THE BULLETIN OF
THE JAPAN SHIPPING EXCHANGE, INC.

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CONTENTS

From the Editor:

Dear Readers,

Please note the following correction to Prof. Iwasaki's article "The Japanese Carriage of Goods by Sea Act, 1992" published in No. 25 of THE BULLETIN OF THE JAPAN SHIPPING EXCHANGE, INC.

Article 9 (Page 13)

If any item inserted into a bill of lading is contrary to the truth,
the carrier can not set up against the bona fide holder of the bill of lading such defence that the items inserted into the bill of lading are contrary to the truth unless he proves that he has exercised due diligence in respect of such items.

<Correction>

a) Delete underlined parts.
b) "the carrier" in the second line should be changed to "The carrier".

Also, I would like to give you some information for your reference relating to articles "The Training of Arbitrators in Hong Kong" by Mr. Philip Yang and "Carriage of Goods by Sea Act 1992" by Mr. Ralph Evers, both of them published in The Bulletin of The Japan Shipping Exchange, Inc. No. 25.

The former article was presented by the author at a seminar in Tokyo presented by the Hong Kong International Arbitration Centre with the support of the Japan Shipping Exchange, Inc. on 5 October 1993.

The latter article was presented by the author at a seminar held in Tokyo by the Japan Shipping Exchange, Inc. on 12 November 1992.

The editor is grateful for their contributions.

The Japan Shipping Exchange, Inc.

Conciliation Rules

The Maritime Arbitration Commision of the Japan Shipping Exchange, Inc. (JSE) adopted the Rules of Conciliation of JSE on March 30, 1992.
The Rules was drafted by the Special Committee of 12 members including commercial men and professors in civil law and international trade law under the Documentary Committee. After several meetings of debate and discussion, the final text of the Rules was placed before the Documentary Committee for consideration and it was unanimously adopted by the Committee. The Rules are intended to be used in foreign trade as well as inland trade in Japan.

Part I Preliminary Investigation

Section 1 [Initiation of Conciliation]

(1) If any of the parties to a dispute wishes to settle the dispute by conciliation under these Rules, it shall file with the Japan Shipping Exchange Inc. (JSE) a written request for conciliation pursuant to Schedule I, together with the appropriate preliminary investigation fee contained in Schedule II.

(2) If all the parties to a dispute wish to settle the dispute by conciliation under these Rules, they shall file with JSE a written submission for conciliation pursuant to Schedule III, together with the appropriate preliminary investigation fee contained in Schedule II.

Section 2 [Determination of Commencement of Conciliation Proceedings]

(1) In the case of a unilateral request under Section 1(1), JSE shall not only review the eligibility to settle the case by conciliation based on the request, but also confirm the other party's willingness to participate in the proposed conciliation and, if necessary, invite that party to agree to it. Then JSE shall, as soon as possible and at least within twenty-one (21) days from the date of the request, inform the applicant and the other party, if necessary, whether JSE can accept the request and is prepared to commence the conciliation proceedings.

(2) In the case of a written submission pursuant to Section 1(2), JSE will immediately commence the conciliation proceedings.

(3) JSE will not return the preliminary investigation fee paid by the party or parties even if JSE does not commence the conciliation proceedings, nor will it credit the preliminary investigation fee against any part of the conciliation fee.

Part II Conciliation Proceedings

Section 3 [Date of Commencement of Conciliation Proceedings]

The conciliation proceedings are deemed to commence at the date when JSE informs all the parties of the conciliation proceedings' commencement.

Section 4 [Number and Appointment of Conciliators*]

* In this and all following articles, the term 'conciliator' includes a sole conciliator and two or three conciliators, as the case may be.

(1) When JSE commences the conciliation proceedings and all the parties nominate a conciliator by their agreement, JSE shall appoint the conciliator so nominated.

(2) When JSE commences the conciliation proceedings and all the parties fails to nominate a conciliator by their agreement, JSE shall appoint, after consultation with all the parties, normally a single conciliator unless two or more conciliators are necessary, within fourteen (14) days from the date of the conciliation proceedings' commencement.

(3) In the case of the appointment of a conciliator under Sub-section (2) above, JSE shall secure an independent and impartial conciliator and if so requested by any of the parties, shall take it into consideration whether to appoint a conciliator of a nationality other than the nationalities of the parties.

(4) In the case of an appointed conciliator being unable to serve, JSE shall appoint another conciliator after consultation with all the parties.

Section 5 [Role of Conciliator]

(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous course of business between the parties.

(3) The conciliator is not liable for any act or omission arising from his role.

Section 6 [Role of JSE]

(1) In order to facilitate the conduct of the conciliation proceedings, JSE assists the conciliator in the administration of the conciliation proceedings.

(2) JSE and any person who works for JSE are not liable for any act or omission arising from their role.

Section 7 [Privacy]

Conciliation sessions are private. Persons other than the parties or those who work for the parties may attend only with the permission of all the parties and the conciliator.

Section 8 [Conduct of Conciliation Proceedings]

(1) Upon the appointment of the conciliator each party shall immediately submit to JSE a brief written statement (in any form) describing the general nature of the dispute and the points at issue, and shall send a copy of this statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of its position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. Each party shall send to the other party a copy of its statement and evidence submitted to the conciliator.

(3) The conciliator may fix the place of the conciliation session and may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes of the parties, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, if he thinks it necessary for settlement of the dispute, take expert testimony on condition that all the parties agree to pay the costs thereof.

(5) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

(6) JSE will assist a party to prepare and send to the other party written statements and documents in accordance with (1) and (2) above. The party shall pay the expense thereof to JSE.

Section 9 [Communication between the conciliator and parties]

The conciliator may, at any stage of the conciliation proceedings, meet all the parties together or each of them separately to ask their opinion. In this case, if required by the conciliator, the parties themselves or persons authorized to settle the dispute on their behalf shall attend the meeting.

Section 10 [Submission and disclosure of information by the parties]

(1) The conciliator may, at any stage of the conciliation proceedings, request the parties to submit to him such information as he deems appropriate.

(2) When the conciliator receives factual information concerning the dispute from any party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers

appropriate. However, when a party gives any information to the conciliator subject to a specific condition that it should be kept confidential, the conciliator will not disclose that information to the other party.

Section 11 [Suggestions by parties for settlement of dispute]

Any party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

Section 12 [Co-operation by parties with conciliator]

The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

Section 13 [Representation and assistance]

(1) The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for the purpose of representation or of assistance.

(2) If requested by a party, JSE shall, at the expence of the requesting party, assist the party to make the above-mentioned communication.

Section 14 [Settlement agreement]

(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, the conciliation shall draw up the settlement agreement. The settlement agreement shall be signed not only by all the parties, but also by the conciliator.

(3) The settlement agreement shall contain an arbitration clause which provides that any dispute arising from this settlement agreement shall be submitted to arbitration held in Tokyo or Kobe by the Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange, Inc. in accordance with the Rules of TOMAC and any amendment thereto, and the award given by the arbitrators shall be final and binding on both parties.

Section 15 [Termination of conciliation proceedings]

The conciliation proceedings are terminated:

(a) By the signing of the settlement agreement by the parties, on the date of the agreement; or

(b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a written declaration of one of the parties to the other party or parties and the conciliator, to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(e) By the conciliator's declaration under the provisions of Section 16(1) or Section 18(3), on the date of the termination; or

(f) By a written declaration of the conciliator to the effect that the conciliator can not properly continue the conciliation proceedings by reason of disobedience of a party or parties to the orders of the conciliator, on the date of the declaration.

Section 16 [Alteration of the conciliation proceedings into arbitration proceedings]

(1) In case all the parties, after reaching a settlement agreement, agree to convert the settlement agreement to an arbitral award in order to secure that settlement of their dispute, the conciliator shall terminate the conciliation proceedings immediately.

(2) In the case of Sub-section (1) above, the parties shall make an arbitration agreement by signing the form provided in the Schedule and shall appoint the conciliator as the arbitrator.

(3) The arbitrator shall commence the arbitration proceedings immediately upon appointment by the parties, and shall make an arbitral award in the terms of the settlement agreement of the parties.

Part III Costs

Section 17 [Costs of the conciliation proceedings]

(1) The costs of the conciliation proceedings includes:

(a) The remuneration of the conciliator;

(b) The administrative expenses of JSE for the conciliation proceedings;

(c) The travel expenses and daily allowance of the conciliator;

(d) The cost of expert's testimony;

(e) The cost of translation; and

(f) any other expenses especially required in the conciliation proceedings.

The costs of (a) and (b) above are contained in the Fee Schedule, and the costs of (c) and (f) above shall be fixed by JSE, if required.

(2) Upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and gives written notice thereof to the parties.

(3) The costs, as defined above, are to be borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

Section 18 [Deposits]

(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in Section 17 which he deems necessary.

(2) During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party.

(3) If the required deposits under Sub-section (1) and (2) above are not paid in full by both parties within thirty (30) days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties; in the latter case the termination becomes effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, JSE will render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Part IV Supplementary Provisions

Section 19 [Prohibition of initiation of arbitral or judicial proceedings]

The parties shall not initiate any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings during the conciliation proceedings (except for the arbitral proceedings mentioned in Section 16 above). However, any party may initiate such arbitral or judicial proceedings that are necessary for preserving his rights against prescription and the like.

Section 20 [Confidentiality]

The conciliator, the parties and JSE shall keep confidential all matters relating to the conciliation proceedings and the settlement agreement, except for purposes of implementation and enforcement of the settlement agreement.

Section 21 [Involvement of conciliator in other proceedings]

(1) The conciliator shall not act as an arbitrator or as a representative or counsel of the party or parties in any arbitral or judicial proceedings in respect of a dispute that is the

subject of the conciliation proceedings except for the arbitral proceedings mentioned in Section 16 above.

(2) The parties shall not present the conciliator and Secretariat of JSE who participated in the conciliation proceedings as witness in any such proceedings.

Section 22 [Admissibility of evidence in other proceedings]

The parties agree not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:

(a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) Admissions made by the other party in the course of the conciliation proceedings;

(c) Proposals made by the conciliator;

(d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

Preliminary Investigation Fee and Conciliation Fee

1) Preliminary investigation fee

Amount of claim	Fee
less than ¥ million	¥ 50,000 per case
¥ 5 million and over	¥ 100,000 per case

If there is a conciliation agreement between the parties, the fee shall be borne equally by the parties.

2) The costs to be deposited by the parties as the remuneration of the conciliator and the administrative expenses of JSE are as follows:

i) In the case where the amount of the claim is not stated at the time of initiation of the conciliation proceedings, a preliminary investigation fee will be determined through consultation between JSE and the parties, and an appropriate conciliation fee will be determined through consultation among JSE, the conciliator and the parties.

ii) The parties shall pay consumption tax, if necessary, on both the preliminary investigation fee and the conciliation fee.

Amount of Claim	Sole conciliator	Two or more conciliators	Additional Session Fee: payable for third and each subsequent conciliation session
less than ¥ 5 mil.	3% of amount of claim (minimum ¥ 30,000)	additional 50% of sole conciliator's remuneration per person	¥ 20,000
¥ 5 mil. to less than ¥ 15 mil.	¥ 150,000 plus 1% of amount of claim	the same as above	¥ 30,000
¥ 15 mil. to less than ¥ 50 mil.	¥ 300,000 plus 0.5% of amount of claim	the same as above	¥ 30,000
¥ 50 mil. to less than ¥ 100 mil.	¥ 550,000 plus 0.2% of amount of claim	the same as above	¥ 40,000
¥ 100 mil. and over	to be determined through consultation among JSE, the conciliator and the parties		

Limitation of Liability

Katsuhiro AOKI*

1. Foreword

As a recovery manager for underwriters I would like to report on this subject by explaining a number of claims I have actually handled. It is appropriate to divide this subject into two categories, i.e. package or unit limitation under bills of lading and limitation of shipowner's liability generally. I will give examples of two claims for the former category and one for the latter and then discuss the results of my investigations to solve these claims. The cases I take up here are ones which actually occurred and some of them are still alive. Therefore, I have changed the names of the relative parties and vessels and the figures related in these case studies, the need for which I trust you will understand.

2. Claims with package or unit limitation

For our purposes we can consider that there are two kinds of contract of carriage of goods by sea: the contract of carriage under the charterparty and the one under the bill of lading. At present the contract of carriage under a bill of lading is regulated by either the Hague Rules, the Hague Visby Rules, the Hamburg Rules or, in situations where none of these regimes applies by law or agreement of the parties, the general law of the country whose legal system is determined to be the governing (or proper) law of the contract. In this connection, I will discuss two examples to show you how one of the above four governing systems might come to be applied and as a result what package or unit limitation is applicable and how.

(1) My first example

Steel goods which were carried onboard the vessel "R" from Rumania to Osaka, Japan sustained seawater damage as a result of seawater flowing backward from the vessel's bilge pipe and leaking through a defect in the pipe line into the hold. The contract of carriage for these steel goods was the bill of lading issued by the Rumanian governmental shipowners. The bill of lading, which did not stipulate jurisdiction or applicable law,

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contained the following paramount clause:

(a) General Paramount Clause
The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply. But in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.

(b) Trades where Hangue-Visby-Rules apply
In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd 1968 — the Hague Visby Rules — apply compulsorily the provisions of the respective legislation shall be considered incorporated in this Bill of Lading. The Carrier takes all reservation possible under such applicable legislation relating to the period before loading and after discharging and while the goods are in the charge of another Carrier, and to deck cargo and live animals.

The insurance company to which I belong settled the insurance claim with the consignees in the amount of ¥70 million for the damage to 165 packages of steel coils and filed a subrogated claim against the P&I Club's agents in Japan. After several reminders sent to the Club's agents, my company received the following offer based on the following grounds:

(a) The amount offered: Stg£16,500.—

(b) (i) As the bill of lading at issue does not stipulate the applicable law, the law applicable to the contract of carriage is determined according to the Japanese International Private Law (Horei). Horei 7-(2) prescribes that when the parties' intention as to the applicable law is not clear, the lex loci actus is applied. Therefore, Rumanian law is applicable to this contract of carriage, since the place of both the making of the contract and issue of the bill of lading is Rumania.

(ii) Although Rumania has not enacted a law implementing the Hague Rules, she has acceeded to the Convention and therefore the Hague Rules should be

applied to the contract of carriage under the bill of lading. Art. 4(5) of the Hague Rules prescribes the limitation amount to be £100 per package or unit, which means £100 in present United Kingdom currency notes, or the equivalent in local currency at prevailing exchange rates.

The issue which arose, therefore, was whether it be construed that the £100 per package or unit prescribed in the Hague Rules should be calculated based upon sterling's 1924 gold value. We successfully rebutted the argument of the Club's agents by quoting to them The Rosa S (decided 21 July 1988 in the QBD), where it was held that £100 per package or unit prescribed by Art. 4(5) of the Hague Rules was equivalent to 100 gold value sterling pounds (i.e. Stg£6,630 in 1984).

The outline of The Rosa S is as follows:
One of 222 packages of machinery loaded onboard the "Rosa S" in Italy in April 1984 arrived at Mombasa with damage amounting to Stg£107,758. Clause 1 of the bill of lading stipulated that the contract was governed by the Hague Rules and Clause 3 stipulated that English law was the applicable law and that the High Court of Justice in London was to have jurisdiction. The Queen's Bench held that £100 per package or unit as stipulated in Art. 4(5) of the Hague Rules means 100 gold value sterling pounds by virtue of Art. 9, which provides that the monetary units mentioned in this Convention are to be taken to be gold value, and that this was equivalent to Stg£6,630 in June, 1984.

As a result of the subsequent negotiations, my company came to an agreement to make a compromised settlement in the amount of Japanese Yen 100,000 per package, which resulted in an aggregate recovery of ¥ 16,500,000 (¥ 100,000 X 165 packages). By the way, ¥ 100,000 is the per package limitation figure under Japan's International Carriage of Goods by Sea Act of 1957, which incorporates the Hague Rules into Japanese law.

(2) My second example

Sixteen packages of machinery loaded onboard the vessel "W" at Kobe for carriage to Los Angeles sustained breakage damage caused by collapse of stowage during the voyage. My company settled the insurance claim of US$900,000 with the consignees in the United States, filed a subrogated claim against W & Company, the issuer of the bill of lading, and later commenced litigation in the U.S. District Court.
W & Company contended that their liability should be limited to US$8,000 on the ground that the carrier's liability is limited to US$500 per package by virtue of sect.

4(5) of U.S.COGSA and clause 16 of the bill of lading.
In this connection, I would remind you that there is a concept in the United States that a carrier is obligated to give a shipper a "fair opportunity" to declare a higher value, i.e. a carrier must give a shipper an option as to limitation amount by informing him that he will be able to obtain a higher recovery by declaring the nature and value of the goods.
In this case, it has been disputed and not yet determined whether or not W & Company gave the shipper such an option at the time of concluding the contract of carriage.
My company intends to proceed with the litigation relying for support upon the following legal cases, which we consider to be favourable to our position:

* Komatsu Ltd. v. States S.S. Co. 674 F.2d 806 at p.811, 1982 AMC 2152 at p.2158 (9 Cir.1982)

* Pan American World Airways, Inc. v. California Stevedore and Ballast Company 559 F.2d 1173 (9th Cir.1977)

* Stephen Nemeth v. General Steamship Corp. 694 F.2d 609 (9th Cir.1982)

* Great American Insurance Co. and Firemans Fund Insurance Co. v. M/V Algenile 1988 AMC 1030 (USDC, N.D. Cal.)

Although clause 16 of the bill of lading stipulates that the carrier's liability shall be limited to US$500 per package unless the nature and value of the cargo is declared to the carrier, we have already obtained an interlocutory judgment that the defendants cannot contend that they gave the shipper a fair opportunity by virtue of the bill of lading clauses on the ground that they are printed in letters too small to read. At this moment it is being disputed whether the shipper had knowledge of such an option at the time of the making of the contract. I would add that we have recently had judgment given in our favor. However, the issue has been appealed to the ninth circuit.
Incidentally, the concept of "fair opportunity" is peculiar to the U.S. and is not in effect in other countries such as the U.K. or Japan.

(3) Conclusion on package or unit limitation

As stated above, at present the four potential governing systems often commingle. Furthermore, the Hague Rules and the Hague Visby Rules are often introduced into the domestic law of each of the acceding countries with minor modifications; as a result

the limitation amount per package or unit varies from country to country.
We are now on the way towards legal unification by virtue of either the Hague Visby Rules (which will apply in Japan from 1 June 1993) or the Hamburg Rules but I am afraid that we will continue to face confusion for a very long period.

Incidentally, from the view point of a recovery manager I regret that the various Conventions do not take into consideration at all the decrease in the real value of the limitation amounts owing to inflation. Even expressing the limitation amounts in SDRs does not resolve the problem of general world wide inflation, although it will protect claimants in the case of particularly high inflation in a particular country, since the value of the SDR is determined as an aggregate of the main currencies in fixed proportions.
In order to cope with inflation, I hope that each Convention will revise its limitation amount periodically, i.e. once every five or ten years.

The Rosa S [1988] 2 Lloyd's Rep. 574, which I mentioned earlier, illustrates well how the real value of the limitation amount has declined since the Hague Rules were first implemented in 1924: the limitation amount agreed in that year to be a fair compromise between shipping and shipowning interests (i.e. £100) was equivalent to a limitation figure adjusted for inflation by reference to the price of gold of about £6,630 per package in 1984, when the claim in The Rosa S arose.
Today, under the SDR regime and the Hague Visby Rules, the limitation figure is only about £637 (666.67 SDRs x 0.9555) per package in England, which, although about 6.3 times the nominal value of the Hague Rules limitation amount, is less than 1 tenth its real value adjusted for inflation by reference to the price of gold.

3. Limitation or shipowners' liability generally

Here I would like to introduce to you a very interesting case in which my company disputed the right of a seagoing vessel to limit her liability in respect of damage to cargo onboard another seagoing vessel with which she had collided.

(1) The outline of the collision
The vessel "L", laden with thousands of vehicles on her way from Japan to Europe, collided with the vessel "A", laden with hundreds of vehicles sailing from Europe to Japan, on the high seas in the Straits of Gibraltar. The bow of the "A" collided with the port side of the "L", which sustained an opening through which sea water entered

into the holds. As a result, the "L" sank to a depth of several hundred metres. The "A", with her bow broken, was salved by salvors and towed to the nearest port of refuge. The amount of loss and/or damage to each vessel and the cargoes laden onboard was as follows:

The "L"	Hull ATL ¥ 1.5 billion		
	Cargo ATL ¥ 7 billion		
The "A"	Hull	PA	US$8.5 million
		GA	
	Cargo	PA	US$1.5 million
		GA	

My Company paid ¥ 5 billion for loss and/or damage in respect of a large part of the cargo onboard the "L" and took up recovery action against the "A".

(2) Recovery action of cargo onboard the "L" against the "A"

a. Immediately after the accident, my company retained C Law Firm in London on behalf of those interested in the cargo onboard the "L". C undertook an investigation of the causes of the collision including crew interviews. Putting together the materials and information C obtained, it appeared that the collision had been caused by an insufficient watch and that as a result apportionment of liability should be made on a 50:50 basis. The owner and hull underwriters of the "A" offered to C that they would issue a letter of undertaking with English law and jurisdiction, but my company took the following line. "We should not agree to this offer because it stipulates a jurisdiction in which it is very difficult to break limitation of shipowner's liability, because the UK has acceded to the 1976 Limitation Convention. We should rather choose the jurisdiction of a country which has acceded to the 1957 Convention and in which, therefore, we can rather more easily break limitation of liability." In the end, we adopted the idea of bringing an in rem suit in the United States when the "A" entered a U.S. port. The detailed reasons for our bringing suit in the United States are as follows:

(a) The limitation amount under the 1976 Convention, to which the U.K. has acceded, was estimated to be US$9,000,000, on the basis that the "A" is 40,000 tons.

Since it is difficult to break limitation under the 1976 Convention, it was thought better to obtain U.S. jurisdiction, in which we could break limitation more easily.

(b) The limitation amount under the 1957 Convention:

1,000 francs x 40,000 ton x 1/15 = 2,666,667 SDR = US$3,600,000

(c) According to the U.S. Limitation of Shipowners' Liability Act, the limitation amount for the "A" is stated as below, and it is relatively easy to break.

The "A" Sound Market Value	US$14,000,000
Repair Costs (–)	$7,000,000
Freight (+)	$500,000
	US$7,500,000

(d) According to a U.S. attorney appointed by C the suit would not be stayed on the basis of forum non conveniens.

b. The lawyer for the "A" opposed our above line vehementaly and asserted that the U.S. court would stay this case on the ground that forum non conveniens would be applied to it for three reasons.

(a) There is another more appropriate jurisdiction. (The "L"'s place of registration: Norway; The "L"'s cargo: Holland, the U.K. and Germany; the "A"'s place of registration: Panama)

(b) None of the parties, no witness and no evidence is in the United States.

(c) The United States has no public interest in this case.

In the event, the issue over jurisdiction was inconclusive. However, with our negotiating position supported by the threat that we would arrest the "A" when she called at a U.S. port, coupled with the possibility that we could break limitation there, we succeeded in concluding an agreement to the effect that the amount of limitation would be increased to US$12,000,000, which is a figure between the sound market value of the "A" and the limitation amount under the 1976 Convention for the "A". The final agreement made among all the relative parties was as follows:

(a) The liability for the collision was agreed at 50:50.

(b) The amount of limitation of liability for the "A" was to be US$12,000,000.

(c) Damages for death and injury were not to be included within the agreement.

(3) The legal issues we investigated to deal with this case are as follows:

a. Jurisdiction

(a) In the U.K.

The U.K. ratified the International Convention for the Unification of Certain Rules Concerning Civil Jurisdiction in Matters of Collision, Brussels, May 10, 1952.

According to this convention, an action for collision occuring between seagoing vessels, or between seagoing vessels and inland navigation craft, can only be introduced:

i) either before the Court where the defendant has his habitual residence or a place of business;
ii) or before the Court of the place where arrest has been effected of the defendant ship or of any other ship belonging to the defendant which can be lawfully arrested, or where arrest could have been effected and bail or other security has been furnished;
iii) or before the Court of the place of collision when the collision has occurred within the limits of a port or inland waters.

Further, parties have the right to bring an action in respect of a collision before a Court they have chosen by agreement or to refer it to arbitration.

(b) In the United States

i) As in the U.K., the United States courts also take jurisdiction in respect of a collision wherever it occurs.
A plaintiff who has sustained loss and/or damage caused by collision can arrest a colliding vessel in the United States pursuant to a suit in rem against her. As a result, the plaintiff can obtain U.S. jurisdiction since jurisdiction for a suit in rem is established at the place of arresting a vessel. However, in the U.S., unlike the U.K., the object against which an action in rem may be brought is limited to the

colliding vessels, and therefore, if the vessel at fault has lost all of her value due to sinking etc., an action in rem cannot be brought.

ii) Forum non conveniens

Recent trends indicate that it is much easier for a defendant in admiralty to succeed in a forum non conveniens motion. Early maritime courts rarely dismissed for forum non conveniens. As the Supreme Court noted in The Belgenland, 114 U.S. at 362, suits between persons of different nationalities and invoking the general maritime law are prima facie proper subjects of inquiry in any Court of Admiralty which first obtains jurisdiction.

However, in Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254, n. 22 (1981), the Supreme Court agreed that a foreign plaintiff's choice of forum is afforded less weight in a forum non conveniens analysis than that of a domestic plaintiff. Following the Piper Aircraft decision, lower courts have dismissed admiralty suits more and more readily.

Although some courts, notably in the Fifth Circuit, still hold to The Belgenland's broad notions of jurisdiction, e.g., Damodar Bulk Carriers, Ltd. v. A/S Det Dansk Franshe D/S, 1981 AMC 1734 (S.D. Tex. 1979), the trend in recent cases is to decline jurisdiction over foreign parties presenting facts rooted in a far flung locale.

(c) In Japan

There is no statutory law or legal case in Japan concerning jurisdiction over collision claims.

According to various theories, the cases where Japanese jurisdiction in collision claims can be obtained are as follows:

(i) where the collision arises in Japan, without regard to whether the vessel is Japanese or non-Japanese;

(ii) where both colliding vessels are registered in Japan, irrespective of whether the collision occurs in domestic waters or on the high seas;

(iii) where the plaintiff resides in Japan; or

(iv) where both parties agree to Japanese jurisdiction.

b. Applicable Law

(a) In England

In England the general principle of applicable law in collision cases is that regarding questions of substance the lex loci actus is applied whereas regarding questions of procedure the lex fori is applicable. Because the issue of liability for a collision is regarded in England as a matter of substantive law, in the case where a collision occurs in the territorial waters of another country, the law of that country, being the lex loci actus, is applied. On the other hand, the law of limitation of shipowner's liability is regarded as procedural law in England and therefore the lex fori is applied to determine questions of limitation.

(b) In the United States

The U.S. concept in respect of applicable law is basically the same as that of England and as the law concerning collision liability is considered to be substantive, the lex loci actus is applied to it. As for the law applicable to limitation matters, it was held in The Norwalk Victory (1946) that where the limitation law of the place of collision is regarded by that place as being substantive, the limitation law of the place of collision should be applied.

This concept has been superceded by subsequent legal cases and in a recent judgment it was confirmed that even if the foreign limitation law is applied as being substantive the limitation amount prescribed by the U.S. Shipowners' Limitation of Liability Act should be the maximum imposed; that is, the value of the vessel plus pending freight is imposed if the limitation amount calculated by reference to the limitation law of the place of collision exceeds the American figure.

(c) Japanese law

In Japan there are no legal cases but various different theories concerning the law applicable to collisions. The representative theory is that the applicable law on limitation of shipowners' liability in collision cases should be determined according to the same principle as is applied to determine the shipowners' liability. Accordingly, it is a leading theory that in the case of a collision occurring in the territorial waters of a foreign country, the limitation law of that country (as part of the lex loci actus) is applied.

However, it may be noted that in Japan it is the current view of a number of influencial scholars and practitioners that whatever be the law governing the collision itself, the lex fori should be applied to the issue of limitation of shipowners' liability.

It is uncertain what is the applicable law in the case where the collision arises on the high seas, but it was once a leading theory that the law of the state of the flag should be applied. However, this theory is no longer so well regarded, and I expect that a modern court will be prepared to look at the matter afresh.

c. The U.S. Limitation of Shipowners' Liability

(a) Limitation Amount

Sect. 183(a) of the U.S. Limitation of Shipowners' Liability Act prescribes the limitation amount as follows:

> "The liability of the owner of any vessel, whether American or foreign,.....shall not exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

Accordingly, the limitation amount can be said to be the value of a vessel immediately after collision plus the pending freight.

(b) Privity or knowledge

Sect. 183(a) of the U.S. Limitation Act also provides that limitation will not be granted if the casualty can be attributed to the owner's privity or knowledge. Although the concept of privity or knowledge under the U.S. Limitation of Shipowners' Liability Act is very similar to that of "actual fault or privity" under the 1957 Convention, the courts in the United States have given the term privity or knowledge a meaning broader than that given to actual fault or privity. If a shipowner is judged to have failed to exercise due diligence to make his vessel seaworthy, it may more often be concluded that he had privity or knowledge and that limitation should not be granted. The shipowner cannot petition for limitation unless he proves absence or lack of privity or knowledge, the onus being on him.

The burden of this proof is severe. According to statistics of the U.S. Maritime Law Committee, during the period from 1953 to 1977 limitation was granted in only 40 of 114 reported cases (35%).

(4) Conclusion

In collision cases, from the recovery manager's view point it is very difficult to judge where and under which law he should file a claim against a colliding vessel for collision damage to cargo, since the elements of place of collision, the nationality of the vessels, their owners and the cargo interests, and the laws associated with each, are entangled in a complicated manner.
As seen above, from the viewpoint of breaking limitation of shipowners' liability, the United States is the most advantageous jurisdiction regarding either "privity or knowledge" or burden of proof.

Therefore, cargo underwriters should consider suit in the United States as a first resort unless some other jurisdiction is evidently more appropriate from the start.

Thus the actual practice involving limitation is in turmoil at present and as a result we must retain the most competent lawyers available.
Unless all the countries in the world ratify the same Conventions, we cannot avoid forum shopping or deny its advantages. And although I hope the 1976 Convention is ratified by as many countries as possible, I might also criticise the low level of the limitation amount under this Convention, which can be readily seen in the example mentioned above.
Furthermore, the real value of the limitation amount under the 1976 Convention has decreased so far and will continue to decrease in future due to inflation. In the circumstances, I hope that the limitation amounts in the 1976 Convention will be revised periodically, for example, once every five or ten years.

Maritime Arbitration in China

Song DIHUANG*

Mr. Chairman, Ladies and Gentlemen:

It is my great honour and pleasure to speak here in the University of London to so many friends who are interested in Chinese laws. I would like firstly to express my gratitude to Mr. Anthony Dicks, Dr. Yuan Cheng and other members of the Group for their organizing this seminar and inviting me to deliver a speech on maritime arbitration in China as well as an brief introduction to the newly promulgated Maritime Law of the People's Republic of China (1992).

Before coming to the details of maritime arbitration, I would like to say a few words about maritime disputes resolutions in China.

1. Maritime dispute resolutions in China

As you all probably know, whenever a maritime dispute arises, the Chinese party, if any, would always tend to solve the dispute firstly by friendly consultation, failing which, however, either party may resort to CONCILIATION, or LITIGATION, or ARBITRATION or ADMINISTRATIVE SETTLEMENT BY THE COMPETENT AUTHORITIES.

(1) Conciliation

Among the four alternatives, conciliation or ADR (alternative dispute resolution) which might be better known to you, is most frequent and flexible. Not only may it be conducted within a conciliation institution such as Beijing Conciliation Centre, according to its specific rules of conciliation (provided of course the parties have so agreed), but concurrently during court or arbitration proceedings either at the request of the parties or purely of the judge's or arbitration tribunal's own volition with the approval of the parties. In later case, the court or arbitration proceedings will be suspended and will resume if conciliation fails. I must emphasize that conciliation is not an integral part of the proceedings and it must be conducted on voluntary basis. Should the conciliation fail or the judges or arbitrators think it impossible to succeed, the proceedings will resume and any concessions or suggestions or proposals or whatsoever during conciliation will not be binding upon the parties when court or

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arbitration proceedings resume. Meanwhile, in the even that any evidence is submitted to the conciliator by the party on the condition that such evidence is confidential, the conciliator(s) are not bound to disclose the same.

Besides, we have also, in the early 1980's, established a so-called "joint conciliation". For example, when a dispute arises between an German party and its Chinese counterpart and both parties agree to joint conciliation either in Beijing or Hamburg, each party may appoint an arbitrator as a conciliator from the arbitration or conciliation institution of his home country and the two or more conciliators will try to solve the differences who may better understand the positions of their appointers. If succeeds, a written agreement will be signed by both parties and a conciliation statement will be made to that effect; if fails, the parties may go to court or arbitration according to arbitration agreement as originally reached or reached afterwards.

(2) Litigation

Generally speaking, Chinese people do not favour litigation due to their temperament although maritime litigations have been increasing rapidly during the past years. As you all probably know, all maritime disputes fall within the jurisdiction of maritime courts with a very few exception. Up to now, we have eight maritime courts, i.e. Dalian, Tianjin, Qingdao, Shanghai, Guangzhou, Wuhan, Xiamen and Haikou, along the coastal cities except Wuhan which is located by the middle reaches of the Yangtze River. They are the courts of the first instance for maritime cases and their courts of appeal are the Higher People's Courts of Liaoning Province, Tianjin Municipality, Shangdong province, Shanghai Municipality, Guangdong Province, Hubei Province, Fujian Province and Hainan Province respectively. The decisions of those courts of the second instance will be final. The Supreme People's Court of PRC has, since 1988, considered to establish a Higher Maritime Court of PRC in Beijing to take cognizance of appeals from 8 maritime courts and it is yet to be decided. I am not going to waste you more time on this subject as I was told that not very long ago, a distinguished scholar from a maritime court had given a lecture on maritime litigation.

However, may I have your attention to the main differences between the maritime lawsuit and arbitration in China.

Firstly, the judgement by a maritime court can be appealed to the Higher People's Court, whereas an arbitral award of China Maritime Arbitration Commission(CMAC) is final and no appeal could be made to any court unless the circumstances listed in Art. 5 of the 1958 New York Convention exist. Secondly, it is usually a requirement that all papers and documents submitted to the court should be in Chinese whereas any submissions and/or documents in English are acceptable by CMAC although Chinese is also the official language as stipulated in its Rules of Arbitration. Thirdly, foreign parties will have to authorize a local counsel to represent them in the court proceedings while both foreign and Chinese lawful

representatives are allowed at the arbitration hearing as long as there is a written power of attorney clearly evidencing the appointment. Fourthly, the parties may find it difficult to enforce a court judgement outside China, but an award of CMAC can be easily enforced in more than 80 contracting states to the 1958 New York Convention.

(3) Administrative settlement by competent authorities

The competent authorities, according to the "Maritime Traffic Safety Law of PRC(1983)", are Harbour Superintendency Administration(HSA) of PRC (or Fishery Administration and Fishing Harbour Superintendency if within a fishing port) and according to "Marine Environmental Protection Law of PRC(1982)", are the state administrative department of marine affairs(State Oceanology Administration, SOA), HSA etc. Should any marine accident occur within the Chinese ports or territory waters, the HSA or SOA will perform their duties as imposed by the said laws. HSA, according to the law, shall "ascertain the causes of the accident and establish the liability of the party(ies)". Meanwhile the parties are also bound to report to HSA immediately after the accident and provide necessary assistance to HSA in its investigation. If any damages occur to the public property, harbour installations, environment, etc, they may impose sanctions such as fine, confiscating the license of the Officers, compensation for any damages etc. And the parties, if contest the decision, may resort to the people's court within 15 days upon receipt of the decision. Further, according to Art. 42 of the Marine Environmental Protection Law, the HSA or SOA may settle the disputes over the compensation liability and the sum thereof between the party causing the pollution and the party suffering any damages or losses therefrom. However, any party, if unsatisfactory with the settlement, he may still go to court according to the Civil Procedural Law of PRC, or after the dispute arises, file a law suit directly with the court or refer to arbitration if they so agree.

In terms of civil liability and/or compensation for loss and/or damage arising from marine accident or environmental pollution, the main role of the above authorities is conciliation. This is of course subject to the written agreement by both parties and if the conciliation fails, they may either go to court or arbitration if they reach an arbitration agreement afterwards. It is worthwhile mentioning that, since the laws empower HSA to investigate any marine traffic accidents, conciliations conducted by HSA are sometimes very effective on the basis of its investigation and liabilities established on the party(ies).

(4) Arbitration

Arbitration has become more and more popular in China nowadays, especially the international commercial arbitration because of its advantages of keeping commercial secret of the parties, consuming less time and cost, easy to enforce etc. Therefore, more often than not, there would be an arbitration clause in a contract. However, it should be noted that we

have two different types of arbitration in China which are backed by different provisions of laws, one is domestic arbitration, and the other international commercial arbitration.

Domestic arbitration, as some scholars say, is not a real arbitration. Taking the economic contract arbitration as an example, firstly, it requires no arbitration agreement between the parties and either party may apply for arbitration with the Economic Contract Arbitration Committee under the State Administration of Industry and Commerce of various levels; secondly, its award is not final and if either party, if contests to the arbitral award, may resort to the people's court for an appeal; thirdly, the power of the arbitrators shall be limited if involving complicated disputes and/or legal issues and in such case, the arbitration committee shall have the final words;

International commercial arbitration, on the other hand, is more prominent for the above-said advantages. In China, there are presently two international arbitral institutions, one is China International Economic and Trade Arbitration Commission(CIETAC) and other is China Maritime Arbitration Commission(CMAC) which are non-governmental and shall not subject to any interference from any bodies. The arbitrators shall hear the case impartially and independently and their awards are final. However, the court may examine the procedural matter of the arbitration as listed in Art. 260 of the Civil Procedural Law of PRC 1991 which is similar to Art. 5 of the 1958 New York Convention. Thanks to their persistent impartiality, justice and independence as well as their great harmony with international practice, Beijing has been ranked as the second busiest international commercial arbitration centre.

Since the arbitration rules of the two arbitration commissions are the same save that the scope of cognizance is different as well as a slight difference on the arbitration fees, I believe you will have no problems in taking up a commercial arbitration case in CIETAC according to the arbitration procedures to be briefed hereinafter.

2. Maritime arbitration body in China

China Maritime Arbitration Commission (CMAC) is the only arbitral body in China that takes cognizance of all kinds of maritime disputes involving foreign interest, viz. CMAC will not handle domestic cases. Arbitration in CMAC is institutional arbitration which is backed by the relevant laws such as Civil Procedural Law of PRC(1991) whereas, as far as I know, there are presently no ad hoc arbitrations in China (although in a number of cooperation agreements signed between CCPIT and its foreign counterpart, ad hoc arbitration is also encouraged between Chinese and its trade partners) nor are they backed by any law. However, there is no reason to doubt about enforcement in China of any award rendered by ad hoc arbitration abroad according to the 1958 New York Convention.

The long-established principle of "taking the facts as the basis and the law as criterion, adhering to independence and justice, respecting contract stipulations and referring to international practice where appropriate" adopted by CMAC in arbitration, as well as the

well-known practice of combination of arbitration and conciliation, has attained wide acknowledgement from all over the world. Furthermore, the inclusion of some distinguished foreigners in our Panel of Arbitrators since 1989(unfortunately, we can not invite more as we should have because of the language problems) have made many foreign parties feel even more relaxed for arbitration in China. With the steady increase of the China's economy, more and more disputes will inevitably arise and I am sure more foreigner (perhaps some of you) will be included in the Panel in the not distant future. To enable the parties both at home and abroad to know better maritime arbitration in Beijing, CMAC published two volumes (in 1985 and 1989 respectively) of its awards and conciliation statements called Selection of Awards and Conciliation Statements of CMAC and CMAC will continue to publish its awards from time to time.

CMAC was formerly known as the Maritime Arbitration Commission of China Council for the Promotion of International Trade(CCPIT), which was set up on January 22, 1959 after CCPIT adopted the Provisional Procedural Rules of Maritime Arbitration Commission of CCPIT on January 8, 1959 in accordance with the decision of the State Council dated November 21, 1958 to set up a maritime arbitration commission within CCPIT. With the approval of the State Council on June 21, 1988, the Maritime Arbitration Commission of CCPIT was renamed as CMAC and its rules amended. The CMAC is now composed of one honourary Chairman(Mr. Ren Jianxin, President of the Supreme People's Court of PRC) and 29 members(the members of CMAC used to be arbitrators as well). Now, CMAC maintains a Panel of Arbitrators which is comprised of 69 arbitrators including 2 foreign arbitrators. The members (arbitrators as well) of the CMAC shall be selected appointed by CCPIT for a term of two years and the members are now responsible for the work such as examining and approving annual work report submitted by the Secretary-General, examining and approving any draft amendments to the Rules of Arbitration of CMAC, drafting and/or amending the Constitution of CMAC, etc. Among them, there are now one Chairman, 6 Vice-Chairmen, one Secretary-General and two senior advisers. There has also been established a Secretariat which shall be responsible for the daily administrative work of the arbitration procedure, e.g. all correspondences either addressed to CMAC or arbitral tribunal should be sent to the Secretariat. The CMAC adopted on November 2, 1991 Points for Attention of Arbitrators of CMAC which is actually an ethic rules of CMAC arbitrators. And on the same day, the Executive Committee of CMAC imposed a detailed regulations on the work by the staff members of the Secretariat of CMAC. All these steps are for the better service for the parties and high efficiency of the arbitral body. Now, CMAC along with the other international arbitration institution, China International Economic and Trade Arbitration Commission(CIETAC) are actively involved in the drafting of the first Arbitration Act of PRC. Meanwhile, the present Rules of Arbitration of the two arbitration commissions are now undergoing amendment and revision.

3. Arbitration Procedures – how to arbitrate in Beijing?

As I mentioned above, CMAC and CIETAC are now amending their rules of arbitration. So, my following presentation will subject to any amendment to the present rules in future though I think it will take some time to finalize the amendment. (Some people suggest that it is better to amend the rules after the Arbitration Act of PRC is enacted)

It is, as a number of foreign lawyers put it, relatively simple to refer a dispute to CMAC for arbitration. Either party to a dispute may commence the arbitration by submitting the following:

(1) An application for arbitration to the Secretariat specifying:
   (a) Name(s) and address(es) of the respondent(s);
   (b) Arbitration agreement relied upon by the claimant;
   (c) Claimant's claim and the facts and evidence;
   (d) Appoint an arbitrator from the Panel of Arbitrators.
(2) Relevant documents and evidence on which the claim is based;
(3) Pay a deposit according to the Arbitration Fee Schedule attached to the Rules, which will be returned if the ruling is in his favour.

One should also bear in mind that if a lawyer is engaged, a Power of Attorney duly notarized should accompany the application. Meanwhile the application along with the supporting documents (also the defence submissions) should, usually, be in quintuplicate, one for the respondent, three for the tribunal of 3 arbitrators and the original one to be kept in the Secretariat.

After receipt of the application and documents, the Secretariat will mail a copy of the application and the documents to the respondent who must within 20 days upon receipt, appoint his arbitrator and within 45 days, submit his defence submissions along with supporting documents as well as counterclaims, if any. According to the Rules of Arbitration, the respondent may also be asked to advance a deposit if a counterclaim is lodged.

After the parties have respectively appointed their arbitrators, the Chairman of CMAC will appoint a third arbitrator as the presiding arbitrator(it is different from an umpire). And the parties may also jointly appoint one arbitrator as a sole arbitrator to hear the case.

An extension of time for submitting points of defence and/or supporting document may be requested and approved under special circumstances.

Then, after exchange of documents between both parties, which is done through the Secretariat, the Secretariat will after consultation with the Tribunal, fix a date of oral hearing and notify the parties at least 30 days prior to the hearing.

Request for preservative measure can be filed with the CMAC which will in turn petition to relevant court for a judgement to that effect.

Arbitration on document alone, ie without oral hearing, is allowed according to the Rules of Arbitration if the parties so request and the Tribunal should be notified through the

Secretariat. The tribunal may itself ask whether the parties agree to arbitration on document only if it deems appropriate.

Either party may challenge an arbitrator if he has evidence that the arbitrator has any personal interest in the case. The arbitrator is also obligated to request for a withdrawal himself if there is anything preventing him from acting impartially in hearing the case.

All hearings will be held in Beijing or other place as the case may require with the approval of the Chairman of CMAC, and be conducted in Chinese. CMAC will provide translation services and supply interpreter upon request.

According to the Rules, if one party or his attorney fail to appear at the hearing despite the appropriate notification, the hearing may still be going on and the tribunal may proceed to an award by default.

Although the Rules provide that the tribunal may, at its own discretion, make investigation and collect evidence on its own initiative, it remains the parties' obligation to provide the tribunal with all necessary evidence in support of his claim or defence, which will be examined by the tribunal.

One of the distinctive features of the arbitration in Beijing is the combination of arbitration and conciliation. The arbitrators will frequently encourage the parties to compromise and conciliate the dispute. There are many ways of conciliation in practice (and the Chinese arbitrators have acquired through years of practice, some tactics in conciliation) including the joint conciliation. For the purpose of enforcement, the tribunal will make an award, instead of a conciliation statement as we used to do, according to the settlement agreement reached by the parties if conciliation succeeds.

The CMAC awards are in writing with reasons for the judgement(except they are made in accordance with the settlement agreement reached by both parties after conciliation) and will be signed by all or majority of the arbitrators. The dissenting or minority opinions will not be written out but will be kept in file. The parties shall execute the award within the time limit set out in the award or immediately if there is no such limit. If either party fail or refuse to honour the award, the other party may apply to the Chinese court or the foreign court which has jurisdiction on the enforcement of the award as the case may be, according to the 1958 New York Convention.

4. Applicable law in maritime arbitration in China

From time to time, foreign friends would inquire what law is to be applied when arbitrators hear the case in China. Generally speaking, the answer will be up to the parties themselves. According to the Maritime Law of PRC (or the General Principles of Civil Law of PRC(1986) which governs the maritime transaction before implementation of the new Law), the parties to any contract are free to choose the governing law in their contract and/or agreement (unless the law provides otherwise, for instance, there are mandatory laws

providing that Chinese law shall apply to the contracts such as a joint venture contract). Nevertheless, it is to be noted that the choice of foreign law or international practice should not infringe the public interest of PRC. If, however, the parties are silent about the applicable law, the arbitrators (judges as well) will decide what law to be applied, usually according to the principle of "the law of the country having the closest connection with the contract". As to the tort cases, needless to say, the law of the place of tort will, more often than not, apply(except, e.g. a collision between two vessels of the same nationality). The arbitrators usually will also refer to international conventions or practices as well as leading cases although they are not bound upon by the case laws. We also have stipulations of applicable law in actions involving foreign interests in the above said laws which are in great harmony with the international practice. For instance, it is provided that any international conventions or treaties which China ratified or acceded to shall prevail if they are in any way in conflict with the existing laws; lex fori on the issue of maritime lien and limitation of liability(Art. 272 & 275); lex loci delicti commission the issue of collision(Art. 273), law of the flag on the issue of the ship mortgage, etc.

5. An arbitration case, how it is held and solved?

Now, let me give you an example so that you may have a rough idea about maritime arbitration in Beijing.

A foreign vessel (hereinafter referred to as m.v. "S") rammed a fishing boat in the coast of China and killed all the 12 crew member on the boat. There was no eye witness. At first, the m.v. "S" denied the responsibilities whatsoever. As to the fact that the vessel stopped for a while for the time being, the Shipowner argued that it was purely out of their high consciousness of responsibility that they stopped as they felt the vessel had come across something. There was no evidence whatsoever to prove that the fishing boat was crushed by m.v. "S". The representatives of the deceased and the shipowners reached an arbitration agreement and the CMAC took cognizance of the case. The arbitral tribunal was formed by three arbitrators each appointed by one party in accordance with the procedural rules and both parties exchanged their submissions and evidence(though we do not have the procedure of discovery, it works similarly). And the tribunal also collected some evidence on its own. An oral hearing was held later on and the parties made presentations respectively. Based upon the submissions, evidence, oral pleadings as well as the evidence collected by the tribunal itself, an award was rendered with the following reasons:

The site and time where and when the m.v. "S" met with the fishing boat were coincident with those the m.v. "S" felt a shock of its hull, reckoning from the course, speed and track of the vessel and the boat respectively;

At that time, there was only one big ship like m.v. "S" in the vicinity of the accident according to local observation station, and only a big ship like m.v. "S" could the boat be

crushed into pieces and all the lives killed. Had the boat collided with other fishing boat, it would have been impossible to suffer such serious damages;

According to the survey and the diver's underwater inspections, there were traces of scratches at the bottom to different extent and it was scratching backward, which showed that the m.v. "S" had collided overside and sunk a small boat with power to move forward, whereas the shipowners could not prove any other causes for these scratches;

The m.v. "S" admitted that in the course of searching at sea after it felt a shock of its hull, they found in the vicinity of the site the igniting life buoy, the name-board of the boat and some other articles;

So, the tribunal in its award decided that the m.v. "S" should be responsible for the sinking of the fishing boat. As to the amount of compensation, the parties agreed that it be conciliated by the arbitrators and the case was finalised with an award on the liability as well as a conciliation statement on the amount of compensation to the satisfaction of both parties.

I hope, after the above brief introduction, maritime arbitration in Beijing will no longer be something new to you. Please allow me to quote the following words by foreign lawyers(one from U.S. and the other U.K.) to conclude my speech on arbitration:

"...the common denominator between our two systems is that arbitrators in America and China are fact sensitive and have an intuitive sense of common sense, justice and fairness...the SMA (Society of Maritime Arbitrators, Inc. in New York) reaffirms its support for the Chinese system of arbitration with its distinctive characteristics and experiences of its own...".

"...I would suggest therefore that from time to time it is worth taking up cases in CMAC Beijing rather than succumbing to unfair pressure to settle at a level which would not be justifiable elsewhere...".

Hague-Visby Rules – International Convention for The Unification of Certain Rules of Law Relating to Bills of Lading Brussels 23rd February 1968*

Tony THOMAS**

1. Introduction: 1893–1993

In the latter part of the 19th Century the British Empire spanned the globe. British shipowner took full advantage of this and duly abused their bargaining position by including extremely onerous terms in their Bills of Lading.

The problem with Bills of Lading was that they were not only contracts of carriage but also documents of title which passed freely in the currency of trade conferring on the holder both rights and liabilities. Accordingly people who had no control over the original contract and its terms became interested in the Bill of Lading. Bills of Lading took many and varied forms and caused uncertainty – cargo owners could not rely on the Bill of Lading as a document of title reflecting the condition of the goods and neither could they know, without considering the actual Bill of Lading in detail, what defences and limitations the shipowner had imposed.

The first attempt to redress these problems came from the United States in the Harter Act of 1893.

The benefits of codification brought about by this Act were appreciated and other countries produced similar rules. It quickly became clear however that a single Convention, binding all contracting parties was preferable to a system of similar, but not identical Acts.

As a result the Maritime Law Committee of the International Law Association met in 1921 to consider a uniform system of law among the maritime states. Various drafts were formulated until eventually the International Convention for the Unification of Certain Rules Relating to Bills of Lading was signed in Brussels on 28th August 1924. This treaty became known as the Hague Rules.

The objective of these Rules was to require standard clauses to be incorporated into Bills of Lading, defining the risks which had to be borne by the carrier and specifying the maximum protection he could claim from exclusion and limitation of liability clauses. Any attempt to further exclude or lessen such a basic liability was declared to be null and void

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* This article was presented by the author at a seminar held in Tokyo by the Japan Shipping Exchange, Inc. on 12 November 1992.

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and of no effect. There was of course no bar to prevent the carrier from undertaking to assume a more extensive liability than the minimum prescribed by the Rules.

In November 1992 the (unamended) Hague Rules remain operative in nearly 30 States.

In the main the Hague Rules were accepted as providing a satisfactory balance between shipowners and cargo interests, however with the passing of time and changes in the pattern of international trade (for example containerisation) it was widely accepted that the Rules needed updating. Accordingly a conference of the Comité Maritime International was held in Stockholm in 1963 and adopted a draft Protocol which was later extensively amended and was made into a Protocol at Brussels on 23rd February 1968. The Hague Rules, as amended by the Protocol became known as the Hague-Visby Rules.

The Hague-Visby Rules were amended by a further Protocol of 21st December 1979 known as the SDR Protocol. This merely had the effect of expressing the monetary limits in terms of Special Drawing Rights as opposed to the rather complicated "units of account" in the original Hague-Visby Rules.

Nevertheless the Hague-Visby Rules were regarded by many cargo owning countries as merely a temporary expedient and there was a growing demand for a thorough re-appraisal of carriers' liability to produce a comprehensive code covering all aspects of the contract of carriage. This movement culminated in the drafting of a new Convention which was adopted at an International Conference sponsored by the United Nations in Hamburg in March 1978. This Convention, known as the "Hamburg Rules" became effective on 1st November 1992 on the expiration of one-year from the date of deposit of the 20th instrument of ratificational accession.

So far as the UK is concerned the Hague Rules were enacted in the Carriage of Goods by Sea Act 1924. This was replaced by the Carriage of Goods by Sea Act 1971 which came into force in June 1977. The UK has also adopted the SDR Protocol.

As I understand it, in May this year the Japanese Diet passed a new Carriage of Goods by Sea Act Bill will mean that Japan ratifies the Hague-Visby Rules together with the 1979 SDR Protocol. The new Act will come into force on 1st June 1993.

Accordingly from June 1993 Japan will be in the same position as the UK – I do not believe that in the foreseeable future the UK will be tempted to ratify the Hamburg Rules.

In Appendix I you will find schedules of parties to the Hague Rules, Hague-Visby Rules, Hague-Visby Rules (SDR Protocol) and Hamburg Rules.

It is worth pausing here to reflect on the current "state of play" in relation to the Hague, Hague-Visby and Hamburg Rules.

When Japan enacts the Hague-Visby Rules you will leave behind only the United States and Australia as major commercial nations, this is said with due respect to Argentina and our European partners Portugal and Eire.

Japan will join the major European Community trading nations who have enacted the

Hague-Visby Rules. The Hamburg Rules have yet to be ratified by any of the major commercial shipping nations.

2. The Hague-Visby Rules – General Scheme

I assume that as the Hague Rules have been part of Japanese law since 1957 you are all familiar with that particular regime. In this lecture I will therefore highlight the differences which you will now face as a result of the Hague-Visby amendments. The amendments are confined to Articles III, IV, IX and X only. Before focusing on the Hague-Visby amendments in turn, it is important to appreciate that the general scheme of liability imposed by the Hague Rules remains unchanged. The most succinct summary of this appears in the text book "Scrutton on Charterparties", from which I now quote:

"The general scheme of the Rules is as follows: Article II provides that in every contract of carriage of good as defined in Article I, with the exception of certain special shipments dealt with in Article VI the carrier shall be subject to the responsibilities and liabilities contained in Article III and entitled to the rights and immunities contained in Article IV and IV bis"

This means that the initial burden of proof rests with the cargo owner to establish that the loss or damage occurred during the voyage. This can usually be achieved by the production of a clean Bill of Lading and the fact that damage or loss has occurred. The burden then shifts to the carrier to establish that the loss or damage falls within one of the exceptions listed in Article IV Rule 2. If he fails to do so, he will be liable. If he succeeds the burden will shift to the cargo owner to establish that the operative cause of the loss was the failure of the carrier to exercise due care under Article III Rule 2 or unseaworthiness under Article IV Rule 1: if unseaworthiness is established then the burden switches back once again to the carrier to prove the exercise of due diligence before and at the beginning of the voyage.

The essential features of the Hague-Visby Rules are:–

(1) The Rules impose on the carrier minimum responsibilities which he cannot reduce e.g. to exercise due diligence to provide a seaworthy ship and to issue on demand a Bill of Lading in a particular form.

(2) The Rules leave the parties, namely carrier, shipper, charterer and consignee free to decide who performs certain other obligations, provided that no term will be valid if it is inconsistent with the main object and intention of the particular contract. Insofar as the carrier does undertake to carry out operations, for example stowage, then he must do so properly and carefully.

(3) The Rules allow the carrier to take advantage of certain exceptions, but he cannot widen these to lessen his liability.

(4) The defences and limitations apply to the servants and agents of the carrier as well

as the carrier himself.

(5) The carrier or his servants and agents stand to lose the benefit of the limitation of liability conferred in the Rules if it is established that damage resulted from an intentional or reckless act or omission and with knowledge that damage would probably result.

3. The Hague-Visby Amendments

I now turn to look at each of the amendments. You will find in Appendix II that I have set out the Hague Rules with the Hague- Visby amendments superimposed. Neither Article I, nor Article II are amended.

Article III Rule 4

The words "however proof to the contrary shall not be admissible when the Bill of Lading has been transferred to a third party acting in good faith" are added here. Under the Hague Rules it was possible for the carrier, assuming the Bill of Lading was not fraudulently issued, to produce evidence to show that although the Bill of Lading may have been signed clean, in fact, on loading the cargo was damaged or defective in some way. The amendment however means that the carrier is now estopped, as against a transferee of the Bill, from denying shipment of the number or quantity of goods described in the Bill and the apparent order and condition of the goods.

The amendment is wide in that the transfer does not have to be for value, nor is it even necessary to prove that the transferee has relied on the statements in the Bill of Lading when accepting the transfer.

Article III Rule 6

The amendment here is to the fourth paragraph of rule 6. Whereas under the Hague Rules the carrier was discharged from liability "in respect of loss or damage" unless suit was brought within one year, in the Hague-Visby Rules the carrier is discharged from "all liability whatsoever in respect of the goods" unless suit is brought within one year.

The Hague-Visby amendment also expressly recognises the fact that the one-year time limit for proceedings may be extended by agreement between the parties.

Whilst, as a matter of practice, people handling marine claims have requested and granted extensions of time in claims involving the Hague Rules as opposed to the Hague-Visby Rules, there are certain jurisdictions which do not recognise such extensions even though they were granted willingly and have treated an action as time barred if proceedings were

not commenced within the 12 month period. The Hague-Visby Rules deals with this anomaly.

The Hague-Visby Rules also widen the type of claim which is subject to the one-year time limit. I would like to refer you to 2 decided cases in the UK on this provision.

In the "CAPTAIN GREGOS" 1990 Lloyds Law Report Volume 1 page 310 it was held by the Court of Appeal that the words in Article III Rule 6 that the carrier was to be discharged from "all liability whatsoever in respect of the goods" meant exactly what is said, the inference being that the one-year time bar was intended to apply to all conceivable claims arising out of the carriage of goods so that even where cargo owners sought to found their action on the carriers' misconduct rather than breaches of contract were still caught by the one-year time limit.

In the "ANTARES" 1987 Lloyds Law Report Volume 1 page 424 the Court of Appeal held that the Hague-Visby Rules and therefore the time limit in Article III Rule 6 were compulsorily applicable and could not be excluded by contrary agreement. Article III Rule 6 made no distinction between fundamental and non-fundamental breaches of contract, nor between breaches which did and did not amount to deviation. The Court held that the underlying purpose of Article III Rule 6 was that the time limit was of general applicability which would promote certainty and predictability.

Article III Rule 6 BIS

This amendment takes out of the one-year time limit actions for indemnity against a third person. This is really aimed at claims between ship interests and gives the person bringing such an indemnity action a minimum of 3 months in which to bring an action commencing from the date when he either settles the claim against himself or is himself served with proceedings.

In the "ANDROS" 1987 Lloyds Law Reports Volume 2 page 210 the Privy Council held that Rule 6 BIS could apply to claims for rights of recourse where only the indemnity claim and not the main action was subject to the Hague-Visby Rules.

In the "VECHSCROON" 1982 Lloyds Law Report Volume 1 page 301 the Court held that even if the Hague-Visby Rules had no statutory force there was nothing to prevent the Court giving effect to Article III Rule 6 BIS in a situation where the Rules had been incorporated into the contract of carriage by agreement between the parties.

Limitation of Liability – Article IV Rule 5 (a)–(h)

In practice this is the most crucial amendment made by the Hague-Visby Rules. The limits of liability are not only increased but cargo owners have a choice of applying a package limit or a weight limit, whichever is the higher.

In the original Hague-Visby Rules the limit was expressed as 10,000 francs per package or unit, or 30 francs per kilo of the gross weight of the goods lost or damaged, whichever was the higher. The SDR Protocol replaces these figures so that the "package" limit is 666.67 SDR's and the "weight limit" is 2 SDR's per kilo. It is worth stressing here that "gross weight" rather than net weight is used.

Rule V(c) provides that where a container, pallet or similar article of transport is used to consolidate the goods, the number of packages enumerated in the Bill of Lading as packed in such article of transport shall be deemed to be the number of packages or units for the purpose of assessing the limit.

I would, at this point, like to mention one Clyde & Co case which is relevant to the Hague Rules package limit rather than the Hague-Visby Rules limits. As stated previously one of the main reasons for the Visby amendments was the fact that the £100 package limit in the Hague Rules had ceased to represent a fair and reasonable limit.

For many years Clyde & Co had argued that the £100 limit in Article IV (5) had to be read with Article IX so that instead of £100 sterling it read £100 sterling gold value.

Many cases settled short of trial because no shipowner or P & I Club wished to test the point. Eventually one carrier did and the result was the decision in the "ROSA S" 1988 Lloyds Law Reports Volume 2 page 574. The Court held that indeed the limit was £100 sterling gold value which meant 732.238 grams of fine (pure) gold, which, at the time the case was decided amounted to £6,630.

Under English law at least the Hague Rules package limit can now result in a substantial recovery. It still does not have the flexibility from cargo owners' point of view of being able to opt for liability to be calculated by reference to gross weight where this is advantageous.

Although the Hague-Visby Rules came into force in the UK in 1977, I still handle a number of cases where the contract is governed by English law but the Hague Rules rather than the Hague-Visby Rules apply.

When we looked at Appendix 1, Australia was mentioned as one of the major trading nations still adhering to the Hague Rules. It is therefore worth noting that the New South Wales Court of Appeal in the case of Brown Boveri (Australia) Pty-v-Baltic Shipping Co 1989 Lloyds Law Reports Volume 1 page 518 also adopted "gold value" in calculating the package limit.

Returning to the Hague-Visby amendments, in addition to increasing the limits and making them more flexible the Rules provide that the carrier may lose the right to limit altogether.

Rule 5(e) provides that the carrier loses the right to rely on the limit of liability if it is proved that damage resulted from an act or omission of the carrier done with intent to cause damage or recklessly and with knowledge that damage would probably result. In the case of Browner International Limited -v- Monarch Shipping Co. Limited ("THE EUROPEAN

ENTERPRISE") 1989 Lloyds Law Reports Volume 2 page 185, the Judge considered at length whether the recklessness required was that of the alter ego of the carrier or whether recklessness on the part of an employee (not being part of the alter ego of the carrier) would result in the carrier losing the right to limit. The Judge favoured the restrictive meaning of the word "carrier" and held that Article IV Rule 5(e) refers only to the misconduct or recklessness of the carrier himself or his alter ego.

In practice this is an extremely difficult limit to break. Not only is it necessary to establish that there was a reckless act or omission on the part of the "carrier" but it is also necessary to prove that the person comprising the "carrier" was also aware that damage would probably result. I think that especially in relation to an omission this is going to be extraordinarily difficult to prove.

In Rule 5(b) one finds which value of the cargo is to be taken in calculating the claim it is essentially the sound market value-which is to be obtained by using the commodity exchange price or current market price by reference to the normal value of goods of the same kind and quality.

Sub-paragraphs (g) and (h) merely repeat provisions in the original Hague Rules.

Article IV BIS

This is an addition rather than an amendment of a corresponding provision in the Hague Rules.

Firstly in paragraph 1 it is provided that the defences and limits of liability apply to actions against the carrier in tort as well as contract.

Paragraph 2 extends the defences and limits to servants or agents of the carrier so long as they are not independent contractors.

Paragraph 3 provides that the aggregate amounts recoverable from the carrier and such servants and agents shall not exceed the limit provided for in this Convention. It seems to me however that the qualification in paragraph 2 probably goes further than anticipated by those drafting the Rules. It is difficult to conceive of any "agent" other than an employee/servant who is not an independent contractor. Paragraph 3 could allow a recovery from the carriers' servants and agents when the carrier himself is bankrupt.

In paragraph 4 the servant or agent loses the right to limit liability if it is proved that damage resulted from an act or omission done with intent to cause damage or recklessly and with knowledge that damage would probably result. It is conceivable therefore that a servant or agent could lose the right to limit in circumstances where the carrier would be entitled to limit for the carrier only losses the right to limit if the act or omission is that of the carrier i.e. alter ego or directing mind of the company rather than a servant such as a Master.

Article IX

Is self-explanatory and does not need further discussion here: this is one type of damage which I personally hope never to have to deal with.

Article X

Apart from the limitation provisions this is the major alteration to the Hague Rules. The UK Carriage of Goods by Sea Act 1924 applied the Hague Rules only to outward shipments, I believe that it is true to say that most other countries who are parties to the Hague Rules also applied them in this manner.

The Hague-Visby Rules then apply to the following types of voyage:–

(a) As before outward voyages where the port of loading is situated in the contracting state and where the port of discharge is situated in another state - Article X(b).

(b) A voyage from a port in one state to a port in another state where the Bill of Lading is issued in the contracting state rather than in the state of the port of loading - Article X(a).

We see a number of cases where the Bill of Lading is issued in London although it involves carriage between two states other than the UK. In practice then this is a rather important addition.

(c) Any voyage from a port in one state to a port in another state where the contract contained in or evidenced by the Bill of Lading provides that the Rules or legislation given effect to them are to govern the contract - Article X(c).

In each of the three instances set out above the carriage envisaged is from the port of one state to a port in another state. Even if goods were discharged short of destination, in circumstances where the actual port of discharge was situated in the same state as the load port, the Rules will in my view nevertheless apply as the Bill of Lading would still show that international carriage was intended.

The final paragraph of this Article reads:–

> "This Article shall not prevent a Contracting State from applying the Rules of this Convention to Bills of Lading not included in the preceding paragraphs".

The UK has taken advantage of this and in Section 1 of the 1971 Act (set out in Appendix 3 to this paper) we apply the Rules to the following additional situations:–

(a) Where the port of shipment is a port in the UK whether or not the carriage is between two different states whithin the meaning of Article X - see section I(3) of the 1971 Act. This effectively means that even domestic sea carriage around the UK will be covered by the Rules if a Bill of Lading is issued. The Act also enables the UK to extend the application of the Rules to shipments from territories such as the Isle of

Man and Channel Islands as if they were part of the UK - Section V(1) of the 1971 Act.

In addition the 1971 Act provides that the Rules shall have the force of law in relation to:–

(b) Any voyage whether or not between ports in different states where the contract contained in or evidenced by the Bill of Lading expressly provides that the Rules shall govern the contract - Section I(6)(a) of the 1971 Act. This would therefore include domestic sea carriage within a state other than the UK and is therefore wider than Article X(c).

(c) Any voyage whether or not between ports in different states where the contract is contained in or evidenced by a non-negotiable document marked as such which expressly provides that the Rules are to govern the contract as if the receipt were a Bill of Lading - Section 1(6)(b).

This then potentially covers roll-on roll-off ferry shipments from the UK to the Continent of Europe where most consignments of cargo are carried under non-negotiable receipt notes or consignments notes rather than Bills of Lading.

There are two rather interesting conflicting first instance decisions of the Commercial Court involving Section 1(6)(b) and non-negotiable consignment notes. In the first the "VECHSCROON" 1982 Lloyds Law Reports Volume 1 page 301, the sea carriers imposed a limit of liability lower than that set out in the Hague Visby Rules. The consignment note incorporated the Hague Visby Rules but then sought to impose a lower limit of liability. It was argued for the defendants that there was a distinction to be drawn between a consignment note which said "this non-negotiable receipt shall be governed by the Hague-Visby Rules" and a document which said "this non-negotiable receipt shall be governed by the Hague-Visby Rules as if it were a Bill of Lading". The Judge held that the intention of Parliament was merely to equate non-negotiable receipts expressly governed by the Rules with Bills of Lading and finding no assistance in arguments on the particular construction of the conditions of carriage the Judge held that the limitation clause could not be relied upon as it contravened the Hague-Visby Rules limitation provisions.

This case must be compared with a later decision of Browner International Limited -v- Monarch Shipping Co. Limited ("THE EUROPEAN ENTERPRISE") 1989 2 Lloyds Law Reports page 185.

In this case again the ferry operators used a consignment note or waybill which provided that goods were carried subject to the Hague-Visby Rules except that the Hague-Visby limitation provisions were only to apply in a very modified form. Here the carriers deleted most of Article IV Rule 5(a) and only left the package limit. The Judge held that for the Rules to have a statutory application they could only do so if the formal requirements in Section I(6)(b) were complied with namely, the consignment note had to be marked as a

non- negotiable document and expressly provide that the Rules were to govern as if the receipt were a Bill of Lading. As the words "as if the receipt were a Bill of Lading" were not included in this particular consignment note, the Judge held that the consignment note failed to comply with Section 1(6)(b). As the Rules had no legislative force it was open to the Judge to decide whether on a construction of the consignment note terms that only a partial incorporation of the Rules was intended by the parties. The Judge then held that only when the receipt expressly provided that the whole Convention was to govern the contract would Section I(6)(b) come into operation and that Parliament in enacting Section I(6)(b) did not intend to override the agreement of the parties when the parties had freedom of choice whether or not to incorporate the Rules into their contract.

Accordingly the Judge held that both the omission of the words "as if the receipt were a Bill of Lading" and the fact that only a partial incorporation of the Rules was intended precluded the Rules from applying statutorily by virtue of Section I(b).

Following this decision it would seem that the present position in the UK is that whilst it is possible for the Hague-Visby Rules to apply statutorily to waybills or non-negotiable consignment notes/receipts, they only do apply if the consignment note etc complies in all respects with Section I(6)(b) of the 1971 Act. Whilst there are conflicting decisions on this point most authors appear to favour the "EUROPEAN ENTERPRISE" decision over the "VECHSCROON".

4. Transhipment

I would like next to mention the question of transhipment. Article X only applies "to the carriage of goods between ports in two different states". Do the Hague-Visby Rules still apply if goods which are destined for a foreign port are nevertheless transhipped in a port in the same state as the port of loading? I would submit that the Hague-Visby Rules would apply in such a situation. It was the intention of the parties that the carriage was to be of an international nature and this would have been stated in the bill of Lading. Accordingly if the port of discharge actually specified in the Bill of Lading is in a different state to the port of loading and the Hague-Visby Rules apply to the Bill of Lading by virtue of Article X, then the Rules will apply. If however the shipowner only assumes liability from the port of loading to the port of transhipment and thereafter acts only as an agent for the onward carrier then the Rules will not apply to that Bill of Lading unless the port of transhipment is in a different state from the original port of shipment.

As already discussed the UK Carriage of Goods by Sea Act 1971 is wider in its application than Article X a situation like that discussed above where the port of transhipment was in the same state as the original port of shipment would be covered by Section I(3).

In England at least it does appear that once the Rules have begun to apply, by virtue of

shipment in the UK they do so throughout the transit. In the case of Mayhew Foods Limited -v- Overseas Containers Limited 1984 Lloyds Law Reports volume 1 page 317 it was held that the Hague-Visby Rules, which applied as the port of loading was within the UK, the Hague-Visby Rules continued to apply during a period of transhipment at Le Havre when the carrier OCL chose to avail themselves of their contractual right to discharge store and tranship the goods. The Court held that once the Rules had started to apply on shipment at the UK port they remained continually in force until discharge at Jeddah, the port of discharge.

5. The Hague-Visby and main features of Hamburg Rules compared

The main purpose of this paper has been to compare the Hague Rules and Hague-Visby amendments. The Hamburg Rules came into force on 1st November. I conclude this paper by taking the major features of the Hamburg Rules and comparing them with the Hague-Visby provisions. Time only allows a rather superficial look. If some major countries ratify them then they will deserve greater attention.

As I said at the outset of this paper the Hamburg Rules are completely original, they are not a further amendment of the Hague-Rules. For ease of reference I set out in Appendix IV the Hamburg Rules.

(a) Applicability

The Hague and Hague-Visby rules apply to contracts of carriage evidenced by Bills of Lading, they are not designed to apply to Charterparties or Bills of Lading issued under Charterparties (so long as the Bills remain in the hands of the charterer) or contracts of carriage evidenced by waybills or other non- negotiable documents although as we have seen above the UK COGSA does give the Rules the force of law when a certain form of waybill or non-negotiable document is used (Section 1(6)(b).

The Hamburg Rules however apply to "any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another, so it is immaterial whether a Bill of Lading or a non-negotiable receipt is issued. The Hamburg Rules are not however applicable to Charterparties or Bills of Lading issued pursuant to Charterparties unless such a Bill "governs the relation between the carrier and the holder" (see Article 2(3)).

(b) The Carrier liable

The Hague Visby Rules do not provide who the "carrier"actually is in a given situation. The Hamburg Rules are more precise in identifying who is liable as carrier and increases the numbers of parties who are potentially liable. Accordingly "carrier" in Article I(1) means any person by whom or in whose name a contract of carriage

of goods by sea has been concluded with a shipper and the concept of an "actual carrier" is introduced in Article 1(2) which means any person to whom the performance of the carriage of the goods or part of the carriage, has been entrusted by the carrier. Where performance of the carriage or part is entrusted to an actual carrier, the carrier nevertheless remains responsible for the entire carriage (Article 10(1)) and all provisions of the Rules governing the responsibility of the carrier also apply to the responsibility of the actual carrier in relation to the carriage performed by the actual carrier. (Article 10(2)).

(c) Obligations of the Carrier

Under the Hague-Visby Rules the carrier has a two-fold obligation, to provide a seaworthy ship and to take reasonable care of the cargo. In relation to seaworthiness the carrier must exercise due diligence before and at the commencement of the voyage to provide a seaworthy ship. I have discussed the burden of proof at the beginning of the paper. In framing the Hamburg Rules the draftsman adopted the argument long advanced by cargo interests, namely that the carrier liability should be based exclusively on fault and that a carrier's should be liable without exception for all loss of and damage to cargo that results from his own fault or the fault of his servants or agents. There is then an affirmative rule of responsibility based on presumed fault and the catalogue of exceptions contained in Article IV Rule 2 of the Hague-Visby Rules are abolished. The basis of liability in the Hamburg Rules is set out in Article 5(1). You will see it states:–

"The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay and delivery if the occurrence which caused the loss, damage or delay took place while the goods were in his charge unless the carrier provides that his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences".

This means that carrier liability is based exclusively on fault and that once the cargo owner has established that the damage or loss occurred during the voyage the burden is on the carrier to prove that he was not at fault.

Whilst as stated above the Hamburg Rules have abolished the catalogue of exceptions that appear in the Hague Visby Rules in Article IV Rule 2 an exception is made in the case of damage caused by fire. Article 5(4) provides that a carrier is only liable for loss caused by fire if the cargo owner proves either that the fire arose from fault or neglect on the part of the carrier, his servants or agents or from their fault or neglect in not taking all reasonable measures to put it out.

(d) Limitation of Liability

We have already looked at the increased limits of liability in the Hague-Visby Rules. In fact the Hamburg rules contain the same scheme, that is to say a limit based either

on a "per package" or "gross weight" basis whichever is the higher but the limits are increased to 835 SDR's per package or 2.5 SDR's per kilo.

(e) Time Bar

Quite simply the time bar is extended to two years rather than the one year period in the Hague and Hague-Visby Rules.

(f) Jurisdiction

Unlike the Hague-Visby Rules the Hamburg Rules make provision for jurisdiction. If you turn to Article 21 you will see that the Plaintiff is given the option to commence proceedings in one of the following places, either the place where the Defendant has his principal place of business or habitual residence, or the place where the contract was made (provided that the Defendant has a place of business or an agency there), or the place of the port of loading or port of discharge, or any additional place expressly agreed in the contract of carriage.

Alternatively the parties may provide by agreement in writing that any claim may be referred to arbitration and in Article 22(3) there are identical provisions giving to the claimant the option of where arbitration may be commenced as I have discussed above in relation to proceedings.

Whereas then the Hague-Visby Rules merely offer an amended regime and, I would suggest, quite considerable certainty due to the fact that they have already been in force in a number of major countries for some years, the Hamburg Rules give rise to completely new problems. It remains to be seen whether the major trading nations are content to remain with the Hague-Visby Rules or whether in the course of time the Hamburg Rules become more widely used.

I have only referred very briefly to the Hamburg Rules and highlighted some of their original features, you will start to see some claims where they apply but for you the immediate challenge remains the Hague-Visby Rules.

APPENDIX I PAGE 1

INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW RELATING TO BILLS OF LADING (HAGUE RULES)

Done at Brussels on 25th August 1924
Entry into force: 2nd June 1931, in accordance with Article 11

State

Algeria

Argentina
Australia
Bolivia
Congo
Cuba
Dominican Rep
Ecuador
Estonia
Fiji
Eire
Iran
Israel
Ivory Coast
Japan
Kuwait
Madagascar
Mauritius
Monaco
Paraguay
Peru
Portugal
Solomon Islands
Sri Lanka
Turkey
United Rep. of Tanzania
United States of America
Yugoslavia

APPENDIX I PAGE 2

PROTOCOL TO AMEND THE BRUSSELS INTERNATIONAL CONVENTION OF 25 AUGUST 1924 FOR THE UNIFICATION OF CERTAIN RULES OF LAW RELATING TO BILLS OF LADING (HAGUE-VISBY RULES)

Done at Brussels on 23 February 1968
Entry into force: 23 June 1977, in accordance with Article 14

State	Date
*Belgium	06.09.1978
*Denmark	20.11.1975
Ecuador	23.03.1977
*Finland	01.12.1984
*France	10.03.1977
Germany	14.02.1979
*Italy	22.08.1985
*Netherlands	26.04.1982
*Norway	19.03.1974
*Poland	12.02.1980
*Singapore	25.04.1972
*Spain	06.01.1982
Sri Lanka	21.10.1981
*Sweden	09.12.1974
*Switzerland	11.12.1975
*Syria	01.08.1974
Tonga	13.06.1978
*United Kingdom	01.10.1976

*States that have ratified the SDR Protocol

APPENDIX I PAGE 3

UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA (HAMBURG RULES)

Done at Hamburg on 31 March 1978
Entry into force: 1st November 1992

State

Barbados
Botswana
Burkina Faso
Chile
Egypt
Guinea

Hungary
Kenya
Lebanon
Losotho
Malawi
Morocco
Nigeria
Romania
Senegal
Sierra Leone
Tanzania
Tunisia
Uganda
Zambia

APPENDIX II-HAGUE RULES WITH HAGUE-VISBY AMENDMENTS

ARTICLE 1

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

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

(b) "Contract of Carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) "Goods" includes goods, wares, merchandise and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) "Ship" means any vessel used for the carriage of goods by sea.

(e) "Carriage of Goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

ARTICLE II

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

ARTICLE III

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
   (a) Make the ship seaworthy;
   (b) Properly man, equip and supply the ship;
   (c) Make the holds, refrigerating and cooled chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.
2. Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.
3. After receiving the goods into his charge, the carrier or the Master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:
   (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.
   (b) Either the number of packages or pieces, or the quantity or wight, as the case may be, as furnished in writing by the shipper.
   (c) The apparent order and condition of the goods. Provided that no carrier, Master or agent of the carrier shall be bound to state or show in the bill of lading any mark, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking.
4. *Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(a), (b) and (c).**

Hague-Visby Amendment

*4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the

goods as therein described in accordance with paragraph 3 (a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of the shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.
6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.
   If the loss or damage is not apparent the notice must be given within three days of the delivery of the goods.
   The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection.
   *In any event, the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. In the case of any actual apprehended loss or damage, the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.**

Hague-Visby Amendment

*6. (Paragraph 4) Subject to Paragraph 6 bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.

6b is An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph, if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.

7. After the goods are loaded the bill of lading to be issued by the carrier, Master or agent

of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, Master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article III shall for the purpose of this Article be deemed to constitute a "shipped" bill of lading.

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

ARTICLE IV

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which the goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article.
2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
   (a) Acts, neglect or default of the Master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
   (b) Fire, unless caused by the actual fault or privity of the carrier;
   (c) Perils, dangers and accidents of the sea or other navigable waters;
   (d) Act of God;
   (e) Act of war;
   (f) Act of public enemies;
   (g) Arrest or restraint of princes, rulers or people, or seizure under legal process;
   (h) Quarantine restrictions;
   (i) Act or omission of the shipper or owners of the goods, his agent or representatives;

(j) Strikes or lock outs or stoppage or restraint of labour from whatever cause, whether partial or general;
(k) Riots and civil commotions;
(l) Saving or attempting to save life or property at sea;
(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;
(n) Insufficiency of packing;
(o) Insufficiency or inadequacy of marks;
(p) Latent defects not discoverable by due diligence;
(q) Any other cause arising without the actual fault or privity of the carrier or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault of privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for the loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.
4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.
5. *Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100.00 sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.*

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

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

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

Hague-Visby Amendment

*5. (a) Unless the nature and value of such goods have been declared by the shipper before

shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 10,000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged whichever is the higher.

(b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.
The value of the goods shall be fixed according to the commodity exchange price or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

(c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed to the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.

(d) A franc means a unit consisting of 65.6 milligrams of gold of millesimal fineness 900. The date of conversion of the sum awarded into national currencies shall be governed by the law of the Court seized of the case.

(e) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proven that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with the knowledge that damage would probably result.

(f) The declaration mentioned in sub-paragraph (a) of this paragraph, if embodied in the bill of lading, shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

(g) By agreement between the carrier, Master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph.

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

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, Master, or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such

goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place,or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Hague-Visby Amendment

ARTICLE IV BIS

1. The defences and limits of liability provided for in this Convention 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 this Convention.
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 this Convention.
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 intend to cause damage or recklessly and with knowledge that damage would probably result.

ARTICLE V

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

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

ARTICLE VI

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

Any agreement so entered into shall have full legal effect.

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

ARTICLE VII

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to, the discharge from, the ship on which the goods are carried by sea.

ARTICLE VIII

The provisions of this Convention shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners for sea going vessels.

ARTICLE IX

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

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

The national laws may reserve to the debtor the right of discharging his debt in national

currency according to the rate of exchange prevailing on the day of the arrival of the ship at the port of discharge of the goods concerned.

Hague-Visby Amendment

ARTICLE IX

This Convention shall not affect the provisions of any international Convention or national law government liability for nuclear damage.

ARTICLE X

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

Hague-Visby Amendment

*ARTICLE X

The provisions of this Convention shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

(a) the bill of lading is issued in Contracting State, or

(b) the carriage is from a port in a Contracting State; or

(c) the contract contained in or evidenced by the bill of lading provides that this Convention or legislation of any State giving effect to it is to govern the contract, whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

Each Contracting State shall apply the provisions of this Convention to the bills of lading mentioned above.

This Article shall not prevent a Contracting State from applying the Rules of this Convention to bills of lading not included in the preceding paragraphs.

APPENDIX III – SECTION 1 OF CARRIAGE OF GOODS BY SEA ACT 1971

Section 1

(1) In this Act, "the Rules" means the International Convention for the unification of

certain rules of law relating to bills of lading signed at Brussels on 25th August 1924, as amended by the Protocol signed at Brussels on 23rd February 1968.

(2) The provisions of the Rules, as set out in the Schedule to this Act, shall have the force of law.

(3) Without prejudice to subsection (2) above, the said provision shall have effect (and have the force of law) in relation to and in connection with the carriage of goods by sea in ships where the port of shipment is a port in the United Kingdom, whether or not the carriage is between ports in two different States within the meaning of Article X of the Rules.

(4) Subject to subsection (6) below, nothing in this section shall be taken as applying anything in the Rules to any contract for the carriage of goods by sea, unless the contract expressly or by implication provides for the issue of a bill of lading or any similar document of title.

(5) The Secretary of State may from time to time by order made by statutory instrument specify the respective amounts which for the purposes of paragraph 5 of Article IV of the Rules and of Article IV bis of the Rules are to be taken as equivalent to the sums expressed in francs which are mentioned in sub-paragraph (a) of that paragraph.

(6) Without prejudice to Article X(c) of the Rules, the Rules shall have the force of law in relation to:–

(a) any bill of lading if the contract contained in or evidence by it expressly provides that the Rules shall govern the contract, and

(b) any receipt which is a non-negotiable document marked as such if the contract contained in or evidence by it is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading.

but subject, where paragraph (b) applies, to any necessary modifications and in particular with the omission in Article III of the Rules of the second sentence of paragraph 4 and of paragraph 7.

(7) If and so far as the contract contained in or evidence by a bill of lading or receipt within paragraph (a) or (b) of subsection (6) above applies to deck cargo or live animals, the Rules as given the force of law by that subsection shall have effect as if Article I(c) did not exclude deck cargo and live animals.

In this subsection "deck cargo" means cargo which by the contract of carriage is stated as being carried on deck and is so carried.

UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA, 1978 (*1)

PREAMBLE

. . .

having recognized the desirability of determining by agreement certain rules relating to the carriage of goods by sea,

. . .

PART 1. — GENERAL PROVISIONS

Definitions

Art. 1. In this Convention:

– 1. 'Carrier' means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.

– 2. 'Actual carrier' means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.

– 3. 'Shipper' means any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.

– 4. 'Consignee' means the person entitled to take delivery of the goods.

– 5. 'Goods' includes live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, 'goods' includes such article of transport or packaging if supplied by the shipper.

– 6. 'Contract of carriage by sea' means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea.

– 7. 'Bill of lading' means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

– 8. 'Writing' includes, *inter alia*, telegram and telex.

Scope of application

Art. 2. – 1. The provisions of this Convention are applicable to all contracts of carriage by sea between two different States, if:

(a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or

(b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or

(c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or

(d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or

(e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

– 2. The provisions of this Convention are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.

– 3. The provisions of this Convention are not applicable to charterparties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.

– 4. If a contract provides for future carriage of goods in a series of shipments during an agreed period, the provisions of this Convention apply to each shipment. However, where a shipment is made under a charter-party, the provisions of paragraph 3 of this article apply.

Interpretation of the Convention

Art. 3. In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity.

PART II. – LIABILITY OF THE CARRIER

Period of responsibility

Art. 4. – 1. The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.

– 2. For the purpose of paragraph 1 of this article, the carrier is deemed to be in charge of the goods

(a) from the time he has taken over the goods from:

(i) the shipper, or a person acting on his behalf; or

(ii) an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment;

(b) until the time he has delivered the goods:

(i) by handing over the goods to the consignee; or

(ii) in cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or

(iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.

– 3. In paragraphs 1 and 2 of this article, reference to the carrier or to the consignee means, in addition to the carrier or the consignee, the servants or agents, respectively of the carrier or the consignee.

Basis of liability

Art. 5. – 1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

– 2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.

– 3. The person entitled to make a claim for the loss of goods may treat the goods as lost if they have not been delivered as required by article 4 within 60 consecutive days following the expiry of the time for delivery according to paragraph 2 of this article.

– 4. (a) The carrier is liable

(i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;

(ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents, in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.

(b) In case of fire on board the ship affecting the goods, if the claimant or the carrier so desires, a survey in accordance with shipping practices must be held into the cause and circumstances of the fire, and a copy of the surveyor's report shall be made available on demand to the carrier and the claimant.

– 5. With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.

– 6. The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.

– 7. Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier

proves the amount of the loss, damage or delay in delivery not attributable thereto.

Limits of liability

Art. 6. – 1. (a) The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea.

(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

– 2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 (a) of this article, the following rules apply:

(a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.

(b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.

– 3. Unit of account means the unit of account mentioned in article 26.

– 4. By agreement between the carrier and the shipper, limits of liability exceeding those provided for in paragraph 1 may be fixed.

Application to non-contractual claims

Art. 7. – 1. The defences and limits of liability provided for in this Convention apply in any action against the carrier in respect of loss or damage to the goods covered by the contract of carriage by sea, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise.

– 2. If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

– 3. Except as provided in article 8, the aggregate of the amounts recoverable from the carrier and from any persons referred to in paragraph 2 of this article shall not exceed the limits of liability provided for in this Convention.

Loss of right to limit responsibility

Art. 8. – 1. The carrier is not entitled to the benefit of the limitation of liability provided for in

article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

– 2. Notwithstanding the provisions of paragraph 2 of article 7, a servant or agent of the carrier is not entitle to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

Deck cargo

Art. 9. – 1. The carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations.

– 2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier must insert in the bill of lading or other document evidencing the contract of carriage by sea a statement to that effect. In the absence of such a statement the carrier has the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier is not entitled to invoke such an agreement against a third party, including a consignee, who has acquired the bill of lading in good faith.

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

– 4. Carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of article 8.

Liability of the carrier and actual carrier

Art. 10. – 1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.

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

– 3. Any special agreement under which the carrier assumes obligations not imposed by this

Convention or waives rights conferred by this Convention affects the actual carrier only if agreed to by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement.

– 4. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.

– 5. The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability provided for in this Convention.

– 6. Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier.

Through carriage

Art. 11. – 1. Notwithstanding the provisions of paragraph 1 of article 10, where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named person other than the carrier, the contract may also provide that the carrier is not liable for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage. Nevertheless, any stipulation limiting or excluding such liability is without effect if no judicial proceedings can be instituted against the actual carrier in a court competent under paragraph 1 or 2 of article 21. The burden of proving that any loss, damage or delay in delivery has been caused by such an occurrence rests upon the carrier.

– 2. The actual carrier is responsible in accordance with the provisions of paragraph 2 of article 10 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge.

PART III. – LIABILITY OF THE SHIPPER

General rule

Art. 12. The shipper is not liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor is any servant or agent of the shipper liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part.

Special rules on dangerous goods

Art. 13. – 1. The shipper must mark or label in a suitable manner dangerous goods as dangerous.

– 2. Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper must inform him of the dangerous character of the goods and, if necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character:

(a) the shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment

of such goods, and

(b) the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

– 3. The provisions of paragraph 2 of this article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character.

– 4. If, in cases where the provisions of paragraph 2, subparagraph (b), of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 5.

PART IV. – TRANSPORT DOCUMENTS

Issue of bill of lading

Art. 14. – 1. When the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading.

– 2. The bill of lading may be signed by a person having authority from the carrier. A bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.

– 3. The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.

Contents of bill of lading

Art. 15. – 1. The bill of lading must include, *inter alia*, the following particulars:

(a) the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

(b) the apparent condition of the goods;

(c) the name and principal place of business of the carrier;

(d) the name of the shipper;

(e) the consignee if named by the shipper;

(f) the port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading;

(g) the port of discharge under the contract of carriage by sea;

(h) the number of originals of the bill of lading, if more than one;

(i) the place of issuance of the bill of lading;

(j) the signature of the carrier or a person acting on his behalf;

(k) the freight to the extent payable by the consignee or other indication that freight is payable

by him;

(l) the statement referred to in paragraph 3 of article 23;

(m) the statement, if applicable, that the goods shall or may be carried on deck;

(n) the date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties; and

(o) any increased limit or limits of liability where agreed in accordance with paragraph 4 of article 6.

– 2. After the goods have been loaded on board, if the shipper so demands, the carrier must issue to the shipper a 'shipped' bill of lading which, in addition to the particulars required under paragraph 1 of this article, must state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier, the shipper must surrender such document in exchange for a 'shipped' bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a 'shipped' bill of lading if, as amended, such document includes all the information required to be contained in a 'shipped' bill of lading.

– 3. The absence in the bill of lading of one or more particulars referred to in this article does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in paragraph 7 of article 1.

Bills of lading: reservations and evidentiary effect

Art. 16. – 1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a 'shipped' bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person must insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.

– 2. If the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparant good condition.

– 3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:

(a) the bill of lading is *prima facie* evidence of the taking over or, where a 'shipped' bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and

(b) proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein.

– 4. A bill of lading which does not, as provided in paragraph 1, subparagraph (k) of article 15, set forth the freight or otherwise indicate that freight is payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, is *prima facie* evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier

is not admissible when the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

Guarantees by the shipper

Art. 17. – 1. The shipper is deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper must indemnify the carrier against the loss resulting from inaccuracies in such particulars. The shipper remains liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity in no way limits his liability under the contract of carriage by sea to any person other than the shipper.

– 2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss resulting from the issuance of the bill of lading by the carrier, or by a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, is void and of no effect as against any third party, including a consignee, to whom the bill of lading has been transferred.

– 3. Such letter of guarantee or agreement is valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including a consignee, who acts in reliance on the description of the goods in the bill of lading. In the latter case, if the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier has no right of indemnity from the shipper pursuant to paragraph 1 of this article.

– 4. In the case of intended fraud referred to in paragraph 3 of this article the carrier is liable, without the benefit of the limitation of liability provided for in this Convention, for the loss incurred by a third party, including a consignee, because he has acted in reliance on the description of the goods in the bill of lading.

Documents other than bills of lading

Art. 18. Where a carrier issues a document other than a bill of lading to evidence the receipt of the goods to be carried, such a documents is *prima facie* evidence of the conclusion of the contract of carriage by sea and the taking over by the carrier of the goods as therein described.

PART V. – CLAIMS AND ACTIONS

Notice of loss, damage or delay

Art. 19. – 1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the carrier not later than the working day after the day when the goods were handed over to the consignee, such handing over is *prima facie* evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition.

– 2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply correspondingly if notice in writing is not given within 15 consecutive days after the day when the goods were handed over to the consignee.

– 3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

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

– 5. No compensation shall be payable for loss resulting from delay in delivery unless a notice has been given in writing to the carrier within 60 consecutive days after the day when the goods were handed over to the consignee.

– 6. If the goods have been delivered by an actual carrier, any notice given under this article to him shall have the same effect as if it had been given to the carrier, and any notice given to the carrier shall have effect as if given to such actual carrier.

– 7. Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the carrier or actual carrier to the shipper not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2 of article 4, whichever is later, the failure to give such notice is *prima facie* evidence that the carrier or the actual carrier has sustained no loss or damage due to the fault or neglect of the shipper, his servants or agents.

– 8. For the purpose of this article, notice given to a person acting on the carrier's or the actual carrier's behalf, including the master or the officer in charge of the ship, or to a person acting on the shipper's behalf is deemed to have been given to the carrier, to the actual carrier or to the shipper, respectively.

Limitation of actions

Art. 20. – 1. Any action relating to carriage of goods under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

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

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

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

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

Jurisdiction

Art. 21. – 1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

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

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

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

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

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

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

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

– 4. (a) Where an action has been instituted in a court competent under paragraph 1 or 2 of this article or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgement of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted;

(b) for the purpose of this article the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action;

(c) for the purpose of this article, the removal of an action to a different court within the same country, or to a court in another country, in accordance with paragraph 2 (a) of this article, is not to be considered as the starting of a new action.

– 5. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an action, is effective.

Arbitration

Art. 22. – 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.

PART VI. – SUPPLEMENTARY PROVISIONS

Contractual stipulations

Art. 23. – 1. Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea in null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, is null and void.

– 2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention.

– 3. Where a bill of lading or any other document evidencing the contract of carriage by sea is issued, it must contain a statement that the carriage is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to he detriment of the shipper or the consignee.

– 4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 3 of this article, the carrier must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this Convention for

any loss of or damage to the goods as well as for delay in delivery. The carrier must, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.

General average

Art. 24. – 1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage by sea or national law regarding the adjustment of general average.

– 2. With the exception of article 20, the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.

Other conventions

Art. 25. – 1. This Convention does not modify the rights or duties of the carrier, the actual carrier and their servants and agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.

– 2. The provisions of articles 21 and 22 of this Convention do not prevent the application of the mandatory provisions of any other multilateral convention already in force at the date of this Convention relating to matters dealt with in the said articles, provided that the dispute arises exclusively between parties having their principal place of business in States members of such other convention. However, this paragraph does not affect the application of paragraph 4 of article 22 of this Convention.

– 3. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or

(b) by virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

– 4. No liability shall arise under the provisions of this Convention for any loss of or damage to or delay in delivery of luggage for which the carrier is responsible under any international convention or national law relating to the carriage of passengers and their luggage by sea.

– 5. Nothing contained in this Convention prevents a Contracting State from applying any other international convention which is already in force at the date of this Convention and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than transport by sea. This provision also applies to any subsequent revision or amendment of such international convention.

Unit of account

Art. 26. – 1. The unit of account referred to in article 6 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 6 are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency in terms of the Special Drawing Right of a Contracting State which is not a member of the International Monetary Fund is to be calculated in a manner determined by that State.

– 2. Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, or at the time of ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as:

12,500 monetary units per package or other shipping unit or 37.5 monetary units per kilogramme of gross weight of the goods.

– 3. The monetary unit referred to in paragraph 2 of this article corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amounts referred to in paragraph 2 into the national currency is to be made according to the law of the State concerned.

– 4. The calculation mentioned in the last sentence of paragraph 1 and the conversion mentioned in paragraph 3 of this article is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for the amounts in article 6 as is expressed there in units of account. Contracting States must communicate to the depositary the manner of calculation pursuant to paragraph 1 of this article, or the result of the conversion mentioned in paragraph 3 of this article, as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this article and whenever there is a change in the manner of such calculation or in the result of such conversion.

PART VII. – FINAL CLAUSES

Depositary

Art. 27. – The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Signature, ratification, acceptance, approval, accession

Art. 28. – 1. This Convention is open for signature by all States until 30 April 1979 at the

Headquarters of the United Nations, New York.

– 2. This Convention is subject to ratification, acceptance or approval by the signatory States.

– 3. After 30 April 1979, this Convention will be open for accession by all States which are not signatory States.

– 4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Reservations

Art. 29. No reservations may be made to this Convention.

Entry into force

Art. 30. – 1. This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the 20th instrument of ratification, acceptance, approval or accession.

– 2. For each State which becomes a Contracting State to this Convention after the date of the deposit of the 20th instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instruments on behalf of that State.

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

Denunciation of other conventions

Art. 31. – 1. Upon becoming a Contracting State to this Convention, any State party to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924 (1924 Convention) must notify the Government of Belgium as the depositary of the 1924 Convention of its denunciation of the said Convention with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

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

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

– 4. Notwithstanding article 2 of this Convention, for the purposes of paragraph 1 of this article, a Contracting State may, if it deems it desirable, defer the denunciation of the 1924 Convention and of the 1924 Convention as modified by the 1968 Protocol for a maximum period of five years from

the entry into force of this Convention. It will then notify the Government of Belgium of its intention. During this transitory period, it must apply to the Contracting States this Convention to the exclusion of any other one.

Revision and amendment

Art. 32. – 1. At the request of not less than one-third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

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

Revision of the limitation amounts and unit of account or monetary unit

Art. 33. – 1. Notwithstanding the provisions of article 32, a conference only for the purpose of altering the amount specified in article 6 and paragraph 2 of article 26, or of substituting either or both of the units defined in paragraphs 1 and 3 of article 2 by other units is to be convened by the depositary in accordance with paragraph 2 of this article. An alteration of the amounts shall be made only because of a significant change in their real value.

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

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

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

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

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

Denunciation

Art. 34. – 1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

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

Done at Hamburg, this thirty-first day of March one thousand nine hundred and seventy-eight, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

In witness whereof the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.

ANNEX II

Common understanding adopted by the United Nations Conference on the carriage of goods by sea

It is the common understanding that the liability of the carrier under this Convention is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule.

Questions and Answers*

EXAMPLE 1

1. Who has title to sue?
   (A) With regard to the claim of cargo interests against the carriers.

ANSWER:

(1) Find out who is the lawful Bill of Lading holder.
It seems very clear that B is the lawful Bill of Lading holder but, in order to check this, we must see whether the three criteria set out on pages 55–56 of my article** are satisfied.

(i) THE POSSESSION REQUIREMENT
Is B the holder of the original Bill of Lading? – Yes.
Was he the holder of the original Bills at the time of delivery? – Yes.
So, the possession requirement is satisfied.

(ii) THE CONSIGNEE/INDORSEE REQUIREMENT
Is B either the named consignee in the Bills of Lading or an indorsee of the Bills? – Yes, he is the named consignee.
So this requirement is also satisfied.

(iii) Is B the holder of the Bills of Lading in good faith? – Yes, he purchased the cargo from A.
So this requirement is also satisfied.
So, it is confirmed that B is the lawful Bill of Lading holder with the right to sue in his own name.

(2) What about A?
He does not have any right to sue in his own name. He lost that right when B became the lawful Bill of Lading holder.

(3) What about Underwriters?
Assuming that English law governs the policy, subrogation rights will pass to Underwriters upon settlement of the policy claim by them; and they will accordingly then

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* The following questions were raised by the audience at the seminar in Tokyo on 12 November 1992 and answered by Mr. Ralph Evers, Solicitor, CLYDE & CO.

** See "Carriage of Goods by Sea Act 1992", No. 25 of THE BULLETIN OF THE JAPAN SHIPPING EXCHANGE, INC., March 1993.

have the right to pursue the carrier in B's name.

(4) Will Underwriters themselves become the lawful Bill of Lading Holder if B passes the remaining two original bills to them in support of his claim under the policy?
I do not think so! The reason for this is that bills of lading invariably contain a provision that, as soon as one has been accomplished, the others are to stand void. So, as soon as B has presented the first original bill of lading to the ship and taken delivery of the cargo, the other two originals will be void and will be incapable of transferring any rights to Underwriters.

(B) With regard to a claim by the carriers against cargo interests
If the carrier has any claim for outstanding freight, demurrage, etc. against cargo interests under the bill of lading contract, he may of course make his claim against A as shipper.
In addition, he may make his claim against B who will here satisfy both the necessary requirements:-
(i) he is the lawful bill of lading holder for the reasons given earlier; and
(ii) he took delivery of the cargo from the carrier against presentation of an original bill of lading.

2. What documents/information will Underwriters require from B in order to prove title to sue in a recovery action?
The information and documents which will be required are set out on page 27 of my paper. They are as follows:-
(i) An invoice. This is required in order to establish:
(a) that the goods were purchased by B in good faith; and
(b) (insofar as necessary) that the purchase was pursuant to a transaction effected prior to the delivery of the cargo.
(ii) The remaining originals of the bill of lading. These are required:
(a) to establish that B is the holder of the original bills; and
(b) in cases where he is the named consignee in the bills, to demonstrate that he has not endorsed the bills on to anyone else; alternatively, in cases where he is the endorsee of the bills, to show the endorsements.
(iii) It would be helpful also to have evidence that B or his agent did present the first original bill of lading to the ship in exchange for the cargo.
(iv) Charterparty, if any. This is needed if B is the charterer and/or if the bills of lading incorporate the terms of the charterparty.
(v) Subrogation Receipt

EXAMPLE 2

1. *Who has the right to apply for the surveyor to go on board?*

ANSWER:

First find out who is the lawful bill of lading holder.

On the facts here, it is clear that either C (the bank) or B (the receiver) is the lawful bill of lading holder. C was the bill of lading holder when the vessel went aground, but B has probably acquired the original bills of lading by the time of the vessels arrival at the discharge port.

Let us suppose that B has acquired the bills at the time the application is made. We must then check whether B satisfies the three necessary criteria.

(i) THE POSSESSION REQUIREMENT

Does B hold the original bills of lading? – Yes.

Was he the holder of the original bills at the time of delivery? – Yes; indeed, delivery may not even have taken place at the time of the application.

This requirement is therefore satisfied.

(ii) THE CONSIGNEE/INDORSEE REQUIREMENT

Is B the named consignee in the bills? – No; C (the bank) is the named consignee.

Is B the indorsee of the bills? – It will be necessary to see the original bills to check this, but no doubt C will have endorsed the bills either in blank or specifically to B. So B will also satisfy this requirement.

(iii) Is B the holder of the bills in good faith? – Yes; the invoice will show that he purchased the goods from A.

So B will be the lawful bill of lading holder with title to sue and can make the application in his own name for the surveyor to go on board the ship.

BUT what would the position have been if the vessel was taken to a port of refuge and Cargo Interests wished to apply for a surveyor to go on board the vessel while she was at the port of refuge?

It is very likely that, at that stage, B would not yet have received the original bills of lading. They may well still be held by C.

In such a case, B will not yet be the lawful bill of lading holder.

Will C be the lawful bill of lading holder? Let us examine whether C satisfies the three necessary criteria:

(i) THE POSSESSION REQUIREMENT

Does C hold the original bills of lading? – Yes. Let us assume that he does.

Since delivery has not taken place, it is not necessary to check that he holds the original bills at that stage.

(ii) THE CONSIGNEE/INDORSEE REQUIREMENT

Is C the named consignee? – Yes.

(iii) Is C the holder of the original bills in good faith? – Yes, the original bills of lading were passed to him pursuant to the letter of credit arrangements.

Thus, C will satisfy the necessary criteria and, on these assumed facts, will be the lawful bill of lading holder with title to sue the carrier and to make the application for the surveyor to go on board at the port of refuge.

Will C be willing to permit his name to be used for these purposes? – I do not know. If C is so willing, no problem arises. The application can be made in his name. If, on the other hand C is not willing to permit his name to be used, it may in that event be necessary for B/Underwriters to ask C to assist in forwarding the original bills of lading quickly to B, so that rights of suit will then pass to B and the application for the surveyor to go on board the ship can be made in B's own name.

Alternatively, C may be willing to assign his rights of suit to B.

2. *Who has the right to arrest the vessel at her final destination?*

The answer, of course, is B, as lawful bill of lading holder.

3. *Who has title to sue in substantive proceedings for GA damage and salvage indemnity?*

Again, the answer is B as lawful bill of lading holder.

4. *Who is liable for GA?*

There are in theory two persons who may be liable for GA.

(a) the person who owned the cargo at the time of the casualty and at the time the GA services were rendered; and

(b) the person, if any, who has a contractual obligation to pay GA contribution under the terms of the bill of lading contract.

In reality, however, the carrier and the GA adjuster will always look for payment of GA contribution to those who provided GA security:

(a) to the receiver who put up GA bonds; and

(b) to the Underwriters who provide GA guarantees.

5. *What would the position be if the contents had been washed over board in the storm and lost?*

The title to sue position remains unaffected by the total loss of cargo. As a matter of English law property in the cargo cannot pass after the cargo has been lost. Under the Pre 1992 Act regime, therefore, B may well never have acquired contractual rights of suit. Under the 1992 Act regime, however, rights of suit are no longer linked to property and B will now acquire title to sue if and when he becomes the lawful bill of lading holder, even if the goods have perished in the meantime.

Japan Maritime Information Service

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— Computerized Information Service —

Detailed and accurate data which contain:

☆ Particulars of all Japanese merchant ships over 100 tons gross (about 9,000 ships; Japanese version with English guide)

☆ Addresses and telephone numbers of Japanese shipowners, brokers, shipbuilders and other companies engaged in maritime businesses (about 2,000 companies; Japanese version)

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All or part of these data are available either on floppy discs for data-processing or as hard copy printout.

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