have appointed the following Plenipotentiaries:

WHO, duly authorized thereto, have agreed as follows:

Article 1

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

a) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as foresaid 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 in 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 2

Subject to the provisions of Article 6, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

Article 3

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

(a) Make the ship seaworthy.

(b) Properly man, equip and supply the ship.

(c) Make the holds, refrigerating and 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 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

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

a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or in the cases or coverings in which such goods are contained, in such a manner as would 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.

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

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(a), (b) and (c).

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

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

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

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

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

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

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 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 3, shall for the purpose of this Article be deemed to constitute "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 this Convention, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

Article 4

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article 3. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article.

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

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

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

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

(d) Act of God.

(e) Act of war.

(f) Act of public enemies.

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

(h) Quarantine restrictions.

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

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

(k) Riots and civil commotions.
(l) Saving or attempting to save life or property at sea.

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

(n) Insufficiency of packing.

(o) Insufficiency or inadequacy of marks.

(p) Latent defects not discoverable by due diligence.

(q) Any other cause arising without the actual fault or privity of the carrier, or without the actual fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

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

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

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

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

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

Article 5

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under this Convention, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this Convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of this Convention. Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

Article 6

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

Any agreement so entered into shall have full legal effect.

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

Article 7

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 8

The provisions of this Convention 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 9

The monetary units mentioned in this Convention are to be taken to be gold value.

Those contracting States in which the pound sterling is not a monetary unit reserve to
themselves the right of translating the sums indicated in this Convention in terms of
pound sterling into terms of their own monetary system in round figures.

The national laws may reserve to the debtor the right of discharging his debt in
national currency according to the rate of exchange prevailing on the day of the
arrival of the ship at the port of discharge of the goods concerned.

Article 10

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

Article 11

After an interval of not more than two years from the day on which the Convention is
signed, the Belgian Government shall place itself in communication with the
Governments of the High Contracting Parties which have declared themselves
prepared to ratify the Convention, with a view to deciding whether it shall be put into
force. The ratifications shall be deposited at Brussels at a date to be fixed by
agreement among the said Governments. The first deposit of ratifications shall be
recorded in a procès-verbal signed by the representatives of the Powers which take
part therein and by the Belgian Minister of Foreign Affairs.

The subsequent deposit of ratifications shall be made by means of a written
notification, addressed to the Belgian Government and accompanied by the
instrument of ratification.

A duly certified copy of the procès-verbal relating to the first deposit of ratifications,
of the notifications referred to in the previous paragraph, and also of the instruments
of ratification accompanying them, shall be immediately sent by the Belgian
Government through the diplomatic channel to the Powers who have signed this
Convention or who have acceded to it. In the cases contemplated in the preceding
paragraph, the said Government shall inform them at the same time of the date on which it received the notification.

Article 12

Non-signatory States may accede to the present Convention whether or not they have been represented at the International Conference at Brussels.

A State which desires to accede shall notify its intention in writing to the Belgian Government, forwarding to it the document of accession, which shall be deposited in the archives of the said Government.

The Belgian Government shall immediately forward to all the States which have signed or acceded to the Convention a duly certified copy of the notification and of the act of accession, mentioning the date on which it received the notification.

Article 13

The High Contracting Parties may at the time of signature, ratification or accession declare that their acceptance of the present Convention does not include any or all of the self-governing dominions, or of the colonies, overseas possessions, protectorates or territories under their sovereignty or authority, and they may subsequently accede separately on behalf of any self-governing dominion, colony, overseas possession, protectorate or territory excluded in their declaration. They may also denounce the Convention separately in accordance with its provisions in respect of any self-governing dominion, or any colony, overseas possession, protectorate or territory under their sovereignty or authority.

Article 14

The present Convention shall take effect, in the case of the States which have taken part in the first deposit of ratifications, one year after the date of the protocol recording such deposit.

As respects the States which ratify subsequently or which accede, and also in cases in which the Convention is subsequently put into effect in accordance with Article 13, it shall take effect six months after the notifications specified in paragraph 2 of Article 11 and paragraph 2 of Article 12 have been received by the Belgian Government.

Article 15

In the event of one of the contracting States wishing to denounce the present Convention, the denunciation shall be notified in writing to the Belgian Government, which shall immediately communicate a duly certified copy of the notification to all the other States, informing them of the date on which it was received.
The denunciation shall only operate in respect of the State which made the notification, and on the expiry of one year after the notification has reached the Belgian Government.

Article 16

Any one of the contracting States shall have the right to call for a fresh conference with a view to considering possible amendments.

A State which would exercise this right should notify its intention to the other States through the Belgian Government, which would make arrangements for convening the Conference.

DONE at Brussels, in a single copy, August 25th, 1924.

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;