

International Carriage of Goods by Sea under the Documentary Aspect – Including the Recent Challenges of Electronic Commerce

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Abstract. The work draws up the international environment of carriage of goods by sea under the operative international conventions and drafted model laws. It deems fruitful to confront the discrepancies whereas there is no uniform approach even among the biggest shipping nations, which results difficulties for traders and carriers taking into consideration that carriage of goods by sea shall be interpreted in the international ring. On the other hand, for decades there is an urgent call from the commercial practice to revise the legal background in order to clarify its standpoint concerning new challenges, namely the possible acceptance and interpretation of electronic document interchange in the realm of transport documents. Hence, the paper points out some cornerstones where commerce and law need to agree in order to furnish the most suitable environment for carriage of goods by sea.

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I. EXPOSITION

1. GENERAL INTRODUCTION OF MARITIME LAW

From the early dawn of civilisation, maritime transportation has played a key role in humanity's survival and endeavour of knowledge, wealth and power as well as mastery of the environment. Since the antiquity, ocean shipping fostered trade and travel, diversifying and enriching human culture through exchange of ideas and goods. Considering that all empires have extended their dominions to peoples and territories "beyond the seas", shipping has been essential to build empires as well. The industrial revolution, imperialism as well as colonisation depended heavily on shipping, fleets and vessels being capable to confront perils of the sea. Bottomry, salvage, general average as well as maritime insurance and chartering are among those ancient principles that have been developed in response to the challenges of maritime commerce and resulted equivalent principles in civil law. Consequently the conflict of law roots also in international trade in the sea. On the other hand, public international law grew out of maritime activity by budding empires and costal states. International conventions in the realm of shipping from the very beginning of the 20th century have been followed by increasing international cooperation among states in combating maritime pollution, for instance.

Considering the two great legal philosophies and jurisdictions – the common law and the civil law – it must be enhanced, that both have added to the development of maritime law until the contemporary confluence of them. Noteworthy, that **common law** bases the firstly oral and then written customs and usages of medieval England, which regulated the people among themselves and sometimes in their relations with government. In recent days, it consists of the collected written decisions of the courts in respecting those customs and usages and encompassed the interpretation of modern statue law. Under the aspect of **civil law**, principles of law are derived from orderly collected customs and usages, codes or general statements ruling the individuals of a society among themselves and more rarely some of their relationships with established authority.

By definition, **maritime**¹ law belongs to the body of private law, which concerns itself with the rights and obligations between persons involved in water and sea transport in all its various forms.² Considering the previously mentioned, maritime law has its origins in the civil law, but has developed both in civil and common law jurisdictions. It was probably born as an oral tradition (*lex maritima*) and continued in various written forms. The expression of *lex maritima* refers to the collection, preservation and development of ancient maritime customs. The notion has several **unique characteristics**³:

- i. Above all, there is a **common venture**, which comes from the concentration of considerable property values on a single hull. Thus, if perils threaten the ship and their cargo, one endangered interest may impact the others. Therefore, there is an enhancing tendency for risk allocation through statutory rules allowing limitation of liability.
- ii. Moreover, shipping is mere an **international business**, hence there is an enormous effort to simplify and improve the legal rules in this field.
- iii. And the last factor is the **dramatic fluctuations**, which is virtually unique to the shipping market. A good contract of yesterday may result losses today.

Taking into consideration that civil law states great emphasis on codification, in the process of codification it infused the customs with some of its legal character and also supplemented them with some of its principles.⁴ These sources were consulted by judges of seafaring countries, both to supplement and validate local customs. Codification continued during the

¹ The Oxford English Dictionary defines maritime as “connected with the sea in relation to navigation, commerce, etc.”; in accordance, the Webster’s Collegiate Dictionary determines it in a similar manner. According to Thomas J. Schoenbaum, the term, maritime law “refers to the entire body of laws, rules, legal concepts and processes that relate to the use of marine resources, ocean commerce, and navigation.”

² See Herber (2001), p. 4.

³ See Falkanger-Bull-Brautaset (1998), pp. 23-24.

⁴ The earliest example of codified maritime law is presumably the *Digest of Justinian* in 529 B.C. The main aim of the code was to preserve existing customs and it already incorporated concepts from the code of Rhodian maritime law from around 800 B.C. Even though the Romans preferred the preservation of already existing rules and therefore the Roman law was not known for original contributions to maritime law, they preserved concepts through Roman codification influenced the growth of maritime law. It seems sufficient to refer to the notion of *pecunia trajectitia*, *actio exercitoria*, and *receptum nautarum* or *nautae caupones stabularii*. Under the first, creditor loaned money for undertaking of a particular sea voyage. Neither principal, nor interest was repaid if the debtor’s ship did not survive the voyage. Probably bottomry and indirectly ship mortgage has rooted from here. By the virtue of *actio exercitoria*, one had an action against the shipowner for contracts entered into by the master of the ship. Under *receptum nautarum*, the sea carrier promised implicitly to deliver safely the goods in his care, unless otherwise the loss of the goods occurred beyond his control. The Hague Rules reflects the ancient concept when it states that the carrier is obliged to proper care for the goods carried and exercise due diligence to make his ship seaworthy. *Nautae caupones stabularii* subjected the master to double liability if goods were lost, stolen or damaged by his employees. In recent days, the carrier is liable for the negligent act of his agent and employees, but on the contrary, no plus liability is imposed.

The *Rôles d’Oleron* from the 12th century witnesses another significant example of codification of maritime law. It defined the duties and responsibilities of masters, crews, shipowners as well as merchants. The *Rôles d’Oleron* had a great impact on shipping customs from the Atlantic coast of Spain to England and Scandinavia; parallel the *Consolato del Mare* from the 14th century impacted the Western Mediterranean area.

middle age⁵ as well and, of course, the golden age of codification, the 19th century also contributed to the development of maritime law. It seems sufficient to refer to the French Civil Code and The French Commercial Code by Napoleon I, whereby the latter one incorporated several concepts and principles of the Ordonnance de la Marine. Nowadays, maritime law has been greatly influenced and modified by statute law as well as international conventions and public law, regarding both the national and the international impact. International conventions have altered the classic conception of law of carriage of goods by sea. In fact, this form of regulation seems to be the only path if maritime law would be responsive and able to provide uniformity and justice between shippers and carriers under the modern trade practices. Then again, the work would like to demonstrate shortly the **system of sources of law** in the maritime field through to clarify already at the very start the sequence of the below referred sources.

- i. In some fields, **mandatory law**, in other words **statue**, is the unconditional primary source of law. In some other areas, statutory rules are merely supplemental and thus may be avoided. In numerous questions the parties may decide among themselves the nature of their relationship according to the freedom of contract; and they need to invoke the statutory provisions, which are thus subsidiary, only if the contract is silent in the matter. The ordinary principles of contract interpretation consist of two approaches. Under the objective interpretation, the language is interpreted according to the everyday usage; but if it arises that both parties has intended some other meaning, this one will be decisive, which leads to the realm of subjective interpretation. Intention of the parties is often based an examination leading up to the contract and their behaviour after reaching the agreement may be decisive as well. However, in general, the objective interpretation test is used and this rests on understanding of a reasonable person within the particular sector, and not on an ordinary person.
- ii. The role of **case law** is emerging as well, especially considering the fact that a case may help how a statue or a contractual provision is to be understood or point out the applicable rules if the statue or the contract is silent.

⁵ Citing the most significant examples of the period, the *Guidon de la Mer* between 1556 and 1584 as well as later the *Ordonnance de la Marine* in 1681 meant the next steps in the process of codification in the realm of maritime law. The novelty of the Ordonnance was the sponsorship by the state. In other words, probably, this was the first state-sponsored consolidation of all the laws and customs of an entire country.

- iii. In international shipping business an alternative dispute resolution are extremely revealing either before or after the dispute has arisen. Thus **arbitral awards** may establish a precedent of a similar weight likewise the decision of an ordinary court.
- iv. And last but not at least, also the long-historic **legal theory** supports the resolution of ambiguous maritime questions.

2. FOUNDATION AND COMPARATIVE APPROACH OF THE BILL OF LADING

The few words above regarding to general definition and nature, characteristic as well as legal sources in maritime law are not senseless on the score that bill of lading shall be expounded in this realm. **Reconsideration of bill of lading** under the legal aspect has actuality in recent days. Both its regulation and the arising questions wear quite a few dilemmas of streamline law. Honour of traditions and keeping up with development is the old dichotomy of law regardless the main legal philosophies and branches of law. However, for jurists this duality may be considered rather juicy challenges to answer. The first appearance of bill of lading retraces to the thirteenth century. On the other hand, for at least two decades, the bill of lading does not seem suffice for all kind of purpose in the realm of carriage of goods by sea. International trade embraces the entire world and call out for up-speeded solutions. Technical development in the shipping market does supply the latter demand. The question may arise whether legal regulation, especially old and well-tried legal phenomena likewise the bill of lading, may provide the same. Effectiveness and safeness of international trade brings on, what is more, demands unification or at least a certain level of harmonization of trade regulations. The enhancing role of multimodality is also waiting for answers and fitting solutions regarding to the bill of lading measures from maritime experts. Moreover, even not-seafaring countries may be involved in maritime question for the very reason of multimodal transportation. These annotations indicate the necessity of the detailed examination and review of one of the most important phenomenon in international trade and carriage of goods by sea, namely the bill of lading.

As a short introduction, bill of lading, as a kind of transport document, can be expounded only in the realm of **international sales of goods** where the **carriage of goods is carried out by sea**. The mentioned document has developed from a receipt for goods by the carrier into nowadays form. It is issued by the transportation carrier to the shipper acknowledging that

they have received the shipment of goods and that they have been placed on board a particular vessel which is bound for a particular destination and states the terms in which these goods received are to be carried.⁶ The most important role of bills of lading is that the holder of them can demand delivery of the goods from the carrier at time of arrival to the port of destination. The **transferable** property may result a successive sale of goods by successive transfer of the bill. Therefore, bill of lading transfers a **constructive possession** of the goods and that is the **document of title to the goods**. From the previous mentioned follows the **main limitation** of it as well. In order to guarantee the effectiveness as a document of title, it seems essential that cargo is delivered only against the production of the bill of lading. Over the last decades the revolution in transport methods has speeded up sea voyage. On the other hand, if the document is negotiated several times to effect successive sales, since each transaction takes time, more often bill of lading does not arrive until months or years after the cargo. Anyway, the development of the document has not kept pace with new phenomena and practices of fast sea voyage as well as containerisation and combined transport operations.

The **main goal** of this work is to demonstrate the legal and economic function of the mentioned transport document as well as to point out challenges, which has to face, to date. The **comparative approach** would like to point out the fact that proliferation of effective international conventions may result only tangle and obscurity, especially that the most important seafaring countries are bound by different conventions. The latest born international convention took into consideration in the last few decades ascending resolutions; however, the cornerstone in the legal regulation is still the bill of lading. The further development by some national legislation points out that the picture of sea trade has become colourful accordingly the technical as well as the international challenges. On the other hand, sea trade needs the old, long-historic bill of lading in reborn and renew way, by the virtue of emerging alternatives cannot prove the same advantages alike.

In aspect of **sources of law** concerning the subject matter the above mentioned does obtain. On closer examination the work takes into consideration all the three international conventions, namely The Hague Rules, The Hague-Visby Rules as well as The Hamburg Rules.

⁶ http://www.itds.treas.gov/bills_lading.htm

II. THE BUSINESS ENVIRONMENT AND CONTRACTUAL QUESTIONS

1. GENERAL OVERVIEW

I am inclined to think that a detailed overview in the field of business notions and definitions is needful to understand latter the functions and the legal nature of bill of lading. Above all, it must be emphasised that the whole procedure is governed by two main kinds of contract in the international realm. First of all, there is a **contract of sale of goods** between the seller/exporter and the buyer/importer and through it is strictly in the field of international sale, it is governed by the **Convention of International Sales of Goods (The Vienna Convention)**. This kind of contract regulates arrangement of transport, payment of the transport cost, passing of the risk in the goods, obligation to insure the goods as well as mode of payment of price. Contract of sale "steers" contract of carriage, contract of insurance and banking contract, which the parties to them are interrelated⁷.

However, goods have to be moved from the place of dispatch to that of destination. This carriage at all times has an international character and may be performed by sea, land, air or even more the combination of the mentioned. If it is accomplished by one of them, the international transport is **unimodal**; on the contrary, if it is carried out by more of them, **multimodal or combined** transport obtains. Thus there is another contract, namely the **contract of carriage by sea**, under which the picture looks however more colourful. The recent day's international unimodal transport is governed by international conventions, in which field concerning to sea transport, **The Hague-Visby Rules** seems the mostly relevant. Traditionally, the carriage of goods by sea is affected by methods being determined by the nature of goods. In case of bulk carriage, presumably the shipper may hire an entire vessel by means of **charterparty**. On the contrary, and that is typical in the everyday international carriage, the goods may be individually packed and loaded in a ship's hold or on deck, and in conjunction with, are carried under **bill of lading**. It covers a document which evidences a

⁷ Carriage of Goods by Sea – Transport Documents and Their Commercial Functions Lecture by Peter Wetterstein in Åbo Akademi, Turku, Finland on 24 November, 2005

contract of carriage by sea and taking over or loading the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document.⁸

2. CONTRACTUAL QUESTIONS REGARDING THE CONTRACT OF SALE

Mercantile custom has developed a number of trade terms and described methods of performance of export transaction. **Contract of international sale of goods** shows a characteristic that they are entwined with other contracts. These other contracts include the contract for carriage of goods by any kind of means has been agreed, the contract of insurance as well as the contract with a bank under which payment for the goods is effected. These documents are mainly the bill of lading, the commercial invoice and the insurance policy. Regarding the sense that the contract of sale of goods denotes the central transaction of the process, the other contracts depend to some extent on it. More precisely, the content of the sale contract allocates whether the buyer or the seller is responsible for entering into contracts with third parties. Through it may stipulate the terms on which third party contracts are to be entered, thus the contract of sale of goods by itself may be broken if contracts concerning third parties are designed on different terms. This phase would like to enhance the main rights and obligations of seller as well as buyer, ending in view that parties are also obliged regarding to shipping documents. However, these duties and those which could arise by and towards banks where payment is by commercial credit could correlate. Although the picture of international sale contracts show a considerable variety the examination focuses on those types where bill of lading plays role, namely the **f.o.b. (free on board)** and the **c.i.f. (cost insurance freight) contracts** as well as their **variations** thereon. In general, under these contracts, the seller's duty concerning the goods ends on loading and delivery is by means of the shipping documents representing the goods. Practically, using this type of transaction, the seller loads the goods at the port of loading and the buyer uses the document to obtain and discharge them at the port of destination, thus there is no need for the concerning parties to ever meet regarding performance of the goods. Moreover, the documents can be used to resell or pledge the merchandise while the goods are still at sea and the eventual buyer of chain sales, against surrendering it, can also obtain the merchandise from the carrier at the port of

⁸ The Hamburg Rules, Article 1 (7)

destination. **The entire transaction is documentary in form.** Recent days, international sale of goods is merely governed by standard terms such as **G.A.F.T.A. 100** (Grain and Feed Trade Association) or **FOSFA** (Federation of Oil Seeds and Fats Associations) and, more commonly, **INCOTERMS 2000** (International Rules for the Interpretation of Standard Terms) or **INTRATERMS** (International Trade Terms, Standard Terms for Contracts for the International Sale of Goods). Special trade terms are primarily designed to define the method of delivery of the goods sold but are also used to indicate the calculation of the purchase price and the incidental charges included therein. INCOTERMS 2000 sets out the duties both seller and buyer in considerable details, but none of its terms do govern risk and property which belong to the realm of national laws.

Until around the 18th century international trade would have been carried out by a buyer chartering a vessel and calling personally at foreign ports of call, in accordance, seller would have brought commodities alongside or on board the buyer's ship and the entire transaction was concluded after the buyer paid the mutually agreed price. Noteworthy, that buyer would have been considered shipper on board his own ship and the bill of lading would have been issued to him. Probably, these are the roots of **f.a.s. (free alongside ship)** and **f.o.b. (free on board)** contracts. With establishment of regular shipping lines, radio and postal services as well as modern insurance and finance facilities, the picture more or less has entirely changed. The buyer can easily arrange the transaction at distance, while the seller also considers as arranger of contract of carriage. Moreover, documents could be sent overland by post ahead of the goods assigning the buyer to raise money on them or resell while they were still afloat. As a logical development of improved telecommunication systems, the buyer could conduct more and more easily the business at distance, whereas the seller became solely responsible for arranging shipment and insurance. **C.i.f. (cost insurance freight)** contract would have its origin in this way at about the end of the 19th century. Under this type of contract the seller has several advantages such as the protection against loss of the goods before payment by the knowledge that insurance has been procured as well as retaining property of the goods beyond shipment and the easier access to secure credit. On the contrary, if the buyer receives the bill of lading and pays for the goods, he is enabled to secure credit and resale as well.

From the business point of view the purpose of the **c.i.f. contract** is not a sale of the goods themselves, but a sale of the documents relating to the goods. "It is not a contract that goods shall arrive, but a contract to ship goods complying with the contract of sale, to obtain, unless the contract otherwise provides, the ordinary contract of carriage to the place of destination, and the ordinary contract of insurance of the goods on the voyage, and to tender these

documents against payment of the contract price.”⁹ In other words, “the seller discharges his obligations as regards delivery by tendering a bill of lading covering the goods”.¹⁰ Under a c.i.f. contract the obligation of the **seller** are the forthcoming:

- i. He needs to provide appropriate packing and marking.
- ii. The seller is required to contract for carriage by sea under which the merchandise will be delivered at the destination agreed by the contract as well as to obtain the bill of lading as evidence of having done so. The bill of lading should afford continuous cover from the port of shipment until the port of discharge.
- iii. He is obliged to deliver the goods on board the ship at the port of shipment.
- iv. Paying the freight at the port of destination as well as to carry out the export procedures belong also to the duties of the seller.
- v. Finally, he has to contract and pay for agreed cargo insurance in favour of the buyer and provide the buyer with transport document and cargo insurance document without delay.

Aptly, the **buyer’s duty** may be drawn as:

- i. The buyer needs to agree on the cargo insurance with the seller.
- ii. He has to accept delivery of the goods as well as documents tendered by the seller at the port of shipment and receive them from the carrier at the port of destination as well as to carry out the import procedures and the carriage to the final destination.
- iii. Last but not least, he is obliged to pay the contract price, of course.

Thus the seller delivers when the goods pass the ship's rail in the port of shipment; in other words, his duties finish when the goods are loaded on board and the buyer bears all risks from that time. The seller is obliged to pay the cost and freight necessary to bring the goods to the named port of destination but the risk of loss of or damage to the goods, as well as additional costs due to events occurring after the time of delivery, are transferred from the seller to the buyer. Anyway, the seller has to procure marine insurance against the buyer's risk of loss of or damage to the merchandise during the carriage as well. Consequently, the seller contracts for insurance and pays the insurance premium. The buyer should consider that under this term the seller is required to obtain insurance only on minimum cover. Thus, if he wishes to have a protection of greater cover, he should make either his own extra insurance arrangement or agree expressly with the seller. Then again, the seller is required to clear the goods for export.

⁹ See Schmitthoff's (2000), p. 30.

¹⁰ *Gardano and Giampieri v. Greek Petroleum George Mamidakis & Co* [1962] 1 W.L.R. 40 at 52. The citation is derived from J. McNair.

Noteworthy, that the term can be used only for sea and inland waterway transport where the goods cross the ship's rail.

It must be enhanced that a large proportion of the world's shipping tonnage is carried under c.i.f. contract. Nowadays, the so-called “**c.i.f. out-turn**” contracts have become general, especially in tanker trade. Regarding the facts that oil is an expensive commodity and some losses are inevitable at loading and discharge as well as en route, buyers prefer to pay on out-turned rather than intake quantity. As far as it relieves buyers only from the obligation to pay for losses which are inevitable, it seems not repugnant to the concept of c.i.f. contract; however, no clear answer can be given. A recently used common variation of the mentioned term is **c. & f. contract**, which sets the obligation to insure on the buyer. This refers mainly to a positive obligation on the buyer, because the seller may also have an interest in insurance and left to reclaim the goods.¹¹

According to **term f.o.b.** the tasks of the **seller** are the next:

- i. He is supposed to supply conforming goods packed and marked appropriately or according to the contract and any documents proving conformity which have been agreed and supply a commercial invoice or the electrical equivalent of it.
- ii. He is also under the obligation to deliver the goods on board the ship at the port of shipment and give the buyer sufficient notice of the fact without delay. He is required to place the merchandise on the vessel in the exact position and manner.
- iii. The seller is bound to carry out the export procedures as well as provide the buyer with the document received for the delivery of the goods.
- iv. And finally, he is bound to pay any incidental costs regarding to the delivery of the goods.

Right the **buyer's duties** are the forthcoming:

- i. He has to take delivery of the goods on board the ship at the port of shipment.
- ii. He is required to give sufficient notice to the seller of the time and location of the delivery as well as to pay for the goods.

¹¹ The work would like to point it out that several other kinds of variations of c.i.f. contract exist. In reference, the c.i.f. and c., c.i.f. and e. and the c.i.f. and c. and e. offers different options regarding to the term. The first one covers “cost, insurance, freight and commission” denoting the exporter’s commission which he charges when acting as buying agent for the overseas buyer. The second one deals with “cost, insurance, freight and exchange” if export houses wish to inform their customers aboard that the prices include their commission. Finally, c.i.f. and c. and i. is the abbreviation of “cost, insurance, freight and commission and interest” which is used when goods are exported to distant places where some time passes before the bill drawn on the customer abroad settled. Anyway, these variations are mainly used in the English speaking part of the world trade.

iii. He is obliged to carry out the import procedures, such as licences, authorisation and comply with the custom formalities whether in the country of destination or in a country of transit.

iv. And of course, it belongs to his duties to carry the merchandise to the final destination. Therefore, free on board means that the seller delivers when the goods pass the ship's rail at the named port of shipment, in other words, he is obliged to carry the goods on board of the vessel, in the manner which is usual or customary at the port of delivery, at the time agreed. Accordingly, the buyer has to bear all costs and risks of loss of or damage to the goods from the mentioned point and previously, if it is occurred by his failure. This term also requires the seller to clear the goods for export and could be used only for sea or inland waterway transportation purposes.

Numerous variations of f.o.b. contract exist in recent international trade regarding the purpose and the properties of the transactions in question. According to the **strict** or **classic f.o.b. contract** the buyer has to nominate a suitable ship. When the vessel arrives in the port of shipment, the seller sets the goods on board under the contract of carriage by sea which he has concluded with the carrier. On the other hand, this contract is made for the account of the buyer. The seller receives the bill of lading and transfers it to the buyer. Marine insurance, in general, is arranged by the buyer, but he may ask the seller to arrange it for the buyer's account as well. Under **f.o.b. contract with additional services**, the buyer is not obliged to nominate a suitable ship hence it is done by the seller. The shipping and insurance arrangements are made by the seller for the account of the buyer. Other parts of the procedure are carried out as it states above, consequently the seller concludes the contract of carriage by sea with the carrier, places the goods on board and transfers the bill of lading to the buyer. The question arises regarding these two variations of f.o.b. term whether the title to the goods passes on shipment or on transfer of bill of lading. The intention of the parties determines it, but normally the intention is that the passing of title is postponed until the seller makes available the bill of lading to the buyer or his agent. On the other hand, passing of property may be postponed until payment in full the purchase price. According to the **simple f.o.b. contract**, the buyer himself enters into a contract of carriage by sea directly or through an agent. The buyer nominates the ship and after the seller places the goods on board, the bill of lading goes directly to the buyer, thus the seller is not a party to the carriage of goods by sea contract. The liabilities of parties under a contract of sale on f.o.b. terms may be defined by usages prevailing in a particular port or trade. Concerning the latter mentioned, for instance, in oil trade according to the trade usage the buyer has to give the seller timely notice of

loading. It seems noteworthy to mention two misleading practices concerning the f.o.b. term. In container transport instead of **f.o.b. container freight station**, it would be better to use the term free carrier. Similarly misleading the term of **f.o.b. Stockholm** concerning to wood products because the buyer has to bear the loading costs into the vessel, hence by this trade usage the term is converted into an f.a.s. delivery.¹²

3. GENERAL COURSE OF BUSINESS IN ASPECT OF CARRIAGE OF GOODS BY SEA

In accordance with the previous mentioned contract of sales of goods, the **seller/exporter** may be obliged to arrange the carriage of goods by sea to the place of destination. Thus he has to conclude a contract of carriage with a **shipowner** or with a person who, for the time being, as against the shipowner has the right to enter into a contract of carriage of goods in his ship, such as a **charterer**. In this case the shipowner is the **carrier** and the exporter is referred to as the **shipper** as a party to the contract of carriage by sea. In conformity with the quantity of the goods the exporter has to decide whether it requires an entire ship or the goods form only part of the intended cargo of it. The first situation is covered by a document called the **charterparty**; however, in most cases, the terms of the contract of carriage are evidenced by **bill of lading**, which acknowledges that the merchandise have been delivered to the shipowner in order to carry and reiterate the terms of the contract. Anyway, it is used in general only after the contract of carriage is properly on the way to perform.

Thus the process by which the contract of carriage is made, and the transport document issued consist of the forthcoming relevant steps. In due course, the shipper instructs a forwarder to procure freight space for the goods. Then the shipowner through his loading broker advises the shipper or his agent of the name of the ship, the place where the goods should be sent for loading and the time when the ship is ready to receive the cargo. This is often carried out by a printed notice, namely, the **sailing card**. After sending the goods to the docks by the seller/shipper or his forwarding agent, the ship's master or the loading broker issues a **mate's receipt**. Sometimes the same company acts as both loading broker and forwarding agent, but the functions are nevertheless distinct. The mate's receipt acknowledges that the shipowner has received the goods in the condition state therein without any further legal relevance.

¹² See Schmitthoff's (2000), pp. 16-18.

However, the mate's receipt may be closed if the goods have not been received in apparent good order and condition. The **records of loading**, which was taken by the tally clerk during the loading operation, are handed to the shipper's clerks, who compare them with the draft bill of lading sent by the shipper to the shipowner's office. Thereafter the seller/shipper or his agent prepares the **bill of lading**, in general, a set of two or mainly three originals. The master or loading broker compares the draft bill of lading with the mate's receipt, signs the bill of lading and sends it to the shipper. Clauses in the mate's receipt may be transferred into the bill of lading. The contract of carriage is concluded at loading at latest and the bill of lading must be issued after this. Thus the terms of the bill of lading can only be evidence of a contract made already, but cannot constitute the contract of carriage itself. Finally, the shipper/seller sends the bill of lading with other relevant shipping documents to the purchaser or to the relevant bank if payment is done by banker's commercial credit. If the bill of lading has been dispatched by letter in the ship's bag, then on arrival, the master delivers the letter to the addressee who delivers the bill of lading to the shipowner's representative or agent at the port of destination. Thereafter the ship's agent issues a **delivery order** which is presented by the holder to the ship's officer in charge of unloading.

4. THE CONTRACT OF CARRIAGE OF GOODS BY SEA

Considering the long-time practice of sea carriage, there are three basic types of contract of maritime transportation of goods, such as common carriage, private carriage and the contract of towage.

The notion of **common carriage** refers to carriage of goods by sea under bill of lading, ship's delivery order or waybill. Tetley points out five general characteristics of this type of sea carriage under the common law:

- First of all, the carrier undertakes to deliver the goods from and to places and at the time advertised.
- Secondly and thirdly, the payment of freight by the shipper is considered and the common carrier offers, by course of conduct or expressly, carrying for freight.
- The carrier has no right to refuse carriage of the goods of any person except for good reason.

- And finally, the definition of common carrier is a question of fact concerning the carriage must not be ancillary or casual in accordance with the carrier's real business.¹³

Regarding to international definitions, **carriage of goods** covers the period from the time when the goods are loaded on to the time they are discharged from the ship.¹⁴ Under The Hamburg Rules the notion means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another. However, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of the Convention only in so far as it relates to the carriage by sea.¹⁵ On the other hand, 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 charterparty from the moment at which such bill of lading or any similar document of title regulates the relation between a carrier and a holder of the same.¹⁶ Under the common law the carrier had to deliver the goods to the destination in the same condition as he received them, unless proving some exceptional circumstances which prevented him from performing that duty and for which he could not be responsible; in other words, showing non-negligence by the carrier is not sufficient. According to the civil law jurisdiction the carrier is liable for loss of or damage to the goods excluding fortuitous event, irresistible force (force majeure) or the nature of inherent defect of the goods. The Hague and The Hague-Visby Rules set a standard of responsibility concerning to the common carrier which cannot be waived or lessened by contract or otherwise.¹⁷ The carrier is obliged to “properly and carefully” load, handle, stow, carry, keep, care for and discharge the goods. Furthermore, he is engaged to exercise “due diligence” to make the ship seaworthy only before and at the commencement of the voyage. In other words, he is not objected to “absolute diligence” at all times and at all stages of the voyage; neither is he considered as “insurer” of the goods – comparing to the common law system. The Rules contains other remarkable benefits as well for the common carrier. By the virtue of the enumerated exemptions the carrier is not liable in case of loss of or damage to the goods.¹⁸ The carrier

¹³ See Herber (2001), p. 14.

¹⁴ The Hague-Visby Rules Article 1 a)

¹⁵ The Hamburg Rules Article 1 (6)

¹⁶ The Hague-Visby Rules Article 1 b)

¹⁷ The Hague-Visby Rules Article 3 (8)

¹⁸ The Hague-Visby Rules Article 4 (2) a) to q)

also enjoys the benefit of the one-year time limitation regarding to suits.¹⁹ According to the package limitation the carrier is not responsible above a defined margin, even when he is otherwise liable.²⁰

Private carriage embraces affreightment or transportation by charterparty and it indicates a lesser responsibility comparing to the common carrier's one. It applies for hiring of a ship – in bareboat and demise charterparties - and the hire of the service of the ship – in case of voyage and time charterparties. The contract is concluded between the shipowner and the lessee of the ship or service, but not necessary with the cargo owner as it is required under the issuance of bill of lading. Hence parties are reckoned relatively equal bargaining strength and thus capable of protecting their interests, the international carriage of goods conventions does not regulate charterparty contracts, except for those terms and conditions which could violate public order/policy. As it is expressed in Article 2 (3) of the Hamburg Rules, the Convention is not applicable to charterparties, unless a bill of lading is issued pursuant to a charterparty, and the bill of lading governs the relation between the carrier and the holder of the bill of lading, not being a charterer.

The third manner, namely the **contract of towage**, like chartering, is also concluded equal negotiating parties, and hence they are only subject to public order/policy measures of public laws.

5. BASIC THEMES AND TERMINOLOGY IN SEA CARRIAGE²¹

Seaworthiness “runs like thread through all maritime law in various forms”²². The Oxford Dictionary of Law defines the adjective seaworthy as “having at the start of the voyage the degree of fitness (as respects the ship, her crew, and her equipment) for that particular voyage that a careful owner might be expected to require of his ship” and “the suitability of a particular ship to carry a particular cargo”.²³ Without the demand of completeness, it is required under The Hague as well as The Hague-Visby Rules and in voyage, demise and time charterparties. By the virtue of The Rules and in voyage charterparties the carrier has an

¹⁹ The Hague-Visby Rules Article 3 (6)

²⁰ The Hague-Visby Rules Article 4 (5)

²¹ See Herber (2001), pp. 16-18.

²² See Herbert (2001), p. 16.

²³ See Oxford Dictionary of Law, p. 448.

obligation to exercise due diligence to make the ship seaworthy. Furthermore, under demise and time charterparties the mentioned obligation become an absolute duty.

Applying the previous paragraph, a party may have an obligation to supply a seaworthy ship. On the other hand, this obligation has no consequence if the loss of or damage to the goods was not **causally connected** to the breach of obligation. A common carrier in case of non-exercising due diligence to make the ship seaworthy is even not responsible for damage to the cargo if the vessel runs aground, if it was not caused by the lack of due diligence.

In accordance with the concept of **common venture** the parties to a maritime adventure share the risk and responsibility, in other words, no absolute liability exist on one or another party. The same rule is applicable in the field of general average or the limitation of the liability of the shipowner.

According to the concept of **equity**, the claimant may lose the right to enforce a maritime lien by unreasonable delay if the delay results in prejudice to the defendant or third parties. Under the concept, the court has the right to modify the normal order of priorities of maritime liens and statutory rights in rem, when vying creditors are competing for a share of benefit of the judicial sale of the ship. Equity also applies in prejudgement interest on damages awarded from the date of casualty. However, the notion is more familiar with the common law doctrine, a similar civil law concept, the abuse of rights, may be invoked to impede harm to a shipowner arising from the slothfulness of a lien holder to bring a suit.

And last but not least, **public order or policy** is also considerable in recent days when state intervention into private law, individual contracts like bill of lading are all subject to implied terms of them and to mandatory provisions found in international conventions. The work in toto builds up the examination of the subject matter of the full acceptance of this.

6. POSSIBLE ATTENDANTS IN CARRIAGE OF GOODS BY SEA

The **main actors of a contract of carriage by sea** are the cargo owner, the carrier, the contracting shipper, the actual carrier/actual shipper/sub-carrier/the performing party and the consignee. The **carrier** means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with the shipper.²⁴ Under The Hague-Visby Rules the

²⁴ The Hamburg Rules, Article 1 (1)

wording refers namely to the charterer and the owner.²⁵ The **actual carrier** means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.²⁶ The **shipper** covers any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.²⁷ Finally, the **consignee** means the person entitled to take delivery of the goods.²⁸ Usually the shipper instructs a **forwarding agent** to attain freight space for the cargo as well as the shipowner, in other words, the performing party employs an agent, the **loading broker** to obtain cargoes for his ship. "The forwarding agent's normal duties are to ascertain the date and place of sailing, obtain a space allocation if that is required, and prepare the bill of lading ... and to put in the necessary particulars and to send the draft ... to the loading broker who advertises the date of sailings in shipping papers ... and generally prepares and circulates to his customers a sailing card. It is his business to supervise the arrangements for loading, though the actual stowage is decided on by the cargo superintendent who is in the direct service of the shipowner. It is the broker's business also to sign the bill of lading, and issue it to the shipper or his agent in exchange for the freight."²⁹ Hence in practice, loading broker and forwarding agent may be the same firm even though the separate functions.

III. REGULATION OF BILL OF LADING

1. BREIF HISTORICAL OVERVIEW

In general, common carriage of goods by sea is achieved by issuing bill of lading, waybill or related documents. As it was referred precede, bill of lading is the oldest creation of mercantile custom. The document was commonly employed already in the thirteenth

²⁵ The Hague-Visby Rules, Article 1 a)

²⁶ The Hamburg Rules, Article 1 (2)

²⁷ The Hamburg Rules, Article 1 (3)

²⁸ The Hamburg Rules, Article 1 (4)

²⁹ *Heskell v. Continental Ltd* [1950] 1 All E.R. 1033 at 1037

century.³⁰ Originally, it was a document establishing only the conditions of carriage without detailed allocation of liability. From the end of the nineteenth century there was an emerging desire from shipowners to protect themselves from liability regarding to transport of general cargo. These were the decades of proliferation of exclusion and limiting liability clauses. The first counter-attack was born in the US regarding the dominant position of American cargo interest. Thus the American law has created a new base for liability on negligence with the exemption of liability for negligence of servants and agents in navigation or management of the ship. European cargo owners demanded protection from exemption clauses as well which has led to international conventions.³¹

Waybills came into existence only in the 19th century, particularly the issue of American railroad carriage of goods. And the newest phenomena of carriage of goods by sea are **ship's delivery order** and different kind of electronic shipping documents. The previous mentioned is primarily used when a seller wishes to sell parts of bulk cargo to different buyers while the merchandise is still at sea. **Electronic shipping documents** are child of recent development.

2. THE UNDERLYING CONTRACT OF SALE AND THE BILL OF LADING

The contract of carriage is entered into so that the sale agreement can be performed, hence it reflects the requirement expressed in the contract of sale. The carrier to a large extent is to 'drawn into' the relationship between the buyer and seller. However, the picture seems more colourful considering insurance agreement and letter of credit which obtain further requirements of the contract of carriage. On the contrary, some principles of sale law are simply inadequate in international sale.³² As it states above, the main prerequisite of international sale is the international character by itself. Therefore a third party, namely the professional carrier, is interposed between the buyer and the seller. The bill of lading bridges over the gap between the seller and the buyer in the realm of international trade. It means

³⁰ It must be pointed out that the bearing and spreading of bill of lading is under question regarding to experts of maritime law. While Fagniez dates it for the 13th century, Tetley mention the 14th century as the date of birth of bill of lading. Considering the fact that for instance the Adriatic queen, Venice, had a sparkling and mostly seagoing commerce already from the 12th century, hence Fagniez point of view seems more genuine.

³¹ The work deals with the birth of these conventions and the detailed examination of their measures below.

³² For instance, according to these principles, the seller does not deliver the goods before receiving the purchase price and simultaneously, the buyer does not pay for the goods until the seller has delivered them. It is obvious that this rule by itself is inappropriate in international sale when goods are needed to be carried.

simply the key to receive the goods providing a solution for problem of payment. The buyer can pay the purchase price providing he simultaneously receives the bill of lading and the seller relinquish control of the goods at the moment of the exchange. Thus the buyer's and seller's security is largely depends on the strictness of the rules applying to the carrier and on the solvency of the carrier in case of breaching these rules.

Hence the principles of the **underlying contract of sale** are **interpreted in the light of maritime law**. Under the maritime nature, delivery takes place when the seller delivers the goods at the correct time according to the contractual description. The buyer bears the risk in relation to the carriage, thus even the goods are damaged or destroyed en route the buyer is still under the obligation to pay the purchase price. Then the buyer's right to claim the carrier is one of the major question of this chapter. Delivery under the sale aspect takes place through delivery of the goods to the carrier. In case of delivery the seller can demand the purchase price exchanging the bill of lading. The seller can retain only the bill of lading, but not refuse sending the goods. The seller still has the risk of the buyer failing to pay against the bill of lading, which situation may be resolved through letters of credit. According to instructions of the buyer, the bank undertakes to pay the purchase sum against surrounding certain documents with defined content.³³ The bill of lading has to adapt precisely to the terms of the letter of credit. If the letter of credit is irrevocable, the bank is under obligation to make payment to the seller if the documents are satisfactory even if according to the buyer the seller has not complied with the terms of the contract of sale.

3. CHARTERPARTY vs. BILL OF LADING

Before examining questions regarding to bill of lading in details, it seems necessary as well as useful to point out the differences between another commonly used transport document, the charterparty. Above all a charterparty contract is provided whereby an entire ship is hired in order to carry out a carriage of goods by sea. It goes back higher in the past than bill of lading. The very first reference to the existence of charterparty could be found in the Byzantine-Rhodian sea law of 600 to 800 A.D. The "carta partita" or "charta partita" was a document written in duplicate on a single paper to cut it half and a part was given to each signatory of the agreement. Under the common law the tradition of cutting a deed, became an indenture, in other words, a bilateral contract.

³³ Uniform Customs and Practice for Documentary Credits, 1993 (UCP 1993)

Charterparties are governed by the principle of liberty of contract; on the contrary, bills of lading are largely regulated by statute law as well as international conventions. On the other hand, the exporter who has chartered a whole ship may issue bills of lading under a charterparty and terms from the charterparty may be incorporated in the bill of lading as well. Thus it deems to define and mark off the two kinds of documents, their functions and the method as they work. However, nowadays there is a considerable difference among the various kinds of charterparty and some of them may show slightly similarity to the bill of lading. Therefore, it deems to examine them shortly in order to detach them. In recent sea trade, three basic types of charterparty exist like the bareboat, the time and the voyage charterparty. The notion of **bareboat or demise charterparty** refers to hiring of an entire ship without the master or crew. The charterer of the ship becomes the beneficial owner (owner ad hoc or owner pro haec vice) and appoints the master and the crew as well as pays and controls them. Thus some national laws require that the master of ships flying its flag be nationals of that country, the master and crew may be appointed by the owners, but still be under the direction and control of the charterer, who pays their dues.

The hiring service of the ship with the master and crew usually for longer period is covered by contract of **time charterparty**. In this case, the master and crew is provided and paid by the shipowner, so the mentioned remains his servants. Hence there is no real redelivery, the time charterer has “no right of property in, or to possession of, the vessel”³⁴.

On the other hand, hiring a ship or part of a ship for a voyage is considered as **voyage charterparty**. In effect, it gives to the charterer very little control of the ship, slightly more than a bill of lading holder has. It is provided, in general, for a single voyage, but it can be issued for longer period as well, when it is considered as a **consecutive voyage charterparty**. **Quantity or tonnage contracts** cover carry of defined quantity of goods in several voyages during a stipulated period, but not necessarily consecutively. Voyage charterparties may be periodical as well only if the contract clarifies when the vessel is to be presented, in order to avoid ambiguity. In fact, it is for carriage of goods of a single shipper, thus it carries several characteristics of bills of lading.

First and last bills of lading, waybills as well as charterparties are **contracts of transport**. On the other hand, both bill of lading and waybill belongs to the **contract of carriage of goods**, and they do not deal with contract of hire or affreightment. Bill of lading is also a document of title or at least of transfer and it symbolises a receipt for the goods. Waybills may be

³⁴ Sea & Land Securities v. William Dickinson & Co., Ltd. [1942] 2 K.B. 65 (69), L.L.Rep. 159 (162-163) (C.A.) and The Berge Tasta [1975] 1 Lloyd's Rep. 422 (424) (Q.B.)

considered as “non-negotiable” bill of lading and is marked as such. However, charterparty contracts refer to hire of the ship or of his service, as it states above. Hence a charterparty is concluded when two equal parties, their brokers or their agents agree upon all essential terms, thus under bill of lading creating an agreement of fixture. Though an oral agreement or hire a ship is also binding regarding to cargo practice and business credibility in the future. The parties usually insert the fixture into a written and signed form, which constitutes the whole contract. Another existing practice is to include a supersession clause by the parties whereby their written charterparty supersedes all previous agreements. Comparing the precede stated, bill of lading is only the best evidence of the contract, however, reference would also have to be made to the carrier’s advertisement, freight tariff, booking note and sometimes to certain practices of the carrier which are known and accepted by the shipper. Bill of lading is used mostly in liner trade where a common carrier offers to transport merchandise of public on a prearranged route at prearranged time, while charterparties are used in the private carriage of goods. A short summary by Tetley seems desirable regarding to the previous mentioned. “A bill of lading is similar to public transportation on an auto bus route; a voyage charter is similar to hiring a taxi to carry you from one place to another of your choice; a time charter is similar to the hiring of the taxi for a day’s outing, and a demise charter is similar to leasing an automobile for a very long time with a driver choose by the owner but paid and controlled by the passenger. A bareboat is similar to the long-term lease of an automobile but without a driver.”³⁵

According to the general practice, in many contracts of transportation of goods a bill of lading and at least one charterparty is embodied. It may be under question which contract governs the entire procedure as well as the rights and obligations of the parties. If a bill of lading is in the hand of a charterer who is considered as the shipper as well, then it is a charterparty which is the contract of hire between the parties and the bill is only a receipt. On the contrary, if the bill is placed in the hands of a third party for value, then it is a bill of lading which is the contract of carriage between the bill of lading holder and the vessel owner and probably the charterer. The distinction is not negligible at all if it takes into consideration that charterparties are subject to the mandatory provisions of nor The Hague, The Hague-Visby, neither The Hamburg Rules comparing to bills of lading.

³⁵ See Tetley (1994), p. 295.

4. GENERAL DEFINITION OF BILL OF LADING

Above all the work would like to lie down that definitions might differ from scholars to scholars as well as books to books. Here and now the main aim is to reveal the effective international definitions.

According to the **Oxford Dictionary of Law**, bill of lading is a transport document acknowledging the shipment of a consignor's goods for carriage by sea. Primarily it is used when a ship is carrying merchandise belonging to a number a consignors, in other words, it is considered as a general ship. All consignors receive a bill on behalf of the shipowner or a charterer under a charterparty. In this case, the bill of lading serves three functions, such as the receipt of the goods, the evidence of the contract of carriage by sea as well as the title of the goods. On the other hand, a bill of lading might be issued by a shipowner to a charterer who is using the ship for the carriage of his own goods. However, the terms of the contract of carriage are in the charterparty contract and the bill means only a receipt and the document of title. The ownership of the merchandise may be transferred by delivering the bill of lading to another if it is drawn to bearer or by endorsing it if it is drawn to order.³⁶

In the realm of international conventions, **The Hague-Visby Rules** does not define the notion. Regarding to **The Hamburg Rules** "the bill of lading means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document". A provision in the document to deliver the goods to the order of a named person, or to order, or to bearer constitutes this undertaking. After taking the goods in the charge of the carrier or the actual carrier, a bill of lading must be issued on demand of the shipper. The bill may be signed by any person having authority from the carrier and it is regarded to have been signed on behalf of the carrier if it is signed by the master of the ship.³⁷

³⁶ See Oxford Dictionary of Law, p. 50.

³⁷ The Hamburg Rules, Article 1 (7) and (14)

5. INTERNATIONAL LEGISLATIVE BACKGROUND

5.1. Review of the development of the international regulations until recent days

From the beginning of the last century it is indispensable to look over the international development of the matter under the scope of the different conventions and some national legislation as well. The first act, under the recent meaning of codification, bore only in the 1890's in the USA, also known as **The Harter Act**. The Harter Act impacted the national legislation of other states, among others the Nordic countries. Parallel to the creation of the Harter Act, there had been some international activity to create harmonized rules since the 1880's.³⁸ Surveying the latter development, the next great steps could be distinguished, such as the **International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the Hague Rules)** in 1924, **The Hague-Visby Rules** in 1968 and **The Brussels Protocol** amending The Hague-Visby Rules in 1979 and the last, an until now, the less important one is the **United Nations Convention on the Carriage of Goods by Sea (The Hamburg Rules)** from 1978. Internationally harmonized solutions are extremely important in contracts for the carriage of goods by sea. By conventions the importance of jurisdiction and applicable law are minimized and similar, and mainly substantive rules are the basis for solutions.³⁹ However, it is a well-known fact that the national understanding of conventions could differ considerably in some aspects.⁴⁰ Thus, it seems more precise to talk about harmonization rather than uniformity. Anyway, the main goal of the carrier's mandatory minimum liability regarding to The Hague Rules is duplex. The liability regime protects cargo interest from excessive exemption clauses in contract and secondly, there is a need to enhance the negotiability value of the bill of lading. The Rules includes a number of stipulations on the bill of lading itself. Even though in the shipping practice numerous situations arise when it is both impossible and unnecessary to define sea transport regarding to the alternatives of either liner traffic or tramp shipping, in a legal context it may be relevant to

³⁸ See Sturley (1991), pp. 6-10.

³⁹ As it states in the Hamburg Rules Article 3, "in the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity".

⁴⁰ The first reason may be already the way to enter into force an international convention. Considering that it may become legally binding without any national modification or the state in question may enact the convention text as a statute and finally, the convention's principle may be incorporated in national legislation.

differ among the international conventions. In general, comparing The Hague and The Hague-Visby Rules to The Hamburg Rules the next **deviations**⁴¹ might be relevant:

- i. First of all, the geographical scope of application is broader in The Hamburg Rules.
- ii. The Hague and The Hague-Visby Rules exclude charterparty relations from the scope of application and albeit The Hamburg Rules does not require it for application, it becomes a necessary prerequisite when there is a charterparty and a bill of lading holder, not being charterer, making a claim for loss of or damage to the goods or for delay.
- iii. Deck cargo and live animals fall within The Hamburg Rules, meanwhile it is not necessary so under The Hague and The Hague-Visby Rules.
- iv. The terminal periods at ports are covered by The Hamburg Rules, while The Hague and The Hague-Visby Rules excludes the time prior to loading and the time after discharge.
- v. The basis of liability may be stricter under The Hamburg Rules, however, the general understanding includes a presumed fault concept and a similar discretion is possibly used as according to The Hague and The Hague-Visby Rules.⁴²
- vi. The carrier's right to limit his liability is increased in The Hamburg Rules and a different ceiling for delay in delivery of the goods has appeared.
- vii. The Hamburg Rules alters the catalogue of exceptions, including error in the navigation and management of the vessel and fire; thus there is no need for separate rule on seaworthiness at the beginning of the voyage comparing to The Hague- and Hague-Visby Rules.
- viii. Notice time and time bar are extended in The Hamburg Rules and the stipulations are more detailed.
- ix. The approach to deviation differs as well.
- x. New rules are inaugurated in the latter born convention regarding to the liability of the contracting and actual carriers and further limitation on the contracting carrier's possibility to exempt him from liability concerning the actual carrier's performance.
- xi. Regulation of bill of lading is more specified in The Hamburg Rules.
- xii. The latter convention deals with the validity of the letter of indemnity as well.

⁴¹ See The Hamburg Rules, The Hague-Visby Rules and Honka (1997), pp. 6-7. and 23.

⁴² The Hague- and Hague-Visby Rules directly refers to the presumed fault concept, whereas the Hamburg Rules uses the terminology of "all reasonable measures to avoid loss, damage or delay".

- xiii. Finally, The Hamburg Rules specifies the restrictions concerning jurisdiction and arbitration clauses. It seems necessary to maintain again, that The Hamburg Rules applies to all contracts for the carriage of goods by sea between two different states, except for charterparties, even if the carriage is not carried out under a bill of lading and furthermore it may applicable to transport document other than bill of lading.

On the other hand, several criticisms do exist regarding to The Hamburg Rules.⁴³ According to some scholars it might interrupt the further international harmonization. Concerning the realities, the liability system of it could not become prevailing. Until recent days, slightly more than 20 states have ratified the latter convention. However, The Hague Rules has also lost its importance while The Hague-Visby Rules seems dominant nowadays.⁴⁴

5.2. Scope of application of the effective international conventions

The comparison in the realm of scope of application is not negligible, especially considering the fact that there are remarkable differences. The first reference point is the **geographical scope of application** and the second one is the regarded kinds of **contract and transport documents**. According to the measures of **The Hague-Visby Rules**, the Convention shall be applied to every bill of lading relating to the carriage of goods between two ports located in different states if the bill of lading is issued in a contracting state, or the carriage by itself is from a port belonging to a contracting state, and finally if the contract of carriage of goods by sea evidenced by a bill of lading provides that The Rules or legislation of any state giving

⁴³ Above all, one of the major criticism states that cost increase in insurance will follow The Hamburg Rules. The insurance market has a significant role in the liability regime in connection with loss of or damage to the goods carried by sea. The merchandise is covered by cargo insurance and the carrier's liability by a P&I insurance (protection and indemnity). While cargo insurance companies in general are profit-based, the P&I Clubs are non-profit based mutual entities with possibilities to require premiums from the member shipowners should the financial situation so demand. The costs increase considering that an increase in the carrier's liability will put more pressure on P&I calls. Simultaneously, cargo insurance premiums will not decrease because cargo insurance has more administrative functions today to settle any claim, including increased activities in recourse settlement with P&I.

The second critical point is the liability system. Taking into consideration the fair risk division, the reparative function prevails concerning liability in damages, even though safety at sea requires accepting a comprehensive approach to achieve optimum results. In this way, loss prevention is also vital. Taking into consideration the comprehensive framework, "the rules concerning liability in damages must be given substance according to the alternative which gives the best possibility incentive for loss avoidance. It is difficult to see why similar arguments concerning the preventive function would not be important in connection with contracts for the carriage of goods by sea." Moreover, this might be also relevant from the insurance market's point of view as well. (See Honka (1997), p. 8.)

⁴⁴ The significance of The Hague Rules even recent days is contributed by the fact, that the U.S. ratified only this convention. Anyway, many nations are still outside any of the international obligations and those which are bounded by any of them also prove the political choice of a liability regime.

effect to them are to govern the contract. It must be enhanced that the nationality of the ship, the carrier, the shipper, the consignee or any other interested person are not decisive.⁴⁵ The Rules limits its scope to the “contract of carriage covered by 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 aforesaid issued under or pursuant to a charterparty 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”⁴⁶. And as it states above, the carriage of goods embraces the period from loading to discharge.

It seems worthy to point out again that **The Hamburg Rules** is applicable to all contract of carriage by sea between two different states, even a bill of lading is not issued or any other kind of transport document has been issued; only charterparties are excluded from the scope of application of the Convention. The Hamburg Rules has also additional requirements beside the two different state prerequisite. Thus The Rules is applicable only “if:

- a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or
- b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or
- c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or
- d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or
- e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.”

It is visible that the Hamburg legislation amends the Hague-Visby requirements with sub-point c) and d). Similarly to the Hague-Visby regime, the nationality is not decisive. Even though The Rules excludes charterparties under its scope of application, if a bill of lading is issued regarding to a charterparty and it governs the relation between the carrier and the holder of the bill of lading, not being the charterer, the measures of the Convention do apply. As a kind of accessory to the application measures, The Rules applies to each shipment, if a contract containing future carriage of goods in a series of shipment during an agreed period –

⁴⁵ The Hague-Visby Rules, Article 10

⁴⁶ The Hague-Visby Rules, Article 1 b)

and then again, only if the shipment has not been carried out under a charterparty.⁴⁷ The definition of the notion of “contract of carriage by sea” under The Hamburg Rules is already defined above.⁴⁸

6. THE LEGAL NATURE AND PROPERTIES OF BILL OF LADING

One of the main goals of this kind of document is to enable the owner of the goods to dispose of them rapidly, although the goods are not in his hand but in the custody of the carrier.⁴⁹ Under the legal point of view, the bill of lading has three relevant properties:⁵⁰

1. It is a **formal receipt**, set out by the shipowner alleging that the goods as they are specified in it will be shipped to the stated destination in a certain ship or at least they are received in the custody of the shipowner for further shipment.
2. On the other hand, it is also the **evidence of the contract of carriage**, which was concluded before exposing the bill of lading.
3. Finally, it may symbolise the **title to the goods** enabling the consignee to dispose of the goods.

Thus the bill of lading defines the conditions for carriage and delivery in respect of the relationship between the bill of lading holder, not being the contracting shipper and the carrier. Under most jurisdictions, blank references to surprising and burdensome clauses are not considered. Similarly, acting in good faith is required from the bill of lading holder. There are two upcoming questions whereby the work deals later in details; however, it is desired to mention them here as well. The first issue is the **legal relevance of representations** in the bill of lading. While the carrier’s obligations regarding to delivery of the goods to the bill of lading holder is regulated in details, liability in damages for wrongful delivery is out of scope of application textually. The second arising question is the consideration and regulation of **other transport documents** than bill of lading. Article 18 of The Hamburg Rules accepts the prima facie evidence principle regarding to conclusion of contract of carriage by sea as well as taking over of the goods as described in the document.

⁴⁷ The Hamburg Rules, Article 2 (1)-(4)

⁴⁸ See Chapter II, Paragraph 5.

⁴⁹ See Schmitthoff's (2000), p. 267.

⁵⁰ See Schmitthoff & Sarre (1967), p. 322. and Grime (1978), p. 83.

6.1. Bill of lading as a formal receipt

Examining by closer the bill of lading as a **receipt of the goods**, the most important part is definitely the **description of the goods**, the so-called **margin**. Its legal and commercial relevancy arise from the circumstance that the consignee or the indorsee of the bill of lading does not have any chance to examine the goods, so they are reclined upon the description of the shipowner. In case of inaccurate description of the goods the shipowner will be responsible in direction to the buyer. Thus the shipper is allowed to require the bill of lading showing at least the forthcomings:

- 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 case or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of 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"⁵¹

It seems necessary to point out here that **mandatory contents** of the bill under The Hague-Visby Rules do not accord with the requirements of The Hamburg Rules. The Hague-Visby regime makes no mention of the nature of the goods and leading marks have to be inserted only on the shipper's demand, while it is obligatory by the virtue of The Hamburg Rules. The latter mentioned is merely detailed as stating that the bill of lading must include:

- a) the **general nature** of goods, the **leading marks necessary for identification** of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or they quantity otherwise expressed, all such particulars as furnished by the shipper;
- b) the **apparent condition** of the goods;
- c) the name and principal place of business of the carrier;
- d) the name of the shipper;
- e) the consignee if named by the shipper;

⁵¹ The Hague-Visby Rules, Article 3 (3)

- f) the port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading;
- g) the port of discharge under the contract of carriage by sea;
- h) the number of originals of the bill of lading, if more than one;
- i) the place of issuance of the bill of lading
- j) the signature of the carrier or a person acting on his behalf;
- k) the freight to the extent payable by the consignee or other indication that freight is payable by him;
- l) the statement referred to in paragraph 3 of Article 23;
- m) the statement, if applicable, that the goods shall or may be carried on deck;
- n) the date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties;
- o) any increased limit or limits of liability where agreed in accordance with paragraph 4 of Article 6.⁵²

On the other hand, the absence of one or more particulars does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the legal definition of bill of lading, as it is maintained in Article 15 (3) of The Hamburg Rules.

Anyway, it must be enhanced that a statement, like **"in apparent good order and condition"** or **"as presented"** does not meet the requirements of the mentioned provision. It simply refers to that "apparently, and so far as met the eye, and externally [the goods] were placed in good order on board this ship"⁵³ Factually, it is a **clean bill of lading**. Although, in this case the shipowner does not promise to deliver the goods in apparent good order and condition, he cannot scuttle off the liability rules by referring for instance a kind of peril. In favour of the consignee he is estopped if the precede mentioned has acted in good faith. As it is stated in the legal opinion of Scrutton "the mercantile importance of clean bills is so obvious and important that the consignee took the bill of lading which in fact is clean, without objection, is quite sufficient evidence that he relied on it"⁵⁴ However, the matter with clean bill of lading could be very confusing in aspect of the carrier if he is asked to provide it. If he furnishes, he may be liable to the consignee; if not, he makes trouble to his client, namely to the shipper. Some bills of lading contain assertion, like **"measurement, weight, quantity, brand, contents, condition, quality and value as declared by shipper but unknown to the carrier"**. On the

⁵² The Hamburg Rules, Article 15 (1)

⁵³ Per Sir R. Phillimore in *The Peter der Grosse* (1875) 1 P.D. 414 at 420

⁵⁴ In *Silver v. Ocean Steamship Co* [1930] 1 K.B. 416

contrary, it is wide-spread recognised that the required particulars cannot be negative or contradicted by such clause. The qualifying clause like "weight and quality unknown" could afford protection to the carrier in the light of the latter particulars. On the other hand, if quantity is expressed to be unknown, the bill of lading is not prima facie evidence of the shipped quantity.⁵⁵ According to the measures of The Hamburg Rules, to the **demand of the shipper** the carrier is obliged to issue a **shipped bill of lading** in addition to the required particulars and stating that the goods are on board a named ship and the date of loading. The shipper has the right to require the shipped bill in exchange if the carrier had previously issued a different kind of bill of lading or other document of title with respect to any of such goods. Thus the carrier may amend any previously issued document in order to meet the shipper's demand for a shipped bill of lading.⁵⁶

The question comes up if the previous mentioned could be **applicable for the shipowner** as well, namely, whether he could get off the effect of the estoppel rule created by a clean bill of lading. However, the answer could be only negative, because the precede consequences arise from the contract of carriage, thus it is not allowed to invoke a defence which is in connection with another contract, more precisely the contract of sale, otherwise it would be *res inter alios acta*. Moreover, the shipper is obliged to guarantee the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him.⁵⁷

6.2. Bill of lading as an evidence of contract of carriage⁵⁸

As it stated above, the second legal function of bill of lading is **evidencing the contract of carriage**. In this field there are two long accepted consequences. Firstly, any terms not containing in the bill of lading, are duly evidence of the contract of carriage between the carrier and the shipper as it is provided before signing the bill of lading. Secondly, the carrier is estopped to add any external evidences contrary to the bill of lading in relation to a *bona fide transferee*.⁵⁹

Anyway, these above mentioned requirements merely based on facts referring to an affirmation that certain facts are correct. On the other hand, the carrier is not required to show

⁵⁵ See Schmitthoff's (2000), p. 287.

⁵⁶ The Hamburg Rules, Article 15 (2)

⁵⁷ The Hague-Visby Rules, Article 3 (5)

⁵⁸ The work deals with matter of contract of carriage in details above, in Chapter II, Paragraph 4.

⁵⁹ See Schmitthoff's (2000), p. 289.

such circumstances in the bill of lading, that he has **reasonable ground for suspecting not accurately** or he has had **no reasonable means of checking**.⁶⁰ The Hamburg Rules amends the previous mentioned with measures regarding to **reservation**. The carrier or the person acting on behalf of him must insert a reservation in the bill of lading specifying the inaccuracies, grounds of suspicion or the absence of reasonable means of checking, if they know or had reasonable grounds to suspect or had no reasonable means of checking that the particulars contained by the bill of lading not accurately represent the goods or a shipped bill of lading has been issued, loaded. The extent of the reservation embraces the general nature, leading marks, number of packages of pieces, weight or quantity of the goods. In case of fail to note it on the bill of lading, the apparent good condition of the goods will be deemed.⁶¹

In other words, the bill of lading is a **prima facie evidence** of the receipt by the carrier of the goods as therein described according to the mentioned requirements. On the other hand, in accordance with the amendment of The Visby Protocol, proof to the contrary is not admissible when a bill of lading has been transferred to a third party acting in good faith.⁶² **The Hamburg Rules** affirm this approach, maintaining that except for the particulars in respect of or to the extent to a reservation permitted, the bill of lading means a prima facie evidence of taking over or loading, in case of a shipped bill of lading, by the carrier of the goods as described in the bill. And the same **estoppel rule** applies like in **The Hague-Visby Rules** in direction to a third party acting in good faith. The rule is applicable regarding to freight or demurrage as well. If the bill of lading does not contain that the freight and the demurrage is payable by the consignee, then it is a prima facie evidence not to be paid by him. And if such bill has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill proofing the contrary is not admissible.⁶³

First and last, a bill of lading is all the time the **evidence of taking over the goods** and if a shipped bill of lading has been issued then the loading of the goods as it described in the bill unless proof to the contrary is given or a reservation has been made. In absence of the note of apparent good condition of the goods, it shall be considered that the merchandise were in this condition, unless otherwise proved. Thus the **carrier** is under the **obligation to inspect** the merchandise and to note if he did not have the chance for it, as well as to note the recognized inaccuracies. On the other hand, the carrier shall be estopped if the bill has been transferred to

⁶⁰ The Hague-Visby Rules, Article 3 (3)

⁶¹ The Hamburg Rules, Article 16 (1) - (2)

⁶² The Hague-Visby Rules, Article 3 (4)

⁶³ The Hamburg Rules, Article 16 (3) - (4)

a third party acting in good faith and may invoke only the reservations expressly mentioned in the bill of lading.

6.3. Function of symbolising the title of goods

The last, but perhaps the most important role is that such kind of document **embodies the title of goods** represented by the bill to dispose of the goods while they are in transit, in other words, it symbolize the key to the goods themselves⁶⁴. In the long tradition mercantile custom, possession of the bill in many aspects incarnates the possession to the goods.⁶⁵

Pre-eminently it must be expressed that the possession of the goods is not equivalent to the property of the goods. **Transferring the bill of lading** results such **rights in the goods** as it posed by the **parties intently**. It must be enhanced, that the transferee could not get better title than the transferor. In relation to the consignee or the indorsee of the bill and agent of the shipper at the port of discharge it pass only the right to claim delivery of the goods from the carrier upon arrival of it. If the consignee or the indorsee is a bank, who advances money to secure the goods is embodied by the bill of lading, the procreation of a charge on the goods in favour of the banker. Finally, in connection to the buyer/importer and the seller/exporter it could result the passing of the property depending on the intention of the parties.⁶⁶

However, only the **bill of lading holder** is entitled to **claim the carrier** in case of non-delivery of the goods. The carrier is not required to inquire the title of the bill of lading holder or the whereabouts of the other parts of the mentioned document, however, if the carrier delivers the good against the bill of lading, than he is protected against any claim, except for knowing the defect in the title of the holder. In practice, the carriers used to cleave producing the bill of lading, otherwise they are liable. As it stated, the opinion of learned Lord Denning, if the carrier "delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading"⁶⁷.

On the other hand, the rightful owner of the goods cannot claim the goods without **producing at least one original bill of lading**. I recline upon Denning stating "whether the property has

⁶⁴ See Carver's (1971), p. 886.

⁶⁵ See Schmitthoff's (2000), p. 289.

⁶⁶ See Schmitthoff's (2000), p. 290.

⁶⁷ Sze Hai Tong Bank v. Rambler Cycle Co Ltd [1959] A.C. 576 at 586

passed or not... the buyers ought to produce the bills of lading duly endorsed in order to make a good title at this stage"⁶⁸.

7. LIABILITY QUESTIONS REGARDING TO THE CARRIER IN ASPECT OF THE HAGUE-VISBY RULES AS WELL AS THE HAMBURG RULES

7.1. General observation of the subject matter

The **mandatory nature of the carrier's liability** serves as a basic principle since The Hague Rules. According to Article 2 of **The Hague –Visby Rules** "... 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". Moreover, "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 ... 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."⁶⁹ On the other hand, under Article 5, the carrier has the chance to increase his liability.⁷⁰ As a kind of accessory to the liability system, Article 6 of The Rules allows an exception for goods of a specific nature carried under specific circumstances when this is considered justifiable.⁷¹ These stipulations could not be against public policy or due diligence. In these cases, no bill of lading has been or shall be issued and the agreed terms shall be embodied in a receipt which is a non-negotiable document and marked as such. It must be

⁶⁸ *Sze Hai Tong Bank v. Rambler Cycle Co Ltd* [1959] A.C. 576 at 586

⁶⁹ The Hague-Visby Rules, Article 3 (8)

⁷⁰ "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."

⁷¹ "... a carrier, master or agent of the carrier and 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..."

enhanced, that this kind of agreement has full legal effect. On the other hand the mentioned article does not cover the ordinary commercial shipment made in the ordinary course of trade. The measures of **The Hamburg Rules** follow the similar pattern, as it states in Article 23(1)-(2), additionally that invalid clauses do not affect the rest of the contract.⁷²

7.2. Scope of application of the mandatory provisions

There are three circumstances to examine the field of the mandatory nature of the application stipulations, such as the geographical requirements, the type of contract and the transport document as well as the time factor. The work already dealt with the **geographical factor** in a different section, above.

Regarding to the **question of transport documents** the approach of the two major international conventions differs. According to the provisions of **The Hamburg Rules**, there is no requirement to use a bill of lading to obtain the application of the mandatory measures in case of the goods have been lost or damaged. On the other hand, the technique of law framing differs. The Hamburg Rules defines the notion of bill of lading itself in Article 1 (7). However, these definitions do not impact the applicability of the liability rules. In other words, the basis of formation of contract or the basis of the type of transport document does not hindrance the application of the mandatory provisions. Thus the wide definition of contract of carriage by sea in The Hamburg Rules is decisive if there a type of contract exists. Only charterparty traffic is expressly excluded both in the Hamburg approach.⁷³ The borderline case shall be decided on the merits and the relevant factors are the intention of the parties and the content of the contract as whole. It must be enhanced, that the exclusion does not apply to a bill of lading holder, not being a charterer. The difference to **The Hague-Visby Rules** is not particularly dramatic as well. According to Article 1 b), only a contract of carriage covered by a bill of lading or any similar document of title as long as it covers carriage of goods by sea is under the mandatory provisions. However, a received for shipment bill of lading or a shipped on board bill of lading must be issued for the shipper's demand, as

⁷² "Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provision of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning a benefit of insurance of goods in favour of the carrier, or any similar clause, is null and void... a carrier may increase his responsibilities and obligations under this Convention."

⁷³ The Hamburg Rules, Article 2 (3)

it states in Article 3 (3) and (7). Thus the requirement of application can be easily fulfilled by the shipper demanding a bill of lading. On the other hand, it might be suffice that the intention of the parties according to the custom of trade covering the carriage in question it is usual to issue a bill of lading.⁷⁴ And finally, the Hague-Visby regime might be applicable in accordance with the paramount clause in the contract of carriage, which is commonly used in the commercial practice.

The third decisive point is the **time factor**. Above all, it must be enhanced that in this field there is an essential difference between the Hague-Visby regime and The Hamburg Rules. **The Hague-Visby Rules** covers the period from the time when the goods are loaded on to the time they are discharged from the vessel. On the contrary, the **Hamburg regime** extends the period of responsibility adding some specifications to it as well. According to Article 4, the mandatory liability of the carrier covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge. Being in charge of the goods by the carrier begins from the time he has taken over the goods from the shipper or any person acting on behalf of him; or an authority or other third party to whom the goods must be handed over for shipment. At the end of the mandatory responsibility lasts until the goods have been delivered by handing over to the consignee; or by placing them at the disposal of the consignee; or by handing over the goods to an authority or other third party to whom it must be handed over.⁷⁵

In fact, contract clauses to place the risk of loading, stowage and discharge on the shipper are not common in liner shipping.⁷⁶ The Hague-Visby regime avoids this problematic question by defining the terms on which the service is to be performed and not the scope of the contract service.⁷⁷ Existence of independent terminal operators⁷⁸ is wide-spread in recent days and, of course, in these cases the carrier is out of the scope of the liability measures. However, if the goods are placed in the carrier's terminal, the mandatory liability regime will apply to him as well.

The last upcoming issue is in connection with the **carrier's vicarious liability**. The carrier is liable to a significant extent for errors committed by different groups of persons who are necessary to perform the carriage. The only exemption is where loading and discharging is

⁷⁴ See Scrutton (1984), pp. 422-423.

⁷⁵ According to the closing paragraph of the article, the reference to the carrier or to the consignee means the servants or agents of them as well.

⁷⁶ On the other hand, for instance English law accepts the validity of this kind of risk passing.

⁷⁷ *Pyrene Co. Ltd. v. Scindia Steam Navigation Co. Ltd.* [1954] 1 Lloyd's Rep 321 QB 328

⁷⁸ Terminal periods might be govern by the Standard Shipping Terms 1996 if the parties so agree or mandatory law might be introduced according to the United Nation Convention on the Liability of Operators of Transport Terminals in International Trade, 1991

undertaken by the cargo interest. This situation is quite usual in tramp trade, in other words, loading and discharging is undertaken by the charterer under the charterparty contract and the issued bill of lading incorporates the charterparty terms. On the other hand, in liner service, mostly the carrier is responsible for loading and discharging. Under these circumstances two questions needed to be clarified. The first one is whether the mandatory liability is induced gradually as the loading is completed by the shipper or when the entire loading operation is completed. Similarly, whether the period ceases gradually or when discharging is commenced. The second matter derives from the fact that The Hague-Visby Rules deals with “terms on which the service is to be performed” and not with “scope of the contractual service”. In other words, if the carrier undertakes to load, then he is under the mandatory responsibility measures of The Hague-Visby Rules. Then again, The Rules is silent if the cargo interest undertakes the loading procedure. On the other hand, taking into consideration the reservation that the carrier is liable for the seaworthiness of the vessel regardless of who is responsible for individual functions. Thus accepting that liability goes hand in hand with allocation of responsibility, the carrier still remains responsible for supervision and care. Summing up this theory, the carrier is not liable for loss of or damage to the goods if the receiver or his servants or agents has discharged them. However, a reservation must be taken regarding to any failure of supervision by the carrier. The same applies, if damage is caused during loading and the shipper is also the receiver. And finally, if damage is caused during loading and the receiver is not the shipper, then the receiver cannot bring a claim against the carrier. On the other hand, if the receiver bases his claim on the bill of lading, it is required to express that loading was undertaken by the shipper in the bill of lading.⁷⁹

7.3. Defining the basis of liability

Above all, both international conventions follow the **presumed fault liability** system. Even though it is not expressly stipulated in The Hamburg Rules, reading together the liability provisions with the Common understanding adopted by the United Nations Conference on the Carriage of Goods by Sea it is unambiguous. Thus the liability of the carrier is based on the principle of **presumed fault or neglect**, therefore the burden of proof rests on the carrier but, respecting certain cases the provision of The Hamburg Rules modify the basic principle.⁸⁰

⁷⁹ See Falkanger-Bull-Brautaset (1998), pp. 320-323.

⁸⁰ This unusual technical approach is connected with the consideration of other modes of transport as well.

This concept consists of two elements such as the above mentioned fault or neglect and **reasonability**. The more strict liability resulting from the reserved burden of proof is a special characteristic of the carrier's liability. The severity of this liability scheme is located between the ordinary liability for negligence and the classic strict liability. According to the interpretation of Article 5 (1) of The Hamburg Rules, the carrier is liable for loss resulting from loss of or damage to the goods being in his charge, if he has not taken all measures that could reasonably be required to avoid the occurrence and its consequences.⁸¹ Consequently, the cargo interest is under the obligation to prove two facts, such as the **loss of or damage to the goods** has occurred **while** the goods were **in charge of the carrier** and, of course, the **scope of the loss**. The mentioned measure of The Hamburg Rules directly refers to the previously detailed time factor.

In order to decide the fault issue of the carrier, first of all, the scope of his obligation must be defined in respect of **taking care to the merchandise**. Whilst The Hamburg Rules does not clarify it, the Hague-Visby regime expressly requires the carrier before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy, to prove proper man, equip and supply the ship fit and safe for the carriage of the goods in question. Summarizing the previous mentioned, a **professional standard**, in other words, ordinary professional diligence relating to the particular trade, goods and voyage are required.⁸² However, in case of container transportation, the carrier is not obliged to inspect internally, unless there is a reason to suspect that the article of transport is packed in a faulty manner. Consequently, this reason must be justified by external control of the container, considering the shipping realities and practice. Thus regarding that the carrier should carry the merchandise with knowledge of deficiencies in the **internal stowage**, he runs the risk not only liability for any damage but also the risk of documentary liability. There are specific measures for dangerous goods and goods which need special care as well. Therefore, deriving the previous mentioned sometimes it is advisable to refuse the carriage by the carrier. The **clear loading instructions** given by the carrier or any person acting on behalf of him, is equivalently important. Thus any ambiguity regarding to it is the carrier's risk as established within the presumed fault liability system.

⁸¹ Some scholars consider this as a stricter measure comparing to the Hague-Visby regime.

⁸² For instance, the carrier was responsible even for the execution of the proper internal stowage, as it was held in the Tor Mercia case by the Swedish Supreme Court. Presumably, the decision was derived from Article 3 (2) of the Hague-Visby Rules, which places a duty on the carrier to load, handle, stow, carry, keep, care for and discharge the goods properly and carefully. On the contrary, in recent days, the general principle established in this case has overturned according to the commercial realities in a reasonable fashion.

The liability system applies the action by the cargo interest found in contract or in tort, as it states in The Hague-Visby Rules Article 4bis (1). The Hamburg Rules follows the same approach amending it with the word “otherwise”, thus also other types of claims are included.⁸³

7.4. Understanding and adaptation of general rule of seaworthiness

The work has already referred to the basic maritime notion of seaworthiness. This subparagraph would like to reveal to the principle in the realm of international conventions.

The Hague-Visby regime expressly requires the carrier to exercise **due diligence** to make the ship seaworthy before and at the beginning of the voyage. On the other hand, the convention does not concretise in details the principle.⁸⁴

The comprehensive principle of seaworthiness is decided on an **objective basis**. It depends on several criteria id est the aim and the year of the contract of carriage, the proper owner or prudent owner concept as well as standards in shipping in the field of administrative rules and proposals⁸⁵. On the other hand, seaworthiness in connection with the commercial field and seaworthiness as a safety standard is not to be discounted either in practice.

Regarding to loss of or damage to the goods concerning to the principle of seaworthiness, the carrier is liable if the loss or damage has occurred through unseaworthiness caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship

⁸³ Article 7 (1) of the Hamburg Rules: “The defences and limits of liability provided for in this Convention apply in any action against the carrier in respect of loss or damage to the goods covered by the contract of carriage of goods by sea, as well as of delay in delivery whether the action is founded in contract, in tort or *otherwise*.”

⁸⁴ Under Scandinavian law, the notion seems to be more precisely defined, as it consists of **technical, voyage and cargo seaworthiness**. Voyage seaworthiness embraces the duty of the carrier to make the vessel duly manned and equipped and the notion of technical seaworthiness refers to the duty to provide hold, cool and refrigerating chambers and all other parts of the vessel in which goods are carried are fit for the reception, carriage and preservation of the goods. It must be enhanced that the Nordic approach uses the principle as a general rule which is not only connected to loss of or damage to the goods, but in any other type of claim by the contracting shipper or any other person who is entitled to sue.

⁸⁵ The administrative regulation of seaworthiness has become incredible relevant in recent days especially regarding to technical and crew conditions and the qualitative standard of the vessel. There are generally accepted standards by international authorities in connection with shipping. Thus these recommendations, for instance by IMO (International Maritime Organization), constitute an objective approach to a reasonable standard and it symbolizes a substantial level of international consensus. Noteworthy that reference to administrative requirements like safety of passengers does not prevent the carrier to be responsible for the loss of or damage to the goods. The subject matter is deeply regulated by international conventions such as the International Convention for the Safety of Life at Sea, 1974 (SOLAS); International Convention on Standards of Training, Certification, Watchkeeping for Seafarers, 1978 (STCW); International Convention on Load Lines, 1966 and the International Management Code for the Safe Operation of Ships and Pollution Prevention a.k.a. International Safety Management Code, 1993 (ISM).

is properly manned, equipped and supplied before and at the beginning of the voyage, as it states in Article 4 (1) of The Hague-Visby Rules. The burden of proof regarding to the exercise of due diligence at the beginning of the voyage is on the carrier under the Hague-Visby regime. The meaning of seaworthiness in the field of loss of or damage to the goods is narrower than the general requirement of seaworthiness of the ship regarding to contract for the carriage of goods by sea. In practice, a claim is often based on the general presumed fault rule and especially that the loss of or damage to the goods have occurred through the unseaworthiness of the vessel before the beginning of the voyage. It deems necessary to clarify that seaworthiness in the technical sense requires the ship to be in a condition to perform the voyage without endangering human life. **Cargoworthiness** rather refers to the condition of the ship that the cargo can be expected to reach the destination in condition described in the bill of lading. The arising circumstances under the latter one may be significant or even crucial for the safety of the cargo without endangering human life.

The question comes up whether negligence at the shipyard might fall on the risk sphere of the carrier. Two available argumentations exist. According to the first one, the carrier is not liable for independent contractors only if they work directly in connection with the cargo carrying operation of the ship. The second approach places the risk on the carrier, but in this case he has the chance to have recourse action against the independent contractors. By examining the rights of participants, the carrier might influence the contract with independent contractors to arrange liability insurance. On the other hand, the cargo interest might have difficulties to claim on the tort basis against the independent contractors. Summarily, the carrier is liable, in general, for the actual carrier, but the liability for the independent contractors would go beyond the control of him.⁸⁶

7.5. Ex lege exceptions

In this field, there is remarkable difference between the international conventions. While The Hague-Visby Rules operates with a detailed catalogue of exceptions, The Hamburg Rules

⁸⁶ There is a debate among the Nordic countries. Except for Denmark, the Nordic legislation systems accept the narrower approach, by other words, the carrier is liable only for those he could exercise **direct control**, such as the actual carrier. On the other hand, the Danish law does consider the liability issue of the carrier regarding to **independent contractors** as well. The British law has the same approach like in Denmark. The leading case is the **Muncaster Castle case**, where the carrier was liable for seawater damage to the goods because of the employee of the shipping company was careless to fix of the inspection covers to two storm valves. On the other hand, if according to due diligence highly qualified and competent persons are applied to carry out inspection and it is done carefully and competently then the carrier is not liable, as it was held in the **Union of India case**.

abolishes it. According to **the Hague-Visby regime** Article 4 (2), neither the carrier, nor the ship shall be responsible for loss of or damage to the goods 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 lock-outs 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 and 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.

The Hamburg regime refers only to loss of or damage to the goods caused by fire, if it arose from the fault or neglect on the carrier's side. The fault or neglect on the carrier's side to take all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences falls under the same judgement. It must be enhanced that the burden of proof falls on the cargo interest and there is no need to include any specific rules on the consequences of the loss or damage having been caused by unseaworthiness of the ship before at the commence of the voyage, as it is required in Article 5 (1).

The catalogue is not the single or final factor to decide the carrier's liability. There is a permanent need to analyse whether the carrier has been at fault or not, even though there is a proof of an occurrence included in the list.

7.6. Specifications to the liability regime: deck cargo and live animals

According to Article 1 c) of The Hague-Visby Rules, the definition of goods does not cover live animals and cargo which is stated as being carried on deck by the contract of carriage and done so. It must be read literally, and there is no option for the carrier whether carry on deck or not. Only a valid agreement may entitle the carrier to have the optional right to carry on deck. Article 9 of The Hamburg Rules expressly defines the circumstances under which carriage on deck is allowed, namely, if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations. If there is an agreement between the contracting shipper and the carrier to **carry the goods on deck**, the carrier is obliged to insert this agreement in the bill of lading or other document evidencing the contract of carriage by sea. The main liability rules with the exceptions and limitation measures applies if the mentioned agreement is inserted in the bill of lading or where the usage of the particular trade or statutory rules or regulations order carriage on deck. On the other hand, in absence of such statement the carrier has the burden of proving that an agreement for carriage on deck has been entered into; however, such an agreement cannot be invoked against a third party who has acquired the bill of lading in good faith.

The Hamburg Rules allows exclusion of liability for deck cargo comparing to the Hague-Visby regime. Nevertheless, this difference is not drastic through the carrier's liability would probably in any case follow the Hague-Visby main liability rules. However, if goods have been carried on deck contrary to an express agreement or when the carrier is not allowed to invoke the agreement against a third party who has acquired the bill of lading in good faith, and deck cargo was lost or damaged, there shall be no right of limitation of liability, as it is considered as act or omission of the carrier with the meaning of Article 8. Above all, **loss** must be caused **solely by carriage on deck** and **causation** must be considered as well. Moreover, there is only a possible loss of right to limitation. Thus the carrier has the chance to avoid liability if he can prove that loss or damage would have taken place even if the goods

had been carried under deck as well as there was a contributing cause to the loss or damage to the goods.

Under Article 1 c) of the Hague-Visby regime, carriage of **live animals** is excluded from the mandatory system. The Hamburg Rules does not exclude it but contains measures regarding to the establishment of liability in Article 5 (5). According to this, the carrier is not liable for loss or damage to the goods due to their inherent vice or due to the act or omission of the shipper; hence these causes do not belong to the risk sphere of the carrier. The burden of proof lies on the carrier, according to the Hamburg regime, if he wants to deny liability on the basis of having complied with any special instructions given to him and the loss or damage could be attributed to the inherent risk connected with the carriage of live animals. Thus, the carrier only needs to prove probable causation. On the other hand, a professional carrier is liable if he should have realised that the given instructions were improper. If the carrier cannot avoid the liability, the cargo interest should prove that all or part of the loss or damage has resulted from fault or neglect on the part on the carrier or any person for whom he is responsible.

7.7. Calculation of amount of compensation and adjustment

By way of introduction, amount of damages may be regulated **contractually** or if the contract in question is silent in the subject matter or mandatory rules set aside contract provisions, then by **statutory instruments**.

It is noteworthy, that The Hamburg Rules does not deal with the subject matter; thus only the Hague-Visby regime should be considered. According to the Hague Rules amended by The Visby Protocol Article 4 (5) 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 lost or damaged merchandise shall be calculated according to the commodity exchange price, or in the lack of such prize, according to the current market price, or in the lack of both, by reference to the normal value of goods of the same kind and quality.⁸⁷

⁸⁷ The three methods include the claimant's **standardize loss of profit** as well. "In practice, the standard starting point with the exceptions accepted, includes a 10% expected profit on the top of the fob value, insurance premium and costs, as this combines with cargo insurance practice." (NMCases 1988. 131 (Rautz) Gulating Court of Appeal, Norway) According to Selvig, a standard approach is more than useful if there is no general or other kind of value at the port of discharge. (See Selvig (1962), pp. 23-27.) The compensation is the result of the difference of the remaining net value and one of the three above mentioned methods.

Proceeding that too remote damages are never compensated, the question arises if **direct costs** and **consequential (indirect) losses** might be considered in this compensation scheme. Regarding to the economical disturbance, two different kinds of approach may be derived from the Hague-Visby regime. It may be interpreted as a **non-exclusive rule** in connection with causality or the **rule of exclusion**, in both case as far as types of damages and causality are concerned. The wording of The Rules, “the total amount recoverable”, denotes there is a supplementary rule to limit the carrier’s liability or no other losses are compensable. On the other hand, there are at least three arguments to consider direct costs. Firstly, it belongs to the general principle of contract law; secondly, it is within the ordinary expectations of the contracting parties; and finally, the carrier’s right regarding to limitation of liability covers any direct and indirect losses. Moreover, the carrier is under the obligation to mitigate the foreseeable loss as well. Thus, accepting the non-exclusive approach, if the required causality obtains the carrier may be liable for direct costs and consequential losses, especially, if he is aware the extraordinary economic interest regarding to carriage of specific goods. Anyway, in practice, it is noteworthy to refer to the general principles on recoverable loss.

The liability scheme considers **concurring causes** regarding to the loss of or damage to the goods. The exception catalogue of The Hague-Visby Rules contains some causes which includes contributory negligence of the shipper, such as act or omission of the shipper or owner of the goods, his agent or representative; insufficiency of packing or insufficiency and inadequacy of marks. According to some scholars and taking the measures literally, the above mentioned causes might probably totally exclude the liability of the carrier.⁸⁸ The Hamburg Rules has a different approach. Article 5 (7) put the duty on the carrier to prove what extent the damage is not attributable to his fault or negligence if the fault or neglect on the part of him, his servants or agents combines with another cause producing loss of or damage to the goods. However, there is no provision to adjustment concerning what is reasonable.

7.8. Limitation of Liability

Already The Hague Rules dealt with the subject matter on that score that **limiting the liability** by the carrier has a long practice in the standard bill of lading clauses. On the other hand, the

⁸⁸ See Wilson (1978), pp. 144-145.

convention had taken into consideration the strong oppose of the cargo interest entering a liberal per package limitation regime. Later on, the originally based limitation sums became too low comparing to inflationary influence, thus The Visby Protocol increased them and promulgated 10,000 francs per package or unit or 30 francs per kilo of gross weight, whichever is higher, of the lost or damaged goods. The Protocol of 1979 modified the measures to SDR (Special Drawing Rights) from the Pointcaré francs, therefore according to the new wording, neither the carrier nor the ship shall become liable for the loss of or damage to the goods in an amount exceeding 666.67 units of account or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher. If the nature and the value of such goods have been declared by the shipper before shipment and inserted in a bill of lading then the case is excluded from the liability limitation measures. The Visby Protocol considered the new, ascending articles of transport like containers and pallets as well. The Hamburg Rules increased again the limits to 835 SDR or 2.5 SDR and it accepts other documents evidencing the contract of carriage by sea beside the bill of lading. Otherwise, there is nothing new in the latter born convention. However, the cargo interest has the right to combine the unit and the kilo limitation in order to achieve the highest possible limitation. It must be pointed out, that the right of limitation embraces claims regarding to loss of or damage to the goods and the article of transport, the direct costs and the consequential losses as well.

The carrier's **right to limitation might be lost**, as it states in Article 4 (5) e) of The Hague-Visby Rules. The carrier is not entitled to the benefits of right to limitation if the damage resulted from the act or omission of the carrier done with the intent or recklessness and with the knowledge that damage would probably result. The Hamburg regime follows the same method, amending delay in delivery as well.⁸⁹ It must be pointed out that both international conventions are debtor with the exact clarification of the carrier's company as well as the meaning of recklessness.⁹⁰

⁸⁹ The Hamburg Rules, Article 8 (1) - (2)

⁹⁰ The carrier company, according to the Nordic approach, embraces the top management, but not the master. And the recklessness regarding to them may occur by **gross omission of control and supervision by the top management of the company** concerning the ship, the master and the crew. Of course, the casual connection is required between the omission and the loss of or damage to or delay the goods in question. Moreover, the recklessness of the actual carrier is considered as the recklessness of the contracting carrier. Under the Nordic standpoint, recklessness is not equal with gross negligence. "The carrier himself might have been grossly negligent with contractual stipulations, but the loss of right to limitation of liability does not necessarily result." (See Honka (1997), p. 72.)

The possibility to **increase the limitation sums** is also given, as it states in Article 4 (5) a) of The Hague-Visby Rules and Article 6 (4) of the Hamburg regime. By reference, The Hamburg Rules also contains this particular in Article 15 (1) o).

7.9. Appendage to the Liability Regime

This subparagraph would like to reveal the role of servants and agents as well as the actual carrier in the liability scheme. Regarding to **servants and agents**, the leading doctrine was maintained by the Himalaya clause⁹¹. According to it, the employee on board may invoke the exception clauses of the contract of carriage as the carrier, on the other hand, an injured passenger on board does not have the same right. The Visby Protocol amended the original Hague Rules in the spirit of the Himalaya clause offering a protection for servants or agents not being independent contractors. Conversely, Article 4bis affords for the aforesaid to avail themselves of the defences and limits of liability which the carrier is entitled to invoke under the Convention.⁹² The Hamburg Rules Article 7 (2) does not repeat the restrictive approach of The Visby Protocol, however, it does not clarify the exact limits, and the terminology occur problems as well. Especially, considering the fact that independent contractor is a common law term and servants and agents are never independent contractors.⁹³

The liability questions regarding to carrier and **actual carrier** came up in the maritime law at least in three aspects, such as in the field of different kind of affreightment contracts, in the realm of pre- and on-carriage as well as under transshipment clauses. The secondly mentioned question is directly in relation with the issuance of bill of lading. In the 1970's The Hague-Visby Rules was introduced in the international ring and defined the carrier as including the owner or the charterer who enters into a contract of carriage with the shipper and Article 3 (3) and (7) defined who is to issue the bill of lading.

⁹¹ Adler v. Dickson [1954] 2 Lloyd's Rep. 267 CA.

⁹² The Nordic approach in the 1970's extended this circle by accepting the independent contractors as well who in general fell under the owner's or **carrier's maritime vicarious liability**.

⁹³ The Finnish Maritime Code requires the aforesaid for whom the carrier is responsible must have acted within the scope of his employment or in the fulfilment of the engagement in order to avail himself of the defences and limits of liability which the carrier is allowed to invoke. By examining the liability levels, the culpa levissima (lenient fault) does not result the establishment of liability, in case of culpa levis or culpa lata (severe fault) the compensation is to be considered due to the prevailing circumstances and dolus eventualis (intentionality) results full compensation. However, these measures are not against the Hague-Visby regime, especially, if it is considered that the international convention is merely a minimum rule of protection and it is connected to defences and limitation of liability.

Under the **Hamburg regime**, the liability scheme regarding to the question of carrier and actual carrier is regulated by Article 1 (Definitions)⁹⁴, 10 (Liability of the carrier and actual carrier) and 11 (Through carriage) and the master's signature in bill of lading in Article 14 (2). All the provisions of the Hamburg Rules governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. On the other hand, the carrier remains responsible for the entire carriage where the performance of the carriage or part thereof has been entrusted to an actual carrier. Moreover, he is responsible for the acts and omissions of the actual carrier and of his servants and agents within the scope of their employment. However, any recourse action as between the carrier and the actual carrier is available. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several, which shall not exceed the limits of liability provided by the Rules. And finally, a bill of lading signed by the master of the ship carrying the goods deemed to have been signed on behalf of the carrier. The provisions regarding to through carriage entitles the contracting carrier to exempt himself from the liability measures only if the contract of carriage by sea explicitly provides that a specified part of the carriage is performed by a named person other than the carrier. The measure is designed by situations when the contracting carrier uses another carrier for pre- and on-carriage.

The question may come up whether the contracting carrier is entitled to **name or rename the actual carrier during on-carriage** or only at the time of the conclusion of contract of carriage by sea. According to the Hamburg regime the carrier concludes the contract of carriage by sea with the shipper. In unambiguous cases, it might help that The Hamburg Rules requires including the name of the contracting carrier in the bill of lading, however it is a *lex imperfecta*.

8. LIABILITY ISSUES OF THE SHIPPER FOR DAMAGE CAUSED BY THE GOODS

8.1. General introduction to issues of shipper's liability

⁹⁴ Accordingly, "actual carrier means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted".

Through the notability of the subject matter, each convention deals with the problem separately. The measures regarding to the shipper's liability do differs on the base of general nature of the goods in question. On the other hand, some questions arise from the measures concerning the goods as well.

8.2. Liability questions regarding to ordinary goods

Shipper's liability sustained by the carrier or the ship refers to damage from the goods provided by the shipper.⁹⁵ Both international conventions recline on the **fault liability concept**. According to Article 4 (3) of **the Hague-Visby regime**, the shipper is liable for loss or damage sustained by the carrier or the ship if it arises from the act, fault or neglect of him, his agent or his servant. **The Hamburg Rules** extends the scope of the provision for servants or agents of the shipper as well by the virtue of Article 12. Under the wording of both conventions, the shipper is protected by the fault concept and the carrier is not allowed to derogate from the shipper's liability scheme by contract. The same applies for any person for whom the contracting shipper is responsible. It must be enhanced, that the contracting shipper has **vicarious liability** for the actual shipper's fault in direction to the carrier. Any claim could be address any person for whom the contracting shipper is liable. In case of tort, the same fault liability concept applies in accordance with the invoked articles. Taking into consideration the wording of The Hamburg Rules the notion **loss** embraces all loss sustained by the carrier, the actual carrier or the vessel. All claims by the actual carrier against the contracting shipper falls within the contract on the score of the actual carrier takes factually the goods in his charge, thus creating a contract. Moreover, plaintiffs may invoke the general tort rules, except for damages born by the vessel. On the other hand, even if amount of shipper's liability is judged by general principles of contract law, there is still room for maritime influence in the discretion to decide to concrete evaluation.

Article 19 (7) of The Hamburg Rules sets an obligation on the carrier or actual carrier to give **notice** to the contracting shipper specifying the general nature of the loss or damage not later than 90 consecutive days after the occurrence of loss or damage or after the delivery of the goods, whichever is latter. The lack of such notice is a prima facie evidence that neither the carrier, nor the actual carrier has sustained loss or damage due to fault or neglect of the

⁹⁵ Contextually, this is the only imaginable option hence through the measures are placed in article loss of or damage to the goods since the Hague-Visby Rules.

shipper or any person acting on behalf of him. Remarkable, the contracting shipper is not allowed to **limit his liability** alike if the carrier is liable.

On the other hand, it may be under question whether the same provisions might be applicable for loss of or damage to the goods **caused by other goods** not being connected with contract of carriage of goods by sea.

The last arising issue regarding the subject matter is the **burden of proof** where international conventions let national legislations to answer the question.

8.3. Special liability rules in the field of dangerous goods

As it states above, liability issue of the contracting shipper sharply differs in the realm of dangerous goods. Both the conventions base on the **direct liability concept**.

The first prerequisite is to define the nature that is considered **dangerous**. None of the legal instruments operate with an exact definition, only The Hague-Visby Rules contains a reference to goods having “an inflammable, explosive, or dangerous nature to the shipment”. National legislations may invoke international safety rules by reference, such as Convention for the Safety of Life at Sea, 1974 (SOLAS) Chapter VII “Carriage of Dangerous Goods” or the International Maritime Dangerous Goods Code (IMDG Code), as well as national public safety rules.⁹⁶ However, the latter reference is not favoured at all through resulting internationally varied solutions and considering other goods to dangerous too under administrative rules. The presumption of non-dangerous goods prevails if they do not fit with the administrative measures.

In accordance with Article 4 (6) of **the Hague-Visby regime**, the **shipper of dangerous goods is liable for** all damages and expenses directly or indirectly arising out of or resulting from the shipment, unless the carrier, master or agent acting on behalf of the carrier has consented with knowledge of the nature and character of the goods. According to the provision, in the precede situation the dangerous goods may at any time before discharging be landed at any place, or destroyed or rendered innocuous by the carrier without compensation.

The Hamburg Rules basically follows the same concept with some added details. It requires the shipper to **mark and label** the goods in question as dangerous. Moreover, the shipper is under the obligation to **inform** the carrier or the actual carrier of the dangerous character of

⁹⁶ Amendments to SOLAS Chapter VII “Carriage of Dangerous Goods” adopted in May 2000 make the IMDG Code mandatory from 1 January 2004.

the goods and to take precautions if necessary. According to Article 13 (2) of **the Hamburg regime**, if the shipper fails to inform and the carrier or the actual carrier does not have the knowledge of dangerous nature of the goods, then the shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment and the goods may at any time be unloaded, destroyed or rendered innocuous, without payment of compensation. It is obvious that the contracting shipper's liability roots two preconditions, such as **non-information in the dangerous character** of the goods in question and **non-knowledge** of the same **on the carrier's or actual carrier's side**. Some further clarifications do need regarding both. First of all, it seems necessary to examine **for whom** the contracting shipper obliged to **give information**. The wording of the Hamburg regime contains alternatively the carrier or the actual carrier. On the other hand, all the above mentioned are accessories through under both alternatives the information must be given to the carrier who actually takes charge of the goods. If once the information has been given, then the contracting shipper is not liable on rules concerning dangerous goods even if an actual carrier in the chain would receive no information and also would not be aware of the dangerous nature of the goods. In this case, liability rules regarding to ordinary goods is applicable. An actual carrier being unaware of dangerous character may directly claim against the previous carrier and so on. The other prerequisite is the **knowledge on the carrier's side**. Noticing the marking or getting information from the previous carrier seems suffice and what the carrier in question should have know is irrelevant. Although professionalism is required from the carrier or the actual carrier, but they cannot be expert of each kind of goods thus they are dependent on detailed information from the contracting shipper. It seems that a qualified limit is required not to concern liable the contracting shipper in case of non-information. However, this issue merely deals with question of proof than measures of substantive law. The contracting shipper falls under the strict liability measures for costs and any other loss if **non- information and non-knowledge** on the carrier's side obtain together. Both international conventions require **shipment** in order to apply this rule. In case of non-information the question comes up whether the lack of notice regarding to goods which may involve **risk or inconveniency** to any persons, vessels or goods may also invoke the liability rules concerning dangerous goods. By closing train of thought, the contracting shipper's liability is judged by principles related to ordinary goods if proper information was given the carrier or the actual carrier had the knowledge about dangerous nature of the goods.⁹⁷

⁹⁷ The Hamburg Rules, Article 13 (3)

The last arising issue is to define the circle of **entitled to sue** and the scope of compensable damage. According to Article 13 (2) (a) of The Hamburg Rules, the contracting shipper is liable to the carrier and the actual carrier for costs and any other loss resulting from the carriage of dangerous goods. Hence, there is a contractually based liability between the actual carrier and the contracting shipper. The **scope of compensable damage** goes beyond physical damage suffered by the carrier or the actual carrier or the corresponding value and includes any occurred loss until causality rules obtain.⁹⁸ On the other hand, the difficulty to earn compensation for pure economic loss depends not only on causality, but also in proof.

8.4. Provisions to the goods

It is obvious that the carrier being in charge of the goods needs to take some **preventive measures** in risky situations. Therefore, he is entitled by both conventions to take certain arrangements. Thus, if the contracting shipper has omitted to inform the carrier or the actual carrier according to the above mentioned, the carrier is entitled to unload, destroy or render innocuous the goods, as the circumstances may require, without any liability to pay compensation.⁹⁹ Even though the carrier is not liable for damages, he is required to **certain degree of care** to take the least destructive measure. On the other hand, this rule may not be invoked if the contracting shipper has fulfilled his obligation regarding to information and only the actual carrier is unaware of it. Thus omission between the carriers in chain is not considered in aspect of the contracting shipper's liability, if once he has sent the required information in the beginning. Of course, there is no prohibition for the carrier or the actual carrier to proceed as above, but liability issues will be decided according to general principles in the liability system.

Even the contracting shipper has given proper information and the carrier or the actual carrier also is aware of the dangerous character of the goods, they may cause **actual danger for person and property**. Under both international conventions the carrier is entitled to dispose without payment of compensation.

⁹⁸ The right of disposal of the goods makes the issue clear. It might occur that the carrying vessel has to deviate and unload the dangerous goods or interrupting loading to unload those goods. It is more than obvious that there are costs to compensate on the carrier's or actual carrier's side.

⁹⁹ The Hague-Visby Rules, Article 4 (6); The Hamburg Rules, Article 13 (2) and The Finnish Maritime Code, Section 41, Article 1

However, the carrier is out of fault, if the **reason of loss lies on the goods or the contracting shipper**, as it states in Article 4 (2) i) and m) of The Hague-Visby Rules. According to the mentioned articles, the carrier is not responsible for any loss or damage arising or resulting from act or omission of the shipper or owner of the goods, his agent or representative; as well as for wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods. Also defects exception p) is informative and reading it together with the main principle in Article 4 (2) q), the carrier is not responsible for actual danger arising after the goods have been handed over for carriage of goods by sea. On the contrary, the carrier is liable if it lies on his fault to cause the goods to become an actual danger and thus he needs to take protective measures.

Notwithstanding, the carrier still remains liable for paying contribution in **general average** even if he is out of liability according to the above mentioned. This is explicitly drafted in Article 4 (6) of The Hague-Visby Rules and in Article 13 (4) of the Hamburg regime. The duty obtains only if the carrier an actual danger has caused the carrier to unload, destroy or render innocuous the goods. This contribution is merely connected to liability due to loss of or damage to the goods or delay in delivery.

9. DELAY IN DELIVERY

Above all, The Hague-Visby Rules seems ambiguous in the subject matter, hence national legislations could reline upon their shipping practice and some measures of the Hamburg regime. The provisions regarding to delay in delivery are substantially complied with the provisions of loss of or damage to the goods and the only difference comes up on the grounds of the nature of the damage. If **delay slew round to damage to or loss of** to the goods then the measures regarding to the latter one prevails. Nevertheless, even if delay means **pure economical loss** with its independent meaning the main rules concerning to loss or damage applies. The Hamburg Rules has introduced a combined liability system, where the carrier shall be liable for delay in delivery as well as the loss of and damage to the goods. In accordance with Article 5 (1) of the Hamburg Rules, the carrier is liable for loss resulting from delay in delivery, if the occurrence which caused the delay took place while the goods were in his charge at the port of loading, during the carriage and at the port of discharge. However, the carrier is entitled to prove that he or his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

Delay in deliver occurs if the goods have not been delivered at the port of discharge as it provided in the contract of carriage within the agreed time and in the lack of such agreement, within the period of carriage which, regarding the circumstances of the case may reasonable be required of a diligent carrier.¹⁰⁰ The **conversion form delay in deliver to total loss** occurs after 60 days following the expiry of the agreed or reasonable time of delivery, as it states in Article 5 (3) of The Hamburg Rules.¹⁰¹

It must be clarified that two different kind of delay exist, such as delay in delivery and other delay than delay in delivery. It seems that any delay after the conclusion of the contract of carriage of goods by sea may be transformed into **delay in delivery**. On the other hand, delay at the port of loading is regarded as other delay even in connection with the carriage of goods by sea and the carrier's liability is judged in the same way as in case of delay in delivery. The split hides in the mandatory nature of the provisions. While delay in delivery belongs to the mandatory measures, other delay is regarded non-mandatory with the lack of the catalogue of the ex lege exceptions. Of course, the carrier still have the chance by contractual terms to point out that he is not liable for other delay or has the equivalent right of limitation as in case of loss of or damage to the goods or delay in delivery. This contractual stipulation is valid even against the bill of lading holder or any other third party.

The Hamburg Rules deals with **limitation of liability** concerning the subject matter. Article 6 (1) b) of the Hamburg regime put the limit to two and a half time the freight payable for the goods delayed but not exceeding the total freight payable under the contract of carriage of goods by sea. According to the limitation measures of the Hague-Visby regime, the limitation is calculated in accordance with the ceiling considering the goods as a whole and no value for the goods at the port of discharge is needed. The limitation measures of the Hamburg regime may be more beneficial for the carrier then the adoption of the physical loss or damage limitation into pure delay liability situations. After the conversion time elapsed the cargo owner has the optional right to refer to delay or total loss. However, the basis of liability is the same; the difference is remarkable that delay in delivery is attached to pure economic loss and not the value of the goods. Additionally, the question may rise up who is entitled to the benefit of the odds between the limitation sum and the possible higher value of the

¹⁰⁰ The Hamburg Rules, Article 5 (2)

¹⁰¹ The amount of 60 days might be problematic under the commercial realities, especially in case of tram shipping or deep sea carriage with transshipment. The previous Nordic approach did not specified the time of delay which might be more convenient from the business point of view. Anyway, the behind reason of conversion is the time of delivery and the conversion time expired. Professor Honka suggests taking into consideration de lege ferenda not to allow the conversion to the total loss if the carrier can prove that the goods have not been lost.

merchandise, after the goods have been recovered once the election of the total loss. In the realm of international sale of goods the seller is liable to return the purchase price and pay interest if the contract is avoided due to the seller's breach of contract.

10. DEVIATION

In the beginning of the examination of the subject matter three issues comes up:

- i. The first one is when **deviation exists** at all.
- ii. The second one derives from the previous one, in closer, what substantive rules are applicable for the **carrier's liability** if deviation is accepted.
- iii. And finally, the **scope of the mandatory law** is also under question, by other words, this defines the limits of freedom of contract.

According to The Hague-Visby Rules Article 4 (4), the carrier is not liable for loss or damage resulting from any deviation in saving or attempting to save life or property at sea or any reasonable deviation.¹⁰² Article 5 (6) of the Hamburg regime merely refers to measures to save life and reasonable measures to save property at the sea. Thus this provision do not require the reasonability test concerning the first issue, it is suffice that the purpose of deviation was to save life. Then again, loss of or damage to the goods occurring the above mentioned reason does not result liability in the carrier's side, except for in general average.

Unreasonable deviation under **The Hamburg Rules** would be interpreted to open the way for the main liability rules. The carrier would be under the obligation that loss of or damage to the goods or delay was not occurred by his fault or neglect. There is no different strict liability principle regarding to deviation and requirement of causality between the cause and the loss exist. The loss of right to limitation is judged by the general intention-recklessness rule maintained in Article 8. However, there is still room for the national interpretation. The carrier is liable for unreasonable deviation, unless proving that loss would be occurred even without deviation. On the other hand, because deviation is an intentional decision of the carrier, therefore, the reasonability test may be also applicable, except in the realm of saving life at sea. Consequently, the main liability concept deems to be connected with some degree of unacceptable behaviour by the carrier. This argumentation carries back to the main liability concept; subsequently, deviation is also decided by the casual connection. However, the

¹⁰² The Hague-Visby regime also contains "saving or attempting to save life or property at sea" among the catalogue of ex lege exceptions.

carrier is liable for any loss arising during an unreasonable deviation; there are also certain limits in the realm of carrier's liability in the causality rules. The last arising question is the carrier's **right to limit his liability**. The terminology of The Hague-Visby Rules refers to "any event" regarding to the subject matter in Article 4 (5) a). On the contrary, the carrier loses his right to limitation in case of unreasonable deviation.

Summing up, deviation may contain delay, or more often, performance without due dispatch. "In any case, deviation and delay often go hand in hand and loss of or damage to the goods as well."¹⁰³ On the other hand, in case of reasonable deviation there is no delay under the legal aspect. Of course, this does not apply if the contract of carriage by sea contains an agreed fixed time for delivery. Both international conventions are silent in many questions regarding to deviation. "A firm international approach to deviation and liability would have been the only way of securing harmonization... It would have sufficed to explicitly state in The Hamburg Rules that any deviation would fall under the delay liability rules... In liner traffic the trend seems to be, however, that geographical deviations are accepted as part of commercial necessity and for that reason liability on that basis is rare. In voyage chartering the situation is somewhat different due to the nature of that type of shipping."¹⁰⁴

11. NOTICE PROVISIONS UNDER COMPARATIVE PROSPECTIVE

In general, the notion of **notice** covers a given form of information from one contracting party to the other one. Wide range of notice does exist, and the notice regarding to loss of or damage to the goods or delay are only one. The duty to inform is derived from the basis of general contract law and the loyalty between the contracting parties. Omission of notice might lead to liability in damages to cover that economic loss which occurred by the omission. This refers to an independent liability and the carrier is liable for the additional loss, which could have been avoided by proper notice, arising on the cargo interest's side.

Article 3 (6) of **The Hague-Visby Rules** upholds the **requirement** giving notice to the carrier or his agent at the port of discharge before or at the time of removal of the goods into the custody of the person entitled to delivery. The removal of the goods into the custody of the person entitled to delivery is significant and it is not suffice from giving of notice point of view if goods stay at an independent terminal operator or custom authority. Written form is

¹⁰³ See Honka (1997), p. 106.

¹⁰⁴ See Honka (1997), p. 107.

required concerning to the notice and the **general nature of loss or damage** at the time of the goods are removed to the custody of the person entitled to delivery must be clarified therein. In case of not apparent loss the notice must be given in three days from the removal of the goods. If notice is not given it is considered as a prima facie evidence that the goods are in the condition as it states in the bill of lading. On the other hand, notice in writing is not required if the state of the goods has, at the time of their receipt, been the subject of joint survey and inspection or if total loss has been occurred when removal of goods is simply impossible. **The Hamburg regime** introduced a more extensive approach, however, the basic concept of notice is pretty the same to The Hague-Visby Rules. Regarding to Article 19 (1) the notice of loss or damage, specifying the general nature of it, must be given in writing not later than the working day after the day when the goods were handed over to the consignee. Handing over is deemed to be a prima facie evidence of the delivery as being described in the transport document, or if it has not been issued, the delivery of the goods in apparent good condition. In case of non-apparent loss or damage the time for notice is extended to 15 consecutive days. The last provision is expressly in conflict with the Hague-Visby regime. Notice in writing is not needed if loss of or damage to the goods is ascertained during joint survey or inspection by the parties. The Hamburg regime places the requirement on both the carrier and the consignee to give all reasonable facilities to each other for inspecting and tallying the goods. **The Hague-Visby Rules** is silent in case of **delay** in delivery in general and concerning the subject matter as well. Nor does so **The Hamburg Rules**. It requires notice in writing to the carrier within 60 consecutive days after the day when the goods were handed over to the consignee, otherwise, no compensation shall be payable for loss occurring from delay in delivery. The Hamburg Rules contains a few other measures concerning the situation of the **carrier and actual carrier** as well as the **shipper** in the realm of notice provisions. According to Article 19 (6) of The Hamburg Rules, notice being given to the actual carrier has the same effect as if it had been given to the contracting carrier and vice versa. On the other hand, if notice is not being given in writing by the carrier or actual carrier to the shipper not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods, whichever is later, is a prima facie evidence that neither the contracting carrier, nor the actual carrier has sustained no loss or damage due to the fault or neglect of the shipper, his servants or agents.¹⁰⁵ The notice given to a person acting on the contracting carrier's or actual carrier's behalf, including the master, or to a person acting on the shipper's

¹⁰⁵ The Hamburg Rules, Article 19 (7)

behalf is deemed to have been given to the carrier or the actual carrier or to the shipper, respectively.

12. REGULATION OF TIME BAR

The subparagraph deals with time obstacles to bring an action for indemnity. According to **The Hague-Visby Rules**, both the carrier and the ship shall be liable for loss or damage only within one year after delivery of the goods or the date when the goods should have been delivered. Of course, by mutual agreement the concerned persons are entitled to extend the time limit after the cause of action by agreement. Moreover, The Visby Protocol added that action for indemnity may be brought even after the expiration of the above mentioned one year in accordance with the *lex fori*. However, the allowed time shall be not less than three months when the person bringing such action for indemnity has settled the claim or has been served with process in the action against him.¹⁰⁶ The mentioned three months period applies if the national legislation is silent in the subject matter and even if settlement has taken place after the expiration of the main one year period.

The difference under the **Hamburg legislation** is obvious. It introduces time bar for judicial and arbitral proceedings regarding any action relating to carriage of goods. The limitation period is two years which commences on the day on which the carrier has delivered the goods or part of it, or, in case of no-delivery, on the last day on which the goods should have been delivered. Incidentally, the commencing day of limitation period is excluded. The person against whom the claim is made may extend the limitation period in writing at any time during the running of the limitation period. Action for indemnity may be brought after the expiration of the limitation period if it is within the time allowed by the law of the State where proceeding is instituted. The allowed time shall not be less than 90 days from the day when the person brought action for indemnity has settled the claim or has been served with process in the action against him.¹⁰⁷ Manifestly, the two conventions differ from two aspects. Firstly, they diverge in the determination of the limitation period, which results conflict. And furthermore, The Hamburg Rules embraces claims by the cargo interest or by the carrier as well, which is not in direct conflict with the Hague-Visby regime.

¹⁰⁶ The Hague-Visby Rules, Article 3 (6) and (3) 6bis

¹⁰⁷ The Hamburg Rules, Article 20 (1) - (5)

It is noteworthy to examine closer the measures and understanding of extension, suspension and interruption. The **possibility of extension** by the person against whom a claim is made is opened any time during the running of the limitation period by a declaration in writing to the claimant, which may be further extended by other declaration(s). A clear intention of the debtor is needed to extend the time bar, but no other formalities are required. On the other hand, it must be considered that each carrier may extend the limitation only for his part. In the commercial practice extension is quite common as one year is too short for a final and binding arrangement outside the court. Under the Hamburg point of view time bar rules are deemed to be the subject of **interruption** and **suspension**¹⁰⁸, whilst the Hague-Visby regime is ambiguous in the subject matter. Exceptional circumstances shall prevail before suspension is deemed to have been granted impliedly. Legal certainty demands to respect the set time bar. Concerning interruption of time bar, instigation of a proper proceeding before the court interrupts the running of period.

Summarizing the above mentioned, the Hague-Visby regime regulates merely the time aspect of time bar issue and does not take into consideration the flexible nature of the subject matter. The general nature of time bar provisions, both procedurally and substantively, as well as extension, suspension and interruption should be developed on an agreed international basis.

13. DOCUMENTARY LIABILITY IN CONNECTION WITH BILL OF LADING

13.1. Fundamental liability measures and problems

Under The Hague-Visby Rules as well as The Hamburg Rules, the **carrier** is **liable** for **misrepresentation** and both conventions contain the **estoppel rule** in accordance with it. "Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described ... However, proof to the contrary shall not be admissible when the bill of

¹⁰⁸ In the legal definition of **interruption** and **suspension** the work would like to re-ly on Laudrup's definition. "Interruption occurs ... where proper legal steps are initiated pursuant to the laws of the country in which the case is heard, or through an express agreement between the parties to that effect. Suspension occurs however as a result of another prejudicing conduct of relevant party or parties." (See Laudrup (1996), pp. 427-428.) Moreover, he creates five categories in the realm of suspension such as debtor's conduct denotes to suspension, debtor's procedural conduct implies suspension, agreed extension impacts third parties, parties have entered settlement negotiations and finally time bar is unreasonable.

lading has been transferred to a third party acting in good faith."¹⁰⁹ Likewise drafts The Hamburg Rules maintaining that " the bill of lading is prima facie evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading: and proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein."¹¹⁰ It is remarkable that the original Hague Rules dealt with the issue as a prima facie evidence and only the amendment of The Visby Protocol has introduced the conclusive evidence approach, as it states above.

The **approach of the Scandinavian countries** has improved the internationally based measures by introducing a **two-tier system**¹¹¹. Thus misrepresentation of the carrier can be transformed into two situations, such as the fictional damage alternative as well as the pure misrepresentation. This kind of two-tier system is peculiar in the Nordic legislation; otherwise it is not senseless to adopt it in the examination of The Hague-Visby Rules as well as The Hamburg Rules. The previous refers to carrier's misrepresentation concerning the goods if they had been lost or damaged during his liability period while the latter is an independent system based on those misrepresentations, including other misrepresentations in bills of lading than those connected with the goods. However, the claimant is entitled to the right of election. The reason of the specified and detailed provisions in misrepresentation is the bill of lading holder's economic loss is not all the time covered by insurance.

13.2. Regulation of the fictional damage alternative

Above all, the base in the subject matter is **content of the bill of lading**. According to Article 3 (3) of the Hague-Visby regime, the bill of lading must contain, on the shipper's demand, the leading marks necessary for identification of the goods, the number of packages and pieces, or the quantity, or the weight as well as the apparent order and condition of the goods. Measures of The Hamburg Rules do slightly differ. The general nature of the goods, the leading marks necessary for identification, express statement to the dangerous character of the goods, the

¹⁰⁹ The Hague-Visby Rules, Article 3 (4)

¹¹⁰ The Hamburg Rules, Article 16 (3)

¹¹¹ The two-tier system is accepted in whole Scandinavia, however, appellation differs. The Norwegian legal theory deals with "implied transport liability" and "liability for incorrect description". The Finnish approach designates the notions as "the fictional damage alternative" and "the pure misrepresentation alternative". Both appellation covers the same essential meaning, but henceforward the work uses the Finnish wording regarding to the fact that this Code creates the base for the comparison.

number of packages and pieces, and the weight of the goods or their quantity as well as the apparent condition of the goods must be included in the bill of lading without the shipper's demand.¹¹² Consequently, the carrier has an extended obligation to check information by the shipper in order to avoid liability for misrepresentation.

The second arising question is the regulation of **reservations** and **evidentiary effects**. The Hamburg Rules Article 16 merely concerns the carrier's liability for misrepresentation concerning the goods, partly as a prima facie alternative between the carrier and the shipper and partly as conclusive evidences the carrier and the bill of lading holder. The bill of lading holder is required to act **in good faith in reliance** on the description of the goods in the bill for applying the estoppel rule. By examining closer the measures of The Hague-Visby Rules the difference is glaring. It includes evidence on the reliance of the bill of lading holder on the description of the goods, so it is merely an independent condition comparing to good faith. In general, this requirement is fulfilled when the bill of lading is used for financial purposes, such as paying the proper price and on the contrary, the own inspection by the bill of lading holder before shipment may be regarded as lack of reliance.¹¹³ The question comes up whether the wording of The Hague-Visby Rules as well could interpreted as including an implied reliance requirement. Under the old English common law concept three conditions are required to meet in order to apply the estoppel rule, such as the statement represented a fact, the maker of the statement intended that the representation should be relied upon and the part referring to the application of estoppel relied upon the representation and has suffered loss in accordance this reliance.¹¹⁴ However, the second and the third requirements do not meet with the wording of The Hague-Visby Rules. Reading together the exact wording of The Hague-Visby Rules with the previous examination of common law doctrine it is obvious, that the inclusion of the reliance requirement is not supported. The background idea of the convention was definitely not to apply the common law predictions to relive the bill of lading holder from such burdens.¹¹⁵

¹¹² The Hamburg Rules, Article 15 (1) a) and b)

¹¹³ In commercial practice it is pretty rare to use the bill of lading for any other purposes than financial. Then again, it may be used as merely a transport document as well, for instance, if goods are moved within the same company, or when they are prepaid or sold on credit. In these cases reliance may fail, but not good faith. These issues symbolize the importance of the question. Consequently, the question might come up if the bill of lading holder should be regarded as a third party under the above mentioned circumstances.

¹¹⁴ See Scrutton (1984), p. 112-113.

¹¹⁵ See Honka (1997), p. 121.

According to The Hamburg Rules Article 16 (1) ¹¹⁶ **specific reservations** concerning the particular of the goods are required, if the carrier **knew about or had reasonable grounds to suspect inaccuracies** concerning the goods. The carrier is required to specify the inaccuracies or the absence of reasonable means of checking in the bill. It must be enhanced that formulation like “weight, measurement... unknown” does not meet with the specification of inaccuracies requirement. Hence if the carrier makes specification due to the inaccuracies, he will not be liable due to misrepresentation as well as if he neither knew nor had reasonable ground to suspect the goods. Under Article 3 (3) The Hague-Visby Rules¹¹⁷, the carrier may insert specific reservation if he has reasonable ground to suspect the inaccuracies or had no reasonable means of checking. In spite of the textual meaning of the convention, the carrier is not allowed to omit the particulars, albeit he may insert an appropriate reservation. There is also a requirement to provide **the apparent good condition of the goods in the bill of lading**. There is a presumption that the goods were in apparent good condition if the carrier fails to note it on the bill of lading, as it is maintained by Article 16 (2) of The Hamburg Rules.

Deriving from the above mentioned the question comes up **what extent the carrier is obliged to check the particulars** provided by the actual shipper. According to the general commercial practice, the particulars of the goods are provided by the actual shipper to the carrier who amends the bill of lading with other information. Of course, requirement of professionalism still lies on the carrier. In case of container transport, it is very often that the forwarding agent is involved by instructing the shipper for loading. The forwarding agent, providing his house bill of lading, may receive the goods separately and then the consolidation may take place in charge of him. On the other hand, the carrier is liable for the forwarding agent, if he acted on behalf of the carrier. These circumstances must be taken into consideration to judge the carrier’s liability towards the bill of lading holder. Without dwelling the problem in very deep, the recent court practice accepts that the obligation on the carrier checking the particulars is not available in modern liner traffic, especially in the field of container transport.

¹¹⁶ "If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over, or where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person must insert in the bill of lading a reservation specifying these "

¹¹⁷ "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 "

By summing up the subject matter, in case of misrepresentation there is a fictional approximation if **damage or partial loss would have occurred** while the goods were **in charge of the carrier**. If the damage or the partial loss had occurred already before this time, then the carrier is unable to invoke the general neither no fault measures nor the ex lege exceptions. **Liability is limited**, however the carrier is not allowed to refer the ordinary defences of no fault or ex lege exceptions. Basically, this kind of **liability concept based on fault**. Anyway, whether the actual shipper has liability towards the carrier for the particulars covers another question.¹¹⁸

13.3. Understanding the pure misrepresentation alternative

As it states above, under **The Hamburg Rules** Article 15 (1) (f) the carrier is required to insert the **port of loading** as well as **the date** on which the goods were taken over by him to the bill. Furthermore, Article 15 (2) demands the **name of the ship** or ships and date or **dates of loading** in case of shipped on board bill of lading. And finally, Article 15 (3) put down that absence of the required particulars does not affect the legal character of the document as a bill of lading. On the other hand, **the Hague-Visby** regime is silent on most of these questions. Article 3 (7) offers simply **optionally** to the carrier to note on the shipped on board of lading the name or names of the ship or ships and the date or dates of shipment. Moreover, **nor** The Hamburg Rules **neither** The Hague-Visby Rules contain any **sanctions due to pure misrepresentation**.¹¹⁹ The exemptions included in The Hamburg Rules Article 16 (4) and

¹¹⁸ See Honka (1997), p. 126.

¹¹⁹ Hence, these issues remain being clarified by national legislations. **The Nordic approximation** took into consideration the necessity to clarify the legal meaning of misrepresentation by legislation as well as the improvement of negotiability of the bill of lading. The Finnish Maritime Code follows The Hamburg Rules regarding to the contents of the bill of lading. The particulars together with the essential information requirements for the document to be regarded as a bill of lading reveal that omission or active wrongful information can be misleading to the bill of lading holder. According to the mandatory protective rule, the third party has the right to cover his loss by the carrier, if this loss has occurred by acquiring the bill of lading in reliance on the particulars. The carrier's fault liability may come up only if he realised or ought to have realised the misleading nature of the particulars in the bill of lading. It is not desirable at all to overlap the fictional damage alternative with the pure misrepresentation. There are to remarkable differences divorcing them. Firstly, under the pure misrepresentation alternative the carrier is liable only if he knew the misleading nature of the particulars in the bill of lading and hence he knew or should have known that it was misleading for the bill of lading holder. This principle requires the carrier to check the information and goes beyond the above mentioned liability issues. The background was not to entitle the carrier to limit his liability. Secondly, the reliance requirement explicitly must be considered under the pure misrepresentation alternative. **Calculation of the amount of damage** also differs from the fictional damage alternative. The positive contract interest way of thinking embraces direct costs and loss of profit and is mainly used in ordinary breach of contract. However, the pure misrepresentation alternative invokes the negative contract interest calculation including negotiation costs and other costs as if the contract had not been concluded. Loss of profit is not considered, only economic loss

Article 16 (3) (b). The previous covers that without mentioning the freight and demurrage is unpaid in the bill of lading is a prima facie evidence that the consignee is not liable to pay and similarly proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including the consignee, who in good faith has acted in reliance on the description of the goods therein.

13.4. Role of the shipper in documentary liability

The shipper's role impacts the carrier's liability in fictional damage alternative as well as in pure misrepresentation. It must be considered that the information establishing the basis for carrier's liability is provided by the shipper. The background of the measures is to indemnify the carrier against wrongful information. Article 3 (5) of The Hague-Visby Rules contains a **guarantee liability for the shipper** concerning the particulars of the goods as furnished by him. The Hamburg Rules drafts similarly with some further clarifications under Article 17 (1), as stated so that "the shipper must indemnify the carrier against the loss resulting from inaccuracies in such particulars. The shipper remains liable even if the bill of lading has been transferred by him."¹²⁰

However, a classic commercial problem could arise whether a specific reservation could be an obstacle for the actual shipper using bill of lading for financial or other essential purposes. By using a separate **letter of indemnity** the actual shipper indemnifies the carrier against any kind of liability through a clean bill of lading. Under the letter of indemnity the actual shipper promises to indemnify the carrier for any liability which arises out of the issuance of a clean bill of lading. Nevertheless, another kind of document, the **back letter** is also commonly issued in a variety of situations like clearly fraudulent or if a reasonable doubt exists whether a clean bill of lading should be issued.¹²¹ There is a further step in The Hamburg Rules regarding the connection between letter of indemnity and defrauding. Under Article 17 (2) – (4), the letter of indemnity issued by the shipper is not valid as against the shipper if the bill of lading was issued by the carrier without necessary reservations concerning the goods with the

which is connected to what he plaintiff expectedly would have done knowing the misrepresentation and the legal remedies he would have had at the time of disposal. Damages and the buyer's right for price reduction impacts the amount of compensation. Finally, the payable compensation may be higher if the pure misrepresentation alternative is invoked in the claim through the fluctuation of the value of the goods at the port of discharge is not considered as under the fictional damage alternative.

¹²⁰ In parallel The Hague-Visby Rules, Article 3 (5) drafts that "... the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars."

¹²¹ See Falakanger-Bull-Brautaset (1998), p. 338.

intention to defraud a third party, including the consignee, who has acted in reliance on the description of the goods in the bill. Anyway, it seems hard to establish the carrier's intention to defraud, moreover, if the actual shipper has taken part in defrauding a third party it is a confusing result that he would not be liable for.¹²²

13.5. Liability questions in connection to delivery of the goods

According to the general custom of international trade, **delivery of the goods** comes off against the presentation and surrender of one of the original bill of lading with a continuous chain of endorsements, unless it has been issued to bearer or there is a blank endorsement.¹²³ It is more than usual to surround three pieces of the bill of lading although one also would suffice. Under these circumstances, if the consignee proves his authority by presenting one original bill of lading is suffice for delivery at the place of destination. The Code also deals with special situations such delivery at any other place than place of destination, several consignees claiming delivery, delivery in case of losing the bill of lading and double endorsement of an original bill.

There are two issues being very insistent, such as **stoppage in transitu** and wrongful delivery. The first obtains in case of buyer's insolvency or failure to fulfil his obligation under the contract of sale and entitles the seller to stop the goods being handed over to the buyer. However, the measure may not be invoked against a third party who has acquired an order or bearer bill of lading in good faith. On the other hand, concrete problem may arise on the carrier's side if the carrier is claimed on stoppage in transitu and on delivery as well as to decide whether the goods are in the buyer's possession.

Two alternatives may arise concerning to **wrongful delivery**. Deliver can be performed to a wrong person and, secondly, the problem may arise with the preconditions under which the consignee is entitled to the goods, by other words, the consignee has no right to claim delivery under the bill of lading rules. Here and now must be expressed that carrying the bill of lading in "the ship's bag" and handing over to a person who then acquires delivery is not in accordance with the negotiable nature of the bill of lading. The requirement to present an

¹²² See Honka (1997), p. 132-133.

¹²³ The question might come up whether the surrender and the presentation of the bill of lading are necessary if not to order bill of lading has been issued through there is only one named consignee and the carrier has the information about him. Under the delivery point of view this is pretty similar to sea waybill; however the Nordic approach does not obtain difference on this basis. In issuance of a not to order bill of lading, the person claiming delivery shall prove substantive authority to receive the goods.

original bill of lading obtains even inspection of the goods by the consignee. The right to inspect is provided only the rightful holder of the bill of lading. Wrongful inspection may be risky on the carrier's side attributing that contract of sale of goods could give rise to the price reduction or be declared avoided by the buyer because of the seller's breach of contract. Another quite often arising problem is the **time gap** between **arrival of the goods** and **arrival of the bill of lading**. It may be dissolved by a letter of guarantee where the guarantor promises to indemnify the carrier for any liability might arise due to inspection or wrongful delivery. Another solution may be to issue a non-negotiable document as well as to issue the bill of lading at the port of discharge by the carrier's authorized agent and hand it over by the actual shipper's authorized agent. The third solution is namely the destination bill of lading. The last issue concerning intentional wrongful delivery is **calculation of the loss** that the seller has suffered. The carrier's liability in direction to the seller in case of wrongful delivery is based on the invoice which covers the loss that the seller has suffered due to the buyer did not acquired the bill of lading. On the contrary, the carrier is not liable if non-acquirement of the goods has occurred due to insolvency of the buyer, likewise he is not liable if the reason to reject the goods was the buyer did know about their defect. The standpoint of evaluation what the buyer would have done if the goods would have been delivered against the issuance of the bill of lading. The invoice value must be diminished accordingly defectiveness of the goods, because the seller should not reach better position under the contract of carriage by sea than the contract of sale of goods. The burden of proof, however, lies on the carrier in non-conformity of the goods in relation to the sale. After the carrier has paid compensation to the seller, he may have claim against the buyer or the guarantor of the buyer.

IV. THE SEA WAYBILL

Hence the sea waybill is a commercial reality and wherefore The Hamburg Rules has also a basic rule as to their legal status. By **definition**, this a kind of transport document without negotiable character and without the precondition to present the original form of it for delivery. The latter particularity has special importance in short sea trade where goods typically arrive as fast as the document or even faster. The sea waybill evidences the contract of carriage by sea; contains an acknowledgement that the goods have been received for carriage and an undertaking by the carrier to deliver the goods to the consignee named in the

document. There is no need to enhance the security of transfer neither to protect the holder of the document through the non-negotiable character.

By examining closer the **delivery** question concerning sea waybill in The Hamburg Rules, it becomes clear that the classic concept as delivery against presentation and surrender of the document is not included in the provisions regarding to sea waybill.¹²⁴ Denomination of the consignee is required to accept the document as a sea waybill. Through the non-negotiable character of the sea waybill, the question may arise how the contracting shipper can issue new instructions concerning delivery to the original consignee. After the issuance of the sea waybill the contracting shipper has a continuous right to give instructions concerning the goods, likewise changing the consignee or even interrupt the carriage of the goods. However, two preconditions are required on the contracting shipper's side to be entitled for giving such instructions. Firstly, he shall not waive this right against the carrier and secondly, the consignee must have not asserted his rights to the goods. The first prerequisite is required to be explicit.¹²⁵ On the other hand, there is no formal requirement to assertion of the right, but any inspection in the terminal or on board may be regarded as an assertion of the consignee's right to the goods. The actual shipper has the right to require a bill of lading, except for the contracting shipper has waived his right to appoint another consignee. Two questions may arise in this field. Above all, the provision presupposes that the contracting shipper and the actual shipper are the same or if the actual shipper is a different person to the contracting shipper, effectively and simultaneously has waived his right to require the bill of lading. Beside this dilemma it is also ambiguous how strong the actual shipper's mandatory right to require a bill of lading versus the contracting shipper's waiver to appoint a new consignee. The carrier is liable to the consignee for **wrongful delivery**. The carrier does not bear particular risk in delivery if the consignee has not paid the purchase price for the goods. Problems in connection with sea waybill are normally in connection with making a claim for delivery by the wrong person. Paradoxically, issuance of a non-negotiable document places obligation for the carrier to use extreme care in the verification process meanwhile under the bill of lading it is suffice to check the document itself. On the other hand, such problems arises pretty rare thanks to the fact that in general liner system both the consignee and the

¹²⁴ The Hamburg Rules Article 1 (7) in comparison with Article 18

¹²⁵ A waiver by the contracting shipper may be necessary in cash agreements whereas the consignee may execute immediate payment and he is convinced of delivery by knowing the carrier will not receive new valid instructions to the consignee. Non-waiver may be necessary if the bank finances the sale. In this case, the bank demands having the chance to require the contracting shipper to give new instructions before payment by the bank to him are executed.

contracting shipper are forwarding agents and delivery in aspect of the sea carrier is merely routine.

The carrier is under the obligation to **include particulars concerning to the goods**, the contracting shipper, the consignee and the carrier, the conditions of carriage and freight and other charges payable by the consignee.¹²⁶ Flowing from the non-negotiable character of the sea waybill, the carrier's liability as to **misrepresentation** is merely in connection with the prima facie role of this transport document and an estoppel rule has not been found appropriate.¹²⁷ The waybill is evidence of the contract of carriage and the fact that goods were received by the carrier as described therein. The Nordic law is silent in other facts in the sea waybill than those referring to the goods. On the other hand, misrepresentation may be based on similar principles of law as in misrepresentation in bill of lading with similar specific requirements on the basis of liability. Also the pure misrepresentation alternative is available for the sea waybill claimant. Nevertheless, the carrier is not estopped from producing evidences on the fact that goods were damaged by the time they were taken over by him. The Hamburg Rules is silent in the realm of the actual shipper's liability for having provided wrongful information concerning the goods which has been inserted in the sea waybill. Hence the lack of any estoppel rule, the carrier may establish an efficient defence as against a third party. Proving that goods in question were damaged by the time of receive results in non-liability, thus no recourse action seems necessary.

V. NEW METHODS TO ELIMINATE THE DEFICIENCIES OF THE TRADITIONAL BILL OF LADING

1. GENERAL REMARKS

Paradoxically, in the modern liner shipping environment the bill of lading has commercially lost much of its previous status, even it still has a significant role as a basis for financing. In fact, the restructure of liner traffic started in the 1920's, since when it has become a part of efficient flow-of-good system with just-in-time deliveries and minimal warehousing. The background of the revolution was a **technical progress** in the construction and design of vessels as well as in the land-based infrastructure. The problem is the greatest in **liner trade**,

¹²⁶ The Finnish Maritime Code, Chapter 13, Section 59, Article 1

¹²⁷ The Finnish Maritime Code, Chapter 13, Section 59, Article 2

where processing by loading brokers often takes place after the ship has departed, and can take time. In recent days, a large amount of goods flow by standardised shipping units resulting in efficient and rapid handling both on board and land. The real breakthrough arrived in the previous 1960's when the merchandise was directly taken on and off the ship without handling them separately during these phases – by other words, this was the beginning of the **ro-ro era**. Then again, it is also a critical point that delivery must be performed only against the production of an original bill of lading. This is not generally a problem until the bill of lading reaches the receiver before the goods arrive at the port of discharge; on the other hand, the carrier takes an enormous risk in delivery without production of a bill of lading.

Three possible answers may be given in this juncture.

- i. In case of a document of title is not required, the best solution is probably, not to use a bill of lading at all. For instance, manufactured goods are in general not resold in transit, thus a non-negotiable waybill may be proper as well. Even in order effecting resale a traditional bill of lading ought not to be necessary if the carrier has reliable information about who is for the time being entitled to the goods at the port of discharge.
- ii. Moreover, if the shipment is part of a larger transaction, the effective length of the voyage may artificially lengthen; however, this solution seems pretty farfetched.¹²⁸
- iii. Electronic Data Interchange and other document arrangements have proved their commercial strength. Moreover, in some cases the factual reception of the goods by the carrier for carriage is the only event which establishes an existing and effective contract of carriage without any further documentary or electronic activities towards the cargo owner than a written receipt of the goods.

Wherefore, there is an emerging need to replace the classic bill of lading, or at least to introduce a new specimen of it, the work, here and now, would like to reveal the pretenders.

2. THE MOST WIDE-SPREAD USED ALTERNATIVE, THE SEA WAYBILL

The work already dealt deeply with sea waybill in the precede paragraph. The reason behind this structural approach is that usage of sea waybill is wide-spread and internationally regarded; meanwhile the below mentioned alternative, namely the bill of lading in the

¹²⁸ See Todd (1990), p. 245.

electronic environment, is still under construction. However, the work would like to draw up the most referred benefits of the sea waybill wherefore it may challenge the bill of lading. Above all, the sea waybill does not have to be produced to obtain the goods and obviates postal delay. Moreover, it is suitable for 'in-house' documentation where no financial risk is involved. And finally, it is suitable for open account trading if absolute confidence exists between the parties to the transaction.¹²⁹ On the other hand, it must be borne in mind, that it cannot provide the same level of security, for instance, the buyer who has paid in advance may find that the seller has changed the consignee.

2.1. Sea waybill in the electronic environment

Implementation of electronic document interchange of sea waybill does not face as heavy difficulties like in the realm of bill of lading, on the score that the precede mentioned does not represent a document of title to the goods, hence either non-negotiable. In this realm delivery does not depend on presentation of the document, moreover, banks also accept the electronic sea waybill until it meets with the conditions set up in the letter of credit. The vital commercial practice of electronic sea waybill since the early '80 can be instanced by the D.I.S.H. project (Data Interchange for Shipping), which was set up by P&O Containers Ltd. and other exporters and carriers; or the Atlantic Container Line's Cargo Key Receipt Scheme, where sea waybill was materialized as a computer print-out as well as the Cargo Key Receipt Scheme, where under a no disposal clause (NODISP) the consignee was entitled to dispose of the goods to another person, and the carrier is informed electronically concerning the necessary information for identification.

However, in 1990 the Comité Maritime International has introduced a new model law for **Uniform Rules for Sea Waybills**. The Rules defines its **scope of application** auxiliary in case of inconsistency with the provisions of any international conventions, like The Hague-Visby Rules or The Hamburg Rules, or national law mandatory applicable to the contract of carriage to that extent but no further null and void. Moreover, the Rules shall apply if the parties **adopts by the contract of carriage** which is not covered by a bill of lading or similar document to title, whether the contract be in writing or not. The contract of carriage as well shall be subject to any international convention or national law which is, or if the contract of carriage had been covered by a bill of lading or similar document of title would have been,

¹²⁹ See Mitchelhill (1982), p. 49.

compulsory applicable thereto. However, in case of inconsistency between the carrier's standard terms and conditions the Rules shall prevail. After the shipper has electronically provided the booking instructions, the carrier forwards an electronic sea waybill. The shipper shall warrant the accuracy of the particulars furnished by him relating to the goods, likewise, shall indemnify the carrier against any loss or damage resulting from any inaccuracy. In absence of reservation by the carrier, any statement in the waybill as to the quantity or condition of the goods shall be **prima facie evidence** of the receipt of the goods so stated between the carrier and the shipper. However, between the carrier and the consignee it shall be a **conclusive evidence** of receipt of the goods as so stated, and proof to the contrary shall not be permitted if the consignee has acted in good faith. The shipper is the only entitled to give instructions to the carrier in relation to the contract of carriage, including changing the name of the consignee at any time up to the consignee claiming the delivery after arrival to the port of discharge, provided that he gives reasonable notice to the carrier in writing or by other means thereby indemnifying him. Not later than the receipt of the goods was provided by the carrier, the shipper is entitled to transfer "**the right of control**" to the consignee, which action shall be noted on the sea waybill and results that the shipper shall cease these rights. Upon arrival of the cargo at the port of discharge, there is no need to present the document, the carrier can deliver the goods upon production of proper identification of the consignee, and he shall not be liable for wrongful delivery if he can prove that he has exercised reasonable care to ascertain the consignee.

3. OVERTURE OF THE FUTURE, THE ELECTRONIC BILL OF LADING

3.1. The subject matter at glance

Use of bill of lading is almost as old as maritime trade itself. However, use of modern means of communication likewise Electronic Data Interchange (henceforth referred as „EDI”) for the conduct of international trade transactions has been increasing rapidly and is expected to develop further as information highways become more and more widespread. Here and now, I would like to sum up shortly the **advantages** and commercial functions as well as the disadvantages of the traditional paper-based bill of lading:

- i. Beside the evidential function of the contract of carriage/affreightment, the bill of lading is a prima facie evidence of the receipt issued by the carrier that the goods have been shipped or received for shipment.
- ii. On the other hand, the most important function is its negotiability which passes the title in the goods, which is also one of the greatest obstacles to the implementation of the electronic format.
- iii. Moreover, it is possible to determine title to the goods by means of a visual inspection of the bill of lading as well as the terms and conditions of the contract of carriage are contained in the document.

The most significant **matters** with the tradition bill of lading are:

- i. delay at the port of discharge;
- ii. considerable expenses of issuance;
- iii. the issuance of a fraudulent bill of lading considering the general shipping custom to issue it in set of three, which can result counterfeit in order to obtain fraudulent delivery;
- iv. the consignor may fraudulently sell the merchandise to other buyer during the voyage, likewise it is possible to forge the bill of lading in order to obtain payment in documentary credit.

Following the train of thoughts of Paul Todd, the next **minimum requirements** need to be fulfilled in order to place the bill of lading into the electronic environment:¹³⁰

- Above all, any kind of system is required to be secured against fraud, however, this requirement is not absolute, considering that fraudulence could occur even in the paper-based environment as well as traders are ready for certain risk in order to effect a more cost-effective and speedy carriage.
- Rights and liabilities steered by the contract of carriage of goods by sea shall be transferred to the new cargo owner.
- Electronic documentation should have the same evidential effect as it is in context of the traditional bill of lading.
- The carrier needs to be notified about the identity of the ultimate receiver without presentation of a paper document.
- The system should be able to transfer property to the goods as well as opened for any intended user.

¹³⁰ <http://ourworld.compuserve.com/homepages/pntodd/intr/publns/demat.htm>

Previous attempts to deal with bill of lading in the electronic environment under the direct way were the forthcoming. First of all, SeaDocs Registry Limited was a London based Delaware corporation formed by Chase Manhattan Bank and INTERTANKO (International Association of Independent Tanker Owners), an association of independent oil tanker operators for the purpose of electronically negotiating bills of lading issued for oil shipment which started in 1986 and lasted less than one year. Thereafter, the CMI Rules for Electronic Bills of Lading were adopted in 1990 and the main feature was the creation of an electronic bill of lading by the carrier who also acts as an unofficial registry of negotiations. In the European continent, the initial Bill of Lading for Europe (BOLERO) pilot project was founded in part by the European Union in the context of the Infosec Program (DG XII) and in part through commercial partners. It composes one of the latest attempts to repeat the negotiable bill of lading by employing sophisticated electronic security measures.

3.2. Future Possibilities of Electronic Data Interchange environment in context of bill of lading

The International Academy of Comparative Law dealt with the affection of the electronic environment already in 1994 when it was pointed out that use of electronic communications to replace the functions of transferable bill of lading is not considered as the evolution of it, merely the creation of a new species of the document in question.¹³¹

3.2.1. Technical aspects of Electronic Data Interchange

Above all, a **standard data format** might largely help compatibility between systems of the concerned persons. Hence, parties should agree in a certain standard in the frame of an electronic data interchange agreement. For instance, UN/EDIFACT (United Nations/Electronic Data Interchange for Administration, Commerce and Transport) is an international EDI standard developed under the United Nations, which has been adopted by the International Organization for Standardization (ISO) as the ISO standard ISO 9735. EDIFACT language provides a common syntax and format as well as a comprehensive coded data register. However, the previous mentioned still not furnish solutions for providing adequate backup procedures and necessary hardware and software services.

¹³¹ “Current Developments concerning the Form of Bills of Lading”, XIV. International Congress of Comparative Law, Athens (Greece), 31 July – 6 August, 1994.

The second issue is **security both the system and the message**. Possible answer for the first matter may be an independent security expert, who frequently audits the system of the parties. Messages may be secured by encryption, non-repudiation or digital signature, depending on the legal environment of the given country as well.

3.2.2. The legal approach

The Electronic Data Interchange designs the main characteristics of the traditional paper-based bill of lading with pointing out its advantages and disadvantages and tries to place the document in the electronic environment. The Model Law reveals five relevant **advantages of the traditional bill of lading**:

- i. Firstly, bill of lading as a transferable commercial document makes the transfer of rights in the goods easy, especially by endorsement and the delivery of the bill.
- ii. Secondly, the bill of lading is reliable collateral for documentary credit and maritime financing.
- iii. Thirdly, the parties are able to determine who has title to the goods by virtue of a visual inspection of the bill of lading.
- iv. Fourthly, in international trade there is a pretty high uniformity in the use of bill of lading.
- v. And the last advantage is the inclusion of the terms and conditions of the contract of carriage in the bill of lading itself.

On the other hand, the **disadvantages** are in connection with delayed arrival, fraudulent issuance, inaccurate and insufficient information and high costs. In order to eliminate these difficulties there is a tendency to substitute bill of lading with sea waybill, however, the latter is not a document of title and cannot be used to transfer ownership of the goods. The Model Law points out the **advantages** as well as the disadvantages of the **sea waybill** as well. Through a sea waybill the long and complex documentary process may be avoided. Moreover, this document can travel with the goods and reduce the carrier's risk against the consignee. On the other hand, there are significant disadvantages likewise the non-negotiable characteristic and they do not afford the same security as bill of lading even though they are accepted by banks for documentary credit. Under a sea waybill the seller is entitled to direct the carrier to change the consignee while the goods are in transit, even if the buyer has already paid the purchase price. And finally, the shipper has the right to demand the issuance of shipped bill of lading which renders the sea waybill nugatory. Then again, if transferability is

not essential for the carriage in question, the sea waybills are significantly used as an alternative to the traditional bill of lading.

According to the annotations of the UNCITRAL Working Group the **functions of bill of lading** might be affected by use of EDI communications included those of serving as a receipt for the goods by the carrier, as evidence of contract of carriage as well as a document giving the holder tremendous rights, including the right to claim and receive delivery of the goods at the port of discharge and the right to dispose of the goods in transit. The first two functions could be easily provided by EDI through the receipt for the cargo and information about the contract of carriage could be given by means of data messages. On the other hand, the third function may be problematic in the EDI environment on the score that it is difficult to establish the identity of the exclusive holder to whom the carrier could deliver the goods without running the risk of being faced with a claim by another party for misdelivery. In this filed the central problem of EDI bill of lading is to guarantee the **singularity and uniqueness** of the message to be relied upon by the carrier for delivering the goods. Whilst uniqueness could be provided by cryptography, the possibility that the message might be fraudulently or mistakenly multiplied could not be excluded. Security, time-stamping or other similar techniques as well as a central registry in which the holder could register its rights might provide solution for the latter mentioned problem. The **negotiability and transferability** of documents of title in goods by EDI means could include establishing a preliminary a list of areas of commercial practice to be covered, validating agreements for negotiability and transferability of rights regarding to the goods through EDI, establishing criteria for parties to be holders in due course for the transfer of rights in goods or subsequently to negotiate such rights through EDI, determining the effect of negotiation of document of title in EDI, establishing default rules for allocation of risk and electronic registries. The Working Group pointed it out that beside transport document of title in general, special attention should be placed on bill of lading since EDI was predominantly practiced in maritime trade and transportation area and in this realm unification of law is an urgent need to remove the existing barriers and let room for the practice to develop. **Electronic bill of lading** is already dominant in North-Atlantic maritime routes and the further development of this practice does require the legal framework. There is an enhancing need to facilitate **delivery** of the cargo at the port of discharge without the presentation of the paper bill of lading. The background is that the necessary documents for delivery might arrive later than the goods at the port of discharge as well as and often the buyer had to receive and sell the goods in order to be able to pay the purchase price and the freight. The shipping practice also required to clarify who

bore the **risk of the goods not being correspondent to its description** through disclaimer clauses by the shipper were not always valid. Furthermore, it was an expressed requirement to equate the electric bill of lading with the paper version which was essential for its function as a document of title. Another particular issue was how to ensure the **uniqueness of an electronic bill of lading** that would entitle the holder disposing the cargo in transit by electronic means meanwhile the carrier is also protected from the risk of misdelivery. The possible solutions dealt with electronic certificates, smartcards, registries as well as keys to be used in communications from party to party. Another matter was the **definition of the holder** in the EDI environment. In the paper context the holder was defined on the basis of physical possession of the bill of lading and was protected against good faith acquisition of rights regarding to the goods by third parties in that possession the bill of lading functioned as a notice to third parties. The protection of the holder might be avoided or solved in a different way in the EDI environment. It may be also under question how the **rights and obligations of the holder and the issuer** of the electronic bill of lading might be defined. In the paper context three principles govern the right of the bill of lading holder, like the bill of lading is the conclusive evidence of title to the goods only after endorsement, only the endorsee is entitled to claim delivery of the goods at the port of discharge and finally, only the endorsee has the right to modify the contract and make a new endorsement. It was pointed out that negotiability shall be examined in the context of trade law, transport law and security law. Property would not be of use under trade law, but effectively lost in the realm of transport law through no right to stoppage or control could be exercised. The holder may be entitled to possess the goods, a property right in the goods or a right to receive delivery arising from the underlying contract of sale. From the carrier's point of view the most important question who has possessory title in the goods. Another arising matter is **allocation of liability** among the shipper, carrier and consignee as well as in the new context, a registry. Other enumerated issues whereby the Working Group dealt with are the effect of transfer of EDI document on third parties, the rights of the rightful holder if wrongful transfer of the goods has occurred and rights of the transferee if its title proved to be defective, relative priority among multiple claimants of the same cargo, timeliness of transfer and messages in the EDI environment, incorporation by reference as well as issues of security are designed to promote negotiability in the EDI environment.

The Model Law attempts to place the **bill of lading into the electronic environment** thorough a **functional-equivalent approach**. The main question is how could be fulfilled the purposes or functions through EDI techniques. The main aim is to enable data messages to

enjoy the same level of legal recognition as the corresponding paper document performing the same function by singling out the functions of the traditional form requirements. Legal obstacles to dematerialized bill of lading may be summarized in the next: satisfaction of writing and signing requirements, probative effect of electronic communications, determination of the place of contract formation, allocation of liability for erroneous messages, communication failures and system breakdowns, incorporation of general terms and conditions as well as safeguarding of privacy. The first three issues are already discussed and solved by the UNCITRAL. **Negotiability** is perhaps the most challenging aspect of inserting EDI in the trade practice. The Working Group has pointed it out that the creation of negotiable document of title is a prerogative reserved solely for statutory law. Regarding to **transferability**, the work would like to refer to a scholar who pointed out that “the transfer of title to the goods is a difficult legal problem and one for which there is no international convention or agreement to serve as a common denominator. Instead, the latest international convention dealing with the sale of goods, the United Nation Convention on Contracts for the International Sale of Goods expressly declares that it is not concerned with the effect which the contract may have on the property of the goods sold.” Thus the working group deals only with the transferability function performed by the bill of lading under the contract of carriage, instead of ownership of the goods under the contract of sale. The bill of lading as a title to the goods can be defined as a transferable promise by the carrier to deliver the goods only to the holder of an original statement recorded in a unique document. **General terms and conditions** are typically placed on the reverse side of the paper bill of lading. These so-called master agreements might be incorporated by reference in the context of electronic bill of lading. Regarding to **liability for erroneous messages, system breakdowns and communication failure** must be clarified before parties would commit themselves to electronic transactions. Moreover, liability should be apportioned in a fair and predictable manner before the widespread use of EDI. The arising question concerning to **privacy** is the accessibility to public of the single central registry through most major international trade and shipping companies have a deep interest to keep in secret their patterns or methods, or pricing.

Conclusively, the UNCITRAL Model Law summarized the arising issues in the forthcoming. Non-negotiable transport documents could be adapted easier in the electronic environment than transferable bills of lading. It is generally agreed that the future development should consider two aspects likewise a closed system where users could contractually agree on an acceptable substitute for bills of lading in electronic context as well as establishing a

legislative environment where the functions traditionally performed by paper bills of lading could be available for all EDI users. Functions of the bill of lading in the context of the contract of carriage could be performed in an electronic environment. On the other hand, establishing a functional equivalent to a document of title, particular attention should be taken to preserving the functions served by such a document of title for the purpose of the contract of sale of goods. Receipt for the cargo and evidence of the contract of carriage is easy to place into the electronic environment respecting that incorporation of general terms and other clauses of contract of carriage require further discussion. Regarding to the title to the goods the hardest question is, anyway, how to identify the exclusive holder. Conclusion: “The main thrust of national reports and of the general report relates to the use of electronic bills of lading in lieu of traditional documents. This current development concerning the form of bills of lading has already given rise to a rich technical and legal literature... Nevertheless, electronic bills of lading are not in use in any of the reporting countries and, there is no provision for implementation of electronic bills of lading in the near future. The main obstacle has been termed ‘traditional inertia’. The legal problems that electronic bills of lading involve are few and related to the **need for legislative authorization** attributing to electronic communication the function of traditional **writing and signature requirements**, determining **the probative effect** of electronically generated prints, and **establishing the negotiability** of electronic bills of lading. These legal problems may be easily resolved. However, legislative action cannot alone promote the generalized use of electronic bills of lading... The use of electronic bills of lading is, essentially, a business rather than a legal decision. The law may provide the legal framework for the function of electronic bills of lading in the same way and with the same effects as the traditional bills of lading. However, business interests will eventually determine whether the availability of, and the economic incentives for, the use of electronic bills of lading outweigh concerns for privacy and the safeguard of trade secrets, for accuracy of information, and for security of transactions and acquisitions. Such concerns call for **technological rather than legal solutions.**” However, if electronic bill of lading suits for necessities of shipping as well as fulfills each functions of the traditional paper-based version, then it may insure and found its existence.

3.3. The SeaDocs Project

Taking into consideration the possible future practice of electronic bill of lading it seems edifying to look over the mechanism of previous attempts as well as recent projects. **The**

SeaDocs project (Seaborne Trade Documentation System) was designed to supply oil and petroleum trade where the commodity is often sold en route and traditional bill of lading seems to slow to provide each buyer with the original bill of lading. After the issuance of the original paper-based bill of lading by the carrier, the transport document was deposited at SeaDocs which acted as a **depository-custodian** in respect of the paper. Hence, SeaDocs operated as agent for all the concerned in shipping business including delivery of the original document. In practice, SeaDocs provided a code or a test key to the shipper upon delivery of the original paper bill of lading. The system was built up with considerable checks ensuring that at endorsement the proper instruction and message was received. In case of endorsement, the seller was required to notify electronically the SeaDocs register, likewise to provide the buyer with a portion of the code. The buyer or the endorsee also had to notify the central registry concerning his acceptance of the transaction. Only after all these steps met, was the electronic message of the buyer or endorsee as against a part of the code verified by SeaDocs. Upon arrival of commodity at the port of discharge, SeaDocs conveyed the carrier as well as the last endorsee an identifying code, by what the endorsee was entitled to take delivery. As it was stated before the system could not survive for longer than a year, in spite of its successful operation. According to Kozolchik¹³² **the downfall** may be attributable to the forthcoming six factors:

- i. Firstly, the unclarified liability allocation eventuated relatively high insurance costs of registry operations.
- ii. Secondly, hence, the corporation was also formed by a bank other banks were reluctant that one of their competitor had exclusive control of the registry.
- iii. Considering participants of carriage of goods by sea, merchants feared inspection of competitors and national tax authorities since their commercial transactions were recorded in the central registry.
- iv. Final buyers were also reluctant because of possible intermediaries and speculators. Fifthly, the monopoly position of the registry was discerned to act rather in its own interest than to the traders.
- v. Moreover, on the score of characteristic and value of the commodity even one error in ten thousand transactions could end up in a loss of \$20 million or even more.¹³³

Lifespan of the project was too short to be examined by courts, however, Todd points out some issues which certainly would have had come up.¹³⁴ Under common law jurisdiction, the

¹³² See Kozolchik (1992)

¹³³ See Chandler (1989)

Bills of Lading Act 1855, which was in force that time, required the factual endorsement and transfer of bill of lading. It is also ambiguous who could have sued the shipowner at wrongful delivery; likewise, what sort of protection might a bank have under documentary credit in case of bankruptcy on the buyer's side. Hence, in practice, all these issues had to be governed by agreement of the parties to the contract of carriage of goods by sea. Lastly, it must be pointed out, that this project was not based on the real meaning of EDI system, since communication was done by telex.

3.4. CMI Rules for Electronic Bills of Lading

The next considerable attempt is the **CMI Rules for Electronic Bills of Lading** drafted by the Comité Maritime International. The set of model rules is an expansion of the United Nation Rules for Electronic Data Interchange. The most important characteristics of CMI Rules are the **lack of force of law**, the **voluntary nature** as well as the **respect of existing international conventions and national sources of law** by stating that “the contract of carriage shall be subject to any international convention or national law which would have been compulsory applicable if a paper bill of lading had been issued”.¹³⁵ The model law **replaces the central registry by the carrier**, which result a less expensive and complex system and makes sure that the carrier is acquainted with each transactions. On the other hand, the system is **theoretically opened** for anyone. The CMI Model Rules works as follows. After delivery of the goods by the shipper to the carrier, the latter shall give notice of the receipt of the goods at the electronic address specified by the shipper. The receipt message shall include¹³⁶:

- i. the name of the shipper;
- ii. description of the goods with any representation and reservation;
- iii. the date and place of the receipt;
- iv. reference to the carrier's terms and conditions of carriage;
- v. the Private Key¹³⁷.

¹³⁴ <http://ourworld.compuserve.com/homepages/pntodd/intr/publns/demat.htm>

¹³⁵ CMI Rules for Electronic Bills of Lading, Rule 1 and 6

¹³⁶ CMI Rules for Electronic Bills of Lading, Rule 4 (b)

¹³⁷ Under Rule 2 (f) of the CMI Rules for Electronic Bills of Lading, the Private Key is defined as „any technical appropriate form, such as a combination of numbers and/or letters, which the parties may agree foreseeing the authenticity and integrity of a Transmission”. As it is pointed out by Muthow, „this approach leaves the door open to future technological advances...”

These information “shall have the same force and effect as if the receipt message were contained in a paper Bill of Lading”. According to the provisions of the Model Law, the **Private Key** is unique to each successive holder and not transferable. On the other hand, Muthow points it out that this method to authenticate and verify the message may require other means of security may be still necessary.¹³⁸ Finally, the shipper is required to verify receipt of the message to the carrier. In order to enhance security, each message is required to be confirmed. **Negotiation** of the electronic bill of lading is carried out by notification of the carrier and furnishing him with the Private Key. After confirmation of the message by the carrier, he transmits all the information to the new holder, except for the Private Key. The new holder is required again to confirm in a message the acceptance of the terms, and only then is the previous Private Key cancelled and a new one sent forth. If the proposed new holder informs the carrier of non-acceptance or fails to advise the acceptance within a reasonable time, then the transfer shall not take place. Accordingly, notifies the current holder and the Private Key retain its validity. The Model Law expressly set up in Rule 7 (d) that such transfer **shall have the same effect as the transfer in the paper-based environment**. Finally, the carrier shall notify the last holder of the place and date of delivery and the last holder may nominate a consignee, in absence of nomination the holder is deemed to be the consignee, and give instructions to the carrier with verification by the Private Key. Factual delivery occurs upon production of proper identification in accordance with the delivery instructions. Delivery automatically cancels the Private Key then. With respect to the liability of the carrier, he is released from misdelivery if can prove that he exercised **reasonable care** to determine that who claims the goods was the consignee.¹³⁹ It must be enhanced, that, under the provisions of the Model Law, only the holder can claim delivery of the goods, nominate a consignee, negotiate the commodity as well as instruct the carrier concerning the goods in tune with the terms and conditions of the contract of carriage by sea.

The Rules also deals with “**metamorphosis**” of the electronic document **into a paper bill of lading**.¹⁴⁰ The holder is entitled to demand and the carrier has the option to issue at any time prior to delivery a paper bill of lading. However, the carrier is under the obligation only to make the document available at the nearest to the location determined by the holder. In this case, the carrier shall not be responsible for any delays in delivery of the goods. On the other

¹³⁸ See Greiner 1997, p. 7.

¹³⁹ CMI Rules for Electronic Bills of Lading, Rule 9 (a) – (c)

¹⁴⁰ CMI Model Rules for Electronic Bills of Lading, Rule 10

hand, undue delay or disrupts the delivery of the goods shall not occur if the carrier issues the paper bill of lading. The thus derived bill of lading shall include the forthcomings:

- i. the information established in Rule 4 (b), apart the Private Key;
- ii. express statement that the paper bill of lading has been issued upon the termination of procedures for EDI under the Model Law.

Issuance of paper bill of lading shall cancel the Private Key, however, the termination of the procedure do not relive any of the parties to the contract of carriage of their rights, obligations and liabilities while performing under the contract of carriage or the Rules. The holder is also entitled to demand a print-out of the receipt message set out in Rule 4 marked as a non-negotiable copy, however, this shall not cancel the Private Key, nor terminate the procedures for EDI.

In regard to the general requirement of **writing and signature**, Article 11 of the CMI Model Law states, that each parties agree that any national law, custom or practice requiring the contract of carriage of goods by sea to be evidenced in writing and signed, is fulfilled by the transmitted and confirmed electronic data residing on computer data storage media displayable in human language or video screen or as printed out by a computer. Likewise, the parties shall agree not to raise the defense that the contract is not in writing. As it was enhanced before, the contract of carriage shall be subject to any international convention or national law which is compulsory applicable in case of issuance of a paper bill of lading. According to Article 9 and 10 of EDI Model Law requirement of writing under the law is satisfied by a data message if the information contained therein is accessible so as to be usable for a subsequent reference. Likewise, where the law requires that any action regarding carriage of goods be carried out in writing or by using paper document, the requirement is met if the action is carried out by using one or more data message.¹⁴¹ Data message meets with the requirement of signature if a method is used to identify that person and to indicate that person's approval of the information contained therein; and that method is as reliable as was appropriate for which the data message was generated or communicated, in the light of all the circumstances, including any relevant data agreement. However, the EDI Model Law is not an international convention which may bind its Members. Deriving from the wording of the Hague – Visby Rules the conventional writing is required, even though the Rules does not define the notion.¹⁴² The approach of Article 1 (8) of the Hamburg Rules is more extensive, as

¹⁴¹ UNCITRAL Model Law on Electronic Commerce, Article 17 (1)

¹⁴² This interpretation is presumed in the light of the terminology, like „issuance” and „document”, as it is stated in Article 1 (b).

“writing” includes, inter alia, telegram and telex. In my understanding, this definition seems broad enough for the EDI environment. Unfortunately, majority of shipping nations have not accepted the progressive Hamburg Rules. Without going into further details, it must be pointed out that, mandatory provisions of national law make the picture even more chaotic.

Considering **admissibility** in the EDI environment¹⁴³, in any legal proceedings, nothing in the application of the rules of evidence shall apply so to deny the admissibility of a data message in evidence on the sole ground that it is a data message; or, if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form. Information in the form of a data message shall be given due evidential weight.¹⁴⁴ Admissibility is also supported by Article 5 and 8 of the Model Law. According to the previous article, information shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of data message. As a data message shall be recognized as original if there exist a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and if presentation of the information is required, that information is capable of being displayed to the person to whom it is to be presented.

The EDI Model Law as well as the CMI Rules attempt to provide solution for the matter of **negotiability**. Regarding to Article 17 (3) of the UNCITRAL Model Law, if a right is to be granted, or an obligation is to be acquired by, a certain person, and if the law requires to this effect that the right or obligation must be conveyed to that person by the transfer of a paper document, that requirement is met if the right or obligation is conveyed by using one or more data messages, provided that a reliable method is used to render such data messages unique.¹⁴⁵

¹⁴³ UNCITRAL Model Law on Electronic Commerce, Article 9

¹⁴⁴ These provisions were set up to eliminate upcoming problems of the Hearsay Rule and the Best Evidence Rule under common law jurisdictions. The Hearsay Rule requires evidence of statements made by persons not called witnesses and which are tendered for the purpose of providing the truth of such statement. Meanwhile, the Best Evidence Rule demands to produce an original document as evidence if the party wishes to submit the content. Under civil law jurisdiction, this issue does not seem so crucial, on the score, that the inquisitorial system attributes the court to attach the necessary weight to the evidence.

¹⁴⁵ Actions related to contracts of carriage of goods include (a) (i) furnishing the marks, number, quantity or weight of goods; (ii) stating or declaring the nature or value of goods; (iii) issuing a receipt for goods; (iv) confirming that goods have been loaded; (b) (i) notifying a person of terms and conditions of the contract; (ii) giving instructions to the carrier; (iii) claiming delivery of goods; (c) (i) giving any other notice or statement in connection with the performance of the contract; (ii) authorizing release of goods; (iii) giving notice of loss of, or damage to, goods; (d) giving any other notice or statement in connection with the performance of the contract; (e) undertaking to deliver goods to a named person or a person authorized to claim delivery; (f) granting, **acquiring**, renouncing, **surrendering**, **transferring** or **negotiating** rights in goods; (g) acquiring or transferring rights and obligations under the contract.

Likewise, the transfer of the Right of Control and Transfer shall have the same effect as the transfer of such rights under a paper bill of lading.¹⁴⁶

Even though these issues seem to be clarified, according to Todd, the forthcoming **potential disadvantages** may be traced in the CMI environment¹⁴⁷:

1. Firstly, in case of refusal of delivery by the carrier to the eventual holder, presumably only the original shipper could sue, wherefore, the Rules does not contain measures for contractual rights and liabilities being transferred with the documentation. In my understanding, solely the lack of express provisions does not result any matter, whereas, Article 6 expressly declares that any international convention or national law do apply to the contract of carriage as if it would have been compulsory applicable in the paper-based context, which leads the question in direction of the measures of the Hague-, the Hague-Visby- and the Hamburg Rules. Moreover, the Rules were born on the base of EDI. In accordance with Article 16 (f) of EDI the contract of carriage of goods includes granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods.
2. The second crucial point may be if the new holder, who has accepted the right of control and transfer does not pay the purchase price of the commodity. The previous holder is not allowed to retain any rights as against the carrier concerning the commodity after the transfer. However, nothing congests the seller to incorporate an express term into the contract of sale of re-transfer of right of control and transfer in such case and make reservation to right of disposal of the goods until payment. This formation of the contract of sale may secure the seller in case of bankruptcy of the buyer, unlike if the buyer was fraudulent and resold the goods to a third party acting in good faith. Todd proposes “to require payment as an electronic equivalent of documentary credit, and only to transfer the right of control and transfer to a reputable bank against payment”.¹⁴⁸
3. In Todd’s opinion, the lack of measures for the passing of property in the goods constitutes the third matter. However, in case of acceptance of train of thoughts concerning the first matter, it does not result any problem, in my understanding.
4. The fourth and most cruel problem is balance between security and expectation of an opened system. According to him “it may be well impossible to provide a system

¹⁴⁶ CMI Model Rules for Electronic Bills of Lading, Article 7 d.

¹⁴⁷ <http://ourworld.compuserve.com/homepages/pntodd/intr/publns/demat.htm>

¹⁴⁸ <http://ourworld.compuserve.com/homepages/pntodd/intr/publns/demat.htm>

which is *both* completely open and completely secured, although *either* one or the other ought to be possible".¹⁴⁹

5. For fifth, Todd does not find secured the transmission of the Private Key without encryption of it as it was suggested also by Greiner. Using encryption requires decryption from the other party, which requires the parties to agree privately upon the encryption algorithm. On the other hand, the CMI model presupposes an open system where the general encryption algorithm would needed to be public, and an encryption key would be issued to each single transaction, hence only the possessor of both the encrypted message and the key decrypt. Then again, he points out the insecurity of the channel whereby the key is sent and the only possible solution, namely the notification of the encryption key in advance of transfer of secret code, may result delay.

Todd draws a **new environment** by what recent lacks **of the CMI Rules** may be eliminated. It bases on the aggregation of a public key, a private key and an encryption method. The method is universally available and adopted in international commerce, the public key is known to everyone, while the private key is never transferred. Each message are encrypted by the private key of the sender and can be make available jointly by the private key of the receiver and public key of the issuer, which shall not work conversely. In practice, the carrier shall forward a secret key to the shipper, who carries out the transaction by returning the secret code, which being encrypted by his private key and the carrier's public key, and the identifying data of the transferee. Only the carrier could decrypt the message by his private key and the shipper's public key. As last step of the transaction, the carrier forwards the electronic bill of lading as well as a new secret code to the transferee, and again the latter mentioned could decrypt it by his private key and the carrier's public key. The final receiver uses the secret code without any further encryption. However, this system requires a central authority at least for keeping registration of the keys, which should be changed regularly in order to obtain a higher level of security.

In order to eliminate the deficiencies of the opened, but not at each steps secured, CMI system, Todd introduces **an entirely new model**. There would be a central registry where each concerned trader would be registered, likewise the carrier. Traders might access the register from their place/places of business, and the carrier from the terminal at the port of discharge, as well as each of them would possess a unique user identity and a secret password. All data would be recorded at the central register including general terms of bill of lading and

¹⁴⁹ <http://ourworld.compuserve.com/homepages/pntodd/intr/publns/demat.htm>

contract of carriage. The carrier would inform the system of the user identity of the shipper, then the shipper could resell the commodity en route by using his user identity and password to access the system, and inform it of the user identity of the buyer. This method would also require the frequent change of password as well as following a certain best practice. The further issues may arise under this frame, namely the monopoly position of the central registry and non-applicability of the CMI Rules on liability issues of the carrier. Considering the first, function of the system requires the membership of the parties which may lead to monopoly position again. This deficiency might be advisable to avoid whereat the same issues resulted reluctance regarding the SeaDocs project. The members of the group might draft further more precise measures in order to resolve any other incidental problems. „I would conclude that it is possible, on the basis of existing technology and under the existing legal framework, to replace bills of lading by electronic documents, which can in principle afford to the parties security at least as great as existing paper documents. Critics would no doubt object that making the models ... workable would depend heavily on the contractual provision made by the parties ... to agree on rules of conduct and protocols ... to ensure that they also make appropriate provision for the transfer of property, constructive possession and contractual rights and liabilities.”¹⁵⁰

3.5. The BOLERO Project

The last and perhaps the most successful trial to place the traditional bill of lading into the electronic environment is the BOLERO project which has started in 1994. „The BOLERO system is a technological and legal infrastructure to facilitate trade transactions through electronic means. It involves digital information technology to transfer messages and store certain information, and a legal system of contractually adopted rules to determine the effect of certain messages and updates of the stored information.”¹⁵¹ At a glance it is operated by a business consortium consisting of large shipping companies, banks and telecommunication companies. BOLERO Operational Ltd. is owned through a joint venture of the London based P&I Club, the Through Transport (TT) Club as well as SWIFT, which has invested close to US\$ 30 million into the development of the project. The TT Club is the international transport and logistics industry's leading provider of insurance and related risk management services. The Launch Program started to operate in February 1998 and the system operated alongside

¹⁵⁰ <http://ourworld.compuserve.com/homepages/pntodd/intr/publins/demat.htm>

¹⁵¹ Appendix to BOLERO Rulebook – Operating Procedure, p. 1.

paper-based procedure until the first part of 1999, then the full commercial launch occurred in the second quarter of 1999. The participated commodity sector included crude oil, computer products, chemicals, agricultural commodities and processed foodstuffs. The aim of the project is giving answers for those issues which have been let opened by the CMI and UNCITRAL Model Law in the past.

The BOLERO system bases on exchange of EDI messages between a central registry and the users. All users send and receive messages from the central registry by means of a computer workstation. In accordance with the Rulebook, the **BOLERO bill of lading** is an instrument, created and evidenced by the transmission into the system messages, which operates as a receipt for a consignment of goods shipped and/or received for shipment by the carrier and as evidence of a negotiable contract of carriage, which instrument has the legal effect described in these Rules. The concerned parties agree to be satisfied with the issue of an electronic bill of lading or use of digital signature when the bill of lading is required to be in writing or to be signed under any international conventions or national law. The holder of the electronic bill of lading shall have the **same rights and privileges** in relation to the contract of carriage evidenced by the electronic bill of lading, as in the paper-based environment.

In order to conclude a contract of carriage, the seller electronically books the space, and then the shipper electronically instructs the carrier concerning the goods. The carrier issues an electronic bill of lading and signs it digitally, which is deposited at the central registry. The digitally signed electronic bill of lading is sent also to the shipper. The central registry authenticates the message by checking the carrier's digital signature as well as it adds its own electronic signature. The so-called 'consignment record' contains the details of the shipping document being stored on the central registry. Then the registry passes the checked BBL on the shipper, who becomes the first record holder as soon as he confirmed, hence accepted the electronic bill of lading. Thereafter, the registry sends the accepted BBL to the carrier. In case of transfer of the electronic bill of lading, the shipper or any current holder transfers the request to the central registry which forwards it to the buyer. After the system has received the acceptance of the buyer, the carrier is also informed about the transaction, hence the carrier is also involved in each subsequent endorsement.

Only appropriately authorized users can access this record in order to read or modify. The central registry authenticates and validates each message. The system has introduced strong security procedures and controls to protect integrity and authenticity of electronic messages. Moreover, in order to supply economic necessities better, the bank can view the consignment

records electronically and “check whether or not the bill of lading tendered by the seller corresponds to the instructions of the buyer.”¹⁵²

VI. CONCLUSION

There are relevant factors which determine sea trade and the type of issued transport document. The need of different **kinds of voyage** is one of these factors. The bill of lading still plays a key role in tramp shipping when vessels seek cargo according to individual needs. On the contrary, short distances on which the goods are carried by sea or if there is a deep sea leg, then the classic bill of lading does not seem necessary. **Nature of the goods** also determines the voyage. And last but not at least the **geographical scope** is also decisive. For instance, from the Nordic export aspect involving liner traffic the bill of lading for financing is mainly used beyond the northern Mediterranean “line”, largely in south- and eastbound traffic. It must be emphasised that **trade traditions** may also determine the voyage in question. According to precedent, outside the European continent the bill of lading is required, especially if the destination of the cargo is located in an Asian country. Moreover, **deals of trade** impacts the issue as well. For import a different concept applies and the use of the bill of lading is noticeable in the western hemisphere. Furthermore, the protection of cargo interest as well as fair risk division¹⁵³ between the parties supplies keeping up the advantages of this old merchandise document.

As it is discernible, there is no beyond all praise article of transport in the realm of carriage of goods by sea as transport document. Variegation of demands by itself is the justification of bill of lading. The above mentioned alternatives are different kinds of possibility to fit the transport document to the necessity of the voyage and the goods in question. Whereas the sea waybill is unable to reproduce and symbolise the same functions, until now, the bill of lading is the only genus of transport document which can symbolize the title to the goods by surrender and presentation, in other words, the bill of lading stands alone to create the constructive possession of the goods under most jurisdiction and court practice. There is no denying the fact that issues regarding to resell as well as rapidity of voyages front the bill of

¹⁵² See Girvin (2007), p. 166.

¹⁵³ Shah describes it in terms of the requirement of laissez-faire concerning the creation of the Hamburg Rules: "... widespread frustration and deep-seated shipper and public resentment over those 'hardy perennials' - the indiscriminate use of invalid clauses in bills of lading, the abuse of the jurisdiction clause, the low monetary limit of liability, and wide exceptions permitted the carrier..."

lading with new challenges. Nevertheless, the author of the work deeply believe that the bill of lading is able to take up the challenge and give answers for the emerging questions and necessities of recent international trade and transportation.

According to me, recently the **electronic bill of lading** cannot be treated otherwise than merely a new species of document with several arising problems and questions under national jurisdictions. Nevertheless, jurisprudence and legal practice is needed to provide clear and accurate answers on the score of insistent commercial needs and the already existing business practice. 'International legislation' has already attempted to envisage the issue proven by the above mentioned model laws and rules. On the other hand, traders act in a 'legal vacuum' until these instruments are not highly accepted and ratified on the national level as well. Sooner or later national jurisdictions need to take a stand, and electronic commerce and the electronic bill of lading cannot be disregarded on the ground of the vital commercial practice. Then again, also the technical background should provide an adequate level in order to eliminate inconsistency with the age long existing legal requirements. And finally, the thus legally and technically processed solution should be uniformly accepted and applied by the commercial practice. In spite of the emerging use of electronic bill of lading, it is still not wide-spread accepted in the realm of international trade and transport. The legal framework is forming; however, an established custom is still missing.

In my esteem, "before consigning bills of lading to oblivion, however, as some argue one should, it is important to appreciate that they have many advantages over any other document as yet conceived"¹⁵⁴ – both under the classic and the electronic meaning.

¹⁵⁴ See Todd (1990), p. 1.

BIBLIOGRAPHY

Ashburner, William, *The Rhodian Sea Law*. Oxford, 1909, reprinted Aalen, 1976. (Ashburner 1976)

Blancard, L., (ed.) Documents Inédits sur le Commerce de Marseille au Moyen Age. Marseille: Barlatier-Feissat, Pere et Fils, 1884, Vol. II., p. 109; reprinted in Cave, Roy C. & Coulson, Herbert H. (eds.) A Source Book for Medieval Economic History. Milwaukee: The Bruce Publishing Co., 1936; reprint ed., New York: Biblo & Tannen, 1965. (Blancard 1965) pp. 159-160.

Carriage of Goods by Sea – Transport Documents and Their Commercial Functions Lecture by Peter Wetterstein in Åbo Akademi, Turku, Finland on 24 November, 2005.

Chandler, George, The Electronic Transfer of Bills of Lading, *Journal of Maritime Law and Commerce*, (1989) (Chandler 1989)

Cheshire, Fifoot and Furmston's Law of Contract. M. P. F. Furmstone. Historical Introduction, A. W. B. Simpson. London, 1986. (Cheshire 1986)

Colinvaux, Raoul, *Carver's Carriage by Sea, Volume I*. London: Stevens & Sons, 1971. (Carver's 1971)

D'Arcy, Murray & Cleave, Schmitthoff's Export Trade, The Law and Practice of International Trade Law. London: Sweet & Maxwell, 2000 [1948]. (Schmitthoff's 2000)

Fagniez Gustave M., (ed.) Documents Relatifs à l'Histoire de l'Industrie et du Commerce en France. Brussels: A. Picard et Fils, 1898, Vol. I, pp. 75-77, reprinted in Cave, Roy C. & Coulson, Herbert H. (eds.) A Source Book for Medieval Economic History. Milwaukee: The Bruce Publishing Co., 1936; reprint ed., New York: Biblo & Tannen, 1965. (Fagniez 1965) pp. 153-155.

Falkanger, Thor & Bull, Jacob Hans & Brautaset, Lasse, Introduction to Maritime Law. Tano Aschehoug, 1998. (Falkanger-Bull-Brautaset, 1998)

Girvin, Stephen, *Carriage of Goods by Sea*, Oxford, Oxford University Press, 2007 (Girvin 2007)

Greiner, Edmund, *EDI and the Traditional Bill of Lading*, Research Option, Cape Town, 1997 (Greiner, 1997)

Herber, Rolf, Law of Transport. Vol. XII. International Encyclopedia of Comparative Law (2001), (Herber 2001)

Honka, Hannu (ed.) New Carriage of Goods by Sea, The Nordic Approach Including Comparisons with Some Other Jurisdictions. Åbo: Åbo Akademis tryckeri, 1997. (Honka 1997)

Kozolchyk, Boris, *Journal of Maritime Law and Commerce*, Vol. 23. No. 2. (1992) (Kozolchyk 1992)

Laudrup, Alex, Suspension of Time Bar in Scandinavian Maritime Law, in *Essay in Honour of Hugo Tilberg*. Stockholm, 1996. (Laudrup 1996)

Martin, Elizabeth A. (ed.) *Oxford Dictionary of Law*. Oxford, New York, Oxford University Press, 2002. (Oxford Dictionary of Law)

Mitchelhill, Alan, *Bills of Lading, Law and Practice*, New York, Chapman and Hall in association with Methuen, Inc., 1982. (Mitchelhill 1982)

Mocatta, Mustill & Boyd, *Scrutton on Charterparties and Bills of Lading*. London: Sweet & Maxwell, 1984 [1886]. (Scrutton 1984)

Muthow, Erik, *The Impact of EDI on Bills of Lading – A Global Perspective on the Dynamics Involved*, Research Dissertation, Cape Town, 1997 (Muthow 1997)

Schoenbaum, Thomas, *Admiralty and Maritime Law*, U.S.A.: West Publishing Company, 2001. (Schoenbaum 2001)

Selvig, Erling, *Erstatningsberegningen ved lasteskader (Calculation of Damages in Damage to the Goods)*. Gothenburg, School of Economics and Business Administration Publications, Vol. 2 (1962) (Selvig 1962)

Sturley, Michael F., The History of COGSA and the Hague Rules, *Journal of Maritime Law and Commerce*, Vol. 22 (1991), pp. 1-57. (Sturley 1991)

Tetley, William, *International Conflict of Laws – Common, Civil and Maritime*, Montreal, 1994. (Tetley 1994)

Tetley, William, *Marine Cargo Claims*, Montreal, 1988. (Tetley 1988)

Tetley, William, Tug and Tow, A Comparative Study – Common Law/Civil Law – U.S., U.K., Canada and France. Directorate Maritime 1991, 893 – 923 (Tetley 1991)

Todd, Paul, *Dematerialization of shipping documents*, <http://ourworld.compuserve.com/homepages/pntodd/intr/publns/demat.htm>

Todd, Paul, *Modern Bills of Lading*. Oxford, London, Edinburgh, Boston, Melbourne: Blackwell Law, 1990. (Todd 1990)

Wilson, J. F., Basic Carrier Liability and the Right of Limitation, in Samir Mankabady (ed.), *The Hamburg Rules on the Carriage of Goods by Sea*. Leyden/Boston, 1978 (Wilson 1978)

http://www.foreign-trade.com/reference/terms_b.cfm

TABLE OF STATUTORY INSTRUMENTS

Appendix to BOLERO Rulebook – Operation Procedures, 1999

BOLERO Rulebook, 1999

CMI Rules for Electronic Bill of Lading, 1990

CMI Uniform Rules for Sea Waybills, 1991

International Convention for the Safety of Life at Sea, 1974 (SOLAS)

International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Signed at Brussels on 25 August 1924, as Amended by the Protocol Signed at Brussels on 23 February 1968 and the Protocol Signed at Brussels on 21 December 1979 (The Hague-Visby Rules)

International Convention on Load Lines, 1966

International Convention on Standards of Training, Certification, Watchkeeping for Seafarers, 1978 (STCW)

International Management Code for the Safe Operation of Ships and Pollution Prevention a.k.a. International Safety Management Code, 1993 (ISM).

International Maritime Dangerous Goods Code, 1965 (IMDG Code)

Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication

Nordic Maritime Code 1994

Protocol to Amend the International Convention for the Unification of Certain Rules of Relating to Bills of Lading, Signed at Brussels on 21 December 1979 (The SDR Protocol)

The Finnish Maritime Code, Chapter 13. Carriage of Goods by Sea, 1994

The Finnish Tort Act, 1974

Uniform Customs and Practice for Documentary Credits, 1993

United Nations Conventions on Contracts for the International Sale of Goods, 1980 (CISG)

United Nations Convention on the Carriage of Goods by Sea, Signed at Hamburg on 31 March 1978 (The Hamburg Rules)

United Nation Convention on the Liability of Operators of Transport Terminals in International Trade of 1994

York-Antwerp Rules, 1994

TABLE OF CASES

Adler v. Dickson [1954] 2 Lloyd's Rep. 267 CA.

Gardano and Giampieri v. Greek Petroleum George Mamidakis & Co [1962] 1 W.L.R. 40 at 52.

Heskell v. Continental Ltd [1950] 1 All E.R. 1033 at 1037

NJA 1996.483 (Tor Caledonia) Supreme Court of Sweden

NMCases 1977.1 (Tor Mercia) Supreme Court of Sweden

NMCases 1995.51 (Shinn Fu) Gothenburg Court, Sweden

Pyrene Co. Ltd. v. Scindia Steam Navigation Co. Ltd. [1954] 1 Lloyd's Rep 321 QB 328

Riverstone Meat Co. v. Lancashire Shipping Co. (The Muncaster Castle) [1961] 1 Lloyd's Rep. 57 HL.

Sea & Land Securities v. William Dickinson & Co., Ltd. [1942] 2 K.B. 65 (69), L.L.Rep. 159 (162-163) (C.A.)

Skips A/S Nordheim v. Syrian Petroleum Co and Petrofina SA (The Varenna) [1984] Q.B. 599; [1983] 3 All E.R. 645; [1983] 2 Lloyd's Rep. 592, CA

The Berge Tasta [1975] 1 Lloyd's Rep. 422 (424) (Q.B.)

Union of India v. N.V. Reederij Amsterdam [1963] 2 Lloyd's Rep. 223 HL