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INTERNATIONAL MARITIME LAW INSTITUTE

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A

LEGAL ANALYSIS OF THE UPCOMING "ROTTERDAM RULES" VIZ-A-VIZ PRESENT REGIMES

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Dedicated To

The Prophet Noah (pbuh),

Shafiq ur Rahman
Lt Commander
Pakistan Navy

[1] *Quran 11:37&38*
[2] *Quran 23:27*
[3] *Quran 11:44*
[4] *Quran 11:40*
[5] *Quran 11:41*

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ABBREVIATIONS

AAR	Association of American Railroads
B/L	Bill of Lading
Bs/L	Bills of Lading
CFR	Cost and Freight
CIF	Cost, Insurance and Freight
CISG	UN Convention on Contracts for the International Sale of Goods 1980
CMI	International Maritime Committee
COGSA	The Carriage of Goods by Sea Act, 1936
EC	European Commission
EDI	Electronic Data Interchange
ESC	European Shippers' Council
ESCWA	United Nations Economic & Social Commission for West Asia
ETR	Electronic Transport Record
EU	European Union
FIATA	International Federation of Freight Forwarders Associations
FIO	Free In and Out
FIOS	Free In-Out-Stowed
Hague Rules	International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels on 25 August 1924
Hamburg Rules	United Nations Convention on the Carriage of Goods by Sea, signed in Hamburg on 31 March 1978
HVR	Hague Visby Rules
IAPH	International Association of Ports and Harbors
ICC	International Chamber of Commerce
ICS	International Chamber of Shipping
IGPI	International Group of P&I Clubs
ILC	International Legal Committee
IMLI	International Maritime Law Institute
IMMTA	International Multimodal Transport Association

IMO	International Maritime Organisation
IRU	International Road Transport Union
ISC	International Sub Committee
IUMI	International Union of Marine Insurance
JIML	Journal of International Maritime Law
JMLC	Journal of Maritime Law and Commerce
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
MLA	Maritime Law Association
NVOCC	Non-Vessel Operating Common Carrier
NVZV	De Nederlandse Vereniging voor Zee- en Vervoersrecht (Netherlands' Association for Maritime and Transport Law)
OLSA	Ocean Liner Service Agreement
OTIF	International Organisation for International Carriage by Rail
STI	Shipping & Transport International
UNCTAD	United Nation Convention on Trade and Development
UNECE	United Nations Economic Commission for Europe
UNO	United Nations Organisation
USMLA	United States Maritime Law Association
WG	Working Group
WMU	World Maritime University
WP	Working Paper

LIST OF CASES

1534 Chapman v Peers (1534).

1774 Lickbarrow v Mason (1774).

1793 Snee v Prescott (1793).

1851 Grant v Norway (1851) Court of Common Pleas (1851) 138 ER 263 10 CB 665, 20 LJCP 93, 15 Jur.296, 16 LTOS 504.

1883 Sanders Bros v Madean & Co. (1883) 11 QBD 327-341

1929 Gosse Millerd v. Canadian Govt. Merchant Marine [1929] A.C. 223, 32 Ll. L R 91

1962 Scruttons Ltd. v. Midland Silicones Ltd [1962] AC 446

1993 The Fiona [1993] 1 Lloyd's Rep. 257

2004 Norfolk Southern Railways Co. V James N. Kirby Pty Ltd., 125 S. Ct 385, 2004 AMC 2705 (2004)

LIST OF STATUTES

NATIONAL LAWS AND ACTS

1855 The Bills of Lading Act, 1855

1893 The Harter Act, 1893.

1904 The Australian Sea Carriage of Goods Act of 1904

1908 The New Zealand Shipping and Seamen Act of 1908

1910 The Canadian Carriage of Goods by Water Act of 1910

1936 The USA's Carriage of Goods by Sea Act, 1936

CONVENTIONS

1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels on 25 August 1924

1975 Additional Protocol No. 4 of 1975 amending Warsaw Convention 1929.

1929 The Carriage by Air Convention, 1929.

1936 the Carriage of Goods by Sea Act, 1936

1956 The Convention on the Contract for the International Carriage of Goods by Road (CMR) 1956.

1968 Visby Protocol to Hague Rules 1924

1978 United Nations Convention on the Carriage of Goods by Sea, signed in Hamburg on 31 March 1978

1980 The Convention Concerning International Carriage by Rail (COTIF), 1980 (old version was of 1890).

1980 The UN Convention on Contracts for the International Sale of Goods 1980.

1980 UN Convention on International Multimodal Transport of Goods (done at Geneva), 1980.

2000 Budapest Convention on the Contract for Carriage of Goods in Inland Navigation 2000

2001 The Budapest Convention on the Contract for Carriage of Goods in Inland Navigation (CMNI), of 20 Jun 2001.

2008 The UN Convention on the Carriage of Goods (wholly or partly) by Sea, 2008

INTRODUCTION

The latest journey for up-gradation of the Convention on carriage of goods, that was conceived[6] by CMI[7] in 1988,[8] pondered by the UNCITRAL[9] in 1996[10] and later gradually taken it over from CMI in Dec 2001,[11] went through many U-turns and a number of forms before getting ripe and shaped in 2008, in structure of the draft "Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea" at the 41st Session[12] of the Commission. The Draft Convention was considered by the 6th Committee[13] of the UN General Assembly on October 20, 2008 and, unlike traditional way of Diplomatic Conference,[14] its resolution was considered and adopted by the UN General Assembly Plenary Session at its 63rd Session on 11 December 2008. A Signing Ceremony is being considered with Rotterdam as the venue[15] on 21-23 September 2009. Thereafter, it will be open for ratification and accession.

The adoption of this Convention is considered a major event in Maritime Law and is being subjected to many diverse comments by various sectors. After taking a falcon-eye appraisal of present regimes i.e. Hague-Visby Rules and Hamburg Rules, this study is based on the analysis of the Convention from a legal perspective by taking into account view point of different scholars as well comments of different representatives of a number of states.

It may be mentioned here that the comments/remarks of various persons contained in Part-5 may not be construed as point of view of the organizations or the institutions they belong to except where expressly mentioned therewith.

Finally Part **6** is devoted to the conclusions, suggestions and recommendations.

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[6] CMI, the first NGO having international character created in 1897 in Paris.
[7] See Abbreviations.
[8] A Brief History of the Involvement of CMI from the Initial Stages to the Preparation of the UNICITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea; http://www.cmi2008athens.gr/uncitral-history.pdf, accessed on 5 March 2009.
[9] See Abbreviations.
[10] Official Records of the General Assembly, Fifty first Session, Supplement No. 17 (A/51/17).
[11] UN Doc A/53/17, para.264 &266, read with UNCITRAL Doc A/CN.9/497 dated 2 May 2001.
[12] Held at New York, 16–3Jun/July 2008, by deleting/renumbering Articles 13 &36 of Previous draft.
[13] International Legal Committee.
[14] Diamond, Anthony QC.; "The Next Sea Carriage Convention", LMCLQ, No.2 (2008), p.137.
[15] http://www.cmla.org/PresidentReport/president.htm, accessed on 8 Nov 2008.

PART-1

BACKGROUND

1.1 HISTORICAL

Water is life, and it is due to this fact that earliest Four Civilisations were mainly concentrated near rivers,[16] of which Indus River Civilisation is the one for which the latest excavations[17] suggest that was seemingly surpassing the rest of the civilisations not only in terms of largeness of size[18], advancement[19] and literacy but also in maintenance of inter-civilisation relations by way of trade and exchange of commodities.[20] As on one hand there are traces of a boats[21] with an average capacity of 5-10 tons used in trade with Mesopotamia, there have been found inscribed objects (see **Figure-1**) in Harappan Civilisation[22] of Indus River that suggest carriage of invoiced goods (perhaps like today's B/L) or simply possessions of property items listed by merchants trading between the two valleys.[23]

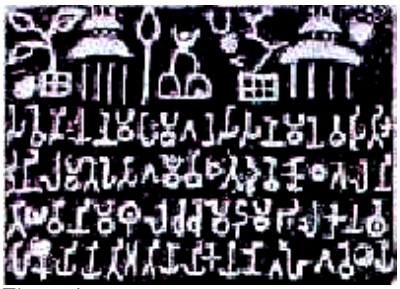

Figure-1 A copper plate of Harappan Civilisation (5500 – 1900 BCE) in Pakistan, showing details, similar to today's B/L, in Indus Valley Script, of merchandise carried by traders via sea to Mesopotamia (presently Iraq). **Source**: http://sarasvati97.spaces.live.com

Development of the sea-trade over ages, necessitated issuance of documents gradually turning into the three functions of the B/L. In 1883, the Bown L J describing the role of B/L more essentially as a document of title[24] said: "A key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be".[25]

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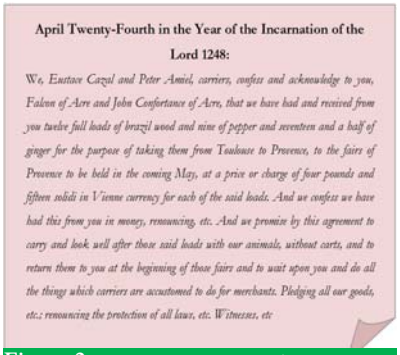
[16] 'Nile' in Egypt, 'Euphrates' and 'Tigris' in Iraq, 'Yangtze' in China and 'Indus' in Pakistan.
[17] Particularly those undertaken at Harappa in 1993-1995 and 2000.
[18] Hasenpflug, Rainer; The Inscriptions of the Indus Civilisation, 2006, Norderstedt, Germany, visited at http://www.indus-civilization.info/, on 4 Feb 2009
[19] The merchants used in business, Transcript of mleccha/meluhha, the spoken language (since 6500BCE).
[20] Ratnagar, Shereen; The Westerly Trade of the Harappa Civilization, Delhi, 1981, p.180, visited at http://www.hindunet.org/hindu_history/sarasvati/dictionary/7398to.htm, on 3 Feb 2009
[21] A flat-bottomed dugout, decked at both ends.
[22] It was known to Mesopotamians (Iraqis) as 'Meluhha' meaning 'Sailors'.
[23] http://sarasvati97.spaces.live.com/, on 4 Feb 2009.
[24] Todd, Paul; 'The Bill of Lading and Delivery: The Common Law Actions', (2006) LMCLQ, p. 539-567.
[25] Sanders Bros v Madean & Co. (1883) 11 QBD 327-341.

1.2 PRE HAGUE SCENARIO

1.2.1 Bills of Lading (through the 10th–19th Century)

In modern times, although the record keeping of cargo on board the vessels by maintaining a register can be found a millennium[26] ago, yet it is hard to find as to when the practice of issuing Bs/L has actually started. Bs/L were employed in the thirteenth century, (see **Figure-2**). They may have accompanied bills of exchange which were used as instruments of credit in order to economize in the shipment of species stating freight charges in the contract.[27] Nonetheless, by mid sixteenth century (see **Figure-3**) use of Bs/L was quite endemic.[28] Around the same period referring to the long practice of merchants as well as the rule of law, it was interestingly noted by the court[29] that if goods were not entered in the B/L, no liability attached to the master or owner of the ship.[30]


April Twenty-Fourth in the Year of the Incarnation of the Lord 1248:

We, Eustace Cazal and Peter Amiel, carriers, confess and acknowledge to you, Falcon of Acre and John Confortance of Acre, that we have had and received from you twelve full loads of brazil wood and nine of pepper and seventeen and a half of ginger for the purpose of taking them from Toulouse to Provence, to the fairs of Provence to be held in the coming May, at a price or charge of four pounds and fifteen solidi in Vienne currency for each of the said loads. And we confess we have had this from you in money, renouncing, etc. And we promise by this agreement to carry and look well after those said loads with our animals, without carts, and to return them to you at the beginning of those fairs and to wait upon you and do all the things which carriers are accustomed to do for merchants. Pledging all our goods, etc.; renouncing the protection of all laws, etc. Witnesses, etc

Figure-2: Extracts of 13th Century B/L
Source: www.fordham.edu

By the 18th century, (see **Figure-4**) growing trade eventually necessitated the transfer of title in the goods at the port of destination before arrival of goods. Hence concept of endorsing the B/L to a third party in order to affect transfer of the goods began to be practiced, making the B/L a negotiable instrument. The first reported case[31] in which endorsement is actually mentioned in connection with the assignment of a B/L dates back to 1793.[32]

Another case to which earliest judicial recognition of B/L as 'negotiable' can be attributed was of City of London Jury's leading case of 1774[33] wherein the contract of carriage was also termed as 'bailment'.[34] Consequently, legal difficulties arose when title of the goods was transferred and they were lost or damaged at sea and the

[26] The Ordonnance Maritime Trani of 1063 (in an Italian town).
[27] http://www.fordham.edu/halsall/source/1248billoflading.html, accessed on 23 Jan 2009.
[28] Which was described as 'Le Guiden de la Mer', Mitchelhill, Alan; bills of lading, Law and Practice, Second Edition, Champan and Hall, New York, 1990.
[29] Chapman v Peers (1534).
[30] McLaughlin, Chester B. Jr.; The Evolution of the Ocean Bill of Lading, The Yale Law Journal, Vol. 35, No. 5 (Mar., 1926), pp. 548-570; visited at http://www.jstor.org/pss/788960, accessed on 24 Jan 2009.
[31] Ibid.
[32] Snee v Prescott (1793).
[33] Lickbarrow v Mason (1774).
[34] As put by Lord Loughborough.

consignee, who though had acquired title of goods, was not able to sue being not party to the contract of carriage.

1.2.2 The Bills of Lading Act, 1855

In 1851, the court[35] held in case where the master had issued a B/L of the cargo which was never shipped on board, such an action of the master was *ultra vires* and hence did not bind the ship owner.[36] Due to this, and the case mentioned earlier[37] there was a strong move in Britain that there should be legislation to regulate such issues, hence the Bills of Lading Act, 1855 was passed[38] seeking to provide a statutory form of assignment of rights under the contract to third parties, for Bs/L only. It linked the transfer of rights and liabilities in the goods with passing of property "upon or by reason of consignment or endorsement".[39]

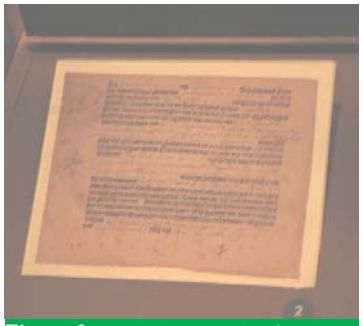


Figure-3: Handwritten Dutch B/L of 1589 (Scheepvaart Museum, Amsterdam); **Source**: flickr.com/photos/sl4mmy/22970769/

1.2.3 Model Bills of Lading:

As the practice grew further in the 19th century, the ship-owners, in the wake of adverse court decisions and in order to protect themselves against inherent sea perils, started strengthening their Bs/L by adding 'exoneration' or 'negligence' clauses. This lead to great dissatisfaction amongst the shippers and a compromise was made towards end of 19th Century[40] in form of 'Liverpool Model Form' for Bs/L, for voluntary adoption by parties.[41]

1.2.4 York-Antwerp Rules, 1877

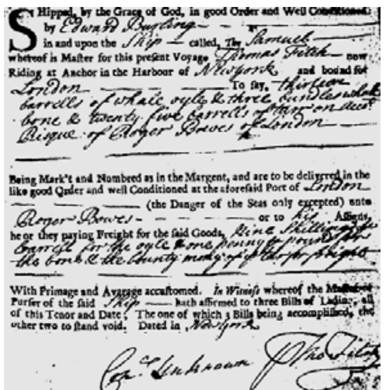
In 1860, the issue of General Average was harmonized which led to a second conference in 1864 producing the York Rules. Later, in 1877 they were revised and

[35] Grant v Norway (1851) Court of Common Pleas (1851) 138 ER 263 10 CB 665, 20 LJCP 93, 15 Jur.296, 16 LTOS 504.
[36] See http://ourworld.compuserve.com/homepages/pntodd/cases/cases_g/grant_n.htm, for remarks of Jervis CJ; accessed on 24 Jan 2009.
[37] i.e. Lickbarrow v Mason (1774).
[38] On 14 Aug 1855.
[39] Ssction.1 of the Bills of Lading Act, 1855, enabling the consignee & endorsee to sue the carrier.
[40] Between 1890-1901; Mitchelhill, Alan; 'Bills of Lading, Law and Practice', 2nd Ed., Champan and Hall, New York, 1990, p.2.
[41] Güner-Özbek, Meltem Deniz; 'The Carriage of Dangerous Goods by Sea', 2007, Springer, Germany, p.151; visited at http://books.google.com/books?id=5hscgGkPwBkC, accessed on 24 Jan 2009.

named as York-Antwerp Rules, 1877. Despite lacking the force of law, they reflect consensus of the international shipping industry and merits full judicial cognizance so long as they are not in conflict with statutory law or public policies of equal or greater importance.[42]

1.2.5 Hamburg Rules, 1885

A meeting held at Liverpool[43] first time introduced the carrier's liability by incorporating the word '*due diligence*' and fixing his liability to the tune of 100 pounds sterling in the Model Bs/L which subsequently lead to adoption of Hamburg Rules in 1885 which the parties could voluntarily incorporate/refer into their Bs/L. These model documents and 'Liverpool Model Form' also made clear those shippers adopting them within Bs/L would be subject to strict liability for damages resulting from inherently dangerous goods.[44]


SHipped, by the Grace of God, in good Order and Well Conditioned, by Edward Burling in and upon the Ship called, The Samuel whereof is Master for this present Voyage Thomas Fitch now Riding at Anchor in the Harbour of New York, and bound for London To say, thirteen barrells of whale oyle & three bundles whale bone & twenty five barrells of ... on acct & Risque of Roger Bowes of London

Being Mark't and Numbered as in the Margent, and are to be delivered in the like good Order and well Conditioned at the aforesaid Port of London (the Danger of the Seas only excepted) unto Roger Bowes or to his Assigns, he or they paying Freight for the said Goods, nine shillings ...

With Primage and Avarage accustomed. *In Witness* whereof the Master or Purser of the said Ship hath affirmed to three Bills of Lading, all of this Tenor and Date; The one of which 3 Bills being accomplished, the other two to stand void. Dated in New York

Figure-4: B/L of 1720 for shipment from New York to London on Burling's Ship *Samuel*, **Source**: http://home.comcast.net/~jane81/

Efforts of striking balance via York-Antwerp Rules, 1877 and Hamburg Rules, 1885 were recommendatory in nature to be voluntarily inserted in the Bs/L with no binding force.[45]

1.2.6 The Harter Act, 1893

While in England, the considerations led to the 'Model' Bs/L to achieve a fairer balance, in USA, cargo-owners succeeded to obtain the Harter Act,[46] adjusting balance in their favour. This was followed by similar legislations in Australia[47],

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[42] Mangone, Gerard J.; US Admiralty Law, 1997, Kluwer Law International, Hague, p.108, visited at http://books.google.com/books?id=CmCzy3IoDQIC, on 25 Jan 2009.

[43] In the year 1882.

[44] Observation of US Circuit Court of Appeals; Gmbh v Eastern Sunway Line, (Doc No.01-7374), 17/5/2002 http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=2nd&navby=docket&no=017374, accessed on 24 Jan 2009.

[45] Karan, Hakan; 'the carrier's liability under international maritime conventions the Hague, Hague-Visby, and Hamburg Rules', 2004, the Edwin Mellen Press, New York, p.23.

[46] Of 1893.

[47] The Australian Sea Carriage of Goods Act of 1904.

Canada[48] and New Zealand,[49] subsequently influencing formulation of the Hague Rules of 1924.[50]

1.2.7 The Regulations, 1917

The Harter style legislations by Australia, New Zealand and Canada lacked uniformity creating confusions in British Empire as it were applied to inward and local shipments only. Hence, Imperial Government set to legislate for the whole of Empire, 1917 being first such abortive attempt.[51]

1.3 HAGUE RULES 1921 & 1924

In 1921 after WW-I, Imperial Shipping Committee recommended to the Royal Government to make the Law similar to Canadian style legislation being of latest experience. The Government did not like to annoy[52] its carriers. So upon her request[53] the International Law Association[54] prepared the draft law which was adopted at Hague on 2 Sep, 1921[55]. However, it didn't attract sufficient support leading to some amendments in Brussels on 25 Aug 1924.[56]

1.3.1 Visby Protocol, 1968

In 1963, after study by the CMI,[57] a 'Draft Protocol', intending to make amendments to the 1924 Convention, was concluded at Visby[58] and was finally adopted at Brussels in 1968 without radically altering the Hague Rules mainly because of the compromise between the demands of the carriers and cargo owners.

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[48] The Canadian Carriage of Goods by Water Act of 1910.
[49] The New Zealand Shipping and Seamen Act of 1908.
[50] Interestingly, the USA adopted the Hague Rules with some modifications as COGSA, 1936 without amending/repealing the Harter Act, 1893.
[51] Karan, Hakan; 'The Carrier's Liability Under International Maritime Conventions; the Hague, Hague-Visby, and Hamburg Rules', Edwin Mellen Press, New York, 2004, p 21-24.
[52] As the trend of making the Carriers liable was dominating, the Royal Govt. did not want to take blame of making this unfavour to its carriers and ship-owning industry.
[53] Karan, p.21-24.
[54] Hereinafter referred to as ILA.
[55] Sooner they were amended therefore referred to as Pre-Hague Rules.
[56] Karan, p.26.
[57] A representative body of National Maritime Law Associations, for unification of maritime laws.
[58] The capital of Gotland Island in the Baltic-Sea off coast of Sweden.

1.3.2 SDR Protocol, 1979

In 1979, another amendment was made aiming to link the liability amount to the SDR[59]which was also used by some other International Instruments e.g. the WARSAW[60] for valuing the maximum liability of the carrier.

1.4 HAMBURG RULES, 1978

Before the ink was dry for signing of Visby-Protocol, there was a move at UNCTAD[61] to amend the Hague Rules in their entirety bringing conformity with the needs of economic developments particularly of developing countries[62] culminating into adoption of Hamburg Rules in March 1978 which entered into force on 1st Nov 1992. There are 32 state-parties to these rules representing almost 5 percent of the world trade by sea.[63]

[59] http://www.imf.org/external/np/exr/facts/sdr.htm; basket of EUR, GBP, JPY and USD, created 1969.
[60] Carriage by Air Convention, 1929.
[61] See Abbreviations.
[62] Astle, W. E.; Bills of Lading Law, Fairplay Publications, Surrey, UK, 1982, p. 49.
[63] Wilson, John F.; Carriage of Goods by Sea, 6th Ed, 2008, Pearson Education Limited, Essex, UK, p.214.

PART–2

AN ABSTRACT OF PRESENT INTERNATIONAL REGIMES

The Hague Rules, 1924,[64] and its Protocols, and the Hamburg Rules, 1978[65] are successively overviewed hereunder. Unless otherwise provided in context generally the sub-title first elaborates the former[66] followed by the latter.[67]

2.1 CARRIER

'Carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper[68] and, by case law, also applies to the performing carrier. Under the **Hamburg Rules,** carrier is the one by whom or in whose name a contract of carriage of goods by sea is concluded with a shipper[69] and covers actual carriers or any person entrusted by the carrier to perform all or part of the contract.[70]

2.2 CONTRACT OF CARRIAGE

The Hague Rules apply to the 'contract of carriage' only if performed under a B/L[71] or a 'similar document' e.g. "Sea Waybill"[72] or "Ship Delivery Order[73] and not charterparties because it was stressed having equal bargaining power[74] they do not need regulatory protection.[75] However from the moment a B/L regulates the relationship between the parties the Rules apply.[76]

Though it envisages issuance of B/L,[77] under **Hamburg Rules** contracts of carriage do not depend on issuance of B/L[78] but obligate the carrier to issue B/L on demand by the shipper.[79] Facsimile printing and electronic transmission of B/L is also permitted.[80] On charterparties issue, the Hamburg Rules correspond to Hague Rules.[81]

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[64] See Abbreviations.
[65] Ibid.
[66] having 16 Articles.
[67] having 34 Articles.
[68] Article 1(a).
[69] Article 1(1).
[70] Article 1(2).
[71] Article 1(b).
[72] A straight B/L is a document of title but is not negotiable.
[73] A document of title that covers the period after the discharge from the ship until the delivery of goods to the consignee.
[74] Moller, A.P.; a Danish shipowner's statement made during CMI Conference held in Goteborg in 1922.
[75] Berlingieri, Francesco; edit, 'The Travaux Preparatoires of the Hague-Visby Rules', p.95.
[76] E.g when there is third party shipper.
[77] Article 2(1)(d)&(e).
[78] Article 2.
[79] Article 14(1).

2.3 GOODS & CARGO

Goods[82] include wares, merchandise and articles of every kind, except 'live animals' and 'deck cargo'[83] because they carry a particular risk greater than the carriage of normal goods.[84]

Hamburg Rules cover all kinds of cargo (including live-animals)[85] subject to the general obligations of care[86] but not for loss resulting from any special-risk inherent in that kind of carriage.[87] Goods also include deck-cargo[88] only if agreed with the shipper or is in accordance with the usage, rules or regulations but a statement to the effect must be made in B/L.[89]

2.4 DANGEROUS CARGO

Dangerous goods shall not be shipped without consent/knowledge of the carrier[90] and if breached, the carrier can neutralize them without any compensation; instead shipper would also liable for any consequential loss or damage.[91]

Hamburg Rules added[92] some provisions for dangerous goods e.g. marking/labeling the cargo as 'dangerous',[93] intimating the character of the dangerous goods to the carrier by taking necessary precaution[94] and expressly mentioning the statement in B/L.[95]

2.5 PERIOD OF RESPONSIBILITY OF THE CARRIER

Deeming the carrier as 'bailee' for the goods entrusted to him the time of his responsibility[96] is from loading to discharge[97]. The **Hamburg Rules**[98] cover the period

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[80] Article 14(3).
[81] Article 2 (3).
[82] Article 1(c).
[83] Subject to the mutual agreement and knowledge of shipper and the goods must be actually carried so.
[84] In a container ship there is no deck. So, interpretation of the Hague-Rules will differ.
[85] Article 1(5).
[86] Article 5(1).
[87] Article 5(5).
[88] Article 9.
[89] Article 9(2).
[90] Article 4.
[91] Article 4(6).
[92] Article 13.
[93] Article 13(1).
[94] Article 13(2).
[95] Article 15(1)(a).
[96] Article 1(e).
[97] Known as 'tackle to tackle' period.
[98] Article 4(1).

from taking charge of the goods at the loading-port, during the carriage till delivery at the discharge-port. 'In charge of the goods'[99] includes agent and servant of carriers also.[100]

2.5 'CLAUSE PARAMOUNT'

'Clause Paramount'[101] denotes that once established that the Hague[102] or Hague-Visby Rules,[103] will apply, they become mandatory with no option to derogate or fettering by covenant/agreement[104] and any agreement modifying to favour the carrier in derogation of the Rules, would be null and void[105]

Similar provisions of nullity[106] are in the **Hamburg Rules,** but it does not invalidate the contract itself.[107] If stipulation brings loss to the consignee, the carrier will compensate him.[108] It also provides to make a statement in the B/L to the effect of strict applicability of the Rules[109] the carrier may however increase his responsibilities under the convention.[110]

2.6 SERIES OF SHIPMENT

The **Hamburg Rules** apply to each shipment, if a contract provides for future carriage of goods in a series of shipments during an agreed period[111] applying also to shipment under a charter-party.[112]

2.7 LIABILITIES OF THE CARRIER

The carrier is principally obliged to provide a seaworthy ship, take care and custody of the cargo and issue B/L.[113] These obligations are, however, softened by a number of exceptions and exclusions.[114]

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[99] Article 4(2).
[100] Article 4(3).
[101] Article 2.
[102] Article 10.
[103] Article 5.
[104] Article 3(8).
[105] E.g. agreement by the shipper to surrender benefit of 'insurance' in favour of the carrier would be void.
[106] Article 23(1).
[107] Ibid.
[108] Article 23(4).
[109] Article 23(3).
[110] Article 23(2).
[111] Article 2(4).
[112] Article 2(4) read with Article 2(3).
[113] Article 3.
[114] Article 4 (5).

2.7.1 Seaworthiness and Cargo-worthiness

The period during which the carrier has to exercise 'seaworthiness' is 'before' voyage and 'at beginning' of the voyage[115] implying that what happens during the voyage is beyond the carrier's control. Seaworthiness has three elements to be fulfilled:

- Ship is in an 'objective'[116] and 'subjective'[117] way ready to perform,
- Ship is "cargo-worthy"[118]
- Ship is 'sufficiently'[119] and 'efficiently'[120] crewed

2.7.2 Taking Care of Goods

Subject to some defences[121] the carrier is responsible for taking care, loading, handling, stowing, carrying, keeping and discharge of the goods while they are entrusted to him.[122] The words "the carrier shall properly and carefully" reflect the standard of diligence that is normally expected from a reasonable and prudent carrier.

2.7.3 Issuing Bill of Lading

On demand by the shipper, the carrier shall after receipt of goods in custody[123] or after loading on the ship[124] issue B/L, mentioning therein, at least (a) the leading marks of identifications of the goods, (b) number, quantity or weight of the goods, and (c) apparent condition of the goods. According to some case laws physical B/L is not must, intention of parties to issue B/L is enough.

The shipper shall indemnify the carrier against all losses, damages and expenses resulting from inaccuracies in B/L particulars.[125] The indemnity action against third person can be extended by the court upto at least three months beyond one year.

Under **Hamburg Rules,** unless it is proved that he[126] took all reasonable measures to avoid the occurrence and its consequences, the carrier is liable for loss, damage, or delay[127] during the period the goods were under his charge.[128]

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115 Article 3(1).
116 The ship and all necessary documents/certificates required by her class are ready.
117 The ship is ready to perform the particular voyage and to carry specific cargo.
118 i.e. in a position to receive the cargo in question.
119 i.e. in number.
120 i.e. in qualification.
121 Article 4.
122 Article 3(2).
123 Article 3(3).
124 To be known as shipped B/L, Article 3(7).
125 Article 3(5).
126 Carrier, his servants or agents.
127 i.e. when the goods have not been delivered within agreed the time; Article 5(2).
128 Article 5(1).

2.7.3.1 Evidentiary Nature of B/L

The B/L[129] shall be *prima facie* evidence of the receipt by the carrier of the goods as described therein,[130] but rebuttable by evidence to the contrary. However, if B/L has been transferred to a third party in good faith, proof to the contrary shall not be admissible.[131]

Hamburg Rules provide[132] similar nature of the B/L[133] and allow carrier to make reservations[134] because omission to make reservation will be deemed as receipt of cargo in 'apparent good' condition.[135] Also, omission to indicate in the B/L the liability of the consignee for freight[136] or any demurrage,[137] would be *prima facie* evidence that no freight or demurrage is payable by him[138] and proof to the contrary by the carrier would not be admissible if B/L has been transferred to a third party, including an innocent consignee.[139]

2.7.3.2 Time bar and procedure for claim

In case of discrepancy, the shipper is obligated to give immediate notice to the carrier[140] and if discrepancy is not visible, the notice must be given within 3 days of the delivery. One year time for filing suit[141] is extendible by agreement of the parties.[142] An indemnity action against third person can be extended by court for carrier at least three months beyond one year.[143]

Under **Hamburg Rules** time for written notice of loss etc. is one working day of delivery,[144] fifteen consecutive days if the loss/damage is not apparent[145] and 60 consecutive days if the claim is for delay in delivery.[146] Written notice is not mandatory,[147]

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129 Article 3(3).
130 Article 3(4).
131 Article 1(1) of Visby protocol, 1968.
132 Article 16(3)(a)& Article 16(3)(b).
133 Prima facie evidence.
134 Article 16(1).
135 Article 16(2).
136 Article 15(1)(k).
137 In connection with port of loading.
138 Article 16(4).
139 Ibid.
140 Article 3(6).
141 Ibid.
142 Article 3(6) amended by Article 1(2) of Visby Protocol, 1968.
143 Article 3(6)bis introduced by Article 1(3) of Visby Protocol, 1968.
144 Article 19(1).
145 Article 19(2).
146 Article 19(5).
147 Article 19(3).

in case of a joint survey/inspection by parties after giving all reasonable facilities to each other.[148]

Conversely, failure to give written notice of loss or damage by the carrier to the shipper within 90 consecutive days after the occurrence of loss/damage or taking charge of the goods,[149] whichever is later, shall be *prima facie* evidence that the carrier has sustained no loss/damage due to shipper.[150]

For filing suit or arbitral proceedings, the **Hamburg Rules** provide 2 years[151] time from the date of actual or supposed delivery of goods,[152] extendible by one or more declarations of the defendant.[153] However, an indemnity action can be brought after expiration of the two years if permitted by law of the State till at least ninety days.[154]

2.8 SOFTENING THE OBLIGATIONS

Under customary maritime law, un-seaworthiness was a strict liability. The Hague Rules[155] turned it to a presumed liability on the carrier to share the onus of proof and the regime of liability for un-seaworthiness with the shipper proving loss/damage, custody of the carrier and un-seaworthiness and carrier countering that he exercised due diligence.

2.8.1 Defences of Carrier

The carrier can then raise one of the defences/listed excepted perils[156] to exempt him from liability. Of the defences,[157] the most significant are negligence in the 'Navigation' or 'Management' of the ship,[158] 'Fire'[159], and *force-majeure*[160] etc[161].

While the faults 'in Navigation' are quite obvious,[162] 'Management of the ship' can include technical as well as commercial management of the ship i.e. supplying her with everything.

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148 Article 19(4).
149 Article 4(2).
150 Article 19(7).
151 Article 20(1).
152 Article 20(2).
153 Article 20(4).
154 Article 20(5).
155 Article 4(1).
156 Article 4(2).
157 Article 4(2)(a to q).
158 Article 4(2)(a); also known as "Nautical Fault".
159 Article 4(2)(b); unless caused by the actual fault or privity of the carrier.
160 Like articles 4(2)(c) to (h) and the defences under (j) and (k).
161 Like the "Catch-All Clause"; Article 4(2)(q).

Courts accept reliance on the defences largely on element of 'unforeseeability.[163] They require carrier to prove exercise of 'due diligence'.[164] The only thing that is less burdensome for him when these defences are in question is that he has to prove due diligence in that framework of defence.[165]

The **Hamburg Rules** do not have an extensive list of exception clauses[166]. Where fault or neglect of carrier combines with another cause, he is liable only to the extent that the loss/damage or delay is attributable to him.[167] The main exceptions which operate in the carrier's favour are:

Live Animals: The carrier is not liable if he proves that the loss/damage occurred due special risks inherent in cargo unless contrary is proved by shipper.[168]

Deviation: The carrier is not liable, except in general average, where loss/damage or delay resulted from saving life or property at sea.[169] However, in contrast to Hague–Visby Rules[170] the carrier will still be liable for loss/damage or delay if it occurs after deviation.

Fire: The carrier is not liable, unless claimant proves that the fire arose[171] from the fault or negligence of the carrier, his servants/agents or they failed to put out/mitigate the fire.[172] The carrier must prove that he, his servants/agent took all reasonable measures to avoid the occurrence/consequences.

2.8.2 Limitation of Liability

The "per package or unit"[173] liability of carrier under Hague Rules 1924 was limited[174] which has been amended by Visby-Protocol[175] and subsequently by SDR Protocol.[176] If the claim goes beyond the limit provided in the Rules, the carrier will only be liable to

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[162] Which means the movement of the ship itself.
[163] Gosse Millerd v. Canadian Govt. Merchant Marine [1929] A.C. 223, 32 Ll. L R 91.
[164] Article 3.
[165] The Fiona [1993] 1 Lloyd's Rep. 257.
[166] Article 4(2)(a to q).
[167] Article 5(7).
[168] Article 5(5).
[169] Article 5(6).
[170] Article 4(4).
[171] Article 5(4)(a)(i).
[172] Article 5(4)(a)(ii).
[173] mentioned in Article 4(5) has not been defined.
[174] 100 pounds sterling per package or unit, or the equivalent of that sum in other currencies.
[175] The amount has been changed as 10,000 francs vide article 2(a) of the Visby Protocol 1968.
[176] The latest amount of limitation is 6666.67 units of account per package or unit or 2 units of account per kilograms of gross weight. See article II(2) of the SDR Protocol 1979.

pay upto cap unless the nature and amount of the cargo had been declared by shipper and mentioned in B/L.[177]

In terms of the **Hamburg Rules** limit of liability for loss of or damage to cargo is 835 SDR per package or 2.5 SDR per kilogram, whichever is higher.[178] The liability for delay is limited to 2.5 times the freight payable for the goods delayed.[179]

2.9 HIMALAYA CLAUSE

Visby protocol has introduced another article[180] in the Hague Rules[181] commonly known as Himalaya-Clause[182] with intent to protect the agents/servants of the carrier[183] which is defined as:

> *'A clause in a transportation contract purporting to extend liability limitations which benefit the carrier, to others who act as agents for the carrier such as stevedores or longshoremen'.*[184]

Hamburg Rules also contain identical provisions under headings 'non contractual claims'[185] and 'loss of right to limit liability'[186]

2.10 HIGHER DILIGENCE

The number of defences given to the carrier under the Hague Rules and the benefit of limitation of liability and the standard of care which is due diligence, can be modified by expressly mentioning in the B/L if it puts more burden on the carrier[187] An identical provision can be found in the **Hamburg Rules.**[188]

2.11 EXCEPTION TO THE 'CLAUSE-PARAMOUNT'

As against the Clause-Paramount,[189] in a contract under the standard of Hague Rules, the liabilities and responsibilities of the carrier can be contracted out[190] rendering the Hague Rules discretionary. This is however subject to two exceptional cases[191] i.e. (a) no B/L

177 Article 4(5).
178 Article 6(1)(a).
179 Article 6(1)(b).
180 Article 3 of the Visby Protocol 1968.
181 Article 4bis.
182 Inserted as result of leading case Scruttons Ltd. v. Midland Silicones Ltd [1962] AC 446.
183 And not the independent contractors.
184 http://www.duhaime.org/LegalDictionary/H/HimalayaClause.aspx, accessed on 11 Jan 2009.
185 Article 7.
186 Article 8.
187 Article 5.
188 Article 23(2).
189 Article 2.
190 Article 6.
191 Proviso to Article 6.

was issued for carriage, and (b) the carriage should not be an ordinary commercial shipment.

2.12 EXTENSION OF TIME OF LIABILITY

As against the provisions of the 'tackle to tackle',[192] the time of liability of carrier can be extended[193] before or after the loading or discharge of the goods[194] with absolute regime of contract during that period. Provisions identical to articles 6 and 7 can not be found in the **Hamburg Rules.**

2.13 JURISDICTION AND ARBITRATION

While Hague-Visby Rules and Budapest Convention[195] are silent, provisions on jurisdiction and arbitration are there in the **Hamburg Rules**[196] and CMR.[197]

2.14 SCOPE OF APPLICATION

The Rules apply to all B/L issued in a contracting state.[198] The idea of the drafters was to assure that the Hague Rules are broadly applied in all Contracting States when Bs/L are issued. However, the anomaly has been resolved by Visby-Protocol[199] by clearly providing that the Hague Rules shall apply to international carriage leaving the question of domestic carriage up to the States to apply the Rules or not.[200]

The **Hamburg Rules** apply[201] without regard to the nationality of the ship or any other interested person[202] if according to the Contract, the port of loading,[203] discharge,[204] one of the optional ports of discharge being actual port of discharge is located in a Contracting State,[205] or B/L etc is issued in a Contracting State,[206] or B/L etc provides or the legislation of any State giving effect to the Convention to govern the contract.[207]

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192 Article 1(e) of The Hague-Visby Rules.
193 Article 7.
194 e.g. "ship delivery order" which is document of title similar to B/L which covers the period after the discharge from the ship until the delivery to the consignee.
195 Budapest Convention on the Contract for Carriage of Goods in Inland Navigation 2000.
196 Articles 21 and 22.
197 Articles 31 and 33.
198 Article 10.
199 Article 5 of Visby Protocol.
200 Ibid.
201 Article 2.
202 Article 2(2).
203 Article 2(1)(a).
204 Article 2(1)(b).
205 Article 2(1)(c).
206 Article 2(1)(d).
207 Article 2(1)(e).

PART-3

ISSUES IN THE PAST

3.1 NEED FOR A NEW REGIME

Despite the two Protocols,[208] the Hague Rules, were still considered to be partly obsolete and did not satisfy the needs of fast changing maritime trade. The reasons, *inter alia,* according to Berlingieri,[209] were that they applied only to 'tackle-to-tackle', did not apply to 'deck cargo', 'economic losses', did not properly deal the carrier's and shipper's obligations and lacked provision regarding e-communication.[210] Due to coexistence of multiple conventions with the slow process of adherence to the Hamburg Rules, it seemed implausible that adding a new treaty would lead to greater harmony of laws.[211]

3.1.1 Gaps in Legislations: Significant gaps were observed in the national and international carriage of goods regimes regarding issues e.g. the functioning of Bs/L and seaway bills, the relation of those transport documents to the rights and obligations between the parties and the legal position of the financiers of a party to the contract.

3.1.2 Unification of Transport Laws: Legislations on transportation rules did not lack; the need was to harmonise, update and unify the rules e.g. Hague Rules 1924, Warsaw Convention 1929,[212] CMR 1956,[213] COTIF, 1980,[214] and CMNI, 2001[215] Multimodal Convention, 1980[216] and Hamburg Rules 1978, including the inland waterways at regional levels in some cases.[217]

3.1.3 Electronic Communication: The use of electronic means of communication in business as a whole and in the carriage of goods by sea in particular aggravated the consequences of the inconsistent and contrasting laws on the subject and needed uniform provisions addressing the issues particular to the use of new technologies.[218]

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[208] Visby 1968 and SDR 1979.
[209] Berlingieri, Dr. Francesco, Professor, Studio Berlingieri, Genova, Italy.
[210] Berlingieri, The UNCITRAL Draft Convention on the Carriage of Goods (Wholly of Partly) (by Sea), Zbornik PFZ, 58, (1-2), 2008, p.48, available at http://hrcak.srce.hr/file/32035, accessed on 5 March 2009.
[211] UNCITRAL doc: A/CN.9/476, Para.4.
[212] On Carriage by Air.
[213] The Convention on the Contract for the International Carriage of Goods by Road (CMR) 1956.
[214] The Convention Concerning International Carriage by Rail (COTIF), 1980 (old version was of 1890).
[215] Budapest Convention on the Contract for Carriage of Goods in Inland Navigation (CMNI), of 20 Jun 2001; http://www.unece.org/trans/main/sc3/sc3_cmni_legalinst.html, accessed on 8 Feb 2009.
[216] UN Convention on International Multimodal Transport of Goods (Geneva, 1980).
[217] Take for example the European Countries.
[218] UNCITRAL: A/CN.9/476, Paras.2 and 5.

3.1.4 Documentary Problems: Due to modern cargo handling methods, particularly containerization which concealed the quantity/condition of the cargo, functions of transport documents were greatly diminishing. Some legal systems[219] started presuming 'good order and condition', but the practice of putting a clause "said to contain" in B/L met strong reservations in some jurisdictions.[220] So, harmonization was necessitated.

3.1.5 Liability of Carrier: Liability of carrier for care of goods has not been uniform in the previous conventions on carriage of goods in general and by sea in particular. The Hague-Visby Rules provided expressed duties and exceptions, while the Hamburg Rules determined the simple liability for negligence with the reversal of burden of proof in favour of shippers. CMR[221] qualified the care with 'utmost', and the Montreal Protocol 4[222] made it straight forward objective liability for the risks of carriage.

3.1.6 Exoneration Clauses, 'Himalaya' etc: Invoking various evasive clauses by the carriers not only for themselves but for the third parties has been in practice in the shipping. The past attempts to remedy and balance the situation have been not much accomplished and rivers of ink flew about such the clauses particularly the most famous 'Himalaya Clause'.[223] The most important issue being in this clause is the doctrine of 'privity' entrenched by the Common Law giving rise to legal constraints.[224]

3.1.7 Nationalistic Reflex: The international convention lost its own typical character frequently as a consequence of interpretation and construction of the local text while giving effect to the convention[225] and further aggravated when domestic enactments while trying to clarify points changed the whole essence of the Convention.

Hence, a compromise was reached[226] to amend the Hague Rules by removing the uncertainties and ambiguities that had trailed its existence, establish a balanced allocation

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219 For example French, Belgian and American courts.
220 Wit, Ralph DE; Multimodal Transport, First Edition, Lloyd's of London Press Ltd., London, UK, 1995, p.512.
221 The Convention on the Contract for the International Carriage of Goods by Road (CMR) 1956.
222 Additional Protocol No. 4 of 1975 amending Warsaw Convention 1929.
223 See for example for details: Tetley, William; the Himalaya clause- Revisited, 9 JIML-40 (2003).
224 Costabel, Attilio M.; 'The "Himalaya" clause Crosses Far Frontier'. Norfolk Southern Railways Co. V James N. Kirby Pty Ltd., 125 S. Ct 385, 2004 AMC 2705 (2004), JMLC, Vol.36 Number 2 April 2005, p.217.
225 Wit, p.511.
226 Griggs, Patrick J.S; 'Uniformity of Maritime Law--An International Perspective', Tulane Law Review Vol.73; No.5, (1551-1584), p.1560, http://runners.ritsumei.ac.jp/cgi-bin/swets/hold-query-e?mode=0&key=&idxno=15868095, accessed on 27 March 2009.

of risks between cargo owners and carriers considering changes in technology and practice of the shipping.

3.2 THE WAY AHEAD

After passing of the Hamburg Rules 1978, the efforts for further improvements in the other related fields of transport law continued at UNCITRAL level[227] for futuristic planned programme[228] by setting forth the work so far accomplished by international organizations in e.g. multimodal transport,[229] charter-parties, marine insurance, transport by container and the forwarding of goods.[230]

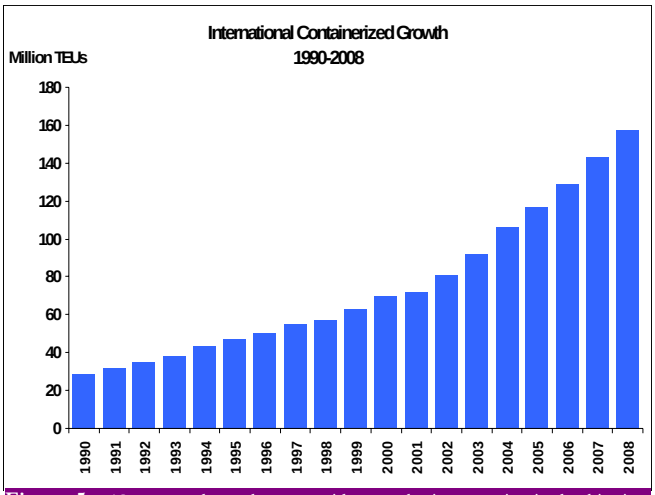

Figure-5: 18 years data shows rapid growth in containerised shipping. **Source**: Drewry Shipping consultants 2006 and 2007

The original efforts for the Convention came from UNCITRAL's WG on EDI[231] by suggesting the Commission in 1994-95 to work on negotiability and transferability of rights in goods in a computer-based environment.[232] But real impetus to the work of the 'to be Rotterdam Rules' started following the adoption of the UNCITRAL Model Law on E-Commerce[233] in 1996, when the Commission,[234] considered a proposal to include in its work programme a review of current practices and laws in the area of the international carriage of goods by sea, for establishing and achieving the uniformity of rules where no such rules existed.[235] Another factor mandating the work was the ever increasing

[227] Particularly at its eleventh session at New York, 30 May-16 June 1978.
[228] Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17), Chap. (Yearbook, 1978, Part One, IT. A).
[229] Which developed the Multimodal Convention, 1980.
[230] Ibid., paras. 67 (c) (vii) and 68.
[231] See Abbreviations.
[232] Lannan Kate; The UNCITRAL Perspective, p-1, http://www.cmi2008athens.gr/kate.pdf, accessed on 20 march 2009.
[233] Official Records of the General Assembly, Fifty-First Session, Supplement No. 17 (A/51/17).
[234] At its twenty-ninth session.
[235] Ibid., para. 210.

container transportation business, entailing door-to-door delivery[236] which initially started in 1930s but actually began with Ships carrying containers between Seattle and Alaska in 1951.[237] See **Figure-5** for an analysis of rapid growth over decades.

3.3 WORKING ON THE CONVENTION

Figure-6: "SS Rotterdam", a hotel ship, to host the Signing Ceremony of UNCITRAL Convention in Sep 09 **Source**: UN Doc A/63/17 Annex-II

The Convention has come about by circa 20 years of efforts of CMI and UNCITRAL (1988-2008). After the 21 sessions of negotiations and deliberations, the Convention was approved substantially in 3 July 2008[238] with little modifications[239] and was formally submitted to the General Assembly[240] for approval.[241] Prior opening for ratification and accession, the draft convention will be put for signature in Rotterdam,[242] Netherlands, in a ceremony to be hosted on board "SS Rotterdam"[243] (**Figure-6**).

For a simplistic overview of the initiatives and workings of CMI and UNCITRAL, see **Appendices I & II** of this dissertation.

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[236] Statement by Pakistani Counsellor on Agenda Item 74: the Work of the United Nations Commission on International Trade Law held on 20th October 2008 http://www.pakun.org/statements/sixth_committee/2008/10202008-01.php, accessed on 9 Feb 2009.

[237] http://en.wikipedia.org/wiki/Containerization, accessed on 2 March 2009.

[238] At its 41st Session.

[239] Articles 1.10, 1.14, 42.3, 45.5, 50.2(b), 78.2 and 84were amended, a new paragraph 38.3 was added and articles 13, 36 and 75.2(b) were deleted.

[240] The 6th (Legal) Committee.

[241] At its 63rd session on 12 December 2008.

[242] On 21-23 September 2009.

[243] Holland-America Line Steamer (1958-2003); after refurbishment she is open for public in 2009 as tourist attraction/hotel in Rotterdam; http://www.derotterdam.com/.

PART-4

AN OVERVIEW OF THE UNCITRAL CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA, 2008

4.1 INTRODUCTION

After 21 sessions by the WG-III of the UNCITRAL,[244] which included representations[245] from the international key players of the industry such as carriers,[246] shippers,[247] freight forwarders[248] underwriters,[249] and port authorities[250] etc.[251], the Convention was approved[252] in July 2008 and finally adopted by the UN General Assembly on 11 Dec 2008.

Compared to only 16 & 17 articles in Hague & Hague-Visby Rules respectively, and 34 articles in the Hamburg Rules, the UNCITRAL convention is quite bulky and comprises 96 articles.[253] This part provides an overview on application of the convention and the main liabilities of the parties.

4.2 SCOPE OF APPLICATION

Like Hague/Hague-Visby Rules, the Convention does not apply to charterparties or contracts for the use of space on a ship[254] and applies to "liner transportation"[255] in which the place of receipt and delivery or the ports of loading and discharge are in different states and one of them is a state party. In non-liner transportation the convention only applies where there is no charterparty or other contract between the parties for the use of

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244 In conjunction with CMI.
245 UNCITRAL Doc A/CN.9/476, para. 6.
246 The International Chamber of Shipping (ICS) and the Baltic and International Maritime Council (BIMCO established in Denmark in 1905), independent international shipping associations composed of managers, ship owners, brokers, agents etc.
247 European Shippers' Council (ESC).
248 The International Federation of Freight Forwarders Associations (FIATA).
249 Group of P&I Clubs and the International Union of Marine Insurance (IUMI).
250 The International Association of Ports and Harbors (IAPH).
251 Like the International Chamber of Commerce (ICC).
252 See http://daccessdds.un.org/doc/undoc/ltd/v02/501/49/pdf/v0250149.pdf?openelement, for the first UNCITRAL draft.
253 Embodied in 18 chapters.
254 Articles 6 and 7.
255 Defined in Article 1(3) as a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.

space on the ship and where a transport document[256] is issued. This is similar to the Hague-Visby Rules which do not apply to a B/L in the hands of a charterer.

4.3 ELECTRONIC TRANSPORT RECORDS

In keeping with the fast growing e-technology, the convention provides extensively for the application of e-records of contracts to be evidenced by electronic transport records.[257]

4.4 AREA OF RESPONSIBILITY (DOOR TO DOOR CONCEPT)

The convention expands[258] its application, beyond the period between 'loading and discharge' under the Hague-Visby Rules, to 'places of receipt and delivery' i.e. 'door to door'. Hence, there is similarity with the multimodal transport except that in the convention one of the modes must be a sea leg. However it recognizes the concept of FIOS[259] shipments, allowing the parties[260] to agree that loading, handling, stowage or unloading shall be performed by the shipper or consignee.

4.5 PERIOD OF RESPONSIBILITY

The convention provides[261] that the carrier's period of responsibility begins with the 'receipt' of goods by the carrier or a performing party and ends with 'delivery'. The parties are free to define the exact period of responsibility by agreeing specific times and locations for receipt and delivery, but these may not be later than the beginning of initial loading and before completion of final unloading under the contract of carriage.[262] Where loss or damage occurs in a mode other than sea-leg, the convention will not prevail over another international convention[263] that would have applied to the particular stage of carriage.[264]

4.6 VOLUME CONTRACTS AND PARTIAL DEROGATION

'Volume contracts' are defined as contracts of carriage that provide for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time.

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256 A document issued under a contract of carriage by the carrier that either evidences the carrier or the performing party's receipt of goods under a contract of carriage and evidences or contains a contract of carriage; see Article 1(14).
257 The word 'Electronic Transport Record' has been used in the Convention more than ninety times, in particular in chapters 3 and 8 under Article 8 and Articles 35- 41 respectively.
258 Article 5.
259 See Abbreviations.
260 See Article 13.
261 Article 12.
262 Article 12(3).
263 Like for instance the CMR, Montreal, COTIF or CIM.
264 See Article 26.

Where a volume contract[265] is used, the parties are permitted to contract out of certain provisions of the Convention, allowing the carrier and shipper to agree greater or lesser rights, obligations and liabilities,[266] provided the contract contains a prominent statement that it derogates from the Convention, is individually negotiated[267] and the shipper had an opportunity to conclude a contract on terms and conditions which comply with the convention without any derogation for volume contracts.[268] The derogating terms may also apply to other persons, provided they expressly consent to be bound by derogations and are properly made aware of same.[269]

4.7 CONTINUING OBLIGATION OF SEAWORTHINESS

Almost similar to the Hague-Visby Rules,[270] the carrier is obliged to provide seaworthy vessel[271] and take care of the cargo during the period of responsibility, however, the obligation to exercise due diligence and to make the vessel seaworthy has been extended to become a continuing obligation throughout the voyage, rather than prior to and at the beginning of the voyage only.[272]

4.8 EXCEPTIONS TO LIABILITY

The Convention retains the fault-based liability regime with a list of exceptions[273], but there are considerable differences, notably the removal of the exception for 'nautical fault', including error in navigation, pilotage or management of the ship.[274] This will probably increase the carrier's liability exposure significantly. The fire exception clause[275] does not refer to "actual fault or privity of the carrier",[276] which was considered to be difficult for claimant to prove to avoid the fire exception. The list also does not contain a 'catch all clause.'[277]

4.9 LIABILITY FOR DELAY

[265] Article 1(2).
[266] Under Article 80.
[267] Or prominently specifies the sections of the volume contract containing derogations.
[268] Article 80(2).
[269] Article 80(3).
[270] Article 3(1).
[271] Which is applicable to sea leg only.
[272] Article 14.
[273] Similar to that of the Hague-Visby Rules as contained in Article 4(2).
[274] Article 17.
[275] Article 17(3)(f).
[276] As was there in HVR article 4(2)(b).
[277] Article 4(2)(q) of HVR.

When the goods are not delivered at the place provided for in the contract within the time agreed,[278] the Convention provides that the carrier is jointly and severally[279] liable for loss of, damage or delay in delivery of goods including pure economic loss,[280] subject to some limitations.[281]

4.10 BURDEN OF PROOF

Largely reflecting the principles adopted by the English courts, the burden of proof of the carrier and claimant has been elucidated in the Convention. The claimant must first prove[282] loss, damage or delay arising during the period of responsibility of the carrier. To be relieved from the liability, the carrier must prove the absence of fault[283] or an exception.[284] The claimant may then prove that the loss, damage or delay is not included in the list of exceptions or was "probably" caused by un-seaworthiness etc,[285] and the carrier must then prove the exercise of due diligence etc.[286]

"Probably" is subject to interpretation differently in various jurisdictions. Its interpretation, elsewhere may be flexible, but under English law it would deem to mean "on the balance of probabilities", i.e. more probable than not.[287]

4.11 LIABILITY OF PERFORMING/MARITIME PERFORMING PARTIES

The convention introduces the new concept of performing party; a person other than the carrier that performs any of the carrier's obligations.[288] The carrier is liable for the acts or omissions of a performing party which may give rise to a breach of the carrier's obligations under the convention.[289] Also if a 'maritime performing party' that performs any of the carrier's obligations during the sea-leg[290] e.g., terminals operators, stevedores or sub-contracted sea carriers, causes any loss, damage or delay in carrying out performance in respect of the goods, in a port in a contracting state, is subject to the same obligations and

[278] Article 21.
[279] Article 20 read with 17.
[280] Article 60.
[281] 2.5 times of the amount of freight; see Article 61.
[282] Article 17(1).
[283] Article 17(2).
[284] Article 17(3).
[285] Article 17(4) read with Article 17(5).
[286] Ibid.
[287] Comments on UNCITRAL by Gard AS, Arendal, Norway Gard News 192, November 2008/January 2009; http://www.gard.no/gard/Publications/GardNews/RecentIssues/gn192/art_3.htm accessed on 10 Feb 2009.
[288] Article 1(6).
[289] Article 18.
[290] Article 1(7).

liabilities as imposed on the carrier[291] and is entitled to the carrier's defences and limits of liability.

4.12 JOINT AND SEVERAL LIABILITY

The concept of joint and several liability of the carrier and the maritime performing parties, has also been included in the Convention which means that the carrier may be liable for the acts of the maritime performing parties.[292] As a result, carriers will need to ensure that rights of recourse against performing parties are fully protected. Ideally, this should encompass not just legal rights of recourse, but also the maritime performing party's ability to pay and sound insurance backing.

4.13 INCREASED LIMITS OF LIABILITY

The convention follows the concept of package and weight limits: 875 SDR (Euro 999.55625[293]) per package and 3 SDR (Euro 3.42705[294]) per kilo, whichever is the higher.[295] For pure economic loss due to delay, there is a further limitation of 2.5 times the freight, with an overall cap corresponding to the package/weight limit on a total loss basis.[296] The test for losing the right to limit is the same as under the Hague-Visby Rules, and has been seemingly made stronger by reference to personal conduct.[297]

LIMITS OF LIABILITY IN THE CARRIAGE BY SEA REGIMES

	HGR 1924	HVR 1968	HMR 1978	RTR 2008
Per Package/Unit	100 £	666.66 SDR	835 SDR	875 SDR
Per Kilo		2 SDR	2.5 SDR	3 SDR

HGR: Hague Rules 1924 **HVR:** Hague-Visby Rules 1968
HMR: Hamburg Rules 1978 **RTR:** Rotterdam Rules 2008

Figure-7: Limits of Liability in Various Carriage of Goods by Sea Regimes **Source**: Author

4.14 DEVIATION

According to the Convention, a deviation which constitutes a breach of the carrier's obligations would not *ipso facto* deprive the carrier or maritime performing party of

[291] Article 19.
[292] Article 20.
[293] http://www.imf.org/external/np/fin/data/rms_mth.aspx?selectdate=2009-03-31&reporttype=cvsdr, rate of 16 March 2009.
[294] Ibid.
[295] Article 59.
[296] Article 60.
[297] Article 61; however practically it is hard to prove such an intent or privity of the carrier by the claimant, hence it is unbreakable.

limitation or defences, subject to the test that if the claimant proves that the loss resulting from the breach was attributable to a personal act or omission of the person claiming a right to limit, done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.[298]

4.15 DECK CARRIAGE

The Convention establishes as to when goods may be carried on deck: when required by law, when in containers on specially-fitted decks, or when carried in accordance with the contract or the custom, usage and practice of the trade.[299] The liability provisions apply to goods carried on deck but the carrier is not liable for loss, damage or delay caused by the 'special-risks' involved in their carriage, except when carried in containers.[300] If goods have been carried on deck in circumstances not covered in the convention or if goods are carried on deck in breach of an express agreement to carry them under deck, the carrier will not be entitled to rely on the defences listed in Article 17 for loss or damage exclusively caused by carriage on deck.[301]

4.16 JURISDICTION & ARBITRATION

The jurisdiction and arbitration provisions in the Convention[302] will apply only where contracting states have declared that they will be bound by these provisions.[303] So it is an 'opt-in' clause and has no automatic effect e.g. for the EU states which have their own law on choice of jurisdiction clauses.[304]

The claimant has freedom of instituting court or arbitration proceedings against the carrier[305] as where the contract contains an 'arbitration clause' he can invoke a court or arbitration tribunal in either the place of receipt or delivery as stated in the contract, the port of loading or discharge, the domicile of the carrier, or in the case of arbitration, in the place agreed in the arbitration clause. However, parties may agree any place for court or arbitration proceedings after a dispute has arisen.[306]

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[298] Article 24.
[299] Article 25.
[300] Article 25(2); however the article is silent about the definition of the special risks.
[301] Article 25(3) & (5).
[302] Chapters 14&15.
[303] Article 74&78 read with 91.
[304] Gard AS; http://www.gard.no/gard/publications/gardnews/recentissues/gn192/art_3.htm accessed on 10 Feb 2009.
[305] Articles 66-78.
[306] Article 77.

4.17 TIME FOR SUIT

Cargo claims[307] become time barred two years after the date of delivery[308] but may be extended by one or more declarations by the person claimed against.[309] Moreover action for indemnity and action against bareboat charterer etc may also be instituted within ninety days.[310]

4.18 RELATIONSHIP WITH OTHER CONVENTIONS

The Convention does not generally prevail over other international conventions governing the carriage of goods by air, road, rail or inland waterways[311] nor those international or national laws that regulate the general average,[312] global limitation of liability of vessel-owners,[313] passengers & their luggage[314] or the damage caused by nuclear incident.[315]

4.19 RATIFICATION, DENUNCIATION AND ENFORCEMENT

Without leaving option for reservation,[316] the Convention would be open for ratification[317] after Signing Ceremony in Sep 2009 and would first become effective one year after it is ratified by the twentieth country;[318] and for those states which subsequently accede to it, after passage of one year from the deposit of their instruments.[319] The states parties shall denounce the Hague, the Hague-Visby[320] and the Hamburg Rules[321] and shall apply the new Convention for all contracts of carriage[322] in future until any state denounces it[323] in writing in which case it ceases to apply after one year of the receipt of the denunciation with depository or from a later date as specified by the state itself.[324]

[307] Which can not be suspended/interrupted.
[308] Article 62.
[309] Article 63.
[310] Article 64&65.
[311] Article 82 read with 26.
[312] Article 84.
[313] Article 83.
[314] Article 85.
[315] Article 86.
[316] Article 90.
[317] Article 88.
[318] Article 94(1).
[319] Article 94(2).
[320] Article 89(1).
[321] Article 89(2).
[322] Article 94(3).
[323] Article 96(1).
[324] Article 96(2).

PART-5

COMMENTS ON UNCITRAL CONVENTION

5.1 GENERAL

The shipping industry is essentially composed of two varying interest bearers i.e. manufacturers[325] on one hand and transporters[326] on the other, both having diverse bargaining powers. Over the time, beside the advancements in technology and rapid increase in trade, (**Figure-8**) these interests have further intensified by disproportionately affecting the balance of the market. The UNCITRAL's present work on transport convention is in black and white now attracting a great amount of applauds by many[327] as well as well adverse comments by various sectors and individuals. This part is dedicated to evaluation of these comments[328] keeping in mind that the rules are still a piece of paper, untested from practical point of view, hence whatsoever is stated herein is based of the past experience gained through present regimes over circa 85 years.

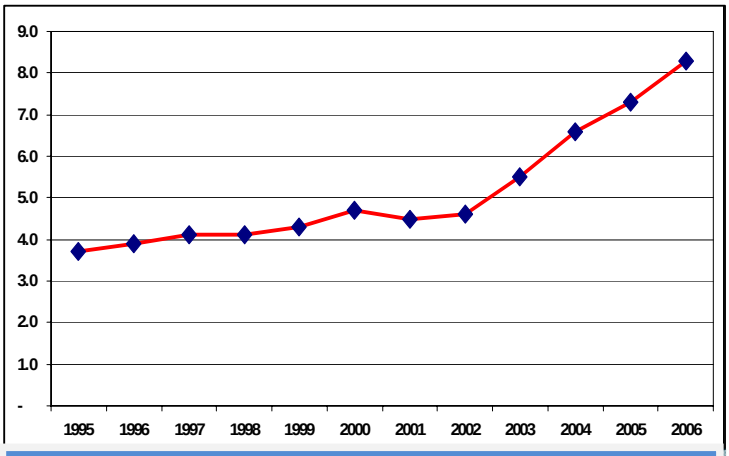

Figure-8: Value of Manufactured Goods in trillion USD; 12 years data showing rapid growth in export of manufactured goods **Source**: UNCTAD Handbook of Stats, 2008

5.2 INDUSTRY'S RESPONSE

ESC[329] consider[330] that except for a few uncertain/thin potential improvements for shippers, the Convention contains such qualifications that makes it illusory[331] and seems unsuitable to be termed as a global multimodal transport Convention due to the under mentioned facts.

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[325] Cargo-owners.
[326] Carriers.
[327] Such as Statement by Pakistani Counsellor, 20th October 2008.
[328] See Disclaimer (paragraph 3 of Introduction).
[329] See Abbreviations.
[330] ESC's position paper http://www.europeanshippers.com/docs/esc_analysis_paperfin.pdf, accessed on 21 Jan 2009.
[331] ESC, p.1.

The convention offers less freedom of contract than existing regimes and does so notably in preventing reduction of shippers' now greatly increased obligations.[332]

It provides[333] more options,[334] protections[335] and defences to the carriers and makes shippers more responsible[336] by creating obligations with limits for breach disproportionately high and hard to 'insure'.[337]

It is 'maritime plus' and has less regard for other modes or modern trade-logistics. Though purports to be so, it may not adequately establish watertight 'door to door' system to supersede the existing uni-modal conventions[338] leading to conflicts by overlapping with their provisions,[339] and consequently may require drafting of a further convention on the subject.[340]

There is also complexity in substance[341] and drafting[342] that may lay parties and lawyers[343] alike, giving rise to prolonged litigations to establish clear meanings[344]

The proposals for opt-outs and other certain clauses[345] under volume contracts, pose serious danger of return to pre-Hague Rules free-for-all regime, disadvantaging the small/medium sized shippers.[346]

It departs from the liability systems of other international conventions[347] by developing alternative defences at the carrier's option[348] and makes it almost unbreakable by using the word "personal"[349] misconduct.[350]

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[332] ESC, p.2.
[333] ESC, p.2&13.
[334] e.g. shipper's responsibility for loading/unloading.
[335] By way of volume contracts.
[336] e.g. delay.
[337] ESC, p.2&13.
[338] such as CMR and CIM.
[339] ESC, p.12.
[340] Ibid.
[341] For example in the containerisation and treatment of deck carriage.
[342] Unintelligible 'terms'.
[343] Creating interpretational disharmony between common and civil law.
[344] ESC, pages. 4 & 12-14.
[345] ESC, p-14.
[346] ESC, p-13.
[347] CMR, CIM, Warsaw/Montreal and Budapest Conventions.
[348] ESC, p-13.
[349] Article 61(1)&(2).
[350] ESC, p-14.

Commenting on ratification,[351] the ESC observed that 30-40 states would have been advisable before such a controversial instrument enters into force so that it would from the outset represent a consensus of the world's trading community.[352]

Efthymiou[353] thinks that although the Convention cannot be considered ideal for carriers' interests, it is likely to achieve a widespread acceptance. If the Convention fails to attract ratifications, it will only add a new layer to the current puzzle of laws/regulations and may be the last chance to replace the existing patchwork of legal regimes.[354]

Though there are still initiatives[355] which could diminish/impinge upon the prospects of its ratification, it is stressed to follow a "wait and see" approach respecting the convention. The new Rules need time to be absorbed/digested by the community and the text should be scrutinized to agree to common interpretation of the remaining grey areas of the Convention to facilitate smooth application in future disputes.[356]

Pontoppidan,[357] considers that answering to the call to meet the complex logistical demands of the 21st century's door-to-door delivery services, UNCITRAL Convention provides an attractive and modern set of rules that allow for delivery of goods without negotiable transport documents, electronic transport documents, and extended freedom of contract. It takes a balanced approach to the rights and obligations of shippers and carriers making it an attractive convention that meets the requirements of today's liner shipping.[358]

Mentioning the shippers' liabilities, **Olebakken**[359] says that the traditional shipper's obligations to deliver the ready-for-carriage 'goods' and pay 'freight', might have significantly been sophisticated due to shippers being as professional as the carriers but the present regime did not cover his obligations.[360] The Convention recognizes the

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351 Article 94(1).
352 ESC, p-14.
353 Nicos D. Efthymiou, President, Union of Greek Shipowners, Athens.
354 Speech at CMI Conference, Oct 2008, http://www.cmi2008athens.gr/efthimiou.pdf, accessed on 19 March 2009.
355 e.g. the EC plans to introduce intra-EU multimodal carriage of goods law.
356 Efthymiou's (CMI Conference).
357 Pontoppidan, Knud; EVP, A.P. Moller-Maersk.
358 Pontoppidan's Statement at CMI Conference, Oct 2008 http://www.cmi2008athens.gr/sub3.12.pdf, accessed on 19 March 2009.
359 Ingeborg Holtskog Olebakken; Associate, Thommessen K. Greve Lund AS Law Firm, Oslo.
360 Olebakken; Background Paper on Shipper's Obligations and Liabilities, CMI Yearbook 2007-2008, p.300.

carrier's need for information from shipper illustrating this approach[361] of cooperation between the parties without altering the element of transportation against payment.[362] Although the convention applies on a non-mandatory basis to volume contracts,[363] the shipper is still protected through certain minimum requirements provided therein.[364] According to him the shipper's obligations[365] are strict, not only for himself but for other persons[366] as well.[367] Also, the specific obligation of the controlling party to provide additional information to the carrier during its period of responsibility[368] is concurrent to the shipper's obligations.[369]

Faghfouri[370] considers the convention extremely complex and lengthy[371] with only 2 provisions relating to multimodal transport and gives no regard to existing rules and regulations.[372] It application does not seem to change the *status quo,* rather will create confusion in applying different regimes[373] in one contract, in the event of 'occurrence' in a leg other than sea.[374] Also, the carrier may not be[375] responsible through-out.[376] Compared to shipper's strict liability[377]/obligation with no monetary limits, carrier's obligation and liability[378] is fault based with long list of exceptions & extensive contracting-out and delivering goods without production of B/L.[379] The freedom of contract in shape of

LIMITS OF LIABILITY IN THE CARRIAGE BY MULTIPLE REGIMES

	SEA	ROAD	RAIL	AIR
Per Package/Unit	875 SDR			
Per Kilo	3 SDR	8.33 SDR	17 SDR	17 SDR
	RTR	**CMR**	**CIM**	**WARSAW**
	Art. 59	Art. 23	Art. 40(2)	Art. 24

CIM: Carriage of Goods by Rail 1980 **CMR:** Road Carriage Rules 1956
WARSAW: Air Carriage Rules, 1929 **RTR:** Rotterdam Rules 2008

Figure-9: Limits of Liability in the Carriage by Multiple Modes **Source:** Author

[361] Article 28.
[362] Olebakken, p-300-301.
[363] Article 80.
[364] Olebakken, p-301.
[365] Articles 31-32.
[366] Articles 34.
[367] Olebakken, p.305-6.
[368] Article 55.
[369] Olebakken, p.302.
[370] President IMMTA.
[371] 96 articles.
[372] Faghfouri, Lectures at IMLI, 25 Feb 2009, PowerPoint Presentation, Slide.5.
[373] Article 26.
[374] Faghfouri, Slides.6-8.
[375] Article 12 read with 13(2).
[376] Faghfouri, Slides.9-10.
[377] Chapter 7.
[378] Chapters 4&5.
[379] Faghfouri, Slides.11-12.

'volume contracts',[380] like 'cherry-picking' provide potential for abuse and contract of adhesion as regards small shippers leaving application of the Convention to marginal.[381] The carrier's limit of liability,[382] beside being comparatively insufficient,[383] (**Figure-9**) is vulnerable to freedom of contract.

5.3 REGULATORS' VIEW

Lannan[384] considers that for setting the goal of creating balance amongst competing stakeholders, the UNCITRAL was encouraged to consult a broad range of IGOs and NGOs[385] in pursuing its work in this area,[386] beside right of delegates/representatives of every UN Member State to participate in WG, by consulting their own stakeholders.[387] Conscious of the outdated nature of the current legal regime in light of modern needs of the industry for a coherent and unified approach, the Convention was negotiated/adopted amidst atmosphere of cooperation and constructive effort towards reaching a common goal, rather than one of confrontation and competition.[388] It represents the efforts of many competing interests to build consensus and to arrive at practical and workable common solutions.[389]

According to **Sturley**,[390] the Convention draws/incorporates significant elements from the Hague-Visby and Hamburg Rules. So, contracting parties that have incorporated significant provisions of these Rules are less likely to see significant changes under the new regime. The countries that still follow original Hague Rules of 1924 may see the major changes.[391] The Convention is deliberately evolutionary, not revolutionary.[392] Despite focus on modernization and harmonization, there are some modest reforms e.g. elimination of "navigational fault" exception[393] for many, but not for countries who have adopted Hamburg Rules. Many other provisions in the Convention will change the law

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380 Article 1(2) read with 6&80.
381 Faghfouri, Slides.13-17.
382 Article 59.
383 Compared to particularly CIM & WARSAW.
384 Kate Lannan, Secretary UNCITRAL WG-III.
385 CMI, UNCTAD, UNECE, ICC, IUMI, FIATA, ICS, Bimco, P&I Clubs, IAPH, EC, AAR, OTIF, ESC, IRU, IMMTA and WMU; see Abbreviations.
386 Lannan, Kate; p.3.
387 Lannan, p.4.
388Ibid.
389 Ibid.
390 Prof. Michael F Sturley, former Rapporteur CMI's ISC of Transport Law and ex-Senior Adviser at the US Delegation to WG-III.
391 Sturley Michael F.; The UNCITRAL Carriage of Goods Convention: Changes to Existing Law, CMI Yearbook 2007-2008, p.255.
392 Ibid.
393 Article 4(2)(a) of Hague-Visby Rules.

to make it better suited to meet the needs of the industry of 21st century.[394] He further discusses/justifies individual reforms undertaken by the Convention e.g. Multimodal Coverage, Scope of Application and Period of Responsibility, Freedom of Contract, Jurisdiction & Arbitration, Limitation Amounts, The Loss of the Right to Limit Liability, Himalaya Clauses, The Time-for-Suit Period, Expanded Shippers' Obligations, Electronic Commerce, Controlling Parties and the Right of Control and Qualifying Clauses.[395]

5.4 DELEGATIONS' REMARKS

Ziel[396] mentions that practically 'maritime contract' is often multimodal[397] and the same has been highlighted[398] as 'shall' and 'may' in the Convention.[399] Concerning 'Carriage preceding or subsequent to sea carriage',[400] he highlights that the phrase "would have applied" creates hypothetical contract by reference of the liability rules of another convention, which is already in practice hence there is no change.[401] The Convention,[402] except for mere conflict avoiding effects, did not draft conflict of convention provision, nor is there any difference for 'maritime container carriers' as it simply follows the current liability practice in maritime container transport.[403]

According to **Mbiah**,[404] the provisions on liability, risks and obligations of shipper and carrier can be found throughout the Convention. Therefore, it is not easy to elicit all points of balancing the carrier and cargo interests.[405]

5.5 ACADEMICS' COMMENTS

Berlingieri considers that, though it differs from the Hague-Visby Rules in some significant aspects, the structure of both is quite similar.[406] Commenting extensively in comparison with present regime, he has diagnosed fundamental elements of the

394 Sturley; p.256.
395 Sturley; p.256-263.
396 Prof. G J VanDer Ziel, Chairman NVZV, and Netherland's delegation head at WG-III.
397 Ziel, GertJan VanDer; 'Multimodal Aspects', Powerpoint Presentaion at CMI Conbference, Oct 2008, Slide-2, availabe at http://www.cmi2008athens.gr/presentation.ppt, accessed on 21 March 2009.
398 Ziel, Slide-3.
399 Article 1(1).
400 Article 26.
401 Ziel, Slides-5, 8 & 9.
402 Article 26.
403 Ziel, Slide-9.
404 CEO of the Ghana Shippers' Council and Leader of Ghana's delegation to WG-III of UNCITRAL.
405 Mbiah, Kofi; 'The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: The Liability and Limitation of Liability Regime', CMI Yearbook 2007-08, p.299.
406 Berlingieri; 'Carrier's Obligations and Liabilities', CMI Yearbook, 2007-08, p.279.

Convention as; 'period of responsibility' & 'obligations' of carrier', 'basis of liability', 'abolition of exonerations from liability', 'burden of proof', 'liability for deck cargo & 'carriage preceding or subsequent to sea leg', 'carrier's liability for other persons' and 'right of action of the shipper and consignee against the persons for whom the carrier is liable'.[407]

Ramberg[408] considers that though the main objective of the Convention to bridge the system under the Hague/Hague-Visby Rules and the Hamburg Rules has been supported by everyone, it is to be seen whether the objective has been successfully reached by the Convention. According to him the Basis of liability,[409] the limits of liability[410] and electronic records,[411] prove that the main objective has been reached with the Convention, except for expansion of the carrier's right to limit his liability for any breach.[412] The innovations e.g. the 'maritime plus', the 'maritime performing party',[413] the 'documentary shipper'[414] and 'delivery without presentation of negotiable bills of lading'[415] of the Convention may cause problems in practice as they are difficult to accept and may not be properly understood and applied.[416]

He thinks that the very purpose of the present regimes was to ensure that the seller receives from the carrier a document which CISG[417] refers to as "controlling the disposition of the goods".[418] Such a document is needed for CFR and CIF sellers under INCOTERMS-2000.[419] The carrier may misuse the option of 'delivery of goods without documents'[420] by avoiding to issue such document.

According to **Honka**,[421] the RR[422] have covered many controversial issues reaching a sufficient consensus and achieving the best compromising results after testing all routes

[407] Berlingieri (2007-08), p.279-286.
[408] Professor Jan Ramberg, Law Dept., Stockholm University, Sweden.
[409] Article 17.
[410] Article 59.
[411] Chapter 3.
[412] Ramberg; 'Comments on UNCITRAL' http://www.cmi2008athens.gr/sub3.3.pdf, accessed on 19 March 2009.
[413] Article 1(7) and 19.
[414] Article 1(9).
[415] Article 47(2).
[416] Ramberg; (Comments).
[417] See Abbreviations.
[418] as in Article 58(2), CISG.
[419] Clause A8.
[420] Article 47(2).
[421] Hannu Honka, Professor Law, Abo Akademi University, Finland.
[422] Rotterdam Rules.

and alternatives.[423] The international community now has to live with it and adjudge the next step of signing and ratification.[424] The RR, though undeniably complicated piece of legislation, is a compromise and reflects only modern and futuristic international approach.[425] Should the RR internationally fail, one may ask what, if any, would come instead. The international community should look at the RR with the serious macro-perspectives bearing in mind supposedly as to what would come instead, if the RR fails. Would there be another unrealistic attempt at international level.[426] Commenting on 'Volume Contract' he says[427] that it was *inter alia* based on the USA's OLSA[428] requirements.

5.6 JUDICIARY/LAWYER'S VIEW

Gauthier[429] is of the opinion that the de-materialisation of 'documents of title'[430] is considered by e-commerce lawyers as not only the most pressing issues to handle due their importance in international commerce but also as a difficult legal issue to tackle.[431] After discussing in detail, the provisions on ETR[432], controlling party etc, she concludes that the Convention certainly paves the way for doing business in a paperless world. Providing solid foundations to Sea Waybills it affords necessary tools for Courts for implementing the negotiable ETRs. She believes the Convention by tendering appropriate solutions has met its objectives/goals.[433]

Gluck[434] describes the UNCITRAL Convention as 'Grand Compromise'[435] between the three blocks i.e.

a. developing countries,[436] which being importers of goods wanted maximum protection for cargo loss and damage, with the fewest carrier defenses to such claims,

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423 Honka, 'UNCITRAL draft Convention….: Scope of Application, Freedom of Contract', http://www.cmi2008athens.gr/sub3.10b.pdf, accessed on 20 March 2009.
424 Honka, p-19.
425 Honka, p-20.
426 Ibid.
427 Honka's Presentation at CMI Conference, Oct-2008, http://www.cmi2008athens.gr/sub3.10.pdf, accessed on 20 March 2009.
428 See Abbreviations.
429 Honourable Johanne Gauthier, Judge of the Federal Court of Canada, Ottawa, Ontario.
430 Negotiable B/L.
431 Gauthier, 'The New Elements; The Facilitation of Electronic Commerce', Summary of the Paper presented in CMI Athens Conference Oct 2008, p.3.
432 See Abbreviations.
433 Gauthier, p.8.
434 Gluck, Richard D., Shipping and Maritime lawyer, USA.
435 Gluck's Abstract of Comments, FIATA Annual Congress, Sep 2008, Vancouver, Canada.

b. the developed countries,[437] desired consistency and uniformity, door to door, for both all water and intermodal shipments with a sea leg[438] and
c. second group of developed countries,[439] which preferred to confine the convention largely to the sea leg of intermodal movements.

He elucidates that this grand compromise increasing the carrier liability limits, also permit opting-out of the increased limits by volume contracts.[440] In contrast, shipper potentially has unlimited and strict liability for failure on his part, with no opportunity to opt-out. One of the carrier defences[441] has been eliminated, but many others have been retained, subject to a complex shifting of burden of proof as between carrier and shipper to the utter favor of the carrier.[442]

Gluck hopes, despite strong reservations on the Convention by many countries,[443] and non-committal by others,[444] that the USA, China and a number of developing countries will ratify it creating necessary momentum to reach twenty ratifications. The prospects for broader ratification will depend heavily on the views of the transportation industry interest groups in each country being directly affected (or benefitted) by the convention.[445]

5.7 PROFESSORS/MARITIME LAWYERS' ANALYSIS

Although he was involved[446] by CMI in the process, as early as 1994[447], when UNCITRAL took up CMI draft towards end of 2001,[448] **Tetley**[449] had had a different view for dealing with the issue of transport law.[450] His general comments were that the

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436 Lead by Senegal and other African nations.
437 Lead by the United States.
438 A convention with "maritime plus" coverage.
439 Lead by Germany, Australia and Sweden.
440 That currently cover more than 90% of container trade.
441 Error of navigation.
442 Gluck, http://www.forwarderlaw.com/library/index.php?category=11, accessed on 9 Feb 2009
443 Including inter alia Germany, Australia, Canada, Korea, and Argentina.
444 Like UK, France and Italy.
445 Gluck , Richard http://www.forwarderlaw.com/library/index.php?category=11, accessed on 9 Feb 2009.
446 As a member of CMI's WG composed of him, Prof. Berlingieri, Mr. Rolf Herber and Jan Ramberg.
447 A Brief History of the Involvement of CMI to the Preparation of the UNCITRAL Draft Convention; http://www.cmi2008athens.gr/uncitral-history.pdf, accessed on 5 March 2009.
448 10 December 2001.
449 Professor William Tetley, McGill University, Canada.
450 Tetley, William; 'The CMI Final Draft Instrument: Participation vs. Decision-Making- What We Need is a Two-Track Approach' (8/4/2002); http://www.mcgill.ca/maritimelaw/maritime-admiralty/cmifinal/, accessed on 8 Feb 2009.

project is "extremely ambitious" encompassing a host of issues[451] besides carriage of goods by sea, and even if satisfactorily drafted and adopted as a convention, would be international triumph.

By highlighting a number of concerns in the draft, Tetley recommended Fast-Track proposal[452] for quick adoption of new port-to-port convention balancing between the Hague-Visby and the Hamburg Rules.[453] On the other hand Slow-Track would consist of the CMI continuing the long process of trying to improve the Instrument.[454]

Now, after adoption of the Convention, Tetley's remarks are no change[455] rather stronger in opposing.[456] He has highlighted[457] a number of lacunas in the Convention such as overall verbosity, complexity and unfamiliarity besides lack of simplicity, precision and concision in drafting style. There seem diverse contracts,[458] multiple exceptions,[459] and opting outs[460] of explicit rules. Tetley has strongly recommended that the Convention be opposed and returned to UNCITRAL for revision and adoption of a new Multimodal Convention[461] because it is a "real missed opportunity", "a mistake", and fails to provide a coherent legal regime for all modes.[462]

Commenting from a civil law perspective, **Delebecque**[463] says that acceptability of Convention does not mean that it does not meet any difficulty. He suggests that many issues would have been easier solved had some civil law concepts been retained,

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451 E.g. multimodal liability, transport documents, freight, liens, delivery, right of control, negotiability, rights of suit etc.

452 Which according to him could be accomplished by UNECE, UNCITRAL and UNCTAD.

453 This proposal, was originally made by Barry Oland (Canada) and Lloyd Watkins of the IGPI Clubs at meetings of the CMI in 1999, and was unanimously agreed by the CMLA.

454 Tetley, (2002); http://www.mcgill.ca/maritimelaw/maritime-admiralty/cmifinal/, 8 Feb 2009.

455 Tetley, William; 'Summary of Some General Criticisms of the UNCITRAL Convention', http://www.mcgill.ca/files/maritimelaw/Tetley_Criticism_of_Rotterdam_Rules.pdf, accessed Mar 3, 2009.

456 A Tête-à-Tête with Tetley (Interview), STI, London, Vol & Number 2 (2008), p.43; http://www.mcgill.ca/files/maritimelaw/here.pdf.

457 In interim comments on 5 Nov 2008.

458 E.g. partial Bills of Lading Act, On-Carriage Act, Multimodal Act, Warehousemen's Act and Responsibility Ashore Act.

459 E.g. from Volume Contracts.

460 E.g. of Jurisdiction and Arbitration.

461 Tetley, (Nov-08).

462 Tetley (Interview); p.43.

463 Philippe Delebecque, Law Professor, University of Paris.

especially, the distinction between 'obligation de moyens',[464] 'obligation de résultat',[465] and 'obligation de garantie'[466] better circle the hypothesis of shipper liability.

Although the basis of carrier's liability[467] is not exactly the same as that of Hague-Visby, Delebecque does not seem to agree that it is a "fault based liability regime". He also negates the argument that the risk has shifted from ship to cargo.

Lexicologicaly, he says that the expression "loss and damage" and the notion of "damage" do not cover the French expression[468] and notion[469] for a French lawyer. He suggests, probably, it would have been better to use civil law terminology "fait générateur" for the verb "occur"[470] which refers either to the place where the damage has been caused or to the place where the damage has been suffered.[471]

Nonetheless, he says the Convention aiming to realise a balance between both interests is neither in favour of the owners nor the shippers and is neither a common law nor a civil law convention, but a uniform law convention allowing many sources to flow together.[472]

[464] Obligation of Shipper, Article 27 and 29.
[465] Obligation of Carrier, Article 31.1 and 32.
[466] Obligation of Guarantor, Article 31(2).
[467] Article 17.
[468] "pertes et avaries".
[469] "prejudice".
[470] E.g Article 26.
[471] Delebecque, Philippe; The New Convention on International Contract of Carriage of Goods Wholly or Partly by Sea: A Civil Law Perspective, CMI Year Book 2007-2008, p.275-6.
[472] Delebecque, p.268.

PART-6

CONCLUSION AND RECOMMENDATIONS

Clash of interests had always been with man since his creation and descending on the face of earth.[473] As the time passed it ever intensified and could never be eliminated. Historically, the shipping industry had also remained indifferent concerning this natural phenomenon of interests, until around a century back when attempts were made to harmonise and neutralize the varying interests culminating into[474] the Hague Rules, 1924 but not to the level that could satisfy the industry. Nonetheless, the system kept running until Visby-Protocol, 1968, brought some positive reforms but still far from the satisfaction of a faction[475] of the industry.[476] A decade later,[477] the regime, under the auspices of UNCTAD, was subjected to 'major overhaul' turning the balance greatly to one side[478] tempting the other side[479] to declare it a 'conspiracy' to wage economic warfare on the industrialized nations by the developing countries.[480]

Subsequently, failure of Hamburg Rules to attract wide/large acceptance coupled with other issues,[481] lead to another long series of deliberations under patronage of CMI followed by UNCITRAL[482] culminating into adoption of the New UNCITRAL Convention.

The efforts to achieve uniformity in the International Transport Law were legitimately realized and undertaken attracting much appreciation. But, as seen earlier, there is mix response of different factions of the shipping industry on the piece of legislation[483] that has been brought about.

The comments[484] of various persons/organization on the Convention, are neither extensive nor substantive as they merely reflect the academic analysis of a law which is still a piece of paper without having been tested from practical point of view. But it does

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473 Like clash between Prophet Adam's two sons, Abel and Cain (Quran 5:27).
474 As described in Part-1.
475 i.e. Shippers interests.
476 As overviewed in Part-2.
477 Hamburg Rules 1978.
478 Cargo-owners interests.
479 Shipowners-intersts.
480 Yancey, B.W; the Carriage of Goods: Hague, COGSA, Visby and Hamburg (1983) 57 TUL.L Rev.1238.
481 As non-exhaustively discussed in Part-3.
482 As discussed in Part-3 and Appendix I&II.
483 In Part-4.
484 In Part-5.

not mean that these comments are irrelevant and be discarded altogether. They reflect the long standing experience of the concerned persons and professionals of the industry.

It is really a hard task to go for analysis of the Convention by concluding the comments of each of the scholars/professionals mentioned hereinbefore.

However, by going through the limited resources and comments on the Convention that had been available to the author, it is observed that there are quite handful scholars/persons who would non-persuasively say that the convention is really a great achievement and that everybody should follow it and work for their ratification at their governments'/states' level.

On the other hand, there are quite a good number of scholars that outrightly reject the Convention recommending that being ambiguous, bulky and confusing piece of rules vis-a-viz other uni-modals, it should be sent back for revision.

In the point of view of the author, there is a need to realize that a lot of efforts and attempts have gone into balancing the interests of cargo-owners and carriers for creating uniformity & reforming the law on the subject, fine-tuning it with current commercial practices and technological developments. The dissertation can be concluded under some non-exhaustive suggestions as under.

The Convention seems to lack at places the ABC[485] characteristics of a good piece of law, in the drafting style/language and in the use of phraseology. The **Annex-A**[486] tends to identify certain areas that are considered to be grey from this point of view. Some of the provisions/areas in the convention need conceptual clarifications, refinements, explanation and removal of difficulties. **Annex-B**[487] seemingly collects details on these aspects.

The attempts for balancing, may not have brought a regime that is entirely satisfactory/convincing for all sides yet, it is to be anticipated that both the sides have some-how benefited something. Take for example, the deletion of 'nautical fault', continuing obligation of 'due diligence' and 'seaworthiness', inclusion of 'provisions on delay', 'higher limits of liability' and the clarity of language etc. may be seen addition to

[485] **A**ccuracy, **B**revity and **C**onsistency
[486] That may be construed as integral part of the conclusion.
[487] Ibid.

cargo interests. Conversely, inclusion of 'exculpatory clauses',[488] 'fire exception', 'limitation of liability' and heavy 'burden of proof' on the claimant may be heart-warming for carriers.

Thus the Convention may neither be taken as Common-Law-Centric nor Civil-Law-Centric. It is a homogeneous law where several sources flow together. Balancing between all interests and protecting no socio-professional category, it favours neither owners nor shippers.

The concern shown by many scholars/lawyers/professionals, however, can not be totally disregarded. The drafting[489] & formatting[490] lacunas, insufficiency of limits of liability[491] compared to other modals,[492] disregarding the inflationary effects[493] over 40 years and multiple opting-outs are, *inter-alia,* areas that can still be remedied without losing time.

Let it not be taken as favouring one side, if it is mentioned that the criticism on the point that the Convention is bulky/lengthy may not be viable as in order to explain the concepts and avoid ambiguities & reliance on presumptions, the Convention had to be so otherwise many things would heave missed mentioning in the text itself.

Concerning criticism on 'Volume Contracts', it is stated that though the bargaining powers of small shippers would tend to be inconsequential in the new regime/scenario, the wording of the Convention[494] itself sets to provide a fair balance between the two interests.

Although, for a cargo interest nation[495] the ideal rules are the Hamburg Rules, however due to fact that they are not applied by countries, the Convention is considered a fair substitute and, to some extent, relief for cargo interests.

Though the Convention is controversial, it is likely to attract sufficient ratifications, as Griggs has rightly pointed out that if USA was not to ratify it will be a big tragedy as USA has been accommodated by the participants throughout the negotiations in order to keep it onboard.[496] If China and America were to ratify it everybody else would rush for

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[488] e.g. strikes lockouts.
[489] As pointed out by Tetley.
[490] As non-exhaustively listed in **Annex-A.**
[491] As pointed out by Faghfouri.
[492] e.g. WARSAW and CIM.
[493] About 542% (in major industrialized courtiers).
[494] Article 80.
[495] Like Pakistan.
[496] Griggs, P.; lecture at IMLI, 25 March 2009.

it[497] but whether USA is going to do it is also not very clear by yet, as can be sounded from the USMLA press releases[498] and Q & As[499] on the issue of the Convention. Professor Reynolds is very much hopeful of the acceptance of the Convention and sees that by around two years time the position would become clear.[500]

Although there are big hopes, there are fears that the innovations of the Convention, i.e. the 'maritime plus', the 'maritime performing party', the 'documentary shipper'[501] that these may cause apprehension problems once put to practice, and 'delivery without presentation of negotiable B/L[502] may be misused by avoiding to issue any document.

'Active participation' of various IGOs and NGOs[503] does not mean that they all have agreed on the UNCITRAL, as evident from the responses, e.g. ESC position paper.[504] Therefore if there is still some kind of disharmony among the various interests and chance can be availed to remedy the same.

However, in order to present a fair and sound regime on transport law to the coming generations, the author would like to offer some humble **suggestions** that can be taken into account at this juncture of time:

a. The legal committee of the UNCITRAL may consider relooking into the convention while accommodating the different issues/points being raised by various sectors before the Convention is finally put across for signature on 23 Sep 2009.

b. There may be conducted an open debate on the issues/points particularly those which are the most controversial, in order to gain more uniformity and wide acceptance before the process of ratification starts.

However encompassing what all has been said or worked about, under the given circumstances, in the point of view of the author, it would be the best policy to 'wait and see'[505] and let the States use their prudence towards adopting the Convention, as after the long series of deliberations and negotiations among individuals, organizations and industry stakeholders, it is the States' turn now to adjudge and take over the situation.

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497 Clark, D.M.; lecture at IMLI, 12 Dec 2008.
498 USMLA press release, links between commercial law reforms and 'culture of rule of law' dated 20 Oct 2008.
499 Questions and Answers why MLA needs an open Debate concerning 'Volume Contracts' exceptions to the proposed Rotterdam Rules, Oct 2008.
500 Reynolds, F.M.B.; lectures at IMLI, 26 Nov 2008.
501 Article 1(7), 19 and Article 1(9) respectively.
502 Article 47(2).
503 Lannan, p-3.
504 http://www.europeanshippers.com/docs/esc_analysis_paperfin.pdf.
505 As rightly put by Efthymiou's (CMI Conference).

Annex A

COMMENTS ON PHRASEOLOGY OF THE ARTICLES OF UNCITRAL CONVENTION, 2008

Article	**Title**	**Area/phrase of the article Commented upon**	**Comments/Suggestion (addition/amendments)**	**Remarks**
Article 1(1) Definitions	"contract of carriage"	'other modes of transport'	'other **mode or** modes of transport'	To make the provision more comprehensive
Article 1(5) Definitions	"carrier"	'with a shipper.'	'with a shipper **under this convention**.'	To bring clarity to the provision
Article 1(25) Definitions	"ship"	'carry goods by sea.'	'carry goods by sea **against a contract of carriage'**	To bring clarity to the provision
Article 3	form requirements	'of the person by **which** it is ..... and of the person to **which** it is communicated.'	'of the person by **whom** it is ..... and of the person to **whom** it is communicated.'	Language issue
Article 5	General scope of application	'any of the following places is located.'	'any of the following places **or ports** is located.'	To bring clarity to the provision
Article 6	Specific exclusions	'or **any space** thereon'	'or **a space** thereon'	The word can be misleading
Article 9(1)(c)	Procedures for use of negotiable electronic transport records	that it is the holder	that it is the **actual** holder	To make the sense clearer
Article 9(1)(d)	Procedures for use of negotiable electronic	to the holder has been effected	to the holder has been **affected**	To harmonise correct use of the word 'affect' (verb) as in Art 49, 70, 73 76 etc and 'effect'

	transport records			(noun) as in art 1(15),(19), 8,9 & 10 etc
Article 51(2)(a)	Identity of the controlling party and transfer of the right of control	'in order to effect a transfer'	'in order to a**ffect** a transfer'	To harmonise correct use of the word 'affect' (verb) as in art 49, 70, 73 76 etc and 'effect' (noun) as in art 1(15),(19), 8,9 & 10 etc
Article 66.	Actions against the carrier	In a competent court or courts designated by an agreement between the shipper and the carrier	In a competent court or courts designated **under article 67 (1) (b)** by an agreement between the shipper and the carrier	Articles 66(1)(b) and 67(1)(b) are intricately interlinked that they cannot be read in isolation from each other, so the cross referencing is necessary
Article 80(3)	Special rules for volume contracts	or similar document is not a volume contract	or similar document is not ***ipso facto*** a volume contract	To make the phrase more accurate and to convey the meaning more forcefully
Article 80(5)	Special rules for volume contracts	the carrier and any person other than the shipper	the carrier and any **third** person other than the shipper	The word 'any person' need to be further qualified with 'third' and defined as well in the Article 1
Article 82	International conventions governing the carriage of goods by other modes of transport	including any future amendment to such conventions, that regulate	including any future amendment **or protocol** to such conventions, that regulate	To make the future changes more comprehensively covered
Article 86(a)	Damage caused by nuclear incident	including any amendment to these conventions	including any amendment **or protocol** to these conventions	To make the future changes more comprehensively covered

Annex B

GENERAL COMMENTS ON UNCITRAL CONVENTION, 2008

Article	Title	Comments
Article 1	definitions	The paragraphs 1 to 30 need sorting out in alphabetical order
Article 1(25)	'ship'	Definition of ship is not comprehensive as it does not exclude the warships and Govt vessels/non commercial vessels
Article 1(27)	"vehicle"	Definition of vehicle. What about if an aeroplane, though small, laden with cargo is carried on board a ship
Article 4	Applicability of defences and limits of liability:	the phraseology is not clear, ambiguous
Article 5(2)	general scope of application	The general scope of application is very wide
Article 6(1)(b)	Specific exclusions:	The phraseology is very wide and vague. If the word other contracts include contracts of carriage other than B/L then this clause need revision. Also the words 'use of ship or space thereon' need to be qualified appropriately.
Article 6(2)	Specific exclusions	The paragraph contains three negations in one sentence making it complex, i.e. 'does not apply', 'except', and then again 'no charterparty'. This idea could have been transcribed by using simpler and clearer method of drafting language.
Article 7	Application to certain	The contents of the article serve nothing but the twisting of the points contained in article 6 and could have been

	parties.	easily merged with the same.
Article 9	Procedures for use of negotiable electronic transport records;	a. Article 9(1); who is to make these procedures is not provided in the instrument. b. Article 9(2) seems to be superfluous in the backdrop of clear definition/details of 'contract particular' provided in Art 1(23) and 36 respectively.
Article 11	Carriage and delivery of the goods.	The wording of the article gives impression that carrier is free to deliver goods subject to the Convention as well as and in accordance with the terms of the contract of carriage. Does this imply that the carrier can go beyond the terms of the convention?
Article 12(3) (a)&(b)	Period of responsibility of the carrier	In this article 'subsequent to the **initial loading**' (not receipt) and 'prior to the **final unloading**' (not delivery) imply that parties may agree on the responsibility of the shipper alongside the ship i.e. tackle to tackle as was in HVR; hence this opting out would gravely hamper upon the fundamental initiative of 'door to door'.
Article 13	Specific obligations	a. Article 13(2) seems to be superfluous in the backdrop of clear definition/details of 'contract particular' provided in Art 1(23) and 36 respectively. b. Isn't it a dent/crack on the door to door principle?
Article 14	Specific obligations applicable to the voyage by sea	This is mere replica of Art 3(1) of HVR with no material change.
Article 17	Basis of liability	Article 17(2) embodies 'catch all clause' Art 4(2)(q) of HVR. Also, Onus to proof by claimant {Article 17(2) & (4)(5)} is not in line with the purposes of the Convention. Where is reversal of onus of proof from HVR to UNCITRAL Rules? Article 17(2) & (3) provides two lines of defences to the carrier for exclusion of liability. What is his duty to prove

		due diligence before invoking the second line of defence i.e. Art 17(3).
Article 18	Liability of the carrier for other persons	Article 18(d) read with Art 13(2) relieves the carrier from a number of his vital responsibilities.
Article 25(2)	Deck cargo on ships	The term "special risks" is very wide and has not been defined in the Convention giving a large freedom of defence to Carrier.
Article 34	Liability of the shipper for other persons	The last phrase of the article absolves the shippers from his liability if he entrusted the performance to the carrier or a performing party. This is a big relief for the shipper
Article 35	Issuance of the transport document or the electronic transport record	Article 35(1) is a big escape for carrier to evade liability. The phraseology itself indicates that the issuance of transport document is not mandatory.
Article 40	Qualifying the information relating to the goods in the contract particulars.	The overall construction of the article read with Articles 35 & 36 is depictive of a regime with 'standard form of disclaimer' that may favour the carrier more.
Article 59	Limits of liability	Keeping in view inflation over 40 years of major industrialized countries i.e. 542%, the current amounts of SDR i.e. 875 SDR per package and 3 SDR per kilo are devoid of rationale.
Article 67	Choice of court	a. Article 67(2) speaks about binding a person other than a party to volume contract. What does person means; a holder of the transport documents, consignee or other persons entrusted by shipper or carrier, nothing is clear.

	agreements	b. The 'timely and adequate notice' under Article 67(2)(c) may have been specified to avoid dispute by the prospective parties.
Article 80	Special rules for volume contracts	a. Article 80(2)(a) and 80(2)(b)(ii) seem to be duplication and both could have been easily merged to convey the sense. b. Article 80(5) speaks about application of derogation from a volume contract to a person other than a party to volume contract. What does the person means; a holder of the transport documents, consignee or other persons entrusted by shipper or carrier, nothing is clear.
Article 91	Procedure and effect of declarations	Declaration by states mandated under article 74, 78 and 91 for applicability of certain rules seems to create confusion in practice amongst states making declaration and those who would not.

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Appendix-I

CMI INITIATIVES

(1988-2001)

Initial Working (1988-1999)

CMI started work on the issue in 1988 with study[506] whether the uniformity of the law of carriage of goods by sea should be placed on the agenda.[507] In 1994 the CMI Executive Council established a WG,[508] to consider the problems of the various regimes dealing with the carriage of goods by sea[509] followed by preparation of a Questionnaire,[510] to which various national Maritime Law Associations[511] responded positively.[512]

International Sub Committee of CMI, 1999

Later, CMI constituted an International Sub Committee[513] on issues of transport laws to consider the areas of transport law for greater international uniformity, prepare the outline and thereafter draft provisions of proposed instrument including liability issue.[514]

Transport Law Colloquium, 2000

Subsequently on 6 July 2000 a transport law colloquium was organized jointly by UNCITRAL and CMI[515] in New York which admitted existence of significant gaps in the national laws and international conventions on transport documents,[516] the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and the legal position of the entities that provided financing to a party to a contract of carriage.[517]

Due to Multimodalism[518] and the Electronic Commerce, the transport law regime required extensive reforms to regulate all transport contracts concerning rights and duties

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[506] CMI Yearbook 1991 Paris II at pages 104-176.
[507] Of the 1990 Paris Conference of the CMI.
[508] See Abbreviations.
[509] CMI Newsletter number 2 of 1994, page 5.
[510] CMI Newsletter number 4 of 1994, page 9.
[511] Hereafter referred to as MLAs.
[512] Newsletter number 1 of 1995.
[513] hereafter referred to as ISC.
[514] Introductory Paper, CMI Yearbook 1999, pages 117 to 120.
[515] http://www.comitemaritime.org/draft/draft.html, accessed on 24 Feb 2009.
[516] e.g. the functioning of B/L and seaway bills.
[517] http://www.comitemaritime.org/draft/draft.html, accessed on 24 Feb 2009.
[518] Wit, p.3, has defined Multimodal as: a contract for multimodal carriage contains an undertaking by a carrier, who is called the multimodal transport operator, to perform carriage of goods by at least two

of parties involved, establish rules for dealing with situation to distinguish the leg of the carriage in which cargo had been lost or damaged, identify the liability regime including financial limits to apply and to provide for preventing fraudulent use of Bs/L.[519]

Singapore Conferences, 2000-2001

The Colloquium recommendations for extension of the liability regime beyond the sea leg were not only supported at the CMI Conferences at Singapore in 2000 and 2001[520] but further proposed a "network" system of liability. The Singapore-II unanimously concluded tasking the ISC to cover that the final Instrument must be compatible with electronic commerce applying to the forms of carriage beside carriage by sea.

Following the Singapore Conference the draft Instrument was circulated for comment to national MLAs and International Organisations. Then ISC in July 2001 concentrating on redrafted chapters after Singapore considered the responses/comments received from MLAs etc for final revision at the sixth meeting of the ISC in November 2001. Finally the 3½ years extensive preparatory work by CMI was submitted to UNCITRAL on 11 December 2001.[521]

different modes of transport from the place where the goods are taken in charge to a place designated for delivery.

[519] UNCITRAL doc A/C.9/497, 2 May 2001.

[520] Which were held in the end of 2000 and on 11-17 February 2001 respectively, http://www.comitemaritime.org/singapore2/singaidx.html, accessed on 24 Feb 2009.

[521] CMI Yearbook 2001-Singapore II, p. 532 and UNCITRAL document A/CN.9/WG.III/ WP.21 of 8 January 2002.

Appendix-II

UNCITRAL WORKINGS

(1996-2009)

UNCITRAL Working Group III

First Reading – 9th-11th Sessions

The project[522] was put on the agenda of WG-III (Transport Law) annexing the CMI Draft to a Note by the UNCITRAL[523] which conducting first reading of the individual articles through the 10-11th sessions in September 2002 and April 2003 reviewed the themes of the Draft[524] and produced "WP-32"[525] containing some variants from CMI Draft.

Second Reading – 12th-13th Sessions

In the second reading,[526] topics were grouped into 'core issues' and 'sub issues' for sake of discussion. Following the 12-13th sessions the Secretariat prepared provisional redrafts "WP-36"[527] and "WP-39".[528]

14th-15th Sessions

At the fourteenth[529] and fifteenth session,[530] the discussion lead to revision containing the scope of application, basis of the carrier's liability, freedom of contract and bringing in for the first time the provisions on jurisdiction and arbitration.[531] The WG also adopted provisions on electronic commerce,[532] previously discussed in a joint-meeting with WG-IV.[533] The consolidated text of a Draft Convention was published as "WP-56".[534]

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522 The analysis in this section are mainly based on the document visited at http://www.comitemaritime.org/draft/draft.html, on 24 Feb 2009.
523 Which is document A/CN.9/WG.III/WP.21 ("WP-21").
524 At its ninth session in April 2002.
525 Which forms the Annex to the Note by the Secretariat document A/CN.9/WG.III/WP.32.
526 Which began at the twelfth session in October 2003.
527 A/CN.9/WG.III/WP-36.
528 A/CN.9/WG.III/WP-39.
529 Held in November/December 2004.
530 Held in April 2005.
531 In 15th session however the articles on arbitration were dropped and restored on proposal by Netherlands; A/CN.9/WG.III/WP.54.
532 Document A/CN.9/WG.III/WP.47.
533 Working Group on Electronic Commerce.
534 Document A/CN.9/WG.III/WP.56.

16th-17th Sessions

At the sixteenth session[535] revised text of the articles on 'jurisdiction' was accepted and revised text[536] of the proposal on 'compromise'[537] was included in compromise package on 'jurisdiction and arbitration'. The revised text of the articles on 'scope of application' and 'validity of contractual obligations'[538] were also agreed.

At the 16th-17th sessions the obligations of the shipper, issue of delivery to the consignee, new provision on the right of retention,[539] provisions on Bs/L consigned to a named person[540] and certain provisions on the right of control were concluded.

18th Session

In the session issues concerning, opting in-out & reservations in 'Jurisdiction',[541] revised text of 'Arbitration'[542] prepared after joint meeting with WG-II,[543] the additions of 'transport documents' proposed in "WP-79"[544], provisions on 'limits of the carrier's liability' for loss of or damage to the goods, the provisions regarding 'relationship with other conventions' and revision[545] of some articles were undertaken. The Draft Convention was published as "WP-81"[546].

Third Reading – 19th-20th Session

At the nineteenth session, 'definitions' were concluded.[547] The 'compromise proposal' was deleted adding 'declaration provision' allowing a contracting state its inclusion as mandatory national law.[548] After nineteenth session the corresponding drafting improvements to some articles were considered at the twentieth session[549] thereby

[535] Paragraph 73 of A/CN.9/591.
[536] Paragraph 103 of A/CN.9/591.
[537] As in WP-54.
[538] Based on the text proposed in A/CN.9/WG.III/WP.61.
[539] Based on paragraph 14 of A/CN.9/WG.III/WP.63.
[540] As proposed in A/CN.9/WG.III/WP.68.
[541] As in document A/CN.9/WG.III/WP.75.
[542] Paragraph 270 of A/CN.9/616.
[543] Working Group on Arbitration.
[544] Document A/CN.9/WG.III/WP.79.
[545] Paragraph 58 of A/CN.9/616.
[546] Document A/CN.9/WG.III/WP.81.
[547] Paragraph 141 of A/CN.9/621.
[548] Paragraph 192 of A/CN.9/621.
[549] As set out in A/CN.9/WG.III/WP.94.

completing the Third-Reading with substantial approvals[550] and minor revisions[551] and deletions[552] due some proposals. Following the session, WP-101[553] was published.

Final Review – 21st Session

On some proposals, few inclusions[554] and deletions[555] were made in the Draft finally setting the 'limitation amounts' as 875 SDR/package and 3 SDR/kilo. Twenty ratifications were required for the Convention to enter into force. Culminating the work of the WG-III the final text of the Draft Convention[556] was approved and submitted to UNCITRAL.

[550] e.g. chapters 'rights of the controlling party' and 'time for suit' etc.
[551] A/CN.9/WG.III/WP.95.
[552] A/CN.9/WG.III/ WP.96.
[553] A/CN.9/WG.III/WP.101.
[554] A/CN.9/WG. III/WP-102.
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