THE HAMBURG RULES

The Hamburg Rules came into force in November 1992, having attracted the requisite 20 ratifications required.[1] Unlike the Hague and Hague-Visby Rules, the Hamburg Convention is a product of the United Nations. The process started in 1968 in UNCTAD and later passed to UNCITRAL. It forms part of the pressure for change in International Liability regimes to reflect the interests of cargo interested states, rather than ship owning states which are comprised mostly third world countries who are beginning to find the United Nations a conducive mechanism for promoting their interests.

Largely therefore the rules are politically motivated to benefit the Third World at the expense of the developed interests of the West. To some extent they are supported by the U.S.A., which is a cargo interested State and which prompted the original Hague Rules. The Hague-Visby Rules were a compromise promoted by ship owning states to deflect criticisms of the Hague rules to which the Hamburg Rules are also largely a response [2]

Apart from a general desire to increase the carrier's liability, the aims of cargo interests were to produce a convention that removed the perceived defects of The Hague Rules such as :-

1. Ambiguity / lack of clarity in the wording.
2. The complex structure and complexity of concepts employed by it.
3. Cargo interests were uncertain about the rule and their rights and liabilities. Carriers exploited this and made excessive use of restrictive clauses in their bills of lading. [3]
4. A number of the rules were no longer relevant to modern shipping conditions.[4]

Despite pressure for a more radical shift in favour of cargo interests, the basic feature of the rules is that they tighten up protection for cargo interests ***'without making fundamental changes'***. Politics prevented a major shift against the shipowners, resulting in yet another compromise. The Conference produced a ***'package deal'*** whereby the ship owning interest succeeded in retaining the basic concept of fault liability rather than replacing it with a strict liability regime, in return for allowing a wider scope of application, loss of the Management and Navigation exception and an increase in the limits of liability.

Regarding the stated aims (2&3 above) of the Convention to clarify and simplify the rules governing carriage contracts and assist understanding by cargo owners may not have been realised. Many of the apparent clarifications and simplifications may have the opposite effect by creating new difficulties of interpretation thereby increasing the potential for litigation. By sweeping away the Hague Rules, 50 years of judicial development and interpretation of existing rules is discarded.

Contents of the Rules : The rules should be read thoroughly, but the following are points to note. They are set out in 26 substantive articles and 6 parts with headings.

1). **Scope of Application**. **Article 2**. [5]

2.1 a) Makes it clear that it is the contractual shipment point which is relevant.

b). Adds port of discharge in Contracting State, thus greatly extending its scope. Thus it covers U.S. to U.K. and U.K. to U.S., if they become parties.

c). Actual port among optional ports of discharge, oddly contradictory to the general aim of increasing certainty as to application.

e). As with the Hague Visby Rules, it makes use of statements in bills of lading or other documents to give statutory effect to voluntary incorporation. [6]

2.3. As with Hague Visby Rules, exclusion of charterparties, but a clearer statement[7].

1 viz . Barbados, Botswana, Burkino Faso, Chile, Egypt, Guinea, Hungary, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Rumania, Senegal, Sierra Leone, Tanzania, Tunisia, Uganda and Zambia.

2 To trace the changes made by the Hague Visby rules see Diamond 1978 LCMLQ 225.

3 E.g.. sea and cargo worthiness.

4 e.g.. tackle to tackle handling clauses in the light of containerisation.

5 Compare Art X of the Hague Visby Rules.

6 Note Art 23(3) which seems to require something like a paramount clause but its chief aim ties in with 23(4) designed to penalise carriers who seek to confuse cargo interests by the use of illicit contract terms or by omitting to refer to the rules. i.e. damages for interests lost through loss - compare benefit and the Hague Rules.

7 N.B. **Article 2.4**

2). Article 1. Included to promote understanding and clarification.

1.1-2 '***Carrier***' and ***'actual carrier,'*** included because of the provisions concerning trans-shipment and through carriage.[8]

1.3 Provides definitions of the ***shipper*** and ***consignee***. The definition of shipper is partly directed towards the contracting party and will be used in applying the provisions of **Part III.** This would seem to raise difficulties of interpretation where the person named as shipper is not the contracting party, such as a forwarding agent or where it could potentially apply to more than one person.

Similarly, the '***consignee***' is widely defined and could give rise to confusion where more than one person is entitled to the goods at different stages of the voyage. Also, it is used in a narrower sense in ***Article 16.4,*** which heightens the confusion.

1.5. ***Goods*** now includes live animals, deck cargo and the shippers' container, although as framed it seems to suggest that an empty container would not be goods. **Article 15.4**. however, excludes luggage carried under other regimes relating to passengers and luggage.[9] There is no equivalent of Art VI of the Hague Visby Rules.

1.6. The Contract of Carriage by Sea is defined widely and not restricted to contracts covered by a bill of lading. Nonetheless the **Article 3** exception for Charterparties follows the lead of C.O.G.S.A. 1971

1.7. Nevertheless there is still a definition of a bill of lading in **Article 1.7**. couched widely enough to include any document used in the trade provided the document is a control document, which would seem to include a ship's delivery order, provided there is an undertaking by the carrier to deliver against its surrender.

2.1. d & e refer to other documents besides bill of ladings and it is clear as indicated by **Article 1.6.** and **Article 1.8.** that carriage under alternative documentation does not affect the application of the convention. Nevertheless the convention contemplates a document and the rules relating to documentation are structured around the bill of lading. As under H.V.R., the carrier is required to issue a bill of lading on demand to the shipper, **Article 14**. It is unclear to what extent any other document would be subject to and have the effects indicated in the rules governing content and evidentiary - presumably it would be except for the special rules consequent upon the transferability of a bill of lading.

3). Period of Responsibility. Article 4

Its central function is to replace the ***old tackle to tackle*** principle with a rule more appropriate to modern practice. Also to obviate the difficulty of applying the idea of '**loading on**' **to** '**discharge**.'[10] It prevents the carrier excluding liability for pre and post loading stages and thus weakens the rights of the cargo owner. It introduces the concept of a carrier being ***'in charge'*** and extends the period of responsibility beyond loading and discharge. The reference to '***period***' in **Article 4.1**. is qualified by '**time of taking over**' in **Article 4.2**. echoing the rule established in **Pyrene v Scindia Navigation**.

Potential difficulties

a). Does **Port of Loading in Article 4.1**. refer to sea ports or can it apply to inland river ports as in Lash Carriage? Probably it would be limited to Sea Ports since it relates to carriage by sea. **Article 1.6**. suggests a more limited interpretation. Difficulties of application arise in relation to goods delivered by the shipper to an inland terminal. If far away from the port, then road carriage is presumably not covered by the rules. Likewise, if the goods are collected from the Shipper's premises . If near the port, have the goods been taken in charge at the port of loading? If the goods are not taken in charge at the port of loading are they ever taken in charge at all for the purposes of the rules ? The inclusion of **Article 1.6** seems to suggest the contrary - but in that case where does carriage within the meaning of the rules begin ?

8 see later.

9 Compare **The Aegis Spirit** under C.O.G.S.A. 1971 The shipowner is not responsible for damage to containers -not in the Bill of Lading.

10 compare **Goodwin Ferreira v Lampoon.**

b). **Article 4.2 iii** makes it clear that delivery to public authority terminates the rules - carriers are reluctant to take liability when cargo is no longer under their control and the customs of port authorities vary around the world, many of which require delivery into a port authority or customs warehouse. ii) seems to permit the termination of the rules where, buy the contract the goods are landed and warehoused awaiting collection by the consignee. It is questionable whether constructive delivery clauses as presently employed would be effective whereby carriage is deemed to end on arrival of the ship if the consignee fails to take delivery alongside. Arguably, ***'placing at the disposal'*** of the consignee means ***'placing property at his disposal'***. [11]

4. Basis of Liability. Article 5

Article 5.1. imposes fault liability on the carrier. Abolition of the management and navigation exception enables the complex structure of the Hague Visby Rules to be dismantled and replaced by a much simplified rule, if not perhaps over simplified.

By virtue of **Annex 2 Hamburg**, "**Principle of fault or neglect"**, the burden of proof is on the carrier.

Points to be noted.

a). The concepts of ***'Due Diligence'*** and of ***'properly and carefully'*** all encapsulated in a single concept of ***'taking all reasonable measures'***. It is unclear what precise standard this entails and how far the old learning relating to seaworthiness can be infused. For example, is a '***reasonable***' carrier the same as a ***'diligent'*** one?

b). Old chestnuts may have to be re-fought. Does the carriers ***'servants or agents'*** include ships repairers or inspectors whose acts prior to the voyage render the ship unseaworthy as in **Riverstone Meat v Lancashire Shipping**? [12]

c). **Annex II** declared that the burden of proof is on the carrier. Does however the reference to an 'occurrence' suggest that there is a burden on the claimant to establish that the 'occurrence' took place while the carrier was in charge of the goods and if so how far does it go? Similarly, what level of proof is required of the carrier? The reference to 'all reasonable measures to avoid the occurrence' suggests specific proof and not general evidence of taking reasonable care - a plausible explanation of how the loss or damage occurred consistent with the exercise of care seems to be required. [13]

d). **Articles 5.1. & 5.2**. Make clear that delay is covered. The understanding at the conference was that where delay causes physical deterioration, this is covered by the damage rules and not the delay provisions, which are concerned with economic loss caused by delay.

e). **Fire -Article 5.4.** - now involves a more extensive liability than under the HVR, but it is detached from the ordinary rule in order to place the burden of proof upon the claimant. N.B. by art 25.1. the M.S.A. limitation provisions are preserved which presumably includes the fire exception. [14]

f). **Live Animals – Article 5.5.** : The natural inference that arises in relation to live animals is preserved and not negated by the heavy burden of proof in **Article 5.1**.

g). **Article 5.6. - saving life and reasonable measures to save property at sea**. No deviation rule. Deviation is not mentioned due to a desire to obviate the confusion that might be caused by reference to a technical concept, which in some jurisdictions involves a departure from the rules. The Hamburg Rules are meant to be a comprehensive cod. The effect of any deviation is to be covered by the rules. In so far as **Article 5.6**. is applicable to deviation it is more restrictive than the Hague Visby Rules. Otherwise the effect of a deviation must be considered in the light of **Article 5.1**. Delay due to a deviation -causing loss is covered under **Article 5.1**. The life provisions are more limited than under C.O.G.S.A. - reasonable measures.

11 See O'Hare's Article.

12 see C.O.G.S.A. and **The Muncaster Castle**.

13 See Professor Cadwallader's Article C.L.P. 1967 for the relationship of C.O.G.S.A. rules 3 & 4. Similarly under the Hamburg Rules - the burden of proof is on the carrier to provide an adequate explanation.

14 compare s6(4) COGSA 71

h). **Article 5.7**. - gives effect to what was the understanding of the position under COGSA at least in the U.S.A. and probably the case in the U.K. **Schnell v Schneider** (U.S.) compare C.M.R. The court can apportion the degree of fault.

5. Limitation - Article 6.

a). 835 SDR's per package, 2.5. S.D.R's per K, approximately 20% higher than under the Hague Rules.

b). **Article 6.1.6.** - delay.

c). **Article 6.2.** Containerisation provision - as with Hague Visby, but with the addition of b) for clarification.

d). **Article 6.4** A statement of value is now insufficient. '**Agreement**' is required.[15]

6). **Non-contractual clauses - Article 7.**

As with IV bis under HVR, with the addition of reference to scope of employment rather than reference to such servant or agent not being an independent contractor.

7. **Breaking limitation : Article 8.** [16]

Deals with the effect of wilful misconduct on the limitation of liability in a single article, following Hague Visby Rules principles. It presents some difficulties of interpretation particularly in respect of the precise meaning of ***'recklessly and with knowledge that such loss, damage or delay would probably result.'***

Whether the knowledge must be subjective or objective, and the extent of the knowledge are relevant questions. If **Goldman v Thai**, is followed, subjective knowledge of the probability of the damage which manifested itself will be required**.**[17]. If the defendant carrier has been reckless he cannot limit liability. But the carrier is not liable for a servant's wilful misconduct under COGSA 1971 or Hamburg.

Factual issues frequently revolve around breach of safety / care rules and whether or not the breach was deliberate / serious. Much of the discussion about seaworthiness / care of cargo may well in future take place under this article rather than **Article 5.1**. especially in view of the pressure to break the limitation rights. The qualification of ***'knowledge of probable damage'*** raises some interesting questions surrounding the traditional application of the deviation rule. [18]

8). **Deck cargo Article 9.** All deck cargo is now covered but note:-

a). The right to carry on deck depends on agreement and/or custom. Any agreement should be stated in the bill of lading, otherwise the carrier has the burden of proving it. Even if he does, it is not binding on third parties.

b). If no agreement or he cannot invoke, the carrier is liable for damage etc which can be attributable to carriage on deck, even if he took all reasonable measures to avoid it.

c). Carriage on deck contrary to an express agreement is deemed to be a breach of **Article 8**. Even if not deliberate or no knowledge of probable damage, it will still be wilful misconduct.

9). **Through Carriage : Articles 10 & 11.**

These are important provisions. An attempt is made to control Trans-shipment clauses and demise clauses which seek to restrict responsibility of the initial I contracting carrier. A proper through bill of lading is required or it will not work. [19]

Article 10 states the general principle that the contracting carrier remains responsible but provides for an exception in **article 11** - but this is limited in two ways.

a) the actual carrier must be a '***named***' person - which will affect optional trans-shipment clauses or demise clauses as used presently and

b) it must be possible to sue the actual carrier within A**rticle 21(1) & (2**[20]

15 N.B. No value provision - which is an odd omission

16 Same as COGSA 1971.

17 **Goldman v Thai Airways International** [1983] 3 All.E.R. 693. Warsaw Convention interpretation of the term '***recklessly***'

18 N.B. that application of **Article 8** affects only limitation and not time bar limitation.

19 Note that one should refer back to A**rticle 1**.

20 Note that **Article 10.2** confirms the responsibility of the actual carrier under the convention.

10. **Liability of the shipper**. **Part III Articles 12 & 13**

Follows **Article IV rule 3 Hague Visby Rules,** with the addition of and exclusion for servants and agents. **Article 13** - dangerous goods -follows **Article IV rule 6 Hague Visby. T**he wording is slightly changed and some further clarification is made.

11). **Transport Document - Part IV - Articles 14-18**

a). Obligation to issue a bill of lading - as under the Hague Visby rules.

b). Obligation to state particulars is subject to **Article 15.3.**

c). Obligation to state both the number of packages or pieces and the weight or quantity.[21]

d). Subject to right to make reservations under **Article 16**. Seems to require a more specific statement than Hague Visby's *'Weight unknown'* - *'Said to contain'* and *'shippers load and count'* clauses are probably insufficient in themselves. [22]

e). **Article 17 - guarantee by shipper**. There is an important contrast between **Article 17.1**. and **Article IV rule 5(h) of Hague Visby**.

f) **Article 17.2 & 3 Indemnity clauses** - are void as against third parties but may be binding on the shipper if no intent to defraud. Is this more lenient than **Brown Jenkinson v Percy Dalton** ? What, if anything at all, does **Article 17.4 Hamburg** add ?

12. **Claims and action - Part V.**

a). **Article 19 - notice to carrier** - 1 day if apparent - 15 days if not. Compare **Article III rule 6 Hague Visby Rules.** [23]

b). **Article 20 - time bar**. Important. Two years - *'any action'* runs from delivery or last day on which goods should have been delivered. [24]

c) **Article 21 - jurisdiction** provision provided for the first time in a carriage convention, in order to obviate ***unfair*** jurisdiction clauses and satisfies a major objection to the old rules. Alternatively, it may be described as a way of defeating the express intentions of the parties.[25]

d). **Article 22. New rules on arbitration** . **Article 22.2**. requires a charterparty arbitration clause to be specifically incorporated into a bill of lading if the carrier wishes to rely on it against a '**holder**' of the bill of lading. A general clauses such as *"subject to charterparty terms"* will not be sufficient.

e). **Article 23. No derogation** - but the carrier can increase responsibilities. Note especially **Articles 23.3** and **23.4.**

f) **Article 24 - General Average.** See in particular the clarification under **Article 24.2.** . and note also **Article 25** -especially **Article 25.5** - limited to Convention already in force.

Bills of Lading under the Hamburg Rules :

Article 1(7) Hamburg Rules : "**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.

The words "**Taking over or loading**" means the Hamburg definition covers shipped and received for shipment bills of lading.

It also covers negotiable and non negotiable bills of lading without the **s1 C.O.G.S.A. 1992** redefinition of non negotiable bills of lading as sea way bills.

21 Note the other statements required and compare **Article III rule 3 Hague Visby Rules**

22 Note also Articles 16.2. 16.3. and 16.4.

23 Note Articles 19.6 & 19.8.

24 Note 20.4 & 20.5.

25 Compare the Hague Visby Rules and the methods of defeating the Hague Visby Rules e.g. **Vita Food** etc. It is rather wide compared to other conventions. Note Article 21.2. in particular.

CHAPTER SIX

Functions of the Bill of Lading under the Hamburg Rules.

The Bill of Lading as evidence of the Contract of Carriage. The Hamburg Rules do not rely on the bill of lading and applies to any contract of carriage by sea covered by **Article 2**. Nonetheless **Article 14(1)** states that 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. The required contents of a bill of lading are set out in Article 15 and the consequences regarding the exclusivity of its contents and estoppel to the benefit of endorsees of the bill of lading are set out in **Article 16**.

Article 2(3) Hamburg : Hamburg does not apply to charter-party bills of lading in the hands of the charterer but does apply to subsequent holders of the bill of lading who are the charterer.

Article 15(1)(k) Hamburg states that the extent of freight due and demurrage must be included in the bill of lading or some other indication that freight is due is required. **Article 16(4)** Hamburg states that in the absence of such a statement proof to the contrary is not admissible against a consignee in good faith. Would incorporation of ***'Charterparty Terms'*** amount to ***'some other indication'*** ?

Hamburg Article 22(2) charterparty arbitration clauses must be annotated in the bill of lading to be effective. Even then the clause may not restrict the endorsee 's rights to avail himself of Hamburg choice of forum rights - **Article 23(1)** - and the arbitrator must apply the **Hamburg Rules Article 22(4).**

Details in bill of lading required by Hamburg : Compare Arts III & IV H.V.R.

Article 9 Deck Cargo : Hamburg

1 *The carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement*

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.*

Article 13 : Special rules on dangerous goods. Hamburg.

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 para 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 para 2 sub-para (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 art 5.*

Article 14. Issue of bill of lading. Hamburg.

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.*

Article 15. Contents of bill of lading. Hamburg.

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;

1) the statement referred to in para 3 of art 23; (ie that the carriage is subject to the provisions of the Hamburg Rules which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee)

m) the statement, if applicable, that the gods 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 para 4 of art 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 para 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 of, 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 para 7 of Art 1 (ie it 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).*

Article 16 : Bill of lading : reservations and evidentiary effect. Hamburg.

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 apparent good condition.*

3 *Except for particulars in respect of which and to the extent to which a reservation permitted under para 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 para 1 sub-para (k) of art 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.*

CHAPTER SIX

Article 17 : Guarantee by the shipper. Hamburg.

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[1] 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 para 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 para 1 of this article.*

4 *In the case of intended fraud referred to in para 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.*

Article 18 Document other than bill of ladings. Hamburg.

Where a carrier issues a document other than a bill of lading to evidence the receipt of the goods to be carried, such a document 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.

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 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 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 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.*

SOME COMPARABLE ARTICLES IN HAMBURG AND HAGUE / VISBY RULES

Article 4(1) Hamburg applies to the entire carriage process including the loading, stowage and discharge. (**semble Art III Hague Visby Rules**.)

Articles 5 & 10 Hamburg require the carrier carefully to load, stow and discharge the goods. (semble **Article III(2) Hague Visby Rules**.)

Article 23 Hamburg 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 III(8) Hague Visby Rules**.

Article 11 Hamburg - the carrier may exclude liability for land carriage providing it is possible for the land carrier to be sued)

Incorporation of Hague and Hague Visby Rules. compared with Hamburg incorporation.

The **Hague Visby Rules**. apply ONLY by being incorporated into a contract of Carriage by virtue of **Article II.** They have no independent force. If there is no contract of carriage or if there is no contract of carriage between the parties to the action the **Hague Visby Rules**. do not apply. **Compare Article 2 Hamburg**. This is one reason why **s1 B.L.A**. Brandt v Liverpool Contracts & C.O.G.S.A. 1992 implied contracts are important.

The **Hague Visby Rules**. do not apply to charterparties **Article V**. and semble **Article 2(3) Hamburg**. However, if the bill of lading is issued under a charterparty governed by the rules they do apply.

Carrier responsibilities are set out in Arti**cle 5 Hamburg** (compare **Article III Hague Visby Rules**

The exemptions to **Hague Visby Rules**. are set out in **Article IV** but there are no exemptions in Hamburg but limitation of liability provisions are set out in **Article 6 Hamburg.**

Hamburg liability of carrier **Article 5(1)** all measures that could reasonably be required to avoid the occurrence and its consequences. **Article III (1)&(2) Hague Visby Rules**.

Compare those excepted perils under **Article IV Hague Visby Rules**. with those which do not attract liability under Hamburg.

Deviation is not discussed in Hamburg, though a duty to save life may be something which cannot be avoided Compare **Article IV.(4). Hague Visby Rules**.

Compare **Article 6 Hamburg** and **Article IV.(5).** H.V.R. on limitation of liability amounts.

Article 19 regarding notice provisions and **article 20** regarding time limits under Hamburg. Compare **Article VI(6) H.V.R**..

Article23 Hamburg. Compare **Article III.(8) H.V.R.**

Article 5 Hamburg requires all measures that could reasonably be required to avoid the occurrence - appointment of a reputable ship repairer could be sufficient to satisfy Hamburg and therefore Hamburg may be more lenient than **Article III(1) Hague Visby Rules** in this respect.

Compare effect of A**rticles 5 & 6** Hamburg and **Articles 1(e) & X Hague Visby Rules.**

Consider the fact of **The Komninos S** and consider what the outcome might be under 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 UK courts would, following **The Komninos S** apply **Article 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 1 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 would be rather different if goods were imported into Egypt from a non-contracting state, because **Article 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.

CHAPTER SIX

Exclusivity of Hamburg. Apart from the basic provisions in **Article 2,**

Article 15 regarding the contents of bill of lading states that the bill of lading must include the statement referred to in A**rticle 23(3)**.

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.*

Jurisdiction & Possible methods of avoiding Hamburg.

Article 21 Jurisdiction : Hamburg.

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.*

2a) *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 para 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.*

2b) *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 paras 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.*

4a) *Where an action has been instituted in a court competent under paras 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.*

4b) *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.*

4c) *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 para 2 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.*

Reasons why a carrier may wish to avoid the Hamburg Rules.

1) The duties under Hamburg are seen as less advantageous to carriers.
2) The limitation levels are different to **Hague Visby Rules**
3) Litigation could be expensive if the courts have to apply two Conventions.
4) The judgements of foreign courts and arbitrators are not accorded the universal confidence given to UK courts and Arbitrators.
5) Inconvenient forum - uncertain foreign law - availability of councel.
6) Linguistic problems.
7) Insurance claim conflicts.

Possible measures to avoid the Hamburg Rules.

1 Do not trade with Hamburg signatory states. Only Hamburg state operated vessels ply some routes. Egypt in particular appears to be suffering a boycott by some Greek shipping companies following what have been perceived as unjust awards against Greek carriers by Egyptian courts and arbitrators.

2 Demise charter vessels - bareboat charter - ensuring the ship owner is not liable for bill of ladings issued by the charterer.

3 Only ship subject to charter-party terms without issuing bill of ladings or other shipping documents. **Article 2(3)** - possible regarding large shipments such as oil and grain - note that merchants bills of lading could be used by the purchaser without jeopardising the security of the vessel since such bill of ladings do not govern the relationship between the carrier and the holder of the bill of lading under **Article 2(3).** If the charter-party forbids the issuing of bill of ladings and the carrying of goods to the account of third parties the ship-owner would be protected since the charterer could only legitimately carry his own goods. In order to facilitate such an option import agents qua charterers could establish bases in export and import states and ship in diverse cargoes as charterers. In turn they would have to take ownership of goods before shipment and divest themselves of ownership ex-ship.

4 Shipper chartering clubs **Article 1(6)** states that a 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. **Article 2(1)** states that the convention only applies to contracts of carriage. Thus this reinforces the fact that a charterparty or other method whereby the vessel is hired, as opposed to a payment for carriage being made, takes the agreement outside the scope of the convention. A standard form voyage charterparty to all the the shippers involved in a voyage whereby they become joint sub-voyage charterers of the vessel and then hire the charterer or shipowner to operate the vessel as their servants could thus obviate the rules. In the event of a dispute the shippers would have to sue themselves -or sue the crew for breach of contract of employment. If the shipper and the carrier are the same person there is again no contract of carriage for the rules to apply to under Art 1. This might be cumbersome to set up at first -but once standard forms are generated and the finer details worked out it could be a viable way forward.

5 Providing the shipowner manages to leave the territorial waters of the contracting state before a claim is made - avoid re-entering such waters with any of his vessels to avoid arrest. A plaintiff might then commence action in the shipowner's own courts. If the Hamburg Rules are not included in the contract of carriage his own state will not apply them.

6 The fear of overseas judicial discrimination should not be exaggerated since the defendant has the right to insist on the action being moved to his own country or to a forum designated in the contract of carriage eg the UK. Nonetheless the Hamburg Rules would have to be conformed to and security must be posted in the court of the Hamburg State.

Article 22 : Arbitration : Hamburg.

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 a 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 paras 3 & 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.*

Problems with Arbitration Clauses : The major limitation of placing an arbitration clause in the contract of carriage lies in **article 22(3)(iii)** in that the claimant can insist on arbitration taking place at port of discharge.

Unlike the jurisdiction clause there is no provision for the defendant to have the arbitration moved to his own country or to the contractual choice of forum. This provision poses a very serious threat to the work of the London Arbitration Houses. It might be better therefore to avoid the use of arbitration clauses in shipments to Hamburg signatory states.

It appears, that the only way that the carrier can protect himself from the variable standards of overseas arbitrators is if the contract of carriage provides for a specific method of appointing the arbitrator which would either enable the carrier to reject the appointment of foreign overseas arbitrators or preferably provides for a specific arbitration house - provided always that the designated arbitrators are able and willing to travel to the port of discharge and set up an arbitration there.

Carriers would be well advised to put a clause in the contract of carriage that all goods must be thoroughly inspected before delivery to the consignee by an independent inspector with a copy of the report being handed to the master before delivery, at the expense of the consignee. Such evidence will help to ensure that inflated demands are not made against the carrier in circumstances where the carrier is no longer able to verify the truth of the allegations.

Arbitration clauses in charterparties are safe provided there is no contract of carriage and no bills of lading or similar documents are issued containing arbitration clauses.

General observations on Hamburg :

One conclusion that can be drawn from the above is that the Hamburg Rules could well significantly increase the cost of carriage of goods to signatory states. If this happens such states may well choose in time to abandon the rules in the interests of their national economies. Much depends on whether larger states such as Australia and the US choose to adopt the rules. An alternative is that the Hamburg Rules should be amended regarding the jurisdiction and arbitration provisions.

If the Hague Visby Rules were to fight back and insert equally predatory and mutually exclusive clauses within its rules a major conflict of laws situation could be forced upon the maritime industry, which if nothing else could force the warring parties to produce a single acceptable convention to all parties concerned.

COMPARISONS BETWEEN HAGUE, HAGUE VISBY AND HAMBURG

The Hague, The Hague Visby and Hamburg Conventions establish frameworks governing the legal rights and liabilities of the parties to the contract of carriage. What does the endorsee get out of this relationship? What benefits accrue to the carrier out of the carrier / endorsee relationship? The ethos behind such rules is that the carrier does not have to act as an insurer against all the vicissitudes of international transportation. It is important on the other hand that the carrier can only limit liability to a certain extent where limitation statutes such as the **H.V.R**. apply so that the endorsee has some degree of protection against financial ruin.

To this effect, **Art III (8) Hague Visby Rules.** provides that :- *'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*.' In consequence ship owners and carriers cannot set lower levels of liability than those provided by The Hague and Hague Visby Rules.

C.O.G.S.A. 1992 transfers rights and liabilities to the buyer, but leaves the shipper with liabilities under the contract of carriage. If the courts find that the Limitation Clauses in the Hague Visby Rules are not ***'liabilities***,' it could mean that whereas the carrier cannot contract out of his obligations the shipper is statutorily contracted out of the limitation of liability provisions in The Hague Visby Rules and can sue in tort for all losses in respect of ex-ship contracts provided he endorses the documents over to the buyer (*a possibly unintended bonus for the shipper*).

Whilst **C.O.G.S.A. 1992** gives the endorsee rights, there is nothing in either to prevent the ship owner incorporating exclusion clauses which would render the so called rights transferred worthless, which is why statutory regulation of limitation of liability is necessary. Many countries such as Argentina have not incorporated The Hague or Hague Visby Rules. Unless there is express incorporation of their rules into the contract of carriage the parties must rely on the common law implied conditions in a contract of carnage.

WHICH RULES APPLY?

23 Countries have signed the Hamburg Rules. A ship owner may find himself simultaneously liable under both The Hague or Hague Visby Rules and the Hamburg Rules. Which set of rules is applied by a court depends on the court hearing the dispute. Two distinct alternatives are possible :-

1 The Common Law Implied Conditions : The common law implies into the contract of carriage variously that the vessel is seaworthy; that the carrier should proceed with reasonable dispatch; and that the vessel must not unlawfully deviate from the contract route. Liability is strict at common law for breach of such 'terms of the contract of carriage. Liability is not dependent on negligence and without exemptions in the contract of carriage, liability would be very extensive.

Common law liability is freely exemptable provided such exemption clauses are drafted clearly. Liability can be reduced almost to nothing. Under **s26 (1)(3) U.C.T.A. 1977** the Act does not apply to International Sales but it does cover contracts for the carriage of goods between U.K. ports. Under **Photo Productions v Securicor** [1980] and **George Mitchell v Finney Lock Seeds** the courts won't strike down an exclusion clause regarding non-consumer sales, even if fundamental to the contract, but the equality of bargaining power and the availability of insurance affects the enforceability of such clauses. It is unlikely that any of the standard form contracts of carriage would be affected by either of the above.

The common carrier is only exempt from liability for Inherent Vice, Acts of God and King's Enemies. If carriers exempt themselves from virtually all liability on a regular basis then the endorsee of the bill of lading gets no protection and the negotiability of the bill of lading is reduced. This accounts for the succession of conventions including **The Harter Act U.S. 1893**, The Hague and Hague Visby Rules and The Hamburg Rules which are incorporated into contracts of carriage. The Hague Visby Rules are automatically incorporated into any bill of lading issued in the U.K. and similarly into any bill of lading from any other Contracting State outward bound but are not incorporated into inward bound Contracts of Carriage unless expressly incorporated by the parties themselves, & therefore incoming voyages are still dealt with under the Common Law Rules.

2 The Hamburg Rules according to Article 2

(1) 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 provides that the provisions of this Convention or the legislation of any Sate 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 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 para 3 of this Article apply.

Comparison between standards under the Hague Visby Rules and Common Law.
Where they apply they impose a lower standard, that of due diligence and not a strict duty regarding the provision of a seaworthy vessel. Compare this with the Common Law Conditions which are strict. Art IV H.V.R. affords exemptions to the carrier. **Article III(8) H.V.R**. states that the Carrier can only limit as provided by the rules and no further.

Comparison between the Hague & Hague Visby Rules. The **Hague Visby Rules**. were initially intended to change the liability of carriers for sea worthiness, but no agreement could be reached and so no alteration was actually made. Thus on this point both sets of rules are identical.

Article III(4) Hague Visby Rules. is not in the Hague Rules. The intention was to over-rule the Rule in **Grant v Norway, t**hough it was only partially successful. S4 C.O.G.S.A. 1992 now does this for the UK.

Art IV bis Hague Visby Rules. is a new rule intended to effect stevedores and the privity of Contract rules, but again it does not extend to independent contracts (which stevedores usually are), though it is effective regarding servants of the carrier.

Changes to limitation of liability calculations.
The Hague Visby Rules replaces the "***clause Paramount***" incorporation device with direct bill of lading applicability, **Article X Hague Visby Rules.** [26]

Article 5 Hamburg Rules: The Carrier is liable for loss and delay unless he can prove that he took all measures that could reasonably be required to avoid the occurrence and its consequences - Liability is not strict. What measures could reasonably be required and which measures would be unreasonable ?

Article 6 Hamburg Rules allows the carrier to limit liability according to a formula based on the International Monetary Fund Special Drawing Rights of the country hearing the claim. See **Article 26**.

Article 8 Hamburg Rules: The right to limitation is lost if the carrier intends toss or is reckless and has knowledge that such loss, damage or delay would probably result. This therefore requires judicial deliberation regarding reasonableness and recklessness - is the test objective or subjective?

Article 23(1): clauses derogating from the Convention in the contract of carriage or bill of lading are null and void. **Article 23(3):** bills of lading must incorporate **article 23(1).**

Article 23(4): If a claimant suffers a loss due to a failure to incorporate A**rticle 23(1)** the carrier must compensate the claimant for the loss and pay his legal costs for making the claim.

Article 25(2): Hamburg does not affect the applicability of other Conventions in other Courts in disputes between members of non-contracting states.

[26] See **Vita Food Products Inc v Unus Shipping Co Ltd** [1939] A.C. 277 and **The Hollandia** [1983] 1 A.C. 565. which show how Art X works.

There a number of differences between the Hague, Hague Visby and Hamburg Rules. Deck and live cargo have different rules. Liability for delay is different. The methods of enforcing jurisdiction and arbitration are quite different. The methods of assessing the limitation of liability are different. Hamburg applies to a different range of shipping documents and stipulates things that must be included in all bills of lading and applies to any contract of carriage. However, like The Hague and Hague Visby Rules it does not apply to charterparties. The **Hague & Hague Visby Rules** sit quite neatly besides recent conventions in Europe on jurisdiction and choice of law. The Hamburg Rules are by contrast a United Nations creation and do not mesh in neatly with the European Conventions.

Who is the carrier under the Hamburg Rules?

Article 1(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. A carrier contracts in his own name but the bill of lading may be issued under the ship owner's name, so who is the carrier? [27]

Article 1(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.

The bill of lading under **Article 14(1)** must be issued by the carrier and **Article 14(2)** is deemed to be signed on behalf of the carrier. The Convention then talks exclusively of the liabilities of 'the carrier' until **Article 10** which states that all references to 'carrier include the actual carrier. They share joint and several liability : Under **Article 11** the contract can stipulate that the Actual Carrier must be sued first - but failing that the carrier can be sued. Who then is the bill of lading signed on behalf of, the carrier or the ship owner who is the actual carrier? Would decisions such as that in **Elder Demster** be adhered to? Will courts treat the carrier and the actual carrier as the same person in demise charterparties and where a vessel is chartered in to augment a fleet ? Or, in respect of the Hamburg rules will **Article 1(1) & (2)** provide the sole means of distinguishing between the carrier and the actual carrier?

By virtue of **Article 1(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.

Which contracts of carriage are covered by Hamburg ?

Article 1(8): 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.

Under **Article 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. This could raise disputes as to where exactly the port limits start and finish. It is settled law following **Pyrene v Scindia** that under The Hague and Hague Visby Rules the duration of the contract of carriage with respect to the applications of the rules is from the time of commencement of loading till discharge is complete.

Jurisdictional conflicts with other applicable conventions.

Article 25(5) permits other conventions to apply to the non-sea leg portion of through carriage contracts. In Europe especially this is likely to involve CMR, which conforms to European requirements regarding choice of law and jurisdiction. Hamburg seems to contradict the Brussels Rome and Lugano Conventions.

Choice of Jurisdiction under Hamburg : Neither The Hague nor The Hague Visby Rules make any attempt to deal with jurisdiction and rely on incorporation into the contract of carriage via the law of the contracting state that is hearing the case. Hamburg however, treads on the territory occupied by Conventions regarding choice of law and jurisdiction because it provides the plaintiff with the ability to choose the forum for

[27] See Article 14(2)

dispute settlement from an exhaustive list of possible venues. Choice of forum clauses in the contract derogating from **Article 21** would be void under **Article 23(1)** but U.K. courts would have to apply Brussels and Rome and C.O.G.S.A. 1971.

The plaintiff may choose the court of a non-contracting state. That state would not be bound to apply the Hamburg Rules. Indeed since the UK is governed by the Hague Visby Rules it would in fact apply them at least in relation to Bill of Lading claims but not to sea way bills. A U.K. court thus seized of jurisdiction would only apply the Hamburg Rules if they increased the carrier's liability and if the contract of carriage had a clause complying with the **Article 23(3)** obligation to incorporate the Hamburg Rules.

The Hague and Hague Visby Rules permit a higher standard but not a lower standard. U.K. judges may in time find themselves having to decide which set of rules set the highest standard and having to select the relevant rules from both conventions to apply to disputes. Consider the facts of **The Muncaster Castle**. It is clear that the duty regarding sea worthiness in absolute under The Hague and Hague Visby Rules. It cannot be delegated even to a competent ship repairer. If the ship repairer is negligent that negligence becomes the carriers negligence also. The rule is strict but the standard is not absolute. Hamburg requires the carrier to take all measures that could be reasonably required to avoid the occurrence. Would appointing a reliable and recognised independent contractor be sufficient to satisfy this or would the carrier have to supervise all the work of the independent contractor? Even if the carrier is found to have complied with A**rticle 5(1)** Hamburg a UK court would still have to apply **Article III (1) C.O.G.S.A. 1971** because it sets the highest standard and C.O.G.S.A. 1971 does not permit lower standards.

If the contract did not place a clause in it incorporating Hamburg the UK courts would apply The Hague Visby Rules only. If however due to a failure to incorporate **Article 23(1)** Hamburg as required by **Article 23(3)** the UK court awarded the plaintiff less under The Hague Visby than would have been available under Hamburg the plaintiff could then apply to a court in a contracting Hamburg State under **Article 23(4)** for the additional award plus legal costs.

If the loss resulted from a failure by the ship owner to insert the clause in his bill of lading then it is the ship owner as actual carrier who would be held liable for this failure under Hamburg. The plaintiff might have problems enforcing the award and getting his money, though to avoid paying the ship owner would have to avoid sailing to that particular country to avoid his vessel being arrested.

This returns us to the question who is the carrier under a charter party the ship owner or the charterer? An action could proceed against a charterer and go through the UK courts with a Hague Visby settlement. The carrier may resolve never to place personal assets within the jurisdiction of the relevant contracting state. The plaintiff makes a claim and receives a legal but as yet un-enforced award in his domestic court.

Carrier includes "***actual carrier'*** under Hamburg. The ship owner, oblivious of the dispute sails into that state. His vessel is arrested as security for the award. His liability is based on the failure to incorporate the **Article 23(3)** clause in his bill of lading. He has to pay to get his vessel released. If he counterclaims under the E & I clause against the charterer, for liability incurred in consequence of signing bills of lading, could he get his money back for a payment based on Hamburg when the UK courts do not recognise Hamburg? Similar questions could be raised regarding the liability of insurers who may argue that no liability has occurred under UK law. The exclusion clauses for restraint of princes could well exclude liability.

Under the Brussels Convention the defendant would have a right to be tried in his own country unless in certain circumstances he had made a contractual choice of foreign jurisdiction, clearly not the case here, since the contract would incorporate The Hague Visby Rules and a fortiori may have chosen the UK courts and English Law. If tried in the UK **Article 23(4)** would not be applied by the UK court.

The Common Law will under the doctrines of comity and obligation enforce foreign judgements, operating the theory that if under UK Law the debt would have arisen then the fact that the award is in fact made by a foreign tribunal does not prevent it from being enforced as an application of U.K. Law. Hamburg is not part of U.K. Law. The doctrine of obligation would not apply for U.K. law so the obligation to pay would not have arisen. Thus it is possible that it would not be a consequence flowing from signing bills of lading covered by E & I Clauses or a loss covered by the insurance policy.

Arbitration : Article 22 Hamburg gives the claimant the right to insist on domestic arbitration. The Arbitrator must apply the Hamburg Rules under Article 22 (4). If the parties chose arbitration in England the Arbitration Act 1996 applies. **s5 and s6 Arbitration Act 1996** only makes an arbitration enforceable if both parties agree in writing to arbitration. Hamburg cannot, under English law, force a person to submit to arbitration if that person wishes to go to court and has not made a prior written agreement to arbitrate.

The Hamburg Rules conflict with the rules under Brussels in respect of arbitration agreements which require the consent of the parties to arbitration. Without consent the parties must submit to the jurisdiction of a court under the Brussels Rules and the arbitration agreement is unenforceable. With consent the arbitration agreement takes the contract outside the scope of Brussels and is enforceable since Brussels expressly states that it does not apply to agreed arbitrations. Hamburg arbitrations appear to be unenforceable in the E.C.

The Brussels Convention only applies to E.C. signatory States and E.F.T.A. under the Lugano Convention. Whilst signatories to Hamburg are required to renounce the Hague or Hague Visby Rules on accession to Hamburg they are not required to renounce Brussels and Lugano. Hamburg and Brussels cannot be complied with at the same time. An E.C. state that does not comply with Brussels will be in breach of E.C. law so these states cannot sign up for Hamburg without leaving the E.C. The result is that unless the E.C. ceases to exist Hamburg can never become a uniform code for the whole world since no E.C. State can accede to it. The E.C. it appears is tied into the Hague Visby Rules for as long as the Hamburg Rules retain the current provisions on jurisdiction.

The Common Law recognises a foreign arbitration award if the parties have willingly submitted to it and the award is valid and final. A defendant has no choice regarding submission if jurisdiction is imposed on him by a foreign law, which according to the Rome Convention he is not subject to. If the U.K. carrier refuses to submit to arbitration abroad and fails to agree to appoint an arbitrator the foreign court may appoint the arbitrator who may then hear the case in the carriers absence. The U.K. Courts must enforce foreign arbitral awards under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958, the Geneva Convention for the Execution of Foreign Arbitral Awards 1927 and under the Arbitration Act 1996, but all three require agreement by the parties to submit to arbitration. Since a U.K. carrier may not have agreed to overseas arbitration under Hamburg U.K. courts may not enforce the award.

The U.K. Carrier may be forced to pay an award or pay monies into a foreign court in order to regain possession of his vessel arrested by a foreign court as security for a claim. Would UK underwriters and the UK courts treat monies paid in compliance with an overseas arbitral award under Hamburg as a legitimate loss which could be claimed under the policy ? If not the carrier / ship owner becomes the insurer of all risks regarding goods shipped into Hamburg States. If the underwriters do pay, it may well be that premiums will rocket in price if these awards are perceived as being excessive and unpredictable. Could the ship owner reclaim this money from the carrier on the basis of the E & I Clause ?

Conclusions regarding Hamburg Jurisdiction Provisions :

The problems with Hamburg outlined above relate to the dangers of ship owners and carriers being subject to two competing International Conventions. Hamburg may have many merits and it certainly has its supporters. However, there appear to be many problems for E.C. States in signing Hamburg. A number of E.C. Conventions would need to be changed and the Hague Visby Rules repealed if the conflicts are to be avoided. In the meantime E.C. based ship owners will have to balance the risk, of being caught up in a conflict of conventions, with the commercial benefits of shipping to Hamburg States.

Details in bill of lading or other shipping document required by Hamburg

Article 9 Deck Cargo : Hamburg

1 *The carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement....*

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.*

CHAPTER SIX

Article 13 : Special rules on dangerous goods. Hamburg.

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 para 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 para 2 sub-para (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 art 5.

Article 14. Issue of bill of lading. Hamburg.

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.

Article 15. Contents of bill of lading. Hamburg.

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 para 3 of art 23; (i.e. that the carriage is subject to the provisions of the Hamburg Rules which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee)

m) the statement, if applicable, that the gods 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 para 4 of art 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 para I 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 of, 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 para 7 of art 1 (i.e. it 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).*

Article 16 : bill of lading reservations and evidentiary effect. Hamburg.

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 apparent good condition.*

3 *Except for particulars in respect of which and to the extent to which a reservation permitted under para 1 of this article has been entered;*
   a) *the bill of lading is prima facie evidence of the taking over or, where a 'shipped' ill 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 para 1 sub-para (k) of art 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.*

Article 17 : Guarantee by the shipper. Hamburg.

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 para 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 para 1 of this article.*

4 *In the case of intended fraud referred to in para 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.*

Article 18 : Document other than bills of lading. Hamburg.

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

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 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 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 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.*

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