Petar Kragić and Diana Jerolimov

A MODERN

LEX MERCATORIA

For Carriage of Goods by Sea

A MODERN

LEX MERCATORIA

FOR CARRIAGE OF GOODS BY SEA

Authors:
Petar Kragić, PhD
Diana Jerolimov, LLB

Title of the book:
A Modern Lex Mercatoria for Carriage of Goods by Sea

Publisher:
Croatian Maritime Law Association, Rijeka
For the publisher:
prof. Gordan Stanković, president

Editor:
Igor Vio, PhD

Reviewers:
prof. emer. D. Rhidian Thomas
Vesna Skorupan Wolff, PhD

Language editor:
Mark Davies, MA

Cover design, computer processing and graphic preparation:
Točka j.d.o.o., Zadar

ISBN 978-953-95067-2-6

RIJEKA, 2023

A MODERN
LEX MERCATORIA
FOR CARRIAGE OF GOODS BY SEA

by

Petar Kragić and Diana Jerolimov

RIJEKA

CROATIAN MARITIME LAW ASSOCIATION
2022

About the Authors

Petar Kragić and Diana Jerolimov were involved in drafting the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules") as members of CMI's subcommittee and delegates to UNCITRAL's working group.
They have both spent their professional careers as in-house lawyers for Croatia's largest ship-owning company and have experience in all aspects of shipping law. Over the years, they have been members of a number of drafting committees for updating Croatian maritime law. They are regular speakers at maritime law conferences and have written many articles for law journals.
Petar was chairman of the Croatian Maritime Law Association from 2000 to 2018 and of the legal committee of the Croatian Chamber of Shipping. He was a director in a leading international insurance company UK P&I Club (1994 – 2009) and in SIGCo (international provider of guarantees for oil pollution liability). He is the author of a legal textbook Tanker Charterparties.

Foreword

This is a text which revives discussion of the Rotterdam Rules the fate of which is increasingly depressing for their supporters. It is written by two authors who have significant knowledge of the law and practice of shipping and international trade, and consequently are well qualified to cast a critical eye over the Rotterdam Rules. They come to their subject following an historical review of the law and practice relating to the carriage of good by sea and criticise the Rules for their failure to meet the needs of contemporary maritime trade. In their analysis and proposals they are fearless and radical. They contend that cargo liabilities should be channelled solely to contractual carriers and that the rights of claimants should be protected by mandatory insurance and direct right of action. This is accompanied by proposals in relation to jurisdiction and arbitration. The arguments are forcefully made and stir a debate which demands engagement. I suspect that every reader of this text will be aroused to some manner of retort. The issues raised merit serious consideration.

Prof D. Rhidian Thomas

Authors' Preface

The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules" or the "Convention") "enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession" (Art. 94). In December 2021, the status of the Convention was indicated on the UN website as "Signatories: 25. Parties: 5" (Benin, Cameroon, Congo, Spain, Togo). This book suggests possible amendments to the Convention to make it more appealing to the industry and to states alike.

The main reason for the complexity of the Rotterdam Rules (which causes states to hesitate to ratify) is the intention to secure shippers' claims by allowing them to sue multiple parties involved in the transportation process. The new conceptual approach suggests securing such claims by mandatory insurance of the shipowners' cargo liability. This Columbus egg solution lies in the fact that all ships of the world's merchant fleet have insurance cover for cargo liability. In fact, such cover is mandatory either de jure (EU Directive 2009 on the insurance of shipowners for maritime claims) or de facto (by trade practice, where charterers regularly require P&I entry for the ships they charter).

In addition, the new approach acknowledges a huge shift, where shipowners do not have the upper hand over shippers as was the case for most of the 20th century. An old saying from the Mediterranean shores goes "Give the child to her mother". This is logical, because the mother knows best how to care for her baby. This book recommends giving merchants the freedom to negotiate the terms of their contracts and the option to choose an expert and impartial forum to resolve their disputes, provided always that the basis for the shipowners' liability is fair, meaning in line with accepted standards and ensuring that the shippers' claims are properly secured. The mediaeval merchants made their own law – lex mercatoria, which served the trade well. Let us go back to the future, and adjust the rules according to the needs and opportunities of the modern era.

Acknowledgements

The authors wish to acknowledge and express thanks to the Croatian Maritime Law Association for support in the production of this book, to Mark Davies for meticulous language editing, to prof. emer. D. Rhidian Thomas and Vesna Skorupan Wolff, PhD for their insightful comments and suggestions, to Martina Perić and Anamarija Ivković for passionately designing the cover page and making the text visually pleasing to the eye.

Contents

1. INTRODUCTION

1.1 Nowadays, it is hard to deny Patrick Dixon's assertion that "history is accelerating whether you look at trends in the economy, industry, technology, social factors or politics".[1] We see profound changes happening all around us, all the time. What drives these changes, what forms the trends, and what shapes our future? The answer, we frequently hear, is globalization. People and communities around the world interact and depend on each other. For these interactions and exchanges, we need special tools. For example, a couple of operating systems facilitate computing all over the world and assist in the transfer of information. – This work is about a tool to facilitate the transport of goods around the world by sea. This tool will give businesspeople the opportunity to create a legal regime to best suit them in regulating their transactions. The shipping industry needs a legal package based on acceptable international standards to govern their transactions and resolve disputes – fairly and effectively. In a fast-moving and ever-changing world, advice from Spenser Johnson's story *"Who Moved My Cheese?"* (proclaimed as one of the most successful business books ever) seems quite appropriate: "Change Happens; Anticipate Change; Monitor Change; Adapt to Change Quickly; Change; Enjoy Change; Be Ready to Change Quickly and Enjoy It Again".[2] Let's see if this can be followed in respect of creating a modern legal instrument for the carriage of goods by sea.

1.2 The Rotterdam Rules were adopted in 2008, and since then they have been waiting for a sufficient number of ratifications to put them into force. But there is no sign that the needed ratifications will come any time soon. In the meantime, the international carriage of goods is regulated by a number of conventions and their amendments (the Hague Rules 1924, the Visby Rules 1968, the Hamburg Rules 1978, the Hague-Visby SDR 1979) respectively, adopted by various countries and applied on various voyages. The coexistence of all these conventions, and the fact that they frequently compete with one another, is causing uncertainty and insecurity in the everyday business of international carriage by sea that serves 90% of international trade involving the movement of goods and commodities round our planet. The global economy and everyday lives of ordinary people heavily depend on daily shipping activities.

---

1 Patrick Dixon, *Futurewise*, London 1999; p. 1.
2 Spencer Johnson, *Who Moved My Cheese?* London 2020, p. 74.

1.3 Why cannot the Rotterdam Rules gain the required number of ratifications? It seems that this is due to their complex and complicated structure. The fear is that their application might cause more ambiguities and disputes than they would solve. Therefore, a push for ratification from the business community is obviously lacking, as it sees the Rotterdam Rules more as a problem than a welcome solution. On the other hand, there is no compelling public interest for intervention in the carriage of goods by sea, as the issues involved would not trigger public concern, let alone an outcry, as was the case when liability for oil pollution from ships was at stake.

1.4 However, the entry into force of the Rotterdam Rules would be just one element of a legal package required to facilitate transactions related to international carriage by sea. The other two elements are: (i) the application of an acceptable general contract law; and (ii) the jurisdiction of a tribunal to conduct trials and pass decisions according to internationally acceptable standards. In other words, a modern *Lex mercatoria* is required to govern modern carriage by sea, and to resolve disputes that arise therefrom.

1.5 This work considers what could be done to simplify the Rotterdam Rules to make them more attractive for ratification, and examines what is required to make a modern *Lex mercatoria* available to the international business community involved in the carriage of goods by sea.

2. A SHORT HISTORY OF THE SEA CARRIER'S CARGO LIABILITY

Roman law

2.1 Modern legal systems have developed on the legacy of Roman law (from 753 BC – the founding of the city, until the end of the Byzantine Empire in 1453). For the huge Roman Empire, well-organised travel and transportation were quintessential. The Romans developed an intricate road system (all roads lead to Rome!), which enabled people and troops to move round the empire, but larger cargoes, like wheat, on which the economy and the feeding of the population depended, were carried by sea.

2.2 The Roman Empire was built around the Mediterranean Sea, which provided regular sea routes for moving large quantities of goods from and to all corners of the empire (something the contemporaneous Chinese Empire was missing). Travelling by ship was not very slow, even compared to modern-day standards.[3] For example, going from Brindisium in Italy to Patrae in Greece would take over three days, compared with about one day today.[4] Romans could also travel from Italy to Egypt in just a few days.[5] Commercial navigation was suspended during the four winter months.[6]

2.3 As travelling and transporting goods was vital for the functioning of the empire, and was obviously carried out on a large scale, Roman law regulated the liability of entrepreneurs that provided services related to travel and transportation. *The Praetor's Edict Nautae Caupones Stabularii ut Recepta restituant* introduced the *strict liability* of seamen, innkeepers and stable keepers for the goods and belongings of their clients received in the course of the service. As the shipper had an action in contract against the *seaman* (as named by *the Edict,* but which in reality meant the entrepreneur who entered into the contract of carriage, i.e. the ship's operator *exercitor navis*), the question arose (and was extensively debated in classical and legal literature) about why an additional cause of action and strict liability for it were introduced by *the Edict.*

---

3 Ancient Journeys: What was Travel Like for the Romans?; Ancient Origins; 17 January, 2016; https://www.ancient-origins.net/artifacts-ancient-technology/ancient-journeys-what-was-travel-romans-005189

4 *Ibid.*

5 *Ibid.*

6 *Ibid.*

2.4 A suggested answer refers to the difference between civil and praetorian liability, and explains that the basis of liability under a *locatio-conductio* contract is *the fault* (culpa), while under *the Edict* it is *receptum*. The liability *ex recepto* is not based on fault, but on the fact of receipt of the goods by the *nauta* in the course of carriage, with an obligation issuing therefrom to deliver them back to his client (or to the person nominated as the consignee) in the same quantity and condition as received, save in the case of an unpreventable loss or damage, such as *"naufragio aut per vim piratorum"* (according to the writings of *Marcus Antistius Labeo* of the 1st century). Later, other misfortunes (known today as excepted perils), such as fire, were added to the *vis maior*. It seems that the reason for the strict liability lay in the difficulty to prove the fault on the part of the seamen, innkeepers and stable keepers, particularly as the client might not be continuously present with the goods, which he had put on board a ship, in an inn or stable.

2.5 Practically, *nautae, caupones* and *stabularii* had to keep an eye on the goods and check the access of people to their premises. It was feared that if their liability was based on fault, they might have cooperated with thieves, and such collusion would be hard to prove. It seems that the problem of theft was of greatest concern and could be the main reason for bringing *the Edict* (*...nisi hoc esset statutum, materia daretur cum furibus adversus eos quos recipiunt coeundi...*) into existence.[7] Clearly, those entrepreneurs did not have a good reputation for honesty, as – according to *Ulpianus* – even after *the Edict* had been passed, they did not abstain from fraudulent acts.[8] Perhaps, for that reason, an additional protection was granted in the form of *actio furti et damni adversus nautas, caupones, stabularios*, requiring the entrepreneur to indemnify the claimant *in duplum* if the goods were stolen by the employees of the ship's operator, inn or stable keeper. The theft had to be proven.

The Middle Ages

2.6 After the collapse of the Western Roman Empire at the end of the fifth century, the Eastern Roman Empire, later known as Byzantium, regained power over the strip of land round the Mediterranean basin and dominated sea trade. About that time, Justinian I ruled (527–565) the empire, and sponsored a codification of the legacy of Roman law,

---

7 See Stanisław Kordasiewicz: *Receptum nautarum and «Custodiam praestare»* revisited; Revue Internationale des droits de l'Antiquité LVIII (2011): p. 203.

8 *Ulpianus, On the Edict, Book XIV*; The Digest or Pandects of Justinian, Translated by Samuel P. Scott (Cincinnati, 1932); droitromain.univ-grenoble-alpes.fr/Anglica/D4_Scott.htm#IX

which produced the famous *Codex Justinianus* of 534 that influenced jurisprudence for centuries, and laid the foundations for modern law systems, concepts, rules and principles.

2.7 Over time, Byzantium lost territories in all corners of the empire to various invaders and emerging powers. However, until the 8th century, it managed to retain its rule over some regions in the west, particularly in Italy, (where Justinian had transformed Ravenna into the westernmost pillar of the Byzantine Empire, and the city, as a pinnacle of civilization at that time, become a light in Europe's Dark Ages[9]). It also held power over the towns along the Croatian coast that formed part of the vital sailing route from Constantinople to Ravenna and Venice (a city subject to Byzantium until 814), known as *limes maritimus*. As Byzantium was shrinking, a central power over the whole Mediterranean region gradually disappeared, together with *Pax Romana*. This brought to an end the universal application of the Roman legal system – its law and its courts.

2.8 In those tumultuous times, a number of independent or semi-independent cities and regions emerged around the Mediterranean Sea, either fighting against or cooperating and trading with each other. One of them was Amalfi, which in the 6th century under Byzantium became an important maritime centre that later, in the 9th century, emerged as one of the first Italian maritime republics, rivalling Pisa, Genoa, Venice and Gaeta in Mediterranean trade. From the 11th to 14th centuries, Amalfi developed a maritime code (influenced by the legacy of Roman law), known as *Tabula Amalphita* which was recognised mostly in eastern Mediterranean trade until 1570. The statutes of the Mediterranean cities, enacted in the 13th century and onwards, contained rules of public and private maritime law. In the western Mediterranean, the famous *Llibre del Consolat de Mar* (written in Catalan), originating in the 13th/14th century – as a compilation of Mediterranean trading custom, ordinances and rulings of maritime judges, all systematized in a doctrinal manner – was a prime source of maritime law until the second half of the 17th century.

2.9 A theory that the *Llibre del Consolat de Mar* was compiled in Barcelona relies on the fact that the maritime court of the city was called *Consulatus maris*, and, therefore, that the book was a product of its activity. However, this title was quite common for maritime tribunals in the Middle Ages. The first institution called *Consulatus maris* was established in Trani in

9 Rick Stevens: Ravenna: Italy's Byzantium; https://www.ricksteves.com/watch-read-listen/read/articles/ravenna-italys-byzantium

1063, and was later copied by other maritime cities and regions including Pisa, Messina, Venice, Constantinople, Mallorca, Montpellier, Malta and Cyprus. In an effort to receive political support from Valencia, Pedro III, King of Aragon, granted the institution of a *Consulate of the Sea* in Valencia in December 1283. The Consulate was ordered to apply the maritime usages and customs of Barcelona, which at that time were not codified in the form known today.

2.10 Medieval feudal law that governed societies in fragmented states and territories with various level of dependence or independence did not have proper rules and procedures to regulate the reviving trade and to resolve disputes arising in relation to commercial transactions. Therefore, the merchants themselves had to agree and accept a set of rules and principles to govern their dealings. At the guilds, trade fairs and established markets, they adhered to recognised practices and called reputable fellow merchants to adjudicate in their commercial disputes. In order to maintain their reputation and access to the markets, the merchants honoured the judgments passed by the chosen arbitrators.

2.11 During the 12th and 13th centuries, special courts (*Consulatus maris*) were instituted in the cities with established markets, under the power of their autonomous rights or with the approval of a sovereign exercising direct or remote rule over the city. Special magistrates, known as *consulatus* or *judices maris*, well acquainted with merchant usages and customs, were entrusted to resolve issues related to shipping. Renowned traders were involved either as counsels, arbitrators, experts, jurors, judicial panellists or witnesses for the purpose of determining the customs and usages to be applied in each case. The rulings of such courts, private collections of usages and customs, oral tradition and rules passed by the cities (or higher authorities in the territories or states) constituted mediaeval maritime law for various regions and trades.

2.12 Another interesting feature of medieval city statutes worth mentioning is the ship's notary. For example, the statute of the city of Zadar (1305) on the Croatian coast prescribed that each ship of a certain size should have a notary on board (*scribanus navis mercatoriae*). The notary was examined and licenced by the maritime judges. He had to enter in his book all the goods received on board, and issue a receipt to the merchant within four days of the ship setting sail (*velum facerit*). The statute provides that the goods loaded on board *"in patronarum custodiam debeant permanere, et sucut patronus per scriptum merces in custodia receperit, ita eas per scriptum in integritate mercatori restituere tenetur, nisi ipsae merces per violentiam aut per ignem perderentur, vel per fortunam*

temporis destruerentur aut extra navem iactarentur seuproicerentur".[10] Therefore, all the goods that the shipowner received in custody as per the *written record* had to be delivered undamaged at the destination to the merchant, as per the *written record*, unless the goods had perished by violence or fire or storm or were thrown overboard (to lighten the ship to better resist the waves).

2.13 Even though the basis of the carrier's liability is *"receptum"* or *"custodia"*, liability *ex scriptura* emerges, due to the evidential effect of the notarial act of *scribanus* books and receipts. When later (probably in the late 17th century) the bill of lading developed into an independent negotiable instrument, liability *ex scriptura* would become of utmost importance for a third-party holder. Proof to the contrary of the description of goods in a bill of lading would be denied.

2.14 Other collections of maritime rules could be found in centres of particular trade routes. In the eastern Mediterranean, there was a compilation called the *Assizes of Jerusalem* (1187) spurred by trade emerging from the crusades. The *Rolls of Oléron* (12/13 century), named after an island in the Bay of Biscay, were made to facilitate the flourishing wine trade from Brittany and Normandy to England, Scotland and Flanders. *The Rolls* are of central importance in the development of modern maritime law.[11] Derived from Roman and Italian sources and adapted to local customs, the Rolls became the basis of the common maritime law of the North Sea and the Atlantic Ocean.[12] Flanders trade had the *Judgments of Damme* (12/13 century) and Baltic trade the *Laws of Wisby* (14th century). Merchant guilds in cities in the European north, stretching from what was then Prussia in the east to England in the west, present-day Bergen (Norway) in the north to Krakow (Poland) in the south, more than 200 of them, formed, from the late 12th century, a trade alliance known as the *Hanseatic League* (from *Hanse* or *Hansa* – a German word for "association", "guild", "convoy of ships", etc.) that dominated maritime trade in northern Europe for about four hundred years. The alliance was coordinated by an assembly of representatives of the members, called the *Hansatag*. The assembly adopted resolutions (*recessus*), including those related to maritime law. The resolutions (passed from 1360 to 1614) constituted a body of law, *Recessus Hanse*, which had to be supplemented with the *Justinian Digesta* for matters of general law and the laws of the cities, as a subsidiary source of law. In the south, privileged trading

10 Statuta Iadertina, Liber IV, Capitullum XXI; Zadar 1997; p.410/412.
11 Thomas J. Schoenboum, Admiralty and Maritime Law, Volume 1; St. Paul, Minn., 1994, p. 9.
12 *Ibid.* p. 9/10.

houses under the auspices of the rulers regulated trade with tendencies towards colonial expansion, such as the *Casa de la Contraction* in Seville, and passed regulatory acts known as ordinances. They were called after the city in which they were passed, so there are the ordinances of Seville (1507 and 1556), Burgos (1538), Bilbao (1560), and others.

2.15 Until the 13th century, England did not engage in shipping to such an extent that there was a need for the institutional application of maritime law. It was only then that courts were set up in seaport towns (Yarmouth, Bristol, Ipswich, London, Rochester) to deal with maritime and commercial matters.[13] The courts applied primarily the *Laws of Oléron* as the basis of the custom prevailing among seaports towns.[14] In this, there was no difference between English and continental practice.[15] In about 1360, the High Court of Admiralty was established by Edward III – and was presided over by the vice-admiral of the fleet – primarily to deal with matters of discipline in the English fleet and with cases of piracy, prizes, wreck and the admiral's *droits* (rights to property found at sea or stranded upon the shore). However, it seems the Admiralty Court accepted some mercantile and shipping cases concerning charter party disputes, and contracts made on board or on the high sea, which caused a conflict of jurisdiction with the local courts. Under the Tudors, the jurisdiction of the Admiralty Court over commercial matters was strengthened, and then again was lost after 1660.

2.16 In 1873, the Judicature Act merged the Admiralty Court into the High Court of Justice, and eventually, from 1970, the Queen's Bench Division of the High Court has handled most maritime cases.

2.17 The maritime courts in the Middle Ages (as the courts of Fairs and Boroughs and the Staple courts) determined disputes, not by English domestic law, but according to the general law of nations based on mercantile codes and custom such as the *Laws of Oléron* and reflecting international and commercial practice.[16] The characteristics of these commercial courts were their speed in adjudicating, a realistic attitude towards the proof of facts, relative freedom from technical rules of evidence and procedure that plagued the common law courts, and acceptance of the fact that the customs of merchants generated rights which required international recognition and which, for the stability of the European markets, needed to be interpreted in a broadly uniform fashion, with an overriding requirement of good faith.[17]

---

13 *Ibid.* p. 12.
14 *Ibid.*
15 *Ibid.*
16 R.M. Goode: Commercial Law; Penguin Books, 1985; p. 31.
17 *Ibid.* p. 31/32

2.18 Ultimately, the merchant courts, with the Court of Admiralty, were vanquished by the courts of common law. By capturing the merchant courts' jurisdiction and business, the common law courts were compelled to modify their own principles and practices (albeit with infinite slowness and caution) to accommodate the needs of the mercantile community and eventually to absorb merchant law into common law itself.[18] English law has been built mostly on the precedents of past judgments.

The early modern era

2.19 The emergence of the larger and more centralised nation states in 17th century continental Europe led their powerful sovereigns to take over the regulation of commercial activities, including shipping. The Maritime Code of Christian XI of Sweden was passed in 1667 (with the first written rules on the bill of lading[19]); the *Ordinance of Louis XIV of France* in 1681; the *Code of Christian V of Denmark* in 1683, all copying existing collections of maritime ordonnances and customs. The French ordinance, under the full title *Ordonnance touchant la marine marchande,* prepared under the auspices of the king's finance minister, Jean-Baptiste Colbert, became the prototype for the modern codification of maritime law, because it systematised public, private and procedural law with precision and clarity. The French Admiralty Court was granted maritime jurisdiction to the exclusion of the old consular courts, whose judges had been elected by the mariners themselves.[20] A number of similar maritime codes were passed in the 17th and 18th centuries, such as the *Pragmatica* in Malta (1697), the *Capitoli* in Genoa (1712), the *Codice* in Venice (1768), the Edict of Peter the Great in Russia (1721), the Kings' Patent in Prussia (1727), etc.

The late modern era

2.20.1 In the 19th century, with centralised nation states and the abolition of feudal systems, comprehensive civil law codes emerged. The first of them was the *French Civil Code* (the Napoleonic Code) of 1804. Napoleon Bonaparte's intention was to pass a civil code to cover all branches of law, emulating the system of Justinian's *Digesta*.[21] However, his advisors

18 *Ibid.* p. 33.
19 V. Brajković, B. Jakaša: Pomorsko pravo; Pomorska enciklopedija; Zagreb 1983; Vol.6, p.334.
20 Nicholas Joseph Healy: Maritime Law, Britanica; https://www.britannica.com/topic/maritime-law#ref424600.
21 See Pierre Crabités: Napoleon and the French Commercial Code, America Bar Association Journal, Vol. 16, No 4 (April, 1930), p. 258.

suggested that, to begin with, only civil law should be codified. Just four months after the first draft of the Code was completed, a commission was set up in April 1801 to prepare a commercial code. Nevertheless, the Civil Code regulated the carrier's liability. It provided that carriers by water had the same obligations for goods received as innkeepers under the section *"Of Deposit and Sequestration"*, and made them liable for the loss and damage of entrusted goods, unless they could prove that the goods had been lost or damaged by *"fortuitous circumstances, or superior force"*.[22] So, the Roman concept of the carrier's liability (still linked to innkeepers) reached the grand codifications of the 19th century.

2.20.2 Five years later in 1809, the *Code de commerce* was adopted, which was copied by many countries, such as Spain (1820) and from there influenced the commercial codes of the countries of Latin America (Mexico 1854; Argentina 1859; Uruguay 1865 ...), Portugal 1833, Egypt 1885, and to some extent the Netherlands 1838 and Belgium 1879. On the other hand, there was a group of countries influenced by the German commercial code (1861), such as the Scandinavian countries, Japan 1911, Turkey 1929, etc. Anglo-Saxon countries relied on the law of precedent.

2.21.1 In the 19th and at the turn of the century, the same concept of strict liability of the carrier appeared in the laws of civil law countries as formulated in the commercial codes, and in the common law countries as formulated by the precedents of court judgments. Article 607 of the German Commercial Code 1861 (*Allgemeines Deutschse Handelsgesetzbuch*) reads:

> The carrier shall be liable for the damage caused by loss or damage to the goods from receipt until delivery, provided that it does not prove that the loss or damage has been caused by force majeure (vis major) or by the natural nature of the goods, in particular by internal spoilage, shrinkage, ordinary leakage and the like, or by externally unrecognizable defects of the packaging.[23]

2.21.2 The rule for common law liability in its modern form was given in the celebrated case *Coggs v. Bernard* (1703) by Sir John Holt, who based liability on the principles of bailment (a delivery to carry or otherwise manage the goods, for a reward to be paid to the bailee), and proclaimed:

---

22 Code Napoleon, Art. 1784; London 1827

23 Der Verfrachter haftet für den Schaden, welcher durch Verlust oder Beschädigung der Güter seit der Empfangnahme bis zur Ablieferung entstanden ist, sofern er nicht beweist, daß der Verlust oder die Beschädigung durch höhere Gewalt (vis major) oder durch die natürliche Beschaffenheit der Güter, namentlich durch inneren Verderb, Schwinden, gewöhnliche Leckage und dergleichen, oder durch äußerlich nicht erkennbare Mängel der Verpackung entstanden ist.

> The law charges ... [the common carrier] ... thus intrusted to carry goods, against all events, but acts of God, and of enemies of the King. ... And this is a political establishment, contrived by the policy of law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealings; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered.[24]

2.22 Not only the principle of liability, but even the reasons for it, emulate the Roman model. An additional reason was given in *Riley v. Horne* (1828), where it was explained that witnesses of the loss or damage of the goods on board would be the carrier's servants, and they, knowing that they could not be contradicted (as the goods were not usually accompanied by the shipper or his representatives), would excuse their master and themselves, even if the goods were lost or damaged by their gross negligence, stolen by them, or by thieves in collusion with them. In such cases, the shipper would be unable to prove either of these causes of loss.[25] The judge explained that carriers assumed the responsibility of an insurer.

2.23 By the 19th century, the carrier's liability in continental law became associated with *"necessary deposit"*, and in common law with *"bailment"*. It seems that in the comments of ancient Roman law scholars, the carrier's *receptum* was not linked to *depositum* or *custodia*.[26] It stood on its own, as a separate legal concept.

2.24 Long-surviving strict liability faced another legal principle that was developing as the economy and societies were being transformed by industrialisation and the new economy emerging therefrom. That principle was *freedom of contracts*. The Mediaeval bills of lading and charter parties did not contain exoneration clauses. They only appeared in the late 18th century, to begin with in short and simple forms, such as "the danger of the sea only excepted". A case tried in 1795 alarmed shipowners to such an extent that they pushed for a bill limiting their exposure under common law. Its proposal had passed through the Commons, but was rejected by the Lords. The result was that the shipowners commenced amending their bills of lading by adding more and more exceptions. Ultimately, exceptions in bills of lading grew so numerous that, as the authors of legal books explained, an exhaustive

---

24 Raoul Colinvaux: Carver's Carriage by Sea, London 1982; Vol 1, p. 4.
25 See *ibid*.
26 Stanisław Kordasiewicz: *Receptum nautarum* ...; p. 205.

enumeration of the exoneration clauses used in practice was impossible. The final result was protection of the shipowners from all liabilities to a degree that led to the following conclusion: "There seems to be no other obligation on the shipowner than to receive the freight".[27]

2.25.1 The American Revolution (1775-1783) bore a new independent state that had to catch up with the advanced economy of Great Britain. The Americans opposed, at that time, the prevailing doctrine of *laissez-faire* resting on the authority of Adam Smith's *Wealth of Nations* (published in 1776 – the same year the Americans declared independence) and his *"invisible hand"* axiom. Led by Alexander Hamilton, Secretary of the Treasury (1789 – 1795), the Americans turned to a development strategy based on protectionism and interventionism. The idea was to protect and support the nascent economy in order to diversify its colonial structure and put it in a position to compete in international trade on a level playing field with the advanced economy of Great Britain.

2.25.2 A hundred years after Hamilton, the Americans were still in the interventionist mode, trying to curb the unleashed forces of the free market. In 1890, Congress passed the Sherman Antitrust Act. The purpose of the Act, as explained by the US Supreme Court in a modern case,

> ... is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself [28]

and eventually the free market as such.

2.25.3 Following the trend, Michael Harter, a congressman from Ohio, decided to intervene in the shipping industry to prevent shipowners from misusing their upper-hand bargaining power to impose *liability exoneration clauses* on shippers. The solution lay in the introduction of mandatory rules on shipowners' liability that could not be derogated through the exercise of sheer economic might. In 1893, Congress passed a law known under the popular name of the Harter Act. It provided, *inter alia*:

> It shall not be lawful ... to insert in any bill of lading ... any clause ... whereby ... [the owner] ... shall be relived from liability ... Any and all words or clauses of such import inserted in bills of lading ... shall be null and void and of no effect.[29]

---

27 See Scrutton on Charterparties and Bills of lading; London 1984; p. 210.
28 *Spectrum Sports, Inc. v. McQuillan 506* U.S. 447 (1993)
29 Harter Act, 1893, Sect. 1.

2.26.1 As the other former British colonies (Australia, Canada and New Zealand) followed suit and passed their own replicas of the Harter Act, the need emerged to adopt uniform international rules. After succeeding in putting through international conventions on collision and salvage in 1910, the *Comité Maritime International* (CMI) turned its attention to unifying the rules on carriage by sea. The developments were halted by the outbreak of WW I (1914 -1918) until 1921, when the Imperial Shipping Committee made a recommendation to the British Government that there should be some uniform legislation through the British Empire to standardise the law regarding the carriage of goods by sea.[30]

2.26.2 The shipping community itself, however, preferred the idea of adopting a set of uniform rules for voluntary adoption rather than to introduce legislation.[31] To this end, a set of rules was drafted by the CMI at a meeting in the Hague in 1921.[32]

2.26.3 However, the voluntary Hague Rules 1921 were transformed into a mandatory international convention at the Diplomatic Conference held in Brussels in August 1924 under the full name of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, known as the "Hague Rules". Michael Harter's very idea of protecting the weaker party reverberated through these rules and all the subsequent international conventions that followed (the Visby Rules 1968, the Hamburg Rules 1978, the Hague/Visby SDR 1979, the Rotterdam Rules 2008).

2.27 The Hamburg Rules were drafted under the pressure of the developing and non-aligned countries. The argument was that the Hague Rules came out as a result of bargaining between the shipowners from – at that time – the developed countries and shippers from the developing countries, when dominance of the shipowners' side still existed. Therefore, new rules for the better protection of developing countries were required.

30 Imperial Shipping Committee; Handy Bulk, https://www.handybulk.com/committee
31 *Ibid.*
32 *Ibid.*

2.28 The Rotterdam Rules were adopted for the same reason as the Hague Rules. Namely, the United States drafted COGSA 99, which raised the alarm that the new US Act would oust the Hague Rules from important US international sea-borne trade. The Rotterdam Rules were adopted in 2008, and since then have been waiting for a sufficient number of ratifications to put them into force. But there is no sign that the needed ratifications will be coming soon. Over the past decade, only four signatories (Cameron, Congo, Togo, and Spain) out of 25 have ratified them. This falls quite short of the 20 ratifications required for them to enter into force.

2.29 In the meantime, the coexistence of a number of conventions and their amendments adopted by various countries (the Hague Rules 1924, the Visby Rules 1968, the Hamburg Rules 1978, the Hague/ Visby SDR 1979) is causing uncertainty and problems in the everyday business of international carriage by sea.

2.30 Friedrich List, a German-American economist, prophesied in his book *Das nationale System der politischen Ökonomie* (1841) that international trade could not continue developing in a free and unregulated form, and that states would be cooperating and coming close together by forming international associations, even federations. He was aware that international rules and institutions superseding national states would be required. He was right. Since then, a number of international agreements, institutions and bodies have been created.[33] However, in spite of all these institutions and numerous international conventions and arrangements, there is a need for a modern *lex mercatoria* which would allow merchants, today called businesspeople, to create their own legal package from the available laws, rules, custom, usages, practices and tribunals (courts and arbitrations).

2.31 Takeaways from the historical overview:

(i) In the ancient Roman Empire, the Praetor's Edict introduced the strict liability of shipowners for the carriage of goods. The reason was the protection of shippers against theft, and the difficulty for cargo interest to prove the cause of damage or loss at sea.

(ii) In the Middle Ages, merchants developed their own custom and usage of trade, and were involved in dispute resolution through

33 For example, the *League of Nations* was established in 1920; the *General Agreement on Tariffs and Trade* – GATT in 1947; the International Organization for Standardization (ISO) in 1947; the United Nations Commission on International Trade Law – UNCITRAL 1966; the European Union – EU in 1992 (which *List* was not only theoretically advocating, but trying practically to initiate); and the World Trade Organization (WTO) in 1995.

ad hoc arbitration or formal courts that gave a significant role to merchants (appointing them as judges, jurors, experts, consultants, or hearing them as witnesses on customs, usage and rules of trade.)

(iii) The Roman concept survived for centuries and found its place in the codifications of the 19th century, and in common law principles.

(iv) Only in the late the 18th century did shipowners begin to introduce in the contracts of carriage and transport documents exoneration clauses, which ended up at the end of 19th century with a great number of broadly drafted clauses, which were recognised by the courts in the name of freedom of contracts.

(v) In 1893, the United States passed the Harter Act prescribing a mandatory regime for the cargo liability of carriers by sea.

(vi) International conventions followed, but today we do not have a universal legal regime for the carriage of goods by sea that would resemble the main features of the medieval *lex mercatoria* and provide a standardised, practical and fair legal framework to serve international sea-borne trade, an activity of vital importance for the globalised contemporary world. On the contrary, on the scene there are competing conventions and different tribunal practices in various jurisdictions around the globe.

3. WHO IS LIABLE?

Who is liable? The Hague Rules 1924

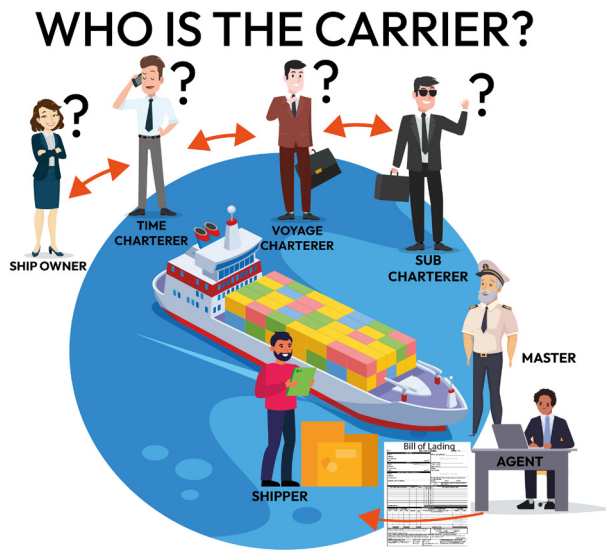
3.1 The Hague Rules provide that "neither the carrier nor the ship shall be liable for loss or damage [to cargo] arising or resulting from unseaworthiness unless caused by want of due diligence …"[34] or from the *excepted perils* listed therein.[35] *A contrario*, if the loss or damage resulted from unseaworthiness caused by want of due diligence or an event not listed within the excepted perils, the carrier (in personam) and the ship (in rem) would be liable.

3.2 The "carrier", as defined by the Hague Rules, is "the owner or the charterer who enters into a contract of carriage with a shipper".[36]

3.3 The Hague Rules further provide that, after receiving the goods into his charge, the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading.[37]

3.4 How do we know *who* entered into a contract of carriage by the shipper? In practice, the question is who issued *the bill of lading*, or, more precisely, on whose behalf was the *bill of lading* issued – by the master or an agent? Apart from the shipowner, on the ship's side there might be a bareboat charterer, a time charterer, and a voyage charterer including their sub-charterers. Who does the signatory of a *bill of lading* represent? The answer has to be found from the facts of each case that include (a) the terms of the bill – printed on it or incorporated (by the intertwined *incorporating* and *incorporated* clauses) from the *relevant* charter party (as there might exist several contemporaneous charterparties in respect of a ship); (b) the company's logo printed on it; (c) *the identity of the carrier clause*; (d) the qualification of the signature; (e) the conduct and statements of various parties involved, and so on and so forth.

34 Art. 4(1).
35 Art. 4(1).
36 Art. 1(a).
37 Art. 3(3).



Slide 1. Who is the carrier?

3.5.1 Who else, apart from the owner or charterer, might be liable? Anyone else who causes damage or loss (of the cargo), and is sued *in tort* by the cargo interest, as a number of court cases, including the landmark *Adler v. Dickson* [1954][38] and *Scruttons Ltd v. Midland Silicones Ltd* [1961][39] cases have demonstrated.

3.5.2 *Adler v. Dickson* is a personal injury case. In July 1952 the cruise ship Himalaya docked in the port of Trieste. Mrs. Adler went ashore and on returning to the ship, while walking along the gangway, a gust of the Bora wind moved the ship from the shore. The gangway came adrift from the gantry on the shore end and collapsed. Mrs. Adler fell onto the wharf, some 5 meters below. She suffered serious injuries. As she could not sue the shipowners, due to an exoneration clause in her ticket, she sued the master and the boatswain for failure to secure the gangway properly.

3.5.3 As a consequence of that ruling, shipowners started drafting *Himalaya clauses*, named after the ship, in an effort to protect the persons employed or engaged by them.

3.5.4 In *Scruttons Ltd*, another celebrated case, the cargo interest – in order to by-pass the contractual per package limitation in *the bill of lading*

38 2 LLR 267, [1955] 1 QB 158.
39 UKHL 4 AC 446 [1962].

(containing a US COGSA per package limitation of $500 = £179) and recover the damage in full (almost £593) – sued the stevedores (hired by the shipowner) for negligently dropping during the discharge a chemical drum, whose content leaked out. In spite of the clause purporting to protect, inter alia, "any person to the extent bound by this BL, whether acting as carrier or bailee", the stevedores – as strangers to the contract – were denied the privilege of limitation.

Who is liable? The Hague/Visby Rules 1968

3.6 The Visby Rules intervened in the liability issue only by ensuring that the carrier would not lose the protection afforded by the amended Hague Rules if sued in tort, and in addition extended protection to its servants or agents (not being the independent contractors). The rule reads:

> Article IV bis
>
> 1. The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.
>
> 2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.
>
> 3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in these Rules.
>
> 4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Who is liable? The Hamburg Rules 1978

3.7 The rise of third-world countries on the international scene in the 1970s called for a stricter law on carriers' liability. The argument was that the Hague Rules had been a compromise based on the legacy of the colonial past, and therefore still favoured shipowners (from the developed countries) over shippers (from the developing world).

3.8 In order to improve the claimant's position and raise its chances of recovering the sustained damage, the Hamburg Rules made an additional

party liable for the carriage of cargo. By copying the aviation Guadalajara Convention 1961,[40] the Hamburg Rules introduced the concept of *"actual carrier"*.[41] Under the Guadalajara Convention, the claimant may sue one or both carriers – the contracting carrier (for the whole flight) and the actual carrier (for its leg of the flight on which the loss or damage occurred).[42] The practical result is that the claimant might be better off in securing its claim, as now it has two parties whose assets it could pursue. In addition, the claimant might gain the advantage of having more options for choosing the more convenient jurisdiction to entertain the case.

3.9 The Hamburg Rules defines "actual carrier" as:

> any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.[43]

Who is liable? The Rotterdam Rules 2008

3.10 The drafting of the Rotterdam Rules was a reaction to the US COGSA 99 draft, which indicated that the United States, the biggest economic power on Earth, might abandon the Hague Rules in an effort to regulate carriage by sea by its national law rather than by the existing or a new internationally agreed convention unifying the regime of international sea-borne trade.

3.11 COGSA 99 added yet another party liable for cargo claims, by using the following definition:

> PERFORMING CARRIER ... means a person
>
> (i) that performs, undertakes to perform, or procures to be performed any of a contracting carrier's responsibilities under a contract of carriage,

This definition was copied by the CMI's May and October 2001 drafts of the Rotterdam Rules.

---

40 Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, Signed in Guadalajara, on 18 September 1961 (Guadalajara convention 1961)

41 Art 1(c) of the Guadalajara Convention 1961 reads: "actual carrier" means a person other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage".

42 Article VII – In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seized of the case.

43 Art 1. (2)

3.12.1 At the 6th meeting of the CMI Sub-committee, held in Madrid on 12-13 November 2001, Croatian MLA delegates and FIATA[44] jointly proposed a straightforward definition with – as argued – beneficial practical consequences:

> "Performing party" means a person ... that physically performs...

3.12.2 The US delegation agreed to accept the proposal, provided the words "or fails to perform in whole or in part" were added. Obviously, in its view "fails to perform in whole" would mean the same as "undertake" – which, according to the said proposal, was removed from the draft.

3.12.3 The Croatian delegation argued that a third party, say a stevedore, *undertakes* by contract to perform, for example discharge, for *its contracting party* (i.e. the carrier), not for the claimant. In addition, it wondered how the claimant could find out that a stevedore – who failed to appear at a quay, say because he had not been paid in advance as stipulated in his service contract – undertook to discharge the cargo, unless the claimant searches the premises of various parties (the shipowner, its agent) in order to find out whether such a properly signed contract lies somewhere in somebody's drawer.

3.12.4 It is very important for the case we are attempting to make here that at that time the International Chamber of Shipping,[45] the World Shipping Council,[46] and the NITL[47] argued that "the instrument should deal with the liability of the contracting carrier only and should not create a right of suit for cargo interests against any performing carrier/parties" and that the "contracting carrier alone should be liable for any cargo loss or damage". So, the industry had spoken out about its needs for simplicity, straightforwardness and practicality.

---

44 FIATA International Federation of Freight Forwarders Associations is a nongovernmental, membership-based organization representing freight forwarders in some 150 countries. FIATA's membership is composed of 108 Association Members and more than 5,800 Individual Members, overall representing an industry of 40,000 freight forwarding and logistics firms worldwide.

45 The International Chamber of Shipping (ICS) is the principal international trade association for the shipping industry, representing shipowners and operators in all sectors and trades. ICS membership comprises national shipowners' associations in Asia, Europe, and the Americas whose member shipping companies operate over 80% of the world's merchant tonnage.

46 World Shipping Council members operate approximately 90% of the global liner ship capacity, providing approximately 400 regularly scheduled services linking the continents of the world. Collectively, these services transport about 60% of the value of global seaborne trade, and more than US$4 trillion worth of goods annually.

47 As [the US's] oldest and largest freight transportation association, the National Industrial Transportation League has a rich history. From its beginnings in 1907 when economic regulation ruled the industry through to the present, the League has been at the forefront of changes that have helped shape the nation's commercial freight transportation system. From rail, to motor carriage, through ocean transport and air commerce, the League has been a proven leader in representing shippers' interests.

Slide 2. Industry support for channelling liability towards the contractual carrier

3.12.5 Professor Zunarelli, the Italian delegate at the mentioned CMI Madrid meeting (on 12/13 November 2001), rightly observed that "... every regime that provides for the channelling of liability also includes mandatory insurance, which does not exist in this context".

3.12.6 The request put forward by the industry (cited in 3.12.4) was resisted on the grounds:

(a) that the practical effect of such a proposal would be to leave cargo interest without an effective remedy whenever the contracting carrier was insolvent or otherwise not amenable, and

(b) that it would require pre-emption of bailment and tort law.

3.13 These grounds lead us to a very important point. Besides the question of who is liable for cargo claims, it is important to ask whether such a person has sufficient funds (assets) to pay the claim, and whether the funds (assets) are accessible to the claimant, or hidden in an account or otherwise on a remote tax-haven island in the middle of the ocean. Therefore, it seems crucial for the success of the Convention that the funds for cargo damage recovery are easily available. It is, however, worth noting that cargo interest can always arrest the ship to secure its claims.

3.14 The CMI December 2001 draft ended with the definition: "Performing party means a person ... that physically performs [or fails to perform in

whole or in part] …", i.e. with the American proposal in square brackets for further consideration. The very same definition appeared in the UNCITRAL New York draft of April 2020.

3.15.1 In the final form of the Rotterdam Rules, "Carrier" (a person that enters into a contract of carriage with a shipper[48]) "is liable for loss of or damage to the goods, as well as for delay in delivery …"[49], and is *vicariously* liable for (a) any performing party; (b) the master or crew of the ship; (c) employees of the carrier or a performing party; or (d) any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.[50]

3.15.2 In addition to the carrier, and *jointly and severally* with it, the "Maritime performing party" is liable for its own deeds. By definition, "Maritime performing party" is "a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship".[51] For the avoidance of doubt "an inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area".[52]

3.15.3 The Rotterdam Rules draw into their scope a person not party to the contract of carriage, due to the fact that such a person entered into a *service agreement* (which facilitates the execution of the contract of carriage) with the carrier. At the same time, to strike a balance, the Rules provide such a third party (that did not enter into a contract of carriage) with the umbrella of the carrier's defences and limits of liability (whether [claims] founded in contract, in tort, or otherwise)[53] if some conditions are met. The relevant article reads:

> Article 19 Liability of maritime performing parties
>
> 1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

48 Art. 1 (5)
49 Art. 17 (1)
50 Art. 18
51 Art. 1 (7).
52 *Ibid*.
53 Art. 4 (1).

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

(b) The occurrence that caused the loss, damage or delay took place:

(i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship and either (ii) while the maritime performing party had custody of the goods or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

3.15.4 The equation is the following:

The convention draws into its regime *parties not privy to the contract of carriage* and gives them protection (defences & limits) against claims in tort

=

But they assume liabilities to the claimant on the convention's terms (from the fact that they entered into a service contract with the carrier, *whose contract of carriage is governed by the Rotterdam Rules*).

3.15.5 The Maritime performing party's theatre of operation is along the way between the arrival of the goods at the port of loading and their departure from the port of discharge, provided (a) it received or delivered goods in a *Contracting State*, (b) had custody of the goods in a *Contracting State* or (c) was participating in the performance in a *Contracting State* of any of the activities contemplated by the contract of carriage.

3.16.1 Therefore, a bill of lading holder may sue – beside the carrier – any Maritime performing party that performed or undertook to perform any of the carrier's obligations entrusted to it, regardless of the terms and conditions stipulated in the service contract between the carrier and the service provider that by virtue of the Rotterdam Rules has been qualified as a Maritime performing party.On the other hand, a Maritime performing party will have defences and immunities available to the carrier under the Rotterdam Rules.

3.16.2 This means, however, that a stevedore might have a number of claims and defences under his service contract with the carrier, but would not be entitled to use them against the claimant. For example, the stevedores did not show up because the advance part of the price was not paid, or there was a large outstanding debt of the shipowner, or the shipowner

failed to secure safe working conditions, or failed to advise the stevedores on time or omitted important information on the properties of the cargo, and so on. The stevedore, if sued in such circumstances, would have to prove "that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault".[54] Would any of the above listed reasons be a good defence in a given factual situation? It could be known probably after a long, complex and costly trial.

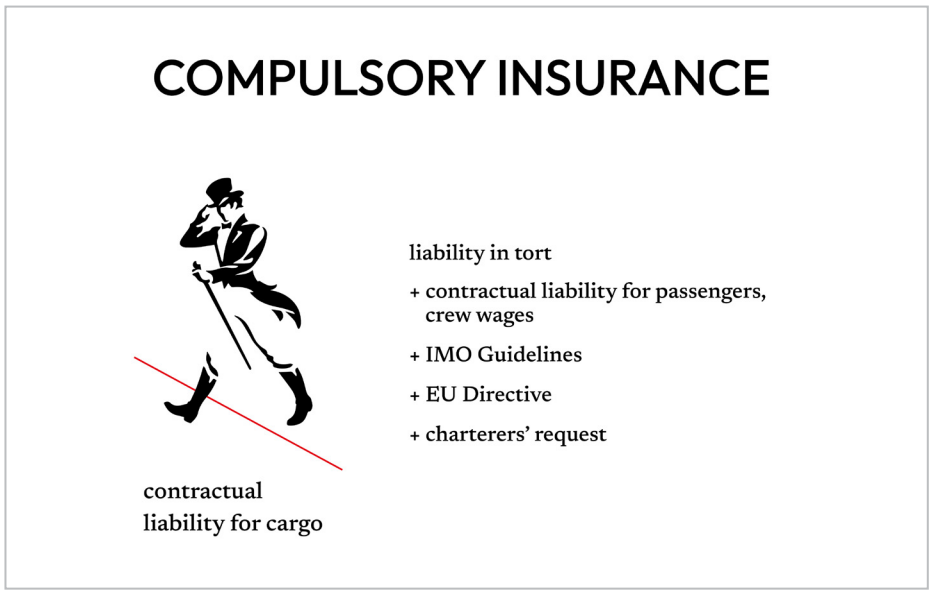
3.16.3 In addition, there might be a chain of parties that performed and/or undertook to perform (any of the carrier's obligations), and the claimant may sue each of them down the chain. In such a case, any one of them would have to prove "that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault".

54 The Rotterdam Rules Art. 17(2)

4. MANDATORY INSURANCE FOR CARGO CLAIMS

Turning existing insurance into mandatory insurance

4.1.1 The complicated structure of the Rotterdam Rules is, to a considerable extent, due to the notion that the cargo interest should not be left "without an effective remedy whenever the contracting carrier is insolvent or otherwise not amenable". So, how to secure cargo claim recoveries? The answer is by using Christopher Columbus' famous solution for keeping an egg in an upright position. By being creative and doing something differently from others. Or, expressing this in a humbler way, by following what other conventions have already done for claims in tort or in contract for passengers[55] and crew.[56] The proposal is to go beyond the red line and introduce *mandatory insurance* for cargo liability claims.

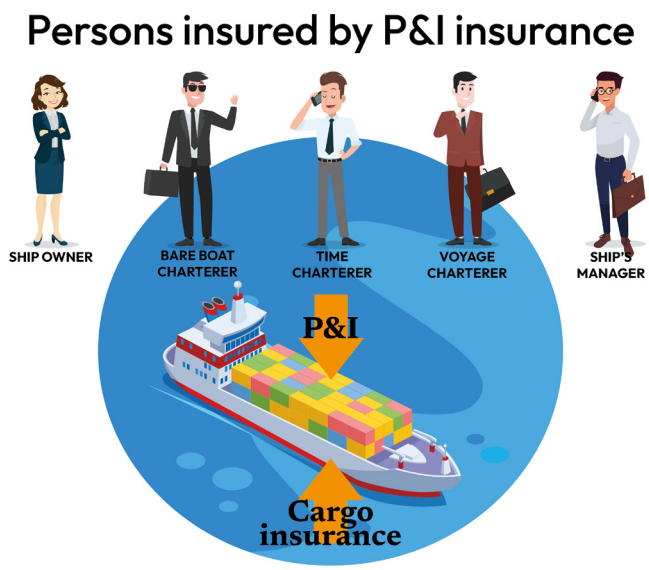


Slide 3. Stepping towards compulsory cargo liability insurance

55 Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, (in Art. 5 Compulsory insurance) provides: " ... any carrier who actually performs the whole or a part of the carriage shall maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover liability under this Convention ...".

56 The Maritime Labour Convention, 2006, as amended, (in Standard A2.5.2 – Financial security) provides: "Each Member shall ensure that a financial security system meeting the requirements of this Standard is in place for ships flying its flag. The financial security system may be in the form of a social security scheme or insurance or a national fund or other similar arrangements".

4.1.2 The trend is already developing. The IMO Guidelines on Shipowners' responsibility in respect of Maritime Claims –Resolution A.898(21) adopted on 25 November 1999 "urges" shipowners to take out insurance, inter alia, for cargo liability. EU Directive 2009/20/EC EU of 23 April 2009 on the insurance of shipowners for maritime claims does not allow a ship uninsured for maritime claims to enter EU waters. The Directive does not go far enough to allow claimants' direct action against the insurer, but relies on the well-established practice of the P&I Clubs[57] of putting up security if a ship entered with a club is arrested or threatened with arrest and ultimately paying the claim (or facilitating its payment by providing funds to the assured). From the legal point of view, this solution is not perfect, because it does not establish any kind of legal obligation of the liability insurer towards the claimant to secure or pay the claim. However, it is a rudimentary effort to secure the claimants[58]. In addition, shipowners are under commercial pressure to buy third-party liability insurance because charterers in their everyday business will not charter a ship before receiving evidence that the ship has a P&I (club) entry.



Slide 4. Persons insured by P&I insurance

57 Under the Directive's definition, "insurance" means insurance with or without deductibles, and comprises, for example, indemnity insurance of the type currently provided by members of the International Group of P&I Clubs. It is interesting that the EU now relies on the IG P&I Group after a long and troublesome investigation of the Group's possible monopoly practices.

58 The obligation to have insurance should make it possible to ensure better protection for the victim (Recital (4) of the Directive).

4.1.3 On the practical side, there is no serious technical or commercial obstacle for introducing mandatory insurance for cargo claims. The insurance required is already in place. The thirteen P&I Clubs, within the International Group of P&I Clubs, provide liability cover for approximately 90% of the world's ocean-going tonnage of some 53,000 ships. The structures of the Pool and Reinsurance layers for chartered entries are identical to those in place for owned (shipowners') entries, up to the cover limit. The P&I clubs offer liability cover to a number of persons / entities on the ship's side. Clubs membership is usually made up of shipowners, corporate and individual, managing owners, ships' operators, charterers[59] and ships' managers.

4.1.4 Direct action against the insurer could be modelled on the standard wording of a P&I Letter of Undertaking and made available to the claimant for recovery of the sum agreed with the carrier by a negotiated settlement or adjudicated by a final unappealable decision of the courts that have jurisdiction to hear the claim against the carrier or an arbitral tribunal, provided the carrier has not effected payment during the period directed by the respective decision. A solution along these lines would put the P&I Clubs (or any other third party insurance provider) in the same position they find themselves whenever they put up securities, mostly in the form of letters of undertaking, in order to have the arrest of members' (assureds') vessels lifted, which happens regularly in the daily course of business. Clubs frequently put up letters of undertaking, because cargo claimants tend to secure their claims by arresting or threatening to arrest the ship or a sister ship. The concept of direct action would have the same effect on the legal and commercial position of the clubs as the concept of the arrest of ships.

Channelling of liability for cargo claims

4.2 The introduction of mandatory insurance for cargo claims in the context of the Rotterdam Rules would do the trick. It would enable the channelling of liability for cargo claims to the carrier. Security for recovery would be direct action against the cargo liability insurer. All other service providers instructed by the carrier would only assume obligations under their respective service contracts (governed by applicable law) with the carrier, and would not be exposed to the claims instituted by cargo interests.

---

[59] Steven J. Hazelwood: P&I Clubs Law and Practice" London 1994; P.100

4.3 The question for the amendments to the Rotterdam Rules ("the Amendments") is who would the carrier be? It would be convenient to look at the available options by first considering the definitions and legal presumptions of the Rotterdam Rules.

4.4.1 For the Rotterdam Rules, "carrier" means a person that enters into a contract of carriage with a shipper.[60] This is in line with the doctrine of privity of contract, according to which a contract creates rights and obligations only between the parties to it. A third party, a stranger to the contract, cannot acquire any rights or obligations, nor incur liabilities under a contract made between some other parties. Unlike the Hague Rules, the Rotterdam Rules do not further qualify the carrier by adding that it "includes the owner or the charterer".

4.4.2 We have already asked how one would know who entered into the contract of carriage with the shipper, i.e. on whose behalf the bill of lading was signed and issued? Under English law, each bill of lading is considered on the facts of the case. The demise clause will be recognised, but other statements, and particularly the form of signature, might override that clause. In *Sunrise Maritime Inc. v. Uvisco Ltd. ("The Hector")* (1998),[61] a bill of lading containing a standard demise clause was signed "for and on behalf of the Master", which indicated that it was an owner's bill. But, as it also contained an express stipulation that the charterers were the carrier, the judge decided that the express stipulation on the face of the bill, which identified the carrier as the charterers, should override the standard printed wording purporting to qualify the bill as an owner's bill.

4.4.3 The Rotterdam Rules follow the same approach. Article 37(1) entitled "Identity of the carrier" reads:

> If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification.

4.4.4 Thereafter, the legal presumptions follow:[62]

> If no person is identified in the contract particulars as the carrier … , but the contract particulars indicate that the goods have been loaded on board a named ship, *the registered owner of that ship is presumed to be the carrier.*

60 Art 1. (5)
61 1(1998) 2 Lloyd's Rep. 287.
62 Art. 37(2)

However, the presumptions do not end there, since the Rules further provide:

> unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, *in which case this bareboat charterer is presumed to be the carrier,*

In turn, the presumed carrier has the opportunity to rebut that presumption:

> Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner.

At the end of all these twists and turns, the claimant is offered the chance to go after the *"proven carrier"*:[63]

> Nothing in this article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier.

4.5.1 Under the Amendments, the following liability arrangement could be introduced:

4.5.1.1 The liability for cargo shall be channelled to the Carrier.

4.5.1.2 The Carrier shall be a person that enters into a contract of carriage with a shipper, provided always:

(i) it is designated as carrier in the contract particulars or specified as such in the transport document, *together with*

(ii) particulars of an approved insurance policy of a licensed underwriter covering the designated carrier's cargo liability (Certificate of insurance[64]).

4.5.1.3 The system of checking the validity of the cargo liability insurance cover already functions in practice. The P&I Clubs regularly, at the charterer's request, confirm the insurance cover (the validity of the Certificate of Entry), or issue blue cards to the states parties to international conventions that require mandatory insurance. The states then, on the basis of the blue card, issue a certificate of insurance cover in the form required by the respective convention.

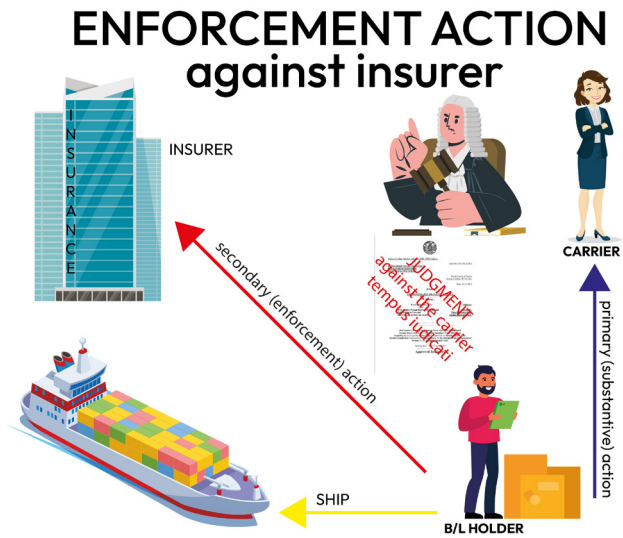
---

63 Art. 37(3)

64 To be issued by a State Party against evidence (blue card) of a valid insurance cover, as already is the case in existing convention requiring mandatory insurance.

4.6 Under the Amendments, for the cargo claims, the claimant would be entitled to sue:

(i) the carrier; and
(ii) the insurer, by a direct action, which (modelled according 4.1.4) could be called the enforcement action.



Slide 5. Enforcement action against the insurer would be available to the claimant provided the final judgment of a court of competent jurisdiction it obtained against the carrier has not been honoured within the period therein directed. The claimant would always be in position to arrest the ship in order to obtain security or enforce the judgment.

4.7 On top of this, under general maritime law, the claimant is entitled to arrest the ship. However, it might be expected that the need for obtaining security through arrest will diminish, because – in principle – arrest is used to obtain a P&I club guarantee (for payment of the claim) in the form of a letter of undertaking, issued to lift the arrest. Now, the arrest of ships for obtaining such letters of undertaking would be to a great extent redundant. Direct action would make the insurer liable, without the need to obtain its letter of undertaking by arresting or threatening arrest of the insured ship.

4.8 If the carrier was not identified in the contract particulars or transport document, or if the particulars of an approved insurance policy covering its cargo liability were missing, the registered owner – under a conclusive presumption – would be considered the carrier.

5. JURISDICTION AND ARBITRATION

5.1 The Harter Act 1893 made illegal any clause inserted in a bill of lading, "whereby [the manager, agent, master, or owner)] ... shall be relieved from liability" for loss or damage to the goods.[65] Later, the question arose about whether the general ban on clauses "relieving from liability" would include jurisdiction clauses.

5.2 Two decades after the American intervention in the freedom of shipping market, the Australians concluded that it would be helpful for their economy to introduce a similar piece of legislation, a carbon copy of the Harter Act. However, concerns were raised that – in spite of the new law banning exoneration clauses – the shipowners would be able to avoid liability by imposing English choice of law and forum clauses in bills of lading. To prevent such circumvention, the lawmakers decided to protect the jurisdiction of the Australian courts (for outbound voyages). Therefore, in the Sea-Carriage of Goods Bill 1904, it was inserted that:

> All parties to any bill of lading ... relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading ..., shall be illegal, null and void, and of no effect.[66]

5.3 The Canadians liked the Australian innovation, and in their Water-Carriage of Goods Act 1910 provided that:

> ... any stipulation ... purporting to oust or lessen the jurisdiction of any court having jurisdiction at the port of loading in Canada ... shall be illegal, null and void, and of no effect.[67]

5.4 The New Zealand Shipping and Seamen Amendment Act 1911 followed suit by stating:

> All parties to any bill of lading ... relating to the carriage of goods from any place in New Zealand to any place outside New Zealand shall be deemed to have intended to contract according to the laws of New Zealand in force for the time being, and any stipulation or agreement to the contrary, or purporting to oust or restrict the jurisdiction of the Courts of New Zealand in respect of the bill of lading ... shall be null and void.[68]

---

65 Harter Act; Sect. 190.
66 Sea-Carriage of Goods Act 1904; Art. 6.
67 Water-Carriage of Goods Act 1910; Sect. 5.
68 Shipping and Seamen Amendment Act 1911; Sect. 9.

5.5 The Hague Rules were drafted under the notion that the forthcoming international convention would be universally accepted by all relevant trading nations, and that the respective courts of all those nations would apply the same convention rules. Therefore, focus was on the question *when* (in which cases) the rules would non-derogatorily apply, rather than on the question *who* would apply them. The attitude was: the same rules, the same outcome, regardless of who interprets or applies them. The Australian lawmakers' concerns of two decades earlier over jurisdiction did not seem to bother the drafters. The Visby Rules 1968 did not take up the point about jurisdiction.

5.6 Despite the widespread agreement in the maritime industry about the need for an international convention, the Hague Rules did not come into force until 1931, a year after the deposit of ratifications by the United Kingdom, Spain, Belgium and Hungary.[69] The United States adopted the convention in 1936. So far, about 100 countries have ratified the Hague / Hague Visby Rules or enacted them in domestic law without formal ratification. Most countries enacted the Hague Rules in the original wording, without adding any provision on jurisdiction. But not Australia.

The Australian case

5.7.1 In enacting the Hague Rules, the cautious Australians did not forget the safeguard introduced in 1904, and in their Sea-Carriage of Goods Act 1924-1973 the following provision was included

> (1) All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.
>
> (2) Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void, and of no effect.[70]

---

69 Joseph Sweeney: UNCITRAL Draft Convention on Carriage of Goods by Sea, Part 1; Fordham University School of Law; 1975; https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi

70 Sea-Carriage of Goods Act 1924-1973; Sect. 9

5.7.2 It proved beneficial for them. In *Wilson v. Compagnie Des Messageries Maritimes* (1954),[71] the Australian Supreme Court of New South Wales invoked the above provision and held that the clause contained in the bill of lading covering carriage from Dunkirk, France to Sydney, Australia, calling for exclusive jurisdiction of French courts, was invalid.

5.7.3 Later a dilemma emerged about whether a provision on the exclusive jurisdiction of Australian courts applies – by analogy – to arbitration clauses, or, a *contrario*, whether arbitration was left, without restriction, to the choice of the contracting parties. To solve this dilemma, a provision on arbitration was included in the Australian Carriage of Goods by Sea Act 1991, which reads:

> 11 Construction and jurisdiction
>
> (3) An agreement, or a provision of an agreement, that provides for the resolution of a dispute by arbitration is not made ineffective ... [despite the fact that it may preclude or limit the jurisdiction of a court] ... if, under the agreement or provision, the arbitration must be conducted in Australia.

5.7.4.1 However, when the legislation resolved that arbitration should be allowed, provided it takes place in Australia, a new question arose about whether the provision applies only to bill of lading disputes or if it includes disputes under the charter parties. The answer lay in the interpretation of the words "sea carriage documents" used in the provision qualifying the legal relation (between the parties) that would be subject to the application of the article on jurisdiction. It reads:

> 11 Construction and jurisdiction
>
> (1) All parties to:
>
> (a) *a sea carriage document* relating to the carriage of goods ...;

The cited provision of the amended Australian Carriage of Goods by Sea Act 1991 (incorporating the Hague Rules) replaced the original reference to "bill of lading or any similar document of title", with "sea carriage document". It was to be discovered whether, by introducing this change, the lawmakers intended to extend the application of the Act to charter parties.

5.7.4.2 The Supreme Court of South Australia was called to give its judgment in a dispute on unpaid freight under a voyage-charter in the GENCON 1994 form (for importing fertiliser to Australia) calling for London arbitration. The owners submitted their claims to London arbitration and won two

71 [1954] 1 Lloyd's Rep. 229

awards. However, the Australian Charterers opposed the recognition and enforcement of those awards in Australia, on the grounds that the London arbitration clause was invalid under the jurisdiction rules of the Australian Carriage of Goods by Sea Act 1991. The case *Jebsens Orient Shipping Services A/S & Anor v. Interfert Australia Pty & Ors* (2012)[72] ended up before the said court, which found that:

> The COGSA in its current form deals with the rights of persons holding bills of lading or similar instruments. A charter party is a document of a different genus. A charter party is not a "sea carriage document" simply because it is a document containing a contract for the carriage of goods by sea.

Consequently, the arbitration awards obtained in London in favour of the owners were declared valid and enforceable in Australia.

5.7.4.3 However, the standpoint taken in the Jebsens case did not prevail without additional twists and turns. The federal court in *Dampskibsselskabet Norden A/S v. Beach Building & Civil Group Pty Ltd.* (2012)[73] stated that, for the purposes of Section 11 of COGSA 91, a voyage charter party (in the Amwelsh 93 form for the carriage of coal from Queensland to a port in China) was a sea carriage document. Consequently, it ruled that an award obtained from an arbitrator in London in a demurrage dispute was unenforceable in Australia. On appeal, the judgment was reversed (two to one) as it was held that:

> The purpose of s 11 of COGSA is to protect, as a part of a regime of marine cargo liability within the object of s. 3, the interests of Australian shippers and consignees from being forced contractually to litigate or arbitrate outside Australia. That purpose does not extend to protection of charterers or shipowners from the consequences of enforcement of their freely negotiated charter parties subjecting them to the well-recognised and usual mechanism of international arbitration in their chosen venue.[74]

5.7.5 Australia generally encourages the use of arbitration for resolving disputes in international trade. It adopted the International Arbitration Act 1974 with the objectives: (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; (d) to give effect to Australia's

72 [2012] SASC 50.
73 [2012] FCA 696.
74 [2013] FCAFC 107.

obligations under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958; and (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration 1985 as amended. Enforcement of a foreign arbitration award may only be refused if the subject matter of the dispute is not capable of settlement by arbitration or if it would be contrary to public policy (ordre public). However, the law does not apply to arbitration falling under the scope of Section 11 entitled "Construction and Jurisdiction" of the Carriage of Goods by Sea Act 1991,[75] which would, if invoked by the defendant in a shipping (carriage by sea) case, prevent enforcement of the foreign arbitral award in Australia.

Forum non conveniens

5.8 For those countries that did not bother to pass articles on jurisdiction, the following question looms: who will resolve the dispute? How to decide on the forum (court or arbitration) or jurisdiction (in which country to litigate or, in the case of mandatory judicial arbitration[76], to arbitrate)? What is a matter for *lex fori* (procedural law and *ordre* public), and what is a matter for *lex causae* (substantive law)?

5.9.1 The United States is one of such countries. In *Muller v. Swedish American Line* (1955),[77] the Court of Appeal was confronted, on one hand, with the jurisdiction clause providing that "any claim against the carrier arising under this bill of lading shall be decided according to Swedish law … and in the Swedish courts", and, on the other hand, with the provision of US COGSA 1936 declaring that "any clause… relieving the carrier…or lessening …[its] …liability otherwise than as provided in this act, shall be null and void and of no effect". The judges concluded:

> We think that if Congress had intended to invalidate such agreements, it would have done so in a forthright manner, as was done in the Canadian Act of 1910. The Carriage of Goods by Sea Act contains no express grant of jurisdiction to any particular courts nor any broad provisions of venue: … Certainly the clause here involved is not one necessarily "relieving the carrier or the ship from liability".

75 Section 2 C of the International Arbitration Act 1974 provides "nothing in this Act affects the continued operation of s. 11 of the 1991 Act" (Section 11 of the *Carriage of Goods by Sea Act 1991* titled construction and jurisdiction,).
76 See 5.19.10 for Chile
77 US Court of Appeals for the Second Circuit - 224 F.2d 806 (2d Cir. 1955).

5.9.2 However, in *Indussa Corporation, Appellant, v. S.s. Ranborg* (1967)[78], the US Court of Appeals for the Second Circuit put emphasis on the mandatory nature of US COGSA and disagreed with the approach in *Muller*:

> We think that in upholding a clause in a bill of lading making claims for damage to goods shipped to or from the United States triable only in a foreign court, the *Muller* court leaned too heavily on general principles of contract law and gave insufficient effect to the enactments of Congress governing bills of lading for shipments to or from the United States.

Therefore, in the opinion of the court

> ... the district courts in applying *Muller* have been obliged to forecast the result of litigation in a foreign court or attempt other expedients to prevent a lessening of the plaintiff's rights.

In the *Indussa* case, the bill of lading clause providing for any dispute to "be decided in the country where the Carrier has his principal place of business [which was Norway], and the law of such country shall apply" was not supported, as it was held that it would lessen the carrier's liability. Not only because of the inconvenience of bringing evidence to the court in Norway (the cargo was discharged in the US), but due to the *per package limitation*, which under Norwegian law was half of that under US law [1,800 kroner or about $240 against $500 under US COGSA].

5.10 On jurisdiction clauses, United States judges have to decide, on a case-by-case basis, which court is more convenient to hear the dispute, taking into consideration the following guidelines: (i) is US law being avoided? (ii) the parties should not lose rights already acquired; (iii) whether the new jurisdiction would be more convenient; (iv) the transfer of jurisdiction must not contravene Sect. 3(8)[79]; and (v) the transfer must be reasonable. This doctrine is known as *forum non conveniens*, and allows a court to decline its own jurisdiction because there is another jurisdiction that can more conveniently try the case.

5.11 As the English COGSA does not have rules on jurisdiction, its courts rely as well on the *forum non conveniens* doctrine. Faced with a foreign

78 US Court of Appeals for the Second Circuit - 377 F.2d 200 (2d Cir. 1967)

79 Of US COGSA, which reads: Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favour of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

jurisdiction clause, the court has discretion to grant or refuse stay of action. In *El Amria* [1981],[80] it was held that where the bill of lading contained an exclusive foreign jurisdiction clause, there was a strong *prima facie* case for stay, and that the plaintiff can avoid the stay only if it shows a strong cause for keeping the proceedings in English courts. The principles were laid in the speech of Lord Brandon:

> (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.
>
> (2) The discretion should be exercised by granting a stay unless a strong cause for not doing so is shown.
>
> (3) The burden of proving such strong cause is on the plaintiffs.
>
> (4) In exercising its discretion the Court should take into account all the circumstances of the particular case.
>
> (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded:
>
> (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.
>
> (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.
>
> (c) With what country either party is connected, and how closely.
>
> (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
>
> (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would:
>
> (i) be deprived of security for their claim;
>
> (ii) be unable to enforce any judgment obtained;
>
> (iii) be faced with a time-bar not applicable in England; or
>
> (iv) for political, racial, religious or other reasons be unlikely to get a fair trial".

The House of Lords endorsed these principles in *Donohue v. Armco Inc.* (2002).[81]

---

80 *Aratra Potato Co. Ltd. v. Egyptian Navigation Co.* [1981] 2 Lloyds Rep 119).

81 [2002] 1 Lloyd's Rep. 425 at pp. 432-433.

The European Regulation

5.12 The European Regulation on jurisdiction of 2012[82] (driven by the notion of equality of the Member States and their acceptance of EU standards), instructs the Member States to recognise *prorogation clauses* in favour of the courts in another EU country.

> *Prorogation of jurisdiction*
>
> *Article 25*
>
> 1. If the parties... have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes ... that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State.

However, it provides (in Art 1) that:

> This Regulation should not apply to arbitration.

The reason is that arbitration matters are already regulated by the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958.

5.13.1 In the application of the European Regulation, an interesting question for shipping arose on whether a jurisdiction clause appearing on the back of a bill of lading which gave jurisdiction to Hamburg Courts[83] bound a Belgian company, being a third-party holder of the document and claiming against the German shipowner. Upon the request of the Belgian Court of Cassation, the question ended before the Court of Justice of the European Communities as the *Tilly Russ* (1983) case. The EU Court had to decide under the Brussels I Regulation (the 1968 Convention preceding the current EU jurisdiction regulation) whether there was a valid prorogation agreement between the shipowner and the bill of lading holder, who had not signed the document, but accepted its transfer. As the bill of lading was not signed by the claimant, it was argued that no express consent was given to the jurisdiction clause on its behalf. Therefore, no agreement on jurisdiction was concluded. However, the Court held that:

> As regards the relationship between the carrier and a third party holding the bill of lading, the conditions laid down by Article 17 of the Convention are satisfied if the jurisdiction clause has been adjudged valid as between the carrier and the shipper and if, by virtue of the

[82] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[83] "any dispute arising under this Bill of Lading shall be decided by the Hamburg Courts."

relevant national law, the third party, upon acquiring the bill of lading, succeeded to the shipper's rights and obligations.[84]

5.13.2 In the view of the Court, it is for the governing law of the contract between the shipper and the carrier to determine whether the jurisdiction clause is transferred in a legal manner to the third party, which then becomes vested with all rights and is subject to all obligations of the contract of carriage contained in the bill of lading. Transfer of the bill of lading works as an assignment of the contract of carriage contained in the bill of lading, and the third party that acquires the bill is the assignee that receives the rights and obligations under the bill of lading contact, to which it was not an original party.

The Hamburg Rules

5.14 In the 1970s, nations emerging in the wake of decolonisation and the post WWII economic developments (many of them members of the non-alignment movement) raised their voices for a fair international trading order. Revision of the Hague Rules appeared on UNCTAD's agenda, supported by the argument that those rules were negotiated on the bill of lading clauses prevailing at the time when shipowners from the developed countries had the upper hand over shippers from the less developed countries of the colonial past.

5.15 The drafters of the Hamburg Rules remembered the concerns of the Australian lawmakers of seven decades previously (when Australia was still a colony, although with relatively wide self-rule) and decided to regulate jurisdiction matters. They did so by Art. 21.

> Article 21. Jurisdiction
>
> 1. ... the plaintiff ... may institute an action ... [in] ... one of the following places:
>
> a. the principal place of business or, in the absence thereof, the habitual residence of the defendant; or
>
> b. the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
>
> c. the port of loading or the port of discharge; or
>
> d. any additional place designated for that purpose in the contract of carriage by sea.

---

84 Judgment of the Court 19 June 1984 1; *Partenreederei ms Tilly Russ and Ernest Russ v NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout* (reference for a preliminary ruling from Hof van Cassatie Belgium) (Brussels Convention of 27 September 1968 – Article 17 – Jurisdiction clause in a bill of lading) Case 71/8.

5.16 In addition, the drafters recognised the role of arbitration in modern commerce and inserted Art. 22 devoted to it, which reads:

> Article 22. Arbitration
>
> 1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.
>
> 2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.
>
> 3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:
>
> (a) a place in a State within whose territory is situated:
>
> (i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or
>
> (ii) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
>
> (iii) the port of loading or the port of discharge; or
>
> (b) any place designated for that purpose in the arbitration clause or agreement.
>
> 4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.
>
> 5. The provisions of paragraphs 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.
>
> 6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.

5.17 Under the framework of Art. 22, the claimant may choose, at *its discretion*, to institute an arbitration proceeding (i) at the defendant's principal place of business; (ii) at the place of contract; (iii) at the port of loading or discharge; (iv) or at a place agreed in the arbitration clause. By virtue of paragraph 5, these places constitute the implied terms of every arbitration clause, and cannot be derogated by the parties, as "... any term of such clause or agreement which is inconsistent" with these implied mandatory terms "is null and void".

5.18 The right to choose the place of arbitration implies the claimant's right to choose the type of arbitration available at the chosen place,

i.e. institutional or ad hoc arbitration, and – to some extent – the rules of arbitration procedure as available. Besides, the place of arbitration determines jurisdiction for judicial control of the arbitration process. The question is whether the claimant's options end there, or whether it can ignore the arbitration clause and go to a court at one of the places listed in Art. 21? It seems that a plain answer could not be found from reading the relevant articles (21. Jurisdiction and 22. Arbitration) of the Hamburg Rules.

A real-life test

5.19.1 A ship was carrying a cargo of wheat from Argentina (a Hague Rules country) to Chile (a Hamburg Rules country) via the infamous Cape Horn, where she encountered a gale force 11. The ship was rolling and pitching, labouring heavily and shipping green seas on deck. Some seawater entered the cargo holds and partly wetted the cargo. A dispute arose between the Owners and the bills of lading Consignees on whether (i) the Owners were exonerated for the damage caused by the gale, and (ii) whether the Consignees failed to mitigate the damage. The Owners argued that by omitting to separate the wet from the sound cargo in the shore storage, the Consignees failed to mitigate the damage. Consequently, they were not entitled to claim damages for the deterioration of the whole quantity of the consignment, and the amount of claim should be substantially reduced.

5.19.2 The ship was chartered on a SYNACOMEX 2000 form and contained a very elaborate arbitration clause providing for London arbitration, the application of London Maritime Arbitrators Association Rules, the number of arbitrators, the procedure of their appointment, and so forth. *Inter alia*, the clause read:

> CLAUSE 47 – ARBITRATION
>
> UK Law, arbitration/general average in London
>
> This contract shall be governed by and construed in accordance with English law and any dispute arising out or in connection with this Contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996.

5.19.3 The bills of lading issued under the charter-party incorporated the arbitration clause by these words:

> All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.

5.19.4 The question might be asked about whether the incorporating clause meets the Hamburg Rules test of "special annotation providing that such provision shall be binding upon the holder of the bill of lading"?[85] Or, whether to meet the test, the annotation must be made explicitly (say, "Warning – the incorporated arbitration clause shall be binding on any bill of lading holder"). It is arguable that the standard customary words (such as "the Law and Arbitration Clause [is] herewith incorporated") would suffice, because there is no other reason for invoking the arbitration clause into a bill of lading, but for the purpose of binding the consignee, i.e. the holder of that transport document endorsed on him. In this sense, reference of the charter party clause to "this contract" should be read and understood in the context of the bill of lading in which it is incorporated, as reference to "this contract contained in or evidenced by this bill of lading". Let us assume that the customary incorporating words are acceptable to the competent court applying the incorporation test under the Hamburg Rules. In this case, the Claimants would have the following options provided by the Chilean Commercial Code 1865 (*Código de Comercio*) as amended (1988), referred hereinafter as *"Código"*, which – enacting the Hamburg Rules – provides:

> Article 1036. Where the parties have not opted for ordinary jurisdiction, as provided for ... (in this Code, §1 Title VIII), the arbitration proceedings shall be instituted, in the claimant's option, in one of the following places:
>
> 1st. Where the main establishment ... of the defendant ... (is located); or at the place of conclusion of the contract, ...; or at the port or place of loading or unloading,
>
> And
>
> 2nd. In actions against the carrier, any place designated for that purpose in the arbitration clause or in the arbitration agreement.[86]

5.19.5 According to above cited article, the Claimants have the options to commence arbitration proceeding: (i) in London (as provided for in the arbitration clause); or (ii) in Chile (the port of discharge); or (iii) in Croatia (place of business of the Owner); or (iv) in Argentina (port of loading). The place of contract would again be Argentina, where the bills of ladings were issued.

---

85 Contained in Art. 22(2) – cited in 5.16 of this book.

86 Art. 1036. Cuando las partes no hubieren optado por la jurisdicción ordinaria, según lo que se dispone en el párrafo 1 del título VIII de este Libro, el procedimiento arbitral se incoará, a elección del demandante, en uno de los lugares siguientes:

1º. Donde se encontrare el establecimiento principal o a falta de éste, la residencia habitual del demandado; o en el lugar de celebración del contrato, siempre que el demandado tenga en él un establecimiento, sucursal o agencia por medio de los cuales se haya celebrado el contrato; o en el puerto o lugar de carga o de descarga, y

2º. En las acciones contra el transportador, cualquier lugar designado al efecto en la cláusula compromisoria o en el compromiso de arbitraje.

5.19.6 As the Consignees did not arrest the ship in the port of discharge in Chile and did not obtain security, they might decide to commence arbitration in Croatia, where the award would be easily enforced against the Owners' assets located in that country. The problem is that Croatia has not ratified the Hamburg Rules, and that the Croatian Arbitration Act 2001 requires a valid arbitration agreement "by which the parties refer to the arbitration for all or specific disputes".[87] The arbitration forum must be indicated as institutional arbitration (with the Croatian Chamber of Commerce) or ad hoc arbitration. In addition, the Act provides that the arbitrators "shall decide [the dispute] by the law chosen by the parties as applicable law" and that "any reference to law or the legal system of a particular state shall be taken as reference to substantive law, and not to choice of law".[88] As Croatia is not a Hamburg Rules country, it is hard to believe that the arbitrators or the court would accept (i) that the arbitration clause providing (by virtue of an implied term imposed by the Hamburg Rules) for arbitration in Croatia, rather than London, and (ii) that the dispute on liability for cargo in stormy weather should be governed by the Hamburg Rules rather than UK law. UK law (in fact, English law), as the agreed governing law, would be applied to the question of the Claimants' obligation to mitigate the damage.

5.19.7 If the Claimants were to obtain an ordinary arbitration award in Chile, they would face the problem of its enforcement abroad. The New York Arbitration Convention 1958 provides that "each Contracting State shall recognize an [arbitration] agreement" and that "the court …, when seized of an action … shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void".[89] The arbitration agreement that provides for the place of arbitration in Chile by virtue of an implied term imposed by the Hamburg Rules, instead of by its own clause, would not meet the qualifying test under the New York Convention 1958.

5.19.8 Could the Claimants go to the Chilean court in spite of the arbitration clause? Reading the Hamburg Rules, it is not easy to find a straightforward answer. The question is whether a bill of lading holder bound by the arbitration clause is entitled to choose a place of arbitration only from the list in Art. 22, or, by ignoring the arbitration agreement, whether the holder could start a court proceeding in one of the places offered by Art. 21.

---

87 Art. 6.
88 Art. 27.
89 Art II.

5.19.9 It seems that there is no such dilemma for the Chilean version of the Hamburg Rules. The local lawyer advised:

> Cargo claimants are not bound by the arbitration/jurisdiction clause of the B/L, they simply have an option as provided by Article 1032 of the Commercial Code

which reads:

> Article 1032. Without prejudice to the rules on jurisdiction laid down by law, in judicial cases relating to the carriage of goods governed by this paragraph, the following courts shall also have jurisdiction, at the plaintiff's option:
>
> 1st. The place where the main establishment of the defendant ...is located;
>
> 2nd. The place of conclusion of the contract ..;
>
> 3rd. The port or place of loading or unloading; and
>
> 4th. In actions against the carrier, any other place designated for that purpose in the contract of carriage.[90]

5.19.10 However, if the Claimants decide to ignore the arbitration clause and sue in Chile (where the port of discharge is located), the case would be heard by arbitration, because the jurisdiction is governed by *lex fori*, which in §1 Title VIII of the *Código*, contains a unique solution for maritime claims, reading – *inter alia*:

> [any dispute] ... arising from facts, acts or contracts ... [related] ...to ... the maritime trade or navigation, including maritime insurance of any kind, shall be subject to arbitration.
>
> The provisions of the preceding subparagraph shall not apply in the following cases:
>
> 1st. Where the parties or interested parties express their willingness to submit to ordinary jurisdiction, in the same act or contract that gives rise to the dispute, by agreement that is in writing, prior to the initiation of the trial;[91]

---

90 Art. 1032. Sin perjuicio de las normas sobre competencia que establece la ley, en los asuntos judiciales relativos al transporte de mercancías regido por este párrafo, serán también competentes, a elección del demandante, los siguientes tribunales:

1º. El del lugar donde se encuentre el establecimiento principal o la residencia habitual del demandado;

2º. El del lugar de celebración del contrato, siempre que el demandado tenga en él un establecimiento, sucursal o agencia por medio de los cuales se haya celebrado el contrato;

3º. El del puerto o lugar de carga o de descarga, y

4º. En las acciones contra el transportador, el de cualquier otro lugar designado al efecto en el contrato de transporte marítimo.

91 Art. 1203. El conocimiento de toda controversia que derive de hechos, actos o contratos a que dé lugar el comercio marítimo o la navegación, incluidos los seguros marítimos de cualquier clase, será sometido a arbitraje. Lo dispuesto en el inciso anterior no será aplicable en los siguientes casos:

1º. Cuando las partes o interesados expresen su voluntad de someterse a la jurisdicción ordinaria, sea en el mismo acto o contrato que origine la controversia, por acuerdo que conste por escrito, anterior a la iniciación del juicio.

5.19.11 Therefore, the *Código* directs the Claimant to arbitration as the proper forum. However, the parties could avoid it, only if they mutually agree to skip the arbitration and go to court. The rationale for this unique concept of jurisdiction law, which – instead of providing rules on the competent court – directs the plaintiff to commence an arbitration proceeding, was the Chilean lawmakers' concern that there were insufficient judges specialised in maritime matters, and that for practical reasons competent arbitrators should be used to resolve maritime-related disputes.

5.19.12 If the contract contains an arbitration clause, then the logical and literal interpretation of the words in Article 1036 of the *Código* (cited under 5.19.4 above), "Where the parties have not opted for ordinary jurisdiction", suggests that the parties have mutually exercised their option to litigate only after the dispute had arisen. Before that, they opted for arbitration by negotiating the arbitration clause or by accepting a document containing such a clause. Could the words "Where the parties have not opted …" be understood as meaning "Where *any* of the parties" i.e. any party of all the parties involved? It seems they could. Otherwise, the advice that "Cargo claimants are not bound by the arbitration … clause of the B/L, they simply have an option as provided by Article 1032" could not hold. Therefore, it seems that the Claimant may avoid the contractual arbitration and go for judicial arbitration (provided for in Art. 1203 of the *Código*), or (by opting one-sidedly, i.e. without the consent of the Owner) for ordinary court litigation at any of the places offered by Article 1036 of the *Código*.

5.19.13 The Chilean Supreme Court in *RSA v. CCNI and Hamburg Sud* (2012)[92] ruled that the jurisdiction of the tribunal should be determined by *lex fori* – i.e. the domestic law of the state where the Court was located. Accordingly, by invoking Art. 1203 of the *Código*, the Court confirmed jurisdiction of *mandatory judicial arbitration*, explaining that such a solution was in conformity with Art. 21 of the Hamburg Rules, which entitles the plaintiff to institute an action at the port of discharge – where the competent forum would be determined by *lex fori*. The Court of Appeal of Santiago also concluded that the Hamburg Rules referred the issue of jurisdiction (determination of which court has jurisdiction) to Chilean domestic law.

5.19.14 However, the award of such mandatory (for the defendant) judicial arbitration would not qualify under the New York Arbitration Convention 1958, as it is not based on a recognisable genuine arbitration agreement made between the parties, which is clearly lacking.

---

92 17 May 2012, Case N°214-2012.

5.19.15 Could the Claimant enforce the award passed by the judicial arbitration as a judgment? That would have to be decided by the courts of any country in which the Claimants decide to have the award recognised and enforced.

5.19.16 On the other hand, as the Owners obviously have no remedy in Chile to escape its jurisdiction, could they turn for help to other countries? England would be the first choice due to the arbitration and choice of law clause. English courts respect charter party arbitration clauses incorporated into bills of lading provided express words to that effect are used (*The Portsmouth* (1912); *The Merak* (1964) *The Annefield* (1971) *The Varenna* (1983) *The Channel Ranger* (2014)), and grant anti-suit injunctions if cargo interest have brought proceedings in a foreign court likely to assert jurisdiction under the Hamburg Rules. (Aline Tramp SA v Jordan International Insurance Company (2016)).

5.19.17 In *The Channel Ranger* (2014),[93] a cargo of coal was discharged in Morocco, like Chile, a Hamburg Rules country. The bill of lading contained the following incorporating clause:

> All terms ... of the Charter Party, dated as overleaf, including the Law and Arbitration Clause/Dispute Resolution Clause, are herewith incorporated.

5.19.18 However, the charter party did not have an arbitration clause, but rather referred to the jurisdiction of the English High Court. The clause read:

> This C/P shall be governed by English Law, and any dispute arising ... in connection with this charter shall be submitted to the exclusive jurisdiction of the High Court of Justice of England and Wales.

5.19.19 The vessel owners commenced proceedings in England in June 2011 seeking a declaration that they were not liable in respect of any damage to the cargo.

5.19.20 In March 2013, the cargo insurers, who covered the cargo owners' loss and subrogated to the rights of the insured, commenced proceedings in Morocco against the vessel owners in respect of the alleged cargo damage, and at the same time challenged in England the jurisdiction of the High Court.

5.19.21 The English court rejected the application of the cargo interests and held that the charter party law and jurisdiction clause were incorporated into the bill of lading, and that therefore the cargo interests were bound by it.

---

93 Caresse Navigation Ltd v. Zurich Assurances MAROC & Ors [2014] EWCA Civ 1366.

5.19.22 The Owners applied for and obtained an anti-suit injunction to restrain the cargo insurers from pursuing the Moroccan proceedings. The insurers appealed.

5.19.23 The Court of Appeal upheld the judgment that the bill of lading holder was bound by the jurisdiction clause, even though the incorporating clause referred to a non-existent charter party arbitration clause, explaining that it was not guided by the plain text of the clause but rather the context of the deal. According to the contextual approach to construction laid down in non-shipping cases such as *Investors Compensation Scheme Ltd v. West Bromwich BS* [1998] and *Chartbrook Ltd v. Persimmon Homes Ltd* [2009], the court has to find the intention of the parties (which resembles the continental approach) rather than to read the plain text of a clause, as previously was the case based on the assumption that the judges do not have power to re-write the contract. The approach is well explained in *The Siboti* [2003][94] where it was said:

> ... in every case, the court is seeking to ascertain the intention of the parties and, when construing the language, it is necessary to have regard to the individual context and commercial background.

What could the outcome be?

5.19.24 Back to our Chilean situation. An English court's anti-suit injunction or a London arbitration decision would not stop the Chilean Plaintiffs from obtaining a decision from the Chilean judicial arbitration against the Owners and enforcing it in Chile if any assets of the Owner were found there. Particularly, if any of its ships should call to a Chilean port.

5.19.25 What are the Claimant's prospects of enforcement of the award abroad? Most probably, in the circumstances, they would not be able to invoke the New York Arbitration Convention 1958. Therefore, in each country chosen for enforcement they would have to have the award recognised. That would not be possible in England and other countries not parties to the Hamburg Rules that respect the arbitration agreements. Perhaps they might be better off in some Hamburg Rules countries. On the other hand, the Claimants might argue that the judicial arbitration award has to be treated as a court judgment, and would try to enforce it as such.

The Rotterdam Rules on jurisdiction

5.20 First of all, it should be noted that the Rotterdam Rules articles on

[94] SIBOTI K/S v. BP FRANCE S.A. [2003] EWHC 1278 (Comm) [2003] 2 Lloyd's Rep. 364.

jurisdiction are provided on an *opt-in* basis, and would "bind only Contracting States that declare ... that they will be bound by them". [95]

5.21 If the contract of carriage does not contain a jurisdiction clause, the Rotterdam Rules offer a list of places[96] where the claimant may bring the suit in a "competent court". Such a court, by definition[97], must be in a Contracting State.

5.22.1 If there is a jurisdiction clause, then it binds the carrier, but not the plaintiff. To the plaintiff, it simply provides an additional option for instituting a court proceeding "for the purpose of deciding claims against the carrier that may arise under... [the] Convention", which will be added to the list of places under Art. 66 (a) (available to the plaintiff when no jurisdiction clause is agreed). However, the option will be transformed into an obligation for the plaintiff that sues the carrier if the parties to the contract agree that the chosen jurisdiction would be "exclusive", **provided always** the agreement conferring jurisdiction (i) is contained in a *volume contract*; and (ii) clearly designates the court(s) of one Contracting State. *A contrario*, exclusive jurisdiction will be valid only if included in volume contracts.

5.22.2 It is logical that the courts agreed by the jurisdiction clause should be used for the determination of any claim or counterclaim which the carrier has against the shipper. However, the question arises that if a claim brought by the carrier is *outside* the scope of the Convention, should the jurisdiction for such a claim be determined by the general rules on jurisdiction of the court receiving the suit? The reference to the "claims (against the carrier) that may arise under... [the] Convention" suggests that this might have been the drafters' intention. It means that the carrier might be forced to honour the jurisdiction clause for claims that are outside the scope of the Convention (say, for unpaid freight) because the courts to which it considers filing the suit might respect the jurisdiction clause. The court indicated in the jurisdiction clause might accept the suit on the grounds that its jurisdiction has been agreed, and the court not indicated in the jurisdiction clause might decline jurisdiction because of the prorogation clause that calls for the jurisdiction of another court. Likewise, the court not agreed by the jurisdiction clause, but selected by the cargo claimant under the options provided by the Convention, might decide to entertain the carrier's lawsuit brought as a counterclaim or reject it

95 Art. 74.

96 (i) The domicile of the carrier; (ii) the place of receipt agreed in the contract of carriage; (iii) the place of delivery agreed in the contract of carriage; or (iv) the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship (Art. 66(a)).

97 "Competent court" means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute. Art. 1(30).

for lack of jurisdiction, as the court is not bound by the Convention for claims outside its scope (but rather by the rules on the jurisdiction of *lex fori*).

5.23 Art. 67 (1)(b)[98] requires that in the case of agreed exclusive jurisdiction, the designated court must be in a Contracting state, a requirement which cannot be avoided by virtue of Art. 80 that allows a volume contract to "provide for greater or lesser right, obligations and liabilities than those imposed by [the] Convention". Therefore, a carrier cannot use Art. 67 to force a claimant into a forum that would not apply the Convention[99].

5.24 A person that is not a party to a volume contract is bound by an exclusive choice of a court agreement only if: *(a)* the court is in one of the [listed] places (domicile of the carrier; place of receipt agreed; place of delivery, or port of loading / discharge); *(b)* that agreement is contained in the transport document ...; *(c)* that person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and *(d)* the law of the court seized recognises that that person may be bound by the exclusive choice of court agreement.[100]

5.25 The Rotterdam Rules have an article[101] on recognition and enforcement of the judgments passed by a court in a contracting state in other contracting states, provided both states concerned with the process have opted in to the articles on jurisdiction. Recognition and enforcement might be refused by *lex fori* (for violation of the public policy).

The Rotterdam Rules articles on arbitration

5.26 The provisions on arbitration in the Rotterdam Rules do not seem to be straightforward, and might cause in practice, if ever applied, serious problems. Just as for jurisdiction, articles on arbitration are provided on an *opt-in* basis.[102]

5.27.1 The parties may agree to refer any dispute that may arise to arbitration, but does this mean that such an agreement restricts the claimant from going to court?

---

98 The jurisdiction of a court chosen in accordance with Article 66, subparagraph *(b)* [an exclusive choice of court agreement], is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:
(a) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated or (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and
(b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.

99 Michael Sturley: Jurisdiction and Arbitration under the Rotterdam Rules; Uniform Law Review, December 2009; p. 965

100 Art. 67(2) of the Convention.

101 Art. 73.

102 Art. 78.

5.27.2 If it does, then the claimant has a number of options about where to start arbitration. The places at its disposal are listed in Art 75(2) as follows:

> (a) Any place designated for that purpose in the arbitration agreement; or
>
> (b) Any other place situated in a State where any of the following places is located:
>
> (i) The domicile of the carrier;
> (ii) The place of receipt agreed in the contract of carriage;
> (iii) The place of delivery agreed in the contract of carriage; or
> (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.

5.27.3 While the place designated in the arbitration agreement is logical, all other places offered to the claimant (considered to be implied in the arbitration clause[103]) are in stark violation of the arbitration agreement. Not only is the agreed place of arbitration not respected, but possibly neither is the choice of the type of arbitration (i.e. ad hoc or institutional arbitration), nor the rules of procedure to which the arbitration clause might refer, nor the judicial control of the arbitration proceeding.

5.27.4 As already mentioned, arbitration established according to a discretionally chosen place, type and rules of proceedings might not be recognised by the international conventions on arbitration, such as the New York Arbitration Convention 1958. Therefore, only Contracting States that opted in to articles on arbitration would be bound by the Rotterdam Rules to recognise and enforce any arbitration award that meets conventional criteria. However, the states that did not opt in to those articles may not recognise the arbitration awards (under the New York Convention or similar general international or domestic law) passed in another Contracting State.

5.27.5 For the arbitration clause in non-liner contracts, the Rotterdam Rules provide:

> Art 76 Arbitration agreement in non-liner transportation
>
> 1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the provisions of this Convention apply by reason of:
>
> (a) The application of article 7[104]; or

---

103 Art 75 (5). The provisions of paragraphs 1, 2 [places of arbitration], 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is void.

104 *Article 7 Application to certain parties* – Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charter party or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.

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

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

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

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

Paragraph (2) tells us that an arbitration clause incorporated from a charter party in a bill of lading (issued in non-liner trade) shall be recognised and respected, in the sense that the alternative places of arbitration listed in Art. 75(2) would not be available to the bill of lading holder, provided such a clause "identifies the parties to and the date of the charter party" and "incorporates by specific reference the clause in the charter party that contains the terms of the arbitration agreement". In other words, if these two qualifications are met, the Rotterdam Rules on arbitration would not apply. However, this does not necessary mean that the applicable law of a Contracting State would find the bill of lading holder bound by the incorporated arbitration clause. As this solution respects well-established business practice, and recognises that the shipowners do not have the upper hand in negotiating contracts in non-liner shipping, it would be convenient to follow this approach in future attempts to draft international rules, not only by excluding arbitration clauses incorporated in bills of lading from the scope of a new convention, but by obliging the Contracting States to give them full effect.

5.28.1 The Rotterdam Rules have special provisions on arbitration for volume contracts.[105] The place of arbitration designated in an arbitration agreement contained in a volume contract is binding on the parties to the arbitration agreement if the volume contract (i) clearly states the names and addresses of the parties *and* (ii) is individually negotiated *or* (iii) contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing

105 "Volume contract" means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.

the arbitration agreement.[106] However, a person that is not party to the volume contract "is bound by the designation of the place of arbitration … only if" (i) the designated place of arbitration is on the list offered by the Convention; (ii) the arbitration agreement is contained in the transport document; (iii) that person is given timely and adequate notice of the place of arbitration; and (iv) applicable law permits that person to be bound by the arbitration agreement.[107]

5.28.2 It seems that the place of arbitration provided for in the arbitration clause of a volume contract would be recognised between the parties to the contract, i.e. the carrier and the shipper, and is not subject to the list of places approved by the Rotterdam Rules. In contrast to the rules on jurisdiction, the rules on arbitration do not require the place of arbitration to be in a country that is a party to the Convention. The latter seems to be more in line with the liberty to derogate, expressed by the rule that "between the carrier and the shipper, a volume contract to which… [the Rotterdam Rules apply] may provide for greater or lesser rights, obligations and liabilities than those imposed by [the Rotterdam Rules]".[108]

5.28.3 There is a special provision[109] determining when the terms of the volume contract that derogate from the Rotterdam Rules apply between the carrier and any person other than the shipper. Two requirements have to be met:

> (a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and
>
> (b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.

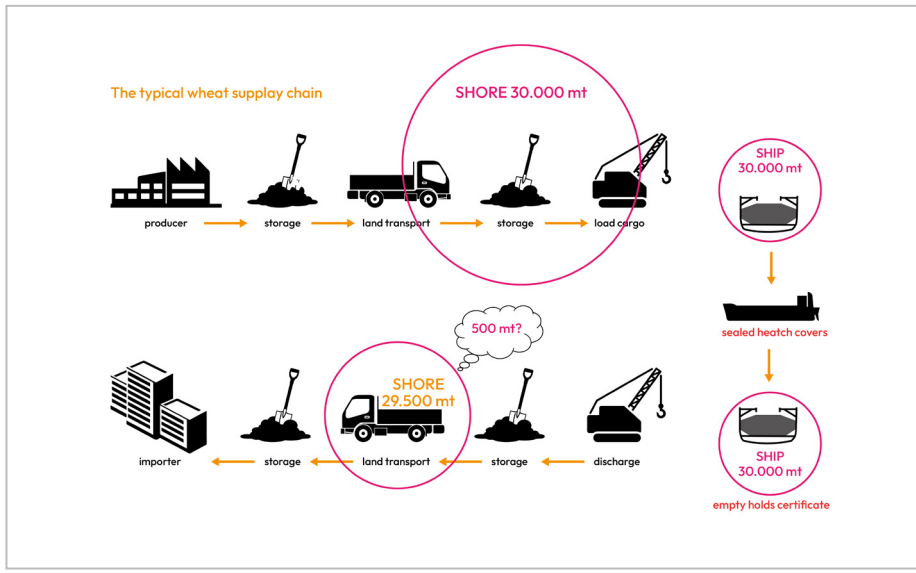
5.28.4 There seems to be no reason why the arbitration clause should be treated differently from the other deviations from the Rotterdam Rules. Why would an arbitration clause not be valid if the third person "gave its express consent to be bound by such derogations"[110], say by a London arbitration clause expressly consented to by a third person, even in the case where London is not on the list of arbitration places available in accordance with Art. 75 (2)(b) (which is not the case when the original

106 Art. 75(3).
107 *Ibid*.
108 Art. 80(1).
109 Art. 80(5).
110 Art. 80(5)(a).

parties to the contract are concerned), as anyhow those places do not have to be in a state party to the Rotterdam Rules (convention)?[111]

Why forum is important?

5.29.1 An example from everyday business practice could best answer the question. In some north African countries, the courts in cargo shortage cases accept only the shore figures, and the shipowners know in advance that in 30,000 MT of bulk cargo there will be a shortage claim of 500 MT, sometimes presented even before the discharge has been completed. The shipowners' arguments that shore figures from the loading port match the ship's figures from the loading and discharge port – all confirmed by a reputable independent international surveying company – and that the holds were sealed during the voyage by an independent inspector and that the ship's cargo holds were found empty at the end of discharge and certified as such have been regularly rejected by the local courts. Those courts would rely on the claimant's evidence – the shore measurement based on weighing the rail carriages showing a shortage of 500 MT. How do all those tonnes disappear? The explanation lies in the fact that the consignees, the local branch of the state-owned importer, notified the shortage and required security before the discharge was completed and all cargo duly weighed by the rail scale. Following the master's inquiry



Slide 6. Cargo "paper loss" claims

111 Michael Sturley: Jurisdiction and Arbitration under the Rotterdam Rules; p. 975 and 977.

about how the amount of shortage could possibly be known *before* the discharge was even completed, the answer provided is: "It's the standard procedure for every ship discharging her cargo".

5.29.2 Arguments such as the duty of damage mitigation, warnings by shipowners against tank cleaning methods, or the comingling of different grades of cargos and so on, have little chance of being accepted by local courts, which is in stark contrast to well-established international standards. In a number of states, local courts are biased in favour of local importers.

Jurisdiction and arbitration solutions in the Amendments

5.30.1 On jurisdiction and arbitration issues, the Amendments [to the Rotterdam Rules] should mirror some well-established practices of international trade and follow the solutions of modern international conventions such as the Hague Convention on Choice of Court Agreements, 2005, entered into force on 1 Oct 2015, the Brussels Convention on jurisdiction and the enforcement of judgment in civil and commercial matters 1968, and the new Brussels I-bis Regulation on jurisdiction and the recognition and enforcement judgments in civil and commercial matters, 2015.

5.30.2 The objective of these conventions is to ensure the certainty and effectiveness of the exclusive choice of court agreements made between the parties to international transactions by facilitating the recognition and enforcement of judgments resulting from proceedings based on such agreements. The Brussels regime created freedom for the parties to select the court with jurisdiction, and this benefit is exercised widely today in commercial practice. Still, it offers special protection to the weaker party. It is noteworthy that the Brussels I-bis Regulation strictly limits the effect of a choice of court agreement imposed by the stronger party in consumer, insurance and employment contracts.

5.30.3 Likewise, the Amendments should protect the weaker party in cases with limited opportunities for fair negotiation. The right to litigate in a non-chosen forum should be the exception rather than the norm. In this sense, two shipping markets should be considered: the non-liner market (tramp and tankers) and the liner market (container ships).

5.40 In *bulk* cargoes trade, charter parties regularly call for either (i) English law, the jurisdiction of the courts of England or London arbitration, or (ii) New York Law and New York arbitration. However, some other

arbitration/litigation centres are on the rise. Such jurisdiction/arbitration clauses are often incorporated into the bills of ladings. English law and jurisdiction/arbitration have become *lex mercatoria* of global maritime trade for tanker and tramp ships. Centres in the Far East, like Singapore, are emerging as well.

5.41 In *liner* trade, there are standard clauses calling for the jurisdiction of the courts of the carrier's place of business. The bill of lading form CONLINEBILL, approved by BIMCO, invokes the applicable international conventions on carriage by sea (the Paramount clause) and has the following clause on jurisdiction:

> Law and Jurisdiction
>
> Disputes arising out of or in connection with this Bill of Lading shall be exclusively determined by the courts and in accordance with the law of the place where the carrier has its principal place of business ... except as provided elsewhere herein.[112]

The bill of lading of a Dutch shipowner has a more detailed and elaborated version of the jurisdiction clause:

> Jurisdiction. The contract evidenced by this Bill of Lading shall be governed by Dutch law, and notwithstanding anything else contained in this Bill of Lading or in any other contract, any and all actions against the Carrier in respect of goods or arising out of the carriage shall exclusively be brought before the District Court of Rotterdam, whilst any actions by the Carrier against the Merchant may be brought before the said Court or any other competent court at the Carrier's option.

5.42 Forum clauses could be differently regulated for no-liner and liner shipping, with some exceptions. The reason is the different state of affairs on those markets with respect to the bargaining powers of the shippers. It should be remembered that the Hague Rules and all the subsequent international conventions on the carriage of goods by sea were passed for one reason only – to limit the monopolistic position of the shipowners and remove the unfair contractual terms that they had been imposing on shippers in respect of liability for cargo. Over time, bargaining power in the shipping markets has greatly shifted, but the perception and the working thesis that emerged in the late 19th century remains, and still governs the minds and approaches of the drafters of international instruments in 21st century.

5.43 In tramp and tanker shipping, shippers, charterers and consignees are regularly business enterprises that transport voluminous and valuable

112 Cl. 4

cargoes that occupy the whole ship, or one or more of her holds/tanks. They are in position to negotiate the terms and conditions of the contracts of carriage, and transportation clauses in the sale and purchase agreements on an individual basis.

5.44 On the other hand, in liner trade, there are still individual customers (citizens – non-businesses) and small businesses that ship a package or one item of cargo, or a single container. They do not have a level play field with the carriers, which is reflected – perhaps most conspicuously – in the forum clauses included in the carrier's general terms and conditions of service, booking notes and bills of ladings forms, calling for the exclusive jurisdiction of the courts of the carrier's place of business.

Non-liner trade

5.45 The Amendments could restrict the validity of the prorogation clauses to those that call for the jurisdiction of the courts in any Contracting State. It is very likely that in such a scenario charter-party clauses on jurisdiction, regularly incorporated in bills of ladings, would call for prominent, well-established legal centres that over a long period of time have gained the trust of the business community through their (i) impartiality, and (ii) quality of the process, carried out by competent judges and attorneys. In addition, the elaborated and well-known governing law chosen by the parties will be applied on all the issues, including those covered and those not covered by international conventions on carriage by sea (such as mitigation of damage, and the like).

5.46 Obviously, centres such as London, New York or Singapore would retain their popularity, which they enjoy today and would be recognised by the Amendments, provided the countries of those centres ratify the amended convention.

5.47 It is no wonder that a Greek, Dutch or Italian shipowner and French, Indonesian or Argentinian charterer would agree on already popular laws and places of jurisdiction, for example, English law and jurisdiction / London arbitration, even though none of them is linked to England. But they know that they would get a first-class legal service in London guided by a standardised approach, well known and trusted by the global shipping community.

5.48 The consignees under a bill of lading in non-liner trade are in principle trading – export/import – houses or businesses, dealing with large quantities of cargoes (for the whole or part of a ship) that have significant value. This gives them leverage in negotiating sale and purchase contracts on CIF terms, or sea transport in the case of the purchase of goods on

FOB terms. Goods in transit are insured by cargo underwriters, so that ultimately any dispute on cargo damage would be resolved between, or under the auspices of, the shipowners' liability insurers and cargo underwriters.

5.49 A buyer of goods may negotiate the form and terms of documents against which it would release the purchase price. For example, in principle, always a "clean" bill of lading is required, but other terms of the bill of lading could be conditioned, including forum clauses. An infrequently used forum clause might be accepted against a higher freight if the risk for the shipowners increases. The same might happen in cases of accepting voyages where the jurisdiction of local courts could not be avoided. For example, the shipowners may ask for a premium on freight for voyages to some North African ports, as they know in advance that an unfounded claim of several hundred thousand dollars would be presented at the end of discharge. It is well known that those local courts would not accept the shipowner's defence and would not honour the forum clauses of the bills of lading.

5.50 The Amendments should have rules on arbitration. Arbitration clauses with the place of arbitration in any Contracting State [if the Amendments decide to deal with recognition and enforcement of awards] would be valid, and arbitration awards recognised and enforceable in all Contracting States. The Rotterdam Rules solution, which does not forbid arbitration clauses incorporated in bills of lading (by leaving them outside the scope of that convention) provided they "identify the parties to and the date of the charter party" and "incorporate by specific reference the clause in the charter party",[113] should be taken a step further by requiring the Contracting States to recognise such clauses. Instead of leaving it to the Contracting State general law to decide on whether or not the bill of lading arbitration clauses will be recognised, the Amendments themselves should legalise them, and make their application mandatory, provided they are clearly identifiable and properly incorporated.

5.51 In addition, the Amendments could establish a maritime arbitration centre ("the Convention Arbitration"), similar to what the Convention on the Law of the Sea did by establishing the International Tribunal for the Law of the Sea in Hamburg. This institutional arbitration could have procedural rules, its own administration, a list of arbitrators (with candidates proposed by the contracting states) and possibly several venues for conducting the hearings, which could be agreed by the parties

113 See Art. 76(2)(b) of the Rotterdam Rules, in 5.25.5 above.

or designated by the arbitration administration when the dispute arises, depending on the convenience for arbitrating each particular case.

5.52 All this would regulate, legalise and formalise the existing practice and provide more certainty, quality and impartiality to the process of dispute resolution.

Liner trade

5.6.1 Would the same approach be appropriate for liner trade? In liner trade, there are two types of transport contracts: single (individual) contracts and volume contracts.

5.6.2 Single contracts are entered into between the shipper and carrier in respect of a single piece of cargo, outside any general or overall agreement for carriage of a number or volume of cargoes over a period of time.

5.6.3 Volume contracts are defined thus in the Rotterdam Rules:

> "Volume contract" means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.[114]

5.6.4 In single contracts documents, carriers include jurisdiction clauses that call for the exclusive jurisdiction of the courts of the carrier's principal place of business.[115] In negotiating a single contract, say for carrying some furniture of a family that moves its home, the shipper does not have leverage to renegotiate the jurisdiction clause printed in the carrier's standard form of booking note or bill of lading. These are adhesion contracts on a "take it or leave it" basis. An outcome, where a family, which, say, moves home from Australia to the United States, would have to sue the Dutch carrier for damage to its furniture in a court in Rotterdam seems neither practical nor fair.

5.6.5 However, it might be argued that the furniture would be covered by the cargo insurance policy, so that the family will be compensated (under the terms of the insurance policy) and that ultimately the dispute will be resolved between the ship's liability and cargo insurers. The argument might go further by claiming that the cargo underwriters would have the expertise and means (through the service of recovery agents and lawyers)

114 Art 1(2).
115 See 5.41 above.

to bring suit in the Rotterdam court in order to recover the insurance money paid to the insured, in our example to the family moving home.

5.6.6 In the case of liner trade single contracts, the Amendments may, in addition to the forum designated by the jurisdiction/arbitration clause of the bill of lading, provide alternative jurisdiction or jurisdictions to the shipper and consignee (the bill of lading holder). For example, the court in the place of delivery stated in the shipping document would suffice, provided it is located in a Contracting State. If it is felt that other options would be welcome, more alternatives could be added.

5.6.7 In the case of single contract calls for arbitration, the claimant could be allowed to accept the clause, or to ignore it by bringing a suit to a court at the place of discharge (or elsewhere), but not to start arbitration in other places not contracted for, but implied by the rules. Arbitration without a proper arbitration agreement seems not to be a good solution. Perhaps an exception could be made in the case of Convention Arbitration.

5.6.8 For cargoes with a declared value over an amount set by the Amendments, and periodically adjusted by the secretariat of the Convention, the clause calling for Convention Arbitration will be binding if inserted in the bill of lading.

5.6.9 Parties to the volume contracts will be bound by the forum clause contained in its terms, as the shipper under such a contract has adequate powers to negotiate a reasonable forum.

5.6.10 However, a consignee to whom the bill of lading has been transferred by the shipper, and who – as the bill of lading holder – is not party to the volume contract should be in the same position as a party to a single contract.

6. THE LEGAL PACKAGE

6.1 Practical experience clearly demonstrates that uniform rules on carriage by sea (regulating the basis of liability, liable parties, the limit of liability, and so forth) are not sufficient to create a coherent and predictable legal regime that would apply standards expected by the international business community on all legal matters that arise from the service of carriage by sea. A broader body of law regulating the calculation of damage, agency, the duty to mitigate damage, good faith, the standard of reasonableness, and so on is a required supplement to the rules of carriage by sea. In addition, an expert, efficient and fair tribunal is needed to apply the governing rules and law in proper procedures to ensure the fair representation of the parties' interests, including the expert and fair assessment of evidence.

6.2 Medieval merchants were in a position to create rules for their transactions, derived from the customs and usages of the trade that their business community regarded as appropriate, fair and logical. In addition, the merchants were involved in resolving disputes, either by entrusting them to fellow merchants at the markets of sea ports or fairs, or by their involvement – in various roles – in trials in institutional courts or tribunals. Political authorities that ruled the trading regions (as self-ruled cities or vassals of a more distant sovereign) interfered very moderately in the private sphere of merchant trading. They respected the merchants' customs and usages. Any codification done under the order or auspices of the political authorities was a compilation of existing trade custom and usages. In addition, for a long time, courts of law under direct royal authority tolerated the jurisdiction of autonomous local courts and tribunals founded by the merchant cities.

6.3 Today, intense, complex, sophisticated and voluminous global trade undoubtedly requires an elaborate, practical and efficient legal regime that is able to respond to the modern global business environment. Just like any other human activity, modern trade needs tools to function as smoothly as possible. One of them is an adequate legal package to match the reality of the 21th century.

6.4 Such a package for modern-day sea-borne trade could be created by:

(a) amending the Rotterdam Rules and making them straightforward and simple by taking advantage of the already existing carrier's liability insurance for the world's merchant fleet;

(b) allowing business people to choose the governing law for their contracts that will supplement the amended Rotterdam Rules by regulating the legal matters and issues not covered by them;

(c) recognising arbitration and jurisdiction clauses in the contracts and documents of carriage (including bills of lading), save for cases where the carriers have the upper hand over the cargo interest, for which a consumer protection type of approach will be offered.

7. THE CHANGING WORLD

7.1.1 The world is constantly changing, and the changes have been happening faster and faster. Never before has the future so rapidly become the past.[116] A monopoly of shipowners hardly exists today, most certainly not in tramp and tanker shipping. Globalisation relies on sea transport which – by volume – moves about 90% of goods in international trade, at very cheap prices. Transportation costs are a fraction of the price of goods in the final markets. It is cheaper to transport frozen lamb meat from New Zealand to Canada than to raise sheep in Canada.

7.1.2 Even in liner (container) trade, a number of carriers from various nations, including significant global players, compete with each other. Competition authorities keep a watchful eye on shipping, which was not the case in the 19th century, when the fight to contain the power of the shipowners' monopoly commenced through the enactment of the Harter Act in 1893. (The Sherman Anti-Trust Act was passed by the US in 1890). The UNCTAD discussion paper states:

> … there appears to be a tendency of the competition authorities in various countries to seek, on the one hand, to promote cooperation agreements other than conferences, and on the other, to discourage any group of shipowners from coordinating freight rates and capacity regulation. In these circumstances, carriers may continue to collaborate to achieve operational improvements, while the competition authorities ensure that the competition in the market is sufficient so that shippers benefit from eventual cost savings.[117]

7.2 Experience from everyday practice clearly shows that fortunes have changed and the tables have turned. Now, shipowners are exposed to unfair trading practices supported by national local courts. Ships are easily arrested for unfounded claims and disputes are often resolved against the standards of fair trade and litigation. On the other hand, by no means could it be argued that established international arbitration and litigation centres – by the rulings of their tribunals – show bias in favour of the shipowners. These tribunals, in principle, have no connections with the countries the parties to the dispute come from, or with the ports of loading or discharge. Any reference to the history of the colonial past or the monopolies of certain shipping nations in the

116 Patrick Dixon: Futurewise; London 1998; page. 1

117 UNCTAD: LINER SHIPPING: IS THERE A WAY FOR MORE COMPETITION?; No 224, March 2016; Page 28, Dr. Petar Kragić: Compulsory Insurance for Shipowners' Cargo Liability: A heresy or Logical Step?; International In-house Counsel Journal; Vol. 3. No.9, Autumn 2009; 14551464.

modern day has no merit. Of course, shippers that might be considered weak consumers should be protected, which is a developing trend in all other industries reflected in the modern consumer law.

7.3 It is time to ask the question: what is different today? Why do the Rotterdam Rules have no support at all, either from the industry or from governments? What should be done? How can we realise that changes have caught up with us, and how – by following advice from *"Who Moved My Cheese?"* – can we adapt to them? The answer seems to be to look at what the industry is doing and saying. The shipping community is negotiating the most suitable laws and jurisdictions from its own point of view. It wants a developed maritime law to govern its business deals that is simple, predictable, functional and that embraces standards acceptable to the world's shipping community. At present, the industry is trying to achieve this by negotiating law and jurisdiction clauses, and, in the past – as we have seen – has raised its voice during the process of drafting the Rotterdam Rules, suggesting that the "contracting carrier alone should be liable for any cargo loss or damage". Such a simple solution in the view of the business community would reduce the unwelcome complexity of the Rotterdam Rules.

8. CONCLUSION

8.1 We have seen that in the first half of the 19th century Friedrich List predicted that global international trade would be regulated by an international legal regime administrated by international organisations. His prophecy became a reality about a century or so later, when various unification projects began to develop. The problem seems to be that global trade and communication have been changing rapidly, so that international rules – agreed from time to time – very often lag behind reality and behind the opportunities offered by contemporary development. Nowadays, practical ideas for the improvement of international trade should be put into practice much more quickly than those of Friedrich List.

8.2 The reality of shipping has substantially changed since the days of the Hague Rules. However, all the following amendments and even the subsequent conventions have followed the same concept of protecting shippers as the weaker side. On the other hand, conventions on the carriage of goods by sea (unlike those on carriage of passengers, on oil pollution, or on wreck removal) have ignored developments in the insurance field and have missed the opportunity to use the existing insurance structure that covers almost the entire deep sea world's fleet to promote a straightforward recovery mechanism, and to make those conventions simple and much more acceptable.

8.3 Clearly, the time has come to reconsider the Rotterdam Rules which have failed to generate sufficient enthusiasm around the world for ratification. It has become clear that the unification of international rules for the carriage of goods by sea should not be limited to dealing with the basis of cargo liability. Instead, it should allow businesspeople to create a whole legal package for their transactions, which would include choice of tribunals that would apply cargo liability rules in the resolution of disputes and the governing law agreed by the parties supplementing the cargo liability regime (by regulating the general issues of contracting law). Therefore, the Amendments need to:

(i) simplify recovery mechanisms by (a) channelling liability to the carrier, and (b) securing the payment of damages by introducing the mandatory insurance of the carrier's cargo liability;

(ii) recognise prorogation and arbitration clauses, and therefore accepting the current practice (by respecting a modern *lex mercatoria*, i.e. established trade practice regarding the resolution

of disputes), provided always due protection is given to weaker customers classified as consumers;

(iii) introduce an institutionalised convention arbitration service which could use established arbitrators from existing arbitration centres.

Since adjustments are certainly needed to move forward, it would be good to heed the said advice and

ENJOY CHANGE

ISBN 978-953-95067-1-9
9 789539 506719
150 kn / 20 €