CHAPTER SIX

CONVENTIONS GOVERNING CONTRACTS FOR THE CARRIAGE OF GOODS BY SEA

Introduction

The three principal International Conventions that govern contracts of carriage of goods by sea are The Hague Rules, The Hague Visby Rules and the Hamburg Rules. The conventions regulate the apportionment of liability between the parties for loss and damage suffered by goods during carriage by sea and establish minimum standards for the care of cargo during sea transit. As such, they are of considerable importance to carriers be they shipowners or charterers. For the large part, contracts of carriage by sea are automatically governed by the relevant Conventions though there is the ability for parties belonging to non-contracting states to voluntarily submit to the strictures of the Conventions. In a limited number of situations the parties can contract out of the Conventions.

The Carriage of Goods by Sea Act 1924 and 1971 (incorporating Hague & Hague Visby Rules respectively**).**
The purpose of the C.O.G.S.A. has been stated per Lord Sumner in **Goose Millard v Canadian Government** as follows: *"To replace a conventional contract in which it was constantly attempted often with much success, to relieve the carrier of every kind of liability by a legislative bargain under which the carriers position was to be one of restricted exemption."*

C.O.G.S.A. 1924 contained 6 sections and 9 articles which brought into being as part of the English Law certain rules which emerged as a result of conferences held at The Hague in 1921 and in Brussels in 1922. The rules were amended in 1923 and an Act containing the amended rules received legal effect in the U.K. in August 1924. The main purpose of the Act was to lay down certain regulations, which were to apply to contracts for the carriage of goods by sea, where such contracts were evidenced by a bill of lading. The rules (known also as The Hague Rules) govern the relationship between carrier and shipper and subsequently between carrier and consignee and endorsee. Before the passing of the Act in the U.K. there was much opposition to it, and it was seen as direct interference with the age-old doctrine of freedom of contract. The 1924 Act was amended by the Protocol signed at Brussels on the 23rd February 1968, known as The Hague-Visby Rules. It was incorporated into a new Act of 1971, which repealed the old 1924 Act.

Application of the Act.

The scope of the new legislation remains true to the original concept, designed to provide for a certain basic standard of conduct on the part of carriers of goods by sea in their relationship with shippers and their assigns, where the contract of carriage expressly or by implication provides for the issue of a bill of lading or similar document of title, s1(4) C.O.G.S.A. 1971 but not otherwise. The application of the Rules falls into two parts, application by force of statute and application by reason of agreement between the parties.

Statutory Application covers

a) Contracts where the port of shipment is a port in the U.K. s1(3) C.O.G.S.A. 1971.
b). Contracts where the bill of lading is issued in a contracting state - Art X(a).
c). Contracts where the carriage of the goods is from a port of a contracting state - Art X(b) H.V.R.

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Application by contract applies to:

a). Any bill of lading where the carriage of goods is between ports in two different states and the contract provides that the Rules or the legislation of any State giving effect to the Rules are to govern the contract ; Art X(c) H.V.R.

b). Any bill of lading where the contract expressly provides that the rules shall govern the contract. s1(6)(a). C.O.G.S.A. 1971.

c). Any receipt being a non-negotiable document and marked as such, where the contract expressly provides that the Rules are to apply as if for a bill of lading. s1(6)(b). C.O.G.S.A. 1971. This is subject to any modifications, which may be necessary. In particular the conclusive evidence clause in Art II r4 H.V.R. has no application, nor does Art III r7 H.V.R. concerning the position of "received for shipment" and "shipped" bills of lading.

In respect of (b) and (c) above, the definition of "goods" as provided by Art 1(c) H.V.R. is extended to cover deck cargo and live animals, where the bill of lading or receipt in question is concerned with such a cargo. s1(7). C.O.G.S.A. 1971.

In relation to those applications of the Rules governed by Art X H.V.R., it is provided that the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person is immaterial.

Definitions provided by The Hague Visby Rules.

"**Carrier**" Art 1(a) H.V.R. includes the owner or the charterer who enters into a contract of carriage with a shipper; "Contract of carriage" - this covers only contracts of carriage governed by a bill of lading - or similar document of title -whether issued under a charterparty or otherwise, from the time when the bill of lading regulates the relations between a carrier and a holder of the same. Although the definition mentions "covered" by a bill of lading yet the Rules will apply even if loss takes place before issue, if it was intended that a bill of lading should be issued according to **Pyrene v Scindia**.[1]

"**Goods**" Art I(c) H.V.R. includes goods, wares, merchandise, and articles of every kind, but does not include live animals and cargo which by the contract of carriage is stated as being carried on deck and so carried. Where however, the contract is contained in or evidenced by a bill of lading which expressly provides that the Rules shall govern the contract; or where the contract is contained in or evidenced by a bill of lading which expressly provides that the Rules shall govern the contract; or where the contract is contained in or evidenced by a receipt which is a non-negotiable document, marked as such, which expressly states the Rules are to apply - then in either case where the bill of lading or receipt is in respect of live animals or deck cargo then the Rules will apply. s1(7) COGSA 1971

"Deck cargo" here also means cargo which by the contract is stated to be carried on deck and is so carried.

"**Ship**" Art I(d) H.V.R. means any vessel used for the carriage of goods by sea.

"**Carriage of goods**" Art I(e) H.V.R. covers the period from the time when the goods are loaded on, to the time they are discharged from the ship.

Situations to which C.O.G.S.A. 1971 does not apply.

Particular Goods. Article VI of COGSA 1971 provides that in the case of "particular goods" a carrier and a shipper may enter into a contract in any terms - including the right to exclude seaworthiness, as long as it is not contrary to public policy. In such a case, however, no bill of lading is to be issued and the terms of the contract must be contained in a receipt which must be "non-negotiable" and marked as such. There is no definition of "particular goods" but a proviso to Article VI states that its terms are not to apply to "ordinary commercial shipments made in the ordinary course of trade." To come within Article VI there must be either some special nature as to the cargo to be carried or some special circumstances as to the terms and conditions under which the carriage is to be performed, before the carrier may use such special agreement. Note by sl(6)(b) such a non-negotiable receipt may be expressly make the contract contained with it, or evidenced by it, subject to the Rules.

[1] **Pyrene v Scindia** [1954] 2 Q.B. 402.

Non-negotiable documents. The 1924 Act made provision for "coasting trade" where the goods were subject to a non-negotiable receipt. The present Act does not mention Coasting Trade at all, but it does appear from sl(6)(b) to envisage the use of non-negotiable documents marked as such which would not be covered by the Rules. This would appear to be in addition to the special proviso for particular goods. It is not at all clear, however, in what circumstances these are expected to operate.

Live Animals - Deck cargo. These are governed by Article 1(c) H.V.R. Whilst it might be thought that they fall outside the definition of "goods", they are covered by the Rules. However, depending on the interpretation given to the provision, if deck cargo and possibly live animals are stated to as being carried on deck and are actually be so carried, the Rules will not apply. The onus therefore is on the carrier issuing the bill of lading to specifically record these details in order to exclude the rules. In the absence of such a record the rules will apply by default. Note by contrast that in marine insurance the opposite is true. By default a policy will not provide cover for deck cargo, by virtue of Rule 17 of the Marine Insurance Act 1906, Rules for Construction of a Policy, unless usual in the trade, so the onus is on the assured to specifically record on the policy that any goods (not just live animals) will be carried on deck.

s1(7) C.O.G.S.A. 1971 makes specific provision for the bill of lading or non-negotiable receipt to expressly be made subject to the Rules if that is desired. Again, in the case of deck cargo, for this to be so, the document must state that cargo is to be carried on deck and it must be so carried. **Svenska Traktor v Maritime Agencies**.[2]

Charterparties. Article V H.V.R. states that the Rules do not apply to charterparties, but note that bills of lading issued under charterparties are to comply with the rules. The same Article provides that nothing in the rules prevents insertion in a bill of lading of any lawful provision regarding general average.

Limitation statutes. By Article VIII H.V.R. nothing in the rules is to affect the rights and obligation of the carrier under any statute concerning the limitation of liability of owners of seagoing ships. By s6(4) C.O.G.S.A. 1971 the provisions of s502 M.S.A. 1894 (now 1995) are to be treated as provisions of limitation.

Contracts to which C.O.G.S.A. 1971 does apply

The basic feature is that C.O.G.S.A. 1971 applies to the carriage of goods by sea, in circumstances already set out, from the time when the bill of lading or similar document of title governs the relationship between the carrier and the holder of the bill of lading.

The carrier's liabilities and immunities.

Article II H.V.R. provides a general account of the position of the carrier under C.O.G.S.A. It states that in relation to the loading, handling, stowage, carriage, custody, care and discharge of goods, he shall be subject to the responsibilities and liabilities and entitled to the rights and immunities as appear in the rules. The responsibilities are contained in Article III. The immunities appear in Article IV.

Article VII specifically enables the carrier to exclude liability for any incident which may take place outside the period governed by the Rules - prior to loading and subsequent to discharge. Under Article V the carrier may surrender in whole or in part any of his rights and immunities or may increase his responsibilities but these must be set out in the bill of lading issued to the shipper.

In order to prevent any other form of avoiding the liabilities imposed by the Act, Article III rule 8 makes any clause or agreement in a contract of carriage which relieves the carrier from the duties and obligations provided in Article III or which lessens the carriers liability, otherwise than as provided within the Rules, Article IV rule 5 in particular, null and void. Thus a clause limiting a carrier's liability to the invoice value of the goods may be void as lessening the carrier's liability under the Rules.

Nabob Foods v Cape Corseo.[3] A Statement in bill of lading that for the purpose of adjusting claims for which the shipowner was liable, the value of the goods was to be deemed to be the invoice value plus freight and insurance if paid, irrespective of whether any other value was greater or less. The court held, that this provision was repugnant to Article III rule 8 and therefore void.

2 **Svenska Traktor v Maritime Agencies** [1953] 2 Q.B. 295.

3 **Nabob Foods v Cape Corseo** [1954] 2 Lloyd's Rep 40.

Similarly a clause which restricts the time which the cargo owner may bring an action to less than that provided by Art III 2.6 will be null and void. **The Ion : Unicoopiapan v Ion S.S.**[4] The case conscerned a CENTROCON arbitration clause. In so far as it states that an arbiter must be appointed by a claimant within 3 months of the final discharge of the goods, the provision is void if incorporated into a bill of lading to which the Hague Rules apply, because it is in conflict with Article III rule 6 which provides a year for suit to be brought against the carrier of the ship. The claimant cargo owners, had shipped on board the respondents vessel 'Ion' cargo at Peruvian ports for Japan under a bill of lading stating 'All terms and conditions of charterparty including the Centrocon arbitration clause are herewith incorporated". Goods discharged were found to be short of 510 bags. The cargo owner submitted a claim and appointed an arbitrator 9 months later. The shipowner contended that the arbitrator was not appointed within the specified time. The cargo owners maintained that the appointment was all right as Article III rule 6 gave them a year to make the appointment. Brandon J held that there was a conflict between the arbitration clause and Article III rule 6 and that the arbitration clause even if it conflicted with the rules should not be regarded as the dominant provision. The second sentence of the arbitration clause conflicted with Article III rule 6 and was to that extent void but no further.

A clause which states that the certificate of a ship surveyor to the effect that the shipowner has used due diligence to make the ship seaworthy and that the certificate is to be conclusive as to the question of sea worthiness would also be void under Art III r8.

By virtue of Art V the carrier may surrender any of the rights and immunities given by the rules and may increase his responsibilities and obligations. However, the terms of each increase or surrender must appear on the bill of lading issued to the shipper if they are to be effective.

As the rules cover a period only from the time of loading to the time of discharge of the goods, Art VII states that the carrier may relieve himself of any form of liability in respect of loss or damage to the goods as long as this relates to a period other than that between the time of loading and the time of discharge. Both Art 1(e) and Art II are concerned with a period of time from the loading of goods to their discharge.

It has been held for these purposes that the carriage of goods commences in respect of loading at least from the time when the actual goods are attached to the ships tackle. **Pyrene v Scindia**.[5] Sellers delivered a fire tender - under a contract f.o.b. - London - alongside a ship nominated by the buyers. While the tender was being lifted on to the vessel by the ship's tackle and before it was across the rail it was dropped and damaged. Under the contract of sale the property had not then passed. A bill of lading had been drawn up but not issued. The court held that rights and liabilities under the Act did not attach to a period of time, but to a contract for the carriage of goods and loading covered the whole operation from the moment the goods were attached to the ship's tackle.

The contract of carriage for the purposes of COGSA will continue until the goods are actually discharged clear of the ship's tackle and probably up to the time when they are safely landed insofar as they have to be landed by lighter. In **Goodwin Ferreira v Lamport**,[6] 22 bales of white cotton yarn were carried from L to B where they were discharged into a lighter. Machinery packed in a wooden case was also lowered to the lighter when the case broke and the machinery fell into the lighter and holed it. Under the contract of carriage lighterage was to be at the risk of owners and COGSA incorporated. The cargo owners claimed damages. The court held that if the sea transit had ended when the goods were placed in the lighter the defendants were protected by the terms of the bill of lading. The sea transit however had not ended. The discharge into the lighter being part of the operation of discharge from the ship and was not completed as long as there were other goods to be discharged into the lighter. The exemption relating to loss due to insufficient packing Art IV r2(a) was wide enough to cover the case of other goods, though primarily it would apply to the goods themselves that were damaged. On the evidence, the shipowner had demonstrated that there had been no negligence on the part of themselves or their servants and were therefore exempt from liability under Art IV(2)(q).

4 **The Ion : Unicoopiapan v Ion S.S.** [1971] Lloyds 541.
5 **Pyrene v Scindia** [1954] Lloyds 321.
6 **Goodwin Ferreira v Lamport** (1929) 34 Lloyds 192.

Where the carrier seeks to make use of an exclusion clause under the terms of Art VII, the goods must have been discharged in a proper manner following good tender of the bill of lading. If this is not done, the carrier will not have fulfilled his duties under Art III r2 to properly discharge the goods and therefore an exclusion clause, excluding the carrier from liability for loss or damage to the goods after the time of discharge will not be operative **Rambler Cycle v P & 0.**[7]

Liabilities & responsibilities of carrier.

Seaworthiness. By s3 COGSA it is stated that the absolute undertaking of the common law for the provision of a seaworthy ship shall not be implied in those contracts of carriage to which the rules apply. Instead Art III rule 1 provides that the carrier shall be bound before and at the beginning of the voyage to exercise due diligence.

A. To make the ship seaworthy.
B. To properly man, equip and supply the ship.
C. To make holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

The words "*before and at the beginning of the voyage*" relate to the time at least from the commencement of loading to the actual sailing of the ship. See **Maxine Footware v Canadian Government**. When cargo was loaded, ship destroyed by fire. Shipowner did not use due diligence before and at the beginning of voyage. The court held that the shipowner was liable.

There is no doctrine of stages as such in respect of voyages to which COGSA applies. Instead, by Art III, what is required is that the ship be adequately prepared for the first stage of her voyage and that at the time due diligence should have been exercised in making proper arrangements in relation to any preparations which may be necessary in respect of later stages of the voyage. **The Makedonia**[8] broke down because fuel oil had been contaminated. The court held that the owners could rely on the exemption of liability given by Art IV r2(a) if they have exercised due diligence at first stage in arranging adequate bunkers.

The duty under C.O.G.S.A. 1971 to exercise due diligence is personal to the carrier, in the sense that he cannot successfully delegate that duty to another person. In such a manner as to avoid liability should that other person fail to exercise due diligence in carrying out the particular task. For example, if the carrier instructs a competent firm of ship repairers (thereby exercising due diligence) to repair his vessel and the ship repairers appoint competent workmen to carry out the repairs (thereby also exercising due diligence), but the workman carries out his work negligently and thereby renders the ship unseaworthy, then the carrier will be liable for this lack of exercise of due diligence on the part of the workman, who is considered to be a servant or agent of the carrier in this respect. Thus, although the carrier may delegate responsibility for providing a seaworthy ship, yet unless due diligence is exercised by all those who may be considered as servants or agents the carrier will be liable for any unseaworthiness which may result.

Under C.O.G.S.A. the carrier will be held responsible for any failure of his independent contractor to exercise due diligence to make the ship seaworthy. Thus in **The Muncaster Castle,**[9] a fitter employed by ship repairers negligently reinstalled inspection covers on storm valves. Water entered the valves during the voyage and damaged the cargo. The House of Lords held that the negligence of the fitter amounted to a lack of due diligence to make the ship seaworthy under Art III r1 for which the shipowner was responsible.

The proximate cause rule, as applied in **The Europa,** is also relevant to cases under C.O.G.S.A. in that the seaworthiness resulting from a lack of due diligence must have been the proximate cause of the loss or damage complained of, if the carrier is to be in breach of Art III r1 in anything other than a purely technical sense.

The mere fact that a carrier employs a Lloyds surveyor to inspect the ship and the surveyor provides a certificate stating the ship to be seaworthy will not be sufficient if in fact the surveyor does not exercise due diligence in carrying out his survey. The certificate as to seaworthiness will however provide good evidence

7 **Rambler Cycle v P & 0** [1968] 1 Lloyds 42
8 **The Makedonia** [1962] 2 All E.R. 614.
9 **The Muncaster Castle Riverstone Meat v Lancashire SS** [1961] A.C. 807.

of due diligence by the carrier, and as long as it is shown that the surveyor carried out his inspection or survey in the usual or proper manner, this should be sufficient to discharge the carrier's duty to provide a seaworthy ship. In **Union of India v N.V.Reeperii,**[10] a cargo of wheat was shipped at Portland for Bombay. A breakdown occurred in reduction gear. The plaintiff claimed for breach of contract in that the shipowner failed to exercise due diligence in making the ship seaworthy. The defendant contended that he had exercised due diligence in that the ship was properly inspected and that they were entitled to the protection of C.O.G.S.A. 1924. The court held that the breakdown was caused by a fatigue crack. Inspection was carefully performed. The shipowner had exercised due diligence.

Where the carrier has a ship built or purchases a ship from another it will be sufficient exercise of due diligence if the carrier shows that good ship builders were employed, that the plans were drawn up by experts and that the ship was finally surveyed and passed as seaworthy by a competent surveyor. If the surveyor is employed by the carrier then the surveyor must have exercised due diligence in the course of his survey. **Angliss v P & 0.**[11] Regarding purchase of a ship it will be sufficient if the carrier has had the ship surveyed by a competent ship surveyor who exercised due diligence during the survey.

Under Art IV r1 the carrier is only to be liable for loss or damage arising as a result of unseaworthiness, if the unseaworthiness is caused by a want of due diligence on the part of the carrier. It is further provided that the burden of proving that due diligence was exercised is upon the carrier. It is still necessary however for the holder of the bill of lading who complains about loss or damage by reason of unseaworthiness to make out a prima facie case showing that the vessel was unseaworthy and caused loss or damage to his interests.

Carrier Defences :
The carrier then has three main defences open to him.

1. He may show the ship was not in fact unseaworthy at all.
2. He may show that although the ship was unseaworthy as understood at common law, yet this unseaworthiness did not arise as a result of a want of due diligence to make the ship seaworthy on the part of the carrier or his servant or agents.
3. It would also be open to the carrier to show that the loss or damage complained of was not in fact caused by the unseaworthiness even though such unseaworthiness as existed did arise from a want of due diligence on the part of the carrier.

Under the American Harter Act the proximate cause rule did not apply and if the carrier failed to exercise due diligence to make the ship seaworthy then he could not rely on the exclusion clauses provided, even though the unseaworthiness did not cause the loss or damage.

Deviation. By Art IV r4, the common law rule in respect of deviation is widened, in that additional circumstances are provided in respect of what may be deemed to be a justifiable deviation. The carrier may deviate in attempting to save life or property at sea, or for "an reasonable deviation". Thus a carrier under C.O.G.S.A. 1971 may deviate to save property and this will be justifiable whereas at common law it would not be so.

The words "any reasonable deviation" have been subject to very little judicial interpretation and it is not clear to what extent, if any, this extends what would be justifiable at common law. **Stag Line v Foscolomango.**[12] What is reasonable as a deviation will depend upon the circumstances. In the course of a voyage from Swansea to Constantinopol a vessel deviated from the contractual route in order to land at St.Ives some engineers who had been testing her fuel saving apparatus. After leaving St.Ives she struck a rock and was lost. Held : That the deviation was not a reasonable one within the meaning of Art IV r4.

It may be argued, that to include a very wide liberty to deviate clause in a bill of lading to which COGSA applies would in fact go against the provisions of Art III r8 but that rule applies only to the provisions of Art III and the limitation of liability provisions of Art IV r5.

10 **Union of India v N.V.Reeperii** [1963] 2 Lloyds 223.
11 **Angliss v P & 0** [1927] 28 Lloyds 202.
12 **Stag Line v Foscolomango** [1932] A.C. 328.

A reasonable liberty clause does no more than set the limits of the particular voyage and as long as these limits are observed there should be no breach of the contract by reason of deviation. Where the carrier attempts to make use of a very wide liberty clause, for the purpose of deviating for reasons unconnected with the particular contract of carriage, this should fail to be governed by the ordinary common law principles applicable to deviations, as for example in **Theiss Bros v Australian SS.**[13] Bunkers sufficient for voyage. deviation for bunkers for subsequent voyage. Delay resulting in loss and damage of cargo. Clause permitting deviation. Not justifiable and not reasonable according to Art IV r4 because for D's own benefit. Not within the contract terms.

Details in the bill of lading.

By Art III r3 it is stated that the carrier or his agent or master shall on demand of the shipper issue to the shipper a bill of lading containing the following.

a. *The leading marks necessary for the identification of the goods in the form presented by the shipper in writing before the loading of the goods commences. The marks must appear clearly on the goods, their coverings or cases, and must be made in such a manner as to remain legible until the end of the voyage.*

   If a carrier states in the bill of lading that he will not be liable for any goods that are not marked in oil paint, this would be void under Art III r8 since Art III rl(a) only required that the goods be marked in such a manner as to remain legible until the end of the voyage.

b. *Either the number or the quantity or the weight of the packages or pieces as furnished in writing by the shipper. Note that the shipper may only require that one of the above items appears in the bill of lading ad if the carrier includes the number of packages he is not bound to state their weight, or if he does so he may state "weight unknown" without being in breach of Art III r8.*

   Pendle & Rivet v Ellerman Lines.[14] Case containing wool and silk worth £256 sent from London to Pireaus. When opened in Pireaus found to contain only old newspapers. Cause of disappearance could not be ascertained. Cause of loss unknown. Liability of shipowner. value of goods not declared before shipment. "Weight unknown" in bill of lading. held : That case when shipped intact and that goods lost while in D's custody. That as value not inserted in bill of lading P could recover only £100.

c. *The apparent order and condition of the goods.*

Insofar as the carrier is required to show the marks of the number quantity or weight, he may refuse to do so if he has reasonable grounds for suspecting that they are not accurate, in that they do not represent the goods actually received or where he had no reasonable means of checking the accuracy of the shipper's statement. See Art III r3.

By Art III r4 the statements contained in a bill of lading by reason of Art III r3(a)(b) & (c) are stated to be prima facie evidence of receipt by the carrier of the g6ods so described - but conclusive evidence in favour of a third party acting in good faith.

In respect of Art III r3(c) the statement as to apparent order and condition continues to be conclusive at common law in favour of the consignee or endorsee as to the condition at the time of shipment. **Silver v Ocean S.S**.[15]. Bill of lading, stating that goods were shipped in apparent good order and condition. Some cans of frozen eggs were gashed and punctured. Others had just some pin holes in them. Held Shipowner was estopped from denying the declaration of apparent good order and condition as regards the gashed cans because their condition was apparent upon reasonable examination. Not the same with pin holes for they may not have been apparent.

Under Art III r5 the shipper is deemed to guarantee the accuracy of the information provided in writing by him to the carrier in relation to the statements contained in Art III r3 (a) & (b).

Should the carrier suffer loss due to the inaccuracy of the shippers statements, then the shipper must indemnify the carrier against any loss, damages and expenses suffered by the carrier.

13 **Theiss Bros v Australian SS** [1955] 1 Lloyd's Rep 459. Supreme Ct of Australia.
14 **Pendle & Rivet v Ellerman Lines** [1927] 33 Com.Cas 70.
15 **Silver v Ocean S.S**. [1930].

Art III r5 and its indemnity has no relationship whatsoever to the statement in Art III r3(c) concerning apparent order and condition of the goods at the time of shipment.

The shipped bill of lading.

By Art III r7 once the goods have been loaded on the vessel the bill of lading to be issued shall, if the shipper so demands, be a shipped bill of lading. If the shipper has already taken up a document of title to the goods, a received for shipment bill of lading, then the shipper must deliver this up to the carrier against the issue of a shipped bill of lading.

The carrier may if he so wishes, mark on this other document of title the name of the ship or ships on which the goods have been shipped and the date of shipment and in such a case, if it shows the particulars mentioned in Art III r3 the document of title endorsed in this fashion shall be deemed to be a shipped bill of lading.

In effect this enables the carrier to convert a received for shipment bill of lading into a shipped bill of lading without having to issue a fresh document to the shipper.

Under Art III r3 in which the shipper may demand that details set out in (a) (b) & (c) of the rule should be placed in the bill of lading, there is no sanction as such should the carrier fail to comply with this duty. It would appear, that if the carrier fails to include such details as requested by the shipper and the shipper suffers loss as a result, the only remedy for the shipper would be to sue at common law for breach of the statutory duty, or for a want of due care in performing the statutory duty, or for fraud. There appears to have been no case based on such a form in respect of a statutory duty for at least the last 100 years.

Care of cargo.

For the shipper and later the consignee or endorsee probably the most important provision in COGSA is to be found in Art III r2. This rule provides that it is the duty of the carrier to properly load, handle, stow, carry, keep, care for and discharge the goods. By "properly and carefully" it is meant that the carrier must perform the various duties placed on him by the Art III r2 in accordance with a sound system of work and that sound system must be carried out with care **Albacora v Westcott Lawrence**.[16] Cases of wet salted fish shipped from Glasgow to Genoa. When the fish arrived at Genoa found damaged. "Reddening" i.e. form of bacterial contamination which renders it unmerchantable. The cargo owner claimed shipowner in breach of Art III r2 being negligent in the ventilation of cargo. The shipowner denied liability and contended that damage was due to inherent vice and they were exempted from ; liability by Art IV 2.2(m)(p). held by HL Action failed. Shipowner not negligent. They proved inherent vice and (obiter) the shipowners were not debarred from relying on the exemption of inherent vice unless they proved an absence of negligence on their part.

The opening words of Art III r2 state, that the rule is subject to Art IV r2 which contains a list of exception clauses (defences) upon which the carrier may rely in order to show how the goods came to be damaged during the course of the period covered by the contract of carriage as provided in C.O.G.S.A. 1971

The defences in Art IV r2 do not in any way lessen the duties placed on the carrier by Art III r2, but these defences do provide the carrier with a means of showing how the cargo came to be damaged even though he carried out his duties under Art III r2 in a proper and careful manner. It has been stated that the carrier may rely on the defences of Art IV r2 without having to prove that the subject of the particular defence arose without negligence on the part of the carrier his servants or agents. This does not apply in the case of the defence given under Art IV r2 which places the burden of proof that there was no negligence, firmly on the carrier.

The opinion that the carrier need not otherwise show that there was no negligence on the part of his servants or agents was stated obiter in **The Albacora**. These opinions of the H.L. go against two actual first instance decisions in which two separate judges decided that under Art IV r2 it was necessary for the carrier to show that the defence relied upon arose without negligence on the part of his servants or agent.

This would not be necessary in the case of the defences under Art IV r2(a) & (b). as demonstrated by **Goose Millard** and **Svenska Traktor** discussed below.

[16] **Albacora v Westcott Lawrence** [1966] 2 Lloyds Rep 52.

It is probable, that the point as to proof of negligence is largely only of academic interest in that in the majority of cases the carrier will in fact show that there was no negligence on the part of his servants or agents in the course of the proof offered by him in showing that the damage to the cargo was prima facie caused by the defence upon which he seeks to rely. This point was made by Roskill J in **The Flowergate.**[17] Cargo of bags of cocoa shipped at Sapelle, Nigeria, for Hamburg. Bill of Lading. Hague rules. Cocoa damaged by moisture. Cargo owners claimed damages from the shipowner on the grounds that he was in breach of Art III r2 as they failed to take proper care of the cargo. The shipowner claimed that damage was due to inherent vice and by Art IV r2(m) they were not liable. Held : the shipowner had shown on the balance of probabilities that the moisture had come from the cocoa itself and therefore they were not liable.

In the case of a defence under Art IV *r2(a)* the above issue does not arise since it is stated in that defence that neither the carrier nor the ship shall be responsible for the loss or damage arising from or resulting from any act neglect or default of the master mariners pilot or the servants of the carrier in the navigation or management of the ship.

Although no difficulties have arisen in respect of the word 'navigation' the word 'management' has provided a number of difficulties since if it is interpreted too widely it might weaken considerably the effects of Art III r2. Essentially, any act neglect or default in 'management' ought only to relate to those incidents which are primarily concerned with the running of the ship as a ship though they may incidentally also concern cargo.

Thus any action which relates basically to care of cargo ought not to be considered as falling within the scope of the term management. This position was clearly stated in **Goose Millard v Canadian Gov.**[18] Tinplates damaged when hatches were left open and rain went in. Held H.L. Shipowner was liable for he had failed to carry the goods as required by Art Ill r2~ The burden lay on him to prove that he was protected from liability by Art V r2(a). Management of the ship does not include management of hatches.

An illustration of the difficulties which may arise in seeking to determine whether an incident causing loss or damage is one of management or care of cargo can be found by contrasting two cases.

Riverstone Meat v Lancashire S.S in which McNair J held at first instance that a failure to take soundings in a hold which resulted in sea water not being discovered and in consequence and therefore within the defence of Art IV r2(a).

Smith Felmonpery v P & 0 where Singleton J held that a failure to take such action after actual discovery of water in the hold as a result of taking soundings was a failure to take care of cargo and was therefore a breach of Art III r2.

In **The Chyebassa,**[19] it was held that the removal of a storm valve cover plate by persons otherwise employed to stow cargo was not an act in relation to the management of the ship. It was also held that the entry of seawater through the storm valve due to the absence of the cover plate was not within Art IV r2(c) which provides a defence for loss or damage caused by the perils of the seas, since on the facts there would appear to have been some negligence in that the cover plate ought to have been present there.

Defences :
Among the defences to be found in Art IV r2 are

Inherent vice Art IV r2(m) and see **The Flowergate** and **The Albacora**

Latent defect Art IV r2(p) - to rely on this defence the defect must not have been discoverable by due diligence - see **Albacora SRL**

Insufficiency or inadequacy of marks. Art IV r2(n), where the bill of lading states that the goods have been received in apparent good order and condition and where the insufficiency of packing must have been obvvious where the goods were loaded on board.

17 **The Flowergate** [1967] 1 Lloyd's Rep 1.
18 **Goose Millard v Canadian Gov** [1929] A.C. 223.
19 **The Chyebassa** [1966] 1 Lloyds Rep 193.

Under Art IV r2(1) the carrier is not liable for loss or damage arising or resulting from error, or omission, or act on the part of the shipper or owner of the goods or his agent or representative.

The list of defences in Art IV r2 is not exhaustive and the carrier is able to show that the loss or damage arises from some other cause not specifically set ou tin the list. To do this the carrier must make use of Art IV r2(q) which provides that the carrier may show any defences in respect of loss or damage to the goods as long as it arose without his actual fault or privity 'and' without the fault or neglect of his servants or agents.

The burden of proof in this case is on the carrier who must show that there was o fault or privity on his part and that there was no fault or neglect on the part of his servants or agents which contributed to the loss or damage.

The wording of Art IV 2r(q) stated "without the actual fault or privity of the carrier "or" without the fault or neglect of the servants or agents of the carrier." compare **Brown v Harrison.**[20] On arrival it was discovered that the cases containing goods had broken and goods pilfered by labourers employed by stevedores. The cargo owners sued the shipowner for damages. The shipowner denied liability on the grounds that Art IV 2.2(q) for the loss had happened without their actual fault or privity. The court held that this was insufficient. The shipowner had to show that it happened 'without the fault or neglect of the agents of the carrier and that he had not done so. So the Shipowner was liable. The second or in Art IV had to read conjunctively and not disjunctively, that is to say, it had to be construed as 'and'.

The only real exception to the duty that the servants and agents must act with proper care arises under Art IV r2(b) where exception of fire arising without actual fault or privity of the carrier is permitted. However, under s186 M.S.A. 1995. which is subject to Art IV Sched 7 the right of limitation is broken by intent or recklessness.

In order for the carrier to be liable for the fault or neglect of his servants or agents it is necessary that the fault or neglect complained of in respect of the servant or agent arose within the course of employment or falls within the scope of authority of the servant or agent.

Where this is not so, and the act or neglect of the servant or agent which causes the loss or damage falls outside the course of his employment, or the scope of his authority then the carrier will not be liable and the carrier will have a defence under Art IV r2(q) in respect of such loss or damage.

The Chyebassa.[21] The C.A. held that the carrier was not liable for theft by stevedore's servants where the theft did not arise in the course of the servant's employment. The shipowners stevedores stole a cover plate during loading. Held That the theft was not in the circumstances by the shipowner' S servant. Stevedores to be regarded as the shipowners agents for the purposes of loading the vessel but in stealing the coverplate he was acting outside the scope of his employment

Although stevedores are generally thought of as independent contractors yet they are considered as agents of the carrier for the purposes of COGSA. To be liable for their action it is necessary that any loss or damage by the stevedores should have arisen whilst they are acting within the course of their employment.

Thus in the case of **Brown v Harrison** in which cargo cases were pilfered by stevedores' employees may be contrasted with the facts of **The Chyebassa**, in that in the first case the carrier was liable for the acts of stevedores whilst in the second the carrier was not liable.

The defences in Art IV r2 are available to the carrier only where a claim is made against him based on a failure to carry out the duties imposed by Art III r2.

The defences in Art IV r2 have no application in so far as a claim is made against the carrier based on a failure by him to provide a seaworthy vessel under Art II r1 (seaworthiness conditions).

The only defence in COGSA is based on Art IV r1. **Fison v Thomas Watson.**[22] The plaintiff's phosphates were shipped in good order and condition on D's motor vessel 'Lady Serens', under a charterparty

20 **Brown v Harrison** [1927] 43 T.L.R. 633

21 **The Chyebassa** [1966] 2 Lloyds 193.

22 **Fison v Thomas Watson** [1971] 1 Lloyd's Rep 141.

incorporating the Hague Rules. The phosphate was damaged by water due to a valve in the hold suction line being jammed open. On a claim by the plaintiff, the defendant denied that the vessel was unseaworthy and alternatively contended that they were entitled to rely on the Hague Rules Art IV r2(a)(p) & (g). The court held that the defect in the valve occurred before the beginning of the voyage. Accordingly, the vessel was unseaworthy at the time 6f the sailing and the defendant had failed to exercise due diligence in failing to make the hold safe. Judgement was given for the plaintiff

Claims for damage to Cargo.

Art III r6 notice of loss or damage to cargo & the general nature of such loss or damage ought to be given to the carrier 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.

If the loss or damage is not immediately apparent then notice of the loss or damage should be given within three days of such removal of the cargo. If notice is not given as required removal of the goods is taken to be prima facie evidence of delivery of the goods by the carrier as described in the bill of lading. Notice in writing is not required if the state of the goods was the subject of a joint survey or inspection at the time when the goods were collected.

The carrier is discharged from liability in respect of loss or damage to goods "***unless suit is brought***" within one year after the date of the delivery of the goods or the date when the goods ought to have been delivered.

The word 'suit' includes commencement of arbitration proceedings and if the bill of lading contains an arbitration clause then the action must be commenced by way of arbitration within a year. **The Merak.**[23] Cargo shipped by bill of lading subject to H.R. Discharged damaged. 'Any dispute to be referred to arbitration within a year' clause. Within a year bill of lading holder issued a writ & a year later the case came for trial. The judge stated the action on the ground that the parties had agreed to refer the case to arbitration. By the date of trial the arbitration clause was effective & there was no remedy. The word suit in Art III r6 included arbitration.

Arbitration proceedings are commenced by a party appointing an arbitrator as required by the arbitration clause In the bill of lading & the notification of the arbitration and his acceptance. See **Tredox Export S.A. v Volkwagenwerk A.G**.[24]

The words 'unless suit is brought' means unless the suit, i.e. the action, is commenced before the particular court now hearing the mater or the particular arbiter, within one year. To be before the court, or for the commencement of the action the particular case, means either the issue of the writ or commencement of arbitration within a year.

In the sense that the action must be commenced before the particular court or arbiter it is not sufficient if the action has been commenced in some other country within the year of the discharge of the cargo. **Compania Colombiana de Seguros v Pacific S.N.**[25] Electric cables delivered damaged. P brought an action in new York which was dismissed for lack of jurisdiction. Then they brought an action in England but after the end of one year from the damage. The court held that the claim was statute barred under Art III r6 for the words 'unless suit is brought within one year' meant 'unless the suit before the court is brought within a year'. The fact that New York proceedings were brought within the one year period was immaterial.

In those cases where the carrier incorporates the British Maritime Law Association Agreement Clause 4, then the action by the cargo owner has to be commenced within 2 years of the delivery of the time when the cargo ought to have been delivered. Art III ~ further provides that both the carrier and the receiver of the goods are to give each other reasonable facilities for inspecting and counting the goods.

Whilst Art III r6 places a limitation on the action by the cargo owner in respect of loss or damage to goods, it does not place any restriction whatsoever on the right of the carrier in respect of any action he may have against the cargo owner.

23 **The Merak** [1964] 2 Lloyd's Rep 527 C.A.

24 **Tredox Export S.A. v Volkwagenwerk A.G**. [1910] 1 Lloyd's Rep 62.

25 **Compania Colombiana de Seguros v Pacific S.N.** [1963] 2 Lloyd's Rep 479.

Thus, if the cargo owner has not paid freight in respect of the goods the carrier will have a period of 6 years in which to bring an action against the cargo owner whilst the cargo owner will have only one year in which to bring an action for loss or damage against the carrier. See **The Aries.**[26]

Art III r6 does provide however) that the one year period may be extended if the parties so agree after the cause of action has arisen. There was no specific provision for this under the 1924 Act. No particular form of agreement appears to be required.

Art III r6 provides that an action for indemnity against a third person may be brought even after the expiration of the year, so long as it is brought within the time allowed by the law of the court which has the case before it. In any event this time is not to be less than three months commencing from the day when the person bringing such action for indemnity has settled the claim or been served with process in the action against himself. This particular provision has no effect in English Law, where no special limitation is made in respect of indemnities.

Insofar as the contract may provide for the carrier to be able to discharge the goods at some earlier time than that of the port of delivery, or even to be able to discharge them at the port of loading this will not necessarily mean that such a clause is void under Art III r8. See **Renton v Palmyra Trading**

Damages - Limitation of Liability

If the nature and value of the goods does not appear in the bill of lading then the carrier may limit his liability in accordance with the provisions of At IV r5(a). Even if the nature and value of the goods does not appear it is only prima facie evidence and is not binding or conclusive on the carrier - Art IV r5(f), and if the value of the goods has been knowingly misstated by the shipper) then under Art IV r5(h) neither the carrier nor the ship is to be responsible in any event for loss or damage to, or in connection with the goods.

Under Art IV r5(a) where no nature or value of the goods appears then neither the carrier nor the ship shall in any event be liable for loss or damage in an amount exceeding a) 10,000 gold francs[27] per package or unit; or b) 30 francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

In order to cope with difficulties which may arise in the case of the use of pallets or containers, Art IV 5.5(c) provides that an article of transport is to be considered as a package or unit unless, in the case of an article of transport -container, pallet or similar article - used to consolidate the goods - the number of packages or units packed in such, are enumerated in the bill of lading, in which case that number of packages or units shall be considered for the purpose of the limitation figure. Once the weight of the unit is more than 333.333 kilos then the weight becomes more beneficial to the cargo owner.

Art IV r5(g) provides that the carrier, master or agent of the carrier may agree with the shipper for higher maximum amounts than those set out.

The total amount recoverable is to be calculated by reference to the value of the goods at the place and time at which the goods are discharged from the ship in accordance with the contract, or the time when they should have been discharged Art IV r5(b) - the value of the goods being fixed according to the commodity exchange price or if there be no such price, according to the contract market price, or, if neither exists, then by reference to the normal value of goods of the same kind and quality.

In Art IV bis Rule 1 these limits are to apply whether the action against the carrier is commenced by way of contract or tort.

Servants of the Carrier.

To avoid the difficulties which may arise in respect of the cargo owner suing a servant or agent & the carrier attempting to give such person protection under the original contract of carriage see Art IV bis rule 2 which provides that in the event of such action being brought against the carrier's servant or agent, he not being an independent contractor - then that person is entitled to all the defences and limits of liability as are provided for the carrier under the Rules.

[26] **The Aries** [1977] 1 Lloyd's Rep 334.

[27] The gold franc system has now been changed to Special Drawing Rights.

Insofar as the cargo owner may seek to sue both the carrier and his servants and agents, the aggregate amount recoverable is not to exceed the limits set out in the Rules - Art IV bis r3. Under the 1924 Act it appeared that the limits set out there were to apply irrespective of the conduct on the part of the carrier or his agents - which had brought about the loss of damage. The 1971 Act remedies this. Thus, whether the action is brought against the carrier or his servant or agent, such a party will lose the right to limit his liability as given in the rules where "It is proved that the damage resulted from an act or omission of that person, done with intent to cause damage, or recklessly and with knowledge that damage would probably result." Art IV r5(5) and Art IV bis r4.

The direct omission of the independent contractor from those who may limit their liability means that the position of the stevedore is still not at all clear. The proposed Privity Act could solve this problem provided a Himalaya clause is used.

Liabilities of the shipper.

Under COGSA the liabilities placed on the shipper are few. By Art III r5 the shipper is deemed to guarantee the accuracy of the details provided by him in writing to the carrier relating to the leading marks or the number or quantity or weight of the goods for the purposes of Art III r3(a) and (b). By Art IV r6 the shipper is liable for all damage and expenses, directly or indirectly arising out of or resulting from the shipment of dangerous goods where the master or agent of the carrier has not consented to carry such goods with knowledge as to their nature and character. By Art IV r2(i) the carrier is not liable for any acts or omissions of the shipper or the owner of the goods or his agent or representative.

Apart from the above, Art IV r3 states that the shipper shall not be responsible for loss or damage caused to the carrier or ship arising or resulting from any cause without the act, fault or neglect of the shipper, his servants or agents.

C.O.G.S.A. 1971 makes no provision at all in respect of the payment of freight and the shipper may be liable for freight directly to the carrier by virtue of s3 Carriage of Goods By Sea Act 1992 or possibly under Brandt v Liverpool. In the case of a bill of lading to which C.O.G.S.A. 1971 does not apply the ordinary implied undertaking under common law which arises in respect of a voyage charterparty will also arise in respect of the bill of lading. Thus common law undertakings as to seaworthiness, deviation and reasonable dispatch will apply to such bill of lading.

Similarly where C.O.G.S.A. 1971 does not apply the carrier is free to exclude liability for all loss or damage as he thinks fit and may therefore exclude liability in respect of unseaworthiness. To do so however the carrier would have to show that the exclusion clause directly covered the incident causing the loss or damage and that there was no ambiguity in the exclusion clause.

Carrier Responsibilities

The responsibilities of the carrier are set out in Art III. The exemptions set out in Art IV. Art III. (1) AND (2). H.V.R. Basic responsibilities of the Carrier. The common law strict liability is replaced by a requirement that the carrier exercise due diligence in the case of seaworthiness and introduces a duty to properly load, handle, stow cargo.

Art IV. Excepted perils H.V.R. These are similar to the common law excepted perils.

Art IV. (2). Neither the carrier nor the shap shall be liable for loss or damage arising or resulting from -

- *a). Act, neglect or default of the master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship.*
- *b). Fire, unless caused by the actual fault or privity of the Carrier.*
- *c). Perils, dangers and accidents of the sea or other navigable waters.*
- *d). Act of God.*
- *e). Act of war.*
- *f). Act of public enemies.*
- *g). Arrest or restraint of princes, rulers or people, or seizure under legal process.*
- *h). Quarantine restrictions.*
- *i). Act or omission of the shipper or owner of the goods, his agent or representative.*
- *j). Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.*

k). Riots and civil commotion.

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 detects not discoverable by due diligence.

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

Art IV. (4). Hague Visby Rules. Deviation is permitted by the rules in order to save life, as is any reasonable deviation. This differs from the common law position on deviation.

Art IV. (5). Hague Visby Rules. Limits the shipowner's liability regarding the amount of damages which may be claimed. Originally based on the Gold Franc, it is now based on the I.M.F. unit of account currently worth about 80p for 666 units.

Art VI. (6). Hague Visby Rules. Time bar limitation of 1 year.

All these clauses protect the ship owner. In general The Hague and Hague Visby Rules operate against the ship owner because the freedom to contract out is curtailed by Art III. (8). Hague Visby Rules. The effect of Art III. (8) Hague Visby Rules is to prevent the carrier putting a clause in a contract limiting his liability below that provided in the rules. It sets a minimum level of liability.

Details in bill of lading required by the Hague Visby Rules

Article III C.O.G.S.A. 1971 : The Hague & Hague Visby Rules

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 the identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.

c) The apparent order and condition of the goods.

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

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with para 3(a)(b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.

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

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

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

Subject to paragraph 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.

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

6 bis. An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding para if brought within the time allowed by the law of the Court seized of the case.

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 ill, shall for the purpose of this article be deemed to constitute a shipped bill of lading.*

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

Article IV C.O.G.S.A. 1971 Hague Visby Rules

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.*

5.b *The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.*

The value of the goods shall be fixed according to the commodity exchange price or if there shall 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.

6. *Goods of an inflammable explosive or dangerous nature to the shipment wherof 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.

Charterparty terms about Loading, Discharge and Stowage and Bills of Lading.

Many charterparties contain terms limiting liability regarding loading and discharge, e.g. free in and out charterparties. They place the obligation of loading and stowing on the charterer. What happens where the bill of lading also states 'all terms as per charterparty' and the goods are damaged during discharge and the cargo owner, shipper or endorsee sues the shipowner for damages, the bill of lading having been issued on the ship owner's behalf ? Can the ship owner plead as a defence that the obligation to discharge was not placed on him ? What is the effect of the Hague and Hague Visby Rules where they apply ?

1). Free in and out clauses. **The Garbis** [1982] 2 LL.R. 283. A bill of lading which incorporates all terms and conditions of a charterparty can incorporate and does incorporate terms which limit the ship owner's obligations ancillary to carriage, such as loading, discharge and stowage. If there are no problems with the Hague and Hague Visby Rules the cargo owner is bound by the limitation.

2). Effect of the Hague and Hague Visby Rules. In **Pyrene v Scindia** [1954] it was held that Article I.(e). Hague Rules (and by implication today the Hague Visby Rules) applies to the entire carriage process including the loading, stowage and discharge. (semble Article 4(1) Hamburg Article III.(2). Hague and Hague Visby Rules requires the carrier carefully to load, stow and discharge the goods. (semble Articles 5 & 10 Hamburg) Article III.(8). Hague and Hague Visby Rules renders void any term of a carriage contract which purports to limit the obligation of a carrier to something below that standard provided in the rules. (semble Article 23 Hamburg).

It appears that the clause of a charterparty can survive the Hague and the Hague Visby Rules because the rules do not apply to the division of responsibility between the ship owner and the other party. They only apply to the manner of discharge of the obligation. See Pyrene v Scindia. Compare with the Hamburg Rules where there is joint and several liability between the carrier and the actual carrier. Under Article 11 Hamburg, the carrier may exclude liability for land carriage providing it is possible for the land carrier to be sued.

The Caspiana : Renton v Palmyra T.C. [1957] A.C. 957 P.C. discussed a clause relating to the discharge of goods, which defined the shipowner's obligations. It was held that the clause was unaffected by the Hague Rules. It was about a choice of ports of discharge, that is to say it was a form of deviation clause. The Hague Rules control the manner of carrying out certain obligations but do not prescribe which obligations are undertaken. Following this logic a clause limiting obligations as opposed to one limiting liability would be unaffected.

COGSA 1971 and COGSA 1992 : Compatibility and Coherence :

The exclusive preference given by The Hague Visby Rules to bills of lading now appear to be anomalous in the light of C.O.G.S.A. 1992 which now applies not only to shipped bills of lading,, but potentially to received for shipment bills of lading, sea waybills and ship's delivery orders. s5(5) C.O.G.S.A. 1992 specifically states that the Act is without prejudice to the application of the H.V.R. The result is that the H.V.R. may be incorporated into a bill of lading but not into other now ostensibly acceptable documents which are thus more favourable to the carrier who may under them may benefit from extensive exclusion clauses.

INCORPORATION OF CONVENTIONS INTO CONTRACT OF CARRIAGE

Incorporation of the Hague and Hague Visby Rules

The Hague and Hague Visby Rules apply ONLY by being incorporated info a contract of carriage by virtue of Art 2. They have no independent force. Therefore if there is no contract of carriage or if there is no contract of carriage between the two parties to the action then the provisions of the rules do not apply. s2 C.O.G.S.A. 1992 is vital if the H.V.R. are to apply to endorsees. The H.V.R. does not apply to charterparties Art V. However, if the bill of lading is issued under a charterparty governed by the Rules then the Rules do apply. Most bills of lading are governed at least by The Hague or Hague Visby Rules. Most charterparties today incorporate The Hague or Hague Visby Rules, as for instance the modem form of the New York Produce Exchange (N.Y.P.E.).

Incorporation of The Hague Rules. The Hague Rules were intended to apply to all outward voyages from any contracting state; the method still relied upon by the U.S., by way of the clause paramount technique. This states that any bill of lading issued in a contracting state must contain an express statement in it stating that it is to be governed by the H.R. All contracting states require the clause paramount stipulating that the H.R should always be included. Because of **Vita Food** [1939] A.C. 277. the clause paramount technique is not used in the Hague Visby Rules. In the U.K. under the H.V.R. the rules themselves apply directly, whether or not the Bill of Lading says so.

Art X The Hague-Visby Solution. C.O.G.S.A. 1971 make direct provision for H.V.R. into bills of lading. Incorporation does not require a clause paramount in the bill of lading. Art X provides that the H.V.R. apply to any bill of lading issued in a contracting state (to the H.V.R.) or where carriage is from a port in a contracting state, or where there is an express choice of law clause stating that these rules apply, or where there is legislation in a state to the effect that the H.V.R. are to govern the contract. Any outward voyage from a contracting state should therefore be governed by the H.V.R. The rules only apply to outward voyages from non-contracting states where the rules are expressly incorporated, choice of jurisdiction alone being insufficient.

The Hollandia [1983] 1 A.C. 565. involved an outward voyage from Scotland. Art X insured that the Hague Visby Rules applied. The bill of lading purported to choose Dutch Law. Diplock thought that the choice of law clause was ambiguous and therefore of no effect. However, he also thought that a choice of forum clause which was not ambiguous would have given the court of Amsterdam exclusive jurisdiction. Amsterdam would have applied the H.R. not the Hague Visby Rules if it had heard the case. The level of limitation under the H.R. differed from that under The Hague Visby Rules

The result was that Art X insured that The Hague Visby Rules applied since it was an outward voyage from the U.K. and The Hague Visby Rules limitation applied. The effect of the Amsterdam choice of forum clause would be to limit the carriers liability to an amount below the Hague Visby Rules. Therefore the choice of forum clause was void because it infringed Art IlI.(8). of the Hague Visby Rules which states that provisions limiting The Hague Visby Rules are void.

What if the choice of law clause had been clear. Diplock thought (obiter) that it would be void under Art lll.(8). for the same reason and that Wright's reasoning in Vita Food did not survive the change from The Hague Rules to The Hague Visby Rules. If this is so then it would not be possible to avoid The Hague Visby Rules. However there are problems

1). The statement was obiter.

2). If the Dutch Clause was valid under Wright in Vita Food then the Hague Rules would apply and Art X of the Hague Visby Rules would not apply.

3). If Diplock is right then it must be because of one of two possible explanations
   a). Wright was in fact wrong in Vita Food.
   b). Some U.K. Statutes employ public policy to override choice of law and C.O.G.S.A. 1972 may be such a statute. Similar rules apply to the Unfair Contract Terms Act 1977 in that it would be contrary to public policy to use foreign jurisdiction as a method of avoiding the Act.

Vita Food Products Inc v Unus Shipping Co. Ltd [1939] A.C. 277. A cargo of herring was shipped from Newfoundland to New York. Newfoundland and U.S. had both adopted the Hague Rules. Neither party had anything remotely to do with the U.K. The carrier was a Nova Scotia company. The consignee was a New York corporation. The vessel ran aground off the coast of Nova Scotia. Under the provisions of the Nova Scotia C.O.G.S.A. 1932, the equivalent of the U.K. C.O.G.S.A. 1924, the bill of lading should have contained a clause incorporating the Hague Rules directly. By mistake an old bill of lading was used without the Hague Rules incorporated by clause paramount. Thus the Hague Rules were not expressly incorporated and so the bill of lading was contrary to Newfoundland law, namely, C.O.G.S.A. s3(2). Under the old bill of lading the contract was governed by English Law. The English Law was in turn governed by C.O.G.S.A. 1924 incorporating The Hague Rules but these applied only to outward voyages from the U.K. and so did not cover outward voyages from Nova Scotia. The Privy Council held that the contract was not governed by the Hague Rules opening up the possibility of deliberate evasion of the Hague Rules should the carrier so desire. The consignee had sued not on the contract of carriage but as a common carrier independently of the contract of carriage. The carrier claimed the protection of express terms in the bill of lading and The Hague Rules.

The consignee claimed the bill of lading contract was an illegal contract and that the absence of a paramount clause prevented application of The Hague Rules. In order to win the consignee had to prove both claims. The Privy Council held that it was not an illegal contract and so the carrier was protected by the terms of the bill of lading, but that The Hague Rules were not applicable to the bill of lading contract. Arguably, the statements regarding the Hague Rules were obiter but they represent a very strong dicta. The rationale was:-

1) The parties made an express choice of English law which was valid even though no connection with England. In effect, per Wright L, one can choose the jurisdiction of any country in the world irrespective of the non-existence of any connection whatsoever, thus using jurisdiction of a non-contracting state and their bills of lading, so that one could avoid the clause paramount and the bill of lading (the relative imbalance of bargaining power between shippers and carriers is such that the shipper would have no real choice in the matter) but jurisdictional choice must be bona tide to be legal and must not be contrary to public policy. In **Vita Food** both parties claimed the jurisdiction of Newfoundland. However, if there are a number of re-sales the same bill of lading may well end up in the hands of an eventual consignee and carrier, neither of whom are from the country of issue of the bill of lading. It is quite possible to have a situation where the ship owner is English. The goods may be shipped from a foreign country to another foreign country and sold to a succession of buyers from a variety of foreign countries. It must be sensible for the law of one country to govern all the sales and is the value of a law making the jurisdiction of the contract independent of the nationality of the parties.

2) The failure in the bill of lading to include a clause paramount as required by Newfoundland law via C.O.G.S.A. 1932 did not make the bill of lading void as an illegal contract, since the object of the contract was not illegal, only the manner of carrying it out. Therefore the carrier could rely on an exemption in the bill of lading. The court concluded that the contract was subject to English law and that it was a valid bill of lading. Since the H.R. apply only to outward voyages from the U.K. the normal rules of contract had to be applied.

The Komninos S [1990] 1 LR 531: [1991] 1 LR 370 :1992 JBL 321: held that the result of Article 10[c] The Hague Visby Rules is that the rules only apply to non~contracting state exporters if the bill of lading states that these rules or legislation of any State giving effect to them are to govern the contract. This means that the parties must not only choose the law of a contracting state - but also the specific legislation incorporating The Hague Visby Rules. The issue turned on cargo worthiness and limitation rights. The hold of the vessel was not cleaned properly. Residue from a previous cargo of salt combined with water, which broken bilge pumps had failed to discharge, resulting in corrosion to a cargo of steel.

The court held:

1 The vessel was uncargoworthy and unseaworthy.

2 There was no express choice of law in bill of lading. The choice of forum was the U.K. U.K. law should also apply even though the contract was made in Greece between Greek shippers and Greek managers for a cargo of Greek steel from Greece to Italy and freight was payable in Greek currency. The reason for this is that under The Compagnie D'Araments Case [1971] AC 572 if a choice of forum is made without a choice of law then the law of the forum is implicit in that choice if not expressly chosen or contradicted.

3 Greece was not at that time a contracting state to The Hague Visby Rules so the Convention was not applicable. Whilst Greek law imposed similar rules to those in the Hague Visby Rules preventing the ship owner from excluding liability these would not automatically apply to the dispute.

4 Without more, the common law would apply and the exclusion clauses in bill of lading would thus exclude the ship owners liability.

5 The Contracts Applicable Act 1990, Art 3(3) Rome Convention states that mandatory provisions of a state which is otherwise closely connected with the essential ingredients of the contract cannot be escaped from by a choice of law clause.

6 Article 142 Greek Code of Private Maritime Law imposes compulsory liability on the ship owner in respect of liability of goods covered by a bill of lading and as a mandatory provision must be applied to the case, so the ship owner was held liable.

In respect of states without protective legislation the Vita Food Case is now confirmed as good law again, so that a contract choosing U.K. Law for an export from a non-contracting state to the Hague Visby Rules such as Argentina, where the contract does not incorporate The Hague Visby Rules, will be governed by the old common law provisions. The only judicial protection against exclusion clauses in the contract would have to be based on **George Mitchel v Finney Lock Seeds.**

Compare the effect of **The Komninos S** on the Hamburg Rules. Egypt, whilst it has made The Hamburg Rules compulsory and provides mandatory provisions regarding the carriage of goods by sea has not signed the Rome Convention. The U.K. courts would under **The Komninos S** apply Art 3(3) Rome and incorporate Hamburg automatically into a contract disputed before the UK courts involving goods shipped out of Egypt by an Egyptian Ship owner for an Egyptian exporter, because Art I Rome states that the rules of this convention shall apply to contractual obligations in any situation involving a choice between the laws of different states. The result however, would be rather different if goods were imported into Egypt from a non-contracting state because Art 3 is limited to situations where 'all the other elements relevant to the situation at the time of the choice are connected with one country only' so since Egypt would not be the only interested state in the dispute the Egyptian mandatory regime would not be enforced.

Incorporation of Hamburg.

Article 2 : Scope of application Hamburg.

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 charter-parties. 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 a 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 para 3 of this Article apply.*

Article 15 : Contents of bill of lading Hamburg

1 *The bill of lading must include (1) the statement referred to in para 3 art 23.*

Article 23 Contractual stipulations Hamburg.

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 is 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 para 1 of this article, a carrier may increase his responsibilities and obligation 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 the 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 para 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 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.*